STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellant,

v

Anthony T. Chambers, P 38177,

Respondent/Appellee,

Case No. 12-80-GA

Decided: October 24, 2013

Appearances:

Kimberly L. Uhuru and Patrick K. McGlinn, for the Grievance Administrator, Petitioner/Appellant
Kathy L. Henry (before the hearing panel), for the Respondent; and,
Donald D. Campbell (on review), for the Respondent/Appellee

BOARD OPINION

Tri-County Hearing Panel #16 issued a report and order of discipline in this matter on April 15, 2013, suspending respondent's license to practice law in Michigan for 180 days, and "until he establishes, to the satisfaction of the panel, that his condition has improved to the extent where the question no longer exists as to his ability to practice law competently." The panel also imposed the condition that respondent's reinstatement must be preceded by his reimbursement of unearned fees to clients, Shannon Williams and David Root. Based upon respondent's default for failure to timely answer the complaint, the panel found the following:

> With respect to Shannon Williams, respondent was paid $27,500 to provide certain legal services to Williams but failed to do so and he refused to provide Williams any refund. In addition, respondent failed to deposit Williams' funds into an IOLTA or non-IOLTA account, all in violation of MRPC 1.1(c); 1.2(a); 1.3; 1.4(a); 1.4(b); 1.15(d) and (g); 1.16(d); 8.4(a) and (c); and MCR 9.104(1)-(4);
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> With respect to David Root, respondent was paid $10,000 to provide certain legal services to David Root's son but failed to do so and refused to provide any refund, all in violation of MRPC 1.15(b)(3); 1.15(d); 1.16(d); 8.4(a) and (c); and MCR 9.104(1)-(4);

> Respondent failed to cooperate with petitioner's investigation of these matters all in violation of MRPC 8.1(a)(2); 8.4(a) and (c); and MCR 9.104(1)-(4); and,
>
> Respondent improperly, and repeatedly, used his IOLTA account for personal and business purchases and did not pay withholding taxes on wages he paid to his employees between November 2010 and November 2011, all in violation of MRPC 1.15(d); 8.4(a) and (b); and MCR 9.104(2)-(5). [HP Report, 4/15/2013, p 3.]

The Grievance Administrator petitioned for review and the Attorney Discipline Board conducted review proceedings on July 10, 2013, in accordance with MCR 9.118. For the reasons discussed below, we increase discipline to disbarment in accordance with the American Bar Association Standards for Imposing Lawyer Sanctions and prior opinions of the Board.

A. Proceedings Before the Hearing Panel

The Grievance Administrator's five-count formal complaint was filed July 26, 2012. Respondent failed to answer and a default was entered. The panel denied respondent's motion to set aside the default. The day before the December 11, 2012 hearing, respondent filed an answer to the formal complaint and affirmative defenses which, for the first time, asserted an impaired ability defense under MCR 9.121(C)(1). While the panel declined to set aside the default, it did allow respondent to present medical expert testimony at the hearing.

The Grievance Administrator admitted relevant bank records which showed that Mr. Root's $10,000 was deposited into respondent's IOLTA account on January 31, 2011, and that respondent immediately made payments to his assistant and for his office rent which rendered the account balance in the negative by $2,400 within a week of the deposit. (P Ex 4; Tr 12/11/2012, pp 148-149.) In closing, the Grievance Administrator's counsel referred to Standard 4.11 of the American Bar Association Standards for Imposing Lawyer Sanctions which calls for disbarment when a lawyer knowingly converts client funds to his or her own use and noted that there were a number of aggravating factors under ABA Standard 9.22 that applied. Specifically, 9.22(a) (prior disciplinary offenses); 9.22(b) (dishonest or selfish motive); 9.22(e) (bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency; 9.22(g) (refusal to acknowledge wrongful nature of conduct); and 9.22(i) (substantial experience in the practice of law). The Grievance Administrator's counsel also cited prior decisions of the Board, namely, *Grievance Administrator v Frederick A. Petz,* 99-102-GA; 99-130-FA (ADB 2001) and

Grievance Administrator v Terry A. Trott, 10-43-GA (ADB 2011), in further support of her request for disbarment. Finally, she requested that respondent be ordered to pay restitution to both Mr. Root and Mr. Williams.

Respondent presented medical experts who testified in mitigation regarding respondent's alleged impairment in support of his request for probation under MCR 9.121(C). Respondent presented the testimony of psychiatrists Xavier White, M.D. and Gerald A. Shiener, M.D. Dr. White examined respondent for the first time on October 2, 2012, and was providing ongoing treatment. Dr. Shiener examined respondent on October 30, 2012, at Dr. White's request. (Tr 12/11/2012, pp 10, 13, 25, 54-55.)

Both doctors generally opined that respondent suffered from alcohol dependency, major depression, avoidant personality disorder, and that he had multiple stresses occurring in his life. (Tr 12/11/2012, pp 19, 64-67.) Dr. White further opined that respondent's depression, alcohol dependancy, and avoidance disorder were the primary reasons that the misconduct set forth in the formal complaint occurred. (Tr 12/11/2012, pp 29-30.) Dr. Shiener further testified that respondent had compulsive traits and that in his opinion, respondent's dependency on alcohol, depressive condition and impaired judgment affected respondent's judgment in the misappropriation of client funds out of his IOLTA account. (Tr 12/11/2012, p 67.) Respondent testified that he believed his use of alcohol had an impact on his representation of Mr. Williams and acknowledged that he was not using his IOLTA account properly. (Tr 12/11/2012, pp 100-101, 103-104.)

Respondent's counsel requested probation under MCR 9.120(C) and noted that there were a number of mitigating factors under ABA Standard 9.23 that applied, specifically, 9.23(a) (absence of a prior disciplinary record); 9.23(b) (absence of a dishonest or selfish motive); 9.23(d) (timely good faith effort to make restitution or to rectify consequences of misconduct); 9.23(i) (mental disability or chemical dependancy including alcoholism or drug abuse); and 9.23(l) (remorse). Respondent's counsel also cited *Grievance Administrator v Patrick M. Tucker,* 91-60-GA; 91-104-FA; 91-180-GA (ADB 1992); *Grievance Administrator v Thomas H. Peterson, III,* 90-41-GA; 91-11-GA (ADB 1994); *Grievance Administrator v Peter W. Macuga,* 10-25-AI; 10-39-JC (ADB 2012); and, *Grievance Administrator v Alexander Benson,* 08-52-GA (ADB 2010).

The panel found that respondent met the "essential criteria of MCR 9.121(C)," but the public interest would not be served by the entry of an order of probation. Instead, the panel determined that

respondent's license to practice law in Michigan should be suspended for 180 days followed by a "further assessment during reinstatement proceedings." The panel further ordered that respondent's reinstatement must be preceded by proof that he has entered into agreements to return the unearned fees to both Mr. Root and Mr. Williams. (HP Report 4/15/2013, pp 12-14.)

B. Proceedings Before the Attorney Discipline Board

The Grievance Administrator petitioned the Attorney Discipline Board for review of the hearing panel's order on the grounds that the panel erred by imposing discipline less than disbarment in relation to the misconduct (knowing conversion of client funds), and by failing to order restitution. In accordance with MCR 9.118(B), the Board issued an order to show cause why the hearing panel order should not be affirmed. Respondent filed a reply brief in which he argued that he did not knowingly convert client property because his alcoholism and depression interfered with his decision making, which would warrant a suspension rather than disbarment under the ABA Standards. Respondent further argued that even if ABA Standard 4.11 applied, as argued by the Grievance Administrator, his alcoholism and depression amounted to compelling mitigation which again would warrant a suspension rather than disbarment under the ABA Standards. Respondent requested that the panel's order of suspension be affirmed.

Discussion

In accordance with *Grievance Administrator v Lopatin,* 462 Mich 235 (2000), the Board and its hearing panels have been directed to utilize the ABA Standards for Imposing Lawyer Sanctions in determining the appropriate level of discipline to impose when misconduct has been established. Once the panel has identified the duty violated, the lawyer's mental state and the potential or actual injury caused by the lawyer's misconduct under ABA Standard 3.0, and identified the appropriate violated standard, the hearing panel may then consider the existence of aggravating or mitigating factors when determining the final sanction. Finally, as this Board noted in *Grievance Administrator v Ralph E. Musilli,* 98-216-GA (2000), the Board or hearing panel may consider whether there are any other factors which may make the results of the foregoing analytical process inappropriate for some articulated reason.

In this case, respondent was found to have committed multiple rule violations. Specifically, respondent was paid $27,500 to represent Shannon Williams and $10,000 to represent Zachary Root,

but he failed to do so and he refused to provide refunds after spending the money. Further, respondent failed to deposit Williams' funds into a trust account. With regard to the $10,000 Root retainer, respondent quickly withdrew these funds from his trust account to, among other things, pay $9,000 in office rent. As noted above, he also failed to cooperate with the Grievance Administrator's investigation of these matters. Finally, respondent used his IOLTA account for personal and business purchases and did not pay withholding taxes on wages he paid to his employees between November 2010 and November 2011. The parties recognize that under the ABA Standards the ultimate sanction imposed should at least be consistent with the sanction for the most serious instance of misconduct. It is undisputed that the most serious instance of misconduct was respondent's conversion of funds.

Clearly, ABA Standard 4.1 is the applicable standard to apply for conversion of client property, and it provides that disbarment is generally appropriate when a lawyer knowingly converts client property. Although, respondent argues that he did not have the requisite mental state to warrant the imposition of disbarment under ABA Standard 4.11 because his alcoholism and depression interfered with his ability to knowingly and/or intentionally convert the funds, the panel made no such specific finding and we cannot conclude that the evidence supports this claim.

The testimony of the medical experts did establish, in our view, that respondent suffered from alcohol and depression for some years, and most likely while he committed the misconduct herein. Both experts testified that respondent's "dependency on alcohol and depressive conditions and impaired judgment affected his judgment in the misappropriation of client funds out of his IOLTA account." (Tr 12/11/2012, pp 69-70.) However, we cannot conclude under these circumstances that such impaired judgment negated respondent's knowledge of his wrongful actions or otherwise amounts to compelling mitigation. To the contrary, his actions showed the ability to manage funds in his best interest quite competently. When given a retainer, which respondent himself admitted was unearned, he took deliberate action almost immediately after his receipt of the funds to withdraw them from his trust account to pay a travel agent, his assistant and his outstanding rent. Thus, while respondent's alcohol dependency and depression was undoubtedly real, the evidence simply does not support the claim of respondent that he was selectively impaired, i.e., that he was competent to try cases and comment upon them in the media, but that he could not manage "the business side of his practice." Respondent's testimony in this regard dovetails with the expert testimony regarding

his compulsive nature which drove him to try cases, something he was good at, instead of managing his practice (and his client's funds), which, not being his strong suit, made him feel less than adequate. Again, respondent's virtually immediate conversion of Mr. Root's funds was a knowing and intentional act that cannot be described in any other way. Even the panel, which found that respondent met the essential criteria of MCR 9.121(C), concluded, as it had the discretion to do under the rule, that the public interest would not be served by the entry of an order of probation. Furthermore, the panel made no finding with regard to an essential element of MCR 9.121(C), that the impairment was the cause of or substantially contributed to that conduct as referenced in MCR 9.121(C)(1)(b). We have also reviewed the record and find that there is insufficient evidence to conclude that causation in this regard was shown and we agree with the panel that the public interest would not be served by the entry of an order of probation.

The Administrator argued below and on review that ABA Standard 4.11 is applicable and that the factors cited in mitigation do not rise to the level of compelling mitigation warranting discipline less than disbarment. Because the evidence in the record clearly establishes the applicability of Standard 4.11 and the absence of compelling mitigation, we conclude that disbarment is the appropriate sanction in these circumstances.

The Administrator raises another claim on review. The panel carefully inquired into the appropriateness of restitution and held that respondent's reinstatement must be preceded by his reimbursement of unearned fees in the Williams and Root matters. Specifically the panel required that respondent:

> Include with his petition [for reinstatement] his verified statement that he had reached agreements with Shannon Williams and David Root for the return of unearned fees in amounts acceptable to Mr. Williams and Mr. Root. In the alternative, respondent shall include a statement for each matter stating the amount of the proposed refund, the date his most recent proposal was submitted to Mr. Williams and/or Mr. Root, and an itemized statement detailing the amounts to which respondent claims to be entitled on a *quantum meruit* basis. If respondent has not made arrangements for a refund of fees in the Williams and Root matters, that issue will be addressed by the panel during the course of the reinstatement proceedings. [HP Report 4/15/2013, p 14.]

While the panel's decision to order restitution was undoubtedly appropriate and intended for the protection of the public, we agree with the Grievance Administrator that the payment of restitution should not be dependent upon whether or not respondent ever decides to seek

reinstatement. By default, it was established that respondent did not earn the fees. The evidence adduced in the hearing does not establish that the clients derived any value as a result of the payment of these fees. Moreover, the conversion and retention of these funds under these circumstances also militates in favor of full restitution. Accordingly, respondent shall be ordered to pay restitution to David Root and Shannon Williams in the amount of $10,000 and $27,500, respectively.

Conclusion

For the reasons discussed above, we conclude that, based on the misconduct in this case, including respondent's knowing conversion of funds, disbarment is the appropriate sanction to be imposed. Accordingly, we will enter an order increasing discipline from a 180-day suspension to disbarment and order respondent to pay restitution in the aggregate amount of $37,500.

Board members Thomas G. Kienbaum, James M. Cameron, Jr., Sylvia P. Whitmer, Ph. D., Rosalind E. Griffin, M.D., Carl E. Ver Beek, Craig H. Lubben, Lawrence G. Campbell, Dulce M. Fuller, and Louann Van Der Wiele concur in this decision.