GRIEVANCE ADMINISTRATOR,
Petitioner/Appellant,
v
KENNETH M. SCOTT, P-32833,
Respondent/Cross-Appellant.

File No. DP 178/85

Decided: February 8, 1988

OPINION OF THE BOARD

The Hearing Panel ordered that Respondent be suspended for 180 days as the result of its findings that he commingled and misappropriated funds in his capacity as conservator of an estate and that in connection with his handling of that estate he oversaw the preparation end filing of false documents with the Probate Court. The Respondent and the Grievance Administrator have petitioned the Board for review of the Panel's factual findings and for modification of the discipline imposed. The Hearing Panel's conclusion that Counts III and IV of the Formal Complaint were not established by a preponderance of the evidence is reversed for the reason that the essential elements of those Counts were admitted in the Answer filed by Respondent. The order of discipline entered by the Panel is modified by increasing to a suspension of three years.

This action arises out of Respondent's appointment in Genesee County Probate Court as the guardian and conservator of the estate of his client, an allegedly incompetent person. Respondent settled two accident claims for the client resulting in a net recovery to the client of $18,880. It is admitted that that sum was received by the Respondent on May 11, 1983 and that it was deposited in a bank account entitled "Grant and Scott, P.C. Attorneys at Law Trust Account". In June 1984, Respondent filed an account showing funds on hand of $14,738. However, no steps were taken to have the account allowed and the Court appointed a successor fiduciary in February 1985. The Respondent failed to account for or turn over the funds and a Surcharge Order was entered in April 1985.

The Complaint filed by the Grievance Administrator charged in Count I that the Respondent commingled those funds with his own, misappropriated them to his own use within a month after he had received them, failed to maintain accurate records of the funds in his possession and failed to account to his client or to the Probate Court for those funds.

In reviewing the findings of a hearing panel, the Board must follow the standard applied by the Supreme Court that such findings will be supported where "upon the whole record, there is proper evidentiary support" In Re Del Rio, 407 Mich 336; 285 NW2d 277 (1979). We conclude that such evidentiary support is present with regard to the findings as to Count I. The evidence introduced at the hearing clearly established that the funds deposited in the trust account of Respondent's law firm in May 1983 had all been transferred to the firm's general account and disbursed to persons other than the client by June 7, 1983. Respondent himself acknowledged that the firm's trust account was utilized as a business account because of the firm's fear that the Internal Revenue Service would attach its accounts for back withholding taxes. However, according to the Respondent, the placement of those funds in the client trust account constituted compliance with the

letter of Canon 9 of the Code of Professional Responsibility, DR 9-102(A) and he had no idea where the money went after that or who was responsible for its removal from the account. He testified that he never reviewed bank records pertaining to that account during the following two years and simply assumed that the client funds were still on deposit.

On this point and others the record below contains contradictory testimony from other witnesses as well as testimony from the Respondent himself which was not altogether consistent. In reviewing these cases, the Board has stated:

> The hearing panel received evidence in the first instance and has the opportunity to judge . . . credibility. The hearing panel's finding of fact should be given deference whenever possible. Schwartz v Walsh, DP 16/83, (Brd. Opn. 1983 p. 333).

We agree with the Panel's assessment that Respondent was aware of the commingling of funds and allowed those funds to be misappropriated, if not deliberately then by a complete lack of supervision. Respondent's failure to maintain records of his client's funds and his inability to make timely delivery of those funds to the successor fiduciary constituted further violations of Canon 9, DR 9-102(B)(2-4).

Similarly, we find ample support for the Panel's conclusions with regard to Count V that the Respondent met with his client Clarence Miller and Mrs. Miller in his office on April 1, 1985 and had them sign a promissory note dated September 6, 1984, a purported receipt dated May 16, 1983 and another receipt dated January 7, 1985, knowing that each of the documents were false. The Panel noted that those documents were intended to mislead the Probate Court and to hide the mishandling of the client's funds.

The Grievance Administrator has not appealed the Panel's dismissal of Count II, but argues that the Panel erred in dismissing Counts III and IV which alleged that Respondent promised to return the funds to his client and the successor fiduciary but delivered checks which he should have known would be dishonored for insufficient funds. As to each Count, the Panel ruled that the Administrator had failed to introduce evidence showing the balance of the account at the time the check was delivered and therefore it could not sustain the charge that Respondent knew or should have known of the insufficient balance. While it is true that such evidence was not offered at trial, the Grievance Administrator correctly notes that Respondent had admitted in his written Answer and in the amendments offered at the commencement of the hearing that there were not sufficient funds in the account at the time. In his Amended Answer, Respondent stated that he "knew that there was not enough funds in said account to cover said check, but Respondent informed Mr. and Mrs. Miller of said fact, and that he would have to place that amount in said account to cover said check . . . Respondent states that Mr. Miller's funds were in a safe, secure place and that a demand was made for the return of said funds". (Tr. 7/10/86 p. 14)

The record in this case does not contain a satisfactory identification of the "safe, secure place" which was alleged to contain the estate funds and that representation in the Amended Answer is at odds with Respondent's testimony at other times that he assumed at all times that the funds rested securely in the firm's trust account. Respondent did, however, admit that he knew that the specific account on which the checks were written was insufficient and the Grievance Administrator

was not obligated to introduce further evidence on that point. We must, therefore, reverse the Panel's findings that the essential elements of Counts III and IV were not established.

The entry of a finding that Respondent Scott committed the additional acts alleged in Counts III and IV underscores the impropriety of Respondent's conduct as a court-appointed conservator of estate funds. Those additional findings do not, however, significantly affect our opinion that Respondent's misconduct demands an increase in the discipline imposed.

The Respondent's conduct included misappropriation of funds within thirty days after the money was received by his office, admitted commingling of funds by using his office trust account as a general business account, preparation of back-dated documents to be filed with the Probate Court by taking advantage of an unsophisticated and allegedly incompetent client by persuading him to sign false documents, complete indifference to the accuracy of his firm's financial records, the failure to make timely payment of client funds, and the delivery of two NSF checks.

In previous cases considered by this Board, misappropriation from an estate has been considered egregious enough to warrant disbarment, Grievance Administrator v Charbonneau, DP 103/83 (Brd. Opn. 1984) p. 316. In other cases involving the misuse of funds, the Board has recognized sufficient mitigation to warrant a suspension of three years. Schwartz v Fabre', DP 84/85 (Brd. Opn. Sept. 30, 1986; Schwartz v Muir B. Snow, DP 211/84 Feb. 17, 1987). In the instant case, the Hearing Panel emphasized the mitigating effect of Respondent's return of the sum of $11,023 to the estate within a few days of the Order of Surcharge dated April 23, 1985. They noted, however, that the funds were removed from the firm's trust account within thirty days of their receipt and were unaccounted for more than two years. While prompt repayment of funds has been recognized by the Board as a mitigating factor, Schwartz v Richards, (Brd. Opn. July 18, 1983 p. 273); Schwartz v Keidan, (Brd. Opn. Sept. 30, 1985 p. 391), we must substantially discount the mitigating effect of restitution made only after the
Probate Court entered an Order of Surcharge. Although not specifically enumerated by the Panel as a mitigating factor, we are inclined to give some consideration to Respondent's prior unblemished record.

In light of all the circumstances presented in this case, Respondent's misconduct warrants an increase in the discipline imposed from a suspension of 180 days to a suspension of three years.

Opinion of Remona A. Green, Robert S. Harrison, Patrick J. Keating and Charles C. Vincent, M.D.

SEPARATE OPINION

By Hanley M. Gurwin

I concur in the result reached by the majority and join in the decision to increase discipline to a suspension of three years. As a general rule, I believe that the maintenance of public confidence in the legal profession requires that attorneys who misappropriate client funds be denied the privilege of practicing law and that their license be revoked. It is clear that there are few more egregious acts of professional misconduct for which an attorney can be disciplined than the misappropriation of a client's funds. Recognition of the nature and gravity of that offense generally suggests only one result--disbarment.

I am not persuaded that the Respondent's lack of a prior disciplinary history or the restitution which was compelled by the Court's Order of Surcharge have significant value as mitigation in this case. If the record in this case was clear that the Respondent had deliberately misappropriated the funds which rightfully belonged to the Estate of Clarence Miller, I would have urged that Respondent's license be revoked. In this case, however, the hearing panel found that the funds in question were improperly deposited in an account used by Respondent's law firm as a general account, were commingled with funds under the control of others employed by the law firm and that the Respondent "by lack of management, if not deliberately, allowed Miller's funds to be channeled into Respondent's business account from which it was [sic] disbursed to others than Miller." There is no excuse for the Respondent's apparent indifference to his obligation to preserve and account for the funds which he held as a fiduciary and his conduct was aggravated by his preparation of false documents in an attempt to deceive the Probate Court.

The Board's decision to increase the suspension in this case from 180 days to three years reflects our condemnation of such misconduct. Nevertheless, disbarment is not clearly required in this case in light of the panel's conclusion that the funds may have originally been diverted as the result of Respondent's indifference to his responsibility rather than as the result of deliberate and knowing misappropriation.

Honorable Martin M. Doctoroff joins in this separate opinion.