GRIEVANCE ADMINISTRATOR,
Petitioner/Cross-Appellant,
v
PAUL WRIGHT, P-25573,
Respondent/Appellant.

ADB 126-87

Decided: December 8, 1988

BOARD OPINION

The Attorney Discipline Board has considered the petitions for review filed by the respondent and the Grievance Administrator, both seeking modification of a hearing panel order suspending the respondent's license to practice law for one year. We affirm the hearing panel's finding that the respondent misappropriated his client's share of a settlement in a personal injury action as well as the panel's dismissal of a second count which charged that his client's endorsements were forged by the respondent or at his direction. The discipline imposed by the panel is modified and is increased to a suspension of three years.

The respondent represented Susan and Bobby McSwain in an automobile accident case. The McSwain's signed a release in February 1986 agreeing to a settlement of their claims for the sum of $17,500. The respondent received a check in that amount in March 1986 made payable to himself and his clients. The Administrator's complaint charged in Count I that the respondent did not notify his clients of his receipt of the settlement funds and that he misappropriated his clients' share of the settlement, approximately $11,725, after the check had been deposited in his account. The second count charged that the respondent was responsible for the forgery of his clients' signatures on the settlement check.

In his answer, the respondent asserted his constitutional privilege against self-incrimination and claimed as an affirmative defense that he lacked the requisite intent to commit the alleged acts or that he acted "under a compulsion to do so as the result of a recognized temporary mental illness or disease."

At the hearing before the panel Susan McSwain testified that she signed the release but never saw the settlement check until the day of the panel hearing and the purported endorsements on the check had not been signed by her or her husband. She stated that she was consulting with attorney David Barnes with regard to another legal matter and that it was only after discussing her automobile accident case with him that the McSwains received their share of the settlement from attorney Wright.

Attorney David Barnes testified that he agreed to assist the McSwains in obtaining their money from Mr. Wright. On October 20, 1986, he spoke to the respondent on the telephone and told him that

Mrs. McSwain had "indicated that she had retained him [Wright] for an auto accident case; that they had settled the case with AAA . . . for $17,500, and that she had not received the money, and she was contending that he had kept the money." (Tr. 10/30/87 p. 17) According to Mr. Barnes, respondent replied "that was true; he said that he felt badly about it, that he was going to try to raise the money to pay her back." (Tr. 10/30/87 p. 18)

The assistant auditor of the Warren Bank was called as a witness pursuant to a subpoena to produce bank records pertaining to Warren Bank Account #3011143, captioned "Law Offices of Paul A. Wright, P.C., Escrow Account." Over the respondent's objections, copies of those bank records were introduced into evidence. They disclosed that the $17,500 settlement check in the McSwain case was deposited in respondent's trust account March 6, 1986. By March 28th, the balance stood at $1,575 and fell to a negative balance by the end of May, 1986.

In defense of the charges, the respondent introduced the testimony of Dr. Charles Goss, D.O., who is board certified in psychiatry from the American Board of Psychiatry and the American Osteopathic Board of Psychiatry. The panel received the doctor's testimony which included his explanation that he saw the respondent in December 1986 and

> "I tried to ascertain, by asking Mr. Wright, essentially first what had happened; why he was coming to see me, which had to do with misappropriation of funds of a client of his, and then to further ascertain what was going on in his life." (Tr 10/30/87 p. 113)
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> "The diagnosis that I arrived at was a dependent personality disorder (Tr. 10/30/87 p. 116) . . . I don't believe that he intended to misappropriate the funds indefinitely. I believe that he intended to reimburse his clients, these funds; but that the anxieties and fears that he experienced, due to his great dependency needs upon his wife and her approval, impaired his judgment severely to the point that at the time he did misappropriate the funds." (Tr. 10/30/87 p. 118)

Based upon the evidence presented, the hearing panel determined that misconduct had been established with regard to the alleged misappropriation and they rejected the doctor's testimony regarding the respondent's "dependent personality" as a basis for a finding that he lacked intent. With regard to the forgery count, the panel concluded that no evidence had been offered which established that the respondent himself affixed those endorsements or that he had knowledge of a forgery.

A separate hearing on discipline was conducted in accordance with MCR 9.115(J)(2). In addition to testimony from two character witnesses, the panel received further testimony from Dr. Goss which included his opinion that the respondent would not be a danger to

the public in the future because of what he has learned about himself during his therapy. Following that hearing, the panel issued its report on discipline with a conclusion that the respondent's misappropriation of client funds had not been mitigated by the psychiatric or character testimony. The panel's decision to suspend respondent's license for one year was appealed by both parties.

The respondent first raises two evidentiary objections. First, he claims that photocopies of the bank statements should not have been admitted. He argues that the bank employee who appeared before the panel did not make the photocopies, did not compare them to the original records, and did not bring original records to the hearing. He claims that the copies were therefore inadmissible under the provisions of MRE 1001 and 1002. The Grievance Administrator argued, on the other hand, that the "copies" in the bank's possession are considered to be "original" for purposes of admissibility under MCLA 600.2148.

The hearing panel did not err in overruling the respondent's objection to the admissibility of those records. MRE 1003 directs that "a duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." See also Joba Cont. Co., Inc. v Burns and Roe, Inc., 121 Mich App 615 (1983). That rule, when read in conjunction with MCR 9.102(A) directing that these rules be liberally construed, supports the panel's ruling. Respondent has not raised a genuine question as to the authenticity of the bank records nor has it been suggested how their admission would be unfair.

The respondent has also appealed the panel's decision to admit the testimony of attorney David Barnes regarding statements made to him by Mr. Wright in a telephone conversation on October 20, 1986. It is claimed that such testimony was inadmissible under MRE 901(B)(6). Witness Barnes testified that he obtained respondent's number from the telephone company, that he called that number and asked to speak to Mr. Wright and that a person eventually came on the line who, when asked if he was Paul Wright, answered that he was. (Tr. Vol. I, p. 15-16) No genuine issue of fact has been raised as to respondent's self-identification to the caller. Respondent's objection was properly overruled in light of the provision in MCR 901(B)(6) that telephone conversations are admissible if circumstances, including self-identification, show the person answering to be the one called.

The respondent has also appealed the panel's conclusion that funds were "misappropriated" and argues that the evidence showed, at worst, that funds were not promptly delivered to respondent's client. Respondent calls our attention to the panel's explanation from the bench regarding its finding of misappropriation where the panel chairman stated:

> "We believe that there may be a conceptional difference in the meaning of the term misappropriation, between the views of the panel and the views expressed by Mr. Golden; and that it is our belief that the failure to the respondent to forthwith deliver the money upon demand to Mrs. McSwain, or her second attorney, would constitute misappropriation and a breach of professional conduct." (Tr. Vol. I, p. 74)

The word "misappropriation" appears nowhere in the Code of Professional Responsibility which was applicable to these proceedings. Rather, respondent was charged under the provision of Canon 9 which require that client funds be segregated in a separate account, that they be accounted for and promptly turned over to the client as requested. DR 9-102(A)(B)(1,3,4). Had the proofs in this case established that the funds rightfully belonging to the McSwains were maintained intact by the respondent in such an account, we would agree that the failure to make prompt delivery did not, in and of itself, establish a "misappropriation." However, the evidence in this case goes substantially further.

The insurance company check in the amount of $17,500 made payable to the McSwains and the respondent was deposited into the "Law Office of Paul A. Wright, P.C. Client Trust Fund" at the Warren Bank on March 7, 1986. Not only was the clients' share of $11,725 not promptly delivered to them, but the balance in the trust account fell below that amount as early as March 18th before eventually falling to a balance of only $25.56 by April 21, 1986. In October 1986, the respondent admitted in his telephone conversation with Mr. Barnes that the client's fears that he had kept their money was trust and that he was going to "try to raise the money to pay her back." Respondent's own witness, Dr. Goss, testified in defense of the charges that Mr. Wright misappropriated the funds, albeit with an intent to reimburse his clients.

In Matter of Barry R. Glaser, DP 106/84, 9/30/85 (Brd. Opn. p. 379), the Board held that "the repeated depletions of the professional account which was used to hold client funds constitutes, at the very least, prima facie misconduct." More recently, the Board has specifically adopted a definition of misappropriation employed in a disciplinary case by the District of Columbia Court of Appeals.

> "Misappropriation of client funds is any unauthorized use of client 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 . . . this is consistent with the language of DR 9-102 which, unlike other disciplinary rules, does not require scienter . . . consequently once the running balance of Harrison's office account fell below the amount held in trust, misappropriation had occurred." (Emphasis added) In Re:

E. David Harrison, 461 A2d 1034 (1983), cited in Matter of Steven J. Lupiloff, DP 34/85 (Brd. Opn. 3/24/88).

It was not necessary, as respondent suggests, that the petitioner establish where the client's funds were transferred to after they were removed from the respondent's trust account nor was the petitioner required to prove that the respondent did not maintain one or more other trust accounts somewhere in the State of Michigan. The evidence presented constituted sufficient grounds from which the triers of fact could reasonably conclude that the funds were misappropriated when they were removed from respondent's trust account in March and April 1986. If the respondent wished to raise as a defense that the funds were maintained in other trust or escrow accounts, the burden was on him to establish the existence of those accounts.

With regard to the issue raised on appeal by the Grievance Administrator, the panel's dismissal of Count II is upheld. That count charged that the respondent forged or caused the forgery of the signatures of Mr. and Mrs. McSwain on the release from the insurance company and on the settlement check. The testimony of Susan McSwain established that she signed both her own name and her husband's on the releases after they were sent to her. While Mrs. MCSwain testified that the signatures on the back of the settlement check were neither hers nor her husband's, the panel found that there was no evidence as to the identity of the forger or the circumstances under which the purported signatures were placed on the check. Mrs. McSwain was not asked whether she had given authority to anyone to sign her name on that check. Although a fair inference could be drawn that the respondent could have been involved with the forgery, the preponderance of the evidence in the record below does not establish that respondent did, in fact, have knowledge of the forgery.

Finally, we address the issue of discipline. This is not a case involving a claim that the account balance fell below the required level as the result of inadvertence or careless bookkeeping. When confronted by attorney Barnes with the allegation that he had kept the money his clients were entitled to, he answered that was true, that he felt badly about it and that he was going to try to raise the money to pay her back. (Tr. Vol I. p. 17-18) As a case involving the unauthorized use of client funds, this case does not differ significantly from others in which the Board has determined that a three-year suspension should be the appropriate sanction. See for example Matter of Kenneth M. Scott, DP 178/85, Opinion 2/3/88; Matter of Muir B. Snow, DP 211/84, Opinion 2/17/87; Matter of Edwin Fabre', DP 84/85; DP 1/86, Opinion 9/30/86; Matter of John D. Hasty, ADB 1-87, Opinion 2/8/88. The order of discipline entered by the hearing panel is modified by increasing discipline from a suspension of one year to a suspension of three years.

Concurring: Green, Harrison, Keating and Zegouras.

DISSENTING OPINION

Hanley M. Gurwin and Martin M. Doctoroff

We agree with the rulings of the majority as to the admissibility of evidence at the hearing, the nature of the misconduct established by the evidence and the panel's dismissal of Count II of the Formal Complaint. We would, however, increase discipline to a revocation of respondent's license to practice law.

We view with dismay the reliance upon prior decisions of the Board to create an upper limit of discipline in which suspensions for attorneys who embezzle client funds are limited to three years. As difficult as it may be, we must look beyond our sympathies for an individual attorney in order to discharge our obligation to the public and the legal profession. When, as in this case, an attorney has taken client's funds, the public should have the right to expect that we will revoke that individual's license and reaffirm the Supreme Court's proclamation that the license to practice law in Michigan is reserved for those who are fit to be entrusted with professional matters as attorneys and officers of the court.