STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellant,

v

Geoffrey L. Craig, P 46554,

Respondent/Appellee,

Case No. 14-123-GA

Decided: May 4, 2017

Appearances:
Emily A. Downey, for the Grievance Administrator, Petitioner/Appellant
Geoffrey L. Craig, In Pro Per Respondent/Appellee

BOARD OPINION

Tri-County Hearing Panel #12 issued a report and an order of discipline in this matter on November 30, 2015, suspending respondent's license to practice law for 180 days, and ordering him to pay $62,500 in restitution on or before December 22, 2015. Based upon respondent's default for failure to timely answer the formal complaint, the panel found that respondent committed professional misconduct as charged in the formal complaint.

The Grievance Administrator petitioned for review and the Attorney Discipline Board conducted review proceedings, in accordance with MCR 9.118. For the reasons discussed below, we affirm the hearing panel's order of suspension and restitution.

A. Proceedings Before the Hearing Panel

The Grievance Administrator filed a formal complaint against respondent on December 16, 2014. The complaint charged that respondent, while acting as the appointed conservator for his father in a probate court matter, failed to file a complete inventory or final account; failed to respond

to the probate court's notice of deficiency; failed to turn over $62,500 in remaining conservatorship funds once his father passed away; and after respondent and Western Surety were surcharged $62,500 by the probate court, he failed to pay the surcharge and indemnify Western Surety after it paid, in full, the surcharge ordered by the court, in violation of MRPC 1.1(c); 1.3; 3.4(c); 1.15(b)(1) and (3); 8.4(a)-(c); and MCR 9.104(1)-(4).[1]

Respondent failed to file an answer to the formal complaint and his default was entered. Respondent appeared *in pro per* for the hearing on misconduct held on April 28, 2015, and did not move to set aside the default. The hearing panel made a finding of misconduct based upon respondent's default and adjourned the sanction portion of the proceedings. Although the panel gave respondent an opportunity after the hearing to file a motion to set aside the default, he did not do so.

The parties next appeared before the panel on June 23, 2015, for the hearing on sanction. Copies of respondent's two prior disciplinary orders that resulted in a 30 day suspension (by consent) effective May 31, 1996, and a reprimand (by consent) effective September 14, 2007, were offered and admitted.[2] The Grievance Administrator's counsel argued for disbarment, citing various authorities including American Bar Association Standards for Imposing Lawyer Sanctions (ABA Standards) 4.11, and 5.11(b)[3], and prior precedent of this Board for the proposition that the

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[1] Respondent's cousin filed a petition to modify the conservatorship in February 2012 and presented a will signed by respondent's father that named respondent's cousin as the sole beneficiary of his estate. After respondent's father died, respondent's cousin was appointed the personal representative of respondent's father's estate. As the personal representative, he took action in March 2013 to surcharge Western Surety and respondent for the $62,500 in remaining conservatorship funds. Western Surety subsequently filed a petition to allow resolution of the petition to surcharge and cancelling bond upon satisfaction of the surcharge. (Tr 6/23/15, pp 25, 28; Tr 4/20/16, p 12; Formal Complaint, ¶¶ 9, 11, 13, 15.)

[2] In the first matter, respondent pleaded no contest to failing to answer two requests for investigation. In the second matter, respondent pleaded no contest to failing to respond to a lawful demand for information from a disciplinary authority and failing to timely answer a request for investigation.

[3] ABA Standard 4.11, states:

> Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client.

ABA Standard 5.11(b), states:

> Disbarment is generally appropriate when a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

intentional conversion of client or third party funds generally warrants disbarment, absent compelling mitigation. She also argued for the applicability of a number of aggravating factors under the ABA Standards, including Standard 9.22(a) prior disciplinary offenses; Standard 9.22(b) dishonest or selfish motive; Standard 9.22(h) vulnerability of the victim; Standard 9.22(i) substantial experience in the practice of law; and Standard 9.22(j) indifference to making restitution.

Respondent was sworn and questioned by the hearing panel about any applicable mitigating factors, specifically, whether there was an absence of a dishonest or selfish motive (ABA Standard 9.22(b)) with regard to the $62,500 in conservatorship funds. In fact, respondent was asked a number of times by the panel point blank whether the $62,500 in question was spent caring for his ailing father. Respondent admitted that he commingled some of his own funds with the conservatorship funds, but maintained that he was unable to provide a specific answer to the panel's question. Respondent explained that he could not answer because he no longer had access to the relevant bank account records, having been "closed out of the account" once his father passed away, to be able to determine what portion of personal or conservatorship funds were used to pay for his father's care. (Tr 6/23/15, pp. 24-27, 32.) However, respondent maintained throughout the hearing that he had no dishonest or selfish intent with regard to the funds. He testified that he was his father's sole care giver, and provided him 24 hour in home health care for approximately one year before his death. By the time the petition to modify the conservatorship was filed in February 2012, respondent testified that he was suffering from his own disabling health problems, having just been diagnosed with end stage renal disease, and had decided not to "fight" his cousin's claims made to the probate court. (Tr 6/23/15, pp 5, 26-27, 32; Tr 4/20/16, p 6.) Respondent also had not anticipated that there were any other heirs to his father's estate given that he was an only child, his parents had divorced long ago, his father never remarried, and his father's parents and only brother predeceased him. (Tr 6/23/15, pp 23-24; Tr 4/20/16, pp 6-7, 10, 16.) Finally, respondent testified that he had been in contact with the bond company's (Western Surety) attorney and that as of the date of the sanction hearing, it had not filed suit against him to collect the funds Western Surety paid for the surcharge. (Tr 6/23/15, pp 29-30.)

At the conclusion of the June 23, 2015 hearing, the panel gave respondent an opportunity, within three weeks of the hearing date, to submit a sanction brief to specifically address any mitigating factors he wished the panel to consider. Respondent did not do so and an order officially

closing the record was entered on August 19, 2015.

On November 30, 2015, the hearing panel's report and an order of suspension and restitution were issued, suspending respondent's license to practice law for 180 days, and ordering him to pay $62,500 in restitution to Western Surety on or before December 22, 2015.

B. Proceedings Before the Attorney Discipline Board

The Grievance Administrator petitioned the Attorney Discipline Board for review of the hearing panel's order on the grounds that the hearing panel imposed insufficient discipline because disbarment is the presumptive level of discipline for the misconduct found. In accordance with MCR 9.118(B), the Board issued an order to show cause why the hearing panel order should not be affirmed. The Grievance Administrator filed a brief in support of his petition for review. Respondent did not file a responsive brief, but did appear before the Board for the review hearing.

Discussion

The sole issue on review is the appropriate level of discipline for the misconduct found by the hearing panel. The Board has a greater degree of discretion when reviewing a hearing panel's sanction determination, *Grievance Administrator v August*, 438 Mich 296, 475 NW2d 256 (1991), in accordance with its responsibility to ensure a level of uniformity and continuity. *Grievance Administrator v Brent S. Hunt,* 12-10-GA (ADB 2012), citing *Matter of Daggs,* 411 Mich 304; 307 NW2d 66 (1981).

The Administrator argued below and on review that, in addition to the ABA Standards earlier referenced, a growing line of prior decisions of this Board regarding the intentional conversion and/or misappropriation of client or third party funds, warrants respondent's disbarment. The cases cited by the Administrator include, *Grievance Administrator v Frederick Petz,* 99-102-GA; 99-130-FA (ADB 2001) (30-month suspension increased to disbarment where lawyer "invested" his client's funds in his own partnership and paid his aunt's nursing home bills, etc.; disbarment declared to be the presumptively appropriate sanction to be imposed for intentional conversion of client funds absent compelling mitigation); *Grievance Administrator v Rodney Watts,* 05-151-GA (ADB 2007) (increasing one-year suspension to disbarment where lawyer lied to court to obtain release of funds

to be shared with predecessor counsel and misappropriated the funds, concluding that disbarment is the presumptive sanction for misappropriation of third-party funds notwithstanding the technical inapplicability of ABA Standard 4.1); *Grievance Administrator v Carl Oosterhouse,* 07-93-GA (ADB 2008) (affirming disbarment of lawyer who converted client and firm funds and submitted false expense reports, etc., and lied when confronted); *Grievance Administrator v Brent Hunt,* 12-10-GA (ADB 2012) (increasing reprimand with conditions to disbarment where lawyer admitted that for six years he commingled and misappropriated $7,423.00, to pay general law office expenses, which he was holding pending distribution to the conservator of the estate of a legally impaired person); *Grievance Administrator v Mark Tyslenko,* 12-17-GA (ADB 2013) (45-day suspension with conditions increased to disbarment where lawyer, in five separate incidents over one year, converted a total of $9,200 in fees paid to him by clients owed to the law firm that employed him); and *Grievance Administrator v Peter C. Mason, Jr.,* 13-4-GA (ADB 2013) (Two-year suspension with condition increased to disbarment where attorney intentionally misappropriated funds while acting as conservator of the estate of a minor and the estate of a protected person).

It has long been held that in disciplinary proceedings in Michigan, a default relieves the Grievance Administrator of an obligation to establish the factual allegations in the complaint. *Grievance Administrator v Michael G. Sewell*, 58-88; 113-88 (ADB 1989). Thus by default, it was established that respondent neglected his duty to file inventories and/or a final accounting, failed to respond to the probate court's notices of deficiencies and suspension, failed to turn over remaining conservatorship funds of $62,500 to his father's estate after he passed away, and failed to indemnify Western Surety after it paid the surcharge imposed by the probate court. Notably, the factual allegations of the formal complaint made no mention of misappropriation or conversion of the funds.

It has also long been held that a default establishes only the well-pleaded allegations in the complaint. By defaulting, a respondent does not admit facts extrinsic or unnecessary to the allegations of misconduct nor does the defaulted respondent admit an averment which is a conclusion of law. *Sewell*, supra. In some instances, additional evidence may be required to prove a legal conclusion if it is not readily apparent from the facts deemed admitted, something the hearing panel appears to have taken note of during the sanction hearing:

> MR. McCANN: Counsel, before you stop, since this was a case of a default we don't have the exact particulars of what happened other than your Formal Complaint. Could you just go into a little bit of

> detail and tell us exactly what happened...to the $62,500, if you know anything beyond the Formal Complaint.
> * * *
> MR. McCANN: The reason I'm asking – to know what happened to the $62,500 is important, it's an important mitigating or aggravating factor. I mean, I assume that you're saying the $62,500 has been misappropriated by [respondent] and that someone is being owed $62,500.
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> MS. DOWNEY: I can tell you based on the court records that he was surcharged, the surety company paid $62,500 and he owes that to them, so that's based on the court records. (Tr 6/23/15, pp 15-16.)

The record reveals that no bank records were offered into evidence by either party at either hearing.[4] Such records would likely have revealed, with some certainty, exactly what happened to the remaining $62,500 of conservatorship funds after respondent's father passed away. As it stands, the record is devoid of any evidence to support the Grievance Administrator's conclusion that "respondent's mental state was knowing and intentional," (Grievance Administrator's Brief, p 4), such that it could be said that respondent "intentionally misappropriated" or "knowingly converted" estate funds, to the extent that the presumptive level of discipline set forth in the *Petz* case, and the others cited by the Administrator would necessarily apply.[5]

We do not disagree with the Administrator that the panel's report contained somewhat contradictory language. The report on discipline specifically found that "[R]espondent's unauthorized and deliberate removal of funds entrusted to his care as conservator of the estate constituted knowing conversion of estate funds," and quoted the definition of "knowing conversion" as referenced in *Grievance Administrator v Paul S. Schaefer,* 01-140-GA (ADB 2004). (Report 11/30/15, p 3.)[6] Additionally, the report indicated that the panel accepted the Administrator's

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[4] As earlier noted, respondent maintained throughout the proceedings that he had no bank records to provide because he no longer had access to the account in question. (Tr 6/23/15, pp 25-26, 32.)

[5] Although Standard 4.11 should be applied when courts find a "knowing" conversion, some courts use the mens rea of "intentional" to support a disbarment sanction. Others use the terms "intentional" and "knowing" interchangeably. Regardless of the terminology used, the focus is on deliberate conduct. Annotated Standards for Imposing Lawyer Sanctions, Standard 4.11, Annotation, p 132 (2015).

[6] "Knowing conversion requires proof of three elements: (1) the taking of property entrusted to the lawyer, (2) knowledge that the property belongs to another, and (3) knowledge that the taking is not authorized." *Schaefer*, supra pp 11-12.

counsel's assessment of the applicable aggravating factors, including 9.22(b) dishonest or selfish motive, despite respondent's continued protestations throughout the proceedings that he was not trying to defraud his father or the bond company or that he acted with any dishonest or selfish intent, (Tr 6/23/15, p 27), and remoteness of respondent's prior offenses, 9.32(m), as the only applicable mitigating factor.[7] Finally, the panel determined that ABA Standard 4.12 (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) was more appropriate because this case "involves misconduct not amounting to misappropriation or conversion."[8]

The theoretical framework and the recommendations suggested by the ABA Standards all contemplate the mental state (intent, knowledge, and negligence) that forms the basis of the misconduct committed and the more culpable mental states generally receive more severe sanctions. While the panel's report uses such terms as "unauthorized," "deliberate," and "knowing conversion," we note that the panel made a point of specifically indicating that "since respondent was in default, no consideration of his mental state was made."[9] Just as we stated in our opinion in *Schaefer* that not every failure to timely return an unearned fee amounts to knowing conversion or misappropriation,[10] not every failure to promptly pay or deliver funds that a client or third person is entitled to receive, as set forth in MRPC 1.15(b)(3), amounts to knowing conversion or intentional misappropriation.

Conclusion

For the reasons discussed above, we conclude that a suspension is the appropriate sanction to impose in this matter. Accordingly, we will enter an order affirming the hearing panel's order of a 180-day suspension and restitution of $62,500 payable to Western Surety.

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[7] Report 11/30/15, pp 4-5.

[8] Report 11/30/15, p 5.

[9] Report 11/30/15, p 4.

[10] *Schaefer*, supra at p 12. It was unnecessary to decide whether the *Schaefer* case fell under ABA Standard 4.11 or 4.12, because the totality of respondent Schaefer's misconduct called for disbarment.

Board members Louann Van Der Wiele, Dulce M. Fuller, Rosalind E. Griffin, M.D., Rev. Michael Murray, James A. Fink, Jonathan E. Lauderbach, and Barbara Williams Forney concur in this decision.

Board members Lawrence G. Campbell and John W. Inhulsen were absent and did not participate.