

Grievance Administrator,
Petitioner/Appellee,
v

Arthur R. Porter, Jr., P-34977,
Respondent/Appellant.

ADB 204-87; 233-87

Decided: January 30, 1989

BOARD OPINION

The Attorney Discipline Board has considered a petition for review filed by the respondent seeking review of an order of revocation entered by a hearing panel. The hearing panel concluded that the evidence presented supported the allegations in the formal complaint that he neglected his responsibilities as the personal representative of a decedent's estate and that he misappropriated funds belonging to the estate in the amount of \$14,310. Upon review of the whole record, the findings and conclusions of the hearing panel are affirmed. The discipline imposed is modified by the vacation of the order of revocation and the entry of an order suspending the respondent's license for a period of five years.

In respondent's answer to the complaint and in his testimony to the panel, the respondent admitted that he was retained in December 1984 to probate the Estate of Irene Williams, deceased, and was subsequently appointed by the Wayne County Probate Court to serve as the estate's independent personal representative. In violation of his duties as an attorney, the respondent failed to prepare and file an inventory of the estate's assets, failed to prepare and file annual accountings, failed to pay creditors of the estate and failed to withdraw as the independent personal representative. The hearing panel found that those violations constituted misconduct within the meaning of MCR 9.104(1)-(4) and Canons 1, 6 and 7 of the Code of Professional Responsibility, DR 1-102(A)(3), (5) and (6); DR 6-101(A)(3) and DR 7-101(A)(1)-(3).

In a separate count, the respondent was charged with the misappropriation of approximately \$14,759.03 belonging to the estate. The respondent substantially admitted those allegations with the qualification that the money which he withdrew from the estate account should be characterized as excessive attorney fees.

There is ample support in the record for the panel's rejection of that proffered characterization. The respondent admitted that he made deposits totaling no less than \$18,969.03 to the estate account during the period December 21, 1984 to December 31, 1986. He offered no objection to the Grievance Administrator's exhibits consisting of withdrawal slips totaling \$910.00, each signed by the respondent and bearing a notation that the withdrawal was for "attorney fees". Nor was an objection offered to the Administrator's exhibit consisting of seventeen additional

withdrawal slips totaling \$14,310 with no notations indicating that they represented attorney fees. The respondent acknowledged that no authority was sought from the Probate Court for the payment of fees. We affirm the hearing panel's conclusion that no credible evidence was offered by the respondent to refute the charges of misappropriation which were established, prima facie, by the Grievance Administrator and that such conduct amounted to violations of MCR 9.104(1)-(5) and Canons 1 and 9 of the Code of Professional Responsibility, DR 1-102(A)(3)-(6) and DR 9-102(B)(1),(3)and(4). We further affirm the panel's finding that the respondent's failure to file a timely answer to Formal Complaint ADB 204-87 constituted misconduct in violation of MCR 9.104(1),(2),(4)and(7) and Canon 1, DR 1-102(A)(5)and(6).

Respondent requested that the panel enter an order of probation, alleging in mitigation an addiction to cocaine. The panel found that the respondent had failed to establish the criteria set forth in MCR 9.121(C)(1)(a)-(d). They noted that the evidence presented suggested that his use of the estate funds commenced prior to his admitted use of cocaine and that he had failed to submit a detailed plan for treatment within the meaning of MCR 9.121(C)(1)(d).

Although two other incidents first referred to by the respondent were not specifically cited by the panel as aggravating factors, the panel did conclude that "respondent's plea of nolo contendere to a charge of uttering and publishing and his admitted involvement in a shooting at a 'crack' cocaine house simply reinforced the panel's conclusion that respondent can no longer be proclaimed by the courts and the legal profession as a person fit to be entrusted with professional and judicial matters as an attorney and as an officer of the court.

In his petition for review, the respondent argues that the proceedings before the panel were flawed by various procedural defects. The record does not support the respondent's arguments. Specifically, we find no merit to his claim that he was unfairly prejudiced by the panel's refusal to adjourn the hearing, that allowing the Grievance Administrator's counsel to proceed first on final arguments wa a violation of due process or that the Grievance Administrator's counsel improperly relied on legal precedents from other jurisdictions. With regard to the claim that the Administrator failed to honor a promise to join additional claims of misconduct arising from a separate misdemeanor conviction, there is no evidence in the record regarding such a promise. Mr. Porter has not been charged with separate acts of misconduct and the first references in the record to both the misdemeanor conviction and the manslaughter acquittal were made by the respondent himself. Both matter were properly considered by the panel as factors reflecting upon the respondent's fitness to practice law.

The Board is not prepared to say that the hearing panel abused its discretion by revoking the respondent's license to practice law. The Supreme Court has recognized, however, that an abuse of

discretion standard would prevent the Board from effectively carrying out its overview function of insuring a certain degree of continuity and consistency in the discipline imposed by hearing panels. Matter of Daggs, 411 Mich 304; 307 NW2d 66 (1981). In reviewing the whole record in this case, we have considered the effect of the respondent's addiction and, more importantly, his attempts at rehabilitation. In his statements to the Board at the review hearing conducted in accordance with MCR 9.118, the respondent addressed the Board with sincerity and we are impressed with his apparent efforts to take control of his life by openly admitting his problem with cocaine and by his efforts to seek treatment. If those efforts continue, we believe that the respondent should be eligible for reinstatement after five years.

Under the provisions of MCR 9.123(B)(2), an attorney whose license has been revoked may petition for reinstatement after five years and our modification of the discipline in this case does not alter the time which will have elapsed before the respondent can file such a petition. However, we do not believe that this modification is without significance. As Justice Levin observed in a separate opinion in Petition of Theodore G. Albert, 403 Mich 346 (1978) (Kavanagh, J., concurring), a "suspension" denotes a "temporary removal from office or privileges" and creates "the implicit assumption . . . that the disciplined lawyer will ordinarily be reinstated at the end of the suspension." We believe that the respondent should be entitled to that assumption.

Robert S. Harrison, Patrick J. Keating, Charles C. Vincent, M.D., Theodore P. Zegouras.

Dissent

Martin M. Doctoroff, Hanley M. Gurwin

We would affirm the order of revocation issued by the hearing panel in this case. We recognize that the respondent will not be able to petition for reinstatement any earlier than if the panel's order was undisturbed. We believe, however, that an order of revocation more forcefully expresses the message that lawyers who embezzle client funds, for whatever reason, are a danger to the public and the legal profession and should be removed as officers of the court. In this case there is support in the record for the panel's conclusion that the respondent's misuse of funds belonging to a decedent's estate preceded his use of cocaine. This factor alone would seem to weaken the argument that the respondent's misconduct should be mitigated by a drug addiction.

We applaud the respondent's efforts at rehabilitation and we wish him well in his efforts to resume a productive role in society. We do not believe, however, that the protection of the public and the legal profession is served by modification of the discipline imposed by the hearing panel. We believe that we have been consistent in expressing our view that revocation should generally be the appropriate sanction in cases involving the

willful embezzlement of client funds. We do not believe that the illegal use of controlled substances should mitigate the appropriate discipline in such cases.