STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellant,

v

Brian D. Albritton, P 46197 ,

Respondent/Appellee,

Case No. 00-200-GA

Decided: May 14, 2002

BOARD OPINION

Appearances: Frances A. Rosinski, for Grievance Administrator, Petitioner/Appellant
Brian D. Albritton, In Pro Per, Respondent/Appellee

The respondent, Brian D. Albritton, commingled client funds with his own by allowing the funds to which he was entitled as fees and costs in a contingent fee case to remain in his trust account while funds belonging to at least one client remained in that account. The respondent committed a further violation of Michigan Rule of Professional Conduct 1.15(a) when, as the result of his grossly negligent failure to keep proper records pertaining to that trust account, he invaded the funds awaiting disbursement to the client. Timely resolution of the Grievance Administrator's investigation was then impeded by the respondent's failure to file a timely answer to the request for investigation submitted by the client. The parties in this case do not challenge the hearing panel's findings and conclusions on the charges of misconduct, including the hearing panel's dismissal of two counts in the formal complaint. The Grievance Administrator has petitioned for review on the grounds that the nature of respondent's misconduct, aggravated by a history of prior discipline, warrants suspension of his license to practice law. We agree. Discipline in this case is increased to a suspension for 90 days with the further condition that respondent attend five hours of continuing legal education on or before March 1, 2003.

Hearing Panel Proceedings

The respondent was retained by four women in November 1995 to handle their sexual harassment claims against their employer, a medical clinic. The respondent and his clients agreed to a contingent fee arrangement. A complaint was filed on the clients' behalf in October 1998 and their claims were settled in early 1999 for the total aggregate amount of $14,500. The respondent's costs were split among the four plaintiffs and respondent computed his one-third contingent fee. The net settlement proceeds were distributed to three of the plaintiffs without incident or complaint. This case arises from respondent's delay in forwarding the settlement proceeds to the fourth client, Wanda L. Miles.

Ms. Miles testified that she met with respondent on February 9, 1999 to review and sign the settlement agreement which called for a settlement of her claim for a total of $2,000. After deductions for costs and respondent's contingent fee, Ms. Miles was to receive a net amount of $1,286.67. She was told that her check would be mailed in a few days.

When she had not received her settlement check by February 22, 1999, Ms. Miles called respondent's office and was told that the defendant's check had bounced following its deposit and that a new check had been ordered. (It is not alleged that this representation was false. The record reflects that respondent first received settlement checks from the defendant in the amounts of $12,500 and $2,000. The larger check was returned for insufficient funds and was subsequently replaced by checks in the amount of $7,000 and $5,500.) The replacement checks were deposited into the respondent's trust account on February 25, 1999. Once those checks cleared, respondent wrote individual settlement checks to the four plaintiffs on March 10, 1999. The respondent met with three of the plaintiffs and handed them their checks in person. Ms. Miles instructed respondent to send her check in the mail. Between March 10, 1999 and May 4, 1999, Ms. Miles called respondent's office to ask why she had not received her settlement check. The respondent acknowledged in his testimony that he did not speak with her personally but, he testified, he assumed that her check had been mailed to her. Ms. Miles filed a request for investigation with the Attorney Grievance Commission which was mailed to the respondent on May 4, 1999. Upon receipt of the grievance, respondent testified, a search of his office produced the check to Ms. Miles, dated March 10, 1999, misplaced in some "loose files" in his office. The check was mailed to her and it is undisputed that Ms. Miles cashed her check on May 18, 1999.

Although the trust account check to Ms. Miles was written on March 10, 1999, the balance

in that account had dwindled to $5.74 by March 31, 1999, even as her uncashed check for $1,286 lay in respondent's loose files. During that month, respondent wrote $5,850 in checks out of his trust account payable to himself, to cash or to his creditors.

The hearing panel found that during the period in question, no client trust check was dishonored, nor were any funds received on behalf of a client ever knowingly withheld or misused. However, the record also confirms respondent's fundamental misunderstanding of the proper nature of a trust account.[1] In response to a question from the panel chair, respondent explained:

> Mr. Albritton: . . . Historically what I had done with my IOLTA account is if I received settlement monies I would deposit the settlement proceeds into the IOLTA account, send out - forward the proceeds to the individual client, and I would keep the monies in the IOLTA account, and I never thought that that was improper. And I'm sure that is what I did with this particular case. The monies that would have been due me as attorney fees would have been kept in the IOLTA account and I would have spent them accordingly, and that's why you would see a check written to Goodyear Tire, or see a check written to cash.
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> . . .
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> I did not know that all monies needed to be transferred out of the IOLTA account and placed into a general account. (Tr 89-90.)

In answer to a further question, respondent testified again that it was his usual practice to deposit settlement funds into his trust account, to forward the client's share and then to leave his portion of the settlement funds in the trust account. Respondent would then draw on the account as needed to pay personal and/or business expenses:

> Mr. Albritton: That was my common practice - that I would leave the proceeds in there and write checks out. I later found out that was improper. I admit that she did not receive her monies in March. As soon as I found out that she did not receive them, I located the check, sent it out immediately with a sincere apology. (Tr 91.)
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> . . .
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> It wasn't a willful use of her money. It was a mistake and mismanagement of funds. (Tr 95.)

When asked by hearing panelists if he had any procedures in place in his office at that time to reconcile his trust account when he received a bank statement, he answered:

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[1] Also referred to as an IOLTA account (Interest On Lawyers Trust Accounts).

> Mr. Albritton: No, I don't reconcile accounts. I don't reconcile even my own personal account. Basically call up and see what's there, so no, I don't. (Tr 95.)

At the conclusion of that evidentiary hearing, the panel announced its decision that count one of the complaint (which charged neglect of his client's legal matter and failure to communicate) and count three (which charged that he endorsed the settlement check without authorization) had not been established and would be dismissed. Dismissal of those accounts is not challenged on appeal. The panel found that misconduct had been established as to the remaining three counts and the case was adjourned for a separate hearing on discipline.

The panel convened for such a hearing on June 20, 2001. Presenting an argument under the ABA Standards for Imposing Lawyer Sanctions and Michigan case law, the Grievance Administrator's counsel argued that since respondent engaged in misappropriation of client funds, discipline must be imposed in the range between a three-year suspension and disbarment. Citing Grievance Administrator v Woelkers, Case No. 97-214-GA (ABD 1999), counsel argued:

> Because of Mr. Albritton's testimony, that it was ignorance in the use of his clients' trust account, and from what I have heard so far, I don't think you have any bad intent. That while Woelkers calls for three years to disbarment, the Grievance Administrator believes that the lower end of that, in other words, three years is the applicable range of discipline. (Tr 118.)

Counsel noted that respondent's failure to file a timely answer to the request for investigation, as charged in count five, appeared to fall within the ambit of ABA Standard 6.23 which suggests that reprimand is generally appropriate when a lawyer negligently fails to comply with a court order or rule.

In terms of aggravating circumstances, the Administrator's counsel pointed out that respondent failed to answer the request for investigation in this case at a time when he was defending himself in an earlier, unrelated discipline proceeding. She also offered evidence of respondent's prior misconduct as demonstrated by an admonishment issued by the Attorney Grievance Commission in March 1996 (Exhibit A); a second admonishment issued March 31, 1999 (Exhibit B); a 30-day suspension in September 1999 (Exhibit C); a hearing panel reprimand in March 2000 (Exhibit D); and a consent order of reprimand in September 2000 (Exhibit E).

Testifying on his own behalf, respondent told the panel that since the difficulties with his trust account which were the subject of this complaint, he has closed that account and opened a new

one. He stated that he no longer allows his personal funds to remain in the trust account and he has a new understanding of the duties and record keeping which are associated with the maintenance of an IOLTA account. Respondent called the panel's attention to ABA Standard 4.13 which states:

> 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.

In its report filed November 6, 2001, the hearing panel explained its decision to order that respondent be reprimanded and that he attend five hours of continuing legal education in the area of law office management. The panel analyzed respondent's handling of client funds under ABA Standard 4.1. The panel found that the respondent was "incompetent and ill-trained" in the management of his civil practice where client funds are routinely and regularly received and disbursed but that under all of the circumstances, his state of mind was more accurately described as negligent than knowing or intentional and that a reprimand was therefore appropriate under Standard 4.13.

Discussion

There is relatively little dispute in this case as to what the respondent did. He allowed his own funds to be commingled with client funds in his trust account; his nonexistent record keeping resulted in misappropriation (albeit negligent or unintentional) of client funds; and he failed to file a timely answer to a request for investigation. Nor is there much dispute as to whether or not Respondent's mishandling of client funds was intentional or unintentional. Although the Grievance Administrator's brief characterizes respondent's nonexistent accounting procedures as "an intentional business practice," trial counsel conceded that respondent did not have a "bad intent" to deprive the client of her funds and that his handling of the trust account was the result of ignorance rather than dishonesty.

Similarly, the Administrator's counsel on appeal requested a suspension of at least six months for respondent's "intentional commingling" but candidly recognized the difficulty in arriving at the appropriate level of discipline in a case of "innocent or technical misappropriation."[2] Nevertheless, the Administrator argues, it would be a mistake in this case to overemphasize the unintentional nature of respondent's misuse of client's funds while overlooking respondent's

[2] We agree with counsel that this terminology, which is occasionally utilized by the parties or panelists in similar cases, is unfortunate. We also recognize that counsel was not suggesting that we ignore the gravity of respondent's misconduct.

knowing commingling of funds, his lack of any reasonable explanation for failing to answer the request for investigation and the aggravating effect of his prior misconduct.

The Grievance Administrator's points are all well taken. ABA Standard 4.12 states:

> 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.

The misconduct in this case appears to be of the type envisioned by the drafters of the commentary to Standard 4.12:

> 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.
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> . . .
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> Because lawyers who commingle client's funds with their own subject the client's funds to the claims of creditors, commingling is a serious violation for which a period of suspension is appropriate even in cases when the client does not suffer a loss.
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> As explained by the Illinois Supreme Court: "It is the risk of the loss of the funds while they are in the attorney's possession, and not only their actual loss, which the rule is designed to eliminate . . ." In re Bizar, 97 Ill2d 127, 454 NE2d 271 (1983).

The seriousness of the offense of commingling of client and attorney funds, and the likelihood of a suspension for that offense, has consistently been recognized by the Board. For example, in Grievance Administrator v Peter Shek, ADB 222-87 (1989), the respondent attorney admitted commingling client funds but he denied intentional misappropriation. Instead, he characterized his conduct as "a clear inattention to proper bookkeeping methods leading to inadequate balances, over-withdrawals and insufficient funds checks." In that case, the Board found:

> Moreover, this case appears to go far beyond mere inattention. This is not a case involving a deposit of funds on behalf of a single client nor is there a claim that client funds were somehow overlooked. The respondent has not claimed that he did not know how his trust account was being used. He acknowledged in his testimony that he continued to use the trust account for general business purposes and wrote checks for business and personal expenses. Shek at p 3.

In Shek, the Board increased discipline from a reprimand to a suspension of 90 days, specifically applying an analysis under the ABA Standards. The Board noted that Standard 4.12

suggests that a suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property. Applying that Standard in Shek, the Board concluded:

> While there is no evidence in this case that the respondent intended to deprive his clients of their funds, it is clear that he knew or should have known that his depletions of his trust account were entirely inappropriate. The respondent admitted that he commingled funds in his trust account by depositing client monies, attorney fees and loan proceeds. Shek at p 4.

We reach a similar conclusion in this case. While we may accept that respondent did not intentionally deprive his client of her funds for approximately five weeks and that he may not have had a clear understanding of how his trust account was to be administered, the inescapable fact remains that he should have known the basic tenets of MRPC 1.15. As we said in Grievance Administrator v Robert R. Cummins, 159/88 (ADB 1988):

> We can perceive of no excuse for an attorney's failure to be aware of the requirement under Rule 1.15 of the Michigan Rules of Professional Conduct [formerly DR 9.102(a)] that client funds be held separately from the lawyer's own money. There are no exceptions in either the former or present rule which allows an attorney to commingle client funds in a business or personal account for reasons of convenience or expedience. Cummins at p 2.

Similarly, there are no exceptions to Rule 1.15 which allow an attorney, as in this case, to commingle his own funds in a trust account, either out of out of convenience, expedience or ignorance of the rule.

We differ somewhat from the hearing panel below which viewed respondent's failure to answer the request for investigation to be a "technical violation" warranting a reprimand. Respondent's statement to the panel that "I have no legitimate reason for not filing it timely other than it wasn't filed timely," was clearly inadequate. Respondent's unexplained failure to answer, in and of itself, would warrant consideration of a suspension for at least 30 days. See our recent opinions in Grievance Administrator v Kerry Leon Jackson, Case Nos. 00-162-GA; 00-181-FA, (ADB 2001) and Grievance Administrator v Mark L. Brown, Case No. 00-74-GA (ADB 2002).

Conclusion

Under both the ABA Standards and the prior decisions of the Board, a suspension is called for in this case. We have weighed the aggravating effect of respondent's prior disciplinary offenses [ABA Standard 9.22(a)] against the absence of a dishonest or selfish motive [Standard 9.32(b)]; his

prompt effort to forward the missing check to his client once his error was brought to his attention [Standard 9.32(d)] and his apparent remorse and willingness to reform his office practices [Standard 9.32(l)]. We are unable to conclude that a reexamination of respondent's character and fitness as a lawyer under the reinstatement proceedings which would follow a suspension of 180 days or more is called for in this case. We therefore increase discipline in this case from a reprimand to a suspension of respondent's license to practice law for 90 days. We affirm the hearing panel's decision to require respondent to undertake five hours of continuing legal education in the area of law office management within 180 days.

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

Board Members Marsha M. Madigan, M.D. and George H. Lennon did not participate.