GRIEVANCE ADMINISTRATOR,
Petitioner/Appellant,
v
JOHN D. HASTY, P-14731,
Respondent/Cross-Appellant.

ADB 1-87

Decided: February 8, 1988

MAJORITY BOARD OPINION

Majority Opinion By Robert S. Harrison, Patrick J. Keating, and Charles C. Vincent, M.D.

The Respondent admitted to the hearing panel that he misappropriated funds from a decedent's estate from 1980 to 1985 and that he filed false accountings with the Probate court during that time. The hearing panel suspended Respondent from the practice of law for three years. Both the Respondent and the Grievance Administrator filed Petitions for Review seeking a modification of that discipline. We believe that the hearing panel acted appropriately in this case and that the suspension of three years should be affirmed.

The Respondent has been an attorney since 1968. According to the attorneys and judges who spoke to the panel on his behalf, he has been a respected member of the local Bar in the Roscommon area for many years and at the time of the hearing was an assistant prosecutor for Roscommon county.

On January 15, 1980, Respondent Hasty filed the necessary papers to commence probate proceedings in the Estate of Minerva Armstrong, Deceased, and he received his appointment as independent personal representative on that date. The Complaint in this case charged that the Respondent misappropriated estate funds to his own use each year from 1980 to 1985 and that each year he filed with the Probate court an accounting as personal representative which failed to include his receipt of land contract payments for the estate or to show his improper disbursements to himself. The amounts alleged to have been converted ranged from $4800 in 1984 to $17,825 in 1982, with a total amount during the five years calculated at more than $68,000. A final count alleged that his failure to prepare and file a timely federal estate tax return for the estate delayed the estate closing and resulted in penalties and interest exceeding $43,000.

In his Answer to the Complaint, Mr. Hasty admitted the misappropriation counts with a qualification that he did not appropriate the funds for his own use but rather withdrew the funds from the estate checking account because he was fearful that the Internal Revenue Service would attach the estate's funds. Similarly, he admitted that the annual accounts filed with the Court were "false" and that his conduct involved "misrepresentation" but he denied that the misrepresentations involved "dishonesty, fraud, or deceit". Notwithstanding his original position that he did not convert the funds to his own use, Respondent did testify to the panel that he not only commingled the funds with money belonging to another client but used the funds to discharge his own financial obligations.

In its report, the hearing panel observed that the Respondent's conduct arose largely from the simple failure to file a timely federal estate tax return. Rather than seek the assistance and professional expertise of an accountant or another attorney, the Respondent engaged in an ever-more complicated pattern of deception intended to convince the Probate Court and the estate beneficiaries that the administration of the estate was progressing in a normal fashion. As the panel further pointed out, however, the circumstances which prompted Mr. Hasty's actions were followed by a deliberate course of conduct which was so reprehensible that it cannot be condoned or excused.

In reviewing the discipline imposed in cases involving the misuse of client funds, the Board has stressed that such misconduct ranks among the most serious breaches of professional ethics and seriously undermines public confidence in the legal profession. We have stated that, depending upon several factors, discipline ranging from a suspension of three years to disbarment would be appropriate for such offense, In the Matter of Douglas E. H. Williams, DP 126/81, March 30, 1984 (Brd. Opn. p. 313). We are not unmindful of the fact that shorter suspension have been imposed in some cases, including the Williams case just cited, where we imposed an eighteen-month suspension, finding that Respondent's single misappropriation was substantially mitigated by alcoholism, depression and severe family and personal conflicts.

Mitigating factors of that magnitude are not present in this case. Moreover, Respondent's continued misuse of funds over a five-year period constitutes an aggravating factor which precludes Us from considering Respondent's request that the level of discipline be decreased.

On the other hand, we are not persuaded by the argument put forward by the Grievance Administrator that a suspension of three years is plainly unacceptable. The hearing panel clearly understood the serious nature of the misconduct in this case, which it described as "reprehensible". The panel, and not this Board, had an opportunity to weigh the character testimony offered on the Respondent's behalf and to observe the Respondent himself as he testified in mitigation.

While we must reject the Respondent's request that the suspension be reduced, the record before us is certainly not barren of mitigating factors. Respondent has practiced without disciplinary sanctions for nineteen years and his practice has earned him the respect and affection of a substantial segment of the local bench and bar. The hearing panel stressed Respondent's genuine remorse and the mitigating effect of the restitution which has been made to the estate.

In light of that record, we do not believe that it would be appropriate for this Board to substitute its own judgment for that of the panel where it appears that the hearing panel acted with discretion in imposing a suspension. We find that the discipline imposed in this case is consistent with our prior decisions and with the goals of these disciplinary proceedings.

DISSENTING OPINION

By Honorable Martin M. Doctoroff and Hanley M. Gurwin

We must respectfully dissent from our colleagues who affirm the three-year suspension imposed by the hearing panel in this case. In the absence of extraordinary factors in a particular case, lawyers who steal from their clients should be disbarred.

More than eleven years ago, our Supreme Court agreed with the opinion of the former State Bar Grievance Board that suspension was inappropriate to the conduct of an attorney who commingled funds and converted the proceeds of estates while acting as a fiduciary. The Court adopted the State Bar Grievance Board's unanimous conclusion that:

> There are few business relations involving a higher trust and confidence than that of an attorney acting as trustee in the handling of money for his client or by order of the court. The basis of this relationship is one of confidence and trust. Any action by the attorney which destroys that basic confidence and trust clearly subjects the legal profession and the courts to obloquy, contempt, censure and reproach. Foremost among the acts destroying the confidence between the public and the Bar is the conversion or misuse of a client's funds and the failure or refusal of an attorney to obey the orders of the court. In the Matter of Leonard A. Baun, 396 Mich 421; 240 NW2d 729 (1976).

We see no change in circumstances since that view was affirmed by our State's highest court. It is still true that ordinary citizens who would not consider depositing their money with a financial institution which is not insured by an agency of the federal government are nevertheless willing to entrust those funds to a lawyer. In most cases, the client does not demand that the lawyer provide proof of insurance or demand an audit of the lawyer's trust account. It is enough simply that that person is a lawyer. It is still true that the lawyer who betrays that trust does irreparable harm to the public confidence in the legal profession.

The pleadings in this case are replete with references to Respondent's "misappropriation", "conversion", or "misuse" of the funds entrusted to him as personal representative of the estate of Minerva Armstrong. In his testimony to the panel, the Respondent employed a more creative euphemism, explaining that he had "overused" the estate's money. (Tr. p.428). We are not entirely sure how one "overuses" money that belongs to someone else. There is an implication, however, that the "overuse" of the estate funds is somehow distinguishable from mere "use". In analyzing and discussing such cases, every member of the legal profession should avoid the tendency to employ such euphemisms to describe the fundamentally dishonest act of stealing.

It is not acceptable for a lawyer to convert estate funds to cash and to transfer estate money back and forth between a safe deposit box and an office safe in an elaborate scheme purportedly designed to hide the money from the Internal Revenue Service. It is not acceptable to commingle cash from a decedent's estate with cash on "loan" from a boyhood friend as alleged by Mr. Hasty. In the end, however, this is not a case of poor office management or sloppy bookkeeping. This Respondent was entrusted with substantial sums of money to be kept, accounted for and distributed to the rightful heirs. He was entrusted with the money as an attorney and officer of the court. He

spent the estate's money for himself. In society as a whole, the unauthorized taking of someone else's money is called stealing. We do a disservice to the public and the legal profession if we characterize the Respondent's conduct in this case as anything else.

The hearing panel below and Board majority agree that the Respondent'' conduct in this case was reprehensible and cannot be condoned. They believe, however, that protection of the public and the legal profession is accomplished by the imposition of a suspension of Respondent's license to practice law for three years. In expressing our disagreement with that view, we must emphasize our recognition that the discipline meted out by the Board and its hearing panels is not intended as punishment for wrongdoing. [MCR 9.105] Rather, we believe that public confidence in the legal profession in matters of personal integrity and trust demand our professions' assurance, on a consistent basis, that those who steal clients' money will not be welcomed back into our midst.

Certainly, we recognize the tremendous financial, psychological and emotional impact which a three-year suspension must have on any attorney. However, a suspension for a fixed period carries with it the expectation that the suspended lawyer will be reinstated. An order of revocation, on the other hand, signifies the determination that that person is no longer entitled to hold the license to practice law which is "a continuing proclamation by the Supreme Court that the holder is fit to be entrusted with professional and judicial matters and to aid in the administration of justice as an attorney and counselor and as an officer of the court" [MCR 9.103(A)].

The Supreme Court of New Jersey has observed that banks do not rehire tellers who have embezzled funds and that the standards of the legal profession should be at least as high. Matter of Wendell B. Wilson, 81 NJ 451; 409 AT2d 1153 (1979). Although the Board has been presented with that analogy on many occasions in the past, we think that it is especially applicable here.

Is it possible to underestimate the public outrage which would follow the announcement that a bank routinely suspends and then rehires employees who "overuse" money belonging to the banks' depositors? Would any of us, as depositors, accept a statement from a bank president that the bank was willing to rehire admitted embezzlers as long as they had shown remorse? Would a bank's customers be mollified by the assurance that although an employee had been embezzling for five years, he or she had an otherwise satisfactory employment record? Could banks justify the continued employment of an embezzler on the grounds that the stolen funds had been replaced? We think not and we believe that remorse, a prior unblemished record, or restitution should be given relatively little consideration as mitigating factors when a lawyer has stolen from his or her clients. We adopt this view for the reasons stated by the Court in Wilson:

> Maintenance of public confidence in this court and in the Bar as a whole requires the strictest discipline in misappropriation cases. That confidence is so important that mitigating factors will rarely override the requirement of disbarment. If public confidence is destroyed, the bench and Bar will be crippled institutions. Matter of Wendell B. Wilson, supra, 81 NJ at 461.

We would therefore modify the discipline imposed by the hearing panel by increasing it to a disbarment.