

IN THE MATTER OF HUGH J. McGUIRE, P 17429,
A Member of the State Bar of Michigan,
Respondent
File No. DP-146/81

Decided: May 13, 1983

OPINION OF THE BOARD

Respondent, who is 46 years of age, had his license to practice law revoked in March, 1982. Respondent appealed to the Board, requesting probation under GCR 1963, 970.3. Respondent's revocation continued without stay while his case was remanded to a Master. The Report of the Master supports a finding that Respondent is eligible for probation. Respondent and the Grievance Administrator are to submit proposed conditions of probation to the Board, one of which must include restitution, with interest, to the complainant.

This case presents two of the most serious problems in the area of professional responsibility: misuse of client funds and substance abuse by practicing attorneys.

Respondent was retained by the complainant as attorney for the estate of her deceased father in March, 1975 [Tr, 31, Panel Hearing]. He neglected the estate for an extended period and Complainant had considerable difficulty in communicating with him. During the professional relationship, Respondent received \$11,000 as the decedent's settlement of a negligence case which Respondent was handling for complainant [Tr, 54, 55, Panel Hearing]. Respondent converted these funds to his own use [Tr, 67-68, Panel Hearing].

On November 20, 1981, the Grievance Administrator filed a formal complaint against Respondent; he did not answer and was placed in default.

A hearing was held before a panel of the Attorney Discipline Board on January 14, 1982. Respondent appeared in propria persona and the panel accepted, with some misgiving, Respondent's oral motion to set aside the default. Respondent admitted the misconduct [Tr, 13, 14, 17, Panel Hearing], and testified briefly, offering information about his arthritic condition. He stated that debilitating pain affected his conduct and impaired his judgment.

Following the original panel hearing, Respondent's motion to reopen the hearing to admit additional evidence was denied. Respondent's license was revoked by the panel and he petitioned the Board for a stay of discipline pending review. The Board granted review but refused to grant a stay of discipline. The case was remanded to the chairperson of the original hearing panel, who was appointed Master to determine if there was sufficient evidence to support probation as required by criteria set forth in GCR 970.3(a)(1-4). The Board had also ordered Respondent to file an Amended Answer in conformity with GCR 1963, 962 and 970.3.

The Master's hearing was held on November 4, 1982 and depositions of medical experts were admitted. Dr. Larry Berkower, a certified psychiatric specialist, testified at his deposition that

Respondent was referred to him in February, 1982, and that he had been a physically active person until he was afflicted with rheumatoid arthritis. Dr. Berkower indicated that Respondent's alcohol abuse was partly an attempt to cope with his physical problems including arthritic pain [Master's Report, 3], and concluded that Respondent's conversion of funds was contrary to Respondent's true character; the Respondent's long, unblemished record and the professional endorsements submitted to the Board corroborate this medical opinion. Dr. Berkower further testified that he believes Respondent has been able to deal successfully with these serious but intermittent illnesses and offered a positive prognosis for recovery; he also testified that his current diagnosis contains no indication of active alcoholism at this time [Master's Report, 5].

The deposition of Dr. James Leisen showed that Respondent was in considerable pain due to rheumatoid arthritis during the years prior to and including the date of the misconduct. Dr. Leisen also testified that Respondent's alcohol abuse was, in part, an attempt to deal with the limitations caused by the disease which ". . . turned him into an 80 year old man in the span of five years..." [Master's Report, 3]. Dr. Leisen testified that he had discussed a program of therapy to help Respondent deal with his affliction. Respondent expressed a willingness to follow such a program [Master's Report, 3].

Mr. Paul Scallen, a moderator of the Alcoholics Anonymous group attended by Respondent, testified that Respondent has joined and been active in the Beaumont Hospital Alcoholics Anonymous group since February, 1982. Mr. Scallen expressed the same belief as Dr. Berkower -- that Respondent's substance abuse contributed to his misconduct.

Respondent's wife testified that she has not seen him consume any alcohol since February, 1982 and stated that his personal deportment has also improved during that time. Other witnesses testified as to Respondent's ability, reliability and professional expertise.

Respondent is currently working as a mortgage broker. He has not practiced law for over one year, since entry of the discipline order. He testified that he has continued to follow the treatment programs suggested by Dr. Berkower and Dr. Leisen [Master's Report, 8] and has made restitution of one half of the converted funds to the complainant and states that he is making arrangements to repay the balance.

GCR 1963, 970.3, the probation rule which became effective in February, 1981 provides four criteria for eligibility, as follows:

- 1) During the period when the conduct which is the subject of the complaint occurred, [Respondent's] ability to practice law competently was materially impaired by reason of physical or mental disability or drug or alcohol addiction,
 - 2) The impairment was the cause of or substantially contributed to that conduct, and
 - 3) The cause of the impairment is susceptible to treatment,
 - 4) [Respondent] in good faith intends to undergo treatment and submits a detailed plan for such treatment.
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Based on the Master's Report we conclude that Respondent meets these requirements. The record now contains substantial medical evidence showing that Respondent is an appropriate candidate for probation; most conspicuous is the absence of any rebuttal medical or psychological evidence. Indeed, there is not even an attempt, other than by legal argument, to challenge the assertion of a causal connection (between the debilitation and misconduct) established by the Respondent.

The decision to grant probation is a discretionary one and the rule does not preclude any class or type of misconduct. We conclude based on the record before us that Respondent is a candidate for probation as contemplated by GCR 970.3.

A significant degree of public protection has been afforded by the suspension that has been in effect for over fourteen months. Based on the record before us we feel that rehabilitation and re-admission under specific conditions ultimately does more to advance the protection of the public than continuation of the disbarment.

Although a substantial term of suspension might be an appropriate adjunct to probation, Respondent has been suspended, as indicated, for a substantial period of time, providing some measure of assurance of a positive prognosis for self-improvement. The hearing panel order of revocation will be vacated and the discipline is reduced to the time disbarred under the hearing panel order. The Board's findings will be considered res judicata on the question of present fitness to re-enter practice, and therefore, reinstatement proceedings will not be required. In re Bessman, 401 Mich 45, 257 NW2d (1976). Respondent and the Grievance Administrator will submit proposed conditions of probation including restitution. Restitution shall include interest.

Board Members Clement H. Kern and Prank J. McDevitt did not participate in this matter.
