Grievance Administrator,

Petitioner/Appellant/Cross-Appellee,

v

David A. Woelkers, P 39197,

Respondent/Appellee/Cross Appellant

97-214-GA

Decided: December 28, 1998

BOARD OPINION

Respondent David A. Woelkers admitted commingling client funds and withdrawing $9,160.00 from his client trust account to pay business expenses incurred by his law office. The hearing panel also found by a preponderance of the evidence that respondent failed to make prompt restitution to his client despite repeated requests from the client and successor counsel. The panel further found that respondent made false statements to stall the payment of the remaining funds to his client. After a separate hearing on discipline, the panel ordered that respondent's license to practice law be suspended for 30 days and that he make restitution of $256.51. The Grievance Administrator petitioned for review on the grounds that the established misconduct warrants discipline in the range of a suspension of three years to revocation. Respondent petitioned for review on the grounds that the panel erred in sustaining the charge that respondent made false statements in violation of MRPC 8.4(b). We reverse the hearing panel's finding of misrepresentation as alleged in Count Two. However, we agree with the Administrator that respondent's misappropriation of client funds warrants a substantial increase in discipline. Respondent's repeated depletion of his client trust account to pay the expenses of his law office warrants a suspension of three years.

Background

Respondent was retained in April 1993 to represent the complainant, Dennis Chabot ("Chabot"), in a civil matter in Oakland County Circuit Court. In January 1994, respondent received three settlement checks made payable to Chabot, totaling $21,000.00, from the three defendants. The court ordered respondent to deposit the settlement proceeds into his trust account. The court further ordered him to disburse $6,226.00 to Chabot; to deduct his attorney fees of $7,773.97; and to escrow $7,000.00 pending the satisfaction of a lien for attorney fees on behalf of Chabot's prior attorneys. Respondent sent a letter to Chabot advising that he would implement the Court's order. Respondent deposited $17,500.00 into his client trust account and maintained one check for $3,500.00 by holding it, uncashed, at his office. By the end of January 1994, respondent had deducted his attorney fees and he retained the sum of $13,226.03--$7,000.00 held in escrow pending resolution of the claimed attorneys lien and $6,226.03, which he had been ordered to disburse to Chabot.

Respondent did not disburse that $6,226.03 to Chabot until May 1995, when he forwarded the $3,500.00 check from one of the defendants together with his own trust account check for $6,226.03. The attorney's lien dispute was resolved in July 1996, when the 52-A District Court ordered disbursement of the $7,000.00 held by respondent as follows: $3,250.00 to Chabot's former attorneys and $3,750.00 to Chabot. As of the date of the formal complaint was filed, August 29, 1997, respondent had not released that $3,750.00 to Chabot.

Count One of the complaint charged that from February 1994 to December 1996, respondent withdrew $9,160.81 from his client trust account, commingled those funds by depositing them in his general business account, converted that money to his own use and failed to make prompt full restitution to Chabot, all in violation of MCR 9.104(1)-(4); MRPC 1.15(a)-(c) and MRPC 8.4(a)-(c). In his answer, respondent admitted the charges of commingling and conversion, qualified only by his insistence that the funds were not converted

"for his own personal use" but were "for the use of his business." However, he denied that he had failed to make prompt restitution to his client.

Count Two of the complaint charged that the respondent "continually falsely represented to Chabot and his counsel that the funds would be promptly disbursed, then gave numerous excuses why they were not" (Count Two, paragraph 19). The complaint further charged that respondent's statements were known by him to be false at the time they were made "for the reason that respondent had converted the funds and they were not available for disbursement to Mr. Chabot" (Count Two paragraph 20). Respondent's conduct as set forth in that count were alleged to be in violation of MCR 9.104(1)-(4) and MRPC 1.4; and MRPC 8.4(a)-(c).

In response to respondent's motion for a bill of particulars regarding the charge of misrepresentation in Count Two, the Grievance Administrator provided a breakdown of the alleged false statements referred to in paragraph 19, as follows:

> a. On or about April 21, 1995, respondent stated to Steve Lehto that it would take one week to locate Mr. Chabot's file and that respondent would forward Mr. Chabot's funds at that time.
>
> b. On or about May 17, 1995, respondent stated to Mr. Lehto that Mr. Chabot's check was in the mail.
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> c. On or about October 14, 1996, respondent stated to Mr. Lehto that he would send Mr. Chabot's funds when he received Mr. Chabot's address.

The panel dismissed the charges in subparagraphs 19(a) and (b), stating that the Administrator had not proven them by a preponderance of the evidence. As to the balance of that count, the panel found that respondent's claim that he needed an address and a signed release in order to release funds to Chabot were false statements made to stall the payment of the remaining funds.

The Charged Violation of MRPC 8.4(b) in Count Two

The Grievance Administrator's bill of particulars with regard to Count Two, paragraph 19 of the formal complaint sets forth the specific alleged misrepresentations which respondent was required

to defend. The panel found that the misrepresentations purportedly made by respondent to attorney Steve Lehto ("Lehto") in April and May 1995 were not established by a preponderance of the evidence.

The dismissal of subparagraphs 19(a) and (b) were not appealed by the Grievance Administrator. The panel's findings that respondent made false statements in violation of MRPC 8.4(b) therefore rest on the allegation in subparagraph 19(c):

> That on or about October 14, 996, respondent stated to Mr. Lehto that he would send Mr. Chabot's funds when he received Mr. Chabot's address.

There is substantial credible evidence in the record to support the hearing panel's finding that "Respondent's claim that he needed an address and a signed release were false statements made to stall the payment of the remaining funds to Mr. Chabot, in violation of MRPC 8.4(b)." (HP report 4/29/98, p 5). Indeed, by October 1996, the complainant's lawyer had every right to be concerned. Respondent was holding (or was at least supposed to be holding) $3,750.00 which a district court had awarded to Chabot. The dispute between Chabot and his former attorney had been resolved by the Court and the former attorney's check for $3,250.00 had been sent out in August 1996. When Lehto called respondent on October 15, 1996 to find out why Chabot's money had not been released, respondent told him that he needed Chabot's address. Lehto testified to the panel that he felt this was a stalling ploy because Chabot's address had not changed but he went ahead and sent Chabot's address to respondent on October 15, 1996 (petitioner's exhibit #10). Another month passed. In November 1996, an employee of respondent called Lehto and said that Chabot's money could not be released without a signed authorization. On November 12, 1996, Lehto wrote to respondent candidly questioning respondent's good faith. Unbeknownst to attorney Lehto, his suspicions were justified as evidenced by the November 1996 monthly statement for respondent's trust account. According to that statement (petitioner's exhibit A), the balance in respondent's trust account on November 12, 1996, the date of Lehto's letter, was only $709.00

or approximately $3,000.00 short of the amount which respondent was supposed to be holding for Chabot.

However, respondent properly argues that this evidence and the panel's general conclusion impermissibly exceeded the scope of amended subparagraph 19(c). This charge is narrowly drawn and focuses on the truth or falsity of a specific statement made by respondent to attorney Lehto on October 14, 996. The statement in question does not concern a past or present fact but is an expression of respondent's intent to do something in the future, namely, to send the funds when he received Chabot's address.

Under the appropriate standard of review, we must search the record for proper evidentiary support for a finding that on October 14, 1996, respondent's statement that he would send the funds when he received Chabot's address was a false statement because he did not, on that date, intend to release the money upon receipt of Chabot's address. We do not find that evidentiary support in the record. The fact that he did not release the funds after receiving Chabot's address was not sufficient, in and of itself, to establish respondent's state of mind on October 14, 1996.

It is with some reluctance that we dismiss the charge of misrepresentation in Count Two. Taken as a whole, the evidence supports a reasonable inference that respondent was stalling for time and that he made statements to attorney Lehto for the sole purpose of delaying the inevitable time when he would have to turn over the funds to which his former client was rightfully entitled. Nevertheless, the allegation in paragraph 19(c) is the only remaining specific allegation of misrepresentation in Count Two and that narrowly drawn allegation is without proper evidentiary support.

Level of Discipline

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:

> 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 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.}

The hearing panel report on discipline in this case provides little or no guidance as to how the panel reached its decision to impose a suspension of 30 days beyond reciting that the panel considered "aggravating and mitigating evidence and testimony presented." While the Board affords a certain level of deference to a hearing panel's subjective judgment on the level of discipline, the Board possesses, of necessity, a relatively high measure of discretion with regard to the appropriate level of discipline. Grievance Administrator v James H. Ebel, 94-5-GA (ADB

1995), citing Grievance Administrator v August, 438 Mich 296, 304 (1991); Matter of Daggs, 411 Mich 304, 381-319 (1981). Such discretion allows the Board to carry out what the Court has described as the Board's "overview function of continuity and consistence in discipline imposed." State Bar Grievance Administrator v Williams, 394 Mich 5 (1995). "Hearing panels meet infrequently and are exposed to a relatively small number of discipline situations. The Board suffers from no such disadvantage." Matter of Daggs, supra, pp 319-320.

While an increase in the period of suspension from 30 days to three years is substantial, it is not unprecedented. In fact, the situation presented here is similar to that in Grievance Administrator v Edwin C. Fabre', DP 84/85 (ADB 1986). In that case, the Board was presented with an attorney who had received a hearing panel suspension of 60 days after he was found to have received settlements funds of $5,000 on behalf of a client, retained the agreed upon fee of $2,000 and misappropriated the remaining $3,000. In mitigation, that respondent testified that restitution had been made to the clients, that he had a prior unblemished disciplinary history and he did not intend to defraud his client. He argued that he used his clients' funds when he was "just trying to stay in business as long as I could" at a time when he was experiencing difficulty in meeting his office overhead and his obligations to the Internal Revenue Service.

Those mitigating factors are present in the instant case, although to a somewhat lesser degree. (Respondent was admonished in 1995 and he failed to make complete restitution until after he received the request for investigation.) As in Fabre', respondent argues that the egregiousness of his offense is lessened because it has not been shown that he specifically intended to deprive the complainant of his money and because he used monies in his trust account to defray expenses of his business at a time when he was experiencing financial difficulty.

Our view on these factors and the seriousness of this offense have not significantly changed since the Board's opinion in Fabre' and we repeat them here:

A short suspension accompanied by the provision for automatic reinstatement under MCR 9.123(A) is not consistent with the purpose of these disciplinary proceedings, the protection of the public, the courts and the legal profession, nor does it adequately reflect our condemnation of the misconduct committed in this case.

The respondent stole money which should have been delivered to his client. That inescapable conclusion is not made more palatable by the respondent's testimony before the panel that there was no intention "on my part to defraud or to deceive, or to take and use for personal gains the money" (T 15). The respondent was not entitled to use his clients' money without permission under any circumstances, and the use of those funds to pay the expenses of his law office is no less reprehensible than his use of those funds for some other purposes.

Nor can the Board assign much weight to the mitigating effect of the respondent's restitution, without interest, on the day of the hearing some nine months after those funds should have been delivered to the client. While prompt repayment of converted funds has been recognized by the Board as a mitigating factor, Schwartz v Richards, [Opinions of the Board, p 275, July 18, 1983], Schwartz v Keidan, [Opinions of the Board, p 391, September 30, 1985], we must substantially discount the mitigating effect of restitution made after the commencement of disciplinary proceedings.

Finally, we acknowledge, as did the hearing panel, that the respondent, has not previously been subjected to disciplinary action. In a case involving the misuse of client funds in violation of Canon 9 of the Code of Professional Responsibility, [now MRPC 1.15] the Supreme Court reduced an order of revocation issued by the State Bar Grievance Board to a suspension of three years, noting the respondent's "previously unblemished record," Matter of Geralds, 403 Mich 387; 263 NW2d 243 (1978). We hasten to emphasize, however that while an unblemished record may have some mitigating effect, it cannot be characterized as an excuse for the

> embezzlement of client funds. [Grievance Administrator v Fabre', supra p 3.]

The Supreme Court of at least one state, New Jersey, has adopted a relatively inflexible policy which mandates disbarment in virtually all cases involving the deliberate misuse of client funds. See In re Wilson, 81 NJ 451; 409 A2d 1153 (1979). This Board has not resorted to inflexible levels of discipline, following the dictates of our Supreme Court that "review of these proceedings if best handled on a case-by-case basis," Grievance Administrator v Nickels, 422 Mich 245 (1985), and that attorney misconduct cases generally stand on their own facts. In re Grimes, 414 Mich 483, 490 (1982). Nevertheless, we cite with approval the New Jersey Supreme Court's view of the essential nature of the offense in that case:

> 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: It is the mere act of taking your client's money knowing that you have no authority to do so that requires disbarment. [In re Noonan, 128 NJ 157, pp 159-160; 560 A2d 722 (1986).]

No can it be said that our Court has expressed any greater tolerance for an attorney's violation of his or her fiduciary responsibility to safeguard client funds.

> There are few business relations involving a higher trust and confidence than that of an attorney acting as a trustee in the handling of money for client or by order of the court. The basis of their relationship is one of confidence and trust. Any action by the attorney which destroys that basic confidence clearly subjects the legal profession and the

> courts to obloquy, contempt. censure and reproach. Foremost among the acts destroying the confidence between the public and the bar is the conversion and misuse of client funds. [State Bar Grievance Administrator v Baun, 396 Mich 421 (1976).]

Regardless of any sympathy we might have for an individual attorney facing financial difficulty, we must impose a level of discipline in this case which conveys the message to both the public and the legal profession that it is never acceptable for an attorney to place his or her financial need above the obligation to safeguard client funds. Under all of the facts and circumstances in this case, maintenance of public confidence in the legal profession as a repository of client funds requires an increase in discipline to a suspension of three years.

Board Members C. H. Dudley, Barbara B. Gattorn, Grant J. Gruel, Kenneth L. Lewis, and Nancy A. Wonch concur in this decision.

Board Members Elizabeth N. Baker, Albert L. Holtz, Michael R. Kramer and Roger E. Winkelman did not participate in this decision.