STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellant,

v

Jeffrey A. Dulany, P 26768,

Respondent/Appellee/Cross-Appellant,

Case No. 05-35-GA

Decided: September 29, 2006

Appearances:

Dina P. Dajani, for Grievance Administrator, Petitioner/Appellant
Donald D. Campbell, for the Respondent/Appellee/Cross-Appellant

BOARD OPINION

The Grievance Administrator seeks review by the Attorney Discipline Board on the grounds that the panel below erred by imposing a suspension of less than 180 days. By cross-petition, respondent Jeffrey A. Dulany seeks dismissal of the formal complaint. For the reasons discussed below, we modify the discipline imposed by the hearing panel by increasing discipline to a suspension of 180 days and until entry of an order of reinstatement pursuant to MCR 9.123(B) and MCR 9.124. In calculating the period of suspension, respondent shall receive credit for the 32-day period of suspension in effect from January 20, 2006 to February 21, 2006 pursuant to the hearing panel's order.

Procedural Background

The Grievance Administrator filed a single-count formal complaint in this case on March 2, 2005. The complaint charged that while respondent was employed by a law firm in Monroe, Michigan, he came into possession of a check from a client of the firm in the amount of $1,000 made out to himself. The complaint further charged that respondent did not turn the check over to the law firm for deposit into the firm's client trust account, but instead endorsed and cashed the check without the firm's knowledge. The complaint charged that his failure to deposit client

funds into an IOLTA account violated MRPC 1.15(a) and 1.15(d)(2); that he misappropriated client funds in violation of MRPC 1.15(a) and 8.4(b); that he engaged in conduct contrary to justice, ethics, honesty or good morals in violation of MCR 9.104(A)(3) and that he engaged in conduct that exposes the legal professional or the courts to obloquy, contempt, censure or reproach in violation of MCR 9.104(A)(2).

Respondent filed a timely answer to the complaint. In his answer, respondent admitted that the client, Tara Lucci, mailed a check in the amount of $1,000 payable to Jeff Dulany as partial payment of a quoted retainer of $1,500 and that respondent endorsed that check on March 3, 2004 and received $1,000 in cash when he cashed the check. He stated affirmatively, however, that by the time the check was cashed, he had performed legal services with a value exceeding $1,000 and the check therefore no longer represented "funds belonging to a client" subject to deposit in a segregated account. Respondent further asserted that the billings from the firm to the client referred to in the complaint were prepared by someone other than respondent. The Administrator then filed an amended complaint in April 2005 which added additional charges that respondent failed to adequately supervise the person who prepared the billing statement referred to in the complaint, in violation of MRPC 5.1(b) and (c), 5.2(a) and 5.3(b) and (c). Respondent filed a timely answer to the amended formal complaint.

The public hearings in Ann Arbor before Washtenaw County Hearing Panel #1 were conducted in two phases: a hearing on misconduct on June 10, 2005 and a separate hearing on the level of discipline on November 11, 2005. At the first hearing, the panel received testimony from respondent Jeffrey A. Dulany and Ruth Flint, the office manager and legal assistant at respondent's former law firm.

In direct examination by the Administrator's counsel, respondent testified that he had no personal knowledge or recollection of the receipt of Ms. Lucci's check for $1,000, by either the firm or him personally, after it was apparently mailed by Ms. Lucci from her home in Arizona in January 2004. He acknowledged that the check was cashed on March 3, 2004 and that he endorsed the check but, again, he claimed no personal memory of those circumstances. Respondent acknowledged sending a letter to the Grievance Administrator during the investigation which stated that he located the $1,000 check in Ms. Lucci's file and cashed it but, he testified, "that's not necessarily my belief now, but that is certainly what I wrote to you." (Tr 06/10/05, p 36.) Respondent was questioned at some length about his agreement to take on the representation of Tara Lucci in a custody matter, the normal procedure at the firm for opening a file, and the firm's procedure for keeping time records so the client could be billed by the firm as services were performed. Respondent was at a loss to explain how Ms. Lucci's separate check for $500, mailed in February 2004, was properly processed and credited while the $1,000 check in question was neither processed nor accounted for by anyone at the firm until Ms. Lucci's inquiry to the firm in May 2004 prompted an investigation by the firm's office manager.

The office manager, Ruth Flint, also testified at length regarding the office procedures normally followed at the firm when a file is opened and/or a check for fees is received from a client. She could shed no further light on how the $1,000 in question in this case came into respondent's possession or how the check could have been cashed without the knowledge of anyone at the firm except respondent. Ms. Flint testified regarding her telephone conversation with Ms. Lucci around May 17, 2004 when Ms. Lucci complained that she had received a bill from the firm which did not include credit for the $1,000 payment she had sent to the firm in January. Ms. Flint then spoke with respondent:

Q. And what was Mr. Dulany's response to the $1,000?

A. Mr. Dulany said that Ms. Lucci was confused and that he would call her and he would handle it.

* * *

Q. So he did not say, oh I cashed that check at that time.

A. He did not.

* * *

Q. And what happened after you realized that Ms. Lucci had in fact sent $1,000?

A. I met with the partners and advised them exactly what had happened when we had received the check back. He took it to National City to determine what the codes meant on the bottom of the check, and then later Jeff was called into the office.

* * *

Q. Now there was a meeting I believe that you had just referred to with Mr. Dulany?

A. Yes, that is correct.

Q. Were you part of that meeting?

A. I was.

Q. And who else was in the meeting?

A. Thomas Russow and William Braunlich.

Q. And what was the outcome of that meeting?

A. The outcome of that meeting was that, how do I word this, that a check had been received by an employee in the office. It had not been given - it had not been given to me in the usual course of business, as it should have been, and it was not deposited in the client's trust account. And so at that point I think Mr. Dulany was called in the office and we discussed the matter with him.

Q. And what did Mr. Dulany say in terms of that check when he was asked about it?

A. We at first did not show him the check and we just reviewed with him the fact that Ms. Lucci had made the call, had made some allegations, and he said that she was - again said that she was confused. That he had actually sent the check back to her. That he had two matters that he had discussed with her, a custody matter and a guardianship matter, and she had decided not to proceed on the custody matter and he had sent the 1,000 check back to her. We then placed the check on the desk and Mr. Dulany looked at it and he said, oh, I must have cashed it.

Q. Okay. And what was the ultimate outcome of that meeting?

A. Mr. Russow asked Mr. Dulany to remove his personal belongings from his office and that he was no longer an employee of our firm. [Tr 06/10/05, pp 148-149.]

In closing arguments, counsel for the Grievance Administrator argued that, as a fee for services to be provided, the $1,000 check from Tara Lucci should have been placed in the firm's trust account immediately and that respondent's failure to comply with Rule 1.15(a) could not be cured by his subsequent performance of legal services. In answer to questions from the panel as to whether or not it was necessary to show his actual knowledge of the whereabouts of the check from January to March, counsel stated:

> So whether, again, you want to focus on the January time frame or the March time frame, that money did not belong to Mr. Dulany. It either belonged to the client in January, when it should have been deposited into the client trust fund, or it belonged to [sic] law firm in March when he cashed the check. Either way, it was not his money to just simply take. [Tr 06/10/05, p 199.]

Respondent's counsel argued that while insufficient evidence had been presented to establish that respondent had possession or actual knowledge of the handling of the check from Ms. Lucci until shortly before he cashed it in March 2004, the evidence did establish that, by the time the check was cashed, respondent had performed sufficient work on Ms. Lucci's behalf, that the fees represented by that $1,000 check had been earned and it could not be said that those funds were "misappropriated" from Ms. Lucci. On the other hand, he argued, the firm owed respondent more than $1,000 in March 2004 under the terms of a written agreement between

respondent and his employers drafted at the end of 2003 and, therefore, it could not be said that respondent misappropriated the funds from the firm, either.

The hearing panel issued its written report on misconduct on August 30, 2005. The panel found that the Administrator had not established that respondent had possession or control of client funds prior to the time that $1,000 worth of legal services had been performed for Ms. Lucci and, therefore, it had not been established that respondent violated MRPC 1.15(a) or 1.15(d)(2) by failing to deposit client funds into an IOLTA account. The panel found, instead, that at the time respondent came into possession of the check, a question existed as to whether the check should be deposited into a firm account or whether respondent was entitled to the funds in partial payment of his claimed salary for 2003 and he therefore violated MRPC 1.15(c) by failing to appropriately segregate the check from his own funds until the matter was settled. By cashing the check and retaining funds in which the law firm had an interest, the panel reasoned, respondent violated MRPC 1.15(a) and MRPC 8.4(b). Finally, the panel dismissed the charged violations under MRPC 5.1(b) and (c); 5.2(a) and 5.3(b) and (c) which alleged that he failed to supervise employees of the firm who may have prepared and sent billings to Ms. Lucci.

At the separate hearing on discipline conducted November 11, 2005, petitioner questioned office manager Ruth Flint about the attorney compensation agreement (Pet Ex 8) which appears to show that, at the close of 2003, respondent and the firm agreed that there was a balance due to respondent of $9,794.43 "to be paid in installments as cash is available in the discretion of [the firm] and that, as of March 12, 2004, there remained a balance due to respondent of $5,081.04.

Respondent also called several character witnesses including attorneys and a probate judge from Monroe County who testified as to his reputation in that legal community. Finally, respondent testified on his own behalf regarding his remorse:

> As I said, I don't know what happened to that thousand dollar check but I don't think there's any - - well, maybe there is doubt. There hadn't been a day gone by since this thing started that I haven't wished it had been handled a different way. That I hadn't wished and truly wished that that check had gone where it ought to have gone, in the client's trust account, from day one and I wouldn't be here with my license to practice law on line.
>
> So yes, I am remorseful. I paid that money back to Braunlich, Russow, Braunlich because I have never questioned and still don't question that that thousand dollars is their money, and I gave it to them. And they owed me money and that's a whole different dispute. And I've tried not be necessarily bring that dispute here.
>
> But yes, I'm remorseful that this thing has come down and happened the way it happened, I'm remorseful that Ms. Lucci felt that way she did about it, and I'm remorseful that Braunlich, Russow, Braunlich apparently felt the way that they did about it. [Tr 11/11/05, pp 52-53.]

The panel issued its written report and order of discipline on December 29, 2005, concluding that respondent knew or should have known that he was dealing improperly with client funds and caused potential injury to his client thereby invoking application of ABA Standard 4.12 which calls for suspension. The panel wrote:

> With regard to the length of the suspension, it is the panel's opinion that a suspension of 30 days is appropriate, it being our view that respondent's actions, while serious enough to warrant a more severe penalty than reprimand under the relevant standards, was not intended to result in harm to a client or the public. [Hearing Panel Report on Discipline, 12/29/06 p 2.]

Proceedings Before the Board

The Grievance Administrator petitioned for review on the sole grounds that the panel erred by imposing a suspension of less than 180 days, conceding that a suspension under ABA Standard 4.12 may be appropriate in this case but that a suspension of sufficient length to require reinstatement proceedings is clearly warranted. The respondent cross-petitioned for review on the grounds that the panel erred by finding misconduct in violation of a rule not charged in the complaint, i.e., MRPC 1.15(c); that even if MRPC 1.15(c) had been charged, that rule would not govern respondent's receipt of funds under the circumstances presented in this case; and that the panel erred in finding a violation under MRPC 8.4(b).

Oral arguments before the Attorney Discipline Board were scheduled for March 16, 2006. On that date, the Board convened to hear arguments in this matter, as well as several other cases and received arguments in one other case with a quorum of five members. (See MCR 9.110(D)(2)). As the result of circumstances beyond his control, the Board's Chairperson, William P. Hampton, was required to leave the Board meeting before the oral argument in this case. Consequently, the Board's Chairperson exercised his authority under MCR 9.118(C)(1) to appoint a sub-Board consisting of Board members McAllister, Martell, Danhof and Matthews to conduct the show cause hearing in this matter and to make a recommendation to the full Board, including a transcript of the presentation made to the sub-Board on March 16, 2006. The Board has concluded its consideration of the sub-Board's recommendation and has reviewed the record before the panel as well as the transcript of the oral arguments presented on March 16, 2006.

Discussion

Michigan Rule of Professional Conduct 1.15(a) was amended effective October 18, 2005 with regard to the way in which "IOLTA" and "non-IOLTA" accounts are administered.[1] At the

[1]Prior to this amendment, the numbering of the paragraphs in Michigan's Rule 1.15 was consistent with the American Bar Association's Model Rules of Professional Conduct. So, for example, the former MRPC 1.15(a), along with Model Rule 1.15(a) and the version of that rule adopted by approximately 45 other states, all directed that a lawyer shall hold property of clients or third persons separate from the lawyer's own property. In Michigan's amended version, MRPC 1.15(a) is now devoted to definitions. The subsequent

time of respondent's conduct and during the proceedings before the panel, however, Michigan's Rule 1.15(a) stated:

> 1.15(a) a lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. All funds of the client paid to a lawyer or law firm other than advances for costs and expenses, shall be deposited in an interest bearing account in one or more identifiable banks, savings and loan associations or credit unions maintained in the state in which the law office is situated, and no funds belonging to the lawyer or the law firm shall be deposited therein except as provided in this rule . . .

Respondent has argued that when he took notice of the check in March 2004, it no longer represented "property of the client" but could be treated as payment of fees already earned. However, former MRPC 1.15(a) (now MRPC 1.15(d)), directed that a lawyer's duty to segregate funds applied to property of third persons as well as to property of clients. In this case, that third person was respondent's employer law firm. The Board is not persuaded by the further argument that a lawyer or law firm in the situation presented here cannot be considered a "third person" as that term is used in former MRPC 1.15(a). The fact that the term "third persons" is used in the first sentence of that sub-rule and that the term "lawyer or law firm" is used in the second sentence does not signify that they must be mutually exclusive in all cases.

Notwithstanding respondent's argument that he had a right to the check in March 2004 because of a dispute with the firm as to compensation owed to him from 2003, that position is not supported by the evidence. The written agreement (Pet Ex 8) reflecting the negotiations between respondent and the firm regarding his earnings for 2003 identifies the document as an,

> Agreement between JAD [Dulany] and BRB [firm] balance due of $9,794.43 to be paid in installments <u>as cash is available in the discretion of BRB</u>. [Emphasis added.]

In short, there was, in fact, no "dispute" in March 2004 between respondent and the law firm regarding his earnings for 2003. He and the firm had agreed that as of December 31, 2003 the firm owed him $9,794.43. Most importantly, he had agreed that this amount would be paid in installments at the discretion of the firm. The exhibit further shows that an installment of $2,448.61 was paid to respondent by the firm on February 12, 2004 and that another installment of $2,264.78 was paid to him on March 12, 2004, leaving a balance, as far as the firm knew, of $5,081.04 on that date. That summary of installments does not reflect a distribution or credit to

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paragraphs are now reordered and/or renumbered. Citations to cases involving violations of the duty to safeguard funds belonging to clients or third persons must now take into account this unique numbering in Michigan's rule.

respondent of $1,000 on March 3, 2004 because, of course, respondent did not tell anyone at the firm that he had received and cashed Ms. Lucci's check.

Indeed, as noted above, respondent expressly testified to the panel on November 11, 2005 that,

> I paid that money back to Braunlich, Russow & Braunlich because I have never questioned and still don't question that that $1,000 is their money, and I gave it to them. And they owed me money and that's a whole different dispute. And I have tried not to necessarily bring that dispute here. [Tr 11/1105, pp 52-53.]

It was argued to the panel that the whereabouts of the check of Tara Lucci from January to March 2004 was, and remains, a mystery. That is true. It is also irrelevant to the issue of respondent's violation of former MRPC 1.15(a). The check which respondent signed and negotiated on March 3, 2004, however it came into his possession, was a check which did not belong to him. It belonged instead to his employer law firm. Under any scenario by which the uncashed check came into respondent's possession, the funds rightfully belonged either to Ms. Lucci, for services to be performed, or were funds owed to the law firm for services already performed for her. Under no reasonable interpretation of former MRPC 1.15(a) could respondent step between Ms. Lucci and the law firm by secretly negotiating and cashing the check, without notice to either of them.

Having concluded that respondent's improper retention of funds intended as payment from a client to a law firm was a violation of former MRPC 1.15(a) as charged in the complaint, it is not necessary to address respondent's argument that the panel erred in its finding of misconduct under MRPC 1.15(c).

Level of Discipline

In this review proceeding, the Grievance Administrator concedes that the hearing panel correctly determined that the sanction in this case is governed by ABA Standard 4.12:

> 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 the client.

We agree with that analysis and we adopt the Administrator's argument that prior Board opinions, including Grievance Administrator v Deborah C. Lynch Case No. 96-96-GA (ADB 1997) and Grievance Administrator v William J. Braaksma, Case No. 94-58-GA (ADB 1995), provide apt precedent for an increase of discipline to a suspension of 180 days in this case.

In Lynch, the respondent received an $8,000 settlement check on behalf of a client. She testified that she placed the check on her desk and then "forgot about it." Respondent Lynch claimed no knowledge of how the check was then deposited into her firm's general account or

that, during the following seven months, her law partner depleted the account and used the money for office renovations. In its opinion to increase discipline from a reprimand to a suspension of 180 days, the Board noted a number of mitigating factors and recognized that respondent had not deliberately misused client funds. However, the Board also recognized that respondent's handling of her client's money was so grossly negligent that it constituted a violation of her fiduciary responsibilities to her client and demonstrated a fundamental misunderstanding of those obligations.

It is true that the amount involved in the instant case, $1,000, falls well below some of the more egregious cases of misappropriation which have come before the Board. In the case of Grievance Administrator v William J. Braaksma, supra, a case involving the misappropriation of $500, the Board increased discipline from a 45 day suspension to 180 days. In Braaksma, the Board concluded,

> The hearing panel placed significant emphasis on its conclusion that the respondent is unlikely to repeat this type of conduct in the future. While we defer to that conclusion, we are also mindful of our role in maintaining public confidence in the legal profession as a repository of client funds. The panel found that the respondent's conduct was not accidental and that he intended to take the money secretly, albeit temporarily. Such conduct requires a suspension of sufficient length to trigger the reinstatement requirements of MCR 9.123(B) and MCR 9.124. [Braaksma, supra, p 5.]

The fact that the Grievance Administrator and the Attorney Grievance Commission may have consented to the entry of reprimand orders in cases characterized as involving misappropriation does not establish precedent to be followed in this case, but simply recognizes that unique facts and circumstances in each case may warrant an appropriate adjustment in the level of discipline. Those prior consent reprimand cases cited by respondent might have had relevance had the Grievance Administrator argued that a violation of MRPC 1.15 can never result in discipline below a certain level. That is not the case here. Rather, the Administrator has argued, appropriately, that the misconduct established here places this case in a category for which a suspension of at least 180 days has been applied under the ABA Standards and precedent of the Attorney Discipline Board.

In this case, the record is clear that respondent knew or should have known that he was dealing improperly with funds to which he had no proper claim. Regardless of how the check came into his possession, it must be asked why respondent did not voluntarily reveal to either Ms. Lucci or his law firm what he was doing when he cashed the check. There is nothing in the record which suggests that anyone would have discovered what he had done if Ms. Lucci had not called office manager Ruth Flint to ask why her payment of $1,000 did not appear as a credit on her billing statement. Our decision to increase discipline to a suspension of 180 days in this case

is consistent with our duty to impress upon other lawyers and the public that misuse of client funds, whether it is intentional, knowing or grossly negligent, will result in a sanction appropriate under the circumstances.

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., did not participate.