STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellant,

v

David L. Rosenthal, P 24758 ,

Respondent/Appellee,

Case No. 06-156-GA

Decided: September 17, 2008

Appearances:

Frances A. Rosinski, for Grievance Administrator, Petitioner/Appellant
David L. Rosenthal, Respondent/Appellee

BOARD OPINION

The hearing panel order entered in this matter on October 5, 2007 directed that respondent be suspended from the practice of law for 18 months, that he make restitution to his former clients and that he take a course in legal ethics and pass the Multi-State Professional Responsibility Examination. The Grievance Administrator petitioned for review and the Attorney Discipline Board has conducted review proceedings in accordance with MCR 9.118. We affirm those provisions of the hearing panel's order requiring restitution in the amount of $20,0000 to Garry and Karen Ruebelmann and requiring the payment of costs expended by the Attorney Grievance Commission and the Attorney Discipline Board for the investigation, prosecution and review in this matter. However, for the reasons discussed below, we modify the hearing panel's order by increasing discipline to revocation of respondent's license to practice law in Michigan.

I. Procedural and Factual Background

Respondent failed to answer the formal complaint served November 13, 2006. The factual allegations in the complaint were therefore established by respondent's default. See *Matter of Daune Elston*, DP 100/82 (ADB 1982). In addition, the hearing panel received testimony from the complainants, Garry and Karen Ruebelmann, during the sanction phase of the proceeding.

Respondent first met Garry and Karen Ruebelmann in 2000. Respondent admitted to the panel that in 2003, he was suffering from severe financial difficulties exacerbated by his wife's spending habits. In July 2003, respondent approached the Ruebelmanns, who had previously consulted with him regarding legal matters and had referred legal business to him, regarding an "investment" opportunity that would return three dollars for every dollar invested. At a meeting at the Ruebelmanns' home, respondent presented a purported business deal whereby the Ruebelmanns would invest $15,000 to fund litigation then being conducted by another lawyer.

> Garry Ruebelmann: He told me that we would be buying into a case through another attorney, basically help finance that attorney's case, and in return, reap the rewards when the case was won at the rate of three to one . . . and he assured me he was going to invest in the project as well, and that if we could combine our efforts, we could probably come out ahead three to one if I would put up 15, he would put up 10. [5/1/07 Transcript, p 47.]

On July 14, 2003, respondent presented the Ruebelmanns with a "PURCHASE AGREEMENT BETWEEN COUNSEL FOR MARCY & CHEEKS, PLAINTIFFS AND DAVID ROSENTHAL, ATTORNEY AND GARRY RUEBELMANN, PURCHASERS." (Capitalization in original.) (Petitioner's Exhibit 11.) According to the agreement, respondent and Mr. Ruebelmann were both to be purchasers of a portion of an unidentified lawyer's anticipated contingent fee, estimated in the agreement to be approximately $400,000. The agreement included a statement acknowledging that the purchasers understood that "the risk is great," and that "the risk of loss of all of the principal is possible, while the reward is substantially greater if the attorney is successful." Separate signature lines were provided for "Garry Ruebelmann, purchaser," and "David L. Rosenthal, Attorney and Purchaser."

On the following day, Mr. Ruebelmann signed the purchase agreement and gave respondent his check for $15,000. At respondent's request, the check was made payable to respondent Rosenthal on his representation that he would deliver one check to the still unnamed attorney, combining $15,000 from Mr. Ruebelmann and $10,000 from respondent. Respondent testified that he cashed the $15,000 check from Mr. Ruebelmann the next day. Thereafter, respondent did not communicate further with Mr. and Mrs. Ruebelmann regarding their "investment" nor did he ever account to them for the $15,000.

Several months after obtaining the $15,000 from the Ruebelmanns for their so-called investment, respondent was retained by Mr. and Mrs. Ruebelmann to prepare a trust for them in light of their recent adoption of two children. Upon respondent's verbal agreement to charge a flat fee of $5,000 for the preparation of the trust, the Ruebelmanns paid respondent $5,000, by check, in October 8, 2003. The following day, respondent cashed that check and used the funds for his personal use. Between October 9, 2003 and August 2004 respondent misrepresented to the Ruebelmanns, on three separate occasions, that he had drafted the trust and that it had been mailed to them.

Having received neither a trust agreement nor return of their $5,000 fee, Mr. and Mrs. Ruebelmann filed a request for investigation with the Attorney Grievance Commission. The request was served on respondent on December 1, 2004. Despite two extensions of time to file an answer, two final notices served by certified mail and various telephone contacts with members of the Grievance Administrator's staff, respondent did not submit an answer to the request for investigation until September 16, 2005, when he appeared at the office of the Attorney Grievance Commission as directed by a subpoena requiring his personal appearance and production of his files.

The Grievance Administrator's formal complaint filed November 13, 2006 includes charges that respondent failed to prepare a trust agreement for the Ruebelmanns; failed to deposit their $5,000 advance fee into his client trust account; misappropriated that advance fee; misappropriated the $15,000 given to him for an investment in a pending lawsuit and failed to respond to the Grievance Administrator's lawful demands for information. That complaint, prepared without the benefit of the documentation requested from respondent, reflected the continuing misapprehension of the Ruebelmanns and the Grievance Administrator that respondent had solicited on investment of $15,000 from the Ruebelmanns for the purpose of underwriting a lawsuit then being handled by another attorney.

It was not until January 8, 2007, when respondent appeared before the hearing panel to offer a verbal request that his default be set aside, that he disclosed that <u>he</u> was the unnamed attorney handling a lawsuit in Genesee County and that he was not, as represented to the Ruebelmanns, a co-investor or co-purchaser.

> Mr. Rosenthal: I was involved in a lawsuit up in Genesee County that involved a claim of 10% against an estate that I was advised had $13 million in it, and I needed the funds to pursue the matter

> without having to refer it to somebody else. I was discussing this with the Ruebelmanns and we mutually agreed that they would help fund it up to whatever amount they wanted to. I frankly forgot about it. It's been three years since that case - - three and a half years since that case happened, and it turned out that, number one, [the estate] didn't have $13 million. It was all paper transaction. I saw the contracts and everything. Secondly, when it did get settled, my fee was $4,000 of which the Ruebelmanns would be entitled to half, and I am prepared to pay that as well. That was an oversight by me, but I did not attempt to defraud anybody, and frankly I just forgot about it. [1/8/07 Transcript, pp 13-14.]

When the Ruebelmanns appeared before the panel on May 1, 2007 at a subsequent hearing to determine sanctions, they heard, for the first time that there was never another attorney and that it was respondent himself who had litigated the case in Genesee County.

In its report on discipline, the panel found that respondent had been dishonest in his dealings with the Ruebelmanns, that he misrepresented the facts in both the trust and lawsuit investment matters on more than one occasion and that he had made no efforts to refund the monies or to explain either situation honestly to his clients.

Following the direction from our Supreme Court in *Grievance Administrator v Lopatin*, 462 Mich 235 (2000), the panel looked to the American Bar Association's Standards for Imposing Lawyer Sanctions. The panel concluded that appropriate guidance was to be found in ABA Standard 4.12, which states that suspension is generally appropriate when a lawyer "knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client." After considering the aggravating effect of respondent's four prior admonishments and his lack of candor during the sanction proceedings, along with the possibly mitigating effect of respondent's depression, remorse and willingness to make restitution, the panel imposed a suspension of 180 days, accompanied by conditions that he attend an ethics class conducted by the State Bar of Michigan and that he take and pass the Multi-State Professional Responsibility Examination. The panel ordered restitution to Mr. and Mrs. Ruebelmann in the amount of $20,000.

II. Discussion

The Grievance Administrator argues persuasively that the panel erred in its imposition of a suspension based upon an application of ABA Standard 4.12. We agree. Viewing the course of respondent's conduct in its totality, it is clear that his failure to return an unearned fee after a period of neglect, as described in Count One of the complaint, is overshadowed by respondent's pattern of deceit over a period of several years.

While the panel found that respondent was dishonest, it is appropriate to comment on the extent of that dishonesty, especially with regard to the so-called "purchase agreement" prepared by respondent for Mr. and Mrs. Ruebelmann in July 2003 (Petitioner's Exhibit 11). The overriding feature of the transaction was respondent's active, and clearly deliberate, misrepresentation that the litigation in question was being handled by another attorney and not by respondent himself. By referring in the agreement to the "attorney for plaintiffs" in the third person and by concealing the fact that "attorney for plaintiffs" and David Rosenthal, "purchaser" were one and the same, respondent deliberately misrepresented the nature of the transaction. At best, this was an unsecured loan from the Ruebelmanns to respondent at a time when respondent desperately needed money, both personally and professionally. Respondent's lack of candor, as charged in Count Two, falls squarely under ABA Standard 4.61 which provides that, absent aggravating or mitigating circumstances, "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."

We need not dwell on the mitigating and aggravating factors noted in the panel's report. Respondent's cavalier testimony to the panel that he "forgot" to tell the Ruebelmanns that the litigation in Genesee County had been concluded and that they were therefore entitled to a return on their "investment" of approximately $2,000 (one-half of alleged attorney fees of $4,000) and his failure, to this day, to return any money to them, negates his claims of remorse and willingness to make restitution. We agree with the Grievance Administrator that the evidence submitted by respondent failed to establish a significant causal connection between his claimed depression and his misconduct in this case. Any mitigation attributed to his mental or physical problems was offset by the aggravating factor of his four prior admonishments.

We also note the aggravating effect of a distinct pattern of misconduct. Respondent extracted a total of $20,000 from his clients, the Ruebelmanns, first by disguising an unsecured loan

of $15,000 as a legitimate investment opportunity and then by accepting a $5,000 fee to prepare a trust. In both instances, he treated the funds as his own as soon as the money was in his possession and he neither accounted for the investment funds nor performed the services for which he was paid.

III. Conclusion

The appropriate sanction for a lawyer's deception to a client must, of course, take into account, among other things, the nature of the attorney-client relationship, the materiality of the false statements, the degree of harm, and the aggravating and mitigating factors which may be unique to each case. In this case, however, it is clear that revocation of respondent's license to practice law in Michigan is the only sanction consistent with our duty to protect the public from a lawyer who would prey upon his clients in the ways demonstrated here.

Board members Lori A. McAllister, William L. Matthews, C.P.A., George H. Lennon, Andrea L. Solak and Thomas G. Kienbaum concur in this decision.

Board members William J. Danhof, Billy Ben Baumann, M.D., and Hon. Richard F. Suhrheinrich did not participate.