Grievance Administrator,
State of Michigan
Attorney Grievance Commission,

Petitioner/Appellant,

v

Cecelia Henderson, P34121,

Respondent/Cross-Appellant.

Case No. 92-118-GA

Issued: March 3, 1993

BOARD OPINION

Petitions have been filed by the Grievance Administrator and the respondent seeking review of a hearing panel order suspending the respondent's license to practice law for a period of twelve months. Respondent failed to appear at the panel hearing, failed to file a required brief, and failed to appear for the review hearing held in accordance with MCR 9.118. The Attorney Discipline Board concludes that the egregious nature of the respondent's conduct, which includes neglect, misrepresentation, signing a client's name to a settlement agreement without consent, and misappropriation, as well as the complete absence of mitigating factors, warrants an increase in discipline to revocation.

In February, 1990, Donzell Green, president of Environmental Chemical Enterprises, Inc. ("ECE"), retained the respondent to represent ECE in an action against Metropolitan Center for High Technology ("MCHT"). Respondent charged and received a flat fee of $5500. In April, 1990, the respondent filed her appearance on behalf of ECE in the pending action in Wayne County Circuit Court.

In June, 1991, the respondent prepared a settlement agreement and mutual release between ECE and MCHT. Pursuant to that agreement, ECE was to dismiss the lawsuit upon receipt of $100,000 from the defendant. The agreement drafted by the respondent required that separate checks be issued, one in the amount of $70,000 to ECE, and the other payable to the respondent in the amount of $30,000.

The panel found that the respondent settled the case without Ms. Green's consent; caused the lawsuit to be dismissed without Ms. Green's knowledge or consent; advised the defendant to forward to her a check for $30,000, knowing that ECE and Ms. Green had already paid her fee in full; failed to respond to Ms. Green's inquiries; failed to respond to the inquiries of Ms. Green's subsequent attorney; caused Ms. Green's signature to be affixed to the settlement agreement without her knowledge or consent; failed to deposit the $30,000 in a trust account; failed to promptly deliver the $30,000 to Ms. Green although she was entitled to these funds; failed to hold the $30,000 in trust pending the resolution of any perceived dispute; and misappropriated the $30,000.

The hearing panel, by a vote of two to one, concluded that the respondent's license to practice law should be suspended for a period of twelve months. The dissenting member of the panel voted to revoke the respondent's license.

The Supreme Court has recognized that while the Board reviews a panel's factual findings for adequate evidentiary support, the Board also possesses "a measure of discretion with regard to its ultimate decision." Grievance Administrator v August, 438 Mich 296; 475 NW2d 256 (1991). With the exception of the panel's dismissal of Count Four, discussed below, the panel's findings that the respondent committed egregious acts of misconduct, including affixing the client's name to settlement documents without permission and misappropriating client funds, are not before the Board. Rather, the Board is asked to exercise its broad overview powers to determine whether a one-year suspension is appropriate.

The Board has previously ruled that, in the absence of substantial mitigation, revocation of an attorney's license to practice could be expected as an appropriate level of discipline in cases involving the intentional misappropriation of client funds. Matter of George H. Furcron, ADB 90-88, Board Opinion 1/17/89. In a number of cases in which misappropriation of client funds has resulted in suspensions of three years, the Board has specifically identified mitigating factors warranting consideration. See, for example, Matter of Muir B. Snow, DP 211/84, Board Opinion 2/17/87 (increasing suspension from two years to three years); Matter of Edwin G. Fabre, DP 84/85; DP 1/86, Board Opinion 9/30/86 (increasing suspension from sixty days to three years); Matter of John D. Hasty, ADB 1-87, Board Opinion 2/8/88 (affirming a three-year suspension); and Matter of Kenneth E. Scott, DP 178/85, Board Opinion 2/8/88 (180 day suspension increased to three years).

In other cases, the Board has concluded that substantial deference should be given to significant mitigating factor identified by a panel in a case involving intentional misappropriation. See, for example, Matter of Patrick M. Tucker, 91-60-GA; 91-104-FA; 91-180-GA, Board Opinion 12/19/92 (one year suspension affirmed with additional conditions). This case clearly does not fall in that category. Unlike the Patrick Tucker matter in which the respondent presented unrebutted evidence of rehabilitation from a serious alcohol addiction and full restitution to the affected clients, this case presents no mitigating factors beyond the fact that the respondent has not previously been disciplined in the ten years since her admission to the Bar.

While a substantial increase in discipline would be warranted based solely upon the lack of mitigation in a case involving intentional misappropriation of funds belonging to a client, this case presents an additional factor which calls into question the respondent's fitness to be a lawyer.

This is not a case in which the respondent succumbed to a temptation to misuse funds entrusted to her by the client. The evidence in this case established that the respondent settled her client's case without the client's knowledge and consent, forged her client's signature on the settlement documents and then specifically requested that a separate check be issued directly to her in the amount of $30,000. This chain of events suggests a carefully crafted plan to obtain funds to which she was not entitled.

In Matter of Mary E. Gerisch, ADB 171-87; 197-87 (1988), the Board increased a three year suspension to revocation. There, the respondent failed to inform a client that his case had been dismissed and fabricated a false settlement check and settlement statement to further the deception. The Board concluded:

> [I]nasmuch as the license to practice law in Michigan is considered to be a proclamation to the public and the legal profession that the holder is fit to act in matters of trust and confidence, we believe that revocation of that license is an appropriate sanction when an attorney violates the fundamental obligation to be truthful. This would seem to be especially true when a deliberate, calculated intent to deceive is evidenced by the preparation of a forged document. Gerisch, supra.

We are mindful that the facts in this case bear some similarity to the misconduct in Grievance Administrator v Fernando Edwards, 437 Mich 1202; 466 NW2d 281 (1990). There, the Board increased a suspension of two years to revocation where the record established that the respondent endorsed his client's name to a settlement check without permission, deposited the funds into his wife's checking account, misappropriated the funds, and misrepresented the status of the case to the client. In lieu of granting the respondent's leave to appeal, the Supreme Court peremptorily reduced discipline to a suspension of three years in an order which stated simply that "[U]nder the circumstances of this case, we conclude that a suspension of three years is a proper penalty."

We are persuaded that the presence of mitigating factors in Edwards and the absence of mitigation in this case support the conclusion that the specific circumstances referred to by the Court in Edwards are not applicable here. Protection of the public, the courts and the legal profession in Michigan requires revocation in this case.

With regard to the hearing panel's dismissal of an additional count alleging false statements in the respondent's answer to a request for investigation, we are not prepared to say that the hearing panel's decision was without evidentiary support. Inasmuch as Count Four of the complaint is based in part on the respondent's duty to answer a request for investigation fully and fairly and to disclose all of the facts and circumstances pertaining to the alleged misconduct [see MCR 9.113(A)], our review of this count might have been aided by an opportunity to review the request for investigation. Although the answer to the request for investigation was offered into evidence, the request for investigation was not and the record does not disclose the precise allegations addressed by the respondent in her answer. We note also that the allegations in Count Four required that the panel find not only that the respondent's statements in the answer were false but that the statements were "known by respondent to have been false at the time they were made." We are not prepared to say that the majority's ruling on the sufficiency of the evidence on this count was clearly erroneous.

John F. Burns, George E. Bushnell, Jr., C. Beth DunCombe, Miles A. Hurwitz and Theodore P. Zegouras

[Linda S. Hotchkiss, M.D. did not participate in this decision. Elaine Fieldman was absent.]