Grievance Administrator

Petitioner/Appellant,

v

William J. Braaksma, P 28003,

Respondent/Cross-Appellant

Case No. 94-58-GA

Decided: December 16, 1995

BOARD OPINION

The Hearing Panel concluded that respondent took possession of a check in the amount of $500 representing a partial payment of a $1,500 settlement negotiated on his client's behalf. The panel further found that the respondent failed to deposit the check into a client trust account, commingled those funds with his own by depositing the check in his personal account and used the entire sum for his personal use in violation of MCR 9.104 and the Michigan Rules of Professional Conduct, MRPC 1.15 (A)(B). The Hearing Panel concluded that the respondent's license should be suspended for a period of 45 days. Both the respondent and the Grievance Administrator filed petitions for review in accordance with MCR 9.118 (A). Based upon our review of the entire record, we conclude that the respondent's actions warrant a suspension of 180 days and reinstatement proceedings in accordance with MCR 9.123 (B).

The respondent commenced an action in January 1992 on behalf of the Ohio Casualty Group for the collection of a debt owed to that company. The respondent was at that time associated with a law firm and he testified that he customarily turned checks received on his client's behalf over to a secretary for deposit into the firm's trust account.

In this particular action, the respondent negotiated a settlement agreement for his client in the amount of $1500, to be

paid in installments. In March 1992, the respondent received a check from the debtor's mother in the amount of $500, made payable to the respondent. On March 11, 1992, the respondent negotiated the $500 check, retaining $25 in cash and depositing the remaining $475 into his own personal account. He did not, until August, 1992, notify either the client or his law firm of his receipt of these funds. By the end of March 1992, the respondent had withdrawn the entire amount.

On August 5, 1992, the respondent sent a letter to his client advising that the debtor had made an initial $500 payment but had failed to make the agreed upon installment payments. The letter continued, "We are still holding the $500. I will give you a call on August 17, 1992 on my return from vacation, to discuss disbursement of the funds and whether we should give Mr. Griscott any further leeway."

The record establishes that when that letter was sent, the $500 payment in question had still not been deposited in the firm trust account and that the respondent's personal checking account, into which the check had been deposited, had a negative balance.

After the respondent left from the law firm in June 1993, the client asked for an accounting of the $500 installment, prompting an inquiry by the law firm. On September 13, 1993, the respondent sent $500 to the client.

In reviewing the Hearing Panel's findings and conclusions, the Board must determine whether those findings have proper evidentiary support in the whole record Grievance Administrator v. August 438 Mich 296; 475 NW 2nd 256 (1991).

The respondent admits that he did not deposit the $500 check into a separate identifiable account as required by MRPC 1.15(A). Furthermore, the evidence clearly establishes that the respondent did not promptly notify his client of his receipt of his funds nor did he promptly deliver the funds to the client or to the firm with which he was associated when the funds were collected, in violation of MRPC 1.15(B).

In arguing that there was insufficient evidentiary support for a finding that he misappropriated client funds, the respondent relies heavily on his claim that he voluntarily reported his receipt of the money in the letter of August 5, 1992. He argues that the letter is evidence that he did not intend to misappropriate the money. While the respondent's intent was a relevant factor in assessing discipline, the element of intent was not required to establish misappropriation of client funds.

In Grievance Administrator v Stephen J. Lupiloff, DP 34/85 (Bd Op 1988), the respondent was entrusted with client funds which he deposited into his business account, thereby commingling client funds with his own. In rejecting the respondent's argument that the subsequent depletion of that account did not constitute misappropriation because the respondent did not intend to deprive his client of her funds, the Board affirmed the Hearing Panel's adoption of the definition of misappropriation employed by the District of Columbia Court of Appeals in In re E. David Harrison, 461 At2nd 1034 (1983);

> Misappropriation of clients' funds is any unauthorized use of clients' funds entrusted to an attorney including not only stealing, but also unauthorized temporary use for the lawyer's own purpose, whether or not he derives any personal gain or benefit therefrom.

See also Grievance Administrator v Barry Glaser, DP 106/84 (Bd Op, 1985); Grievance Administrator v David A. Nelson, DP 127/86; DP 165/86 (Bd Op, 1987); Grievance Administrator v George A. Furcron, DP 87/86 (Bd Op, 1988); Grievance Administrator v William A. House, ADB 219-87;247-87 (Bd Op, 1989); and Grievance Administrator v Norman Farhat, 92-196-GA;93-154-GA;93-188-FA;93-201-GA (Bd Op, 1994).

The Hearing Panel noted in it's report on discipline that misappropriation of client funds may, depending upon the circumstances, result in discipline ranging from a reprimand to revocation of the attorney's license. In Grievance Administrator

v William W. Swor, ADB 118-87 (Bd Op, 1989), for example, the Board imposed a reprimand where the record established that the respondent properly deposited a $500 settlement check into his client trust account but that a temporary shortfall in that account was inadvertent. See also Grievance Administrator v Robert R. Cummins, ADB 159-88 (Bd Op, 1988).

A similar result in this case was properly rejected by the Hearing Panel below, which stated,

> We rule out reprimand as an appropriate discipline for two reasons. First, this is a serious violation of the rules of professional conduct. It would take more mitigating factors than Respondent has offered to justify mere reprimand for the mishandling of client funds. Secondly, this Panel believes that Respondent's conduct was not accidental. We believe that Respondent intended to borrow the money secretly and temporarily. We do not believe Respondent intended to permanently deprive his client of these funds.

Rejecting the Grievance Administrators request for disbarment, the Panel continued,

> We also do not believe that disbarment [revocation] is called for. We are dealing with one bad act in 17 years of otherwise ethical conduct. There appears to be no pattern or repeat of this conduct. Furthermore, Respondent made prompt restitution for the loss. He has also demonstrated, for the most part, true remorse for his actions.
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> The difficult question for this Panel was to determine what period of suspension was appropriate and, whether the suspension should exceed 179 days, thereby requiring Respondent to petition the Supreme Court for reinstatement.

An important element of the Board's review of the level of discipline in a particular case includes an overview function of continuity and consistency in discipline imposed. Matter of Daggs, 411 Mich 304; 307 NW2d 66 (1981), citing State Bar Grievance Administrator v Williams, 394 Mich 5, 15; 228 NW2d 222 (1975). We

exercise that authority in this case by increasing discipline to a suspension of 180 days.[1]

The hearing panel placed significant emphasis on its conclusion that the respondent is unlikely to repeat this type of conduct in the future. While we defer to that conclusion, we are also mindful of our role in maintaining public confidence in the legal profession as a repository of client funds. The panel found that the respondent's conduct was not accidental and that he intended to take the money secretly, albeit temporarily. Such conduct requires a suspension of sufficient length to trigger the reinstatement requirements of MCR 9.123(B) and MCR 9.124.

Board Members Marie Farrell-Donaldson, Elaine Fieldman, Albert L. Holtz, Miles A. Hurwitz, Michael R. Kramer and Paul D. Newman

Board Member Barbara B. Gattorn would affirm the hearing panel's decision.

Board Member C. Beth DunCombe was recused and did not participate.

Board Member George E. Bushnell, Jr., was absent and did not participate.

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[1] The petitioner cites Matter of Albert, 403 Mich 346; 269 NW2d 173 (1978) for the proposition that the presence or absence of remorse should not be considered in the imposition of discipline. In Albert, the Court ruled that a reinstatement petitioner need not establish remorse in the face of his continued claim that he had not committed professional misconduct. The ABA Standards for Imposing Lawyer Sanctions recognize remorse as a factor which may be considered in mitigation, ABA Standards, Sec. 9.32(1).