

GRIEVANCE ADMINISTRATOR,
Petitioner/Appellee,
v
RICHARD L. FISCHER, P-13456,
Respondent/Appellant.

File Nos. DP 73/86; DP 100/86

Argued November 11, 1986

Decided: January 30, 1987

OPINION OF THE BOARD

Based upon Respondent's admissions, the Hearing Panel found that the Respondent misappropriated the sum of \$5000.00 entrusted to his care on behalf of a decedent's estate. In light of the mitigating factors presented by the Respondent, the Panel ordered that his license to practice law in Michigan be suspended for a period of two years. The Grievance Administrator and the Respondent have both filed Petitions for Review seeking modification of that discipline.

The Panel's factual findings are not challenged by either party. The Respondent, a fifty-six year old attorney who has been licensed to practice in Michigan since 1961 handled the State of John Hardy, deceased, in 1976-77 as attorney and executor. John Hardy was survived by his two sisters, Mrs. Neiman and Mrs. Allard, but his Will left his estate to his companion, Elsa DeWit. When the estate of John Hardy was closed, the Respondent agreed with Hardy's sisters that the residue of \$14,000 should be placed in a joint account in the name of the Respondent and the sisters to pay for the medical and/or funeral expenses of Elsa DeWit. Following Elsa DeWit's death, Respondent met with Mrs. Neiman and Mrs. Allard in early 1983 and was confronted with their discovery that \$5000.00 was missing from the account. The Respondent admitted to the sisters that he had taken that amount from the account in 1980-81 and, in February 1983 he agreed to repay the misappropriated funds equally to the sisters in one year at ten percent annual interest. Promissory Notes reflecting that agreement were executed and delivered by the Respondent.

In January 1984, partial payment, with interest, of \$1250.00 was made by the Respondent on each Note and in January 1985 the balance of \$1500.00 principal and \$150.00 interest was paid to each of the sisters. This payment was made one day after a Request for Investigation regarding his handling of those funds was received by Respondent.

The Hearing Panel found unanimously that Respondent's unauthorized misappropriation of funds constituted professional misconduct in violation of MCR 9.104(1-4) and Canons 1 and 9 of the Code of Professional Responsibility, DR 1-102(A)(4-6), DR 9-101(A) and DR 9-102(B)(1,4).

In explaining its decision to impose a two year suspension, the Hearing Panel commented in its Report that "despite the seriousness of his misconduct, Respondent's full restitution with interest begun before a Request for investigation was filed, his remorse and acknowledgment of wrong-doing, and his long, unblemished record persuades the Panel that the usual range of discipline

of three years suspension to revocation of license for misappropriation should yield in this case.” The Grievance Administrator urges that the mitigation demonstrated by this Respondent does not justify a discipline which is, in his view, “limited” to a two year suspension. The Respondent, on the other hand, has requested that we consider a modification of the Order of Discipline by taking action “less than the suspension of Respondent's license to practice law.”

Having considered the arguments presented, this Board, by a majority, affirms the Hearing Panel Order suspending Respondent’s license to practice law for two years.

There are few more egregious acts of professional misconduct of which an attorney can be guilty than the misappropriation of a client's funds held in trust, In Re Wilson, 81 NJ 451; 409 AT2d, 1153. In that case, the Supreme Court of New Jersey went on to discuss the rationale for imposing disbarment as the generally appropriate sanction in cases involving the misappropriation of client funds and to serve notice upon the Bar in that state that, absent compelling mitigation, disbarment could be expected in future misappropriation cases in that jurisdiction.

While this Board has traditionally emphasized the seriousness of the misappropriation of client funds, we have heretofore declined the invitation of the Grievance Administrator to adopt a policy which would automatically result in revocation in all cases where misappropriation has been established.

In this case, divergent views on the weight to be assigned to the mitigation presented by this Respondent has resulted in the filing of a dissent by one of our colleagues who would increase suspension to three years while another Board member would reduce the suspension to one year. We issue this majority opinion, therefore, to emphasize our condemnation of the misappropriation of client funds but also to reaffirm our belief that some deference must be shown to the conclusions of the Hearing Panel's and that the sanction imposed by a Panel, when reasonable, should be affirmed.

In this case, the Respondent took money which did not belong to him.¹ Whether described as misappropriation, embezzlement or theft, there can be no excuse for the unauthorized use of client funds entrusted to a lawyer and the Board has held that a short suspension in a case involving misappropriation of client funds "is not consistent with the purpose of these disciplinary proceedings, the protection of the public, the courts, and the legal profession, nor does it adequately reflect our condemnation of the misconduct committed in this case", Schwartz v Fabre, DP 84/85; DP 1/86, Opinion of the Board, September 30, 1986. In that case, the Board considered the Hearing Panel Order suspending a respondent's license for sixty days upon a finding that he had misappropriated \$3000.00. Despite the mitigating effect of respondent's prior unblemished record, we increased discipline to a suspension of three years.

In the instant case, the Hearing Panel made specific findings with regard to the mitigating factors presented by the Respondent and noted the absence of prior misconduct in twenty-five years of practice, his acknowledgment of wrong-doing accompanied by a remorseful attitude, his repayment of the funds with interest, and his agreement to make restitution before the commencement of the Grievance Administrator's investigation. The Panel made further specific reference to its awareness that in the absence of such mitigation, Respondent's misconduct should subject him to discipline in the range of three years suspension to a revocation. Regardless of whether we might have imposed a different level of discipline, we are unable to conclude that the Panel's consideration of the mitigating factors in this case was unreasonable. The suspension of two years is therefore affirmed.

Martin M. Doctoroff, Remona A. Green, and Patrick J. Keating concurring.

¹There is some question as to whom the funds did belong. Elsa DeWit apparently died intestate and there is no evidence in the record below that the Respondent or the Complainants ever considered the institution of probate proceedings to determine the rightful ownership of the funds which Elsa DeWit inherited from John Hardy. Nevertheless it is sufficient to note that Mr. Fischer specifically acknowledged at the hearing that he made no claim to the money in the joint account and that he used it for his personal purposes without the knowledge and consent of the joint owners of the account.

DISSENTING OPINION

Hanley M. Gurwin

I am unable to agree with the majority that the mitigating actors presented in this case are sufficiently compelling to justify a two year suspension. Although the Board has traditionally deferred to the Hearing Panels with regard to findings of fact, the Board has also announced that it would apply its broader overview when assessing appropriate discipline based upon comparative cases and appellate circumstances in order to insure reasonable uniformity among the hearing panels. Matter of Robert Grimes, 35939-A, 1981 (Brd. Opn. p. 118). In my view, misappropriation of client funds by an attorney strikes at the heart of the public's confidence in the legal profession. Such misconduct may, in the absence of mitigating circumstances, warrant revocation of the attorney's license to practice law, but should not, as a general rule, result in discipline less than a suspension of three years. This is particularly true in the instant case in which the funds taken apparently belong to the Estate of Elsa DeWit, not the sisters to whom repayment was made.

DISSENTING OPINION

Charles C. Vincent, M.D.

I would reduce the discipline imposed by the Hearing Panel to a suspension of one year. According to the record before us, this case represents Respondent's only transgression during twenty-five as a Michigan attorney. It is also clear from the record that he has a clear understanding of the wrongful nature of his conduct. He admitted his misuse of the funds to clients and immediately executed Promissory Notes for the return of the money with interest. Under those circumstances, a one year suspension, which requires a lengthy reinstatement procedure, would be sufficient.