Grievance Administrator,
State of Michigan
Attorney Grievance Commission,

Petitioner/Appellant,

v

Paul F. Zyburski, P 41488

Respondent/Appellee.

92-277-GA

Issued: November 14, 1993

BOARD OPINION

The hearing panel found that respondent Paul F. Zyburski affixed client signatures to a settlement check without the clients' knowledge or consent; commingled the clients' share of the settlement with his own funds by depositing the settlement check in his office account; and, for approximately two months, failed to deliver the settlement funds to his clients. In a separate matter, the respondent had no valid excuse for failing to appear for a scheduled pretrial hearing in a landlord tenant case. The panel concluded that the respondent's conduct was in violation of the Michigan Rules of Professional Conduct: MRPC 1.1(c); 1.3; 1.15(a,b) 8.4(a-c). Following a separate hearing on discipline, the hearing panel concluded that a sixty-day suspension of the respondent's license to practice law was warranted in light of the mitigating factors presented. The Grievance Administrator has petitioned the board for a review of the panel's decision. We agree that an increase in discipline is required in this case. The respondent's license to practice law in Michigan shall be suspended for a period of one year, with credit given for the sixty days served in accordance with the hearing panel's order.

The respondent was licensed to practice law in Michigan in 1988. In October 1991, he was retained by a couple, the Kincaids,
to seek compensation for the wife's personal injuries sustained in a slip and fall accident. The claim filed by the respondent on his client's behalf was referred to the landlord's insurer and, in December 1991, the parties agreed to settle the matter for the total amount of $3,450.00. The insurance company's draft in that amount was mailed to the respondent on December 27, 1991, payable to the respondent and his clients. It was agreed that the clients were entitled to a net recovery of at least $2,100.00, although there is conflicting evidence in the record that the client's were entitled to as much as $2,300.00.

Although the respondent testified at the hearing that Mr. Kincaid gave authorization to endorse the settlement draft on both clients' behalf, Mrs. Kincaid denied such authorization. Mr. Kincaid was not called as a witness. The respondent has not appealed the hearing panel's factual finding that the signatures were affixed to the draft without permission.

At the time that he received the settlement draft, the respondent did not maintain a trust account. On December 31, 1991, he negotiated the settlement draft, retaining $200.00 in cash and depositing the balance of $3,250.00 in his office checking account. On January 28, 1992, the respondent issued a check in the amount of $2,100.00 to Mrs. Kincaid. That check was returned by the bank for non-sufficient funds. The checking account records received into evidence show that the checking account balance prior to the deposit of the settlement draft was $5.07. During the week following the deposit, the respondent wrote checks totalling $2,747.00 for personal or professional obligations unrelated to the settlement. By January 7, 1992, the balance in the account had fallen to $498.78 and it fell further to $263.93 during that month. Respondent's replacement check to Ms. Kincaid on February 7, 1992 was also returned for non-sufficient funds.

On February 11, 1992, the respondent gave Ms. Kincaid $1,900.00 in cash with a promise to pay the balance of the funds to which she was entitled. He also explained to her at that time that he was suffering from alcoholism. On February 19, 1992, the respondent began a thirty-day inpatient treatment program for alcoholism.

Notwithstanding the respondent's assertion that "the respondent did not knowingly use his clients' funds, embezzle or in any other fashion intentionally misappropriate his client funds" [1]; there should be no misunderstanding as to the nature of the respondent's misconduct.

The respondent's deposit of the settlement draft into his office account rather than a separate identifiable account cannot be attributed in this case to mistake or inadvertence. Indeed, the respondent testified that he was aware of the requirement that client funds must be segregated. A lawyer's duty to refrain from commingling his or her own funds with those of a client is clearly set forth in MRPC 1.15(a). In a 1988 Opinion, the Board said:

> "We can perceive of no excuse for an attorney's failure to be aware of the requirement under rule 1.15 of the Michigan Rules of Professional Conduct [formerly DR 9.102 (a)] that client funds be held separately from the lawyer's own money. There are no exceptions in either the former or present rule which would allow an attorney to commingle client funds in a business or personal account for reasons of convenience or expedience.
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> . . .

[1] Respondents brief in response to Petition for Review page three.

> The rule prohibiting the commingling of client funds with the funds of an attorney is not subject to a defense based upon accounting error nor is the amount of money involved significant in determining whether the rule has been violated. The rule is designed to insure against any invasion of client funds, whether careless or intentional." Matter of Robert R. Cummins, ADB 159-88 (Brd. Opn. 12/5/88)

That warning is particularly applicable here. The respondent maintained throughout these proceedings that there was no intent to defraud his clients and that the misuse of his client's money was the result of his inability to maintain accurate records due to a diminished capacity caused by alcoholism. As the Board pointed out in Cummins, supra, acceptance of the respondents position would not change the inescapable conclusion that the commingling of client funds in the respondents general account did result in the invasion of those funds and did prevent the client from receiving those funds in a timely manner.

Although the term does not appear in MRPC 1.15 and was not used by the hearing panel in it's report, it should also be clearly understood that the respondent's actions constituted misappropriation of client funds. The element of intent is not required to establish misappropriation of funds and the Board has specifically adopted the definition of misappropriation employed by the District of Columbia Court of Appeals in In re E. David Harrison 461 A2d 1034 (1983):

> "Misappropriation of client 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 Matter of Stephen J. Lupiloff, DP 34/85 (Brd. Opn 3/24/88; Matter of Robert Cummins supra,

In Lupiloff, supra, the Board went on to note that although intent is not an essential element in a misappropriation case, it does not follow that the issue of intent may not be considered in determining the appropriate level of discipline. Indeed, such factors as the lack of actual harm to a complainant coupled with a respondent's lack of intent to defraud may mitigate the gravity of a respondent's technical misconduct to such a degree that discipline should be reduced to a reprimand. Matter of Robert E. Helm, 36292-A August 7, 1980, Opn. Brd p.90. This is not such a case.

The Standards for Imposing Lawyers Sanctions adopted by the American Bar Association in 1986 suggest that "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". Two cases cited in the commentary to standard 4.12 of the ABA Standards are instructive. In Disciplinary Board of the Supreme Court v Banks, 641 SW2nd 501 (Tennessee 1982) the court imposed a one-year suspension where the lawyer took the client's money to invest but did not pay her interest on a regular basis or pay over

the client's money upon demand. The court noted that the lawyer did not intend to convert the client's funds to his own use; and "At all times he acknowledged his responsibility for them and his indebtedness to her" 641 SW2d 504.

Whether or not respondents Zyburski intentionally applied his clients funds to his own use, he admits the intentional commingling of client funds with his own. Commingling alone is a serious violation for which a period of suspension may be appropriate even in cases where the client does not suffer a loss. As explained by the Illinois Supreme Court: "It is the risk of the loss of the funds while they are in the attorney's possession, and not only their actual loss, which the rule is designed to eliminate . . ." In re Bizar 97 IL2d 127, 454 NE2d 271 (1983).

The hearing panel granted substantial weight to the mitigating effect of the respondent's apparently successful rehabilitation in dealing with alcoholism, a prior unblemished record, the respondent's remorse and a conclusion that the respondent has the capacity to serve the public and the legal profession in the future as a member of the bar.

We do not overlook these mitigating factors. The fact remains, however, that a sixty day suspension for misconduct which includes the unauthorized signing of a settlement draft, deliberate commingling of client funds and misappropriation of those funds is dramatically inconsistent with the level of discipline imposed in similar cases. In cases involving the commingling and misappropriation of client funds, the Board has stated that, absent mitigation, such offenses may result in revocation of the license to practice law. Matter of Muir B. Snow,DP 211/84 (Brd. Opn 1987 (Increasing a suspension from two years to three years, citing the mitigating effect of the respondent's continued recovery from alcoholism). More recently, the Board was persuaded that a hearing panel's decision to impose a one-year suspension in a case involving misappropriation should be affirmed, with the addition of certain conditions, in light of the respondent's voluntary treatment for alcoholism, a prior unblemished record, remorse and restitution. Matter of Patrick M. Tucker, 91-60-GA; 91-104-FA; 91-180-GA.

As with many cases which come before the Board, elements of tragedy are present here. We have no reason to doubt the assessment of a district judge called to testify in mitigation. The respondent has done well by clients and may accomplish much in his professional career. The primary goal of these proceedings is not and should not be punishment. Nevertheless, protection of the public, the courts and the legal profession includes the maintenance of public confidence in the legal profession as a repository for client funds. A suspension of one year is warranted in this case.

(Board member Elaine Fieldman did not participate in this decision)