STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner-Appellant/Cross-Appellee,

v

Edward A. Schneider, P 30628,

Respondent-Appellee/Cross-Appellant,

Case No. 10-121-GA

Decided: December 16, 2011

Appearances:

Frances A. Rosinski, for the Grievance Administrator.
Phillip J. Thomas, for the respondent.

BOARD OPINION

This case involves misappropriation of client funds and misrepresentation to a client and third parties about the status of the funds. The panel found that respondent failed to promptly pay funds that the client or third person was entitled to receive and failed to promptly render a full accounting upon request by the client or third party, in violation of MRPC 1.15(b)(3). The panel also found that respondent engaged in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer, in violation of MRPC 8.4(b), and that respondent engaged in conduct contrary to justice, ethics, honesty, or good morals, in violation of MCR 9.104(A)(3). The parties do not challenge these findings of misconduct.

The hearing panel ordered that respondent be suspended for a period of 2½ years and ordered respondent to pay restitution in the amount of $12,000.00 plus interest to his client, Kifah Bazi. The Grievance Administrator has petitioned for review, arguing that the hearing panel imposed insufficient discipline that the Board should revoke respondent's license to practice law in Michigan. Also, the Administrator contends that the hearing panel erred in calculating the amount of restitution

based on the testimony and documentary evidence. Respondent has filed a cross-petition for review and argues that the discipline should be reduced to a one-year suspension based on the panel's findings that he did not act knowingly or intentionally in misappropriating the monies in question. For the reasons set forth below, we will revoke respondent's license and enter an order of disbarment. The hearing panel's order of restitution is affirmed.

I. Procedural and Factual Background.

Respondent acknowledges that he received approximately $50,000.00 in funds from his client, Mr. Bazi, to be held in trust, pursuant to an escrow agreement, to enable Mr. Bazi to purchase certain real property. There is no dispute that the money (or most of it) disappeared from respondent's trust account. After stonewalling the seller's attorney and the attorney for Mr. Bazi (who succeeded respondent as counsel), respondent finally admitted that he did not have all of the money. The Administrator's brief thoroughly summarizes the facts, including receipt by respondent of $5,000 earnest money, $31,000 at a subsequent closing, and payments of $1,200 per month (these amounts are approximate) until the balance in respondent's trust account was supposed to be nearly $50,000. There is no dispute that the balance in respondent's IOLTA trust account fell to approximately $17,000 within the two weeks after respondent deposited the $31,257.08 in closing proceeds. Respondent admits that he still owes Mr. Bazi approximately $12,000.00, not including interest.

The panel found, based on respondent's admissions, that he: failed to promptly pay funds that the client or third person was entitled to receive, in violation of Michigan Rules of Professional Conduct (MRPC) 1.15(b)(3); failed to promptly render a full accounting upon request by the client or third party, also in violation of MRPC 1.15(b)(3); engaged in conduct prejudicial to the administration of justice, in violation of MCR 9.104(A)(1) and MRPC 8.4(c); and engaged in conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach in violation of MCR 9.104(A)(2).

In light of respondent's admissions, the main focus of the hearing was on the allegations that respondent knowingly misappropriated the funds entrusted to him and misrepresented the status of those funds to his client, to Mr. Bazi's counsel in the land contract forfeiture lawsuit, and to the seller of the property. The panel found, based on testimony and exhibits presented at the hearing, that

respondent engaged in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer, in violation of MRPC 8.4(b) and engaged in conduct contrary to justice, ethics, honesty, or good morals, in violation of MCR 9.104(A)(3).

The panel made the critical decision to apply the ABA standard calling for suspension instead of disbarment:

> While not condoning respondent's conduct in any respect, we do not find that the evidence in this case established that respondent did, in fact, knowingly and intentionally convert the funds in such a way as to bring his misconduct under the guidelines of Standard 4.11 and *Grievance Administrator v Petz*, [99-102-GA; 99-130-FA (ADB 2001)]. Rather, funds in his IOLTA account were withdrawn when he knew, or should have known, that he was failing to discharge his obligations as a fiduciary.[1]

The hearing panel also found that:

> The testimony presented clearly showed that respondent continued to represent to Mr. Bazi, opposing counsel and Mr. Bazi's successor counsel, that the funds Mr. Bazi had paid into respondent's IOLTA account were being maintained.[2]

The panel suspended respondent for 2½ years and ordered restitution in the amount of $12,000 with statutory interest, less $1,000 to be credited for an interest payment previously made by respondent.

II. Misappropriation.

With respect to misappropriation, the panel's report contains the following discussion:

> When respondent was questioned about how his IOLTA account was handled, he stated that it was his wife's responsibility to review the IOLTA account statements and determine when payments were to be made from it. She was also responsible for the bank reconciliation and handled the day-to-day operations of disbursements from his IOLTA account and she would prepare checks for his

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[1] HP Report, p 7.

[2] HP Report, p 2.

signature. He did not realize until he reviewed his IOLTA account records in the latter part of 2008 that his wife had been mismanaging or mishandling his law office bank accounts, but he took full responsibility for how his office was run and for the amounts in his IOLTA. (Tr 02/28/11, pp 188-192.)

Respondent testified there was a general ledger in his office, which his wife maintained, and that she would note any monies coming in or going out. However, respondent stated that he would make a notation in a separate client ledger. Additionally, his wife would tell him when monies needed to be paid out of his IOLTA account and she would prepare the checks for his signature. Although the check register was kept separate from the checkbook, respondent would usually check to see that there was sufficient money in the IOLTA account before he signed the checks. Respondent admitted that in January 2006, he paid over $23,000.00 to the State of Michigan out of his IOLTA account on behalf of another client, Extreme Gas, but stated that he did not know that he was using Mr. Bazi's escrow funds. Also, by the time he found out about the overpayment, Extreme Gas had gone out of business and had filed bankruptcy. (Tr 02/28/11, pp 212-222; Tr 03/31/11, pp 30-32.)

A review of respondent's IOLTA Account Summary for February 2006 shows a beginning balance of $20,007.15. (Petitioner's Exhibit 2, page 13.) Even though respondent received deposits in the total amount of $21,403.70 during the month of February, which included Mr. Bazi's monthly land contract payment of $1,213.65, he continued to authorize checks from the account. As of February 28, 2006, his IOLTA account balance was $16,909.25, well below the $31,000.00 that Mr. Bazi had deposited back in November 2005.

* * *

By his own admission, respondent was responsible for funds entrusted to him to hold in an escrow account and he failed to maintain those funds in his IOLTA account. Under prior opinions of the Attorney Discipline Board, respondent has engaged in misappropriation which is a *per se* offense. *Grievance Administrator v Deborah Lynch*, 96-96-GA (ADB 1997). However, it appears to this panel that the Attorney Discipline Board, in *Grievance Administrator v Petz*, [99-102-GA; 99-130-FA (ADB 2001)], intentionally distinguished between a lawyer's intentional conversion of funds, generally warranting disbarment, from the *per se* offense of misappropriation which may result in lesser forms of discipline. See, for example, *Grievance Administrator v Lynch, supra* (reprimand with conditions increased to suspension of 180 days); *Grievance*

> *Administrator v Robert R. Cummins*, ADB 159-88 (ADB 1988) (discipline reduced from 30 day suspension to reprimand); and *Grievance Administrator v William F. Klintworth*, ADB 104-88; 210-88 (ADB 1989) (reprimand affirmed). Indeed, that distinction is present in ABA Standard 4.1, which distinguishes between knowing conversion in Standard 4.11 and a lawyer's knowledge that he is dealing improperly with client property in Standard 4.12.
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> In this case, respondent has essentially admitted the factual allegations in the complaint but has denied intentional conversion of funds. **While not condoning respondent's conduct in any respect, we do not find that the evidence in this case established that respondent did, in fact, knowingly and intentionally convert the funds in such a way as to bring his misconduct under the guidelines of Standard 4.11 and *Grievance Administrator v Petz, supra*. Rather, funds in his IOLTA account were withdrawn when he knew, or should have known, that he was failing to discharge his obligations as a fiduciary.**
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> We draw this conclusion in large part from respondent's testimony, especially the testimony that appears at pages 188-192 of the February 28, 2011 transcript, in which respondent acknowledged several times that he was ultimately responsible for the handling of funds in his office, but that he had, in fact, delegated the day-to-day bookkeeping and check writing duties to his wife, who worked in the office as his secretary. It was his wife/secretary who handled the bank reconciliations (p 188) and the day-to-day paying of bills (p 189). **This case involves more than a simple failure to exercise oversight of the financial transactions in the office and a sanction significantly greater than the 180 day suspension ordered by the Board in *Grievance Administrator v Lynch, supra*, is warranted. On the other hand, we conclude that this case is distinguishable from *Petz* and other intentional conversion cases which have resulted in disbarment.**[3]

The panel erred in concluding that this case is meaningfully distinguishable from *Petz* or other cases involving conversion of client funds for which disbarment is the appropriate sanction.

Standard 4.11 provides: "Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client." This Board observed, in *Grievance Administrator v Paul S. Schaefer*, 01-140-GA (ADB 2004):

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[3] HP Report, pp 2-3, 6-7; emphasis added.

> 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)).[4]

We explained in *Grievance Administrator* v *Frederick A. Petz, supra*, that:

> Under ABA Standard 4.11, disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client. Respondent's conduct in this case falls squarely under that Standard. In the absence of compelling mitigating circumstances which would justify a lesser sanction, we conclude that disbarment is appropriate in this case.[5]

Mr. Petz's misconduct consisted primarily of using client funds entrusted to him for safekeeping pursuant to an escrow agreement. He withdrew funds to pay for his aunt's nursing home bills, as well as personal, law office, and other business obligations. Though this conduct was exacerbated by misrepresentations to his clients, the focus of the opinion was on the applicable standard for failure to preserve client property or funds, and on the requisite level of intent, and, finally, upon the cognizable mitigating factors.

The question presented in this case is whether, in light of all of the evidence in this record, respondent's self-serving profession of ignorance can sustain a finding that his conversion of client funds was not done "knowingly" such that ABA Standard 4.12 would be applicable instead of Standard 4.11, which recommends disbarment. Based on this record, we conclude that it cannot.

The hearing panel paid particular attention to the invasion of trust funds that occurred in January 2006 when respondent paid over $23,000.00 to the State of Michigan from his IOLTA account on behalf of another client, Extreme Gas. This is indeed problematic. However, the misappropriation occurred here almost as soon as respondent received the closing funds for safekeeping. None of the excuses offered by respondent or evidence referred to by the panel, or indeed any other evidence in the record which we have carefully reviewed, warrants a sanction less

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

[5] *Petz, supra*, p 1.

than disbarment or supports a finding that the conversion by respondent was anything less than "knowingly" done.

The Administrator's brief provides a helpful overview of the condition of respondent's trust account:

> During the first 20 days after Bazi's closing check [in the amount of $31,257.08] was deposited into Respondent's IOLTA, the total Respondent paid to himself was $13,225, with another $4,000 to his wife's company to reimburse his office expenses . . . .
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> In the following 14 months through February 9, 2007, there were only four months in which the ending monthly balance in the IOLTA was greater than the amount of Bazi's funds that should have been in the IOLTA (November and December of 2005, July and August of 2006), (Ps Ex 2, pp 1-39, 185-203). The lowest daily balance of $686.49 occurred on May 11, 2006 (Ps Ex 2, p 23), when the balance of Bazi's escrowed funds should have been $42,697.20. May's ending balance was $4,686.49. (Ps Ex 2, p 22). The lowest ending monthly balance was $2,014.14 on June 30, 2006 (Ps Ex 2, p 25), when the balance should have been $43,910.85.[6]

Similarly, our own review of the record shows the following transactions:

- January 2005 - respondent is retained by Mr. Bazi and $5,000 in earnest money goes into respondent's IOLTA.
- October 14, 2005 - closing, execution of escrow agreement, and deposit of part of the purchase money together with money for certain taxes and a water bill (totaling $31,257.08) into respondent's IOLTA.
- October 19, 2005 - respondent pays water bill and city taxes ($113.58 and 1,941.85, respectively), leaving what should be a balance of $34,201.85 in respondent's IOLTA for Mr. Bazi. (See Petitioner's Ex 4.)
- October 27, 2005 - ***check made payable to, signed by, and endorsed by respondent*** in the amount of $3,200. (Petitioner's Ex 2, p 216.)
- October 31, 2005 - ending balance in IOLTA $27,213.95. (Petitioner's Ex 2, p 3.)
- November 1, 2005 - ***check made payable to, signed by, and endorsed by respondent*** in the amount of $10,005, bringing the account balance to approximately $17,000. (Petitioner's Ex 2, p 218.)

In addition to the foregoing evidence, respondent admitted that he wrote out all checks from the trust account, and signed them, and usually checked the balance in the trust account before writing the checks. Moreover, he maintained a client ledger (reflecting the deposits, disbursements

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[6] Petitioner's Brief in Support of Petition for Review, pp 10-11.

and balance held in trust for each particular client) in addition to a general ledger (reflecting all deposits, disbursements, and the overall balance in the trust account). According to respondent, he maintained a client ledger for Mr. Bazi and made entries contemporaneously with the monthly payments by Mr. Bazi of $1,213.65 which were deposited to respondent's IOLTA account.[7] Therefore, according to respondent's own testimony, he looked at this ledger at least once a month, and his practice of checking the balance in the IOLTA account must have provided notice that the account, at numerous times, could not cover the balance supposedly maintained for Bazi.

Respondent seeks to distinguish this case from *Petz*, in which Mr. Petz wrote checks to himself and cashed them, thereby invading funds he had a duty to safeguard for his clients. We find no meaningful distinction. Nor do we see a significant distinction between this case and *Grievance Administrator v Terry A. Trott*, 10-43-GA (ADB 2011). There, respondent Trott denied that he knowingly converted advance fees held in his trust account because he was sloppy about keeping track of which fees in his trust account had been earned and which had not. In *Trott*, the argument was made that the absence of respondent's wife/bookkeeper justified a sanction less than disbarment. Here, the argument is made that the presence of respondent's wife/bookkeeper provides such justification.

It has been said by this Board that misappropriation occurs, *per se*, whenever the balance in the trust account falls below the amount to be held on behalf of the attorney's client(s). Scienter, or improper intent, need not be proved to establish a charge of misappropriation. See, e.g., *Grievance Administrator v Michael A. Conway*, 97-156-GA (ADB 1998). However, it does not follow from this that disbarment is always the appropriate sanction. The ABA Standards, and our cases, do recognize varying sanctions dependent, in large part, on the state of mind of the respondent. In order to establish that disbarment is the appropriate sanction, the burden of proof remains with the Administrator to show that the respondent knowingly converted client funds. That showing has been made here, notwithstanding respondent's protestations of ignorance with respect to the state of the trust account.

The record clearly shows that on October 14, 2005, the sum of $31,257.08 belonging to Mr. Bazi was deposited to respondent's IOLTA account which was supposed to also have $5,000 of Mr.

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[7] See Tr 2/28/2011, pp 167-168, 220, and Tr 3/31/2011 [misconduct phase], p 8. The client ledger for Mr. Bazi is Petitioner's Ex 4.

Bazi's funds in it, and that respondent made out and signed a check payable to himself in the amount of $3,200 on October 27, 2005. The check was endorsed by respondent and paid that same day. As of October 31, 2005, the balance in the account was $27,213. The next day, respondent cashed yet another check payable to himself, this time in the amount of $10,005, which brought the balance in the account that much lower.

Respondent also seeks to distinguish this case from *Grievance Administrator v William L. Fette*, 10-70-GA (ADB 2011), arguing that, "Respondent in this matter did not accept his client's monies and immediately misappropriate them."[8] Not that immediacy is truly relevant, but Mr. Schneider's misappropriation occurred within only two weeks after receiving the $31,000 sum mentioned above. Mr. Fette's misappropriation took place a month or more after he received his client's advance fee.[9] Again, the distinction would be immaterial, but it is also nonexistent.

Finally, at the review hearing, respondent's counsel argued:

> I think it is really unfair to focus on any given period of time here, any one month after the IOLTA account was opened up. What you have to do is you have to look at varying amounts of money that were in that IOLTA account within the full six or eight months following the creation of the trust account from Mr. Bazi's money. And what I keep getting back to is this, by the time you get into June, July, August of 2006, roughly about eight months away, the balance is up and the balance is roughly maybe two or three times what the Bazi monies would have been.[10]

This oral argument echoed a passage in respondent's brief on review:

> A critical fact that Respondent testified to before the Panel which was not referenced in the Panel's report is that in July, 2006 (about eight months after the apparent misappropriation of Complainant's monies) the balance in Respondent's IOLTA account went up to $132, 839.00. This was due to deposits of monies from other clients and third parties.[11]

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[8] Respondent's Brief in Support of Cross-Petition for Review, p 7.

[9] The fee was received by respondent Fette sometime in May 2006, and the balance in his business checking account (in which the funds were deposited) dipped below the amount of the fee on June 30, 2006.

[10] Rev Tr 11/9/2011, p 25.

[11] Respondent's Brief in Support of Cross-Petition for Review, pp 4-5.

Of course, we emphatically reject this argument. The client's funds were not to be touched except for authorized purposes. Respondent took them for unauthorized purposes. The fact that the balance in the trust account later rose to a level exceeding the amount required to be held for the client does not make the misappropriation go away. The new funds deposited into the account were for the benefit of other clients, and were also required to be held inviolate. Missing client funds cannot be "made good" or "covered" with someone else's money. The use of one client's funds to cover up the conversion of another's is the very essence of a Ponzi scheme.

III. Misrepresentations Regarding the Balance in the Trust Account.

The hearing panel also made the following findings:

> The testimony presented clearly showed that respondent continued to represent to Mr. Bazi, opposing counsel and Mr. Bazi's successor counsel, that the funds Mr. Bazi had paid into respondent's IOLTA account were being maintained.
>
> First, Mr. Bazi testified that sometime between the time he received the letter from Mr. McNab's attorney and the filing of the lawsuit, respondent told him that there was $50,000.00 in the escrow account. (Tr 02/28/11, p 52.) David Ghannam, counsel for Mr. Bazi in the land contract forfeiture lawsuit, testified that, on about four or five occasions, between June 2008 and January 2009, respondent confirmed that the amount he was holding in his IOLTA account pursuant to the Escrow Agreement, was between $49,500.00 and $50,000.00. Mr. Ghannam also stated that, although he asked respondent for a written accounting of the escrow funds, he never received anything in writing from respondent. (Tr 02/28/11, pp 133-137, 160-161.)[12]

Respondent has not challenged the evidentiary support for these findings. To the contrary, he has argued only that his suspension should be reduced in light of the panel's finding that the misappropriation was not knowing and intentional. The Administrator argues for the application of ABA Standard 4.61, which provides 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."

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[12] HP Report, p 2.

These misrepresentations and the serious nature of such misconduct are additional factors in our decision to impose disbarment in this case.

IV. Should the Restitution Ordered by the Panel be Modified?

The Administrator seeks an increase in the principal amount of the restitution ordered from $12,000 to $14,000. Respondent's counsel argues, however, that respondent only owes Mr. Bazi $12,000.00 because respondent paid $2,000.00 out of his IOLTA account to Huron Development on Mr. Bazi's behalf for an ongoing environmental issue.

Counsel for respondent directed the panels' attention to Petitioner's Exhibit 2, p 138, which was a copy of a check, drawn on respondent's IOLTA account, made payable to Huron Development, in the amount of $2,000.00. Mr. Bazi testified that he had paid two sums to respondent - $2,000.00 and $5,000.00 - which were to be paid to Huron Development regarding the environmental issue. Mr. Bazi testified that he had given $2,000.00 to respondent, in cash, but that he did not have a receipt, or, if he had been given one, he had misplaced it. Respondent testified that the money was paid from the funds held in trust. Mr. Bazi also testified that he had paid $5,000 to respondent with a check, and he produced a copy of that check at the hearing.

The panel heard the testimony of the witnesses and ordered that respondent pay $12,000.00 to Mr. Bazi, with statutory interest to be calculated from February 1, 2009, less $1,000.00, which sum respondent had already paid toward interest. There is sufficient evidentiary support in the record below to uphold the panel's finding that respondent owes Mr. Bazi $12,000.00.

For all of the foregoing reasons we will enter an order modifying the hearing panel's order of discipline to increase the sanction from suspension for 2½ years to disbarment.

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