

Grievance Administrator,
Petitioner/Appellant,
v
Stephen C. Watt, P-27207,
Respondent/Cross-Appellant.

ADB 150-88

Decided: August 18, 1989

BOARD OPINION

The hearing panel in this case issued an order suspending the respondent's license to practice law for 100 days following the panel's acceptance of the respondent's plea of no contest to charges that he misappropriated funds belonging to an estate. The complaint alleged that the respondent negotiated a check to which he had improperly affixed a decedent's signature. The Grievance Administrator has filed a petition for review seeking an increase in discipline to a term which will require a petition for reinstatement and which otherwise recognizes the seriousness of the respondent's misconduct. A cross-petition for review has been filed by the respondent seeking a determination that the evidence presented to the hearing panel warranted the imposition of a order of probation in accordance with MCR 9.121(C). We conclude that the hearing panel did not abuse its discretion by declining to impose probation. The hearing panel's order of suspension is modified by increasing discipline to a suspension of 120 days and by eliminating the condition requiring a written report by Dr. Michael Abramsky.

At the hearing, a stipulation was placed on the record that the respondent would offer a plea of no contest to the common allegations and the allegations in Count IV of the formal complaint. The Grievance Administrator agreed to dismiss the remaining counts of the complaint. The respondent's plea was accepted and a finding of professional misconduct was entered.

Lela E. Hooper died at a nursing home on September 28, 1986. Twelve days earlier she had executed a durable power of attorney appointing the respondent as her attorney-in-fact. On September 29, 1986, the respondent sent a letter to Genesee Merchants Bank in Flint advising that Ms. Hooper was presently in a nursing home. He was subsequently advised by the bank that Ms. Hooper maintained an account at that bank in the amount of \$129,859.39. On October 10, 1986, the respondent requested that Ms. Hooper's funds be wired to his trust account. On October 13, 1986, the respondent furnished the bank with a death certificate for Olive Hooper, the joint depositor, and again requested that the funds be transferred.

On October 21, 1986, the bank in Flint forwarded a bank money order in the amount of \$129,859.39 payable to Lela E. Hooper and the respondent's bank. The money order and the accompanying correspondence from the bank both recited that the personal

endorsement of Lela Hooper was required. On October 24, 1986, the respondent signed or caused to be signed the purported endorsement of Lela Hooper on the money order and he presented it personally to First Security Bank in Ionia for deposit to his trust account.

Count IV, to which the respondent pleaded no contest, alleged that the respondent's signing of the purported personal endorsement, the negotiation of the money order and the deposit of the proceeds to his account constituted a misappropriation of funds belonging to the estate of Lela Hooper, in violation of Canon 1 of the Code of Professional Responsibility, DR 1-102(A)(4)-(6).

The respondent maintains that his letter to Genesee Merchants Bank dated September 29, 1986 was dictated prior to Lela Hooper's death and that he was not, in fact, aware of her death for several days. He has acknowledged in his pleadings and his testimony to the panel, however, that he became aware of her death by October 2, 1986, that he relied upon the invalid power of attorney to obtain the funds from the bank in Flint and that he placed Lela Hooper's signature on the money order at a time when he knew that the power of attorney was extinguished and that he was not the properly appointed personal representative of her estate. It is his position, however, that he believed that he would be the personal representative and that he was merely taking a "short-cut" to marshal the assets of the estate.

The respondent has requested review of the hearing panel's conclusion that probation is not appropriate in this case. The standard to be applied in the review of the panel's findings is whether those findings have ample evidentiary support in the record. In re Del Rio, 407 Mich 336; 285 NW2d 277 (1977). MCR 9.121(C) places the burden upon the respondent to establish eligibility for probation. Based upon our review of the record, including the deposition of Dr Abramsky, we are unable to conclude that the hearing panel erred in its determination that the respondent failed to demonstrate that he was materially impaired by a mental disability during the period when the misconduct occurred. Furthermore, the court rules provide that probation may be imposed when the hearing panel or the Board makes a specific finding that an order of probation is not contrary to the public interest. The Board declines to make such a finding in this case.

With regard to the sufficiency of the 100-day suspension imposed by the panel, the Grievance Administrator argued that the respondent should not be allowed to be reinstated upon the filing of an affidavit, in light of the "felonious facts of this case."

That conclusionary characterization is not helpful in our consideration of respondent's misconduct. (There is not evidence in the record before us that the respondent has, in fact, been charged with criminal conduct, felonious or otherwise.) In arguments to the Board, the issue is narrowed by the Administrator to a question of whether or not a 100-day suspension is appropriate for a "\$130,000 embezzlement".

The respondent's misconduct in this case constitutes neither embezzlement nor misappropriation as those terms have been defined in the context of criminal or disciplinary proceedings. "Embezzle" means wilfully to take or convert to one's own use another's money or property which was acquired lawfully, by reason of an office or employment or position of trust. See for example, People v Bergman, 246 Mich 68. In considering cases involving the alleged "misappropriation" of funds, the Board has adopted the definition employed by the District of Columbia Court of Appeals that misappropriation is "any unauthorized use of clients' funds entrusted to an attorney including not only stealing, but also unauthorized temporary use for the lawyer's own purpose, whether or not he derives any personal gain or benefit therefrom." (Emphasis added.) In re E. David Harrison, 461 A2d 1034 (1983).

The element included in those definitions missing from the respondent's conduct in this case is the legitimate acquisition of the funds by the respondent. Those funds were not entrusted to Mr. Watt by a client nor did he take possession of those funds as the legally designated representative of the estate. Rather, the gravamen of the charges to which the respondent pleaded no contest is that he wrongfully took possession of the funds by misrepresenting himself to the Genesee Merchants Bank in Flint as the attorney-in-fact, that he deposited those funds in his own trust account at the First Security Bank in Ionia by forging Lela Hooper's endorsement, and that he concealed from both banks his knowledge of Lela Hooper's death although that fact was known to him by October 2, 1986.

We attach some significance to the fact that the funds in question remained in the respondent's trust account until they were turned over to the fiduciary of the estate. Had the record contained evidence that any portion of the funds had been removed from the account by the respondent and converted to his own use, greater discipline would have been imposed. We reach no conclusion as to respondent's motive for taking possession of those funds and find that there is insufficient evidence in the record to support a finding as to the respondent's intent.

Nevertheless, it is clear that the respondent's actions were not merely negligent but involved calculated deception. The respondent's violation of his fundamental duty as a lawyer to tell the truth in his representations to the two banks warrants an increase in discipline to a suspension of 120 days. The respondent will not be reinstated until he has appeared before a hearing panel in proceedings in accordance with MCR 9.123(B) and MCR 9.124 and established that he can safely be recommended to the public, the courts and the legal profession as a person fit to act in matters of trust and confidence as an officer of the court.

All concur.