Grievance Administrator,
Petitioner/Appellant,
v
Peter S. Shek, P-32749,
Respondent/Cross-Appellant.

ADB 222-87

Decided: March 13, 1989

BOARD OPINION

The respondent was reprimanded by a hearing panel which found that the respondent's mishandling of his trust account resulted in the commingling and misappropriation of client funds as alleged in a five-count complaint filed by the Grievance Administrator. The panel specifically referred to the respondent's contention that the mishandling of client funds was not intentional but was exacerbated, if not caused, by emotional problems resulting from a divorce and severe alcohol abuse. The Attorney Discipline Board has considered the Petition for Review filed by the Grievance Administrator urging that the discipline be increased. A Cross-Petition for Review was filed by respondent which argued that the findings of "misappropriation" lacked evidentiary support and that the panel abused its discretion in denying the respondent's request for probation. Upon consideration of the whole record, the hearing panel's findings are affirmed. The order of discipline is modified; the respondent's license to practice law is suspended for ninety days.

There is little, if any, dispute as to the factual allegations in the complaint. The respondent's delivery of an NSF settlement check to a client in 1986 led to an investigation by the Attorney Grievance Commission which disclosed that the respondent's trust account was not properly maintained during much of that year. The five-count complaint charged that in at least five instances funds collected for clients were not maintained intact and were not segregated from the respondent's own funds as required by Canon 9 of the Code of Professional Responsibility, DR 9-102(A). The specific improprieties may be summarized as follows:

> Count I--The respondent received a check in the amount of $3431.06 from an insurance company on January 9, 1986 payable jointly to himself and his clients, Charles and Rosie Lewis. The check was endorsed and deposited in the respondent's trust account. The clients were entitled to a net recovery of $1867.20. Before he wrote a settlement check to his clients on February 26, 1986, the account balance fell to $1215.11, approximately $650.00 below the amount which should have been maintained intact for his

clients. The trust account check to the Lewis' eventually cleared March 25, 1986.

Count II--A $9500.00 settlement check payable to respondent and his client Diane Stadnika was deposited into the respondent's trust account April 30, 1986. As the result of his withdrawal from that account, the first disbursement check to his client, in the amount of $5981.70, was dishonored. The client received her money on June 27, 1986.

Count III--A $3500.00 settlement draft was deposited into the respondent's trust account July 17, 1986, of which his client, National Dentex Corporation, was entitled to received $3020.69. On the day he issued the settlement check to his client, respondent's trust account held a balance of less than $2000.00 and the settlement check was returned NSF. It was this client who filed a grievance with the Attorney Grievance Commission. The client was made whole with a money order in October 1986.

Count IV--A $3600.47 settlement check was deposited September 9, 1986. The clients were entitled to $3032.03. The check to the client was issued September 9, 1986 and was dishonored when it was presented for payment on September 29, 1986. At one point during those twenty days, respondent's trust account showed a negative balance of $587.33. Respondent delivered a money order to his client on October 7, 1986.

Count V--The respondent deposited a $400.00 check on September 23, 1986 for delivery to the opposing party in settlement of a case. He delivered his trust account check to the other party but depleted the trust account before the check was honored. The funds were eventually delivered when the check was presented a second time on October 27, 1986.

The respondent has admitted the commingling of funds but denies that there was intentional misappropriation. He prefers to characterize his conduct as "a clear inattention to proper bookkeeping methods leading to inadequate balances, over-withdrawals and insufficient funds checks."

The respondent's delayed cross-petition for review asks that the Board find that the evidence presented to the panel was insufficient as a matter of law for the panel to conclude that "misappropriation" had occurred. To the contrary, the evidence,

including respondent's own admissions, clearly support a finding that the respondent's withdrawal of funds from his trust account constituted a misappropriation as that term has been defined by the Board.

Between January 29, 1986 and October 27, 1986, the respondent deposited into his trust account funds which belonged to five separate clients. Had those client funds been maintained in the account as required by Canon 9 of the Code of Professional Responsibility, the settlement checks to the clients would have ben honored when presented to the bank. Instead, the respondent's unauthorized withdrawal of funds to this he had no legitimate claim resulted, in each instance, in a delay in respondent's ability to make prompt delivery of those funds. While the distinction between intentional and unintentional misappropriation may have relevance in determining the appropriate discipline, the "misappropriation by neglect" argument does not constitute a defense.

The Attorney Discipline Board has held that the repeated depletions of a professional account used to hold client funds constitutes, at the very least, prima facie misconduct. Matter of Barry R. Glaser, DP 106/84, September 30, 1985 (Brd. Opn. p 379), (120-day suspension increased to one year). More recently, the Board approved the definition of misappropriation cited by a hearing panel in Matter of Steven Lupiloff, DP 34/85, ADB Opn. March 24, 1988, leave denied #83004, (Reprimand Aff'd)"

> "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 use, whether or not he derives any personal gain or benefit therefrom . . . [it] does not require scienter; rather, 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." In re E. David Harrison, 461 A2d 1034 (DC 1983).

Moreover, this case appears to go far beyond mere inattention. This is not a case involving a deposit of funds on behalf of a single client nor is there a claim that client funds were somehow overlooked. The respondent has not claimed that he did not know how his trust account was being used. He acknowledged in his testimony that he continued to use the trust account for general business purposes and wrote checks for business and personal expenses.

While the Board concludes that the panel's findings as to the nature of misconduct in this case has overwhelming evidentiary support, a more difficult issue is presented with regard to the appropriate sanction which should be imposed. The respondent offered unrebutted testimony that he was in a depressed state

during the year 1986. Following the breakup of his marriage in August 1985, respondent began to drink heavily. Although he was not drinking during working hours (Hrg. Tr. p. 142), he was drinking ten to twelve mixed drinks a night and was convicted of impaired driving in 1986. The deposition of respondent's psychiatrist, Dr. Joseph J. Tiziani, was submitted to the panel and it includes the doctor's observation that the respondent was suffering from an adjustment disorder which was related to a deterioration in his office practice during the year 1986. It is the respondent's position that he is now happily married, he no longer drinks excessively and he has no further need of counseling. In short, his problems are behind him. Respondent argues that the hearing panel abused its discretion by refusing his request to place him on probation.

While not discounting the personal problems described by the respondent, the hearing panel found that the impaired ability which was asserted did not substantially contribute to the respondent's conduct. Although Dr. Tiziani described a causal relation between respondent's adjustment disorder and certain problems including Mr. Shek's being late for court dates and not keeping up with the demands of his practice, Mr. Shek admitted that his shoddy trust account practices pre-dated the divorce problems.

We are inclined to give deference to the hearing panel's findings and those findings are to be affirmed where there is ample evidentiary support in the record. Matter of David N. Walsh, DP 16/83, August 16, 1984 (Brd. Opn. p. 333). It would not be appropriate for the Board to substitute its own findings where there is support for the panel's conclusion that the alleged impairment was not a substantial cause of the misconduct.

Furthermore, MCR 9.121(C) does not provide that the respondent/attorney who successfully establishes the criteria in MCR 9.121(C)(1)(a)-(d) is entitled to an order of probation. On the contrary, once those criteria have been met, the panel, the Board or the Supreme Court may enter a probation order and then only if there is a specific finding that an order of probation is not contrary to the public interest. We are not prepared to say that the hearing panel abused its discretion by finding that probation would not be an appropriate discipline in this case.

Finally, the Grievance Administrator has requested that the Board increase discipline. Although the issuance of a reprimand in a case involving the misuse of client funds is not entirely without precedent, those few cases in which a reprimand has been imposed have generally involved a temporary delay in the delivery of funds held for a single client under circumstances suggesting negligence or inattention. See Matter of Steven J. Lupiloff, supra, (1988); Matter of Robert R. Cummins, P-12392; ADB 159-88, ADB Opinion (December 5, 1988). A reprimand in such a case is consistent with the ABA Standards for Imposing Lawyer Sanctions which suggests that "reprimand is generally appropriate when a lawyer is negligent in

dealing with client property and causes injury or potential injury to a client." Standard 4.13.

Those Standards further provide, however, that suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client. Standard 4.12. While there is no evidence in this case that the respondent intended to deprive his clients of their funds, it is clear that he knew or should have known that his depletions of his trust account were entirely inappropriate. The respondent admitted that he commingled funds in his trust account by depositing client monies, attorney fees and loan proceeds. The return of the first trust account check for insufficient funds should have alerted him to the existence of a serious problem.

Although we have affirmed the panel's conclusion that the respondent's personal or emotional problems neither excuse his misconduct nor establish a basis for probation, we cannot overlook the mitigating effect of those problems together with his treatment and his apparently sincere efforts to overcome those difficulties. In the absence of that mitigation, discipline in this case would be significantly greater. We believe that respondent's license to practice law should be suspended for a period of ninety days.

Concurring: Remona A. Green, Hanley M. Gurwin, Linda S. Hotchkiss, M.D., Patrick J. Keating and Theodore P. Zegouras.

DISSENT

Hon. Martin M. Doctoroff

I disagree with the majority in this case only as to the sufficiency of a ninety-day suspension. I have repeatedly expressed my view that neither the legal profession nor the public should expect or tolerate anything less than the highest standards of care when an attorney holds client funds. While we may have sympathy for an attorney's demonstrated problems in his personal or professional life, that sympathy should not override our responsibility to protect the public and the profession. I share the view expressed in these proceedings by the Grievance Administrator that deterrence is a legitimate and important consideration when discipline is imposed. The respondent in this case mishandled and misused client funds for the better part of a year. A ninety-day suspension which may be automatically terminated by the filing of an affidavit of compliance does not, in my opinion, constitute an appropriate sanction. I would increase suspension to a period of one year.