

OFFICE OF DISCIPLINARY COUNSEL v. LOWREY.

[Cite as *Disciplinary Counsel v. Lowrey* (1999), ___ Ohio St.3d ___.]

Attorneys at law — Misconduct — Indefinite suspension — Misappropriation of client funds.

(No. 98-2218 — Submitted December 16, 1998 — Decided March 3, 1999.)

ON CERTIFIED REPORT by the Board of Commissioners on Grievances and Discipline of the Supreme Court, No. 97-99.

On December 8, 1997, relator, Office of Disciplinary Counsel, filed a complaint charging that Thomas James Lowrey of Akron, Ohio, Attorney Registration No. 0020548, violated several Disciplinary Rules while acting as a fiduciary and further that he violated Gov.Bar R. V(4)(G) by not cooperating with relator's initial inquiries regarding his conduct. Respondent filed an answer, admitting most of the factual allegations of the complaint and his violation of Gov.Bar R. V(4)(G), but denying that he had violated any Disciplinary Rules. A panel of the Board of Commissioners on Grievances and Discipline of the Supreme Court ("board") heard the matter upon the parties' stipulations, relator's testimony, and the parties' arguments.

The panel found that in November 1995, the Stark County Court of Common Pleas, Probate Division, appointed respondent successor testamentary trustee of the trust created for the benefit of Elizabeth Tschantz under the will of James S. Harvey, the decedent. At the time of his appointment, respondent filed a \$110,000 bond, which had been provided by the Cincinnati Insurance Company.

In 1997, respondent neglected to file a timely account of the testamentary trust, and the trust remained delinquent in payments on a home equity loan taken to finance the purchase of Florida real estate, which was not consummated because Tschantz had changed her mind. Respondent eventually filed an account in which

he indicated that over \$7,000 of trust assets had been disbursed to him as an “Advancement on Trustee and Trustee’s attorney fees.” In June 1997, at a probate court hearing on Tschantz’s motion to remove respondent as testamentary trustee, respondent admitted a shortage of funds in the trust accounts and that he had taken the money because of personal financial problems. The probate court removed respondent as trustee and appointed a successor trustee for the testamentary trust.

In September 1997, the successor trustee filed an account detailing over \$20,000 in unexplained expenditures by respondent. The probate court approved the successor trustee’s account and ordered respondent to reimburse the trust the sum of \$23,176.05 plus interest. When respondent failed to pay the deficiency, Cincinnati Insurance Company repaid the trust the amount due from respondent. Respondent executed a promissory note in favor of Cincinnati Insurance Company and has made regular payments on the note. Respondent did not answer the initial inquiries by relator concerning his handling of the testamentary trust.

The panel concluded that by his conduct, respondent violated DR 1-102(A)(3) (engaging in illegal conduct involving moral turpitude), 1-102(A)(4) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation), 1-102(A)(5) (engaging in conduct prejudicial to the administration of justice), 1-102(A)(6) (engaging in conduct adversely reflecting upon the attorney’s fitness to practice law), 9-102(B)(3) (failing to maintain complete records of all client funds coming into his possession and to render an appropriate accounting regarding them), 9-102(B)(4) (failing to promptly pay or deliver to the client as requested the funds, securities, or other properties in the attorney’s possession that the client is entitled to receive), and Gov.Bar R. V(4)(G) (failing to cooperate in a disciplinary investigation).

In mitigation, the panel accorded great weight to respondent's remorse, his numerous years of practicing law without any previous disciplinary record, his efforts to pay restitution to the bonding company, his complete disclosure of his misconduct to the probate court and to the panel, and his eventual cooperation in the disciplinary proceedings following his initial failure to assist in the investigation. The panel additionally found that respondent suffered a heart attack in 1995, that his misconduct occurred following his heart attack, and that his misconduct was prompted by financial difficulties engendered by his inability to generate enough money from his law practice to offset his practice's expenses.

The panel recommended that respondent be indefinitely suspended from the practice of law. The board adopted the findings, conclusions, and recommendation of the panel.

Jonathan E. Coughlan, Disciplinary Counsel, and *Lori J. Brown*, Assistant Disciplinary Counsel, for relator.

Thomas J. Lowrey, *pro se*.

Per Curiam. We adopt the findings, conclusions, and recommendation of the board. Absent any mitigating factors, the appropriate sanction for misappropriation of client funds is disbarment. *Cleveland Bar Assn. v. Belock* (1998), 82 Ohio St.3d 98, 100, 694 N.E.2d 897, 899. Nevertheless, we give weight to the board's recommendation of the lesser sanction of indefinite suspension based on the evidence of mitigation. See, *e.g.*, *Disciplinary Counsel v. Kurtz* (1998), 82 Ohio St.3d 55, 57, 693 N.E.2d 1080, 1082, in which we held that an attorney's misappropriation of funds while serving as testamentary trustee warranted adoption of the board's recommendation of indefinite suspension, and

the board relied on mitigating evidence of respondent's general reputation for honesty and good character; see, also, *Dayton Bar Assn. v. Shaman* (1997), 80 Ohio St.3d 196, 201, 685 N.E.2d 518, 521 (mitigating evidence warranting lesser sanction of indefinite suspension included agreement to provide restitution and attorney's genuine remorse for misconduct involving misappropriation of client funds). Respondent is hereby indefinitely suspended from the practice of law in Ohio. Costs taxed to respondent.

Judgment accordingly.

DOUGLAS, RESNICK, F.E. SWEENEY and LUNDBERG STRATTON, JJ., concur.

MOYER, C.J., PFEIFER and COOK, JJ., dissent.

COOK, J., dissenting. The majority concedes that disbarment is the appropriate sanction for misappropriation of client funds, absent mitigating factors. I do not find that the evidence cited by the majority justifies a lesser sanction.

That an attorney has, prior to his misappropriation, enjoyed a reputation for honesty and good character hardly qualifies as a mitigating factor; it is the expected reputation of all attorneys. Likewise, no personal financial needs, even those related to poor health, vitiate the corrupt conduct of stealing from clients.

Respondent should be permanently disbarred, and I therefore dissent from the decision of the majority.

MOYER, C.J., and PFEIFER, J., concur in the foregoing dissenting opinion.