STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellant,

v

Farzad A. Farshidmehr, P 47405,

Respondent/Appellee,

Case No. 05-12-GA

Decided: August 15, 2006

Appearances:

Nancy R. Alberts, for Grievance Administrator, Petitioner/Appellant
Daniel W. White, for the Respondent/Appellee

BOARD OPINION

The hearing panel entered an order in this matter on December 12, 2005, suspending respondent's license to practice law in Michigan for a period of 175 days commencing January 5, 2006. The Grievance Administrator petitioned for review arguing that disbarment is the appropriate level of discipline. The Attorney Discipline Board has conducted review proceedings in accordance with MCR 9.118 which included review of the whole record, consideration of the briefs and arguments of the parties, and review of the discipline imposed in light of the American Bar Association's Standards for Imposing Lawyer Sanctions (ABA Standards).[1] For the reasons set forth below, we agree that the respondent's license to practice law should be revoked.

This case arises out of respondent's handling of money paid to him by Randy King in connection with various criminal charges or potential charges at various times. The sums paid to respondent are clear ($1,500 followed by $7,205.50), but how much was to be designated a "retainer" for which charges, and how much was to be held by respondent and doled out to Mr.

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[1] Respondent failed to appear at the hearing as required by MCR 9.118(C)(1) ("The respondent shall appear personally at the review hearing unless excused by the Board. Failure to appear may result in denial of any relief sought by the respondent, or any other action allowable under MCR 9.118(D)."). The Board was informed by counsel for respondent that respondent had left the country for an unspecified period of time.

King's prison account was the source of some evidentiary conflict. No written fee agreement exists. King and respondent agreed that $3,000 (according to King) or $4,000 (according to respondent) was to be "kept by [respondent] as a retainer," and that "[s]mall amounts of the remaining $4,205.50 or $3,205.50 were to be deposited periodically into Mr. King's commissary account at the jail. If Mr. King was later imprisoned, deposits were to be made into his account at the prison."[2] The essential point is that respondent had a duty to safeguard two separate "pools" of money (to use the Grievance Administrator's phrase): one such pool was a fee paid in advance; the other was not.

The panel found, in its report on misconduct, that:

> The evidence establishes that immediately prior to receiving Mr. King's $7,205.50, the Respondent's office account was overdrawn; the Respondent had a number of unpaid bills; that the check for $7,205.50 was made out specifically to the Respondent's trust account; that within a few days of the depositing of the $7,205.50 into the Respondent's office account, the funds were entirely spent on the Respondent's expenses; and that the Respondent's secretary knew exactly what she was doing when she deposited the funds into the Respondent's office account, as he instructed her to do.
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> * * *
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> The evidence further establishes that the Respondent ordered his secretary to spend Mr. King's $7,205.50 to pay his personal, business [sic] expenses before those sums were earned. [HP Report on Misconduct, p 6.]

In addition to misappropriation of client funds entrusted to the lawyer by his imprisoned client, the panel also found that respondent committed other misconduct, to wit, false statements in answer to the request for investigation, a false statement on the dues certification form submitted to the State Bar, and failure to supervise his non-lawyer legal staff.

The report on discipline reiterates the previous findings and then summarizes the duties respondent violated:

> [T]he Panel finds that the Respondent violated his ethical duty to his client, including his duty to preserve the property of this client; violated his ethical duty to the general public by engaging in conduct

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[2] Formal Complaint & Answer, ¶¶ 12, 14.

> involving dishonesty, fraud or interference with the administration of justice; and violated his ethical duty to the legal system by creating false evidence.
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> With regard to the Respondent's mental state, this Panel finds that the Respondent acted with a culpable mental state, that being with the conscious objective or purpose to accomplish a particular result. This Panel has determined that the Respondent intentionally misappropriated his client's funds by taking the same before they were earned; that the Respondent instructed his secretary to deposit his client's funds into his office account, rather than this [sic] client trust account; that the Respondent ordered his secretary to spend his client's funds before they were earned; that the Respondent falsely stated in his Answer to this investigation that his client's funds had been deposited into his trust account; and that the Respondent prepared and directed his secretary to file a false affidavit in an effort to conceal his actions. [HP Report on Discipline, p 7.]

The panel determined that disbarment was the generally appropriate sanction under four separate standards, and found the following aggravating circumstances: "prior disciplinary offenses, dishonest or selfish motive; submission of false evidence; false statements or other deceptive practices during the disciplinary process; refusal to acknowledge the wrongful nature of his conduct; vulnerability of the victim; substantial experience in the practice of law; and indifference to making restitution." (HP Report, pp 8-9.) The following mitigating factors were found to exist: "personal or emotional problems; character or reputation; [and] remorse (to some extent)." (HP Report, p 9.)

The panel then went on to identify three other factors that justified discipline other than disbarment: (1) the credibility of respondent's secretary, Ms. Glomski; (2) the fact that respondent "did provide what appeared to be valuable legal services to Mr. King for a total price arguably less than what should have been charged"; and (3) testimony from practitioners familiar with respondent leading the panel to conclude that respondent "has the potential of continuing to serve as a valuable member of the Alpena legal community."

Respondent does not argue that there is insufficient evidentiary support for the panel's findings. Nor does respondent quarrel with the panel's conclusions regarding the applicable standards – 4.11 (disbarment for knowing conversion of client funds); 4.61 (disbarment generally appropriate for knowingly deceiving a client); 5.11 (disbarment generally appropriate for intentional conduct involving dishonesty, fraud, deceit or misrepresentation seriously adversely reflecting on

fitness to practice); and 6.11 (disbarment generally appropriate for falsifying documents or statements or withholding material information with the intent to deceive court [panel]). Therefore, respondent relies entirely on the mitigating factors identified by the panel to justify discipline other than revocation.

With respect to the first factor, the panel stated:

> First of all, this panel's prior decision on misconduct relied, in substantial part, on the testimony and credibility of witness Glomski. During the discipline phase of this proceeding, both the Petitioner and the Respondent presented testimony, and documentary evidence, that caused at least one member of this panel to question the weight that had been previously given to the testimony of witness Glomski. [HP Report on Discipline, p 9.]

We note, however, that the panel did not modify the findings it made in its report on misconduct, but rather reiterated them after hearing Ms. Glomski's testimony.

The second factor identified by the panel – that respondent did render services for Mr. King – also does not justify more lenient discipline. Not only did respondent take a retainer before earning the fees, he also took money from the second "pool" of funds, i.e., the money that was to be doled out to his imprisoned client. The second "pool" of money was in no way being held in contemplation of future legal services. Respondent claims the client authorized use of this second pool after the Huron Undercover Narcotics Team (HUNT) investigation targeted Mr. King. But, respondent spent all of the money entrusted to him on business and personal expenses in May, almost as soon as the check came into his possession. Respondent was not approached by Michigan State Police Detective Schultz of HUNT regarding King's role in a narcotics distribution ring until July, 2003.[3] Therefore, this is a case of misappropriation and subsequently attempting to justify and camouflage that misconduct with work done on a subsequent legal representation that fortuitously materialized. Moreover, it is not clear exactly how much time respondent spent on the HUNT matter, but the record contains evidence that he only billed 2.5 hours for work attributed to HUNT.

Finally, the testimony of respondent's colleagues does not persuade us that revocation is an inappropriate sanction.

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[3] 6/6/05 Tr, p 109 [Respondent]; see also *id.*, p 19 [opening], and p 59 [questioning of King].

The panel clearly found that respondent directed his secretary to deposit the $7,205.50 check into the business account and to pay "personal, business expenses" (HP Report on Misconduct, p 6) and committed the other misconduct mentioned above in violation of MRPC 1.15(a)[4], (b)[5] and (d)(2)[6], MRPC 5.3(b) and (c)(1), MRPC 8.1(a)(1), MRPC 8.4(a)-(c), MCR 9.104(A)(1) - (4) and (6), and MCR 9.113(A). The reasons advanced for departing from the recommended sanction of disbarment under four separate ABA Standards are insufficient.

Disbarment is also appropriate under our caselaw. This is not the first time a Michigan lawyer has helped himself to trust funds and subsequently claimed that he earned the money. We confronted a similar situation in *Grievance Administrator v McCloskey,* 94-175-GA (ADB 1995). In that case,

> Respondent . . . attempted to justify the withdrawals on the basis that the client agreed he would have the right to satisfy his fee and expense charges from those funds, although invoices of fees and expenses were not generated until several months later and were substantially less than the amounts he withdrew for his own use. [*McCloskey*, *supra*.]

In discussing that contention, this Board drew on yet another case involving similar facts:

> The respondent's claim that funds were withdrawn in anticipation of attorney fees for future services has also been rejected in prior cases. In Matter of Michael J. Kavanagh, DP 71/84 (Bd Op 1985), for example, the Board held:
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> > We cannot, however, condone an improper withholding, even where the attorney may in good faith contemplate providing valuable services. To do so would create a potential for widespread abuse.
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> > * * *
> >
> > It is an untenable conclusion that an attorney may commingle, convert or apply to his own use a client's funds so long as he later performs sufficient legal work to earn the commingled or converted sum.

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[4] MRPC 1.15(d), effective October 18, 2005.

[5] MRPC 1.15(b)(1)-(3), effective October 18, 2005.

[6] MRPC 1.15(d), effective October 18, 2005.

> Client funds cannot be arbitrarily or unilaterally withheld with a view toward speculative future services in the absence of some retainer agreement and authorization to provide such future services.
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> While we do not disagree with the hearing panel's conclusion that the respondent "exercised extremely poor judgment and was sloppy and lazy in his bookkeeping and administration practices," the record as a whole cannot sustain a finding that the respondent's conduct was merely careless. [*McCloskey*, *supra*.]

Having rejected the argument that subsequent work mitigated the misappropriation, the Board then placed that case in the category of the most serious money offenses, stating that: "Absent compelling mitigation, an attorney's deliberate misappropriation of client funds may generally be expected to result in discipline ranging from a suspension of three years to disbarment." *McCloskey*, *supra*. Although the respondent had made restitution, the Board increased his suspension of 130 days to three years. *Id.*

In a subsequent case, *Grievance Administrator v Petz*, 99-102-GA (ADB July 2001), the respondent misappropriated the proceeds of a property sale that were to be held by him and disbursed as directed by his clients. This Board increased discipline from a suspension of 30 months to disbarment and,

> serve[d] notice that hearing panels presented with facts similar to those in the instant case, that is, intentional conversion of client funds for the lawyer's 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*, p 10.]

For all of the foregoing reasons, the order suspending respondent for 175 days shall be modified and respondent's license to practice law in Michigan shall be revoked.

Board Members William P. Hampton, Lori M. McAllister, Marie E. Martell, George H. Lennon, Billy Ben Baumann, M.D., Hon. Richard F. Suhrheinrich, William J. Danhof, and William L. Matthews, C.P.A., concur in this decision.

Board member Rev. Ira Combs, Jr. was absent and did not participate.