

GRIEVANCE ADMINISTRATOR

v

ALAN M. SILVER

Respondent

File No. DP-9/83

Decided: June 26, 1984

OPINION OF THE BOARD

Respondent was hired by the Teamster's Credit Union to perform collection work. He was responsible for a large volume of cases and neglected approximately 19 of these files, made misrepresentations to the Credit Union about the status of these matters, and knowingly represented a debtor of the Credit Union while acting as counsel for the Credit Union, thereby creating a conflict of interests. The Credit Union alleged that because of Respondent's neglect, it lost \$32,000 in uncollected or uncollectible debts.

Charged by the Attorney Grievance Commission with neglect, misrepresentation, and conflict of interest, Respondent failed to answer and was placed in default. After considering certain psychological reports submitted by Respondent as mitigation evidence in support of a plea for probation, the panel found Respondent ineligible for probation and issued an order of suspension of 121 days. We vacate the panel order of suspension and place Respondent on supervised probation for two years.

The Hearing Panel was presented with two psychological reports of Respondent: the evaluations of two psychologists -- Christine M. Panyard, Ph.D., ordered by the panel, and Richard B. Traitel, Ph.D., obtained independently by Respondent. After considering both psychological reports, the Panel found that Respondent did not qualify for probation under GCR 1963, 970.3. That Rule states in pertinent part:

- (a) If, in response to a formal complaint . . . the respondent asserts in mitigation and thereafter demonstrates by satisfactory proof that
 - (1) during the period when the conduct which is the subject of the complaint occurred, his or her ability to practice law competently was materially impaired by reasons of physical or mental disability or drug or alcohol addiction,
 - (2) the impairment was the cause of or substantially contributed to that
 - (3) the cause of the impairment is susceptible to treatment,
 - (4) he or she in good faith intends to undergo treatment, and submits a detailed plan for such treatment,

the hearing panel, the board, or the court may enter an order placing the respondent on probation for a specific period not to exceed two years.

The psychological reports indicate that Respondent, at the time of misconduct, compulsively over-extended himself and was consequently under constant stress and that he had a negative self-image and attempted to compensate with intense efforts at professional achievement. The

hearing panel concluded that these circumstances did not show, by satisfactory proof, that Respondent's "ability to practice law competently was materially impaired by reasons of . . . mental disability . . .". Upon review of the whole record, however, we find that this criteria has been met by the requisite standard of "satisfactory" proof.

While Respondent has not submitted a sufficiently detailed plan for treatment as required by GCR 970.3(a) (4) the record shows that Respondent has demonstrated by satisfactory proof, all other elements necessary for probation, and we shall afford him an opportunity to present a plan for treatment.

The hearing panel questioned whether Respondents psychological difficulties materially impaired his ability to practice law competently. The Panel did not find in the proofs a sufficient link between the psychological problems mentioned in the reports and Respondent's inability to carry out his duties as an attorney in a competent manner. However, the uncontroverted findings of the expert witnesses is adequate support for the averment that Respondent's misconduct grew ultimately from his destructive psychological cycle of overextension-stress-overcompensation.

The Board, and only a few of its hearing panels, have had limited opportunities in which to make a complete and definitive construction of the language in this relatively new and untried probation court rule. Although it is clear in this case that Respondent's condition was serious enough to cause a material impairment, the Supreme Court, in promulgating Rule 970.3(a)(1), could not have intended the words "materially impaired by reasons of . . . mental disability" to be limited to cases of psychotic or near-psychotic disturbance. Indeed, attorneys who are so grossly debilitated that they cannot function should not be candidates for probation of any type but rather should be transferred to inactive status under GCR 1964, 970.1 or 970.2. Unlike the inactive status provisions (which refer to attorneys judicially declared incompetent, or involuntarily committed, or who remain incapacitated due to mental infirmity or disability), candidates for probation will generally suffer from a lesser degree of mental or psychological difficulty which can be treated without substantial continuing risk of professional misfeasance or malfeasance. Respondent's syndrome caused him to take on more work than he could handle, and then to make false representation to his client out of desperation.

In assessing this record, the Board has considered that Respondent was admitted to practice in Michigan 16 years ago and was reprimanded for neglect 6 years ago (1978). We also note that Respondent appears to be an otherwise capable practitioner and was responsible for hundreds of other credit union cases which were apparently handled competently.

During his two years of probation, Respondent's practice shall be supervised by his attorney J. Laevin Weiner who has expressed a willingness to assist the Respondent and the bar in this capacity. Reports on Respondent's status and progress, both in psychological treatment and in law practice, shall be submitted quarterly both to this Board and to the Attorney Grievance Commission. Respondent shall, within thirty (30) days of the filing of this opinion, submit to the Board and Commission a detailed plan of psychological counseling to be followed during his probation. Failure to comply with the terms of probation set forth here shall be grounds for withdrawal of the Order of Probation and may be grounds for imposition of other discipline, and to that extent we retain jurisdiction of this matter.

AFFIRMED IN PART AND REVERSED IN PART.

ALL CONCUR, EXCEPT FOR BOARD MEMBER JOHN L. COTE', Concurring in part and dissenting in part - attached.

COTE', Member, Concurring in part and dissenting in part:

While I concur with the Board's remarks on the appropriateness of probation, I would add a suspension of sixty (60) days in conjunction with the period of probationary supervision. There is no evidence that Respondent's representation of a debtor of the Credit Union -- an obvious conflict of interest -- grew out of his psychological impairment. Nor am I convinced that his false representations to his client can necessarily be attributed to his neurosis. Not every aspect of Respondent's misconduct is mitigated by his psychological problems. To the extent that misconduct discrete from that influenced by mental impairment can be identified, separate discipline for that misconduct should be imposed. Such, I think, is the case here. Probation serves both to rehabilitate an attorney who possesses promise and as a form of public protection; however, there is a degree of culpability here warranting some level of discipline in order to provide the deterrent effect necessary for the prevention of similar offenses.