STATE OF MICHIGAN

# Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellant,

v

Jamal J. Hamood, P 40442,

Respondent/Appellee,

Case No. 05-26-GA

Decided: April 30, 2008

FILED ATTORNEY DISCIPLINE BOARD
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*Appearances:*
Dina P. Dajani, for Grievance Administrator, Petitioner/Appellant
Philip J. Thomas, for the Respondent/Appellee

## BOARD OPINION

The Grievance Administrator petitioned the Attorney Discipline Board for review of the order of Tri-County Hearing Panel # 14, dated August 23, 2007, suspending the license to practice law of respondent, Jamal J. Hamood for a period of thirty days. The Attorney Discipline Board has conducted review proceedings in accordance with MCR 9.118, including review of the record before the hearing panel and consideration of the arguments and briefs presented by the parties. For the reasons discussed below, discipline is increased to a suspension of 180 days with the requirement that respondent must petition for reinstatement under MCR 9.123(B) and MCR 9.124. However, respondent shall receive credit for the 31 day period of suspension served in this case from September 14, 2007 through October 14, 2007.

The hearing panel's findings and conclusions regarding the charges of misconduct are not challenged on review by either party. We therefore accept the panel's finding that respondent violated Michigan Rule of Professional Conduct 1.8(a) by entering into a business relationship with his client, Lina Awada, without sufficiently advising her, in writing and in a manner in which could be reasonably understood, that she should seek the advice of other counsel before investing the

proceeds of a life insurance settlement in a restaurant venture owed by respondent and a partner. While the panel acknowledged that language regarding Ms. Awada's right to seek other counsel appeared in the agreement entitled "Authorization to Disburse Funds," the evidence suggested that the client was not given sufficient time to actually read, understand and, if necessary, act upon the boiler plate language which was not in Arabic, Ms. Awada's native language. In addition to the violation of MRPC 1.8(a), the panel found that respondent's conduct in that transaction was in violation of MCR 9.104(A)(3).

With regard to Count Two, the panel found that, in an unrelated matter, respondent achieved a settlement of $30,000 in an employment discrimination case and received a wire transfer from the defendant in the approximate amount of $30,000. It is undisputed that the defendant in that case (StoneAge Corporation) then mistakenly made a second wire transfer deposit of $30,000 to respondent's trust account. The panel found that respondent misappropriated the overpayment of $29,986.50 by disbursing those funds as part of the settlement of another client's matter, resulting in his inability to return the overpayment to the original payor. The panel concluded that respondent failed to safeguard the property of a third person, (StoneAge Corporation); failed to promptly return the entire amount of the overpayment of $29,986.50 to StoneAge as soon as he was made aware of the overpayment; and failed to segregate the funds belonging to StoneAge, all in violation of MRPC 1.15(a)-(d). The panel also found that respondent's conduct was in violation of MRPC 8.4(b), MCR 9.104(A)(2) and MCR 9.104(A)(3). After the hearing panel rendered its decision on the charges of misconduct, the panel conducted a separate hearing on discipline as required under MCR 9.115(J)(2) and then issued a report on discipline explaining its reasons for imposing a suspension of 30 days.

It is also not disputed by the parties that a suspension is warranted in this case. The Attorney Discipline Board has considered the arguments presented by the Grievance Administrator in favor of an increase in discipline to a suspension of three years. We do not agree that a three year suspension in this case is compelled by the American Bar Association's Standards for Imposing Lawyer Sanctions. However, we do agree with the Administrator's contention that a 30 day suspension for the misconduct established in Count Two is not consistent with prior opinions of the Board and that a greater suspension must be imposed.

As the Board has previously noted, the Standards do not, in and of themselves, provide guidance to a hearing panel with regard to a specific length of a suspension. See, for example, *Grievance Administrator v Butcher*, 04-21-GA (ADB 2007), at p 7. In this case, the hearing panel

adopted the Grievance Administrator's argument that respondent's mishandling of funds belonging to a third party warranted a suspension under ABA Standard 4.12. As discussed below, we disagree with the panel's ultimate conclusion as to the appropriate length of suspension, but we find no error in the panel's application of the ABA Standard's in its decision that a suspension is warranted.

In this review proceeding, the parties have called the Board's attention to prior Board opinions involving the misuse of client or third party funds. Many of these cases were also cited to the hearing panel and we agree with the panel's observation that those cases are, to varying degrees, distinguishable on the facts from the situation presented in this case. In *Grievance Administrator v David A. Woelkers*, 97-214-GA (ADB 1998), the respondent admitted commingling client funds and intentionally withdrawing $9,160 from his client trust account to pay business expenses related to his law office. On review, the Board increased discipline from a suspension of 30 days to a suspension of three years, citing a line of prior Board opinions holding that wilful misappropriation of client funds, absent compelling mitigation, should generally result in discipline ranging from a suspension of three years to disbarment.

*Woelkers,* and the cases cited in it, were subsequently overshadowed by the Board's 2001 opinion in *Grievance Administrator v Frederick A. Petz*, 99-102-GA; 99-130-FA (ADB 2001). This was the first case involving deliberate misappropriation of funds brought to the Board on review following the Supreme Court's directive in *Grievance Administrator v Lopatin*, 462 Mich 235 (2000), that hearing panels and the Board must apply the ABA Standards in all cases. In *Petz*, respondent's clients, a divorced couple, had sold a piece of property for $160,000. They entrusted the money to respondent as an escrow agent with instructions for distribution to each of them under the terms of the escrow agreement. It was not disputed that Respondent Petz made withdrawals of $20,000 and $36,350 for his personal use, including payment of nursing home bills for an aging aunt, and that he withdrew another $67,000 as an "investment" in a company he owned. On review, the Board increased discipline from 30 months to disbarment, stating:

> 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 lawyers 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's Standards for Imposing Lawyer Sanctions and, if appropriate, to explain why the presumptive

> sanction of disbarment under Standard 4.11 should not be applied.
> [*Petz*, *supra*, pp 10-11.]

That pronouncement in *Petz* was followed in later Board opinions cited to the panel or Board in this case, including *Grievance Administrator v Farzad Farshidmehr*, 05-12-GA (ADB 2006); *Grievance Administrator v Mark C. Matheny*, 04-155-GA (ADB 2005); and *Grievance Administrator v Rodney Watts*, 05-151-GA (ADB 2007). Other cases have been cited to the panel and the Board in this case in which various types of commingling or misappropriation have resulted in suspensions as low as 180 days under various factual situations.

The hearing panel below found that respondent's handling of the funds belonging to StoneAge was "knowing" for purposes of making the original assessment necessary to find that suspension was appropriate under ABA Standard 4.12. However, the panel also noted that the element of "knowing conduct" in this case, unlike the deliberate withdrawal of funds in *Petz* and other cases cited above, applied solely to Respondent Hamood's conduct after he discovered that there had been an overpayment from StoneAge and that the funds had then been mistakenly distributed to another client in an unrelated matter. In short, this case does not involve a prior premeditated decision to take or "borrow" funds from a trust account.

In that important respect, this case differs significantly from *Petz* and its progeny. Rather, the misconduct under MRPC 1.15 in this case resulted from respondent's failure to make StoneAge whole by returning the mistakenly-deposited $29,986.50 immediately. The panel found in its report:

> 41 b) Based upon the testimony and evidence presented, the panel finds that respondent violated then-existing MRPC 1.15(b) by failing to promptly deliver the entire amount of the overpayment of $29,986.50 <u>as soon as he was made aware of its existence</u>.
>
> 41 d) Based upon the testimony and evidence presented, the panel finds that respondent misappropriated the excess funds which he received from StoneAge, by disbursing those funds as part of the settlement of another client's matter, which made him unable to immediately repay the excess funds <u>once he became aware of the overpayment</u>, in violation of MRPC 1.15(a)-(d). (Emphasis added.)

Although this case differs from the usual case in which a lawyer deliberately removes client or third party funds from a trust account and then uses the funds to pay personal or business

expenses, a prior Board opinion cited by the Administrator in the sanction brief to the hearing panel has relevance to this case.

In *Grievance Administrator v Deborah C. Lynch*, 96-96-GA (ADB 1997), the respondent received a settlement check on behalf of a client in the amount of $8,000. She testified that she placed the check on her desk but then forgot about it until months later when the client called to demand an accounting. Upon review of her bank records, she discovered that the settlement check had been deposited, unendorsed, to her general office account. Within days, respondent delivered the funds owed to her client. Further review of respondent's bank records established that, after the check was deposited to the office account by an unidentified office employee, the balance in that account dropped below the amount owed to the client. The hearing panel in that case found that both the improper deposit to respondent's business account rather than to a trust account and the subsequent depletion of the account to amount below the amount to which the client was entitled were primarily the result of respondent's poor business practices. Finding that respondent did not intentionally use any of the client's funds for her personal use, the panel imposed a reprimand. On review, the Board did not disturb those factual findings. However, the Board increased discipline in that case to a suspension of 180 days, finding that respondent's sloppy practices in the handling of the settlement check and her indifference to her obligation as a safekeeper of client funds were grounds for an increase in discipline to a suspension of 180 days. The majority in that case was disturbed by respondent's testimony that when she received the $8,000 settlement check, she did not immediately inform her clients, she did not insure that the check was properly deposited and she testified that she did not review her monthly bank statements for a period of six months.

An analogous situation is presented here. If the Board accepts the panel's findings (and those findings are not challenged on review) that respondent did not initially "know" that funds had mistakenly been wired to his account or that they had mistakenly been distributed to another client, we may nevertheless find that respondent should have known about the improper distribution. It was his responsibility as a fiduciary to know what money was coming in and going out of his trust account. More importantly, when Respondent Hamood did have actual knowledge that funds belonging to StoneAge had mistakenly been disbursed from the account, it was his responsibility to rectify the situation immediately. We acknowledge respondent's claim that he was simply not financially able to undo the combined mistakes and he did the best he could under the circumstances

by repaying $10,000 to StoneAge immediately and then returning the remaining $20,000 in four separate checks over a period of several months.

In *Lynch*, the Board noted that the respondent was financially able to pay the full $8,000 to her client once the improper deposit of the settlement check was known. However, the Board continued:

> While prompt restitution on demand was appropriately considered in mitigation, we warn against the over-emphasis of restitution as mitigation in these cases. We have cited the importance of maintaining public confidence in the legal profession as a repository of client funds. When client funds have been commingled with the attorney's funds and then spent, whether by mistake or design, some attorneys will be in a position to rectify the situation. Some, unfortunately, will not. The client entrusting funds to an attorney's care should not have to gamble on that attorney's future financial well-being. Compliance with MRPC 1.15 assures that regardless of the attorney's personal financial situation, the client's money will remain intact and inviolate in a segregated account. As the Illinois Supreme Court stated: "It is the risk of the loss of the funds while they are in the attorney's possession, and not only their actual loss, which the rule is designed to eliminate. . . ." *In re Bizar*, 97 IL2d 127; 454 NE2d 271 (1983). [*Lynch*, *supra*, pp 7-8.]

Unlike the respondent in *Lynch*, Respondent Hamood was not able to immediately rectify the situation by immediately returning the $30,000 overpayment to StoneAge. Fortunately, respondent was able to make repayment within a relatively short number of months, but the principle enunciated in *Lynch* is the same. Strict compliance with MRPC 1.15 should be the hallmark of every attorney's handling of funds belonging to others. This duty is so important that, as in *Grievance Administrator v Lynch*, *supra*, an increase in discipline to a suspension of 180 days is warranted to impress upon respondent, the legal profession, and the public, the importance of a lawyer's fiduciary obligations under MRPC 1.15.

Board members Lori McAllister, William J. Danhof, William L. Matthews, C.P.A., Billy Ben Baumann, M.D., Thomas G. Kienbaum, and Eileen Lappin Weiser concur in this decision.

Board members George H. Lennon and Hon. Richard F. Suhrheinrich did not participate.

Board member Andrea L. Solak was voluntarily recused