STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellee/Cross-Appellant,

v

Terry A. Trott, P 27729,

Respondent/Appellant/Cross-Appellee,

Case No. 10-43-GA

Decided: July 15, 2011

Appearances:

Patrick K. McGlinn, for the Grievance Administrator, Petitioner/Appellee/Cross-Appellant
John L. Coté, for the Respondent/Appellant/Cross-Appellee

BOARD OPINION

The hearing panel found that respondent failed to return, and misappropriated, an unearned fee which had been paid in advance.[1] The panel suspended respondent's license to practice law in Michigan for a period of two years and six months. Respondent has petitioned for review, seeking a decrease in discipline. The Grievance Administrator has filed a cross-petition for review and asks that respondent be disbarred. Finding no compelling mitigation in this case, we will enter an order of revocation.

The formal complaint alleges that respondent was retained by Gregory Schober to handle a family law matter on or about January 24, 2008, that Schober paid respondent a flat fee of $1,500 for the representation, and that respondent deposited that sum in his client trust account that same day. The complaint also alleges that on February 2, 2008, Mr. Schober terminated the representation

[1] The panel concluded that respondent violated MRPC 1.15(b)(3), MRPC 1.16(d), and MRPC 8.4(b), among other rules.

via email and requested a refund of any unearned fees.[2] Respondent did not reply to this request. Exhibit 1 is a compilation of bank statements for respondent's client trust account. On February 1, 2008, there was a balance of $2,412.10 in the account. On February 6, 2008, the balance was $1,310.07, and on February 8th, the balance was up to $1,973.91. On March 6th or 25th, 2008, Mr. Schober sent a certified letter again requesting a refund.[3] Sometime after March 6th or 25th, 2008, respondent telephoned Mr. Schober and acknowledged that a refund of an unearned fee of about $1,368 was due, said that he did not have the funds at the time, and indicated that he would make installment payments throughout the summer of 2008.

The formal complaint alleges, and respondent admits, that the balances in the trust account went from $1,533.37 on April 4, 2008, down to a negative balance on May 7, 2008 (-22.80), and that, "As of May 21, 2008, respondent had entirely misappropriated the unearned fee that was owing to Mr. Schober."[4] Also on May 21, 2008, respondent made his first payment of $200 to Mr. Schober in accordance with his promise to make installment payments through the summer. A second payment of $150 was made on July 18, 2008, and a third payment of $150 was made on September 8, 2008, which left a balance of $768 due to the client. On October 2, 2008, respondent sent the $768, having received Mr. Schober's request for investigation in the mail a day or two earlier.[5]

Respondent filed an answer admitting the formal complaint's factual allegations in almost all material respects, and admitting the alleged rule violations, with one exception. Respondent admitted the allegation that, "At all relevant times . . . [he] repeatedly used his IOLTA account for personal and business expenses," and that he engaged in "[m]isappropriating an unearned or unauthorized fee, in violation of MRPC 1.15(b)(3)."[6] He also admitted failing to return an unearned fee, and other rule violations, including portions of MRPC 8.4(b), which prohibits lawyers from

---

[2] The answer admits the formal complaint's allegation in ¶7 that Schober terminated the representation via email, but notes that a March 25, 2008 letter from Mr. Schober refers to the date of the email as February 3, 2008.

[3] The complaint alleges that the letter was sent March 6, 2008. The answer notes that Mr. Schober states the letter was sent March 25, 2008.

[4] See paragraph 12 of the formal complaint and answer.

[5] Answer, ¶ 13. The formal complaint alleges slightly different amounts, but the same total, over the same time period. Tr, pp 43-45.

[6] Formal complaint, ¶¶ 14, 15(a).

engaging in "conduct involving dishonesty, fraud, deceit, misrepresentation," etc., "where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer." Respondent denied fraud, deceit, and misrepresentation, but not dishonesty, and he affirmatively acknowledged adverse reflection on honesty, trustworthiness and fitness.[7]

Respondent was the only witness at the hearing. His testimony included assertions that he did not keep close track of whether funds in his trust account had been earned or not, and he admitted[8] – and Exhibit 1 demonstrates – that he paid Walmart, Comcast, and a host of other personal and business expenses out of the trust account. A portion of his testimony shows that respondent possesses, if not the integrity to act as a fiduciary, at least the common sense and intellectual honesty to reject an overture to blame his misconduct entirely on poor bookkeeping:

> RE-EXAMINATION BY MR. COTÉ:
>
> Q. If you had been a better bookkeeper and if you had had bookkeeping support staff that you had previously, this wouldn't have happened would it?
>
> A. . . . Bookkeeping would have helped but I think just things outside of bookkeeping would have been better too. I mean when you get something like this where you have to pay somebody money back and you know you owe it from day one, I think that I should have given it the attention it deserves and put that right next to pictures of my family basically is what it amounts to.[9]

We agree. Attempts to blame misuse of client funds on poor bookkeeping practices seldom make any sense. With respect to the handling of trust funds, "poor bookkeeping" is often actually a refusal to assign priority to the lawyer's role as a fiduciary. The public is asked to trust lawyers with their confidences, their liberty, and their fortunes. The public is also asked to trust lawyers as repositories of funds. The duty to keep client and third party funds safe and separate from lawyer funds is a fundamental one.

---

[7] Answer, p 2, ¶ 15 d). The violation of MRPC 8.4(b) alleged in paragraph 15 d) was "denied as alleged for the reason that while my conduct was improper, I do not believe it can be regarded as constituting fraud or deceipt [sic] or misrepresentation in light of my other admissions. I would agree that my conduct reflects adversely on a lawyer's honesty, trustworthiness and fitness." Answer, p 2, ¶15 d).

[8] See Tr, p 22.

[9] Tr, pp 45-46.

Despite respondent's arguments to the contrary, this case does not involve the negligent mishandling of funds. As the Attorney Grievance Commission counsel argued, "If there's a red light that's going to stop you [from spending trust funds] . . . it's going to be a note, a reminder to you that this isn't your money, and . . . each and every one of those checks said that by saying 'trust account.'" The hearing panel found "Mr. Trott knew that he was taking money from the client trust account and using it for his own personal expenses."[10]

When a member of the bar spends money held in trust for others under these circumstances, it amounts to more than a mere clerical error. To the public, a lawyer who spends trust funds knowing they do not belong to him is indistinguishable from a thief. This is why the ABA Standards for Imposing Lawyer Sanctions recommend disbarment, generally, "when a lawyer knowingly converts client property and causes injury or potential injury to a client." ABA Standard 4.11.

Respondent seeks to characterize this as merely a failure-to-return-unearned-fees case. However, respondent admitted that he misappropriated client monies by repeatedly using his trust account for personal and business purposes.[11] Although respondent and his counsel have gone into some detail about the decline of his practice and loss of bookkeeping personnel, and respondent's testimony that he was at times insufficiently motivated to figure out whether or how much of the fees he held in trust were earned (or not), there is no serious contention made that he was unaware of the fact that he was taking unearned fees. His client requested a refund approximately one week after retaining him. Thereafter, respondent spent all of the money in his trust account, and the checks reflect many personal expenditures for things such as his cable service, pizza, advertising, the coffee shop, the fence in his yard, etc. Certainly, he cannot claim ignorance of the fact that he was spending other people's money. He does not challenge the evidentiary support for the panel's finding that he knew he was spending unearned fees. Accordingly, the factors set forth in ABA Standard 4.11 have been established and the presumptive level of discipline here is disbarment, which should generally be imposed for the knowing use of client funds unless there is "compelling mitigation." *Grievance Administrator v Frederick A. Petz*, 99-102-GA (ADB 2000). See also *Grievance Administrator v Farzad A. Farshidmehr*, 05-12-GA (ADB 2006); *Grievance*

---

[10] HP Report, p 2.

[11] Answer, p 2, ¶¶ 12, 14; Tr, p 22; Respondent's petition/brief on review, p 8 ("'I needed the money and I will repay you – in full.'").

Administrator v George V. Warren, 07-103-GA (HP Report on Misconduct, 2007) (panel applied Standard 4.11 to misappropriation of $500 advance fee and $550 in costs paid in advance), affirmed order of revocation in an ADB order dated September 26, 2008; and *Grievance Administrator v Ronald P. Derocher*, 99-98-GA (ADB 2000) (pre-*Petz* decision applying ABA Standard 4.11 to misappropriation of relatively small sums, including a $250 unearned fee, and deferring to the Administrator's request for imposition of four-year suspension).

For all of the foregoing reasons, we will order that respondent's license be revoked.

Board Members William J. Danhof, Thomas G. Kienbaum, Andrea L. Solak, Carl E. Ver Beek, Craig H. Lubben, and James M. Cameron, Jr., concur in this decision.

Board Members William L. Matthews, C.P.A, and Sylvia P. Whitmer, Ph.D., would order the suspension of respondent's license to practice law for a period of three years.

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

Concurrence of Thomas G. Kienbaum

I concur with my colleagues, but write separately because the disbarment of respondent may seem unduly harsh to some. After all, respondent has practiced law without discipline or even reprimand for over 30 years. By all accounts, he has been a respected member of his legal community. And, some might say, he "only borrowed" money from "his" client trust account – which surely cannot be the same thing as stealing money from a client. But, as unfortunate as respondent's situation is, our precedents, consistent with decisions in other jurisdictions, do not recognize such a distinction – nor should they.

Client trust accounts contain funds originating with clients, and the lawyer assumes the responsibility of a fiduciary to safeguard those funds. The lawyer initially has no claim whatsoever to funds in a client trust account. Only when a fee is earned may an equivalent amount be withdrawn from the account with the client's approval. The expectation that a fee will be earned may blur this important truth in some lawyers' minds, but a lawyer who ignores this bright line may find himself facing the equivalent of a charge of theft.

Did respondent fully understand the nature of his conduct – its venality and the potential penalty – when he withdrew funds from the trust account for personal expenses, likely intending to return the monies as soon as he could? I am almost certain he did not. One may ask, then, why lack

of intent should not be considered a mitigating factor. After much reflection I, and my colleagues, have again concluded that the profession cannot afford the slippery slope that such an approach would create. Respondent knew what he was doing, and any lawyer must conclusively be presumed to have understood the nature of such acts and their consequences.

Respondent relies on the dispositions in some cases that have been summarized in notices of discipline appearing in the Michigan Bar Journal and on our website. Some of these decisions predate the Michigan Supreme Court's adoption of the ABA Standards and our opinion in *Grievance Administrator v Petz*, 99-102-GA (ADB 2000), some are simply factually distinguishable, and some are the result of stipulations for consent discipline which have not always spelled out the facts and mitigating factors.

On the same day we heard this Respondent's case, another case – *Grievance Administrator v Fette*,10-70-GA (ADB 2011) – was before us. In that case, the Grievance Administrator asked for an increase of the 120 day suspension imposed on that Respondent – but he did not seek disbarment, only a one year suspension. The facts were almost identical – certainly there were no material distinctions – and we were compelled there to increase the penalty to revocation, just as we did in this case. We have not done so lightly in either case, and can only hope that the message this Board sent to the profession in *Grievance Administrator v Petz*, *supra*, is again heard clearly.