GRIEVANCE ADMINISTRATOR,
Petitioner/Cross-Appellant,

v

DAVID A. NELSON, P-18227,
Respondent/Appellant.

ADB 252-88

Decided: October 9, 1990

BOARD OPINION

Based upon the testimony and other evidence presented, the hearing panel concluded that the following acts of misconduct had been established: As attorney for the conservator of the estate of a minor, the respondent failed to place the funds of the ward in a restricted account as specifically ordered by the Probate Court, but instead placed the funds in his own trust account. Although requested to do so by the Court, he failed to furnish the Court with evidence of the whereabouts of the ward's funds. As alleged in Count II of the complaint, the panel concluded that the respondent commingled the funds belonging to the ward with funds belonging to himself and others and that he misappropriated funds belonging to the ward. Finally, the panel sustained the charges in Count III of the complaint that he provided false information regarding those funds in response to an inquiry from the Attorney Grievance Commission during the course of its investigation.

The panel conducted a separate hearing on discipline and considered both mitigating and aggravating factors. The panel issued an order suspending the respondent's license to practice law for a period of ninety days coupled with conditions during the period of suspension and followed by a two-year period of probation aimed at an alcohol-abuse problem. The respondent has filed a "limited petition for review" which seeks a suitable plan for the payment of costs assessed and asks for a declaratory ruling on the panel's decision to quash certain subpoenas. The Grievance Administrator has filed a cross-petition for review which argues that the discipline imposed is not appropriate under the circumstances. Based upon its review of the whole record and the arguments presented by the parties, the Board has concluded that an increase in the level of discipline is warranted. The respondent's license to practice law shall be suspended for a period of six months. During that period and until his reinstatement in accordance with MCR 9.123(B) and MCR 9.124, respondent shall be subject to the conditions contained in the hearing panel's order.

Neither party has sought review of the hearing panel's factual findings. In August 1984, the Genesee County Probate Court entered an order appointing the respondent's client as conservator of the estate of a two-year old child in whose name a personal injury claim had been made. The order stipulated that all funds received on behalf of the child be deposited in a restricted account with no funds to be disbursed without prior approval of the Court. In August 1984, the Court entered an order authorizing the conservator to settle the personal injury claim in the amount of $45,000. Upon his receipt of the settlement checks totaling $45,000, the respondent placed the funds in his law-office trust account which was not "restricted" within the

meaning of the Court's order but was subject to the respondent's exclusive care and control. In October 1984, the respondent filed an inventory disclosing net settlement proceeds of $26,500 held on the child's behalf.

In March 1985, the Probate Court received a written communication from an attorney expressing concern that the restricted bank account may not have been set up as ordered. Although requested in writing to provide proof that a restricted account had been established, the respondent did not comply with the request.

Following the suspension of the respondent's client as fiduciary for failure to file her annual accounting, a special fiduciary was appointed by the Court and the respondent was subsequently cited by the Court for his failure to turn over the records and funds of the ward.

The proofs amply demonstrated that the respondent was entrusted with funds of the ward totaling $26,500, that expenditures for the benefit of the child or her guardian in the amount of $13,243.60 were paid from the respondent's trust account, and that the respondent was responsible for maintaining the difference, $13,256.40, as a fiduciary. In December 1986, the respondent did deliver a bank money order in that amount to the special fiduciary. The trust checking account records, however, clearly establish that the funds of the ward were not maintained in that account and the respondent did not satisfactorily explain the location of the funds while they were entrusted to his care. Moreover, his written representation to the Attorney Grievance Commission that he had used the funds to purchase certificates of deposit was found by the panel to be a deliberate misrepresentation.

In its report on discipline, the panel reported:

> This panel finds that Mr. Nelson's actions were not based upon any malicious intent, and that the trust funds involved have not inured to the benefit of respondent, and in fact the monies have been restored to the proper parties. It is further noted that Mr. Nelson's office procedures are in a state of disarray, and his problems are magnified by an obvious alcohol abuse problem which he does not deny. It is believed that Mr. Nelson has in the past and would in the future be capable of very adequate legal services provided that the discipline herein ruled is totally complied with by respondent.

The panel's order provided that a ninety-day suspension be accompanied by conditions requiring the respondent to attend counseling sessions at a recognized alcohol/drug therapy program and he was further ordered to complete a two-year period of probation involving continued attendance at such a program and supervision of his law practice by another attorney.

The Board's decision to increase discipline in this case is based primarily upon two important considerations. First, we have considered the serious nature of respondent's misconduct. In a 1988 opinion affirming a three-year suspension of an attorney who misappropriated funds from a decedent's estate, the Board stated:

> 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 from three years to disbarment would be appropriate for such offense.

Matter of John B. Hasty, ADB 1-87, Brd. Opn. February 8, 1988, citing Matter of Douglas E. H. Williams, DP 126/81 (Brd. Opn. p. 313, 1984).

Similarly, the Board increased a suspension of two years to a suspension of three years in a case involving an attorney's commingling and conversion of funds belonging to a probate estate. Matter of Muir B. Snow, DP 211/84, (Brd. Opn. February 18, 1987). In that case, the Board suggested that revocation might have been an appropriate sanction absent the significant mitigation of the respondent's active attempts to rehabilitate himself from alcoholism.

In this case, no challenge has been raised to the panel's findings that the respondent clearly failed in his duties to safeguard funds entrusted to his care. In response to the legitimate inquiries of the Genesee County Probate Court and the Attorney Grievance Commission, he either failed to provide the information requested or engaged in active misrepresentation. Under those circumstances, we cannot, in good conscience affirm a suspension of ninety days which would allow the respondent to be automatically reinstated to the practice of law upon the filing of an affidavit.

We have also considered the aggravating factor of the respondent's prior suspension for a period of six months in an unrelated case which involved the improper use of client funds. In Matter of David A. Nelson, DP 127/86; DP 165/86, (Brd. Opn. March 27, 1987), we increased a hearing panel suspension of ninety days to a suspension of 180 days. In that case, the Board affirmed the hearing panel's finding that the respondent received a settlement check on behalf of a client in April 1983, deposited the check into his trust account in May 1983 and then withdrew the funds on the same day. In that case, the respondent acknowledged that the funds withdrawn from the trust account were converted to cash, commingled with funds belonging to another client of Mr. Nelson and used to discharge a land contract payment of another client. In rejecting respondent's claim that an equivalent amount was maintained in a safe-deposit box, the Board stated:

> The provisions of Canon 9 exist for one purpose only--the protection of the public . . . It would undoubtedly be more convenient for all attorneys if they were not required to maintain separate accounts and separate records when they are charged with the responsibility of holding money which belongs to other people. We categorically reject the argument that an attorney may waive the trust-account provisions of Canon 9 by the deposit of the lawyer's own funds in a safe-deposit box, personal account, business account, money order or other instrument. Any other ruling by this Board would constitute a declaration that clients may no longer rely upon the trust which has categorically reposed in the legal profession as a repository of client funds.

The hearing panel in the instant case acknowledged the prior order of suspension but noted "it is the belief of the panel that such previous order did not deal with the basic problems of the respondent which resulted in activities resulting in further grievance proceedings".

It is true that there would be little deterrent effect expected from the discipline order in the first case inasmuch as the improper use of client funds in this matter had already occurred when the first case was brought to trial. The respondent's misrepresentations to the Grievance Commission in September 1988 occurred well after the imposition of discipline in the prior matter, however. We do not believe that it would be appropriate to impose a lesser sanction in this case.

Although the Board is impelled to increased discipline in this case, we are not unmindful of the weight which the panel gave to the mitigating effect of the respondent's unfortunate problems with alcohol abuse. But for the panel's views in that regard and the fact that the respondent has recognized the problem, a much higher level of discipline might have been expected.

The Board has also considered the issues raised in the respondent's "limited petition for review". The respondent asks first that the Board review the hearing panel's order of November 10, 1989 quashing certain subpoenas served on the Attorney Grievance Commission. He asks for a declaratory order by the Board that the records of the Attorney Grievance Commission are subject to subpoena. The respondent's subpoenas served by mail on November 7, 1989 requesting the production of Grievance Commission records, including personnel files, at a hearing on November 10, 1989 were properly quashed by the panel upon the respondent's failure to explain their possible relevance at a hearing confined to the issue of the appropriate discipline.

The respondent has also requested a proper itemization of the costs assessed in this case in the amount of $1751.92 and he has requested that he be given an extension of time to pay those costs. These requests are reasonable and should be granted.

MCR 9.128 directs that "An itemized statement of the expenses allocable to a hearing must be made a part of the report in all matters of discipline and reinstatement. The hearing panel and the Board in the order for discipline or reinstatement must direct the attorney to reimburse the State Bar for the expenses of that hearing, review, and appeal, if any." In accordance with the usual procedure followed in these matters, the panel's report lists the court reporting and transcript charges incurred by the Discipline Board, amounting to $1447.40, together with costs incurred by the Attorney Grievance Commission of $304.52.

The Board has provided to the respondent copies of the statements for court reporting services along with the unsigned memo to the Board from the Attorney Grievance Commission dated February 1, 1990 itemizing the Commission's costs into six general categories (postage, transcript, mileage, meals, subpoenas and telephone). The Board has been advised by the Acting Grievance Administrator that the Grievance Commission may formulate a more definite policy regarding its requests for reimbursable costs. The Board does not rule on the sufficiency of the cost assessment procedure in this case. With regard to the request for an extension of time to pay costs, the balance now due in the amount of $1351.92 shall be paid at the rate of $100 per month commencing November 1, 1990.

John F. Burns, Hon. Martin M. Doctoroff, Remona A. Green, Hanley M. Gurwin, Linda S. Hotchkiss, M.D., and Theodore P. Zegouras

Mr. Harrison would defer to the judgment of the hearing panel members who were aware of the prior discipline, who received first-hand the evidence submitted by the parties and who had an opportunity to personally observe the respondent's demeanor during these proceedings. Mr. Harrison would affirm the hearing panel's order.