STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellant,

v

William L. Fette, P 13397,

Respondent/Appellee,

Case No. 10-70-GA

Decided: July 15, 2011

Appearances:

John K. Burgess, for the Grievance Administrator, Petitioner/Appellant
William L. Fette, Respondent - no appearance

BOARD OPINION

The Grievance Administrator has petitioned for review of the hearing panel's order suspending respondent for 120 days. The formal complaint alleges, in Count One, that respondent accepted a $20,000 retainer for a potential criminal representation, failed to place the funds in a trust account, and failed to make a full refund of the unearned fee. Counts Two and Three of the formal complaint allege, respectively, that respondent failed to answer two separate requests for investigation, one from the mother of the target of the criminal investigation referred to in Count One, and another from a different complainant. The Administrator argues on review that discipline should be increased. Respondent has failed to answer the request for investigation, the formal complaint, or appear before the hearing panel. He has failed to appear at this stage of the proceedings as well. For the reasons discussed below, discipline in this case is increased to the revocation of respondent's license to practice law.

We agree with the Administrator that when a respondent fails to answer and appear, the minimum period of suspension that is appropriate under our decisions is 180 days. See *Grievance Administrator v Peter H. Moray*, DP 143/86; DP 157/86 (ADB 1987) (attorney who "dropped off the face of the earth" suspended for 180 days notwithstanding "underlying misconduct [that was] not that grievous"). See also, *Grievance Administrator v Deborah A. Carson*, 00-175-GA; 00-199-FA (ADB 2001). Otherwise, an attorney would be able to commit misconduct, flout the

disciplinary system, accept a short suspension, and become automatically reinstated to the practice of law, all while avoiding the scrutiny of a hearing panel and an opportunity for full examination of his conduct. This cannot be allowed by a disciplinary system established "for the protection of the public, the courts, and the legal profession." MCR 9.102(A).

We also understand the hearing panel's puzzlement over respondent's failure to participate in the investigation or adjudication of his discipline matter. The panel was apparently familiar with respondent's reputation, or was at least reluctant to presume the worst of an attorney who had practiced for nearly four decades without any record of misconduct. Thus, the panel assessed the aggravating and mitigating factors addressed at the hearing:

> When behavior is out of character or at odds with the reputation one enjoys within the legal community, the Hearing Panel must ask, what has happened to bring about this change? Neither the Petitioner nor the Hearing Panel has any direct knowledge. The Hearing Panel, however, does not believe that it is obligated to presume bad faith or intentional misconduct where there is no proof beyond the pleadings to support it. Indeed, the Petitioner agreed that, under the facts and circumstances of this case, it is not unreasonable for the Hearing Panel to conclude that Respondent is experiencing some problems in his personal life whether physical, mental or emotional. These are mitigating factors that the Hearing Panel may also properly consider. See, ABA Standards 9.32(c) and (h). [HP Report, pp 4-5.]

It is unfortunate that respondent did not participate in any phase of the discipline process. Had he done so, perhaps the hearing panel or the Board might have been provided with some insight as to why this attorney, with a previously unblemished record during 40 years as a member of the bar, fell so woefully short of the ethical mark in this case. Instead, respondent's failure to answer or appear at either the investigative or adjudicative level constitutes an aggravating factor that must contribute to our ultimate decision. The Administrator acknowledged to the panel that the absence of a prior disciplinary record should be considered as a mitigating factor in this case.[1] See ABA Standard 9.32(a). It was appropriate to consider this factor, but, in the absence of record evidence regarding other mitigating factors, their existence may not be presumed. In fact, as we discuss below, in light of the particular misconduct established here, the burden is on respondent to provide evidence of compelling mitigation in order to avoid the most severe sanction.

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[1] Tr 8/18/2010, p 17.

While it is commendable that the Administrator acknowledges that a full record might afford a clearer understanding of the nature of the misconduct and of potential mitigating factors (or aggravating factors), we must disagree that a suspension ranging from 180 days to one year is sufficient in this case.

The following facts are established by the respondent's default:

> 4. In May of 2006, Respondent was retained and paid $20,000.00 by Kathy Berglund (hereinafter "Ms. Berglund") for representation of her son, Brian Harrison (hereinafter "Mr. Harrison"), with regard to a criminal matter in which Mr. Harrison was under investigation.
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> 5. As charges had not yet been filed against Mr. Harrison, Respondent and Ms. Berglund verbally agreed that Respondent would hold the $20,000.00 in trust, and maintain an appropriate amount in trust in the event that the investigation into Mr. Harrison never resulted in formal criminal charges.
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> 6. Respondent did not deposit the $20,000.00 payment into a trust account, but instead deposited the payment directly into his business checking account . . . in the name of William J. Fette P.C., . . . on June 6, 2006.
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> 7. Respondent did not transfer any portion of the $20,000.00 payment into his IOLTA trust account at any time after depositing the funds into his business checking account.
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> 8. As of June 30, 2006, Respondent's checking account balance had fallen below $20,000.00, with his account balance for June, 2006 ending at $13,473.64.
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> 9. As of July 31, 2006, Respondent's checking account balance had fallen to $1,580.00.
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> 10. Respondent met with Mr. Harrison and Ms. Berglund on two occasions between June, 2006 and February, 2008 to discuss possible charges.
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> 11. In February of 2008, the investigation into Mr. Harrison's conduct was officially closed and charges were never filed against him.
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> 12. After the investigation into Mr. Harrison was closed, Ms. Berglund contacted Respondent and requested a full accounting of services rendered and an appropriate refund.

> 13. Respondent informed Ms. Berglund that he had not kept an accounting of services rendered but that he believed he had performed $3,000.00 of legal services, and that Ms. Berglund was entitled to a refund of $17,000.00.
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> 14. Respondent instructed Ms. Berglund to come to his office on August 11, 2008 to obtain the $17,000.00 refund.
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> 15. Ms. Berglund went to Respondent's office on that date, but was provided a check for $10,000.00 as opposed to the $17,000.00 promised.
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> 16. Ms. Berglund was assured by Respondent's secretary that the remainder of the refund would be forthcoming by the end of August, 2008.
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> 17. Beginning in August, 2008 and continuing through May, 2009, Ms. Berglund continuously attempted to contact Respondent regarding the remaining $7,000.00.
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> 18. As of this date, Respondent has not provided Ms. Berglund with the remaining $7,000.00 refund. [Formal Complaint.]

The formal complaint also alleges that respondent failed to hold the prepaid fee separate from his own funds in violation of MRPC 1.5(d) and (g), that he failed to return unearned fees upon termination of representation, in violation of MRPC 1.16(d), and that he engaged in dishonest conduct contrary to MCR 9.104(3), among other rule violations.

With respect to cases involving the failure to return an unearned fee, we have said:

> Sanctions imposed in Michigan for failure to return an unearned fee have included reprimands, and suspensions of varying lengths up to disbarment, depending upon numerous factors. Such factors include the length of time during which the lawyer withheld the unearned fee, whether that misconduct is accompanied by other violations, and whether the case has been characterized mainly as a neglect case with the attendant failure to return an unearned fee, or as a violation of MRPC 1.5(a) (misappropriation). [*Grievance Administrator v Paul S. Schaefer*, 01-140-GA (ADB 2004), citing the pre-2005 version of MRPC 1.15(a).[2]]

We should clarify an aspect of our opinion in *Schaefer*. Not every violation of former MRPC 1.15(a), now MRPC 1.15(d), amounts to "misappropriation" as that word is sometimes used to

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[2] MRPC 1.15(a), prior to October, 2005, provided that: "A lawyer shall hold property of clients or third persons in connection with a representation separate from the lawyer's own property." That language is now lodged in MRPC 1.15(d).

express a knowing conversion of client property. The rule may also be violated by commingling of lawyer and client funds. While commingling may be a factor in assessing the appropriate level of discipline for failure to return an unearned fee, disbarment is most likely to be appropriate where the conduct approximates knowing conversion of client funds. And as we also said in *Schaefer*, "it is not difficult to argue that an attorney's refusal to refund the unearned portion of such a fee becomes, at some point after the termination of the representation, tantamount to knowing conversion."

It has been established by the default in this case that respondent failed to safeguard the funds of his client (or the third person who delivered them, his mother). While an agreement is not required to trigger a lawyer's duty to keep separate and safeguard unearned fees held by the lawyer, respondent's flagrant disregard of the Rules of Professional Conduct *and* his express promise is disturbing. It has also been established by default that respondent put the funds in his business checking account and spent them.

This is not a difficult case, and it is not meaningfully different from another one we decide today, *Grievance Administrator v Terry A. Trott*, 10-43-GA (ADB 2011), where we restated the truism that: "The duty to keep client and third party funds safe and separate from lawyer funds is a fundamental one." In *Trott*, the respondent put the advance fees in trust, but used the trust account to pay personal and business expenses. In this case, respondent did not even bother to put the funds in trust. As in *Trott*, respondent here knowingly spent funds (advance fees) that did not belong to him. And, as in *Trott*, this case involves more than a failure to return unearned fees. Respondent has knowingly converted funds entrusted to him by another, and disbarment is appropriate whether the funds belonged to the client or his mother or both. *Grievance Administrator v Rodney Watts,* 05-151-GA (ADB 2007); *Grievance Administrator v Frederick Petz*, 99-1 02-GA (ADB 2001); American Bar Association Standards for Imposing Lawyer Sanctions, Standard 4.11.

For all of the foregoing reasons, we order that respondent's license be revoked. The hearing panel's order that respondent make restitution to Kathy Berglund in the amount of $7,000 is affirmed.

Board Members William J. Danhof, Thomas G. Kienbaum, William L. Matthews, C.P.A, Andrea L. Solak, Carl E. Ver Beek, James M. Cameron, Jr., and Sylvia P. Whitmer, Ph.D., concur in this decision.

Board Member Craig H. Lubben was voluntarily recused and did not participate.

Board Member Rosalind E. Griffin, M.D., was absent and did not participate.