

IN THE MATTER OF ROGER J. OEMING,
A Member of the State Bar of Michigan,
Respondent.
File No. DP-106/83

Argued: January 19, 1984
Decided: March 13, 1984

OPINION OF THE BOARD

Respondent was charged with misappropriation of \$6,000 of client funds. In April 1982 Respondent undertook to represent a client for the purpose of filing a personal injury suit. A settlement was reached in the amount of \$10,000. The client was to receive \$6,000 and the Respondent was to be paid \$4,000 for his fee. Respondent deposited the full \$10,000 into his trust account.

The client, who lived out-of-state, wrote Respondent in July 1982 requesting that she be paid her portion of the settlement. In May 1982 Respondent had begun writing checks from the settlement fund, and by January 1983 he had used \$9,800 to satisfy certain personal obligations. In August 1982 Respondent and the client conversed at length by phone. As a result of this conversation Respondent stated that he believed his client had agreed to loan him \$6,000, representing the amount of her net recovery. Respondent sent his client a demand note executed by him and later made interest payments to the client; the client-complainant apparently acknowledges receipt of the interest payments but has not cashed these checks. However, as early as September, 1982 and at all times thereafter, the client expressly repudiated the alleged loan agreement and refused to accept Respondent's interest payments. In March, 1983, after repeated attempts to clear up what Respondent claims was a misunderstanding, Respondent repaid the full \$6,000 and interest.

Based on the above facts, the hearing panel found that Respondent “. . . did not pay or deliver to his client as requested by her the funds in his possession which she was entitled to receive . . .” in violation of Canon 9 of the Code of Professional Responsibility, DR 9-102(A)and(B)(4). [Hearing Panel report pp. 4 and 5, paragraph 10.] This misconduct was exacerbated by the fact that Respondent misrepresented to his client that the full amount owed her was available at all times during their dispute in violation of Canon 1, DR 1-102(A)(1)(4)and(6). [Hearing Panel Report p. 4 paragraphs 6 and 7, p. 5, conclusion.] This statement was incorrect, as were other statements made by Respondent regarding the cause of the alleged misunderstanding. In mitigation, the panel found that Respondent had an unblemished record of practice spanning 31 years, and that he fully repaid his client with interest. As a result of these findings, the panel imposed a thirty day suspension.

A thirty day suspension is clearly insufficient in this case of misappropriation of client funds, particularly when coupled with misrepresentations to the client. In the past we have dealt with misconduct of generally similar nature with orders of revocation. See, e.g., In re Baun, No. 32207-A (1979); In re Moskal, Nos. 34966-A, 35104-A (1979). However, the instant case presents substantial and persuasive evidence in mitigation and the hearing record is not completely satisfactory regarding the specific extent of culpability with regard to Respondent's statements which the panel found were "not true." [Hearing Panel Report, p. 4, paragraphs 6 and 7.] Respondent has been in the practice of law over thirty years and had a long-standing relationship with this client. The Board is persuaded despite the aggravating misrepresentation, that Respondent did not knowingly intend to defraud or otherwise prejudice this client's interests. He evidenced a bona fide belief that a loan arrangement eventually existed, wrote numerous letters in an attempt to clear up the misunderstanding thereof, made substantial interest payments, and finally refunded the full amount to the client and apparently cooperated reasonably well in response to the investigation and prosecution of this complaint.

Respondent's use of his client's money for approximately three months between May and August, 1982 was clearly without authority even by Respondent's account of the matter and constitutes a serious breach of ethics, but is atypical of Respondent's character. He apparently acted out of desperation stemming from a poor financial situation, and relied, albeit very foolishly, on a presumption that a loan arrangement would be accepted by his client. We hasten to emphasize that this is no excuse; yet, it is a factor which, together with other mitigation, takes this case out of the realm of revocation or a lengthy suspension.

We, therefore, increase discipline to a suspension of 121 days. This sanction will require reinstatement proceedings and fulfills the purpose of public protection given the circumstances of the transaction in question. We grant the Grievance Administrator's motion to strike subparagraphs 2(b), 2(c), and paragraph 3 of Respondent's brief in support of petition for review. Counsel for the Grievance Administrator made an objective and professional presentation of this matter before both the panel and the Board, and we find Respondent's allegations contained in the stricken paragraphs to be baseless.

ALL CONCUR.