STATE OF MICHIGAN

Attorney Discipline Board

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ATTORNEY DISCIPLINE BOARD
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Grievance Administrator,

Petitioner/Appellant,

v

Shawn P. Davis, P 42546,

Respondent/Appellee,

Case No. 13-21-GA

Decided: October 7, 2014

Appearances:

Frances A. Rosinski & Patrick K. McGlinn, for the Grievance Administrator, Petitioner/Appellant
David J. Gass & Katerina M. Vujea, for the Respondent/Appellee

BOARD OPINION

Muskegon County Hearing Panel #1 issued an order of discipline in this matter suspending respondent's license to practice law in Michigan for two years. The panel found that respondent misappropriated funds from his law firm on 22 separate occasions from 2007 to 2011. The Grievance Administrator filed a petition for review and the Attorney Discipline Board has conducted review proceedings in accordance with MCR 9.118. For the reasons discussed below, we will modify the hearing panel's order and increase the sanction to disbarment.

The Grievance Administrator filed Formal Complaint 13-21-GA alleging that respondent, while working as a managing partner for the Nolan & Nolan, P.C. law firm in the criminal and divorce section, misappropriated $14,060.00 in client funds that were due and owing to the firm. The complaint charged respondent with violations of MRPC 1.15(b)(1) and (3); MRPC 1.15(d) and (g); MRPC 8.4(a) and (b); and MCR 9.104(2) and (3). Respondent filed an answer to the complaint in which he admitted the factual allegations and raised the affirmative defense that the alleged misconduct was the result of a temporary mental disability within the meaning of MCR 9.121(C)(1)(a)-(d).

At the commencement of the hearing, the panel concluded, based on the representations of the parties, that "the misconduct has either been admitted or established" and the proceeding moved to the discipline phase. The essentials of the misconduct in this case are that respondent converted $14,060.00 in fees that were owed to his law firm. He admitted taking payments from firm clients for work (and retainers), and skimmed various amounts off the top. For example, if he received cash from a client, he would pocket some of the funds and give the remainder to the bookkeeper, stating that the client had paid in full. If the client paid by check, respondent would have the check made payable to him and deposit it into his personal account. Respondent would then either keep all of the funds and not open a file, or he would keep a portion of the funds and open a file, showing that he was charging and that the client paid an amount less than he actually received.

The petitioner's brief describes the proceeding below, and the respondent does not disagree: because it was not disputed that respondent "knowingly converted approximately $14,000 on 22 separate occasions over a period of 3-4 years and across 19 client files," the focus at the hearing was "the search for compelling mitigation."

The panel, by a two-to-one vote, suspended respondent's license to practice law in Michigan for two years. The Grievance Administrator had urged disbarment under ABA Standard 5.11, *Grievance Administrator v Mark J. Tyslenko*, 12-17-GA (ADB 2013), *Grievance Administrator v Frederick A. Petz*, 99-102-GA (ADB 2001), and other authorities for the proposition that disbarment is appropriate for knowing conversion of client or third party funds absent compelling mitigation. The panel majority agreed "that the presumptive sanction in Mr. Davis' case is disbarment," but, after a thorough discussion of aggravating and mitigating factors, found that "compelling mitigating factors exist to rebut the presumption of disbarment." The majority report then discussed respondent's character or reputation at some length:

> This hearing panel listened to seven hours of testimony from nine witnesses, and read approximately 50 letters - most of which addressed Mr. Davis' character and fitness to practice law. Witnesses testifying in support of Mr. Davis' character and fitness included former Muskegon County Bar Association Presidents, a former Muskegon County Circuit Court Judge, a hearing panelist of the Attorney Discipline Board, a reverend of one of the largest churches in the inner city who was also a past president of the local NAACP, former clients, fellow practitioners, and his wife of 22 years.

> This hearing panel affords great weight to this evidence. We opine that Mr. Davis' character and reputation are compelling mitigating factors against disbarment. Mr. Davis, himself, was elected by his peers to serve as the president of the Muskegon County Bar Association where he served as an officer for many years. He has capably represented thousands of clients over the years. He competently handles some of the county's largest high profile criminal cases. He provides pro bono representation, volunteers his time for community events, speaks on various legal issues at local high schools, churches, and is on many boards. He is a frequent guest speaker on a local radio station where he offers free legal advice to the community. He is actively involved in fund raisers, his church, his neighborhood association, and is the attorney of choice for many in the Muskegon African American community. [HP Report, p 4.]

The chairperson of the panel, David L. Bossenbroek, dissented and wrote:

> The recent and similar case of *Grievance Administrator v Tyslenko*, 12-17-GA (ADB 2013), where the Board increased discipline from a 45 day suspension to revocation, does give some guidance however. There, respondent also took law firm funds and in defense pled personal hardship, an otherwise clean record, and good character as mitigating factors. In rejecting these factors as "compelling," the Board, citing [*Grievance Administrator v Lisa M. Londer,* 07-127-GA (ADB 2008)] said its hearing panels must find a "causal link" between the mitigating factors and the theft. *Tyslenko*, p 9.
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> Apparently mitigating factors in order to be "compelling" must, to some degree, explain or justify the bad conduct to overcome the presumptive sanction. In this case I find it difficult, if not impossible, to find such a causal link between theft and respondent's good character and reputation. On the contrary, I think the two are inconsistent. [HP Report, dissent, p 5.]

The Grievance Administrator petitioned for review, arguing that the hearing panel erred in imposing insufficient discipline and requested that the suspension be increased to disbarment. Respondent argued that, in light of the applicable mitigating and aggravating factors under the American Bar Association Standards For Imposing Lawyer Sanctions (ABA Standards), the hearing panel correctly determined that a two-year suspension was an appropriate sanction.

Our standard of review in this case is set forth in *Tyslenko*, at pp 4-5:

> [O]ur responsibility to ensure consistency and continuity in discipline imposed by panels and the Board sometimes requires us "to independently determine the appropriate weight to be assigned to various aggravating and mitigating factors depending on the nature of the violation and other

> circumstances considered in similar cases." *Grievance Administrator v Karen K. Plants*, 11-27-AI; 11-JC-JC (ADB 2012), p 18, citing *Grievance Administrator v Saunders V. Dorsey*, 02-118-AI; 02-121-JC (ADB 2005). Further, as we have said previously:
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> > [T]he same aggravating or mitigating factor may warrant different degrees of consideration, depending upon the facts and circumstances of a case. . . . [For] example, the mitigating effect of certain factors identified in Standard 9.32 may be sufficient to warrant a decrease in the level of discipline in a case involving relatively minor misconduct while the same mitigating factors may not warrant consideration of discipline less than revocation in cases involving the "capital offenses" of law discipline, such as intentional theft of client funds held in trust or deliberate presentation of a forged document during a proceeding. [*Grievance Administrator v Che A. Karega*, 00-192-GA (ADB 2004) (Memorandum Opinion, After Remand), p 8.]

The panel noted various mitigating factors under ABA Standard 9.32.[1] Respondent argues that, "It is hard to imagine a stronger case for compelling mitigation." We emphatically reject this characterization of the record in this case, and this view of what is to be considered compelling. And, we are puzzled by this argument:

> To ignore mitigating facts and circumstances in assessing a penalty takes jurisprudence back to early Nineteenth Century France where Victor Hugo's fictional Jean Valjean was sentenced to five years in prison (note the resemblance to the period of disbarment) for stealing a loaf of bread to feed starving children. The more nuanced approach of modern criminal law, which differentiates shoplifting a Snickers bar from armed robbery inside an occupied dwelling, is universally accepted. If it is to meet fundamental standards of fairness, professional discipline must do likewise.

The proffered mitigating evidence has not been ignored; it has been evaluated and put into proper perspective in light of the gravity of the ethical violation here. It makes no sense to compare the multiple thefts here to a single instance of shoplifting a candy bar. And, respondent was not stealing bread for his family; he was, as he admits, living beyond his means.

Not only is the mitigation offered in this case not compelling, some of the arguments are seriously misguided.

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[1] The hearing panel's report is attached as an appendix to this opinion.

"Character or reputation," a factor which may be considered mitigating (ABA Standard 9.32(g)), is relied upon by the panel and respondent. This factor is worthy of some examination and discussion in this context. Respondent points to community support, client testimonials, and the like, noting that "the hearing panel reviewed 50 letters . . . that community members, lawyers, a judge, and clients submitted on Mr. Davis's behalf," and "heard testimony from nine witnesses speaking for Mr. Davis." We have reviewed the letters and they do not constitute compelling mitigation.

This is not the first case in which a "good lawyer," who is active in professional and community affairs, has made the decision to convert funds entrusted to him or her, and, after discovery, began to examine his or her decisions. Such searching may occur in preparation for the defense of charges or due to the crises commonly experienced in such instances (loss of status, employment, professional license, etc.). It is also not atypical for several underlying problems to be discovered at this point.[2] It may then be argued, as it is here, that the "transgression was an aberration, totally at odds with [respondent's] otherwise exemplary family, professional, and community-centered life."

When a competent lawyer who is well-known and perhaps even well-liked, and who may lead an otherwise mostly respectable life, makes the decision to steal when it looks like he can get away with it, this may only prove that people are complicated and that some have the ability to compartmentalize. It does not constitute compelling mitigation.

Respondent also cites financial distress as a mitigating factor in his decision to convert firm funds for his own use. This is a particularly unconvincing argument in this case. Respondent's wife did not want him to join the Nolan firm, but respondent wanted to make more money and joined the firm in 1999, gaining a $10,000 pay increase and a country club membership. (Tr, pp 22-24.) By 2003, Terry Nolan had left the firm and respondent had become a partner. (Tr, p 27.) He made approximately $125,000 – 130,000 annually. (Tr, p 33.) Still, he would skim or redirect client payments intended for the firm beginning in 2007 and until 2011 when he was eventually caught by his partners. (Tr, pp 35 – 44.)

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[2] In this case, reference is made to respondent's treatment for "alcohol abuse, anxiety, depression, and OCD."

Respondent explains:

> The reason he converted – and this is not an excuse – is that Mr. Davis's family was living beyond its means and, in an attempt to provide for every need of his family, Mr. Davis promised things to his three children, such as sending them to expensive academic camps during school breaks, that he could not afford. (HT, 44-48) [Respondent's brief, at p 3.]

It is also apparently significant to respondent that he was not taking the money to buy sports cars. (Tr, p 49.) We cannot understand how this could be perceived as mitigation, and yet, others have made the argument as well. See *Grievance Administrator v Ronald P. Derocher*, 99-98-GA (ADB 2000) (pre-*Petz* case increasing 180-day suspension to the four years requested by the AGC, where small sums were taken not to buy a Maserati or go to the Bahamas, but because respondent "simply had to have something to eat and pay bills with"). Obviously, the self-imposed financial straits of this respondent are not mitigating.

Further, respondent testified that he "learned" his dishonest ways from Terry Nolan (Tr, pp 39-40):

> And even though I somewhat questioned what he was doing, you got to remember as a young lawyer starting off in private practice, I'm watching a partner put money into his pocket. And at that point I'm trying to come up with in my own head is this the way in which practice is done at this firm. [Tr, p 103.]

At that time, respondent was at least 37 years old and had become a seasoned prosecutor. He had also been at another law firm for two years, where they handled money much differently – in a manner that was "very clean." (Tr, pp 20, 38, 102.) Respondent also testified that he "absolutely knew every time [he] did this that what [he] did was wrong." (Tr, p 99.)

The Administrator's brief on review accurately states the issue in this case:

> [I]s there compelling mitigation - mitigation distinct from ... the trials, tribulations, difficulties, and frailties of our lives, mitigation different than the respect, accolades, or admiration of others for which we strive, mitigation capable of explaining how over 36-48 months and over 22 occasions Respondent chose to do what he knew was ethically wrong instead of sufficiently changing the factors and forces in his daily life or, more significantly, simply using his own retirement funds to cover his choices in his costs of living - present in this case? [Petitioner's brief on review, p 9.]

Respondent suggests that disbarment here would be unduly punitive, harsh and inconsistent with the letter and spirit of the Standards. We disagree. The mitigation advanced here, though artfully assembled, is certainly not compelling. For the reasons set forth in the panel chairperson's dissent, the Grievance Administrator's brief on review, and numerous decisions of this Board,[3] the panel's order suspending respondent for two years will be modified and the discipline increased to disbarment.

Board members James M. Cameron, Jr., Sylvia P. Whitmer, Ph.D., Carl E. Ver Beek, Lawrence G. Campbell, Dulce M. Fuller, Louann Van Der Wiele, and Michael Murray concur in this decision.

Board member Rosalind E. Griffin, M.D., was absent and did not participate.

Board member Craig H. Lubben was recused.

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[3] See, e.g., *Tyslenko, supra*, and *Grievance Administrator v Michael R. Carithers, Jr.*, 11-95-RD (HP Report, 4/22/2013), at p 8, aff'd (ADB order dated 1/31/2014), wherein the panel stated, in a reciprocal discipline matter:

> In Maryland, "Absent compelling extenuating circumstances, intentional misappropriation of client funds or another's funds is deceitful and dishonest conduct, which justifies disbarment." . . . In Michigan the rule is much the same. See *Grievance Administrator v Brent S. Hunt*, 12-10-GA (ADB 2012) (disbarring respondent for misappropriating estate funds and citing, with approval, Board decisions requiring "compelling mitigation" to avoid the presumptive sanction of disbarment when client funds are knowingly converted). *See also*, *Grievance Administrator v Carl Oosterhouse*, 07-93-GA (ADB 2008) (disbarment for conversion of client and firm funds), and *Grievance Administrator v Rodney Watts*, 05-151-GA (ADB 2007) (disbarment for conversion of attorney fees belonging to another attorney).