STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellant,

v

Peter C. Mason, Jr., P 24259,

Respondent/Appellee,

Case No. 13-4-GA

Decided: September 17, 2013

Appearances:

Robert E. Edick, Deputy Administrator, (on review) for the Grievance Administrator, Petitioner/Appellant

Patrick K. McGlinn, Senior Associate, (before the hearing panel) for the Grievance Administrator

Peter C. Mason, In Pro Per, Respondent/Appellee, did not appear

BOARD OPINION

Ingham County Hearing Panel #2 issued an order of discipline in this matter on April 25, 2013, suspending respondent's license to practice law in Michigan for two years, with an additional condition that he resign as the trustee of a revocable trust which was not the subject of this proceeding. Based upon respondent's default for failure to answer the complaint and his admission to the hearing panel that, "the essence of the complaint is true," the panel found that, as conservator of the estate of a minor child and as conservator for a protected adult, respondent intentionally misappropriated funds from the two accounts under his control. The Grievance Administrator has petitioned for review and the Attorney Discipline Board has conducted review proceedings in accordance with MCR 9.118. For the reasons discussed below, we adopt the Administrator's argument that respondent's admitted conduct requires the entry of an order of disbarment in accordance with the American Bar Association Standards for Imposing Lawyer Sanctions (ABA Standards) and prior opinions of the Board.

A. Proceedings Before the Hearing Panel

The Grievance Administrator's formal complaint was filed January 11, 2013. The complaint was served by regular and certified mail on January 15, 2013, and respondent's default for his failure

to answer was filed March 1, 2013. Respondent does not dispute that he received the formal complaint and that he had notice of the proceeding. At the commencement of the hearing before the panel on March 8, 2013, respondent was asked if he had plans to move to set aside the default:

> No, I do not. I, as I indicated to [AGC counsel], the basic factual allegations are correct. There are explanations which in the second stage I'd like to present, however, the essence of the complaint is true. And I am not going to - and that's why I didn't file a reply to it. I wasn't going to contest it. [Tr, p 9.]

Following the panel's declaration that the misconduct described in the complaint was established by default, the panel proceeded to the sanction phase of the hearing.

Count One of the complaint is based upon respondent's conduct while serving as the court-appointed conservator for a minor who had been awarded $10,000 in a personal injury matter. It is charged in Count One that although the letters of authority issued to respondent by the probate court in January 1999 specifically ordered that funds were not to be withdrawn "without a separate specific order of the court authorizing the withdrawal," respondent nevertheless depleted the account to $910, without authorization, between August 2011 and January 2012. It is noted in Count One of the complaint that respondent was subsequently removed as conservator of the estate in January 2012, and that he has since made restitution for the full amount of those withdrawals.

Count Two is based upon respondent's conduct as conservator for the estate of an adult who voluntarily requested a conservator to assist in the handling of her finances at a time when she was recovering from serious injuries sustained in an auto accident. As conservator, respondent was entrusted with funds in excess of $250,000 belonging to the ward. It is charged in Count Two that from June 2005 to April 2012, respondent removed at least $220,000 from the estate accounts, with approximately $200,000 going to respondent's professional or personal accounts and $20,000 going to a business, Mogg Enterprises, in which respondent had a partnership interest. The complaint charges that respondent consulted with the ward regarding the withdrawals, describing them as loans to Mogg Enterprises, but that he did not advise her that the vast majority of the transfers were for his own personal use. Subsequent to January 2012, respondent was removed as conservator for that estate by the probate court and he has since made full recompense to the successor fiduciary, as ordered by the court.

With regard to the $10,000 held on behalf of a minor [Count One], respondent testified to the panel that the probate court was aware that the child and her mother could not easily be located

and that he had decided not to conduct a meaningful search until the child turned 18. Respondent admitted to the panel that in the fall of 2011, he removed the remaining balance of around $9,000 (the amount remaining after ten years of annual fees of approximately $100). He explained that the restricted account for the estate was at the same bank where he maintained his personal accounts and that the restricted estate account "magically appeared" (Tr, p. 20) when he logged on to his personal account online. In answer to a question from the panel chairperson as to whether he knew that he was misappropriating the funds, respondent testified,

> I knew I was taking the funds out and certainly without the court's permission. I certainly don't deny that at all. [Tr, p. 21.]

Respondent was also questioned about his use of funds belonging to the conservatorship estate of the adult ward [Count Two]:

GA's Counsel:	How many times did it take you to misappropriate that $220,000?
Respondent:	You mean how many withdrawals from the account?
Q:	Yes.
A:	I don't know how many. There were many, many, probably close to 100.
Q:	Was it based on you needed some money for a specific thing and so you paid for it out of that account or were you taking a larger lump sum for your own use and then using it as you desired?
A:	It was taken out from time to time, frankly, when I needed funds, and it was noted as a transfer or a loan from, it was denoted as [sic] all the records in [sic] a loan to Mogg Enterprises and the monies were used.
Q:	Was your partner, Mr. Mogg, aware that you were using Mogg Enterprises properties to secure the loan or secure these transfers from the trust?
A:	Withdrawals, no, no. [Tr, pp 29-31.]

Respondent was given an opportunity to testify with regard to mitigating factors. Respondent is 64 years old and he described the medication he is taking, as well as a chronic condition for which

he was hospitalized during the preceding year. Respondent claims some responsibility for the care of his adult daughter, as well as his 90 year-old mother who lives independently in Arizona.

In closing arguments, the Grievance Administrator's counsel referred the panel to Standard 4.11 of the ABA Standards which calls for disbarment when a lawyer intentionally converts client funds to his or her own use. He acknowledged that respondent has no prior discipline but suggested the presence of the aggravating factors of a dishonest or selfish motive; a pattern of misconduct; multiple offenses; and, especially, the vulnerability of the victims. Counsel also called the panel's attention to the Board's opinions in the recent matters of *Grievance Administrator v Terry Trott*, 10-43-GA (ADB 2011) and *Grievance Administrator v Oosterhouse*, 07-93-GA (ADB 2008), in which misappropriation of funds resulted in disbarment.

Following its deliberations, the panel members returned to state on the record that they had determined that a two-year suspension would be appropriate in this case and that respondent should immediately resign as trustee of a revocable trust which was not the subject of the proceeding.

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 in its application of the ABA Standards and imposed insufficient discipline. In accordance with MCR 9.118(B), an order to show cause was issued directing the parties to appear before the Board on July 10, 2013, to show cause why the hearing panel order should not be affirmed. In response to the Grievance Administrator's brief in support of petition for review, respondent filed a reply brief taking the position that although he admitted to self-dealing and failure to make full disclosure as conservator to either of his wards or to the probate court, he denied that he had engaged in conversion of funds.

On the day of the scheduled review hearing before the Board, respondent sent an email to the Grievance Administrator's counsel stating:

> Due to health reasons, I will not be able to attend the hearing today. I am not asking for an adjournment as I wish to have this matter concluded.

That information was provided to the Board which determined that the oral argument by the Grievance Administrator for increased discipline should proceed as scheduled.

Discussion

In his brief, respondent argues that his unauthorized withdrawals from the two estates did not constitute conversion of funds. He claims that when the withdrawals were discovered, he made full repayment to the successor fiduciaries and, he argues, neither ward suffered financial loss.

Such a "no harm, no foul" argument must be soundly rejected. Under the prior opinions of the Board, as well as opinions from other jurisdictions, respondent's unauthorized and deliberate removal of funds entrusted to his care as conservator of the two estates constituted knowing conversion of estate funds. As this Board observed in *Grievance Administrator v Paul S. Schaefer*, 01-140-GA (ADB 2004):

> It has been held in another jurisdiction that: "Knowing conversion requires proof of three elements: (1) the taking of property entrusted to the lawyer, (2) knowledge that the property belongs to another, and (3) knowledge that the taking is not authorized. *Colorado v Jerrold C. Katz*, 58 P 3d 1176 (Colo PDJ 2002) (following *People v Varallo*, 913 P2d 1 (Colo 1996)).[1]

As established by respondent's own testimony to the panel, respondent's deliberate unauthorized removal of estate funds met all three prongs of this definition of "knowing conversion."

In the instant case, respondent testified to the panel that when the shortfalls in the two estates were discovered, he was able to repay the money using funds from a trust established for his benefit by his mother. (Tr, p 30.) When asked why he did not take funds from that trust, as opposed to taking funds held on behalf of two protected individuals, he explained to the panel that it was simply a matter of convenience,

> Because the corpus of the trust [established by my mother] was invested in bank funds, bank stock, and the bank stock, you know, it did worse than the real estate in terms of liquidation. [Tr, pp 30-31.]

While it is fortunate that respondent had the financial resources to repay funds he had taken from the two estates, the Board has previously warned against an over emphasis on restitution as mitigation in misappropriation cases and we have cited the importance of maintaining public confidence in the legal profession as a repository of client funds.

> When client funds have been commingled with the attorney's funds and then spent, whether by mistake or design, some attorneys will be in a position to rectify the situation. Some, unfortunately, will not. The client entrusting funds to an attorney's

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[1] *Schaefer, supra,* pp 11-12.

> care should not have to gamble on that attorney's future financial well-being. Compliance with MRPC 1.15 assures that regardless of the attorney's personal financial situation, the client's money will remain intact and inviolate in a segregated account. As the Illinois Supreme Court stated: "It is the risk of the loss of the funds while they are in the attorney's possession, and not only their actual loss, which the rule is designed to eliminate...." [*Grievance Administrator v Deborah C. Lynch*, 96-96-GA (ADB 1997), citing *In re Bizar*, 97 IL2d 127; 454 NE2d 271 (1983).

In accordance with *Grievance Administrator v Lopatin*, 462 Mich 235 (2000), the Board and its hearing panels are to follow the ABA Standards in determining the appropriate level of discipline when misconduct has been established. Once the recommended sanction has been determined under ABA Standard 3.0 by identifying the duty violated, the lawyer's mental state and the potential or actual injury caused by the lawyer's misconduct, the hearing panel may then consider the existence of aggravating or mitigating factors. In this case, respondent's conduct falls squarely under ABA Standard 4.11 which states that, absent aggravating or mitigating circumstances in cases involving the failure to preserve client property:

> 4.11 Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client.

Furthermore, the Board has held, in a line of opinions beginning in 2001 with *Grievance Administrator v Frederick Petz*, 99-102-GA; 99-130-FA (ADB 2001), that cases involving conversion of funds held as a fiduciary warrant strict scrutiny in terms of the weight to be given to mitigating factors. As the Board announced in *Petz, supra,*

> With our opinion today, we serve notice that hearing panels presented with facts similar to those in the instant case, that is, intentional conversion of client funds for the lawyer's personal or business use coupled with the absence of *compelling mitigation,* are, until further order of the Attorney Discipline Board or the Supreme Court, to apply the American Bar Association's Standards for Imposing Lawyer Sanctions and, if appropriate, to explain why the presumptive sanction of disbarment under Standard 4.11 should not be applied. [*Petz, supra,* pp 10-11.] (Emphasis added.)

We have applied that scrutiny to the panel's rationale for its decision to impose a suspension of two years. In its report filed April 25, 2013, the panel acknowledged the duty to apply the ABA Standards, but explained,

> However, the members of this panel do not read the ABA Standards as rigid sentencing guidelines and we note that individual Standards, including Standard 4.11, state that certain levels of discipline are generally appropriate "absent aggravating or mitigating circumstances." In this case, both aggravating and mitigating factors are

> present and the panel does not overlook the aggravating factors of a selfish motive, a pattern of misconduct, and the vulnerability of the victims of respondent's conduct. However, substantial weight must be given to the mitigating factor of the absence of a prior disciplinary record when the attorney in question has practiced law in Michigan without blemish for approximately 39 years. Respondent has demonstrated a cooperative attitude during these proceedings and has exhibited his remorse. Finally, the panel must recognize the unrebutted testimony from respondent regarding his personal health and family care issues over the past several years. Weighing all of these factors, the panel has concluded that a suspension of respondent's license for a period of two years, followed by the rigorous reinstatement proceeding contemplated in MCR 9.124, will achieve a public protection. [Panel Report, p 4.]

With all due deference to the hearing panel in this case, we are unable to conclude, under the specific facts and circumstances of this case, that the factors cited in mitigation rise to a level of compelling mitigation warranting discipline less than disbarment, especially when those mitigating factors are weighed against the aggravating effect of the vulnerability of the two wards whose funds had been entrusted to his care and his repeated withdrawal of funds from those estates over a period of years.

Conclusion

For the reasons discussed, we conclude that respondent's intentional conversion of funds entrusted to him as conservator of the estate of a minor and the estate of a protected person must, when analyzed under the ABA Standards and the prior opinions of this Board, result in respondent's disbarment from the practice of law.

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.