GRIEVANCE ADMINISTRATOR,
Petitioner/Appellant,
v
STEVEN J. LUPILOFF, P-16862,
Respondent/Cross-Appellant.

File No. DP 34/85

Decided: March 24, 1988

MAJORITY BOARD OPINION

Opinion of Remona A. Green, Robert S. Harrison, Patrick J. Keating.

The hearing panel in this case imposed a suspension of forty-five days as the result of a finding that Respondent's client entrusted him with funds to discharge an obligation to a treating physician but that Respondent commingled those funds with his own and improperly delayed the distribution of those funds to the physician. The panel further found that reductions in the Respondent's general account balance before disbursement to the doctor constituted a misappropriation of funds even though there may have been no intent on Respondent's part to do so. Both the Respondent and the Grievance Administrator have filed Petitions for Review seeking modification of the level of discipline imposed by the panel. The hearing panel's order is modified by reducing discipline to a reprimand.

Respondent represented his client, Barbara A. Montgomery, in a redemption hearing on March 27, 1983 before the Bureau of Worker's Disability Compensation. Her claim was settled in the net amount to her of $26,044.00. A check payable to Ms. Montgomery in that amount was mailed to the Respondent and she appeared at his office on April 4, 1983 to receive her check. Respondent and Ms. Montgomery discussed division of the check between Ms. Montgomery and Affiliated Clinics, an association of chiropractor physicians with whom she had been treating. The clinic had submitted a statement to the Respondent in the amount of $2,272.00 for treatment rendered to Respondent's client and Respondent was aware of a "direct pay" assignment of benefits which had been made to the clinic.

On April 4, 1983, Respondent deposited Barbara Montgomery's check for $26,044.00 in his general account He has acknowledged that he had no client's trust account at that time. He simultaneously issued a check to Barbara Montgomery in the amount of $24,147.40, retaining the balance of the redemption check in the amount of $1,897.00 for payment to Affiliated Clinics. Respondent and his client gave conflicting testimony to the panel regarding the $500.00 discrepancy between the amount owed to the clinic and the amount retained in Respondent's general account. Although the Complaint contained a separate count alleging that Respondent made a misrepresentation to his client regarding the $500.00 difference, the panel ruled that the evidence did not sustain those allegations and the dismissal of that count was not appealed.

It has not been disputed that the sum of $1,897.00 retained by Respondent in his general bank account on April 4, 1983 was to be used to discharge Barbara Montgomery's obligation to Affiliated Clinics nor is it disputed that a check in that amount was not sent to the clinic until December 17, 1983. The Respondent admits and his bank records establish that the balance in that general account fell below the level of $1,897.00 on sixteen occasions during the eight month period commencing April 4, 1983 and ending December 17, 1983.

Although the panel received conflicting evidence regarding Respondent's failure to disburse the funds to Affiliated Clinic shortly after he received the money, the hearing panel ruled that Respondent had not established a good reason why the funds were not disbursed immediately. The assignment was in Respondent's possession, he had knowledge of the assignment, and his client had specifically authorized him to distribute the money to the clinic. Furthermore, the panel ruled, the funds should have been held in a client trust account.

Based on the evidence presented, the panel ruled that Respondent's deposit of his client funds into his own general account rather than a trust account constituted commingling of funds in violation of Canon 9 of the Code of Professional Responsibility, DR 9-102(A); that his failure to distribute those funds to the clinic for eight months despite written inquiries from the clinic constituted an unreasonable delay; and that Respondent "misappropriated" his client's funds, at least in a technical sense, by allowing the balance of his general account to fall below the amount entrusted to him by his client.

With regard to the issue of Respondent's delay in delivering the funds in his possession, we agree with the hearing panel that the eight month delay was unreasonable under the circumstances. The testimony of Respondent's secretary disclosed that ledger cards showing the disposition of Mr. Lupiloff's closed files and the checks distributed in those files were immediately available at all times and that an inquiry regarding a closed file could have been answered in "about five minutes". (Hrg. Tr. p. 205) In fact, Respondent admits that such inquiries were received in the form of telephone calls from both the client and the clinic and that written inquiries were received in August or September 1983. Although contradictory testimony was received by the panel on these points, we must defer to the factual findings of the panel where there is proper evidentiary support in the record for those findings. Grievance Administrator v Crane, 400 Mich 484, 1977; In Re Del Rio, 407 Mich 336, 1979.

The provisions of the Code of Professional Responsibility which deal with the maintenance of funds in a trust account are found in Canon 9. Specifically, DR 9-102(A) directed that:

> All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in one or more identifiable bank accounts maintained in the state in which the law firm is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows: [1) funds to pay bank charges and 2) funds to which the lawyer has a present or potential claim].

Respondent has argued that the portion of Ms. Montgomery's redemption award which was earmarked for payment to the clinic no longer constituted "funds of a client" within the meaning of Canon 9 by virtue of the assignment executed by Ms. Montgomery and the resulting lien in favor of the clinic. In short, Respondent argues that Ms. Montgomery had no further claim to the $1897.00 retained by Respondent in his general account and he argues that his failure to deliver those funds could not result in disciplinary sanctions since Canon 9 applies only to "client" funds. We believe that this argument was properly rejected by the hearing panel.

Even though the clinic had a lien on the award to Ms. Montgomery, the fact remains that Respondent's overriding duty at all times was to his client. When Respondent agreed to handle the distribution of the redemption award, it was Ms. Montgomery's money that was deposited in his general account and it was Ms. Montgomery's $1,897.00 which was retained in that account, in trust, to be delivered at her direction to the health care provider. Until delivery of the funds was actually accomplished, they were "clients' funds" within the meaning of DR 9-102(A) and the commingling of those funds with Mr. Lupiloff's own monies in a general office account constituted professional misconduct.

It is Respondent's further contention that even if the funds should have been deposited in a separate trust account, the proofs did not establish that Mr. Lupiloff intended to deprive either Ms. Montgomery or the clinic of the use of those funds and the panel could therefore not find that there had been a misappropriation. Again, we affirm the decision of the hearing panel. The element of intent is not required to establish misappropriation of funds and we affirm the panel's adoption of a definition of misappropriation employed by the District of Columbia court of Appeals in the case of In Re E. David Harrison, 461 AT2d 1034 (1983):

> "Misappropriation of clients' funds is any unauthorized use of clients' funds entrusted to an attorney including not only stealing, but also unauthorized temporary use for the lawyers own purpose, whether or not he derives any personal gain or benefit therefrom."

Citing a case from the New Jersey Supreme Court, In Re Wilson, 81 NJ 451, 409 AT2d 1153 (1979), the Court in Harrison rejected the notion that "improper intent" is an element to be considered in determining whether there has been a misappropriation and the Court stated:

> "This is consistent with the language of DR 9-102 which, unlike other disciplinary rules, does not require scienter; rather, it is essentially a per se offense. Consequently, once the running balance of Harrison's office account fell below the amount held in trust for Hart, misappropriation had occurred".

This definition is entirely consistent with earlier ruling by this Board. We stated, for example, in Matter of Barry R. Glaser, DP 106/84, September 30, 1985 (Brd. Opn. p. 379) that "the repeated depletions of the professional account which was used to hold client funds constitutes, at the very least, prima facia misconduct". We noted then the ethical and practical reasons for a rule requiring that an attorney segregate his clients' funds from his own. "That a client has a chose-in-action for

monies commingled by an attorney is not a defense to misconduct charges . . . . paper title is of little worth or comfort to the client/public if the account containing a client's money is wrongfully disbursed or commingled." In Re Barry Glaser, supra.

In the instant case, the panel correctly summarized Respondent's obligation with its observation that "until the lawyer properly disposes of the money in his account which is there by consent or direction of the client, the lawyer has a continuing obligation to the client, the client's creditor, to the legal profession, to the courts and to the public to pay promptly and not to use it other than for the purposes for which it is placed. Using it in his general account is commingling and, if the account falls below this balance, [the money] has been used for the benefit of the lawyer and not the client, the creditor, the legal profession, the courts or the general public"

The hearing panel's report in this case was filed prior to June 1, 1987 and the panel was therefore not subject to the Supreme Court's Amendments to MCR 9.115(J) which now require that a panel conduct a separate hearing to determine the appropriate discipline. This panel's report recites Respondent's previous reprimand, issued October 23, 1984 in File No. DP 35/84, but contains no further discussion of the aggravating or mitigating factors, if any, which were considered in the assessment of a forty-five day suspension.

Based upon our review of the whole record, we conclude that protection of the public, the courts and the legal profession does not demand the imposition of a suspension and we therefore modify the hearing panel's order of discipline by reducing the discipline to a reprimand.

Although we have affirmed the panel's ruling that intent is not an essential element in a misappropriation case, it does not follow that the issue of Respondent's intent may not be considered in determining the appropriate level of discipline. Absence of a dishonest or selfish motive has specifically been recognized as a mitigating factor in discipline cases by the American Bar Associations Joint Committee on Professional Sanctions. Standards for Imposing Lawyer Sanctions, 1986, Standard 9.32(B). This Board has previously ruled that the lack of actual harm to a complainant coupled with respondent's lack of intent to defraud may mitigate the gravity of respondent's technical misconduct to such a degree that discipline should be reduced to a reprimand. See, for example, Matter of Robert E. Helm 36292-A, August 7, 1980 (Brd. Opn. p. 90) where respondent admitted placing his client's name on an insurance company's settlement draft without the client's consent.

The Standards of Imposing Lawyer Sanctions published by the American Bar Association in 1986 recognize the distinction between cases where a lawyer knows or should know that he is dealing improperly with client property and the lawyer who is merely negligent in dealing with client property. Those standards suggest that suspension is the generally appropriate sanction in the former case while reprimand may be appropriate in the later case. We feel that all of the facts and circumstances in this case tend to support the characterization of Mr. Lupiloff's conduct as negligent. Respondent Lupiloff should have placed the funds in a separate identifiable client trust account. He should have maintained better office accounting procedures and he should have disbursed the funds to the clinic in a more timely fashion. Trusting that those deficiencies have been corrected, we are unable to conclude that a suspension is warranted in this case.

MINORITY OPINION

Martin M. Doctoroff, Hanley M. Gurwin

We concur with our colleagues in affirming the factual findings and conclusions of law submitted by the hearing panel. We differ, however, with the majority on the level of discipline which should result from a finding that Respondent commingled and misappropriated funds. While there are indeed circumstances peculiar to this case which would prevent imposition of the most extreme forms of discipline, we would increase discipline to a suspension of one year.

The members of the hearing panel and the Board majority feel that the Respondent's deposit of client funds into his general account constituted "commingling" but treat it as a mere technical violation overshadowed by the eight month delay in the disbursements of those funds. Indeed, counsel for the Grievance Administrator agreed at the hearing that it is unlikely that Respondent would have been called to answer disciplinary charges if the funds deposited in his general account had been disbursed within a day or two.

The requirement that funds belonging to a client be segregated from those belonging to a lawyer is not, however, a little known or technically obscure provision in our Code of Professional Responsibility. We find it difficult to believe that this Respondent, who had been engaged In the practice of law for approximately twelve years, was unaware of the provisions of DR 9-102(A) which clearly direct that a lawyer shall preserve the identity of funds belonging to a client by depositing those funds in an identifiable bank account separate and apart from the accounts into which the lawyers own funds are deposited. It is not extraordinarily difficult or costly to maintain a clients' trust account or to open such an account when the need arises. In any event, that is not the point when considering a lawyer's duty to comply with the requirements of the Code. The rules which prohibit the commingling of client funds with those of a lawyer are intended for the protection of the public. Respondent Lupiloff has given no satisfactory reason for his failure to comply with the basic rule that client funds are inviolate.

We agree with the majority that a lack of harmful intent would not constitute a defense to the charges of professional misconduct but would have weight as a mitigating factor under the circumstances presented In this case. However, we believe that the findings that Respondent misused funds entrusted to him by a client would warrant a suspension. Furthermore, a reprimand would seem to be especially inappropriate in light of Respondent's prior reprimand for conduct which bears a striking similarity to the factual situation in this case. The records of the Attorney Discipline Board disclose that Respondent Lupiloff was reprimanded in November 1984 for failure to make payments to an examining physician out of funds paid to him by the Workers' Compensation Bureau. The hearing panel in that case found that Respondent had both a contractual and fiduciary obligation to reimburse the physician in a timely manner and he had not been entirely candid in his answer to a Request for Investigation.

The misconduct in this case aggravated by prior discipline for a similar occurrence would, in our view, warrant an increase in discipline to a suspension of one year.