Grievance Administrator,
Petitioner/Appellant,
v
Gary B. Perkins, P-18787,
Respondent/Appellee.

ADB 238-87

Decided: June 28, 1989

BOARD OPINION

The hearing panel found that the respondent misappropriated $26,000 belonging to a client while those funds were held in his trust account pending resolution of a wrongful death action. The panel further found that the respondent failed to reduce a contingent fee agreement to writing in personal injury case in violation of MCR 8.121(F). The Grievance Administrator has appealed the panel's decision to impose a reprimand with certain accompanying conditions. The Board vacates the panel's order and imposes a suspension of respondent's license to practice law for a period of two years.

The essential facts of the misappropriation are not in dispute. Christina Dean, age sixteen months, died in April 1980 as the result of alleged medical malpractice. The child's mother was referred to the respondent and he agreed to pursue a wrongful death action on her behalf. Suit was filed in January 1981 and was settled in 1985 for $70,000. Settlement drafts were deposited into the respondent's client' trust account as they were received between April 15, 1985 and August 29, 1985.

A dispute between the child's divorced parents regarding the division of the proceeds was resolved on November 22, 1985 when a probate judge issued an order granting authority to distribute the proceeds. Mr. Perkins was not involved in those probate proceedings, but it was his duty to maintain the funds in his trust account until the appropriate distribution order was issued. The respondent admitted that the new recovery to the heirs of Christina Dean, after deduction of attorney fees and costs, was to have been $46,026.

On November 20, 1985, in anticipation of the Probate Court Order of Distribution, the net settlement proceeds were divided between the parents and the respondent wrote checks to them totalling $44,026. ($2,000 had previously been released.) On the date he wrote those checks, respondent's trust account balance was less than $26,000 and there were insufficient funds on deposit to honor both checks. Approximately one week later, the respondent replenished the trust account with a deposit of $26,000 borrowed from a friend.

At the hearing, the respondent admitted that he misappropriated the approximate amount of $26,000 from the account.

He further acknowledged that he knew the funds belonged to his client (Hrg. Tr. p. 177) and that it was wrong to take the money for his own purposes (Hrg. Tr. p. 180).

In his answer to the complaint, the respondent asserted that during the time in question, his ability to practice competently was materially impaired by alcohol addiction, that the impairment caused the misconduct and that he was undergoing treatment. He requested that he be place on probation in accordance with MCR 9.121(C). In support of that request, he presented the testimony of a psychologist, Dr. Janis Lewis, and a psychiatrist, Dr. Harvey Ager.

Dr. Lewis treated the respondent in 1987 for depression related to job pressures and a dissolving marriage. She did not treat for alcohol abuse and offered no opinion of whether or not his behavior in 1985 was affected by alcohol. Based upon the history given to him by the respondent, Dr. Ager concluded that Mr. Perkins was suffering from the disease of alcoholism. That testimony that the respondent was an alcoholic in 1985 when the funds were take was unrebutted.

In the exercise of its discretion, the hearing panel declined to order probation and we believe that the panel acted properly in that regard. MCR 9.191(C) required the respondent to establish that alcoholism substantially caused the embezzlement of funds. Dr. Ager testified that the proximate cause of the misappropriation was the respondent's financial need--primarily his purchase of a house in Grosse Point--and they ruled that "his acts of conversion were calculated, related to a temporary hardship."

The hearing panel also noted that the respondent had failed to establish a further criteria for an order of probation--that his ability to practice law "competently" was impaired at the time of the misconduct. The panel ruled that despite his alcoholism, he continued to practice law in a competent fashion in 1985. No testimony was offered suggesting a decline in the quality or quantity of his work product and the panel place some significance on his testimony that his income increased in the years 1984 and 1985.

Although the hearing panel concluded that the respondent's request for probation should be denied, the discipline imposed by the panel was, for all practical purposes, a probation order entered under a different name. The panel determined that the respondent should be reprimanded with the following conditions found to be relevant to the established misconduct: 1) the respondent to pay the costs of these proceedings; 2) the respondent to attend and pass an ethics course at a law school; 3) the respondent to provide free legal services for at least three hours per month at a domestic shelter; 4) the respondent to practice law under the supervision of an attorney for two years; 5) the respondent to received treatment, at least once a month, for

alcohol addiction, and; 6) respondent to send a letter of apology to his client for the inconvenience he caused her.

In its written report, the hearing panel stated that it had been presented with no evidence that respondent had previously been disciplined for misconduct. They concluded that the respondent's prior unblemished record constituted mitigation. Under a separate hearing in the report entitled "Prior Discipline", the panel's report includes a reference to a thirty-day suspension in file DP 123/85 effective February 23, 1987. Although this discrepancy was not referred to by either party in their pleadings filed on appeal, both counsel acknowledged at the review hearing that the respondent was, in fact, reprimanded in File No. DP 123/85. We take this opportunity to clarify the record with regard to the respondent's prior discipline. We note that in the previous case, the respondent was found to have failed to reduce a contingent fee agreement to writing, mishandled the distribution of the proceeds of a wrongful death action and distributed funds prior to obtaining proper court authority. We do not, however, cite that prior reprimand as a factor in our decision to increase discipline in this case.

Our decision to increase discipline is based solely upon the nature of the respondent's admitted misconduct. Between April and August 1985, respondent repeatedly invaded his client trust account. Client funds totalling $26,000 were removed.

The Board has, in a very small number of cases, found a reprimand to be an appropriate discipline in a case where an attorney has improperly used client funds. See Matter of Steven J. Lupiloff, DP 34/85 (Brd. Opn. March 24, 1988); Matter of Robert Cummins, ADB 159-88 (Brd. Opn. December 5, 1988); Matter of William W. Swor, ADB 118-87 (Brd. Opn. March 16, 1989). In each of those cases, the Board has emphasized that the lawyer's negligence or inattention to the handling of client funds would not be considered a defense, but that such negligence, under very narrow circumstances, might be considered to constitute sufficient mitigation to warrant reprimand.

In Matter of Steven Lupiloff, supra, the Board noted 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. This is consistent with the view of the American Bar Association's Joint Committee on Professional Sanctions which recognizes absence of dishonest or selfish motive as a mitigating factor in discipline cases. Standards for Imposing Lawyer Sanctions, 1986, Standard 9.32(B).

The Standards for Imposing Lawyer Sanctions further recognize a distinction between cases where a lawyer knows or should know that he is dealing improperly with client property and that law 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 second instance. Standards for Imposing Lawyer Sanctions, 4.12 and 4.13.

The factors considered by the Board in Lupiloff, Cummins and Swor are not present in the instant case. The Board's rulings in the three cases cited above should not be construed by the public or the legal profession as a departure from the generally accepted view that the strictest forms of discipline are called for when an attorney embezzles client funds. There are few more egregious acts of professional misconduct of which an attorney can be guilty than the misappropriation of client's funds held in trust. In re Wilson, 81 NJ 451; 409 A2d 1153 (1979). Our Supreme Court has recognized the importance of maintaining public confidence in the legal profession as a repository of client funds:

> "There are few business relations involving a higher trust and confidence than that of an attorney acting as a trustee in the handling of money for client or by order of the court. The basis of their relationship is one of confidence and trust. Any action by the attorney which destroys that basic confidence 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 and misuse of client funds." State Bar Grievance Administrator v Baun, 396 Mich 421 (1976).

In the absence of compelling mitigation, the respondent's knowing use of his client's funds could be expected to result in discipline ranging from a three-year suspension to a disbarment. See, for example, Matter of John Hasty, ADB 1-87, Brd. Opn. February 8, 1988 (three-year suspension affirmed); Matter of Muir B. Snow, DP 211/84, Brd. Opn. February 17, 1987 (two-year suspension increased to three years); and Matter of Fernando Edwards, ADB 31-88; 47-88, Brd. Opn. December 6, 1988 (two-year suspension increased to revocation).

The decision to limit discipline in this case to a suspension of two years is based upon the mitigating effect of the respondent's alcoholism and, more importantly, his efforts to deal with this problem. The respondent will, after two years, be eligible to file a petition for reinstatement and he will have an opportunity to establish to the satisfaction of a hearing panel that he is a person with whom the public, the courts and the legal profession can place their trust and confidence. At that time, we would expect that the respondent would provide evidence of his continued rehabilitation. Regardless of any sympathy we might have for the respondent, however, we conclude that respondent's rehabilitation must be undertaken during a suspension of sufficient

duration to convey to the public and the Bard the message that knowing misuse of client funds simply cannot be tolerated.

Remona A. Green, Hanley M. Gurwin, Patrick J. Keating, Theodore P. Zegouras.

OPINION OF BOARD MEMBER LINDA S. HOTCHKISS, M.D.

I agree with my colleagues on the majority in this case that respondent's alcoholism constituted neither a defense nor grounds for probation and I do not disagree with the decision to increase discipline to a suspension of two years. However, I do not believe that the public, the legal profession or the respondent himself are well served by simply expressing the hope that the respondent will continue the rehabilitation program which he described to the panel. MCR 9.106(2) gives the hearing panel or the Board the authority to attach additional conditions to a suspension if those conditions are relevant to the established misconduct. In this case, both the panel and the Board have considered the respondent's alcoholism as a mitigating factor and I believe that it would be entirely appropriate to attach conditions to the respondent's suspension requiring regular attendance at AA during the entire period of suspension. If the Board is sincere in its hope that the respondent is able to establish his eligibility for reinstatement at the end of the suspension period, it is only fair that we indicate to him the conditions he is expected to meet. If the respondent is sincere in his expressed desire to deal with his problem, such conditions will not be viewed by him as punishment but as aids to his recovery.

DISSENTING OPINION

Robert S. Harrison

I believe that the two-year suspension imposed in this case is unduly punitive and that protection of the public and the legal profession may be achieved through the imposition of a suspension for a period of less than 120 days followed by probation for a period of at least two years. As the majority concedes, the evidence of the respondent's alcoholism at the time of the misconduct is unrebutted as is the testimony of Dr. Ager that the alcoholism clouded the respondent's judgment to the extent that it was a significant factor in his decision to take funds from his trust account. The majority's conclusion that the "proximate" cause of the misappropriation was the respondent's financial need is facile at best and overlooks the evidence in the record that the respondent's alcohol consumption had reached a level which materially affected his conscience and his good sense. The Board's failure to recognize the respondent's alcoholism as an impairment warranting probation flies in the fact of enlightened medical knowledge.

DISSENTING OPINION

Hon. Martin M. Doctoroff

I believe that a suspension of at least three years would be appropriate in this case. This Board, indeed the legal profession as a whole, has a special duty to preserve the public confidence in the legal profession as a repository of client funds. Depositors who would not consider opening a bank account at an institution not insured by the federal government will, nevertheless, allow a lawyer to take possession of their money and hold it on their behalf simply because he or she if a lawyer. When an attorney violates that trust, public confidence in the legal profession is irreparably harmed. The Attorney Discipline Board runs the risk of compounding that harm if it fails to send an unequivocal message: Lawyer, thou shalt not steal and your transgression will not be tolerated.

This may be a simplistic view of right and wrong. It is, in my opinion, however, the proper view. I do not suggest that mitigating factors should never be considered nor should we overlook an attorney's sincere efforts at rehabilitation. In Matter of Muir B. Snow, DP 211/84, cited by the majority, the Board concluded that the respondent's conversion of approximately $27,000 mitigated by the "significant mitigation of alcohol rehabilitation" warranted a suspension of three years. I do not see that this case differs in any material respect.