

GRIEVANCE ADMINISTRATOR,
Petitioner/Appellant,
v
EDWIN C. FABRE, P-13265,
Respondent/Appellee.

File Nos. DP 84/84; DP 1/86

Decided: July 23, 1986
Opinion issued: September 30, 1986

OPINION OF THE BOARD

The Respondent was charged with the misappropriation of client funds and with failure to answer the Request for Investigation filed by the Grievance Administrator. Based upon the Default which was filed for his failure to answer that Complaint, and upon his statements at the hearing, the Hearing Panel concluded that the acts of misconduct were admitted. An Order of Discipline was entered by the Panel suspending Respondent's license for a period of 60 days. The Petition for Review filed by the Grievance Administrator sought a substantial increase in the level of discipline. The Respondent did not file a Petition for Review, but filed a Motion for Leave to File an Amended Answer and for a Remand to the Hearing Panel to take further testimony in support of mitigation. That Motion by the Respondent is considered and it is denied. Based upon our review of the record below, the Board adopts the findings of the Hearing Panel but modifies the discipline imposed. Discipline in this case is increased to a suspension of three years.

I.

This matter comes before the Board on the timely filing of a Petition for Review by the Grievance Administrator in accordance with MCR 9.118(A). The Respondent did not seek a review of the Order of Discipline. Respondent's Answer to the Administrator's Petition for Review was the first pleading of any kind filed by Mr. Fabre. On July 7, 1986, the Respondent filed a pleading entitled, "Motion for Leave to File an Amended Answer Raising Mitigation Defenses and for Remand to the Hearing Panel or a Special Master to Take Testimony in Support of Mitigation." In that Motion, the Respondent seeks to introduce, for the first time, evidence regarding his personal and professional background, and to interject into these proceedings a claim that his admitted misconduct occurred at a time when he was abusing alcohol.

Having failed to file an Answer to the Request for Investigation, or to answer two Formal Complaints, and having declined to seek review of the Hearing Panel Order, Respondent has not, in the Board's opinion, demonstrated adequate grounds for a remand to the Panel or a Master. Respondent has neither established nor alleged the existence of any matter which could not

have been brought to the Panel's attention in properly filed pleadings or in his testimony to the Panel

Remand to a Master to receive additional evidence bearing upon a Respondent's eligibility for probation has been ordered by the Board in a case cited by the Respondent, In the Matter of Hugh J. McGuire, (DP 146/81, Opinions of the Board, page 268, May 13, 1983). In that matter, however, a timely Petition for Review was filed by the Respondent alleging all of the essential criteria set forth in GCR 1963, 970.3 [Now MCR 9.121(C)]. We therefore determine that Respondent's Motion to Remand should be denied and that our consideration of the appropriate level of discipline to be imposed in this case should be based upon the existing record.

II.

The Formal Complaint charges that the Respondent received settlement funds of \$5,000 on behalf of a client in May, 1984, retained the agreed upon fee of \$2,000 and misappropriated the remaining \$3,000. The Complaint also alleged that Mr. Fabre failed to answer the Request for Investigation served on him by the Grievance Administrator in April, 1985.

The Respondent's Default for failure to answer the Complaint was filed along with a second Complaint alleging that, in accordance with MCR 9.104, his failure to answer the first Complaint constituted an additional act of misconduct. The Respondent's Default was entered on that Complaint as well.

The Respondent appeared in pro per at the hearing and made no attempt to set aside the Defaults which had been entered. In his testimony to the Panel, the Respondent observed that he could not offer any substantial arguments contrary to the charges against him and he testified that the clients' funds were used when he was "just trying to stay in business as long as I could" at a time when he was experiencing difficulty in meeting his office overhead and obligation to the Internal Revenue Service.

The Respondent was given an opportunity to present mitigating evidence to the Panel and he testified that restitution had been made to the clients, that he had a prior unblemished disciplinary history and that he did not intend to defraud his client.

In light of the record presented, we are impelled to conclude that the 60 day suspension ordered by the Hearing Panel is simply not appropriate. A short suspension accompanied by the provision for automatic reinstatement under MCR 9.123(A) 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.

The Respondent stole money which should have been delivered to his client. That inescapable conclusion is not made more palatable

by the Respondent's testimony before the Panel that there was no intention "on my part to defraud or to deceive, or to take and use for personal gains the money" (T 15). The Respondent was not entitled to use his clients' money without permission under any circumstances, and the use of those funds to pay the expenses of his law office was not less reprehensible than his use of those funds for some other purpose.

Nor can the Board assign much weight to the mitigating effective of the Respondent's restitution, without interest, on the day of the hearing some nine months after those funds should have been delivered to the client. While prompt repayment of converted funds has been recognized by the Board as a mitigating factor, Schwartz v Richards, [Opinions of the Board, page 273, July 18, 1983], Schwartz v Keidan, [Opinions of the Board, page 391, September 30, 1985], we must substantially discount the mitigating effect of restitution made after the commencement of disciplinary proceedings.

Finally, we acknowledge, as did the Hearing Panel, that the Respondent has not previously been subjected to disciplinary action. In a case involving the misuse of client funds in violation of Canon 9 of the Code of Professional Responsibility, the Supreme Court reduced an Order of Revocation issued by the State Bar Grievance Board to a suspension of three years, noting the Respondent's "previously unblemished record." Matter of Geralds, 402 Mich 387; 263 NW2d 241 (1978). We hasten to emphasize, however, that while an unblemished record may have some mitigating effect, it cannot be characterized as an excuse for the embezzlement of client funds.

Our appraisal of this Respondent and our consideration of the record in this case leads us to conclude that discipline must be increased to an Order suspending Respondent's license for a period of three years.

The Respondent will be required to establish his eligibility for reinstatement in accordance with the criteria listed in MCR 9.123(B) and will be required to obtain recertification from the Board of Law Examiners.

Members Keating, Doctoroff, Vincent, Green, Gurwin, Harrison and Komer concur.