FILED
ATTORNEY DISCIPLINE BOARD
DECEMBER 28, 2012

STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellant-Cross Appellee,

v

Brent S. Hunt, P 30711,

Respondent/Appellee-Cross Appellant,

Case No 12-10-GA.

Decided: December 28, 2012

Appearances:
Todd A. McConaghy, for the Grievance Administrator
Brent S. Hunt, Respondent, In Pro Per

BOARD OPINION

Respondent admitted to a hearing panel that from 2003 to 2009 he commingled and misappropriated the sum of $7,423.00 which he was holding pending distribution to the conservator of the estate of a legally impaired person. Respondent acknowledged to the panel that he placed the funds in his business account and, for approximately six years, used the money to pay general law office expenses. The Grievance Administrator petitioned for review of the hearing panel's order entered June 20, 2012, imposing a reprimand, with educational and supervisory conditions, on the grounds that the hearing panel erred in not imposing greater discipline. The respondent filed a cross-petition for review on the narrow ground that the Grievance Administrator's original petition for review filed July 3, 2012, did not state reasons and grounds for the petition and therefore did not meet the minimum requirements of MCR 9.118(A)(1). The Attorney Discipline Board has conducted review proceedings in accordance with MCR 9.118. For the reasons discussed below, discipline in this matter is increased to disbarment.

Proceedings Before the Hearing Panel

The Grievance Administrator's formal complaint in this matter was filed February 6, 2012. Respondent, Brent S. Hunt, did not file a timely answer and his default was filed by the Grievance Administrator on March 6, 2012. Respondent filed an answer to the formal complaint three days later, on March 9, 2012. However, respondent did not file a motion to set aside the default.

At the hearing conducted on April 2, 2012, respondent appeared before the panel and stated that he was contesting the default, although he had not presented a motion to set aside the default or an affidavit of facts showing a meritorious defense, as required under MCR 2.603(D)(1). The panel nevertheless allowed respondent to present his oral motion to set aside the default.

Following its deliberation, the panel announced that it would not grant respondent's request to set aside the default. The panel noted that, apart from the technical deficiencies of his oral motion, respondent had "willingly and without any nudging by any third party," admitted that he had commingled the funds. The panel further noted that the Grievance Administrator had presented a transcript of respondent's sworn statement, taken September 23, 2011 (Petitioner's Exhibit 4), in which respondent admitted under oath that he had used the funds in question to pay general office expenses such as rent, utilities, telephone, automobile expenses and filing fees. The panel found that, based on respondent's default, together with his admissions, the charges of misconduct in the formal complaint were established and the panel moved to the separate sanction hearing to determine the appropriate discipline which is required by MCR 9.115(J)(2).

In his testimony to the panel, respondent described his conduct as resulting from misunderstandings or carelessness on his part and he explained that although the funds in question were, admittedly, not in his IOLTA account, he always considered those funds to have been "available." Respondent did not present an argument to the panel in support of a specific level of discipline. The Grievance Administrator's counsel argued for the entry of an order of disbarment, citing the American Bar Association Standards for Imposing Lawyer Sanctions, as well as prior opinions of the Attorney Discipline Board.

Following a recess, the hearing panel announced to the parties that it had concluded its deliberations and would enter an order of reprimand, coupled with conditions relative to the established misconduct as provided in MCR 9.106(3), including respondent's attendance at a

seminar on law practice management and an audit of his law office practices and procedures by the State Bar's Practice Management Resource Center (PMRC). The hearing panel's Order of Reprimand With Conditions was issued June 20, 2012. The Grievance Administrator's petition for review was filed July 6, 2012.

Factual Background

The evidence presented to the hearing panel, including respondent's own testimony, provides the factual background to the charges of misconduct in this case. In 2003, respondent was asked to assist in the sale of a house in Ecorse, Michigan owned by sisters Mary Jane Bicsak and Julia Rush. Their parents, who had died some years before, had quit claimed the house to the sisters but had reserved a life estate in the house for a third sibling, Donald Peters. In accordance with that life estate, Donald Peters had lived in the house, but by 2003 he was suffering from several physical infirmities and was living in a convalescent home where, according to respondent, he was receiving SSI benefits and Medicaid and was, in essence, a ward of the state.

Ms. Bicsak and Ms. Rush both resided outside of Michigan and they agreed to pay respondent $1,000.00 for his assistance in selling the house as well as an additional $1,500.00 to handle the necessary probate proceedings in Wayne County Probate Court in light of their bother's interest in the property. Respondent succeeded in having Ms. Bicsak appointed conservator of her brother's estate and he obtained approval from the probate court for the sale of the house. The house was sold in November 2003 and shortly thereafter the net proceeds from the sale were distributed to the siblings: $20,031.75 was distributed to Ms. Bicsak; $20,031.75 was distributed to Ms. Rush; and $7,423.16 was to be distributed to Mr. Peters (because Mr. Peters had lived in the house before moving to a convalescent home, certain charges for taxes and other expenses were deducted from his portion of the proceeds).

At a sworn statement at the Attorney Grievance Commission on September 23, 2011 (Petitioner's Exhibit 4), respondent explained that he did not distribute any funds directly to Mr. Peters after the closing because "he was a ward of the state and he was in a group home, and I was waiting for - I didn't know who to make the check to, because it wouldn't go to him." (Petitioner's Exhibit 4, p 21.) Respondent further explained that although he was not an expert in such matters, he assumed that if he gave the money to Mr. Peters, either the State of Michigan would take it or,

worst case, Mr. Peters would become ineligible for his federal benefits. He explained that it was his intention that "when they [Peters' caregivers] asked me for the money, I would pay them, and that is basically what I did." According to respondent, nobody asked him for the money for six years.

In June 2009, Ms. Bicsak, who now lives in Florida, filed a request for investigation (Petitioner's Exhibit 8) with the Attorney Grievance Commission. She complained that she had not received any cooperation from respondent since 2004. When she wrote to the Grievance Commission, she was under the impression that she was still the appointed conservator of her brother's estate. (In fact, the probate court had closed the estate for failure to file an accounting several years earlier.) Ms. Bicsak included a copy of her 2009 letter to respondent requesting, in her capacity as conservator, the balance of $7,423.36 held on behalf of her brother Donald Peters. She closed her request for investigation by saying,

> *My concern covers three things:*
>
> 1. *I want the information to answer to the State of Michigan as required.*
> 2. *Funeral arrangements were made by me to carry out my bother's [sic] wishes for his remains and I would like to see the money used to carry out his last request.*
> 3. *Since he is bed ridden, I would like to see some of the money used to replace the TV he has in the Eastwood Convalescent Home.*
>
> *If this is not possible and the money needs to go to the State, then that is fine. I just want to make sure that the money due my brother is spent on his behalf for him, and not misappropriated or mishandled in a questionable manner.* [Petitioner's Exhibit 8.]

Respondent filed his answer to the request for investigation on August 13, 2009 (Petitioner's Exhibit 5). He stated in that answer,

> I am holding $9,412.99 [sic] and I am willing to waive the attorney fee of $1,500.00 and pay the $9,412.99 to the appropriate party. [Petitioner's Exhibit 5.]

On November 5, 2009, Guardian Care Inc. sent a written request to respondent for delivery of all funds held on behalf of Donald Peters. On December 15, 2009, respondent wrote a check to Donald Peters, drawn on his IOLTA account at Charter One Bank, in the amount of $7,432.16 (Petitioner's Exhibit 9).

At his sworn statement in September 2011, respondent failed to bring the bank records specified in the Grievance Administrator's subpoena and he was somewhat vague as to whether or not the money to be distributed to Mr. Peters was originally deposited in his general account or into a trust account, but he did acknowledge that the money ultimately ended up in his business account (Petitioner's Exhibit 4, p 27). In fact, the Administrator had obtained the records for respondent's IOLTA account, which established that either (1) the money held for Donald Peters was not deposited into the IOLTA account in November 2003 or (2) if the funds had been placed in an IOLTA account after the sale of the house in November 2003, those funds were depleted by May 1, 2004.

At the hearing before the panel on April 2, 2012, respondent testified:

> I didn't have an escrow agreement with anyone in this file, and I guess I misunderstood or obviously was careless with the idea of my obligation in terms of trust for that $7,400. In my mind, it was money that was, that really was owed to the State. Again, I mean, I benefitted from it, bills were paid from it, but I never intended to take that money, and it was my intention to pay that money as soon as a proper request was made.
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> . . .
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> I didn't want to just send the money to Guardian Care because I didn't know what was going to happen with it and I didn't want to compound things. I did have conversations with Ms. Bicsak. I mean, I -- the money went into my account and there's, and there's no answer to that, other than I made a mistake with that. But I tried to communicate to Ms. Bicsak the fact that this isn't a situation where the money was going to Donald Peters, it was going to go to the State of Michigan. And even when I spoke with Mr. Borowski, who was the attorney for Guardian Care in the summer of 2009, I mean, he basically admitted to me he was going to be disqualified, they agreed they weren't going to boot him out of a convalescent home, but that's ultimately what happened, he didn't get the money, the money didn't go to him. And this is not a situation where -- I mean, Ms. Bicsak knew that I had the money the whole time and I never, I never misrepresented to her that the money was there, okay, it wasn't in a trust account, and I'll admit that, but the money ultimately was paid. [Tr, pp 44-46.]

As noted above, respondent wrote a check on his IOLTA account in the amount of $7,432.16 to Donald Peters on December 15, 2009. Donald Peters died in June 2010. The Grievance

Administrator's investigation continued, including the taking of respondent's sworn statement in September 2011 and formal proceedings were commenced with the Attorney Discipline Board on February 6, 2012.

Discussion

In its report issued January 20, 2012, the hearing panel acknowledged its obligation under *Grievance Administrator v Lopatin*, 462 Mich 235; 612 NW2d 120 (2000), to employ the American Bar Association Standards for Imposing Lawyer Sanctions and the panel acknowledged that it had considered the Grievance Administrator's argument that disbarment would be appropriate in this case under at least three of those Standards: Standard 4.11, which states that disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client; Standard 4.61, which states that disbarment is generally appropriate when a lawyer knowingly deceives a client with the intent to benefit the lawyer or another, and causes serious injury or potential serious injury to a client; or Standard 5.11, which states that disbarment is generally appropriate when a lawyer engages in serious criminal conduct, a necessary element of which includes misappropriation or when a lawyer engages in other intentional conduct involving dishonesty that seriously adversely reflects on the lawyer's fitness to practice.

The panel concluded, however, that

> The Administrator has very ably argued for a strict interpretation and enforcement of the ABA Standards and interpretative case[s] following. Strict constructionism has its place but it must on occasion yield to a more nuanced view of the intent of the rule and the nature of the offense by the specific person on trial. Such is the case before the panel.
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> There is no material dispute about the fact or with respect to this panel's judgment after its thoughtful interrogation of the respondent, review of evidence, and careful observation of the respondent throughout the proceedings. The panel is convinced, by respondent's ready acknowledgment of a mistake in judgment, that his resultant misconduct was but a "one-off" event. Mr. Hunt's error in judgment resulted from the unusual circumstance that Mr. Peters was a ward of the state and could not directly receive monetary proceeds without the potential harm of losing government benefits. In other words, respondent's error was due to unique circumstances that were most unlikely to reoccur. It is important to note that Mr. Hunt has served

> the public for 32 years and amassed a nearly spotless record. (One prior misstep occurred in 1991 for which he received a reprimand.) [Hearing Panel Report, June 20, 2012, p 5.]

The standard of review for the Attorney Discipline Board's review of a hearing panel's decision recognizes that while the Board is to determine whether or not there is evidentiary support for a panel's findings, the Board has greater discretion in its review of the panel's final result, in this case, the appropriate level of discipline. *Grievance Administrator v August*, 438 Mich 296, 304; 475 NW2d 256 (1991). This greater discretion to review and, if necessary, modify a hearing panel's decision as to the level of discipline, is based, in part, upon a recognition of the Board's overview function and its responsibility to ensure a level of uniformity and continuity. *Matter of Daggs*, 411 Mich 304; 307 NW2d 66 (1981).

While we agree with the hearing panel's view that the ABA Standards are neither absolutely rigid nor immune from reasoned interpretation, the Board has been straightforward in its instructions to hearing panels when it comes to applying the Standards to cases involving a lawyer's intentional conversion of funds.

The case of *Grievance Administrator v Frederick A. Petz*, 99-102-GA; 99-130-FA (ADB 2001) was the first such case considered by the Board following the Supreme Court's explicit instruction in *Grievance Administrator v Lopatin*, *supra*, to employ the ABA Standards in determining the appropriate level of discipline. Following the methodology provided in ABA Standard 3.0, the Board concluded that the intentional conversion of funds in *Petz* fell under ABA Standard 4.11, which states:

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

The Board noted in *Petz* that during its then more than 20 years of existence, the Board had regularly declared that willful misappropriation, absent compelling mitigation, had generally resulted in discipline ranging from a suspension of three years to disbarment. The Board also noted that in many of those cases the Board had been inclined to grant substantial deference to a hearing panel's imposition of discipline if the discipline fell within that presumptive range. However, the Board continued in *Petz*,

> 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 Standards for Imposing Lawyer Sanctions and, if appropriate, to explain why the presumptive sanction of disbarment under Standard 4.11 should not be applied.

The Attorney Discipline Board has consistently held that misappropriation of funds is a *per se* offense that does not involve the element of intent. *Grievance Administrator v Robert R. Cummins*, 159-88 (ADB 1988); *Matter of Steven J. Lupiloff*, DP 34/85 (ADB 1988), citing *In Re E. David Harrison*, 461 A2d 1034 (1983). The Board has also held that a lawyer's duty to hold money belonging to someone else separate from their own is so fundamental that there can rarely be an excuse. As we stated 25 years ago in *Grievance Administrator v Cummins*, *supra*:

> There should be no question as to the nature of the misconduct in this case. We can perceive of no excuse for an attorney's failure to be aware of the requirement under Rule 1.15 of the Michigan Rules of Professional Conduct [formerly DR 9.102(a)] that client funds be held separately from the lawyer's own money. *There are no exceptions in either the former or present rule which allow an attorney to commingle client funds in a business or personal account for reasons of convenience or expedience* . . . [*Cummins*, *supra* at p 2.] (Emphasis added.)

Regardless of whether or not anyone asked respondent for Mr. Peters' money for over six years, respondent has offered no justification for why *he* was entitled to use that money to pay his own office and personal expenses, without any supervision and without accounting for the funds to Mr. Peters, his conservator or caregivers, his sisters or a court.

We recognize that an argument could be made in this case that the funds in question were not, in fact, "client funds" but were funds held on behalf of a third person, Donald Peters. The ABA Standards, in the commentary to Standard 4.11, notes that "lawyers who convert the property of third persons other than their clients are covered by Standard 5.11." That Standard, in turn, directs that disbarment is generally appropriate when a lawyer engages in intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

In *Grievance Administrator v Rodney Watts*, 05-151-GA (ADB 2007), the Board noted this lack of clarity in the ABA Standards with regard to a lawyer's misuse of funds held on behalf of someone other than a client, but held,

> [W]e find nothing in the current ABA Standards which suggests that conversion of funds held in trust for another lawyer is somehow less egregious than conversion of funds held on behalf of a client. As succinctly argued by the Grievance Administrator, it is untenable to give this respondent a "break" simply because he stole money belonging to another lawyer rather than money belonging to a client. [*Watts*, *supra* at p 7.]

In this review proceeding, the Grievance Administrator has cited the Board's prior decision in another case involving a lawyer's improper handling of funds from the sale of a house before eventually remitting the proceeds to the client. In *Grievance Administrator v Patricia Dockery*, 00-72-GA; 00-91-FA (ADB 2001), the Board increased discipline from a suspension of 180 days to a suspension of three years, concluding that it should not disturb the hearing panel's reasoned conclusion that a suspension under ABA Standard 4.12 was appropriate under the circumstances of that case. In this case, *Dockery* is aptly cited for the Board's rejection of the notion that a lawyer's misappropriation of funds is mitigated in any significant way because the lawyer did not intend to permanently withhold the funds from the rightful owner. The Board's opinion in *Dockery* includes this citation:

> The passage of almost 30 years has not dimmed the relevance of a case often cited by the Board, *In Re Wilson*, 81 NJ 451; 409 A2nd 1153 (1979), which had this to say about the lawyer's intent in a case involving, among other things, the lawyer's failure to turn over the proceeds from the sale of a house until after an ethics complaint was filed:
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> > When restitution is used to support the contention that the lawyer intended to 'borrow' rather than steal, it simply cloaks the mistaken premises that the unauthorized use of clients' funds is excusable when accompanied by an intent to return them . . . lawyers who 'borrow' may, it is true, be less culpable than those who had no intent to repay, but the difference is negligible in this connection. Banks do not rehire tellers who 'borrow' depositors funds. Our professional standards, if anything, should be higher.

> Lawyers are more than fiduciaries: they are representatives of a profession and officers of this court. [*Wilson*, 409 A2nd at 156].

In the instant case, respondent had a number of opportunities during the six years that he held the funds belonging to Donald Peters to turn that money over to the court-appointed conservator or to Mr. Peters' caregivers or to seek instructions from the court. We cannot agree that his use of those funds for six years allows the misconduct in this case to be described as a "one off" event. Nor can we find in the record sufficient evidence of compelling mitigation of the type envisioned in *Grievance Administrator v Petz, supra*, and subsequent opinions dealing with the knowing misuse of funds belonging to another. There are, however, significant aggravating circumstances to be considered in this case, including respondent's selfish motive [Standard 9.22(b)]; an obstruction of the Grievance Administrator's investigation by failing to comply with requests to produce trust account records [Standard 9.22(e)]; a refusal to acknowledge the wrongful nature of his conduct [Standard 9.22(g)]; and the vulnerability of the victim of that conduct [Standard 9.22(h)].

Without doubt, the aggravating effect of the victim's vulnerability should be given weight in this case. When his parents' house was sold in 2003, Donald Peters was 66 years old and living in a convalescent home. He was described in the guardian ad litem's report (Petitioner's Exhibit 6) as "oriented and coherent," but "completely bedridden" and in need of 24 hour care. Despite respondent's professed assumption that any funds distributed to Mr. Peters would be taken by the state, respondent was admittedly "no expert" on the subject and there is no evidence in the record that he made any effort to research the issue between the time he took possession of Mr. Peters' share of the sale proceeds in November 2003 and his delivery of a check to Mr. Peters in December 2009. Perhaps Mr. Peters would not have benefitted from those funds if the money had been released to him. On the other hand, it is possible that the conservator or guardian could have found a way to use a small portion of that money to fulfill Ms. Bicsak's desire to replace her brother's television at Eastwood Convalescent Home. Unfortunately, Donald Peters was not in a position to assert a claim for that money.

Conclusion

On the issue presented in the respondent's cross-petition for review, that is, whether or not the Grievance Administrator's petition for review filed July 3, 2012, met the criteria of MCR

9.118(A)(1) by including a statement as to the grounds and reasons upon which the Grievance Administrator sought review, that issue is rendered moot by the filing of the Grievance Administrator's supplemental petition on July 16, 2012, clarifying his position that review was sought on the grounds that the hearing panel erred in not imposing greater discipline. That is consistent with the admonition in MCR 9.102(A) that subchapter 9.100 is to be liberally construed for the protection of the public, the courts and the legal profession and the instruction in MCR 9.107(A) that a proceeding may not be held invalid because of a non-prejudicial irregularity or an error not resulting in a miscarriage of justice.

On the issue presented in the Grievance Administrator's petition for review, we are unable to reconcile the discipline system's paramount duty of public protection with the imposition of a sanction less than disbarment under the facts and circumstances of this case. We therefore vacate the hearing panel Order of Reprimand With Conditions issued June 20, 2012, and increase discipline in this case to disbarment.

Board members James M. Cameron, Jr., Rosalind E. Griffin, M.D., Andrea L. Solak, Carl E. Ver Beek, Sylvia P. Whitmer, Ph. D., Lawrence G. Campbell, and Dulce M. Fuller concur in this decision.

Board Chairperson Thomas G. Kienbaum and Board Member Craig H. Lubben were absent and did not participate.