STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellant,

v

Paul S. Schaefer, P-29748,

Respondent/Appellee,

Case No. 01-140-GA

Decided: April 8, 2004

Appearances:
Nancy R. Alberts, for Grievance Administrator, Petitioner/Appellant
Paul S. Schaefer, In Pro Per, Appellee

BOARD OPINION

Respondent pled no contest to the allegations of the five-count First Amended Formal Complaint filed by the Administrator. Count One alleges neglect of an inmate's post-appeal motion for relief, and Count Two alleges that respondent failed to return the unearned $15,000 fee paid in advance by the incarcerated client's mother. Counts Four and Five allege similar neglect and failure to return an unearned fee in another client's criminal matter. Count Three alleges that respondent violated MCR 9.119 by, among other things, failing to notify a client of his suspension in an unrelated case, and misrepresentation during the process of reinstatement following that suspension. The hearing panel imposed a 30-month suspension. The Administrator filed a petition for review[1], seeking an increase in discipline. We agree with the Administrator that the misconduct committed warrants revocation of respondent's license under the circumstances of this case, and we therefore modify the order of the panel.

[1] Respondent also initially filed a petition for review, seeking a decrease in discipline, but that petition was dismissed for failure to file a brief.

I. Misconduct.

Respondent pled nolo contendere to the allegations of the formal complaint. Several witnesses testified at the hearings on discipline.

Counts One and Two of the formal complaint pertain to respondent's client, Herbert Collins. Mr. Collins pled guilty to 2nd degree murder in 1968. In 1997, he retained respondent to commence post-appellate proceedings, including the filing of a motion for a sentence reduction. A retainer of $15,000 was paid to respondent by Mr. Collins's mother who had received an inheritance. Count One alleges lack of competence, diligence, and reasonable communication with the client, as well as neglect of Mr. Collins' case. Respondent was found to have violated MRPC 1.1(a)-(c), 1.2(a), 1.3, 1.4(a) and (b), and 8.4(a) and (c). Count Two alleges that respondent failed to return the $15,000 unearned and clearly excessive fee paid in advance by Collins' mother. By his nolo contendere plea, respondent was found to have violated MRPC 1.5(a), 1.15(b), 1.16(d), and 8.4(a) and (c) as alleged in Count Two.

Counts Four and Five, similarly, charge respondent with neglecting the case of another inmate, Robert Closz, and with failing to return papers and the $1,700 retainer paid to respondent by Closz' family. Respondent was found to have violated MRPC 1.1(c), 1.3, 1.2(a), 1.4, 3.2, 1.15(b), and 1.16(d) as alleged in Counts Four and Five. Finally, respondent also admitted the allegations in Count Three that he violated an order of discipline and engaged in dishonest conduct contrary to MRPC 8.1(a) and (b)[2], MCR 9.119(A) and (C), MCR 9.124(B)(1)(a)-(b), MCR 9.124(B)(4), MRPC 8.4(b), and MCR 9.104(A)(1)-(4).

II. Level of Discipline.

The sole issue on review is the appropriate level of discipline for the admitted misconduct. The Grievance Administrator argues that the hearing panel failed to properly apply the ABA Standards for Imposing Lawyer Sanctions by not recognizing that revocation is the presumptive

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[2] At all times relevant to these proceedings, and prior to July 30, 2001, MRPC 8.1 read:

> An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not
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> (a) knowingly make a false statement of material fact; or
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> (b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information protected by Rule 1.6.

sanction in this matter. We agree that revocation is warranted in this case, but not necessarily for the reasons advanced by the Administrator.

In deciding the appropriate discipline to be imposed, we employ the American Bar Association (ABA) Standards for Imposing Lawyer Sanctions. Grievance Administrator v Lopatin, 462 Mich 235; 612 NW2d 120 (2000). Pursuant to the ABA Standards, hearing panels and this Board examine the duty respondent violated, respondent's mental state, and the actual or potential injury caused by the respondent's conduct. Next, the Standards' recommended sanctions are considered based upon the answers to these questions. Lopatin, 462 Mich at 240; ABA Standards, pp 3, 4-5. Then, aggravating and mitigating factors are to be considered. Id. Finally, "the Board or a hearing panel may consider whether there are any other factors which may make the results of the foregoing analytical process inappropriate for some articulated reason." Grievance Administrator v Frederick A. Petz, No. 99-102-GA (ADB 2001), citing Lopatin, 462 Mich at 248 n 13.

Although the panel made several references to the Standards, it did not recite the recommended sanction (i.e., a sanction set forth as generally applicable in Standards 4.0 – 8.0, which Standards are cross-referenced to the Rules of Professional Conduct in an Appendix to the ABA Standards). In the following discussion, we have examined the potentially applicable Standards to the extent necessary to render our decision, although we are not persuaded that revocation was the presumptive sanction for the various acts of misconduct committed by respondent. We do, however, conclude that revocation is appropriate. "While the Board affords a certain level of deference to a hearing panel's subjective judgment on the level of discipline, the Board possesses, of necessity, a relatively high measure of discretion with regard to the appropriate level of discipline." Grievance Administrator v David A. Woelkers, 97-214-GA (ADB 1998), p 6. This allows the Board to carry out what the Court has described as the Board's "overview function of continuity and consistency in discipline imposed." Matter of Daggs, 411 Mich 304, 320; 307 NW2d 66 (1981). While the panel's report is comprehensive and its findings and conclusions are sound, we have determined that revocation is a more appropriate sanction than the 30-month suspension imposed by the panel in light of the nature and pattern of misconduct in this case.

A. Neglect, Lack of Diligence and Communication, and Related Misconduct.

With respect to the neglect charges, the Administrator cited Standard 4.4 in his sanctions memorandum to the panel.[3] Standard 4.42 (recommending suspension) was referenced as well as Standard 4.41 (recommending disbarment). The commentary to Standard 4.41 opens with the following paragraph:

> Lack of diligence can take a variety of forms. Some lawyers simply abandon their practices, leaving clients completely unaware that they have no legal representation and often leaving clients without any legal remedy. Other lawyers knowingly fail to perform services for a client, or engage in a pattern of misconduct, demonstrating by their behavior that they either cannot or will not conform to the required ethical standards.

The commentary to Standard 4.42 (recommending suspension) cites examples of broken promises, lack of communication, loss of the fee paid to the attorney, and even a pattern of neglect, i.e., conduct similar to that presented in the instant case.

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[3] Standard 4.4 reads, in part:

> 4.4 Lack of Diligence
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> Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0 the following sanctions are generally appropriate in cases involving a failure to act with reasonable diligence and promptness in representing a client:
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> 4.41 Disbarment is generally appropriate when:
>
> (a) a lawyer abandons the practice and causes serious or potentially serious injury to a client; or
>
> *(b) a lawyer knowingly fails to perform services for a client and causes serious or potentially serious injury to a client; or*
>
> (c) a lawyer engages in a pattern of neglect with respect to client matters and causes serious or potentially serious injury to a client.
>
> 4.42 Suspension is generally appropriate when:
>
> *(a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client,* or
>
> (b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client.
>
> [The emphasized portions were cited to the hearing panel.]

The panel did not, in its thorough report, specifically determine whether there was "serious or potentially serious injury" (Standard 4.41) or "injury or potential injury" (Standard 4.42). This is not uncommon when other determinations lead to the imposition of a sanction.[4] Indeed, in this case there was less focus on the degree of injury stemming from the neglect (such as the loss of a meritorious claim or other prejudice resulting from delay) than upon the injury stemming from the failure to account for client funds/failure to return unearned fees. Although respondent has never filed the motion for postappeal relief for which he was paid in 1997, the Administrator has argued, in connection with the excessive fee charge, that Mr. Collins' cause was a hopeless one. No evidence as to the merits of Mr. Closz' matter was introduced, and although the delay was not as great as that suffered by Mr. Collins, the need for action may have been even more immediate. Mr. Closz' sentence was nearly served, and at issue were some 60 days of "good time." Mr. Closz ended up serving the full sentence.

While we do not in any way minimize the client neglect shown here, we are not persuaded that the panel erred in failing to find Standard 4.41 to be the applicable starting point for its sanctions analysis with regard to the MRPC 1.1, 1.3, and 1.4 violations in light of the Administrator's argument below that Standard 4.42 may also set forth an appropriate presumptive sanction.

B. Excessive Fee.

Respondent was found to have charged Mr. Collins an excessive fee. MRPC 1.5(a). We note that such violations are cross-referenced in Appendix 1 to the ABA Standards to Standard 4.6 (lack of candor) and Standard 7.0 (violations of other duties owed as a professional). The Administrator cites to Standard 7.0.[5]

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[4] See, e.g., In Re Silkey, 2002 Ariz Lexis 109 (2002), at 63-64 (Disciplinary Commission's opinion which, in discussing proposed suspension for four years by consent, reviewed ABA Standards 4.41 and 4.42, noted "varying degrees of harm to each client" and that based upon those standards "the presumptive sanction is at a minimum suspension and possibly disbarment," and then turned to aggravating and mitigating factors).

[5] Standard 7.0, a catch-all section which lumps unreasonable fee violations together with various types of unrelated conduct, reads in part:

> 7.0 Violations of Other Duties Owed As A Professional
>
> Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving false or misleading communication about the lawyer or the lawyer*s services, improper communication of fields of practice,

The Administrator quotes the language of Standard 7.1. The commentary to Standard 7.2 reads, in part: "Suspension is appropriate, for example, when the lawyer does not mislead a client but engages in a pattern of charging excessive or improper fees." The commentary to Standard 7.3 states: "Courts typically impose reprimands when lawyers engage in a single instance of charging an excessive or improper fee." Again, we conclude that the panel's failure to start with the Standard recommending disbarment for the excessive fee charge was not erroneous.

C. Failure to Account for Client Funds and Return an Unearned Fee.

Respondent was also found to have engaged in two instances of failing to account for client funds and failing to return an unearned fee in violation of MRPC 1.15(b) and 1.16(d). The violations of MRPC 1.15(b) (failure to account for client property) and 1.16(d) (failure to return an unearned fee) stem from precisely the same conduct: respondent's failure to return documents and unearned fees when the representation terminated. We have analyzed the pertinent Standards and have surveyed many decisions in Michigan and in other jurisdictions dealing with this particular misconduct in an effort to begin the process of articulating the factors which may account for the broad range of sanctions imposed for these seemingly similar rule violations. Although we do not definitively decide in this opinion when disbarment is the presumptive sanction for failing to return an unearned fee, we have again concluded that the panel's failure to commence its analysis with the standards recommending revocation was harmless even if error.

MRPC 1.15(b) (failure to account for client property) violations are treated under Standard 4.1, which deals with failure to preserve client property, including intentional misappropriation

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improper solicitation of professional employment from a prospective client, unreasonable or improper fees, unauthorized practice of law, improper withdrawal from representation, or failure to report professional misconduct.

7.1 Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system.

7.2 Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

(knowing conversion) and commingling (dealing improperly with client funds).[6] The commentary to Standard 4.12 reads, in part: "Suspension should be reserved for lawyers who engage in misconduct that does not amount to misappropriation or conversion. The most common cases involve lawyers who commingle client funds with their own, or fail to remit client funds promptly." The commentary also references a one-year suspension case in which the lawyer "at all times acknowledged his responsibility for [the funds] and his indebtedness [to his client]."

Respondent's failure to return unearned fees after termination by his clients also constitutes a violation of MRPC 1.16(d).[7] Appendix 1 to the ABA Standards cross references "Declining or Terminating Representation - Rule 1.16" with standard 7.0. As noted above, under Standard 7.1 disbarment is said to be "generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system." Standard 7.2 provides that "suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system." The difference, then, is whether the lawyer has the intent

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[6] Standard 4.1 reads, in part:

> 4.1 Failure to Preserve the Client*s Property
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> Absent aggravating or mitigating circumstances, upon application of the factors set out in 3.0, the following sanctions are generally appropriate in cases involving the failure to preserve client property:
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> 4.11 Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client.
>
> 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 a client.
>
> 4.13 Reprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client.

[7] MRPC 1.16(d) reads:

> Upon termination of representation, a lawyer shall take reasonable steps to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by law.

to obtain a benefit for someone. Yet, the commentary to Standard 7.2 states: "Suspension is appropriate, for example, when the lawyer does not mislead a client but engages in a pattern of charging excessive or improper fees." Such a violation would seem to involve a benefit. The only illustration in the commentary to Standard 7.1 does not involve fees and does not help one determine under which standard a Rule 1.16(d) violation should fall.

Sanctions imposed in Michigan for failure to return an unearned fee have included reprimands, and suspensions of varying lengths up to disbarment, depending upon numerous factors. Such factors include the length of time during which the lawyer withheld the unearned fee, whether that misconduct is accompanied by other violations, and whether the case has been characterized mainly as a neglect case with the attendant failure to return an unearned fee, or as a violation of MRPC 1.5(a) (misappropriation). See, e.g., Grievance Administrator v H. Eugene Bennett, 02-56-GA (HP Consent 2003) (reprimand with conditions for lack of diligence, failure of communication, failure to return an unearned fee and other misconduct)[8]; Grievance Administrator v Seymour Floyd, 90-129-GA (ADB 1991) (30 days for failure to return $2,500 out of a $2,700 retainer after discharge by the client aggravated by failure to answer request for investigation and mitigated by undocumented depression over breakup with fiancé; increased in subsequent show cause proceedings to eight month suspension after failure to make ordered restitution.); Grievance Administrator v Albert Chappel, DP 21/81 (ADB 1981) (180 day suspension reduced to "30 days and until the unearned fee is returned" in light of purported mitigating factors); Grievance Administrator v Thomas A. Howard, No 01-153-GA (HP Consent 2002) (60-day suspension with conditions for failure to segregate, account for, and refund advance payment of $25,000 fee upon termination by one client in a criminal matter and similar conduct with respect to $10,000 advance fee in domestic relations matter); Grievance Administrator v Joan Marsh Simmons, 00-113-GA

[8] While orders imposing discipline by consent have been the subject of extensive sanctions analyses in some other jurisdictions, this has not traditionally been the case in Michigan. Our Court's recent adoption of the ABA Standards will likely result in fuller articulation of the bases for a given level of discipline in stipulations and orders for discipline. However, readers of this opinion should be aware that consent disciplines are not reliable precedent. And, as we recently said, "Just because one individual case presents unique and compelling mitigating circumstances warranting approval of a consent discipline proposal does not mean that the appropriate range of discipline is lowered in subsequent, contested cases." Grievance Administrator v G. Scott Stermer, No 00-206-AI (ADB 2003). Nonetheless, any purported recitation of the sanctions imposed for certain conduct would be incomplete without mentioning that under certain circumstances – even though unarticulated and perhaps rare – a particular sanction has been imposed for certain conduct and deemed appropriate by the parties (including the AGC, composed of lawyers and non-lawyers appointed by the Supreme Court) and a hearing panel.

(ADB 2001) (ADB affirmed panel's order of 45 day suspension and restitution of $8,150 for respondent's failure to pursue postappeal relief for over three years, mitigated by respondent's depression and eventual filing of motion and brief); Grievance Administrator v G. Michael Doroshewitz, ADB 138-89 (ADB 1990) (180 day suspension coupled with various conditions for "persistent pattern of neglect and inattention including . . . failure to provide legal services [and return unearned fees] to six separate clients" mitigated by ongoing recovery from alcoholism); and, Grievance Administrator v Richard G. Parchoc, 93-39-GA (ADB 1994) (3 year suspension increased to revocation for neglect and failure to return fees aggravated by misrepresentation to client, failure to notify her of his suspension in a prior disciplinary action, failure to answer request for investigation and formal complaint, and prior discipline among other things).

Similar ranges are found in other jurisdictions. *See, e.g.*, Colorado v Jaramillo, 35 P3d 723 (Colo PDJ, 2001) (Attorney disbarred for eight instances of misconduct, including failure to return unearned portions of flat fees paid in advance after termination by operation of law due to unrelated disciplinary suspension), *and compare* Colorado v Espinoza, 35 P3d 547 (Colo PDJ, 2001) (Six month suspension for neglect, misrepresentation, failure to return unearned fee and file after discharge by client, and failure to comply with diversion agreement). See also, In re Peter R. Ruiz, Jr., 2002 Ariz Lexis 88 (2002) (order adopting Disciplinary Commission Report on consent suspending respondent for six months for neglect and failure to return an unearned fee in violation of RPC 1.15(b) and 1.16(d), applying ABA Standard 4.12, and Standard 7.0); In re Sara Odneal, 2001 Ariz Lexis 91 (2001) (order adopting Disciplinary Commission Report on consent censuring respondent and ordering ethics enhancement program for delay in disbursing client funds, disbursing disputed funds to herself and failing to promptly return an unearned fee after discharge in violation of RPC 1.15(b) and 1.16, applying ABA Standards 4.13, 4.43, and 7.3); and, Colorado v Kuntz, 908 P2d 1110 (Colo, 1996) (six month suspension with reinstatement proceedings required for neglect of three separate client's matters and failure to return unearned fees [$300 in one case and approximately $390 in another] after discharge, citing only Standard 4.42).

Of course, each of the foregoing cases doubtless involved unique circumstances, and factors in aggravation and/or mitigation which have not been set forth herein but which certainly affected the level of discipline imposed.

Jaramillo, supra, bears some similarity to this case. The report and decision in that case discusses respondent's receipt and retention of a $1,500 flat fee (on August 21, 1988) in one of the matters for which discipline was imposed:

> The entry of the suspension order on September 16, 1998, prevented Jaramillo from continuing to represent Hernandez, effectively terminated the attorney/client relationship, triggered the provisions of Colo. RPC 1.16(d) and required Jaramillo to refund any advance payment of fees that had not been earned. The $1,500 flat fee arrangement agreed upon between Jaramillo and Hernandez required Jaramillo to provide professional services to Hernandez to the conclusion of his criminal trial. Jaramillo did not do so. Indeed, the suspension order precluded him from doing so. Consequently, some portion of the $ 1,500 flat fee payment remained unearned at the time Jaramillo was suspended and was subject to the mandatory refund provisions of Colo. RPC 1.16(d). Jaramillo's failure, upon termination, to refund the unearned portion of the advance payment of fee is a violation of Colo. RPC 1.16(d). Jaramillo knew the $ 1,500 was for representation through conclusion of the criminal matter, knew that after September 16, he could not continue the representation through completion, and therefore knew he retained some portion of the unearned fee. His failure to promptly refund that portion of the unearned fee to which he knew he was not entitled was knowing conversion of client funds and violates Colo. RPC 8.4(c). See People v. Varallo, 913 P.2d 1, 11 (1996). [Jaramillo, supra, 35 P3d at 731.]

In addition to caselaw, the Colorado Presiding Discipline Judge and Hearing Board Members cited ABA Standard 4.11 for the proposition that disbarment is generally appropriate when a lawyer knowingly converts client property.

In this case, the hearing panel made the following findings with regard to the charges in Counts One and Two:

> Respondent entered into a stipulation in ADB Case No. 96-261-GA [unrelated to the instant proceedings] on November 6, 1997, in which he agreed to the entry of a consent order of discipline pursuant to which his license to practice law was to be suspended for a period of 180 days effective February 1, 1998. (FAC [First Amended Complaint] ¶¶, 17, 19; Tr 28.) The next day, November 7, 1997, the Respondent entered into an agreement with Herbert Collins' mother, Peggy Cameron, to represent Collins "in a delayed motion for a new trial and delayed motion to withdraw a guilty plea for a fee of $15,000." (Tr 28; FAC, ¶ 17.) By that time, inasmuch as Mrs. Cameron had given the Respondent a check on October 20,

> 1997, part of the agreed upon fee had already been paid. The balance of the fee was paid by Mrs. Cameron in the form of two checks, one of which the Respondent received on November 18, 1997, and the other on December 15, 1997. (FAC, ¶ 18; Tr 29-30.)
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> It is undisputed that on October 20, 1997, when the Respondent accepted the first of Mrs. Cameron's three payments, plea bargain negotiations in ADB Case No. 96-261-GA were in fact in progress; however, according to the Respondent, "nothing [had been] finalized." (Tr 29.) It is obvious, however, that by November 7, 1997, the date on which he entered into the agreement to represent Collins, the Respondent had full knowledge of what the discipline in ADB Case No. 96-261-GA was to be and when the suspension was to commence. Nevertheless, he entered into the retainer agreement, kept the payment received October 20, 1997, and in fact accepted two more payments from Mrs. Cameron, those made on November 18 and December 15, 1997. (Tr 29-30.) Respondent felt he had already earned some of the money when he accepted the fee payments and was hopeful that the case would be finished by February 1, 1998. (Tr 30-31.) [HP Report 12/13/02, pp 6-8.]

Thus, Jaramillo may be distinguished from the instant case in that, unlike Mr. Jaramillo, respondent theoretically could have completed the motion in the three months prior to the effective date of his discipline. Yet, at some point, either when his suspension commenced, or in the years after his reinstatement in October, 1998, it cannot have failed to occur to respondent that his fee had not been earned. Indeed, the panel discusses in some detail respondent's repeated assertions to his client over several years that the motion would be completed by a certain date. Similar representations were made to the Grievance Administrator in a sworn statement taken prior to the filing of the formal complaint herein. Also, Mrs. Cameron sued respondent in Van Buren County Circuit Court and obtained a consent judgment against respondent providing that unless respondent filed a motion for reduction in sentencing or a request for resentencing by May 1, 2002, he would be liable to Mrs. Cameron for the entire $15,000, plus attorney fees and costs. He did not file the motion by that deadline, and, the panel notes, "insists that he still intends to repay the $15,000 even though he feels he has spent 150 hours or more on the Collins case." (HP Report, p 11.)

The panel did not specifically discuss the standards applicable to the rule violations. However, we presume that the panel did not find Standard 4.11 applicable. As noted above, Standard 4.11 provides: "Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client." It has been held in another

jurisdiction that: "Knowing conversion requires proof of three elements: (1) the taking of property entrusted to the lawyer, (2) knowledge that the property belongs to another, and (3) knowledge that the taking is not authorized." Colorado v Jerrold C. Katz, 58 P 3d 1176 (Colo PDJ 2002) (following People v Varallo, 913 P2d 1 (Colo 1996)). MRPC 1.16(d) requires that upon termination of representation a lawyer shall refund "any advance payment of fee that has not been earned." Conceptually, it is not difficult to argue that an attorney's refusal to refund the unearned portion of such a fee becomes, at some point after the termination of the representation, tantamount to knowing conversion. But, it is obviously not the case that every failure to timely return an unearned fee amounts to knowing conversion or misappropriation.

In Grievance Administrator v Joan Marsh Simmons, supra, for example, the Grievance Administrator sought a suspension in the range of 60 - 90 days under Standards 4.12 (dealing improperly with client property) and 4.42 (knowing failure to perform services for a client). The panel imposed a suspension of 45 days notwithstanding the long delay between respondent's retention by the client 1996 and filing of the motion on December 7, 2000 (4 days before the hearing on discipline). The panel also ordered respondent to make restitution of $8,400 of the $10,000 fee despite the eventual filing of the motion and respondent's estimate that she spent 1,500 hours on the matter. The Board affirmed this decision under Standard 4.42, but also noted the Administrator's argument that suspension was appropriate under Standard 4.12 because respondent Simmons commingled client funds with her own and did not remit unearned fees to her client.

We do not decide whether this case falls under Standard 4.11 or Standard 4.12 because we conclude that revocation is appropriate in any event given the nature and pattern of the several acts of misconduct presented here and the aggravating evidence (discussed below).

D. Other Violations, Including MRPC 8.1(a) and 8.4(b).

Count Three of the Amended Formal Complaint alleges that respondent violated an order of discipline and engaged in dishonest conduct, as he was previously being suspended and reinstated, so that he could keep the Collins/Cameron fee.[9] The Administrator argues that the

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[9] Paragraph 23 of the Amended Formal Complaint enumerates the particulars:

> 23. Respondent violated his duties and responsibilities, as follows:
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> a) He failed to notify Herbert Collins in writing by registered or certified mail of his suspension and related matters as required by MCR 9.119(A) and by the Order of Suspension;

presumptive level of discipline for this admitted misconduct is disbarment under Standard 8.1. In light of our conclusion that the totality of respondent's misconduct calls for revocation of the respondent's license to practice law, we need not analyze the application of this standard to these facts.

E. Aggravating & Mitigating Factors.

The panel found that various aggravating factors in ABA Standard 9.0 should be considered, including the following: 9.22(a) (prior disciplinary offenses – two admonishments and a 180-day suspension for violating MRPC 1.15(a) and (b)); 9.22(b) (selfish motive); 9.22(d) (multiple offenses); 9.22(f) (submission of false evidence and statements, deceptive practices during disciplinary proceedings); 9.22(h) (vulnerability of victims); 9.22(i) (substantial experience in the practice of law); and 9.22(j) (indifference to making restitution). The panel did not assign much weight to the character testimony from three witnesses, respondent's unsupported claim to have been "acting under an emotional impediment" with respect to these two criminal matters, and his tardy restitution in the Closz matter.

III. Conclusion.

As noted above, we have, in the exercise of our overview discretion, determined that revocation is appropriate in this case.

> b) He failed to file an affidavit of compliance with the administrator and board within 14 days after his suspension, and failed to file copies of a disclosure notice and mailing receipt to Herbert Collins;
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> * * *
>
> e) In his Petition for Reinstatement filed with the Michigan Supreme Court on July 9, 1998, Respondent falsely stated that, "He has complied fully with the Order of Suspension;"
>
> f) In his Petition for Reinstatement filed with the Michigan Supreme Court on July 9, 1998, Respondent falsely stated, "As of the date of suspension, Petitioner had no clients to notify per MCR 9.119;" and,
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> g) In the statement under oath described above, Respondent created and failed to correct the misapprehension that all of this [sic] clients existing before hid [sic] date of suspension had agreed to the substitution of other attorneys for their matters.

Factors weighing in favor of the panel's decision to suspend respondent for 30 months might be: (1) that respondent has refunded (albeit tardily) the fee paid by Mr. Closz (Counts Four & Five), and acknowledges that he must repay the fee to Collins' mother (Ms. Cameron); and, (2) that the panel has ordered that respondent will not be eligible for reinstatement until Ms. Cameron is made whole, i.e, until respondent repays her $15,000 and her costs and attorney fees in the civil action she filed against respondent. Thus, as in Chappel, supra, the sanction essentially converts to a longer term if the injury is not remedied.

However, the most persuasive argument for increasing discipline is the panel's own concise description of the misconduct in this case:

> Respondent took money from Mrs. Cameron for which he did little or nothing, used the money for his own purposes, intentionally failed to comply with the notice requirements of MCR 9.119(A)(1)-(6), deliberately withheld information and in fact made statements under oath during the reinstatement proceedings which were not true, and in general engaged in a course of unethical and unprofessional conduct which can only be described as deplorable. [Hearing Panel Report, p15.]

In light of the totality of respondent's misconduct and the aggravating factors in this case, we conclude that disbarment is appropriate and we therefore will modify the panel's order of discipline and enter an order revoking respondent's license to practice law in Michigan.

Board members Theodore J. St. Antoine, Marie E. Martell, Ronald L. Steffens, Rev. Ira Combs, Jr., Billy Ben Baumann, M.D., and Hon. Richard F. Suhrheinrich concur in this decision.

Board member George H. Lennon would affirm the hearing panel's decision.

Board members William P. Hampton and Lori M. Silsbury were absent and did not participate.