Grievance Administrator,
Petitioner/Cross-Appellant,
v
William A. House, P-23849,
Respondent/Appellant.

ADB 219-87; 247-87

Decided: June 28, 1989

BOARD OPINION

A hearing panel suspended the respondent's license to practice law for two years following its findings that he misappropriated the approximate sum of $70,000 while acting as a bankruptcy trustee and was convicted of criminal contempt for the neglect of his duties as a trustee. The Attorney Discipline Board has considered the petitions for review filed by the respondent and the Grievance Administrator. The hearing panel's decision is modified with regard to the effective date of the two-year suspension and is affirmed in all other respects.

The respondent has not denied the factual allegations set forth in the Grievance Administrator's complaint. The record below discloses that Mr. House was appointed by the United States Bankruptcy Court to act as a trustee in accordance with 11 USC Sec. 701. At that time, the respondent had developed a successful practice which employed four other attorneys. However, the history given to his psychiatrist contains the respondent's claim that he had for several years become increasingly involved with a "spiritual advisor" who urged him to make large donations to various religious and charitable causes and to become involved in local politics. From 1984 until April 1985, he claims to have devoted his efforts solely to politics, leaving the affairs of his law firm in the hands of others. In 1985, respondent left Detroit and spent the next eight months in Switzerland.

In September 1985, the U.S. Bankruptcy Court removed the respondent as trustee in thirty-two bankruptcy estates. The respondent was confronted by the successor trustee who charged that funds were missing from one of the estates. The respondent acknowledged using bankruptcy estate funds to run his law firm while he was out of the country and admitted that a total of $77,000 had been used. By January 1986, all funds had been repaid, with interest.

The respondent's mishandling of those bankruptcy estates resulted in subsequent contempt proceedings in the United States District Court. The formal complaint filed by the Grievance Administrator is based upon the respondent's conviction of criminal contempt for violations of 18 USC 401(2) on October 31, 1986.

The respondent's grounds for appeal range across a broad spectrum of procedural and substantive issues. Each has been

considered by the Board, beginning with the alleged defects in the hearing panel's report.

Although the order of suspension filed by the panel was signed by the panel's chairman, the accompanying report was signed by the panel's secretary, contrary to the requirement of MCR 9.115(J)(5) that both documents be signed by the chairman. We cannot construe this as a fatal defect. This technical deficiency clearly falls within the spirit of MCR 9.102(A) which directs that these rules are to be liberally construed and MCR 9.107(A) which declares that a proceeding "may not be held invalid because of a non-prejudicial irregularity or an error not resulting in a miscarriage of justice." Similarly, respondent's objection to the absence of an itemization of the Grievance Administrator's costs in the report has not been shown to be prejudicial. It is noted that the itemization was promptly provided to respondent's counsel on request.

Respondent has further objected to the makeup of the hearing panel which consisted of three lawyers whose principle offices are located in Oakland County. Respondent argues that his residence and law office are both located in Wayne County and that the case should have been assigned to a panel comprised of Wayne County lawyers. The respondent has acknowledged that he is not raising an issue of venue. MCR 9.115(G) states that, unless the chairperson otherwise directs, the hearing must be held in the county in which the respondent has or last had his or her office or residence. Although the respondent specifically waived any objection to holding the hearings outside of Wayne County, the proceedings before the panel were, in fact, conducted at the Board's hearing room in Detroit. The Court Rules are silent as to the makeup of a hearing panel and MCR 9.110(D)(3) states simply that the Board has the duty to assign a complaint to a hearing panel. There has been no showing, indeed no allegation, in the record below that the three lawyers assigned to this hearing panel were prejudiced or biased nor is it claimed that the issues presented in this case are uniquely within the experience of lawyers who practice in a particular county.

A more complex issue is presented by the respondent's claim that the disciplinary proceedings are unconstitutional in that an attorney's license may be suspended or revoked without a judicial hearing. This, he contends, amounts to a violation of his right to due process of law guaranteed by the Fourteenth Amendment of the U.S. Constitution. The Attorney Discipline Board was created by the Michigan Supreme Court as that Court's "adjudicative arm to discharge its exclusive constitutional responsibility to supervise and discipline Michigan attorneys." MCR 9.110(A) [formerly GCR 1963, 959]. We reject the respondent's constitutional argument. While it is true that our Court grants applications for leave to appeal in a relatively small number of cases, it does not necessarily follow that a party whose application has been denied by the court has been denied an opportunity to adjudicate constitutional claims. In a majority of cases which are appealed

to the Board or the Supreme Court, the sole issue on appeal is a claim that the discipline imposed is too harsh or too lenient. These appeals, along with those citing evidentiary, procedural or constitutional infirmities in the hearing panel proceedings, are considered by the Board in accordance with the rules promulgated by the Supreme Court. Both the panel and Board proceedings are subject to the superintending control of the Supreme Court [MCR 9.107(A)]. Application for leave to appeal to the Supreme Court may be filed by an aggrieved party [MCR 9.122(A)]. It has not been established is unconstitutionally abrogated its responsibility to oversee and supervise the system of professional discipline created by sub-chapter 9.100 of the Michigan Court Rules.

It is the respondent's further argument that the hearing panel improperly rejected his defense that he was suffering from a mental disorder that the time the misconduct occurred. Respondent emphasizes the expert testimony offered on his behalf by his psychiatrist, Dr. Jamora, that respondent suffered from a bipolar disorder and was acting delusionally. Specifically, we are referred to Dr. Jamora's testimony that respondent's conduct was something "that had been dictated to him by God." He has consistently emphasized that no claim is made that the respondent could not distinguish between right and wrong. Rather, respondent draws on the provisions of MCL 768.21(A) and MCL 330.1400(A) for his argument that a person is no culpable if, because of a mental illness, he "lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law."

We affirm the hearing panel's decision that misconduct was established by the respondent's admission and its decision to reject the medical testimony submitted in defense of those charges. Respondent has never denied that he embezzled funds from a bankruptcy estate. It is his argument, reduced to its simplest terms, that he was under a compulsion caused by a mental disorder. In his arguments to the panel, respondent's counsel specifically drew the analogy between the instant disciplinary case and a criminal case. It is his position that a person suffering from a mental disorder prohibiting him from conforming his conduct to the requirements of the law should be held neither criminally nor professionally responsible for the resulting misconduct.

We believe that the panel was correct in rejecting that analogy. Our system of professional discipline is founded on the notice that discipline for misconduct is imposed for the protection of the public, the courts and the legal profession. (MCR 9.105) It is especially important that such protection be afforded in cases involving the misuse of client funds. Moreover, the Board has specifically found that the element of intent is not required to establish misappropriation of funds. In Matter of Steven J. Lupiloff, DP 34/85, Board Opinion March 24, 1988, the Board adopted this definition of misappropriation employed by the District of Columbia Court of Appeals in the case of In re E. David Harrison, 461 A2d 1034 (1983):

> "Misappropriation of clients' is any unauthorized use of client's funds entrusted to an attorney including not only stealing, but also unauthorized temporary use for the lawyer's own purpose, whether or not he derives any personal gain or benefit therefrom."

The Court in Harrison rejected the notion that "improper intent" is an element to be considered in determining whether there has been a misappropriation:

> "This is consistent with the language of DR 9-102 which, unlike other disciplinary rules, does not require scienter; rather, it is essentially a per se offense. Consequently, when the running balance of Harrison's office account fell below the amount held in trust for Hart, misappropriation had occurred." In re Wilson, 81 NJ 451; 409 A2d 1153 (1979).

This definition is entirely consistent with earlier rulings by the Board. We stated, for example, in Matter of Barry R. Glaser, DP 106/84, September 30, 1985 (Brd. Opn. p. 379) that "the repeated depletions of the professional account which was used to hold client funds constitutes, at the very least, prima facie misconduct."

The Board has further ruled, however, that the issue of intent, while not constituting a defense to a misappropriation charge, may be considered by a panel in determining the appropriate level of discipline. It is clear from the hearing panel's report in this case that the transcripts of Dr. Jamora's testimony were admitted and considered by the panel during the discipline phase of the proceedings. The panel specifically cited the mitigating effect of the "psychiatric circumstances" described by Dr. Jamora. Additionally, the panel stated that it had given considerable weight to the fact that the misappropriated funds had been restored with interest. The panel concluded that a two-year suspension was appropriate.

The Board has considered the Grievance Administrator's Cross-Petition for Review seeking an increase in that discipline. We conclude that the discipline imposed by the panel was appropriate and should be affirmed. However, the panel's report may imply that restitution was considered to have a greater mitigating effect than the respondent's psychological history. Although we reach the same final result, we would reverse the relative weight of those mitigating factors.

Restitution in this case was made after a successor trustee had been appointed and had filed suit to recover the money. We agree with the American Bar Association Joint Committee on Professional Sanctions that forced or compelled restitution should

generally be given little or no weight as a mitigating factor. Standards for Imposing Lawyer Sanctions, Sec. 9.0 (American Bar Association 1986). We believe, on the other hand, that the somewhat unique psychological circumstances described by Dr. Jamora distinguish this case from those cases involving misappropriation of funds resulting in discipline ranging from three-year suspensions to disbarment. The respondent will be required to establish his eligibility for reinstatement to the satisfaction of a hearing panel in accordance with the procedures described in MCR 9.123(B) and MCR 9.124. We are satisfied that the two-year suspension imposed in this case affords adequate protection to the public, the courts and the legal profession.

Hon. Martin M. Doctoroff, Remona A. Green, Hanley M. Gurwin, Linda S. Hotchkiss, M.D., and Theodore P. Zegouras

Opinion of Robert S. Harrison and Patrick J. Keating

This case has presented a number of important procedural and substantive issues. We join with the majority in the rulings on the various grounds for appeal raised by the respondent. On the issue of the discipline, however, we would go further in recognizing the special circumstances presented by the psychiatric testimony received in mitigation. Given the nature of the bipolar disorder described in the unrebutted testimony of Dr. Jamora, it is clear that reinstatement proceedings in accordance with MCR 9.123(B) would be appropriate. However, an appropriate balance between the primary purposes of these proceedings and the interests of the respondent would be adequately achieved by modifying discipline to include a somewhat shorter suspension coupled with conditions requiring ongoing treatment under Dr. Jamora's supervision.