STATE OF MICHIGAN

Attorney Discipline Board

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Grievance Administrator,

Petitioner,

v

Lisa C. Watkins, P-41053,

Respondent.

98-06-GA; 98-22-FA

BOARD OPINION

The hearing panel issued an order suspending respondent's license to practice law for 60 days, based upon its findings that the Grievance Administrator established the charges of misconduct in three of the four counts in complaint number 98-6-GA. A supplemental complaint, case number 98-22-FA, which charged that respondent's failure to answer the first complaint constituted separate grounds for discipline, was dismissed by the panel. The Grievance Administrator petitioned for review on the grounds that the panel erred in its dismissal of the supplemental complaint and on the grounds that increased discipline is warranted. We agree that the misconduct charged in the supplemental complaint was established, prima facie, and that respondent's combined misconduct, including a dereliction of her duties as a fiduciary, requires a suspension of sufficient length to trigger reinstatement proceedings under MCR 9.123(B) and MCR 9.124. We reverse the hearing panel's dismissal of Formal Complaint 98-22-FA and increase discipline in this matter to a suspension of 180 days.

I. Panel Proceedings

Formal Complaint 98-6-GA was filed on January 16, 1998. Count One alleged that respondent failed to prepare and/or file an Inventory for a client in a probate matter, resulting in the issuance of a Notice of Complaint; failed to obtain and file a Verification of Funds on Deposit for the client, resulting in the issuance of a Notice of Complaint; failed to prepare and/or file an account for the client, despite the court's sua sponte grant of an extension of time to file the documents; failed to take action to reinstate the client's powers of fiduciary;

and, failed to maintain reasonable communications with the client or to respond to the client's numerous messages. Count One charged that respondent's conduct violated MCR 9.104(1)-(4); and Michigan Rules of Professional Conduct 1.1(a)-(c); 1.3; 1.4(a); 3.2; and 8.4(a) and (c).

Count Two alleged that respondent was retained in April 1995 to probate the Estate of Ruby Marion, deceased. In May 1995, respondent filed a Petition for Commencement of Proceedings and sought the appointment of Betty Wims, Ruby Marion's daughter, as personal representative of the estate. In June 1995, Letters of Authority were issued appointing Betty Wims the personal representative of the estate. Count Two alleged that respondent failed to prepare and/or file an annual account, resulting in the issuance of Notices of Complaint on Omission, and the suspension of her client's powers of fiduciary; and failed to maintain reasonable communications with Betty Wims or respond to numerous messages from Ms. Wims and other members of her family. Count Two charged that respondent's conduct violated MCR 9.104(1)-(4); and Michigan Rules of Professional Conduct 1.1(a)-(c); 1.3; 1.4(a); 3.2; and 8.4(a) and (c).

Count Three alleged that a bank account was opened at the First of America Bank for the estate. The sole signer was the personal representative, Betty Wims. In 1995, respondent requested that Betty Wims sign and deliver to her two blank checks on the estate account, representing that the checks were for the purpose of paying outstanding bills of the estate. Count Three alleged that respondent violated her duties and responsibilities in connection with the estate funds by improperly requesting attorney fees of $4,794.40 in June 1995 without authority under the probate court rules and by improperly holding $2,003.80 in cash belonging to the estate. Count Three also charges that respondent commingled estate funds with her personal funds. Count Three charges that respondent's conduct violated MCR 9.104(1)-(4); and Michigan Rules of Professional Conduct 1.15(a)-(c); and 8.4(a)-(c).[1]

A default and failure-to-answer complaint (98-22-FA) were filed on February 19, 1998. Respondent's Motion to Set Aside Default, Answer to Formal Complaint 98-6-GA, and Affidavit of Meritorious Defense were filed on March 3, 1998. Petitioner's Answer to Respondent's Motion to Set Aside Default and brief in support were filed on March 12, 1998. A default on Formal Complaint 98-22-FA was filed on March 19, 1998.

At a hearing conducted on May 12, 1998, the panel heard oral argument regarding respondent's motion to set aside default. On June 22, 1998, the panel issued a decision in

[1] Count Four of the Formal Complaint was dismissed by the panel and will not be discussed.

which it found that respondent had no meritorious defense to the action and that she admitted the basic allegations in Counts One through Three of Formal Complaint 98-6-GA. The panel concluded that the default as to Counts One through Three should not be set aside, but that Count Four of that complaint and Formal Complaint 98-22-FA should be dismissed.

A hearing to determine the appropriate discipline was conducted on December 15, 1998. Petitioner's counsel submitted a brief on the issue and recommended that respondent be suspended from the practice of law for three years. Respondent's counsel recommended a reprimand.

The panel's report on discipline and Order of Suspension for 60 days were issued on January 15, 1999. The panel made the following findings and conclusions:

1. Respondent failed to comply with the court rules relative to fee payments in probate estate matters.
2. Respondent failed to deposit funds belonging to the estate in a properly maintained client's trust account. Although she claimed to have requested a clerk to put the money in the trust account, the clerk returned to the office with estate funds of $2,003.80 in cash. Respondent maintained that cash in her office safe, which was, at least, a technical violation of the Rules of Professional Conduct.

The panel concluded that respondent's conduct was mitigated by the following findings of fact:

1. Respondent has no previous discipline for misconduct.
2. Respondent returned all of the funds to the estate well prior to the original hearing. Respondent claimed it was done prior to the original grievance having been filed, but the panel found as a matter of fact that it was done shortly after respondent had notice of the original grievance.
3. Respondent voluntarily agreed to accept no fees for her services rendered to the estate when she returned the funds to the estate.

II. Dismissal of Complaint 98-22-FA

There is no dispute that formal complaint 98-6-GA was properly served on respondent by the Grievance Administrator, that she received it and that she failed to file a timely answer. At the first hearing before the panel, Ms. Watkins testified, "But at any rate, I did receive notice of the formal complaint. I received it in my office, reviewed it. I had set it to the side." (Hrg 5/12/98, Tr 5.) She explained that she attempted to contact an attorney to assist her in drafting an answer but that attorney was out of town. She further explained to the panel,

> I guess just to be quite frank in terms of not responding, I did set it to the side, I was continuing handling clients' cases, I guess a little overwhelmed in the process itself what should be responded to it, how to respond to it, having to deal with it for myself, it was somewhat a little bit more overwhelming, so I did kind of set it to the side hoping to have someone else help me to respond to it. [Hrg 5/12/98, Tr 7.]

In its report on misconduct filed June 22, 1998, the hearing panel ruled,

> With respect to the second formal complaint which relates to the failure to respond, it is the unanimous opinion of the Board [sic] that the second complaint should be dismissed inasmuch as the respondent did appear and did respond to the questions asked of her. [6/22/98 HP Report, p 2]

In Grievance Administrator v Mary Banks, ADB 95-234-GA; 95-264-FA (1997), the Board ruled that, "the circumstances surrounding respondent's failure to file a timely answer may well constitute a mitigating factor to be considered by the panel in determining the appropriate discipline. Those circumstances did not, however, relieve respondent of the unavoidable duty to provide a timely answer to the Complaint." Banks, supra, p 6. Even the setting aside of a respondent's default does not preclude a finding that the failure to file a timely answer to a Complaint nevertheless constituted a violation of MCR 9.104(7) and the plain language of MCR 9.115(D)(1). Grievance Administrator v Rhonda R. Russell, ADB 91-202-GA; 91-235-FA (1992). The hearing panel's dismissal of Formal Complaint 98-22-FA must be reversed.

III. Respondent's Misconduct Under Case 98-6-GA

It must first be noted that although the panel declined to set aside respondent's default with regard to Counts One, Two and Three of complaint 98-6-GA on the grounds that the acts alleged in those counts were essentially admitted, the record before the panel includes the testimony of respondent, the testimony of the attorney retained by Frances Marion and Betty Wims in May 1996 to complete the administration of the estates, and copies of the probate court files in the estate of Ruby Marion and the estate of Ashley and Ariel Gardner. Taken together, this evidence provides a greater basis for evaluating respondent's conduct than is usually found in a default case.

We must also emphasize that our decision to increase discipline in this case is based primarily upon respondent's improper handling of estate funds. Counts One and Two of the complaint involve respondent's neglect as attorney for the conservator of the estate of Ashley and Ariel Gardner, and her neglect as the attorney for the personal representative for the estate of Ruby Marion. In each case, respondent stated that there were some "problems" which prevented the timely administration of the estate but her neglect is essentially admitted. In the conservator estate, respondent's failure to file the necessary papers resulted in an order by the Oakland County Probate Court suspending her client's powers as fiduciary. Similarly, respondent's failure to file an annual account in the decedent's estate resulted in a suspension of her client's powers as personal representative. While we do not minimize respondent's dereliction in those probate matters, we would likely have affirmed the 60 day suspension imposed by the panel if it was limited to those two counts.

However, we are troubled by all of the facts and circumstances surrounding respondent's handling of two checks drawn on the estate of Ruby Marion as outlined in Count Three.

On June 13, 1995, respondent had her client, Betty Wims, sign a check drawn on the estate account made out to Lisa Watkins in the amount of $4,794.40. Respondent testified that this was intended to be payment for her attorney fees, based upon her estimate that she would eventually be entitled to fees of about 10% of the total value of the estate. According to respondent's own statement for fees prepared later, her actual costs and expenses attributable to that estate through June 30, 1995, came to $1,433.00. When respondent prepared a statement in June 1996, she claimed fees and costs of $2,700.00.

By her own testimony, respondent admitted that the fees requested from the personal representative in June 1995 were based not upon services rendered (or even services actually

rendered in the future) but upon a percentage of the estimated estate. Under MCR 8.303(A), a probate court's determination of the reasonableness of a fee is explicitly tied to the factors listed in Michigan Rule of Professional Conduct 1.5(a). Those factors do not contemplate the charging of attorney fees in a probate matter based primarily upon the value of the estate assets. Moreover, MCR 8.303(B) is explicit in its requirement that a fee agreement between and attorney and personal representative in a probate matter must be in writing. Finally, MCR 8.303(E) clearly requires that attorney fees in a probate matter may be paid under either of the following scenarios:

1. The attorney and the fiduciary have entered into a written fee agreement and a statement for services and costs has been sent to the fiduciary; or
2. The attorney fees have been approved by the probate court prior to payment.

Respondent may be correct that some probate attorneys routinely receive fees from an estate without a written fee agreement and without prior court approval. That does not change the applicability of the rule. This case is a good illustration of why such a rule makes sense. The $4,794.40 attorney fee which Ms. Watkins requested from the personal representative of the estate of Ruby Marion in June 1995 simply had no rational basis - it did not represent the value of the services which respondent had performed to date and it was even substantially less than the value of the services she eventually claimed to have performed for the estate.

The probate rule cited above makes it clear that respondent did not have legal authority to request payment of her fees from the estate account until she had either rendered an account to the personal representative or obtained approval from the probate court. We are not persuaded, however, that respondent's improper request for payment of attorney fees can or should be equated with the more egregious "misappropriation" cases cited by the Grievance Administrator in requesting a suspension of three years or more.

The Administrator cites three Board opinions in which the Board rejected the characterization of misappropriated funds as attorney fees as an appropriate defense. In Grievance Administrator v Fernando Edwards, 436 Mich 1202 (1990), respondent endorsed a settlement check by forging his client's signature, deposited client funds into his wife's checking account and lied to both the client and the Grievance Administrator. The Board increased discipline from a two year suspension to disbarment. The Supreme Court peremptorily reduced the discipline to a three year suspension.

In Grievance Administrator v Frederick Sauer, ADB 9-89 (1989) (six month suspension affirmed), the attorney claimed that his temporary depletions of his client trust account were the result of his "draws" on anticipated fees. There, the Board ruled that such "draws" without the client's knowledge or consent constituted " misappropriation" but the Board was unable to conclude that the temporary shortfalls were the result of wilful embezzlement.

In the third case cited by the Administrator, Grievance Administrator v Michael J. Kavanaugh, DP 71/84 (1985), the Board stated:

> Client funds cannot be arbitrarily or unilaterally withheld with a view toward speculative future services in the absence of some retainer agreement and authorization to provide such future services. [Kavanaugh, supra, p 3.]

In that case, the Board increased discipline from a reprimand to a suspension of 60 days, finding that respondent did actually perform the legal services described and implying that the attorney acted in good faith.

In those three cases, the client funds were under the respondent's direct control, usually in a client trust account. In each of those cases, the attorney took funds from the account without the knowledge or consent of the client. In each case, the depletion of the account was discovered sometime later and the attorney then explained in his defense that he was simply taking an advance on anticipated attorney fees.

This case is different. The personal representative, Betty Wims, was the signer on the estate account and the account was under her care and control. There was no claim that respondent forged Ms. Wims signature or removed funds from the estate account without her client's knowledge or permission. Rather, the evidence shows that respondent told her client that she needed a check for a certain specific amount of attorney fees and that her client wrote the check. Respondent clearly did not follow the proper procedure required by the probate court rules. That particular check could be described as an unauthorized fee, an improper fee or an excessive fee but respondent's conduct did not amount to a surreptitious embezzlement as in the cases cited above.

We are even more concerned by respondent's handling of the November 17, 1995 check drawn on the estate account, made out to "cash" in the amount of $2,003.80. Again, respondent did not secretly remove this money from the estate account. She told her client, Ms. Wims, that she needed a check to make a payment on the mortgage and insurance for the house. As requested, Ms. Wims wrote out the check. For what may have been entirely

legitimate reasons, the check was not used for the stated purposes. However, not only is there no adequate explanation as to why the check was made out to "cash," or why the cashed proceeds were held at respondent's office rather than returned to the account, but respondent's claim that she then kept the $2,000 cash in her office safe constituted a prima facie violation of Michigan Rule of Professional Conduct 1.15.

At various stages of these proceedings, respondent has described, with varying degrees of success, how she intended to make payment toward the mortgage and insurance on the house, how her clerk mistakenly cashed the check, how she discovered that the bank had mistakenly transferred funds from the conservatorship account to the decedent's estate account, how she decided not to apply the money to the mortgage until the accounts were cleared up and how, on November 17, 1995, she found herself holding cash in the amount of $2,003.80 which belonged to the estate of Ruby Marion.

Leaving aside the inconsistencies in respondent's testimony, it is uncontroverted that when respondent decided not to use those estate funds to make a payment on the mortgage, she could have either deposited the cash in her client's trust account or returned the funds to the personal representative for re-deposit in the estate account. Instead, she placed the cash in her office safe where it remained, according to her testimony, until she returned the proceeds of both checks to successor counsel for the estate in the fall of 1996.

Again, we are not sure how much guidance is provided by those Board opinions cited by the Administrator in which the balance in an attorney's client trust account fell below the required amount through negligence or the attorney's outright embezzlement of client funds. Here, respondent had a right to request a check from the personal representative to pay a legitimate bill of the estate. She did not secretly remove the money from the estate account. However, once she decided that she would not use the money to make a payment on the mortgage, she did not immediately deposit the cash into an appropriate repository for client funds. This case is not so much about "misappropriation" as it is about respondent's utter disregard for her obligation as a fiduciary.

The hearing panel, which had the firsthand opportunity to assess respondent's credibility, accepted respondent's unrebutted testimony that the funds were, in fact, in her office safe from August 1995 until the fall of 1996. That factual finding has evidentiary support in the record and will not be disturbed. However, we cannot accept the panel's characterization of this conduct as a "technical violation" of the rules of professional conduct.

Michigan Rule of Professional Conduct 1.15(a) describes an attorney's fundamental duty to hold client funds in an interest bearing account and to maintain complete records pertaining to those funds. This rule is so basic and so important that hearing panels and the Board should be especially dubious of an attorney's claim that he or she was ignorant of the rule or did not fully comprehend its requirements.

In this case, we believe that a suspension of 180 days is appropriate. First, the public and the legal profession must be assured that lawyers can be trusted to hold client's money. This trust is engendered by scrupulous adherence to the requirements of MRPC 1.15(a). Public confidence is eroded when, without any supporting records or accounts, an attorney claims to have held client funds in an office safe or, as we have seen in other cases, in a safe at home, in a desk drawer, or in a closet.

Secondly, our concern is magnified in this case by respondent's failure to answer either of the formal complaints. Having put the first complaint aside, respondent did not make more than a minimal attempt to seek counsel. Respondent did not file a motion to set aside default and proposed answer until March 3, 1998, more than five weeks after service of the complaint, and then only after she had been served with a default and a supplemental complaint.

Finally, respondent's claimed ignorance of her responsibilities under the Probate Rules and the Rules of Professional Conduct has, in our minds, demonstrated the need for reinstatement proceedings during which respondent will have the burden of establishing her understanding of and attitude toward her professional obligations.

Board members Elizabeth N. Baker, C.H. Dudley, M.D., Barbara B. Gattorn, Albert L. Holtz, Michael R. Kramer, Nancy A. Wonch and Roger E. Winkelman concur in this decision.

Board Members Grant J. Gruel and Kenneth L. Lewis did not participate.

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