

Grievance Administrator,
Petitioner/Appellant,
v
Frederick A. Sauer, Jr., P-19906,
Respondent/Cross-Appellant.

ADB 9-89

Decided: December 8, 1989

BOARD OPINION

Based upon his default for his failure to file a timely answer, the hearing panel assigned to this case ruled that the misconduct alleged in the complaint was established. The respondent, following his retention in a divorce matter, failed to maintain the required balance of \$8698.38 in his client trust account following his deposit of proceeds from the sale of the marital home. The respondent was also found to have made a misrepresentation to the Grievance Administrator in his answer to a Request for Investigation. The hearing panel's decision to impose a suspension of six months is appealed by both parties. The Grievance Administrator argues that the discipline imposed is insufficient in light of the findings of misappropriation and misrepresentation. The respondent, on the other hand, requests a reduction in discipline for the reason that the failure to file a timely answer to the formal complaint was not due to culpable negligence on his part. He also urges a finding that only a technical misappropriation occurred when he withdrew funds for legal fees to bring the trust account balance below the minimum amount required.

Based upon a review of the whole record, the Board is not persuaded that the discipline imposed by the hearing panel was inappropriate. The suspension of six months is therefore affirmed.

The respondent's brief states that "the primary basis of the cross-appeal is the procedural and technical defect in the default sign by Mr. Higle in that the jurat appearing on said default is undated, as is the default and affidavit." This alleged defect was not raised at the time the default was entered, it was not brought to the attention of the hearing panel nor was the issue raised in respondent's cross-petition for review. Respondent has not shown that such a technical defect prejudiced him in any way and we are therefore guided by the provisions of MCR 9.107(A) which direct that a proceeding may not be held invalid because of a "non-prejudicial irregularity or an error not resulting in a miscarriage of justice."

We also affirm the hearing panel's decision to deny the respondent's motion to set aside the default entered by the Grievance Administrator. We defer to the judgment of the panel which stated in its report that ". . . (we) found that the motion made by respondent did not state good cause and the affidavit of

meritorious defense did not respond to the allegations of the formal complaint nor otherwise assert such defense."

Moreover, we note that the respondent's testimony offered to the panel during the discipline phase of the proceedings provides ample support in the record for the essential elements of the misconduct charged. In its report, the panel noted that "respondent's testimony and the exhibits established that the funds held by the respondent were funds of the parties to the divorce action and that until a divorce judgment was entered the funds of the parties in respondent's trust account were not at all times available to them and fell below the amount required for distribution." It was further established that the respondent had not obtained permission or notified his client of those withdrawals.

It is undisputed that the respondent received \$18,099.44 on May 21, 1987, representing the proceeds of the sale of the marital home in a divorce action. He was authorized to distribute sufficient funds to pay off a car loan and the parties had agreed that he had a duty to maintain a balance in his account of \$8698.38. The bank statements offered into evidence by the Grievance Administrator during the discipline phase of the proceedings show that the trust account balance fell below that amount for a brief period in June 1987, fell to \$6440 in October, 1987 and did not rise above \$8600 until April 1988. The judgment of divorce was not entered until August 1988. At that time, the balance in the trust account was approximately \$8000. Mr. Sauer testified that he added \$700 of his own money to the account in order to distribute the sum of \$8698.38 to his client.

Count II charged that Mr. Sauer made a misleading statement in his answer to the Request for Investigation. Respondent advised the Grievance Commission that after he paid the loan at his client's direction, he had \$10,050.58 on deposit in his trust account. He stated "that amount remains in my trust account, except for the sum of \$87.50 which was paid to the mediator." That answer was filed in July 1988. The bank records offered into evidence conclusively establish that the statement was not true at the time it was made.

It is the respondent's position that the temporary depletions of his clients' trust account were the result of his "draws" on anticipated fees. In his testimony to the panel and in his brief on appeal, he describes the funds held for this client as a "deposit against fees." Under cross-examination, he admitted that he did not tell his client that he considered it to be a deposit, he did not inform her that he was withdrawing money for fees, he did not seek her permission, and he apparently withdrew \$700 more than he eventually billed.

In Matter of Michael J. Kavanaugh, DP 71/84 (1985), Brd. Opn. p. 382, the Board increased a reprimand to a suspension of sixty days where the respondent deposited client funds in a trust account

and then withdrew a portion of those funds to be applied to legal fees for future services. Although that respondent did eventually perform the legal services, the Board stated:

"The more egregious violation was respondent's unilateral application of client funds to future unspecified, unauthorized legal services. Fortunately, respondent did in fact eventually perform adequate services at least equal to the funds retained. We cannot, however, 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."

In Matter of Barry Glaser, DP 106/84 (1985), Brd. Opn. p. 379, the Board increase a 120-day suspension to a suspension of one year for an attorney who deposited client funds in his general account and then withdrew them for "fees". The Board ruled that the "repeated depletions of the professional account which was used to hold client funds constitutes, at the very least, prima facie misconduct." Aggravating factors found in that case but absent here were respondent's deposit of client funds directly into his general account, testimony regarding the vulnerability of the client and the respondent's charging of a grossly excessive fee.

From the record below, we are unable to conclude that the temporary shortfalls in the respondent's client trust account were the result of willful embezzlement of client funds. We therefore decline to increase discipline to a level normally imposed for that most egregious category of misconduct. Neither, however, are we able to characterize the respondent's mishandling of these funds as inadvertent. On the contrary, the respondent's testimony that he considered the funds in his trust account to constitute a "deposit against fees", and his subsequent withdrawal of funds without notice to the client constitutes evidence of his fundamental misunderstanding of the nature of a trust account and his obligation as a fiduciary.

The hearing panel afforded the parties ample opportunity to present evidence regarding the mitigating and aggravating factors to be considered. These included evidence of the respondent's 180-day suspension in 1974 as the result of a personal income tax conviction and a reprimand in 1985 for his failure to communicate adequately with a client. Under the circumstances, we believe that the six-month suspension imposed by the hearing panel falls within the range of appropriate discipline and it is therefore affirmed.

Hon. Martin M. Doctoroff, Remona A. Green, Hanley M. Gurwin, Robert S. Harrison and Theodore P. Zegouras.