GRIEVANCE ADMINISTRATOR,
Petitioner/Appellant,

v

PAUL R. JACKMAN, P-15370,
Respondent/Appellee.

ADB 189-87

Decided: January 16, 1990

BOARD OPINION

The Attorney Discipline Board has considered the Petition for Review filed by the Grievance Administrator. It was claimed that the hearing panel erroneously ruled that misappropriation of client funds was not established as alleged in Count I of the formal complaint, that the panel erroneously dismissed Count II, and that the Order of Probation issued by the hearing panel was not appropriate under the circumstances of this case. Upon review of the whole record, the panel's factual findings are affirmed. We conclude that the panel's findings that the respondent commingled his funds with those of his ward warrants modification of the discipline order. The respondent's license to practice law shall be suspended for thirty (30) days with further conditions incorporating the trust account auditing requirements imposed by the panel.

The hearing panel filed a detailed report which included its findings of fact based upon the evidence presented during two days of hearing. The standard which has been mandated by the Supreme Court for our review of our findings is whether there is proper evidentiary support in the whole record for those findings, In Re Del Rio, 407 Mich 336; 285 NW2d 277 (1979). The Board has recognized that a hearing panel is uniquely qualified to consider the credibility of the witnesses before it. The hearing panel's findings of fact should be given deference whenever possible, Schwartz v Walsh, DP 16/83, Brd. Opn. p. 333 (1984).

Having applied that standard of review, we are not able to reverse the hearing panel's finding that the respondent commingled funds belonging to the ward with his own funds but did not misappropriate estate funds, as alleged in Count I of the complaint. For the same reason, we affirm the hearing panel's conclusion that the evidence did not support the charges in Count II that the respondent caused the ward, Joseph Garbarino, to execute a waiver and consent in January 1984 when he knew that the ward was under a disability and was not competent to execute that document.

Although the respondent admitted that Mr. Garbarino had been diagnosed as suffering from Alzheimer's disease, there is no testimony or other evidence in the record which bears directly upon the ward's competence or state of mind at the time he executed a consent and waiver in January 1984 or at the time when, according to respondent, he gave permission to

respondent to borrow funds. We are unable to draw any conclusion from the failure of either the Grievance Administrator or the respondent to call Mr. Garbarino as a witness although he was apparently present at the hearing. The testimony of Mr. Garbarino's nephew, Thomas Foster, is not dispositive on this issue. At the hearing on April 19, 1988, he testified that he did not have any real problems communicating with his uncle and that Mr. Garbarino seemed to understand what was going on on a day-to-day basis (Tr. Vol. II, page 152)

While the finders of fact could well have been skeptical of the respondent's testimony, it was essentially unrebutted with regard to his conversations with Mr. Garbarino. The record does not support a conclusion that the diagnosis of Alzheimer's disease constituted a prima facie showing that Mr. Garbarino was incapable of giving his consent to his attorney.

We hasten to add, however, that we are extremely troubled by this aspect of the respondent's handling of the affairs of his client. But for the claimed authorization from Mr. Garbarino, the respondent's use of estate funds for his own purposes would clearly constitute a misappropriation. The record discloses that, at best, such authorization was obtained 1) from a ward who was eighty-six years old and known to be suffering from Alzheimer's disease, 2) without any written evidence such as a memorandum or promissory note, 3) without any witnesses, 4) without any suggestion by Mr. Jackman that the ward seek independent legal counsel, 5) without any offer to pay interest and 6) without any accounting during the year 1984 as to the amounts which had been borrowed.

In all respects, the appearance of impropriety suggested by those factors is magnified by the respondent's admission that he was in need of funds during that period. Those factors might well have supported a finding that the respondent's own financial interests resulted in violations of Canon 5 of the Code of Professional Responsibility, specifically DR 5-101(A) and DR 5-104(A), provisions not charged in the complaint.

Discipline

The hearing panel found that the misconduct which was established, commingling of funds and writing a check for his Bar dues drawn on his trust account, was mitigated by the respondent's thirty-two years of prior unblemished practice. They further concluded that there was little or no likelihood of a repetition. Finally, the panel found that the respondent had established his eligibility for probation in accordance with MCR 9.121(C). The order entered by the panel required that the respondent be placed on probation for one year during which time he should furnish quarterly audits of his trust accounts compiled by a certified public accountant.

In making a finding that the respondent should be placed on probation, the hearing panel, the Board or the Supreme Court must specifically find that an order of probation is not contrary to the public interest. See MCR 9.121(C)(1). Although that specific finding is not explicitly set forth in the hearing panel's report on discipline, it is implied in the panel's report. The Board could make that finding on its own if it considered only the effect that this order of discipline would have on the respondent himself. The Board must, however, consider its overriding duty to impose discipline in these cases in a way which is consistent with the duty to protect the public,

the courts, and the legal profession. To that end, we must also consider whether an order of discipline will have a deterrent effect and whether other members of the legal profession and the public may draw some conclusion between the nature of an attorney's misconduct and the discipline imposed. This is especially true in cases involving the mishandling of funds entrusted to a lawyer.

Although we have affirmed the hearing panel's finding that the respondent did not misappropriate funds, his commingling of client funds with his own is misconduct warranting suspension. Under all of the circumstances presented in this case, we conclude that the respondent's license to practice law should be suspended for a period of thirty days. As a condition relevant to the misconduct, the respondent shall be required to submit quarterly audits of his clients' trust account prepared by a certified public accountant. This condition is imposed in accordance with MCR 9.106(2).

Hanley M. Gurwin; Linda S. Hotchkiss, M.D.; Theodore P. Zegouras

DISSENT

Hon. Martin M. Doctoroff

I would impose a suspension of at least one year in this case based upon a conclusion that the respondent commingled and misappropriated client funds.

I agree with the majority that a hearing panel's finding of fact should be given deference and that those findings should be affirmed where there is proper evidentiary support in the record In Re Del Rio, 407 Mich 336 (1979); Schwartz v Walsh, DP 16/83 (Brd. Opn. p. 333 1984). Application of that standard would not disturb the panel's dismissal of Count II. It was not established by a preponderance of the evidence that the ward was incapable of executing a consent and waiver in January 1984.

However, applying that standard to the panel's finding that the respondent's gross misuse of estate funds did not constitute misappropriation, I believe that finding should be reversed.

In November 1983, the respondent prepared a petition asking that he be appointed by a probate court to serve as the conservator of the Estate of Theodore Garbarino. Mr. Garbarino stated in the petition that he had been diagnosed to be in the early stages of Alzheimer's disease and that he was forgetful and had experienced loss of faculty. The bank records admitted into evidence disclose that Mr. Jackman removed $11,500 from the estate from February 1984 to December 1984. The respondent testified that the first "draws" were made without any conversation with the ward and that he considered them to be advances on his anticipated fees.

At some point, "midway through the year" he noticed that his draws would probably exceed his fees and he claims that he then sought and obtained authorization from Mr. Garbarino to withdraw funds from the estate for his own personal use. The respondent acknowledged that this authorization was never confirmed in writing and that he did not suggest to Mr. Garbarino

that he should consult with another lawyer. (Hrg. Tr. p. 23) On January 3, 1985, the respondent filed an account with the probate court showing disbursement of attorney fees in the amount of $3100. The account did not disclose in any way that the respondent had "borrowed" an additional $8400 and did not list that sum as an asset of the estate. On January 16, 1985, the respondent repaid the amount of $7900 to the estate. At the time of the disciplinary hearing in February 1988, he had still not repaid the remaining $500.

This case is factually similar in certain relevant respects to a case considered by the Board in 1985, Matter of Michael J. Kavanaugh, DP 71/84, (3rd. Opn. p. 382, 1985) Respondent Kavanaugh was charged with misappropriation of $5000 which he held on behalf of a client following a real estate transaction. The charge was dismissed by a hearing panel which cited the respondent's testimony that the money was withheld in anticipation of fees for future legal services. The Board reversed that dismissal and imposed a sixty-day suspension.

> It is an untenable conclusion that an attorney may commingle, convert or apply to his own use a client's funds so long as he later performs sufficient legal work to earn the commingle or converted sum . . . we cannot condone an improper withholding, even where the attorney may, in good faith, contemplate providing valuable services; to do so would create a potential for wide-spread abuse.

Matter of Kavanaugh, at page 384.

As in Kavanaugh, respondent Jackman claims that his first withdrawals should be characterized as "advances on fees". However, the respondent was subject to the provisions of the Probate Code which require court authorization for those fees. It is clear from his testimony that he neither sought nor obtained such approval at the time he began taking self-described "draws" on the estate funds entrusted to his care.

I am not persuaded that the respondent successfully established a defense to the misappropriation charges based upon an alleged "authorization" obtained from his ward. In the Kavanaugh opinion, the Board stated that "the withdrawal of funds could be considered a fee only if there was sufficient objective evidence of request of the client for services or client authorization of retainer." (Emphasis added.) Applying a similar test in this case, there is simply no objective evidence of Garbarino's authorization of any "loans".

It was respondent's wholly uncorroborated testimony the approached Mr. Garbarino "midway through the year" and obtained permission to borrow against the estate funds. Prior to September 1984, the respondent had withdrawn $3000 from estate funds. The respondent took $7000 in September and $500 per month in October, November and December 1984. Incredibly, the respondent did not make a single written notation which would allow him to establish the date he obtained that "authorization". He executed no promissory note nor did he leave so much as a memorandum to the file as evidence of his indebtedness. Although respondent had been told by his ward's doctor that Mr. Garbarino was suffering from Alzheimer's disease which would progressively worsen, respondent allegedly obtained authorization for the loans without any

witnesses. He admitted to the panel that he did not advise Mr. Garbarino to seek independent legal advice regarding the advisability of allowing the respondent to take unsecured loans, with no interest charge, at such times and in such amounts as the respondent desired.

Respondent's duty to segregate and safeguard the estate funds in his possession was described in Canon 9 of the Code of Professional Responsibility, DR 9-102(A)(B). An attorney who "borrows" client or estate funds without authorization has misappropriated funds as that term is used in these disciplinary proceedings. In this case, the authorization claimed to have been obtained by the respondent was not established by any objective, credible evidence. In accordance with my previously expressed view that the discipline imposed in cases involving the misappropriation of funds should send a clear message to the public and the legal profession that misuse of funds will not be tolerated, I would impose a suspension of no less than one year.

DISSENT

Patrick J. Keating

I concur with the opinion of the majority with respect to the hearing panel's factual findings. The Board, in exercising its power of appellate review, should always be mindful that the attorney charged with misconduct is not required to disprove the charges and characterizations contained in the complaint. In this case, the hearing panel found that the evidence offered by the Grievance Administrator is simply not sufficient to establish the elements of Count II or the charges of misappropriation of client funds contained in Count I. When the record contains evidentiary support for the panel's findings, the Board should exercise great restraint when those findings are challenged.

However, I believe that rationale is also applicable to some extent to the Board's review of the discipline imposed and I differ with my colleagues who would impose a suspension in this case. As pointed out in the majority opinion, the required finding that an order of probation would not be contrary to the public interest is obviously implied by the panel's report if not stated explicitly. There is no evidence in the record suggesting that the panel's decision to impose probation constituted an abuse of its discretion.

I am convinced that the facts of this case are sufficiently unique that any considerations of deterrence are far outweighed by the mitigating factors presented. Chief among these is the respondent's thirty-two years of practice without prior discipline. The hearing panel also clearly recognized that the personal, professional and financial pressures which converged during a period of the respondent's life have been greatly ameliorated and there is little likelihood that the respondent will engage in similar misconduct in the future. Under those circumstances, I oppose the imposition of a suspension on the grounds that it is primarily punitive.