STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellant,

v

Rodney Watts, P 26832,

Respondent/Appellee,

Case No. 05-151-GA

Decided: August 23, 2007

Appearances:

Dina P. Dajani, for Grievance Administrator, Petitioner/Appellant
Marvin L. Berris, for the Respondent/Appellee

BOARD OPINION

The panel below found that, following a verdict in his client's favor in a dog bite case, respondent filed a motion with the court for release of funds representing costs and attorney fees to be divided between respondent and the client's first attorney. The panel found that respondent failed to provide notice of the motion to the first attorney; that he falsely represented to the court that the dispute between attorneys as to the division of fees had been resolved; that upon receipt of the funds he did not deposit them in a separate interest bearing account, but deposited the funds in a checking account belonging to his wife's business; that he failed to notify the other attorney that he had received the funds; and that he knowingly misappropriated funds rightfully belonging to the client's first attorney. In a second count, the panel found that respondent failed to answer a request for investigation. The hearing panel ordered the suspension of respondent's license for a period of one year, noting that under the American Bar Association's Standards for Imposing Lawyer Sanctions, revocation would appear to be generally appropriate for the misappropriation of client funds but that the funds in question belonged to another attorney and not to the client.

The Grievance Administrator seeks an increase to revocation on the grounds that under the ABA Standards and precedent of the Attorney Discipline Board, deliberate conversion of third-party

funds is no less egregious than deliberate conversion of client funds. We agree. For the reasons discussed below, including the aggravating effect of respondent's long and varied history of prior misconduct and a complete absence of mitigating factors, we increase discipline in this case to a revocation of respondent's license to practice law in Michigan.

Proceedings Before the Panel and Findings of Misconduct

A two-count formal complaint in this matter was filed with the Attorney Discipline Board on December 20, 2005. Count One alleged that respondent misappropriated funds belonging to a third person (prior counsel Michael Morse); knowingly made false statements of material fact to Mr. Morse; and engaged in conduct involving fraud, deceit, or misrepresentation reflecting adversely on his honesty, trustworthiness, or fitness as a lawyer. Count Two charged that he failed to answer a request for investigation.

The allegations set forth in Count One arise out of respondent's representation of Cynthia Eden and her minor son, plaintiffs in a dog bite case. Previously, Mr. Morse had represented Ms. Eden and her son. At the time of his discharge, in August 2002, the defendants had offered a structured settlement of $60,000. (Tr 05/25/06, pp 17, 22-23.). Following his discharge, Mr. Morse filed a notice of lien in the Oakland County Circuit Court, in the amount of $19,757.64, for his attorney fee. (Pet Ex 4.) A copy of the notice of lien was provided to respondent, who never objected to it. (Tr 05/25/06, p 25.)

The case proceeded to a jury trial and was tried by respondent on behalf of Ms. Eden and her son. A jury verdict of $40,000 was obtained in June, 2004. On August 11, 2004, respondent filed a motion specifically requesting that the court enter an order declaring that Mr. Morse was entitled to attorney fees based on quantum merit. On September 15, 2004, a satisfaction of judgment in the amount of $45,569.71 was entered, which the defendants paid to the Oakland County Clerk. (Pet Exs 9 and 10.)

Mr. Morse and respondent had some conversations concerning their respective attorney fees, but there was no agreement or resolution. (Tr 05/25/06, p 35.) On October 6, 2004, respondent filed a motion to release funds from escrow for the payment of expenses and attorney fees. In that motion, respondent requested a total withdrawal of $15,021.27, including attorney fees of $12,081.84 to be divided between the two attorneys. Respondent, however, failed to send this motion to Mr. Morse.

(Pet Ex 11; Tr 05/25/05, pp 36, 67-68.) On November 3, 2004, respondent appeared before the judge regarding his motion to release funds from escrow. The following colloquy occurred:

> THE COURT: Are you expecting an opposing party?
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> MR. WATTS: No. In fact, when we were here a couple weeks ago, Ms. Eden's new attorney showed up and we've been in communication since then. So, he knows exactly what's going on.
>
> THE COURT: Okay. Your motion is granted. I'll sign the appropriate order. [Pet Ex 15.]

The order, prepared by respondent, released $17,355.40 to himself "for the payment of the expenses and attorney fees delineated in his motion." (Pet Ex 16.)[1]

On November 8, 2004, respondent obtained a check in the amount of $17,355.40 from the Oakland County Clerk. (Pet Ex 17.) The following day, respondent deposited all but $1,000 of that check into the "Guardian Angel, Inc." Trust Account. (Pet Ex 18.) Respondent admitted that he did not inform Mr. Morse that he had obtained the check at that time. (Tr 05/25/06, p 72.) Respondent also acknowledged that Guardian Angel, Inc. is not a law firm and the trust account is not an IOLTA account. Guardian Angel, Inc. is respondent's wife's guardianship business. (Tr 05/25/06, p 73.)

In the meantime, Mr. Morse attempted to resolve the fee dispute with respondent. On February 8, 2005, Mr. Morse, who was unaware that respondent had already obtained the check from the Oakland County Clerk, filed a motion to release funds from escrow for his attorney fees and costs. (Pet Ex 13.) It was not until March 1, 2005 that respondent told Mr. Morse that he had unilaterally obtained release of the funds. (Pet Ex 14; Tr 05/25/06, p 75.) Respondent then falsely informed Mr. Morse that he had been suspended from the practice of law and could not appear in court on respondent's motion, scheduled for the next day. Respondent told Mr. Morse that he had the money, would work out the issue of the attorney fees, and would call Mr. Morse on March 16, 2005. (Tr 05/25/06, p 40.) Respondent did not call Mr. Morse on March 16, 2005, or at any time thereafter. Mr. Morse filed a civil action against respondent in the 46th District Court in July of 2005 to obtain his portion of the fee. (Tr 05/25/06, pp 41-42.)

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[1] At the hearing before the panel, respondent explained that the discrepancy between his motion for withdrawal of $15,021.27 and the amount actually released of $17,355.40 was the result of a miscalculation on his part when he filed his motion. (Tr 05/25/06, p 70.)

In support of Court Two, alleging that respondent failed to answer the request for investigation, the Administrator presented evidence that the request was mailed to respondent's address of record with the State Bar by regular mail on June 30, 2005, and by certified mail on July 28, 2005 (Pet Exs 20-22), but that respondent did not file an answer. Respondent does not dispute that he received the request for investigation.

The hearing panel found that respondent engaged in the misconduct charged in the complaint. Following the filing of the panel's report on misconduct, a separate hearing to determine the level of discipline was conducted on October 30, 2006. At that hearing, the panel received 15 exhibits from the Grievance Administrator detailing respondent's prior history of misconduct, including 10 confidential admonishments, two orders of reprimand and three orders of suspension. No further evidence was offered by either party and the parties presented their arguments as to the appropriate level of discipline.

In arguing that respondent's conduct was of a type that should generally result in disbarment under the ABA Standards, the Administrator's counsel noted that whether the panel utilized Standard 4.1 [conversion of client property]; 5.1 [failure to maintain personal integrity]; or 6.1 [false statements, fraud and misrepresentation], a finding that respondent's conduct should result in disbarment or suspension would turn on whether respondent's conduct was "intentional" or "knowing." She argued that the evidence established that respondent intentionally placed funds to which Mr. Morse had a claim in his wife's account; that he misappropriated those funds; and that he intentionally engaged in fraudulent behavior in the way he obtained a court order authorizing distribution of the funds without proper notice to Mr. Morse. Counsel also stressed the very significant aggravating effect of respondent's lengthy history of admonitions and orders of discipline.

Respondent's counsel emphasized that much of respondent's prior misconduct was relatively remote in time and occurred at a time when respondent was having problems with clinical depression. He characterized this as a dispute between two lawyers over fees which should result in no more than a reprimand.

In its order of January 25, 2007, the panel imposed a one year suspension. The panel's report on discipline included the following:

> Counsel for the Administrator acknowledged that ABA Standard 4.11 is not directly applicable to the facts in this case in that the funds in

> question were not client funds. As for the other Standards cited by the Administrator, disbarment is "generally" recommended when the lawyer's dishonest conduct is both intentional and "seriously adversely reflects on the lawyer's fitness to practice" or causes "serious or potential serious injury to a party." Particularly striking in this case was respondent's lack of candor and the deceit perpetrated upon a third party. Respondent admitted that "I wanted to screw him" in reference to Michael Morse, the prior attorney on the file who claimed a portion of the fee earned and spent by Mr. Watts. While this conduct clearly reflects on respondent's character and was potentially injurious to Mr. Morse, the panel is unable to reach the conclusion that respondent's conduct in the single matter requires the termination of his license to practice law.
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> The panel also finds that respondent has breached multiple Canons and, given his multiple prior violations, the violations in this case were merely consistent with prior conduct. Although the panel found no mitigating circumstances whatsoever and believes that respondent is, at this time, a danger to the public, this case involved a dispute between lawyers and did not involve client funds. We do not believe that disbarment is appropriate or necessary where, as here, no client funds were at issue. [HP Report, 01/25/07, p 2]

Discussion

The Grievance Administrator petitioned for review under MCR 9.118 on the grounds that respondent's conduct, coupled with significant aggravating factors, warrants the entry of an order of revocation. Respondent filed a timely cross-petition for review which sought dismissal of the case, characterizing it as "a dispute between two attorneys over the distribution of attorney fees." However, respondent failed to file a brief in support of that cross-petition within the time ordered in the Attorney Discipline Board's briefing schedule and the cross-petition was dismissed. There are therefore no challenges to the hearing panel's findings on misconduct. The only issue on review is the panel's decision to impose a suspension of one year.

The primary basis for the panel's decision to impose a one year suspension appears to be its conclusion that, "this case involved a dispute between lawyers and did not involve client funds. We do not believe that disbarment is appropriate or necessary where, as here, no client funds were at issue." To the extent that this conclusion is based upon the panel's reading of the ABA Standards for Imposing Lawyer Sanctions, the panel's finding highlights a flaw in those standards.

ABA Standard 4.0, entitled "Violations of Duties Owed to Clients," states, in its introduction, "this duty arises out of the nature of the basic relationship between the lawyer and the client." The introduction is followed immediately be Standard 4.1, entitled, "Failure to Preserve the Client's Property." Under Standard 4.11: "Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client." Unfortunately, the Standards do not specifically address the consequences of a lawyer's knowing conversion of property belonging to an individual group or entity other than the client.

While it is true that the small-print commentary to ABA Standard 4.11 includes a parenthetical note that "lawyers who convert the property of persons other than their clients are covered by Standard 5.11," that standard does not specifically address conversion of third-party funds. Instead, Standard 5.11(b), which otherwise deals with a lawyer's "failure to maintain personal integrity," apparently includes such conversion under the broad umbrella of "intentional conduct involving dishonesty, fraud, deceit or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice."

Pursuant to directions from the court in Grievance Administrator v Lopatin, 462 Mich 235 (2000), the Attorney Discipline Board submitted its report on proposed Michigan Standards for Imposing Lawyer Sanctions in June 2002. In its reworking of Standard 5.1, which appears under the heading of "Violations of Duties Owed to the Public," the Board attempted to emphasize that a lawyer entrusted with money has equally important responsibilities as a fiduciary whether those funds are entrusted by a client or by a third party. The Board therefore proposed a new Standard 5.11(c) which would state that "disbarment is generally appropriate when . . . a lawyer knowingly converts the property of another entrusted to the lawyer." The Board proposed that misuse of third party funds should also be addressed in a new Standard 5.12(c) [suspension] and 5.13(c) [reprimand]. It was the Board's intent to maintain the logical structure of the ABA Standards by including a hierarchy of sanctions (reprimand, suspension, disbarment) for conversion of client funds under Standard 4.1 while providing a similar hierarchy of sanctions for conversion of third party funds under Standard 5.1.

The proposed standards published for comment by the Supreme Court in July 2003[2] do not include the Board's proposal for dealing specifically with misuse of third party funds under Standard

[2] ADM File No. 2002-29.

5.1 but instead propose that Standard 4.11 be modified by stating that "disbarment is generally appropriate when a lawyer knowing fails to preserve property held in trust." In its subsequent comments to this version of Standard 4.11 published for comment, the Board noted that placing together all knowing failures by a lawyer to preserve property held in trust, whether belonging to a client or a third party, would not maintain the integrity of the organizational structure of the current ABA Standards and could cause confusion inasmuch as both the ABA Standards and the proposed Michigan Standards are based upon a structure in which violations of duties to clients are found under Standard 4.0 while violations of duties to the public are to be found in Standard 5.0.

That having been said, both the proposed standards submitted to the Court by the Board in June 2002 and the standards published for comment in July 2003 do a better job than the current ABA Standards of emphasizing that the duty to safeguard funds to which a third party is entitled is as important as a lawyer's duty to safeguard funds belonging to a client and that intentional conversion of funds in either situations should generally result in disbarment, absent mitigating circumstances.

Notwithstanding a lack of clarity on this point, we find nothing in the current ABA Standards which suggests that conversion of funds held in trust for another lawyer is somehow less egregious than conversion of funds held on behalf of a client. As succinctly argued by the Grievance Administrator, it is untenable to give this respondent a "break" simply because he stole money belonging to another lawyer rather than money belonging to a client. Nor is such a view supported by precedent of the Board or the Supreme Court.[3]

As seriously as we must view respondent's misappropriation of the funds to which Attorney Morse had a legitimate claim, we are in agreement with the Grievance Administrator's argument that disbarment could also be considered in this case under ABA Standard 6.11 which states:

> Disbarment is generally appropriate when a lawyer, with the intent to deceive the court, makes a false statement, submits a false document, or improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.

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[3] For a discussion of how application of ABA Standard 4.11 will generally result in disbarment when a lawyer deliberately converts client funds, see Grievance Administrator v Petz, Case Nos. 99-102-GA; 99-130-FA (ADB 2001).

When, as established in the record, respondent appeared before an Oakland County Circuit Judge in November 2004 on his motion to release funds from escrow, he told the court that he was not expecting the opposing party, stating:

> MR. WATTS: No. In fact when we were here a couple weeks ago Ms. Eden's new attorney showed up and we've been in communication since then. So he knows exactly what's going on. [Pet Ex 15]

Whether by design or otherwise, respondent's statement to the court explicitly referenced his client's "new attorney," not his client's former attorney, Mr. Morse. Under the circumstances presented, however, respondent's statement could only have been understood by the court to be a reference to Attorney Morse who was the attorney who had filed a lien against the judgment for attorney fees. By failing to disclose to the court that he had not provided notice to that attorney and by implying that respondent and Mr. Morse were in agreement, respondent improperly withheld material information from a court and caused serious or potentially serious injury to a party within the clear meaning of ABA Standard 6.11.

Finally, the Grievance Administrator has ably argued that greater consideration should be given in this case to the aggravating effect of respondent's prior history of misconduct. Respondent Watts received his first reprimand in 1980 and then received no further marks on his record until 1992. At that point, the pace picked up considerably. Respondent was admonished by the Attorney Grievance Commission three times in 1992 and then received seven more admonishments from the Commission between 1993 and 1996. He was reprimanded in 1993 for failing to timely answer two requests for investigations and he was suspended for 30 days in 1997 for neglecting two legal matters and for failing to answer a request for investigation. After another blemish-free period of eight years, respondent was the subject of two orders of discipline in 2005. The first order combined a suspension of 60 days with a probationary period of 18 months based upon a finding that respondent failed to appear for status and settlement conferences in a civil matter, failed to otherwise diligently seek his client's legal objectives and failed to answer a request for investigation. The second order combined a suspension of 90 days and a probationary period of three years for respondent's failure to comply with the conditions imposed in the order entered earlier that year. It is especially striking that after being publically disciplined on at least four occasions for misconduct which included

failure to answer a request for investigation, respondent has again failed to comply with the clear mandate of the rule[4] requiring an answer to a request for investigation.

Conclusion

While the Board can, and does, provide a certain level of deference to a hearing panel's decision with regard to the level of discipline, the Board has an overriding duty to provide consistency and continuity in the exercise of its overview function, State Bar Grievance Administrator v Williams, 394 Mich 5 (1975). Furthermore, the Board is required under the directives of Grievance Administrator v Lopatin, supra, to fashion appropriate discipline orders under the guidance of the ABA Standards. In this case, there has been no articulation of why there should be a significant departure from what appears to be the presumptive sanction of disbarment. The panel below specifically found that there were no mitigating factors; indeed, the panel emphasized respondent's lack of candor which should be considered as an aggravating factor along with his abysmal record of prior misconduct. We therefore vacate the one year suspension ordered by the hearing panel and direct a revocation of respondent's license to practice law.

Board members William P. Hampton, George H. Lennon, Hon. Richard F. Suhrheinrich, William J. Danhof and William L. Matthews, C.P.A. concur in this decision.

Board members Lori McAllister, Rev. Ira Combs, Jr., and Billy Ben Baumann, M.D. did not participate.

Board member Andrea L. Solak was voluntarily recused.

[4] MCR 9.113(A)