STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellee,

v

Patricia J. Dockery, P-44725 ,

Respondent/Appellant,

Case Nos. 00-72-GA; 00-91-FA

Decided: May 10, 2001

BOARD OPINION

The Grievance Administrator petitioned for review of the hearing panel's order of suspension entered in this matter on November 2, 2000. The issue presented to the Board is whether the discipline imposed by the hearing panel, a suspension of 180 days, should be affirmed or increased. We adopt the Grievance Administrator's arguments to the hearing panel and the Board that respondent's misuse of client funds entrusted to her care warrants the imposition of a suspension under ABA Standard 4.12. Consistent with prior decisions of this Board misconduct of the type established in this case, absent compelling mitigation, may be expected to fall in the range of discipline from three years suspension to revocation. Mitigation of that type or degree is not present here. We increase discipline in this case to a suspension of three years.

The respondent's misconduct was established by her default and the hearing panel's findings as to misconduct are not challenged on review. It should be noted that, notwithstanding her default, the respondent did appear at the public hearings conducted by the panel on July 27, 2000 and September 14, 2000 and submitted to examination under oath with regard to the nature of her representation on behalf of the complainant, Ms. Verlee Sledge, and her handling of certain funds collected for her client. We point this out for two reasons. First, although respondent's failure to answer the original formal complaint constituted a separate act of misconduct and resulted in her default, the respondent was not entirely uncooperative during this proceeding and did fulfill her obligation under MCR 9.115(H) to appear personally at the hearing and to answer the questions posed to her. Secondly, respondent's testimony at the hearing does provide a somewhat clearer picture of the underlying facts and circumstances than is often present in a default case.

The complainant in this case, Verlee Sledge, lives in Alabama. In October 1997, Ms. Sledge retained respondent to assist in the sale of real property which Ms. Sledge owned in the city of Detroit. The property was sold in February 1998 for $10,000. The check from the title company in the amount of $9,670.38 was made payable to respondent and she cashed it on February 19, 1998.

It is undisputed that respondent did not remit any funds to Ms. Sledge until November 15, 1999 when she mailed a check, drawn on her business account to Ms. Sledge in the amount of $9,000. The complainant did not receive these funds until after she had submitted a request for investigation to the Attorney Grievance Commission.

Formal complaint 00-72-GA charged, and the hearing panel found, that respondent failed to promptly notify her client that the property in Detroit had been sold and that she failed to respond to her client's inquiries, including a letter from Ms. Sledge in September 1998. The panel further found that respondent failed to notify her client when she took possession of the proceeds from the real estate sale; that she failed to forward the funds to the client or to deposit the sale proceeds into a separate trust account but converted the proceeds to cash; that she commingled the client's funds with her personal funds and that she misappropriated the sale proceeds for her own use.

It is not entirely clear from the record how long respondent held the check from the title company which she received in February 1998 nor was respondent able to explain why the intended disbursement to the client of $9,000 next appeared in the form of a $5,000 cashier's check dated January 29, 1999 and a second cashier's check in the amount of $4,000 dated February 3, 1999. Both checks identify the respondent, Patricia Dockery, as the remitter and the payee. The cashier's check dated January 29, 1999 (Exhibit 7) was cashed by respondent on February 3, 1999. The $4,000 cashier's check dated February 3, 1999 (Exhibit 8) was cashed by respondent on February 8, 1999. While respondent was unable to explain the purpose of these transactions or the location of the funds until they were delivered to the client in November 1999, she conceded that the money was not held in a client trust account (TR 09/14/00 p 20-21).

At the separate hearing on discipline, counsel for the Grievance Administrator summarized the evidence, arguing in the alternative that if respondent's conduct did not amount to a knowing conversion of client funds, it amounted to gross negligence with client funds. Consistent with this analysis, counsel argued to the panel that the evidence presented suggested two applicable standards under the ABA Standards for Imposing Lawyer Sanctions - Standard 4.11 which states that disbarment generally is appropriate when a lawyer knowingly converts client funds and causes harm or potential injury to the client or Standard 4.12 which states that suspension is generally appropriate when a lawyer knows or should know that he or she is dealing improperly with client property and causes injury or potential injury to the client. (TR 09/14/00 pp 43-44). Counsel specifically argued that if the panel decided that analysis under Standard 4.12 was appropriate, it should order a suspension of respondent's license for a least three years.

Based upon a review of the whole record, the Board is satisfied that the hearing panel engaged in an appropriate analysis in accordance with Grievance Administrator v Lopatin, 462 Mich 235 (2000) and that its decision to impose a suspension in accordance with ABA Standard 4.12 was

appropriate. However, we modify the hearing panel's order with regard to the length of the suspension. In particular, we disagree with the hearing panel's reliance upon respondent's voluntary restitution in November 1999 as "strong mitigation" warranting a downward departure from the range of discipline identified in Grievance Administrator v David Woelkers, ADB 97-214-GA (1998).

Although respondent took possession of funds belonging to her client in February 1998, she did not pay those funds to her client until November 1999, after the complainant had filed a request for investigation with the Attorney Grievance Commission. It is clear from the record that the funds in question were not maintained in a separate account as required by MRPC 1.15(a) and the respondent was unable to provide an explanation to the panel of the whereabouts of those funds during that 21 month period. The panel found Woelkers inapposite because of the circumstances in this case which "include a lack of demonstrated intent to deprive the client of her funds and the existence of mitigating factors." (Panel report p 5). While we agree that such a lack of demonstrated intent is present in this case, we have, in prior opinions, afforded relatively little weight to the mitigating effect of an attorney's lack of intent to permanently deprive the client of his or her funds or a demonstrated intent to eventually repay the funds improperly used.

The passage of almost 30 years has not dimmed the relevance of a case often cited by the Board, In Re Wilson, 81 NJ 451; 409 A2nd 1153 (1979), which had this to say about the lawyer's intent in a case involving, among other things, the lawyer's failure to turn over the proceeds from the sale of a house until after an ethics complaint was filed:

> When restitution is used to support the contention that the lawyer intended to 'borrow' rather than steal, it simply cloaks the mistaken premises that the unauthorized use of clients' funds is excusable when accompanied by an intent to return them . . . lawyers who 'borrow' may, it is true, be less culpable than those who had no intent to repay, but the difference is negligible in this connection. Banks do not rehire tellers who 'borrow' depositors funds. Our professional standards, if anything, should be higher. Lawyers are more than fiduciaries: they are representatives of a profession and officers of this court [Wilson, 409 A2nd at 156].

> The Grievance Administrator's brief in support of petition for review states:
> Both the ABA Standards and the prior decisions of the Board compel an increase in the level of discipline. A six month suspension does not address the severity of respondent's misconduct, nor does it address the great risk to which respondent subjected Ms. Sledge's funds. Respondent should be disciplined in the range of three years to disbarment for her actions. [Grievance Administrator's Brief p 12]

We agree and increase discipline in this case to a suspension of three years.

Board members Wallace D. Riley, Theodore J. St. Antoine, Michael R. Kramer, Nancy Wonch, Grant J. Gruel, Diether H. Haenicke, Ronald L. Steffens and Marie E. Martell concur in this decision.

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