STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellant-Cross Appellee,

v

Ronald P. Derocher, P 35042,

Respondent/Appellee-Cross Appellant,

Case No. 99-98-GA

Decided: August 10, 2000

BOARD OPINION

Respondent was charged in a four count complaint with (1) misappropriating $2,893 from a decedent's estate while serving as the estate's personal representative; (2) failing to comply with probate court orders to close the estate and pay claims, and neglecting his responsibility to close the estate for five years; (3) taking $250 to handle a driver's license restoration, failing to deposit the money in a separate trust account, failing to perform services for the client, converting the money to his own use, and failing to refund the money when discharged by the client; and (4) failing to communicate with his client in the license restoration matter. The hearing panel found, and respondent essentially admitted, the allegations of misconduct in the complaint. Citing the serious nature of respondent's misconduct and aggravating factors, including a prior history of misconduct, the Grievance Administrator petitioned for review on the grounds that the 180 day suspension imposed by the hearing panel is insufficient. For the reasons stated below, we adopt the Grievance Administrator's recommendation and increase discipline in this case to a suspension of four years.

On May 6, 1993, respondent was appointed as the personal representative of the estate of

Irvin H. Powell, deceased, by the Antrim County Probate Court. In his annual accounts as fiduciary for the estate, filed in September 1994, and February 1997, respondent showed cash assets of $2,893. In July 1997, respondent was served a notice of complaint or omission for his failure to pay a claim against the estate (a claim relating to a VISA account for $1,881.40 filed by Citizens Banking Corporation in November 1993) and for his failure to close the estate. In October 1997, the probate court ordered respondent to show cause why he should not be held in civil contempt for failing to pay claims and close the estate. Another notice of complaint or omission was filed by the court in April 1998 and in July 1998. Respondent was ordered to have all claims paid and the estate closed within 30 days. Respondent's failure to comply with that order resulted in a hearing before the probate court on September 1, 1998. The court held respondent in civil contempt, assessed a civil fine of $100 for each day the estate remained open, and ordered that respondent should be incarcerated if the estate was not closed by September 15, 1998. On September 14, 1998, respondent filed a final account with the probate court showing that the $1,881.40 VISA claim had been paid and that the residue of $1,011.60 had been paid to the Moose Lodge in Mancelona, Michigan.

Count One, paragraph 11, of the formal complaint charged,

> 11. During the pendency of the estate, respondent experienced several financial problems and used estate funds for personal living expenses.

In his answer, respondent candidly admitted that charge, but with the qualification that the money was eventually repaid. In answer to questions posed by the Grievance Administrator at the panel hearing, respondent expanded on the extent of his financial difficulty. He explained that he represented four or five current clients from an office in his home, that he had overdue property taxes and utility payments and that he has significant health problems which are not covered by medical insurance. In respondent's own words, "I've been hand to mouth." (T 10.)

With regard to the payments on behalf of the estate for the VISA account and the Moose Lodge in September 1998, respondent acknowledged that the estate's funds were no longer available when he made those distributions and that he had to borrow the money from his family. (T 13.)

Counts Three and Four detail respondent's failure to handle a driver's license restoration matter for Eric L. Little, and respondent's misuse of the retainer fee in that matter. Respondent was retained by Mr. Little in June 1998 and accepted a retainer fee of $250. By letter dated November 18, 1998, Mr. Little fired respondent for not doing anything on his behalf. Mr. Little requested a return of the $250 fee. Respondent admitted that he had done no work on the file and that he was financially unable to refund the $250 (Respondent's answer to formal complaint paragraphs 19, 20 and 21).

Level of Discipline

On June 27, 2000, the Michigan Supreme Court entered its opinion in Grievance Administrator v Lopatin, __ Mich __ (2000), which explicitly directed the Board and hearing panels to follow the American Bar Association's Standards for Imposing Lawyer Sanctions to determine the appropriate discipline for lawyer misconduct. The Court noted, however, in a footnote:

> We caution the ADB and hearing panels that our directive to follow the ABA Standards is not an instruction to abdicate their responsibility to exercise independent judgment. Where, for articulated reasons, the ADB or a hearing panel determines that the ABA standards do not adequately consider the effects of certain misconduct, do not accurately address the aggravating or mitigating circumstances of a particular case, or do not comport with the precedent of this Court or the ADB, it is incumbent on the ADB or the hearing panel to arrive at, and explain the basis for, a sanction or result that reflects this conclusion. [Lopatin, slip op, pp 14 - 15 n 13. Emphasis added.]

This case presents a situation in which the body of case law in Michigan represented by 20 years of Attorney Discipline Board opinions provides somewhat more precise guidance than the

larger framework of the ABA Standards.

Looking first to the ABA Standards, we are initially directed to answer three questions:

1. What ethical duty did the lawyer violate? (A duty to a client, the public, the legal system or the profession?)

2. What was the lawyer's mental state? (Did the lawyer act intentionally, knowingly, or negligently?)

3. What was the extent of the actual or potential injury caused by the lawyer's misconduct? (Was there a serious or potentially serious injury?) [Grievance Administrator v Lopatin, supra, slip op, p 4, citing ABA Standards, p 5. See also ABA Standard 3.0.]

Such an analysis is not difficult in this case. Respondent has violated one of the most fundamental duties which a lawyer owes to a client, the duty to hold client funds inviolate, regardless of the temptation to "borrow" those funds to alleviate the lawyer's own financial problems. Respondent does not claim that the funds which he held on behalf of the estate were "accidentally" used for his own benefit and it is beyond argument that respondent's conduct with regard to the estate funds caused both injury to both the estate and, potentially, to the public's confidence in the legal profession as a repository for client funds.

Further, analysis under ABA Standard 4.1 suggests that one of three broad categories of discipline will generally be deemed appropriate when a lawyer has failed to preserve the client's property:

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.

In this case, the 180 day suspension imposed by the hearing panel and the four year suspension recommended on appeal by the Grievance Administrator both fall within the general scope of ABA Standard 4.12, that is, a suspension.[1] We therefore turn to the precedent of the ADB in a line of Board opinions which identify a presumptive range of discipline of three years suspension to disbarment where willful misappropriation of client funds is not accompanied by compelling mitigation.

The Grievance Administrator appropriately cites our recent opinion in Grievance Administrator v David A. Woelkers, 97-214-GA, (ADB 1998), lv den 602 NW2d 579 (1999),[2] in which we said:

> During the 20 years of its existence, the Attorney Discipline Board has regularly declared that willful misappropriation of client funds, absent compelling mitigation, will generally result in discipline ranging from a suspension of three years to disbarment. As recently as our November 3, 1998 opinion in Grievance Administrator v T Patrick Freydl, 96-193-GA (ADB 1998) we stated:
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> > While discipline must always be imposed in light of the unique factors in each case, the seriousness of an attorney's misuse of funds entrusted by a client is reflected in a long line of decisions in which

[1]We do not suggest that the Board is necessarily precluded from imposing discipline higher than the sanction which has been requested or recommended by the Grievance Administrator.

[2]In his written response to Grievance Administrator's oral arguments in support of the Administrator's petition for review, respondent complained that citation to the Woelkers opinion in arguments to the panel and the Board was, in his opinion, "dirty pool" in that a copy of the opinion was not provided to respondent at the panel hearing and is not a "reported" case. Opinions of the Board are by no means unavailable and respondent has not shown that he expended the slightest effort to obtain copies of the opinions cited at the panel hearing. The cited opinions are available directly from the Board, on request. Alternatively, the Woelkers opinion was available on the internet at the time of the panel hearing on the Michigan's Lawyers Weekly website (michlaw.com/miadb.htm). Since May 5, 2000, all opinions of the Attorney Discipline Board since its creation in 1978 are available on the Board's website (www.adbmich.org) and are searchable by attorney name, word(s), phrase or rule violation. Finally, Michigan ethics opinions, opinions of the Board and notices of discipline since 1988 are available on PC Ethix,™ a computer software package available from the State Bar.

> outright misappropriation of client funds has resulted in discipline ranging from a suspension of three years to disbarment. See, for example, Grievance Administrator Charbonneau, DP 103/83; DP 126/83 (ADB 1984) (increasing discipline from a one-year suspension to disbarment); Grievance Administrator v Edwin C. Fabre', DP 84/85; DP 1/86 (ADB 1986) (increasing discipline from a 60-day suspension to three years); Grievance Administrator v Muir B. Snow, DP 211/84 (ADB 1987) (increasing discipline from a suspension of two years to three years); Grievance Administrator v Paul Wright, ADB 126-87 (ADB 1998) (increasing discipline from a one-year suspension to three years); Grievance Administrator v Kenneth M. Scott, DP 178/85 (ADB 1988) (increasing discipline from a six-month suspension to three years); Grievance Administrator v Fernando Edwards, 437 Mich 1202; 466 NW2d 281 (1990) (ADB increased discipline from a two-year suspension to disbarment; SC peremptorily reduced discipline to a three-year suspension); Grievance Administrator v Richard E. Meden, 92-106-GA (ADB 1993) (increasing discipline from a 18-month suspension to disbarment); Grievance Administrator v John T. McCloskey, 94-175-GA; 94-189-FA (ADB 1995) (increasing discipline from a 130-day suspension to a three years). [Grievance Administrator v T. Patrick Freydl, supra, pp 11-12.]

In Woelkers, the Board increased discipline from the 30 day suspension imposed by the hearing panel to a suspension of three years, noting that upon application of all of the relevant aggravating and mitigating factors, protection the public nevertheless mandated imposition of discipline at a level required to convey the message that it is never acceptable for an attorney to place his or her financial need above the obligation to safeguard client funds.

In this case, modification of the discipline imposed by the hearing panel is warranted. In its report on discipline, the hearing panel noted its conclusion that respondent did not intend to steal or permanently deprive Mr. Little, the Citizen's Banking Corporation or the Moose Lodge of the money which was due to them.

Respondent's intent to eventually repay the estate funds entrusted to his care merits relatively

little weight as a mitigating factor nor is it particularly relevant to the essential nature of the this particularly egregious type of misconduct.

> Misappropriation consists simply of a lawyer taking a client's money entrusted to him, knowing that the client has not authorized the taking. It makes no difference whether the money is used for a good purpose or a bad purpose, for the benefit of the lawyer, for the benefit of others or whether the lawyer intended to return the money when he took it, or whether in fact he did reimburse the client, nor does it matter that the pressures on a lawyer to take the money were great or minimal . . . The relative moral quality of the act, measured by the many circumstances that may surround both it and the attorney's state of mind, is irrelevant. [In re Noonan, 128 NJ 157, pp 159 - 160, 560 A2d 722 (1986).]

Presumably, most embezzlers, whether they are attorneys, accountants, bank tellers, or public officials, intend to pay the money back. Some of those individuals are able to replace the funds they have taken. Others, unfortunately, are not. Compliance with MRPC 1.15 assures that regardless of the attorney's financial situation, funds belonging to a client or third party will remain intact and inviolate in a segregated account.

Addressing respondent at the hearing, one member of the hearing panel referred to another mitigating factor:

> I want to say, sir, I admire your candor today. If you had not basically fessed up to it, I would have voted for what the Grievance people are asking for, for four years. (T 76.)

We recognize that full and free disclosure to a disciplinary body or a cooperative attitude toward the proceedings is recognized in the ABA Standards as a factor which may be considered in mitigation. See Standard 9.32(e). Unfortunately, in his candor to the panel, respondent revealed an attitude toward the fiduciary responsibility embodied in MRPC 1.15 which is troubling, to say the least.

In arguing that a four year suspension would be "totally unrealistic," respondent told the

panel:

> The sums involved were not thousands of dollars, if it was $150,000, $100,000 I could see it. I did not go to the Bahamas, I did not hide it, I did not buy Mazarati [sic] sports cars or whatever with the money. I simply had to have something to eat and pay bills with. [T, p 58.]
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> . . .
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> The funds were something that did not harm anyone from the standpoint that they weren't begging for money to live on. For example, let's say I hypothetically handled a personal injury suit, which by the way I do not handle, but got a judgment there for $100,000. That person needs the money to live on. I would not take anything, because obviously they need it. I did not do it in this situation. Two hundred and fifty dollars, yes, yeah, that's a small sum. Mr. Little I believe was not relying on that for funds to live and eat on. He had other income.
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> Mr. Powell's estate, Mr. Powell is deceased, so the funds there would not be - and they got their money. The Moose Lodge got their money. I told them when I got - it would be a while to clear the estate, so they weren't counting on it and they just put it in their building fund for future building expenses, whatever. [T, pp 73 - 74.]

By his comments, respondent displays a fundamental misunderstanding of his fiduciary responsibility. We repeat: Intentional misuse of client or estate funds is a serious offense regardless of the amount involved or the financial situations of either the lawyer or the client.

In Woelkers, supra, the Board increased the suspension ordered by the panel from 30 days to three years for respondent's intentional use of client funds to pay his office expenses. In that case, we noted the mitigating effect of respondent's previously unblemished record. That is not the case here. The hearing panel's report recites that respondent was admonished by the Attorney Grievance Commission in 1992 and 1997, he was reprimanded (by consent) in 1990, suspended for 45 days and ordered to make restitution in 1994 and reprimanded (by consent) again in 1997. The common theme which runs through these prior discipline matters is respondent's failure to perform legal services for which he was retained. We find that the following aggravating factors are present in this

case: a history of prior disciplinary offenses [ABA Standard 9.22(a)]; a dishonest or selfish motive (placing his own short term financial needs above his duty to safeguard client funds) [ABA Standard 9.22(b)]; a pattern of misconduct [ABA Standard 9.22(c)]; and multiple offenses [ABA Standard 9.22(d)].

The ABA Standards also recognize refusal to acknowledge the wrongful nature of one's conduct as an aggravating factor. See ABA Standard 9.22(g). Although respondent has stated that he recognizes that his conduct was "wrong," respondent's argument that his conduct was somehow less egregious because his client and the creditors of the estate did not have an immediate pressing need for the funds does not engender confidence that respondent truly understands the seriousness of his acts.

Conclusion

Taking into account the seriousness of respondent's misconduct and the aggravating and mitigating factors which appear in the record, we conclude that a suspension of respondent's license to practice law for four years is an appropriate sanction and is consistent with both the American Bar Association's Standards for Imposing Lawyer Sanctions and prior opinions of the Board.

Board Members Kenneth L. Lewis, Wallace D. Riley, Nancy A. Wonch, Diether H. Haenicke, Theodore J. St. Antoine and Ronald L. Steffens concurred in this decision.

Board Members C.H. Dudley, M.D., Grant J. Gruel and Michael R. Kramer did not participate.