STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellee,

v

Robert G. Vaughan, P-29814,

Respondent/Appellant,

Case No. 00-125-GA

Decided: April 9, 2002

BOARD OPINION

Appearances: Wendy A. Neeley, for Grievance Administrator, Petitioner/Appellee
Robert G. Vaughan, In Pro Per, Respondent/Appellant

The respondent admitted misappropriating funds which he had held on behalf of a minor and which he had been ordered to turn over to his client once she achieved majority. The hearing panel ordered the suspension of the respondent's license to practice law in Michigan for 30 months. The Grievance Administrator petitioned for review of the level of discipline. For the reasons stated in Grievance Administrator v Frederick A. Petz, 99-102-GA; 99-130-FA (ADB 2001), we hold that the respondent's intentional conversion of client funds, coupled with misrepresentations to the Grievance Administrator and failure to answer a request for investigation, must, when properly analyzed under the American Bar Association's Standards for Imposing Lawyer Sanctions, result in the revocation of the respondent's license to practice law, absent compelling mitigating circumstances. We conclude that such mitigation is not present in this case and we therefore increase discipline to the revocation of respondent's license.

I. Hearing Panel Proceedings

The Grievance Administrator's three-count formal complaint was filed July 18, 2000. Coincidentally, that was five days after the effective date of a 119-day suspension which had been entered in an unrelated case. The respondent failed to file a timely answer and his default was entered August 11, 2000. Respondent then filed an answer on August 15, 2000. The parties stipulated to setting aside the default and the case proceeded to a hearing before Genesee County Hearing Panel #5 in Flint. The respondent appeared on his own behalf at that hearing. At the outset of the hearing, he advised the panel that he was admitting the allegations in Counts I and II of the complaint and that the only contested issue was whether or not he gave false testimony to the Attorney Grievance Commission at his sworn statement taken in June 1999. The parties also

stipulated that the funds in question were delivered to the complainant in August 1999 and that restitution was therefore not an issue before the panel.

Notwithstanding the default, the Grievance Administrator's counsel offered exhibits which were received without objection, including a copy of the probate court file in the matter of Terri L. Clark, a Minor, Case No. 92-136823-CV; the records of respondent's trust account and the transcript of respondent's sworn statement taken at the Attorney Grievance Commission on July 15, 1999.

The respondent's admissions and the documentary evidence established that respondent had been appointed conservator of the Estate of Terri L. Clark, a Minor, by order of the Genesee County Probate Court in January 1992. Ms. Clark had been awarded $15,530.28 in a civil matter. As conservator, respondent had placed the funds in a restricted account until Ms. Clark reached the age of 18.

Terri Clark turned 18 in May 1998. In June 1998, the probate court directed the respondent to file a final account and to distribute the funds to Ms. Clark. It is undisputed that he withdrew the amount of $25,714.11 from the restricted account on August 11, 1998 and that he deposited that amount into his client trust account on the same day. Starting three days later, on August 14, 1998, the respondent began writing checks on the trust account payable to himself. Between August 14th and August 30, 1998, respondent wrote 11 checks payable to himself, all in even amounts ranging from $250 to $1,000. Those checks alone totaled $6,000. Additional checks were written on the account during September 1998 and by September 30, 1998, the balance in respondent's trust account was $17.63. It is undisputed that none of the funds withdrawn from the trust account during that period were delivered to Ms. Clark or used on her behalf.

In December 1998, Terri Clark filed a request for investigation with the Attorney Grievance Commission, complaining that she had not received the money. The respondent admits that he did not answer that request for investigation. He was subpoenaed to come to the office of the Attorney Grievance Commission to give a statement under oath on July 15, 1999. During that interview, respondent testified that he had sent the funds in question to Ms. Clark shortly after he closed the restricted account in August 1998. He also testified that when he heard that she had not received those funds, he sent a second check:

> [Ms. Clark] then told me that they had severe weather and flooding and I don't know what all down there, okay,
>
> And I said, okay, I said, well, we'll send it again.
>
> I did it again. They still didn't receive it and I didn't hear anything for a while, and then they called, and at that point, the account was then short because I had went into it and taken some of the funds to pay some bills. (Ex. 8 at 24).

It is undisputed that respondent sent a cashier's check to Terri Clark on August 12, 1999 (after his sworn statement at the AGC) in the amount of $27,588.08.

The only disputed issue before the panel was the charge in Count III that his sworn statement to the Grievance Administrator that he had written two checks to Ms. Clark prior to July 1999 was false. At the hearing before the panel on November 1, 2000, the respondent was asked to provide some evidence in support of his claim that he had mailed two checks to Ms. Clark. Respondent was unable to provide such documentation and he was questioned about the fact that his bank records showed that the checks in his trust account for that period were all written in numerical sequence and were all accounted for.

At the conclusion of respondent's testimony, the hearing panel deliberated on the disputed charge in Count III and returned to announce its unanimous decision that all of the charges in the complaint had been established. The panel proceeded immediately to a hearing on discipline in accordance with MCR 9.115(J)(2). During this phase, the Grievance Administrator's counsel offered evidence of respondent's five prior admonitions in 1997, 1998 and 1999. (Exs 51-55). She also offered copies of the report and order in Grievance Administrator v Robert G. Vaughan, 99-191-GA, in which respondent received a 119-day suspension, effective July 13, 2000, for neglecting a probate matter, failing to return an unearned fee of $350 and failing to answer the request for investigation.

Respondent offered no exhibits in mitigation. He told the panel that the events in this case took place at a period when he was going through a divorce. He stated:

> I would indicate for the court or to the hearing panel that I know that what I did was wrong. I never should have crossed that line, but I did that, and I can't change what happened. The only thing I can be thankful for was that I was able to get the funds back to Ms. Clark so that in the end she was not damaged by my actions, although my actions are not correct. (T 49).

Under further questioning from the panel, Mr. Vaughan revealed that his divorce proceedings lasted from March 1995 to August 1997. (The misappropriation of funds in this case occurred in August and September 1998.) Respondent stated without elaboration that he has a daughter who has not spoken to him for 3 ½ years.

Following a further period of deliberation, the panel announced its decision to impose a suspension of 30 months effective November 10, 2000 (consecutive to the 119-day suspension period ordered in Case No. 99-191-GA).

II. Discussion

A. ABA Standard 4.11

In Grievance Administrator v Frederick A. Petz, supra, the Board analyzed the appropriate discipline for an attorney's knowing conversion of client funds under the ABA Standards for

Imposing Lawyer Sanctions as directed by the Supreme Court in Grievance Administrator v Albert Lopatin, 462 Mich 235; 612 NW2d 120 (2000). Upon consideration of the factors in ABA Standard 3.0, we concluded in Petz that, with regard to the handling of client funds, discipline was appropriate under ABA Standard 4.11 which states:

> Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client.

In this case, although the panel did not specifically articulate an analysis under the ABA Standards, it reached the same result in finding that embezzlement of client funds is one of the most serious offenses that an attorney can commit and that, but for the mitigating circumstances described as the sudden convergence of a raft of professional difficulties and the stress of certain family problems, the panel would have had no hesitancy in revoking respondent's license.

It is clear from the record below that respondent's conversion of funds violated, at the least, his duties to his client and the legal profession. It is undisputed that respondent acted intentionally by using those funds to pay personal obligations. For the reasons discussed in Petz, supra, the respondent's failure to safeguard those funds caused not only potential injury to his client but actual injury to public confidence in the legal profession as a repository of client funds. Petz, supra, pp 8, 9. As in Petz, application of the factors in ABA Standard 3.0 leads inevitably to ABA Standard 4.11 and a presumptive discipline of revocation, absent aggravating or mitigating factors.

B. Aggravating and Mitigating Factors

In this case, the record contains the following aggravating factors under ABA Standard 9.22:

9.22 Factors which may be considered in aggravation.

(a) prior disciplinary offenses;
(b) dishonest or selfish motive;
(c) a pattern of misconduct;
(f) submission of false statements during the disciplinary process;
(h) vulnerability of victim;
(i) Substantial experience in the practice of law.

On the mitigating side of the ledger, however, the panel concluded:

> What makes this case a difficult one in which to set the penalty is the marked contrast between Robert Vaughan's first eighteen years in practice and his last three years as a member of the bar. It is most unusual for a lawyer to practice law for 18 years without as much as a single admonishment, and then suddenly accumulate five admonishments and two orders of discipline within a relatively short span of time. . . . Were it not for the unusual timing of these professional problems, and the fact that they coincided with certain highly stressful and depressing events in the respondent's life, the panel would have no hesitancy in revoking his license. If the professional difficulties suffered by Mr. Vaughan had been spread evenly throughout his long tenure as a lawyer, or even over the past ten years, we would have no reluctance to impose a revocation of his license to practice. But the contrast between eighteen years of unblemished service and three years of acute professional

> problems, coinciding as those problems do with the breakup of Mr. Vaughan's marriage and the serious deterioration of his relationship with his daughter, prompts the panel to extend to him the benefit of doubt. (Hearing panel report at 6).

We believe that respondent's prior history of misconduct (five admonitions and a 119-day suspension) merits consideration only as an aggravating factor under ABA Standard 9.22(a). While the hearing panel or the Board may speculate as to whether or not respondent's disciplinary problems were symptoms of underlying personal or professional problems, there is simply no evidence in the record upon which to make such a connection. Respondent referred briefly to a divorce completed one year before the misconduct in this case and he mentioned his estrangement from his daughter. Similarly, there is no evidence in the record relating those two personal events to respondent's ability to practice law or to his ability to conform to the two fundamental obligations breached in this case - his obligation to safeguard client funds and his obligation to be truthful in his sworn testimony.

III. Conclusion

We are mindful that our opinion in the Petz matter had not yet been issued when the hearing panel first announced its decision in this case to impose a 30-month suspension. We rely on our opinion in Petz not because it should have been followed as precedent by the panel but because it articulates the rationale for our decision to increase discipline. In Petz, we explained why proper analysis under the ABA Standards will generally require revocation when an attorney has been shown to have wilfully converted client funds unless compelling mitigation or unusual circumstances have been established. We also re-stated the rationale, expressed in our prior opinions, for holding attorneys to the very highest fiduciary standards.

We are unable to identify compelling mitigating factors in the record which would warrant a departure from the presumptive level of discipline which is called for in this case. We therefore vacate the hearing panel order of suspension, with conditions, and order the revocation of respondent's license to practice law.

Board Members Wallace D. Riley, Theodore J. St. Antoine, Nancy A. Wonch, Ronald Steffens, Marie E. Martell, William P. Hampton, and Rev. Ira Combs, Jr. concurred in this decision.

Board Member Marsha M. Madigan, M.D. did not participate.