

Grievance Administrator,  
Petitioner/Appellant,  
v  
William W. Swor, P-21215,  
Respondent/Cross-Appellant.

ADB 118-87

Decided: March 16, 1989

BOARD OPINION

The Attorney Discipline Board has considered separate petitions filed by the Grievance Administrator and the respondent seeking review of a hearing panel order placing the respondent on probation for a period of two years with conditions relating to continued therapy, review of his law practice by another attorney, attendance at two legal education seminars per year, and random drug testing. The Grievance Administrator also seeks review of the panel's dismissal of the court which charged the misappropriation of funds. Based upon its review of the whole record, the Board reverses the hearing panel's dismissal of Count I of the complaint. A reprimand is imposed as to that count. The hearing panel's decision to order probation as to Counts II through VII is affirmed. The Order of Probation is modified by eliminating the requirement that respondent practice law under the supervision of another attorney. The order is further modified with regard to the provisions for drug testing.

The first count of the complaint filed by the Grievance Administrator alleged that respondent deposited a \$500.00 settlement check in his client trust account in May 1983 and misappropriated a portion of the funds belonging to the client before distribution was eventually made in 1985. At the hearing, the respondent admitted that, after deduction of his fee, the amount of \$366.66 should have been maintained in the account for his client. He testified that the file was closed and that he somehow forgot about the case until he was contacted by the client in November 1985. After some investigation, and the filing of the Request for Investigation by the client, he sent her a check for \$500.00. The bank records offered into evidence by the Grievance Administrator established that the balance in the trust account fell below the required amount of \$366.66.

Based upon the evidence presented, misappropriation was established. The allegations are similar to those made in the Matter of Steven Lupiloff, DP 34/85, ADB Opinion March 24, 1988. In that case, the respondent held client funds for distribution to a doctor but "forgot" to pay the doctor for approximately nine months. During that time, the account balance fell below the amount owed to the doctor. In its opinion, the Board adopted the definition employed by the District of Columbia Court of Appeals. In re E. David Harrison, 461 A2d 1034 (1983).

"Misappropriation of clients' funds is any unauthorized use of clients' funds entrusted to an attorney including not only stealing, but also unauthorized temporary use for the lawyer's own purpose . . . it is essentially a per se offense. Consequently, once the running balance of Harrison's office account fell below the amount held in trust for Hart, misappropriation had occurred."

This definition is consistent with earlier rulings of the Board including Matter of Barry R. Glaser, DP 106/48, September 30, 1985 (Brd. Opn. p. 379). "The repeated depletions of the professional account which was used to hold client funds constituted, at the very least, prima facie misconduct."

Respondent's testimony that his failure to make timely delivery of the funds and the depletion of the account was negligent rather than intentional did not constitute a defense but was properly considered in mitigation. Matter of Steven Lupiloff, supra. We believe that the misconduct is mitigated by respondent's prior unblemished record, his restitution to the client and the negligent, rather than intentional, nature of his acts. The misconduct alleged in Count I warrants a reprimand.

Neither party has appealed the panel's factual findings with regard to Counts II through VII. The allegations in those counts all arise from respondent's retention in 1981 by Antonio Velardo to start an age discrimination suit, respondent's failure to seek his client's objectives and his misrepresentations to the client to conceal his lack of progress in a case in which the respondent was admittedly "in over his head."

It is the Grievance Administrator's position that the hearing panel improperly entered an order of probation. The objection to probation is based in large part upon the argument that while respondent's admitted use of cocaine in late 1982 and early 1983 may have been a cause of the misconduct during that period, it was not shown to be a cause of the neglect and misrepresentation which began in 1981 and continued until the respondent was discharged by Mr. Velardo in 1986. We note, however, that neither respondent nor his witness, Dr. Talbot, claimed that the cocaine use was the sole cause of his impairment. It was emphasized at the hearing that the cocaine use should be viewed as respondent's way of dealing with other, broader problems including severe financial problems and the strain of dealing with a troubled spouse and a deteriorating marriage. Testimony was offered regarding respondent's divorce which was not finalized until 1987 and the custody dispute which ended in an award of custody of the two minor children to Mr. Swor.

We are not inclined to disturb the hearing panel's findings with regard to respondent's eligibility for probation where those findings have support in the record. Given the absence of any evidence offered in rebuttal, we cannot say that eligibility for

probation was not established by a preponderance of the evidence. Nor can we say that probation is not an appropriate result. The respondent has a prior unblemished disciplinary record. The difficulties with these two clients appear to be unrelated and are not part of a continuing pattern of misconduct. On the contrary, since his last contact with Kathy Ferguson in 1985 and Antonio Velardo in 1986, no further complaints have been filed against Mr. Swor. More importantly, the record discloses that the underlying causes of respondent's emotional difficulties seem to have been arrested. The panel had an opportunity to observe and question the respondent at three separate hearings and we are satisfied with their conclusions.

However, the argument by respondent with regard to certain provisions of the Order of Probation are well taken. Provisions requiring the appointment of another attorney to supervise respondent's law practice while on probation involves a number of potential problems, including the confidentiality of the respondent's files and the potential liability of the supervising attorney. These potential difficulties are not insurmountable but should be weighed against the benefits to be gained by the appointment of a practice monitor. We are not persuaded that the appointment of a supervising attorney is necessary in this case.

The respondent raises a further objection to the provision in the Order of Probation which requires that he undergo drug testing at any time, within six hours after being requested by the Grievance Administrator to present himself for testing. The respondent argues that his admitted cocaine use ceased in 1983. His testimony on that point is unrebutted and he argues that the provision for continued drug testing serves no meaningful purpose.

When drug or alcohol use is cited as a cause for a respondent's impairment and drug use is raised as grounds for an order of probation, the hearing panel may have a legitimate concern with regard to a recurrence of that problem. In order to establish eligibility for probation, the respondent must establish that the cause of the impairment is susceptible to treatment and he or she intends in good faith to undergo treatment. MCR 9.121(C)(1)(c) and (d). As previously noted, the hearing panel had an opportunity to observe the respondent closely at three separate hearings. We are not prepared to say that the requirement that respondent submit to future drug testing is unreasonable. The provision is modified, however. The respondent shall, during the period of probation, submit to a drug test upon ten (10) days written notice by the Grievance Administrator. Such request may be made at reasonable intervals.

All concur.