Grievance Administrator,

Petitioner/Appellant,

v

John T. McCloskey, P 17313

Respondent/Cross-Appellant.

94-175-GA; 94-189-FA

Decided: December 27, 1995

BOARD OPINION

The respondent and the Grievance Administrator both petitioned the Attorney Discipline Board for review of a hearing panel order suspending the respondent's license to practice law in Michigan for 130 days. Prior to the presentation of oral arguments, the Board issued an order in accordance with MCR 9.118 (B) dismissing the respondent's petition for review for his failure to comply with the requirement for briefs. We have considered the Grievance Administrator's argument that a suspension of 130 days is insufficient in light of the panel's findings that the respondent failed to maintain client funds in a segregated account, misappropriated client funds for his own use, failed to answer the request for investigation and made false statements during the course of the Grievance Administrator's investigation. We agree. Discipline in this case is increased to a suspension of three years.

The Grievance Administrator filed a six-count formal complaint in this matter on September 19, 1994. The respondent's default for failure to answer the complaint was filed October 18, 1994 together with a supplemental complaint which charged that the failure to file a timely answer to a complaint constituted a separate act of misconduct. The respondent's default for failure to answer the supplemental complaint was entered on January 25, 1995. By virtue

of those defaults, the respondent was deemed to have admitted the charges of misconduct in the two complaints. MCR 9.115(D)(2); Matter of David A. Glenn, DP 91/86 (Bd Op 1986). Following the panel's announcement that misconduct had been established, the panel proceeded with the discipline phase of the hearing and the respondent testified on his own behalf at hearings before the panel on November 11, 1994, February 21, 1995 and May 16, 1995. In addition to that testimony, the panel admitted transcripts of the respondent's sworn testimony given to the Attorney Grievance Commission on January 31, 1994 and April 22, 1994.

The hearing panel had the opportunity to consider the respondent's version, given on five separate occasions, of the events alleged in the formal complaint. Based upon the respondent's defaults, his sworn testimony and the bank records admitted into evidence, the panel concluded:

> Respondent is clearly guilty of failing to maintain client's funds in a trust account, co-mingling [sic] client's funds with his own, using client's funds for personal purposes without the client's consent and failing to make prompt restitution. He failed to answer the request for investigation. He made statements to the investigator for the Grievance Administration which were false in fact. He failed to fully and accurately disclose the facts and circumstances of the alleged misconduct and made statements that he should have known were not true. He also failed to answer and properly respond to Petitioner's Complaint.
>
> On April 6, 1992, Respondent received from Complainant an insurance company check dated April 4 in the amount of $40,000 with the request it be cashed. For reasons which are not entirely clear, Respondent flew to Boston to expedite the processing of the check. The proceeds were wired to his checking account on August 9. That same day he withdrew $4,500 in case of which $3,000 was given to the Complainant and $1,500 used to reimburse the expenses to Boston. He wrote checks to himself and his mother and for the payment of numerous of his personal obligations, totaling

> $30,111.93. Two days later, he withdrew $5,300.
>
> He alleges that the client directed him to keep the money in cash instead of a separate client trust account. He stated to the investigator for the Attorney Discipline Administrator that the client signed that directive in April 1992, but in fact she did not sign it until 1994, after complete restitution had been made by Respondent.
>
> Respondent's primary defense is his unsubstantiated assertion that at all times he retained sufficient cash in his safe at home to reimburse the client. When questioned by the investigator about the $30,111.93 in checks written on his account, he said "I had the money in cash for a short period of time in my office, and then I put it in my safe." He also said with reference to the $30,000.93, that it "would have been the cash amount that I put in the safe". He further stated that he withdrew that as "my money". At the same time, he acknowledged that "she (the client) wanted me to hold it". All of these statements cannot be true. They could be lies buy the Panel concluded they resulted from an unfocused and careless mind.
>
> Respondent also attempted to justify the withdrawals on the basis that the client agreed he would have the right to satisfy his fee and expense charges from those funds, although invoices of fees and expenses were not generated until several months later and were substantially less than the amounts he withdrew for his own use.

Absent compelling mitigation, an attorney's deliberate misappropriation of client funds may generally be expected to result in discipline ranging from a suspension of three years to disbarment. Grievance Administrator v Charbonneau, DP 108/83 (Bd Op 1984); In the Matter of Douglas E. H. Williams, DP 126/81 (Bd Op 1984); Grievance Administrator v Muir B. Snow, DP 211/84 (Bd Op 1987); Grievance Administrator v Gary B. Perkins, ADB 124087 (Bd Op 1989); Grievance Administrator v Fernando Edwards, 437 Mich 1202; 466 NW2d 281 (1990); Matter of Cecelia Henderson, 92-118-GA (Bd Op

3/4/93). The respondent's claim that he kept the client's money in an envelope marked "Tina" in a safe at his home would constitute neither a defense nor significant mitigation even if that claim had been presented consistently and credibly. In prior opinions,[1] the Board has cited Louisiana State Bar Association v Krasnov, 488 So2d 1002, (LA 1986):

> Indeed when an attorney relies on a 'black box' defense, viz., that he kept client funds secretly but securely in a private safe or similar unregulated depository, the likelihood of actual embezzlement is so great, and the policy of professional responsibility in protecting the client from such risks is so strong that it should be presumed that the attorney is guilty of embezzlement unless he successfully carries both the burden of going forward with the evidence and the burden of persuasion otherwise.

The respondent's claim that funds were withdrawn in anticipation of attorney fees for future services has also been rejected in prior cases. In Matter of Michael J. Kavanagh, DP 71/84 (Bd Op 1985), for example, the Board held:

> We cannot, however, condone an improper withholding, even where the attorney may in good faith contemplate providing valuable services. To do so would create a potential for widespread abuse.
>
> * * *
>
> It is an untenable conclusion that an attorney may commingle, convert or apply to his own use a client's funds so long as he later performs sufficient legal work to earn the commingled or converted sum. 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.

While we do not disagree with the hearing panel's conclusion

---

[1] Matter of Richard Meden, 92-106-GA (Bd Op 1992); Matter of Wilfred C. Rice, 90-85-GA (Bd Op 10/11/91).

that the respondent "exercised extremely poor judgment and was sloppy and lazy in his bookkeeping and administration practices", the record as a whole cannot sustain a finding that the respondent's conduct was merely careless. Moreover, the respondent's misconduct is not limited to his misuse of client funds but includes equally serious charges that the respondent produced misleading evidence during the Grievance Administrator's investigation. Of particular concern is the purported authorization produced by the respondent at an interview conducted at the Attorney Grievance Commission on April 22, 1994. The authorization was signed by respondent's client, Erthena McAdory and was dated April 8, 1992. It stated, in part:

> I hereby authorize [respondent] to wire, transfer funds in the amount of $40,000 to [respondent's] trust account. . .I hereby request that any funds held by you, be held in cash and not deposited in your bank trust account.

During the panel proceedings, the respondent admitted that the authorization was back-dated and was actually signed by Ms. McAdory, at the respondent's request in January 1994, after Ms. McAdory had filed her request for investigation and after the respondent had made restitution.

Under the circumstances presented in this case, we conclude that discipline should be increased to a suspension of three years.

Board Members John F. Burns, George E. Bushnell, Jr., Marie Farrell-Donaldson, Elaine Fieldman, Albert L. Holtz and Miles A. Hurwitz.

Board Members C. Beth DunCombe, Barbara B. Gattorn and Paul D. Newman did not participate.