

IN THE MATTER OF ROBERT W. LUOMA,
A Member of the State Bar of Michigan,
Respondent.
File No. DP-171/82 & DP-252/82

Argued: September 26, 1983
Decided: September 30, 1983

OPINION OF THE BOARD

BY THE SUB-BOARD of John L. Cote', Chairperson, Lynn H. Shecter, Vice-Chairperson and Frank J. McDevitt, D. O., Member. Pursuant to GCR 1963, 967.3(a), David Baker Lewis, Secretary concurs. Leo A. Farhat, Member did not participate.

The hearing panel found that Respondent neglected certain civil litigation resulting in entry of a default against his client and that Respondent failed to answer the Grievance Administrator's Request for Investigation. Regarding a second Complaint, the hearing panel found that a separate client had deposited approximately \$180,000 with Respondent during the attorney/client relationship over a period of time; approximately \$40,000 to \$50,000 of that amount is unaccounted for at the time of this appeal. That money which the panel found to be the client's funds, is the subject of civil litigation between the client and Respondent. Respondent failed to answer three Requests for Investigation and this second Formal Complaint. Although the Respondent was in Default, the panel allowed him to make a statement in mitigation and imposed a suspension for a period of 1 year. The Grievance Administrator appeals claiming the severity of misconduct warrants greater discipline. We affirm the findings of the hearing panel, but agree that the level of discipline is insufficient. The suspension is increased to 3 years and 1 day.

Two Formal Complaints, DP-171/82 and DP-252/82 are before the Board for review. Respondent was retained in the first matter to defend an action on a monetary obligation. Respondent failed to take any action on his client's behalf and because a default was entered and a judgment obtained, the client's property was subjected to garnishment and seizure. Because of Respondent's neglect and refusal to assist and cooperate with the client properly, the client was forced to obtain substitute counsel and was precluded from asserting a potential set-off claim. Notwithstanding the fact that there is no prior history of discipline, this general type of neglect, aggravated by Respondent's failure to answer the Request for Investigation resulting in default in these proceedings, could result in a suspension.

However, the Board has before it a finding of extremely grave misconduct, fully substantiated in the record, to-wit: the commingling and conversion of approximately \$180,000. We amend the panel's findings of fact to make more specific the status of \$40,000-\$50,000 of that amount. We find that this money also was the rightful property of the client. The complainant-client in this second matter paid a \$2,000 retainer to Respondent to handle certain business matters and legal affairs over a period of time. During the attorney/client relationship Respondent received approximately \$180,000 from the client. Some of these funds were deposited in a money market account with a brokerage firm, however, the funds were not properly identified, as required by Canon 9, as client trust funds. Moreover, approximately \$30,000 in cash was deposited in Respondent's personal checking account. While approximately \$90,000 was eventually returned to the client and there was an accounting for an additional \$40,000 to \$45,000, we have found the client-complainant

is entitled to the remaining \$40,000 to \$50,000 (Hearing Panel Tr, p 81).

Respondent has claimed that he is entitled to a substantial portion of the funds in question as remuneration for legal services rendered. However, when the client requested an itemized bill for legal services, the Respondent could not or would not produce one (Hearing Panel Tr, p 47-48). Eventually a bill for \$75,000 was produced by the Respondent (Hearing Panel Exhibit 1)13). The legal fee was later reduced to \$41,000 (Hearing Panel Tr. p 73), which the panel declined to characterize as excessive (Hearing Panel Report, p 4, line 19 and 20); however, very little of the fee was substantiated by documentation or itemization. The Board is left with a clear showing in the record of substantial commingling and conversion of client funds.

A review of similar cases involving commingling and conversion of and failure to account for client funds points out the inadequacy of the sanction imposed by the panel in this case. E.g., Grievance Administrator v Baun, File No. 32207-A (April 1979), Grievance Administrator v Goldberg, File No. DP-2/80 (September, 1981), Grievance Administrator v Zdorodowski, File No. DP-141/81 (1982), Grievance Administrator v Kostecke, File No. DP-117/80 (1980), Grievance Administrator v Moskal, File Nos. 34966-A and 35104-A (May 1979). The discipline in these cases has ranged from suspension of 3 years to revocation of license. In the present case, we do not order revocation in deference to the hearing panel's assessment of Respondent's statement in mitigation which included references to his recent divorce and his alcoholism, and in consideration of no prior record of discipline since admission to the Bar in 1963. It is noted that Respondent had not obtained treatment for alcoholism at the time of the panel hearing. Respondent will be required to undergo reinstatement proceedings and recertification by the Michigan State Board of Law Examiners, should he seek readmission.

The Grievance Administrator, based upon the entry of a default, which was not set aside, has challenged the right of the Respondent to submit a statement in mitigation to the hearing panel. The Respondent did not examine the witnesses or take any other action which would actually constitute assertion of a defense to the allegations in the Formal Complaint. Although an unsworn statement is not evidence, the Board has ruled that a defaulted party may submit evidence relevant to the level of discipline. Grievance Administrator v Elston, File DP-144.82 (1983)(leave to appeal denied by the Michigan Supreme Court).

The record also reflects that the monetary transaction between the client and the Respondent was part of a plan to avoid outstanding obligations to creditors by concealing assets of the client whose business was apparently facing imminent financial danger (Hearing Panel Report, p 4). While the creditor-avoidance aspect of the case is not embodied in the factual allegations of the Formal Complaint, it is evidence relevant to the appropriate disciplinary sanction to be imposed and, when taken together with the misappropriation of funds, it has an aggravating influence in the assessment of proper sanction. The misconduct is further aggravated by Respondent's failure to cooperate with . . . "the Court and [complainant's substitute] Counsel . . .". (Panel Report, p 4, lines 5-7).

Other factors leading us to increase the panel's order of discipline include Respondent's failure to file an accounting with the Court and his failure, as well, to answer the Complaint.