STATE OF MICHIGAN

Attorney Discipline Board

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ATTORNEY DISCIPLINE BOARD
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Grievance Administrator,

Petitioner/Appellant,

v

Mark J. Tyslenko, P 62987,

Respondent/Appellee,

Case No 12-17-GA.

Decided: May 1, 2013

Appearances:

Emily A. Downey (briefed), Patrick K. McGlinn (argued), for the Petitioner/Appellant
John L. Coté, for the Respondent/Appellee

BOARD OPINION

In five separate incidents over approximately one year, respondent converted a total of $9,200 in fees paid to him by clients and owed to the law firm that employed him. When confronted about the first instance discovered by his employer, he lied and said it was an isolated incident. He reiterated this false statement a few days later and ultimately admitted the truth only when the firm discovered additional instances of his conversion. Respondent admitted these facts and admitted that he had violated various sections of the trust accounting rule, as well as rules prohibiting dishonest and criminal conduct reflecting adversely on his fitness to practice law. The rules violated include MRPC 1.15(b)(1) and (3), MRPC 1.15(d), MRPC 1.15(g), MRPC 8.4(b), and MCR 9.104(2) and (3). The hearing panel entered an order suspending respondent from the practice of law for 45 days and imposing conditions requiring monitoring, reporting, and evaluation by the State Bar of Michigan's Practice Management Resource Center. The Grievance Administrator petitions for review seeking an order of disbarment, citing this Board's decisions and the American Bar Association Standards for Imposing Lawyer Sanctions (ABA Standards). We agree that the discipline imposed is insufficient for the misconduct in this case, and we will enter an order disbarring respondent from the practice of law in Michigan.

The conduct here may be described as intentional misappropriation, knowing conversion, or simply as theft. However it is described, there is a great deal of consistency in the decisions of this Board with respect to the appropriate sanctions for this fundamentally dishonest conduct. Whether the funds are client funds or third party funds, the presumptive sanction is disbarment. See, e.g., Grievance Administrator v Frederick A. Petz, 99-102-GA (ADB 2001) (30-month suspension increased to disbarment where lawyer "invested" his client's funds in his own partnership and paid his aunt's nursing home bills, etc.; disbarment declared to be the presumptively appropriate sanction to be imposed for intentional conversion of client funds absent compelling mitigation); *Grievance Administrator v Carl Oosterhouse*, 07-93-GA (ADB 2008) (affirming disbarment of lawyer who converted client and firm funds and submitted false expense reports, etc., and lied when confronted; ABA Standards 4.1 and 5.1 were applied; probation under MCR 9.121(C) was rejected); *Grievance Administrator v Rodney Watts*, 05-151-GA (ADB 2007) (increasing one-year suspension to disbarment where lawyer lied to court to obtain release of funds to be shared with predecessor counsel and misappropriated the funds, concluding that disbarment is the presumptive sanction for misappropriation of third-party funds notwithstanding the technical inapplicability of ABA Standard 4.1); and, *Grievance Administrator v Brent S. Hunt*, 12-10-GA (ADB 2012) (disbarring attorney for conservator who spent estate funds for personal and business expenses, citing, among other authorities, *Watts, supra,* and Standard 5.11, and rejecting attorney's claim in mitigation that he was unsure about where to send estate funds).

In this case, the hearing panel below applied ABA Standard 4.12 (suspension generally appropriate when a lawyer knows or should know he is dealing improperly with client property) and cited our opinion in *Grievance Administrator v Jeffrey A. Dulany*, 05-35-GA (ADB 2006), a case in which the Board rejected an argument that a client's check for $1,000 was properly retained by the lawyer in light of his written agreement with his law firm employer that he was owed more than $9,000 in compensation. In *Dulany*, the Administrator conceded that the hearing panel correctly applied ABA Standard 4.12 in light of the unique facts presented. However, the facts in that case differ markedly from those before us in the instant matter. Here, as the Administrator points out, the record is clear that respondent knowingly converted funds from his law firm, and our recent decisions involving such deliberate and dishonest conduct consistently proceed to assess the appropriate level of discipline from the starting point of disbarment either pursuant to Standard 4.11 (if client funds are involved) or under Standard 5.11 (where third party funds are taken).

We shall now proceed to examine the mitigating and other factors relied upon by respondent and the hearing panel in this case to support the sanction imposed. To attempt to support a sanction less than disbarment for respondent's conversion, and his dishonesty upon its discovery, respondent introduced the testimony of a licensed professional counselor who testified that she had seen respondent for six 50-minute sessions from June 4, 2012 through July 24, 2012. Also introduced at the July 30, 2012 hearing was a July 27, 2012 letter from the counselor, which states:

> Through a time line of events beginning in April of 2009 and continuing through October of 2010 it was determined that Mark was suffering from Chronic Adjustment Disorder with Mixed Disturbance of Emotions and Conduct (309.4 DSM-IV-TR). The diagnosis, in part, is defined by the onset of a series of events that persist and escalate causing emotional symptoms of depression and anxiety as well as a disturbance of conduct that can violate the rights of others. The Chronic specifier applies when the duration of the disturbance is longer than 6 months in response to a chronic stressor or to a stressor that has enduring consequences. [Exhibit A.]

The counselor explained that respondent "had a lot of significant events happen over some time with [his father-in-law's] heart attack[1], his wife becoming pregnant and not handling it very well, [his wife's] gallbladder issues[2], premature baby, father-in-law passed away of a heart attack, helping mother-in-law. So many emotional things that translated into financial."[3]

Respondent testified that cost overruns on the new home marked the start of his problems.[4] The "Time Line of Events" attached to respondent's brief to the panel also references the following events, among others:

2007	New home is built and completed in October of 2007
October of 2009	I don't have the funds available to pay mortgage. Payment from client is not turned over to the law firm.
January of 2010	Learn my insurance will not cover all medical bills from

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[1] Respondent's father-in-law's heart attack is the only one referenced in the Time Line or in testimony or briefs.

[2] The gallbladder issues are respondent's wife's, not his.

[3] Tr, pp 10-11.

[4] Tr, p 58.

	delivery and that it will not pay for daughter's Well Baby Checkups (the shots she must have).
[Winter] 2010	Help wife's parents with heating bills by purchasing wood pellets for their stove.
June of 2010	I request a second payment from client because I don't have enough money to pay all the bills.
Summer of 2010	I request a $700.00 payment from Mr. & Mrs. Flores for same reason.

Respondent's counselor testified that respondent's ability to practice law was not impaired by his adjustment disorder, but that the disorder substantially contributed to the misconduct. When asked to explain why, she responded: "I just think the emotional stressors and the pressure." She further testified that respondent no longer had chronic adjustment disorder "[b]ecause of the work that he's done, the steps that he's taken. He's become transparent. He's implemented healthy communication skills, incorporated people into his life to hold him accountable."

Asked whether the disorder went away in 2012 after respondent saw the counselor on the eve of the hearing or earlier, the counselor stated: "I think it's been a process. I don't think it instantly went away. I think it's on a continual process. I think it will continue to be something that he will purposefully work at." She further testified that the disorder could go away without any treatment and that respondent was not likely to be a repeat offender, even if he faces additional stresses like he faced starting in 2009:

> I believe the difference is that he now has things in place. He has reached out for a mentor within the profession. He has reported to me that counseling is something that he believes will be helpful throughout the year to check in and keep his stress in place, communication, personal support system has been put in place. And he reports that it's been very helpful. [Tr, pp 18-20.]

Respondent also presented to the panel evidence that he is using an accountant. And a 31-year practitioner testified that she would be monitoring respondent and assisting with bookkeeping matters among other things. Additionally, respondent submitted a brief which argued:

> THERE IS NO EVIDENCE THAT MR. TYSLENKO IS APT TO BE A RECIDIVIST. For one thing, circumstances have changed. His financial picture has improved. He is not exposed to handling

> large sums of cash. His clientele can only afford nominal retainers, which are usually earned within a matter of days. [July 20, 2012 Hearing Brief of Mark J. Tyslenko, p 9.]

The panel's decision to impose a 45-day suspension with conditions, turned in part on the following factors:

> strong unrebutted testimony from respondent, his counselor and his prospective monitor that the conduct which led to respondent's dismissal from his employer's law firm in October 2010, was not in character for this individual, that it was not consistent with his otherwise unblemished record as a lawyer or his reputation in the legal community; [and] that there is virtually [no] likelihood that this conduct will be repeated in the future. [HP Report, p 4.]

The hearing panel also found that the following mitigating factors existed:

> prompt restitution to [respondent's former] firm; the presence of personal or emotional issues which affected respondent's judgment and for which he is now treating with a counselor; an absence of injury to respondent's clients; cooperation with the discipline process; and respondent's remorse. [HP Report, p 5.]

To evaluate the degree to which these mitigating factors and circumstances might justify a departure, in this case, from the generally appropriate discipline of disbarment, we will review certain decisions of this Board regarding the weight assigned to various mitigating factors in particular cases, as well as some decisions from other jurisdictions which have a similar approach to misappropriation cases.

Initially, we note that our 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; 11-55-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:

> [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.]

In applying the ABA Standards, the first factor considered is the ethical duty violated. See ABA Standard 3.0(a). Additional factors, such as the lawyer's mental state, the actual or potential injury caused by the lawyer's misconduct, and aggravation and mitigation may vary in terms of importance. *Grievance Administrator v Ralph E. Musilli*, 98-216-GA (ADB 2000), p 3. As the Standards point out: "In a case where a lawyer intentionally converts client funds, for example, disbarment can be imposed even where there is no actual injury to any client (See Standard 4.11)." ABA Standard 3.0, Commentary.

Attorney discipline decisions from Michigan and elsewhere are replete with pronouncements to the effect that: "'The duty to keep client and third party funds safe and separate from lawyer funds is a fundamental one.'" *Grievance Administrator v William L. Fette*, 10-70-GA (ADB 2011), p 5. See, also, *Petz, supra,* quoting our Supreme Court as follows:

> There are few business relations involving a higher trust and confidence than that of an attorney acting as a trustee in the handling of money for a client or by order of the court. The basis of their relationship is one of confidence and trust. Any action by the attorney which destroys that basic confidence clearly subjects the legal profession and the courts to obloquy, contempt, censure and reproach. Foremost among the acts destroying the confidence between the public and the bar is the conversion and misuse of client funds. [*State Bar Grievance Administrator v Baun*, 396 Mich 421, 423 (1976).]

This language appeared originally in the opinion of this Board's predecessor, the State Bar Grievance Board, and was quoted by the Court in its opinion upholding the disbarment of respondent Baun for misappropriating funds from four estates.

We must now determine whether there is a basis in this case to impose a sanction other than the one deemed generally appropriate under the ABA Standards and Michigan precedent. In other words, we must decide whether there is evidence of "compelling mitigation" here. *Petz, supra.*

Because conversion of another's funds is antithetical to the fiduciary duties of an attorney, other jurisdictions follow a precept similar to that announced in *Petz, supra,* requiring compelling mitigation in order to justify a departure from the generally appropriate sanction of disbarment recommended by the ABA Standards for such conduct. See, e.g., *In Re Todd J. Thompson*, 991 P2d 820 (Colo, 1999). In *Thompson*, the respondent "misappropriated about $15,000 in funds that clients gave to him that he should have turned over to his law firm." 991 P2d at 821. The Colorado court affirmed the conclusion of the panel and board that respondent violated that state's trust accounting rule and its version of MRPC 8.4 which prohibits conduct involving dishonesty, fraud, deceit and misrepresentation. The opinion notes that respondent's treating psychiatrist testified, but the substance of that testimony is not summarized. It also notes a finding that respondent did not intend to permanently deprive the firm of the funds. Nonetheless, relying in part on ABA Standard 5.11(b), the court rejected the appellate disciplinary body's recommendation for a three-year suspension based on the court's decision in a 1998 case, and ordered disbarment. The court specifically found that the previous decision was "an unjustified departure from our cases that prescribe disbarment for knowing misappropriation of funds" and overruled it. 991 P2d at 823.

Mr. Thompson had 12 years in the profession without discipline, suffered from personal and emotional problems, was cooperative in the discipline proceedings, made a timely and good faith effort at restitution, and had evidence of good character and remorse.[5] The Colorado court said "the mitigating factors in this case are not so extraordinary as to call for a lesser sanction than disbarment." 991 P2d at 824. Although it found that Thompson was experienced, the court observed: "Inexperience in the practice of law is of little or no importance as a mitigating factor when the lawyer's conduct is dishonest." 991 P2d at 823. Thus, the sanction was imposed in accordance with this general rule: "Knowing misappropriation of funds from clients, or one's law firm, almost always results in disbarment." *Id.*

Colorado and Michigan are not alone in making disbarment the presumptive sanction for theft of firm funds and requiring exceptional mitigation in order to rationalize departure from that sanction. See, also, *In Re Jeffrey F. Renshaw*, 353 Ore 411 (2013) (citing ABA Standard 5.11(b) and others, rejecting various mitigating factors, citing two previous cases in which lawyers had diverted firm fees, and stating "a lawyer who 'embezzles' funds from the lawyer's firm is no different from

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[5] ABA Standard 9.32(c), (d), (e), (g), and (m).

a lawyer who takes his or her client's funds and . . . 'disbarment will generally follow' from that conduct").

This Board has also cited, with some frequency, an influential decision establishing a strong presumption that the most stringent discipline should be imposed for misappropriation. *In Re Wilson*, 81 NJ 451; 409 A2d 1153 (1979). In *Wilson*, the court noted that misappropriation of client funds by New Jersey lawyers had "occasionally resulted in suspension, ranging from six months to three years, rather than disbarment,"[6] and found this unacceptable in most instances. Thus, the New Jersey Supreme Court held that the strictest discipline for knowing misappropriation would be required absent extraordinary circumstances.

We cited *Wilson* in *Petz, supra* (involving client funds), and most recently in *Hunt, supra* (involving third party funds). We often cite it for the proposition that banks do not rehire crooked tellers or that restitution does not invariably yield a reduction in discipline. Today, we note its observations with regard to other mitigating factors. Although discipline cases will always have unique facts and arise out of distinct circumstances, and although we do not announce inflexible rules dictating the imposition of strictly uniform discipline for specific violations, general guidance is appropriate. In that spirit, we note with approval that the *Wilson* court minimized the importance of many mitigating factors traditionally offered in discipline cases when they are offered in a misappropriation case. For example, the court was not swayed by

> the economic and emotional pressures on the attorney which caused and explained his misdeed; his subsequent compliance with client trust account requirements; his candor and cooperation with the ethics committee; his contrition; and, most of all, restitution. [81 NJ at 456.]

Two other factors, frequently offered in all discipline cases, were also dismissed in *Wilson*:

> The inexperience or, conversely, the prior outstanding career, of the lawyer, often considered a mitigating factor in disciplinary matters, seems less important to us where misappropriation is involved. This offense against common honesty should be clear even to the youngest; and to distinguished practitioners, its grievousness should be even clearer. [81 NJ at 459-460.]

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[6] *Wilson, supra*, p 456.

We are unable to conclude that this case presents compelling mitigating factors warranting a reduction in the sanction that is generally appropriate for the knowing conversion here. Even the testimony of respondent's counselor does not explain the misconduct or serve as compelling mitigation. We have rejected or found unpersuasive similar mitigating evidence in other cases. See, e.g., *Oosterhouse, supra*, and *Grievance Administrator v Lisa M. Londer*, 07-127-GA (ADB 2008). Whether assessing impairment under MCR 9.121(C), or mitigating factors in the ABA Standards (such as Standard 9.32(c) or (i)), this Board and its hearing panels must find a "causal link . . . between [a] respondent's [mental condition] and [his or her] . . . theft." *Londer, supra*, p 6. That link has not been sufficiently established here. We do not minimize the tribulations respondent suffered at the time he committed his misconduct, but, as we have said in another matter,

> we cannot distinguish respondent from a person without the fundamental ethical grounding that prevents one from cheating, stealing or lying when the chips are down or circumstances are dire. A member of the bar need not be impervious to stress or be superhuman, but he or she must have the character to reject the option of theft under the circumstances of this case. [*Londer, supra,* p 6.]

This is an unfortunate case. Respondent, an 11-year practitioner, with an otherwise clean record and some support in his legal community, made a series of bad decisions which are entirely inconsistent with the most basic character requirements of a lawyer. The Michigan Supreme Court has established the discipline system's priorities and defined our duty here: "Regardless of our sympathy for the unfortunate circumstances of the disciplinary respondent, the paramount concern must always be the protection of the public and the profession." *In Re Grimes*, 414 Mich 483, 497; 326 NW2d 380 (1982). Accordingly, we will enter an order increasing the discipline imposed from a 45-day suspension with conditions to disbarment.

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

Board members James M. Cameron, Jr., Rosalind E. Griffin, M.D., and Craig H. Lubben, did not participate.