

GRIEVANCE ADMINISTRATOR,
Petitioner/Appellant,
v
MUIR B. SNOW, P-20746,
Respondent/Appellee.

File No. DP 211/84

Argued: March 21, 1986
Decided: February 17, 1987

OPINION OF THE BOARD

The Respondent admitted the following: 1) Commingling and conversion of approximately \$27,000 of funds belonging to the probate estate; 2) Failure to administer the probate estate in a timely fashion; and 3) Charging a clearly excessive fee. Respondent presented mitigating evidence of active alcoholism during the period of the misconduct and expressed a willingness to see that restitution was made. The Grievance Administrator has filed a Petition for Review of the Hearing Panel Order of Suspension of two (2) years and seeks Revocation of Respondent's license, arguing that any mitigation is overwhelmed by the seriousness of the misconduct. The sole issue before the Board is the appropriate level of discipline to be imposed. We increase the suspension to a period of three (3) years, taking into consideration the significant mitigation of alcohol rehabilitation.

Respondent testified that his income decreased during this period of heavy drinking and that he used the estate funds to discharge his own personal obligations. He was candid in his admission that he could not conclude the administration of the estate without revealing that he had misappropriated assets of the estate. Respondent stated his belief that he has largely recovered from active alcoholism but he acknowledged that he has not sought continued therapy and he does not believe that participation in Alcoholics Anonymous or similar programs would be beneficial. Restitution has been delayed on the advise of Respondent's counsel, who awaits completion of the probate proceedings which are now being handled by another attorney. Testimony was also received by a psychologist who examined the Respondent at the Grievance Administrator's request. The psychologist opined that Respondent has been an active alcoholic but that he currently has his drinking under control. Apparently, there is no continuing effect of the alcohol abuse on Respondent's professional judgment or thought processes in general.

Absent mitigation, Respondent's offenses would likely result in revocation of license. See Grievance Administrator v Charbonneau, File No. DP 103/83 (1984). The Respondent in Charbonneau, in his capacity as appointed guardian, misappropriated \$25,000 from an estate; we decided that such misconduct "is alone egregious enough to warrant disbarment," and entered an Order of Revocation of License.

We have not been unmindful, however, of important factors in mitigation, even in cases involving misappropriation of funds from estates. In the recent case of Grievance Administrator v Keidan, File No. DP 87/84 (1985), we suspended the Respondent for three (3) years and one (1) day for misappropriating approximately \$61,000 from an estate in probate. The Respondent in Keidan presented significant mitigating evidence, without which his "discipline would have been more severe." See also, Grievance Administrator v Hovey, File No. 36409-A (1980), in which the incident of misconduct "occurred when the Respondent was an active alcoholic" (who has since) overcome his alcoholism. This is an all too rare achievement which should not be lightly regarded. Respondent deserves our encouragement. Excessive discipline here may have a severely punitive effect.

We emphasize that Respondent will not be eligible for reinstatement until he has been recertified by the Michigan Board of Law Examiners. In addition to the requirements that he demonstrate his eligibility for reinstatement by clear and convincing evidence in accordance with MCR 9.123(B), we believe that the circumstances of this case dictate that the following additional conditions be met as a prerequisite to reinstatement:

- 1) Respondent should be prepared to provide evidence of his ongoing therapy for alcoholism;
- 2) At the time of the reinstatement hearing, Respondent must provide the hearing panel with proof of his continued sobriety and rehabilitation; and,
- 3) Respondent shall, as a condition of reinstatement, make full restitution to the estate.

We adhere to a definition of mitigation as circumstances which, in fairness and mercy, may be considered as extenuating or reducing the degree of Respondent's moral culpability. Grievance Administrator v Citron, File No. DP 135/84 (1985); Grievance Administrator v Fazio, File No. DP 105/80; DP 143/80 (1981). The record before us supports Respondent's assertion that there was a condition of active alcoholism during the period of misconduct bearing upon Respondent's ability to make proper and ethical judgments. The record further reflects that Respondent has recovered from that illness. We therefore suspend the Respondent for three (3) years and impose the conditions precedent to reinstatement mentioned above.

DISSENTING OPINION

Hanley M. Gurwin

I respectfully dissent from the Opinion of the Board and would increase the discipline to revocation of license. The record contains no documented medical evidence that Respondent's alcohol abuse influenced his judgment to such a degree that he should not

be held culpable for the misappropriation of thousands of dollars from the estate. We must remain mindful of the seriousness of the duties of a fiduciary. That standard of conduct is greatly enhanced for attorneys, who are officers of the court. The evidence in this case shows that a psychologist examined Respondent approximately one (1) hour without the benefit of his prior medical records of alcohol abuse therapy. The psychologist's findings are not a sufficient basis for concluding that Respondent suffered impairment of his ability to form proper moral judgments regarding the handling of property belonging to others.

Furthermore, despite the lapse of several years, Respondent has made no attempt to make restitution to the estate. It is unpersuasive that Respondent has delayed efforts of restitution on the advice of counsel; some effort should have been made and the funds should have been placed in an interest bearing account pending judicial resolution of the administration of the probate estate.

Finally, I cannot say that it has been shown that alcohol abuse is necessarily exculpatory or mitigatory in cases involving the theft of client funds. A minimal nexus between the substance abuse and the misconduct must be shown before the Board, in its discretion, lessens the sanction for what is widely considered one of the most serious offenses which can be committed by a lawyer. I believe that we are constrained to enter an Order of Revocation in the absence of substantial and compelling mitigation.