In re Mark Vincent Kelly
Attorney-Respondent

Commission No. 2020PR00029

Synopsis of Hearing Board Report and Recommendation
(June 2021)

Respondent made six transfers, totaling $2,230, from an account in which he held escrow funds, into the account from which Respondent paid his own expenses. The transferred funds did not belong to Respondent, and the escrow account became overdrawn. The Hearing Board found that Respondent failed to safeguard funds belonging to others and engaged in dishonest conduct. The Hearing Board recommended that Respondent be suspended for three months.

BEFORE THE HEARING BOARD
OF THE
ILLINOIS ATTORNEY REGISTRATION
AND
DISCIPLINARY COMMISSION

FILED
June 17, 2021
ARDC CLERK

In the Matter of:

MARK VINCENT KELLY,

Attorney-Respondent,

No. 6196349.

Commission No. 2020PR00029

REPORT AND RECOMMENDATION OF THE HEARING BOARD

SUMMARY OF THE REPORT

Respondent made six transfers, totaling $2,230, from an account in which he held escrow funds into the account from which Respondent paid his own expenses. The transferred funds did not belong to Respondent, and the escrow account became overdrawn. The Hearing Board found that Respondent failed to safeguard funds belonging to others and engaged in dishonest conduct. The Hearing Board recommended that Respondent be suspended for three months.

INTRODUCTION

The hearing in this matter was held on March 2, 2021, before a Panel of the Hearing Board consisting of John L Gilbert, Chair, Jolene Danielle Carr and Peggy Lewis LeCompte. Marcia T. Wolf represented the Administrator. Respondent appeared at the hearing and was represented by Samuel J. Manella.

PLEADINGS AND ALLEGED MISCONDUCT

The Administrator filed a one-count Complaint, alleging that Respondent failed to hold third party property separate from his own and engaged in dishonest conduct, in violation of Rules 1.15(a) and 8.4(c) of the Illinois Rules of Professional Conduct (2010). The charges are based on

allegations that Respondent improperly transferred funds from an escrow account into his own account and knowingly used those funds for his own purposes.

EVIDENCE

The Administrator presented testimony from three witnesses and Respondent as an adverse witness. Administrator's Exhibits 1 through 10 were admitted into evidence. Respondent testified on his own behalf and presented character testimony from three witnesses. Respondent's Exhibits 1 through 4 were admitted into evidence.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In an attorney disciplinary proceeding, the Administrator has the burden of proving the misconduct charged by clear and convincing evidence. In re Thomas, 2012 IL 113035, ¶ 56. Clear and convincing evidence requires a high level of certainty, which is greater than a preponderance of the evidence, but less stringent than proof beyond a reasonable doubt. In re Santilli, 2012PR00029, M.R. 26572 (May 16, 2014). The Hearing Board determines whether the Administrator has met that burden. In re Edmonds, 2014 IL 117696, ¶ 35.

Respondent is charged with using escrow funds for his own purposes, knowingly and without authority, in violation of Rules 1.15(a) and 8.4(c).

A. Summary

Respondent transferred funds out of an escrow account, which contained funds Respondent was to hold for later distribution to others, into the account from which he paid his own expenses. Respondent intentionally made six such transfers, totaling $2,230, even though Respondent was not entitled to use those funds. Respondent thereby violated Rules 1.15(a) and 8.4(c).

B. Admitted Facts and Evidence Considered

During 2017, Respondent was an attorney agent for Attorneys' Title Guaranty Fund, Inc. (ATG). In that capacity, Respondent received, held and distributed funds for real estate

transactions through an escrow account Respondent maintained. Most of the funds in that account belonged to the parties to the real estate transactions or third parties. The account also contained funds Respondent had used to open the account and provide a reserve to cover bank charges against the account. Respondent's personal funds initially deposited equaled $600. Fees for Respondent's services on ATG transactions were paid out of that account, typically by a check issued when the transaction closed. (Ans. at pars. 1, 2, 3, 4; Tr. 13-14, 34-35, 102-103, 119-20, 166-67).

Between March 29, 2017 and June 7, 2017, Respondent made six transfers, totaling $2,230, out of the escrow account and into his operating account, from which Respondent paid his expenses. During that time, the escrow account contained funds Respondent was holding as an ATG attorney agent. The first five transfers were in amounts ranging from $20 to $300. By April 24, 2017, a total of $620 had been transferred. The final transfer, on June 7, 2017, was for $1,575. (Ans. at pars. 6, 8; Tr. 105, 118).

On June 7, 2017, the balance in Respondent's escrow account was $-257.45. On June 9, 2017, the account balance was $-481.90. Respondent's bank honored two checks presented on the escrow account even though the account did not contain sufficient funds to cover those checks. After the bank notified him of the overdrafts, Respondent transferred $452 on June 12, 2017 and $30 on June 13, 2017 from his operating account into the escrow account to cover the shortfall. Respondent's escrow account was not an IOLTA account, and the bank did not notify the ARDC of the overdrafts. (Ans. at pars. 11, 12; Tr. 100-101, 108-110).

Respondent accepted responsibility for failing to follow Rule 1.15. He denied acting dishonestly or intentionally taking money that belonged to someone else. (Tr. 190).

Respondent testified that, when he made the transfers, he thought he was entitled to the funds. He acknowledged that it turned out otherwise. Respondent stated that he knew over $500 remained in the escrow account from the funds he deposited when he opened the account. At the

time, the exact amount was $582. Respondent believed he could take a small amount from the escrow account, effectively using his own funds, to ensure that his operating account contained sufficient funds to cover upcoming expenses. Respondent had other sources of funds, but considered that to be the easiest thing to do. Before making the transfers, Respondent did not confirm whether he was entitled to the funds taken as a result of his work on any specific file or from the amount that remained from Respondent's initial deposit. While Respondent thought he was entitled to the final transfer from a specific ATG transaction, he did not connect any of the prior transfers to any particular file. Respondent identified poor bookkeeping as a factor. He testified that the June 2017 overdrafts occurred after he inadvertently failed to record a check he had written on the escrow account. (Tr. 105-107, 110, 118-21, 166-67, 169-72, 175-76).

ATG conducts routine, periodic audits of its attorney agents. During an audit in 2015, the auditor recommended that Respondent use an IOLTA account instead of the escrow account for funds from his real estate transactions. Respondent did not make the change at that time, even though he acknowledged that he should have done so and the escrow account should have been an IOLTA account. (Tr. 36, 86, 103-104, 166).

ATG scheduled an audit with Respondent for December 6, 2017. When the auditor, Hiren Panchal, arrived, Respondent had not completed all of his account reconciliations and did not have all of the necessary records at his office. Therefore, Panchal could not complete the audit. Based on Respondent's testimony, when he tried to complete the bank reconciliations after Panchal left, Respondent discovered the shortages in the escrow account. The next day, Respondent spoke with Panchal and told Panchal the account could not be reconciled. Respondent testified that he was trying to give Panchal the information he needed and own up to the mistake he recognized he had made. (Tr. 33, 81-83, 111-17, 166, 178-83).

On December 7, 2017, Respondent transferred $1,808 from his operating account into his escrow account. Respondent did so because he believed he owed that money to the escrow account, in addition to the amount he had transferred in June 2017 (Tr. 117; Adm. Ex. 2 at 6).

During a follow-up meeting with ATG employees Ryan Murphy and Vimal Patel, Respondent stated that he transferred funds to pay bills because he was struggling financially. Respondent told Murphy and Patel that he stopped doing so once the escrow account became overdrawn because he felt he was not handling the matter correctly. Murphy noted that Respondent was behind in record keeping in general and thought poor bookkeeping contributed to the problems with the escrow account. (Tr. 47-48, 52, 55-60, 63-64, 71-73).

C. Analysis and Conclusions

1. Rule 1.15(a)

A lawyer who holds property of clients or third persons in connection with a representation must keep that property separate from the lawyer's own property. Ill. Rs. Prof'l Conduct R. 1.15(a). Funds must be deposited in one or more separate and identifiable interest or dividend bearing client trust accounts. Rule 1.15(a). Funds that are nominal in amount or will likely be held for a short period of time are to be deposited in an IOLTA account. Rule 1.15(f). A Rule 1.15(a) violation occurs when, due to the lawyer's use of funds that lawyer should be holding in his or her client trust account, the account balance falls below the amount due to the client or third persons. In re Storment, 2018PR00032, M.R. 30336 (May 18, 2020).

Here, at a time when he should have been holding funds for ATG transactions, Respondent transferred funds from his real estate escrow account to his operating account, which caused an overdraft on the escrow account. As Respondent acknowledged, he thereby violated Rule 1.15(a). See In re Adesina, 2017PR00097, M.R. 29549 (Nov. 15, 2018).

2. Rule 8.4(c)

It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. Ill. Rs. Prof'l Conduct R. 8.4(c). Dishonesty encompasses anything calculated to deceive. Edmonds, 2014 IL 117696 at ¶ 53. Whether dishonesty is present is an issue of fact, to be determined based on all the circumstances. See In re Gallo, 2017PR00101, M.R. 30139 (Mar. 13, 2020).

Dishonesty is not established simply because the balance in an attorney's trust account falls below the amount the attorney should be holding for a client or third person. In re Bleiman, 2016PR00132, M.R. 29458 (Sept. 20, 2018). While some cases involving misappropriation of funds involve dishonest conduct, others do not. See In re Mulroe, 2011 IL 111378, ¶ 23. In general, the Hearing Board looks to whether the attorney knowingly used funds that did not belong to him or her or whether the failure to maintain the proper balance resulted from unintentional errors such as sloppy bookkeeping. See In re Knowles (Scott), 2015PR00073, M.R. 28744 (Sept. 22, 2017). Attorneys who take funds that they know do not belong to them engage in dishonest conduct. See In re Miller, 2014PR00134, M.R. 28618 (May 18, 2017). This is true even where sloppy bookkeeping may have contributed to the misconduct. In re Tyler, 98 CH 74, M.R. 16873 (Sept. 22, 2000).

Based on his own testimony, Respondent moved funds from the escrow account to his operating account to ensure that the operating account had sufficient funds to cover his expenses. He did so intentionally on six separate occasions. While Respondent stated he thought there was enough of his own money in the escrow account to cover the transfers, Respondent made transfers totaling $2,230, the first four of which alone exceeded the $600 Respondent deposited when he opened the account. Before making the transfers, Respondent did nothing to verify how much of his deposit remained. Respondent also could not have reasonably believed that he was entitled to

any of the funds transferred as fees, as his fees were paid by check when the transaction closed. In five of the six instances, Respondent also did not connect the transfer to any specific ATG file. Respondent stopped transferring funds only after the escrow account became overdrawn and there was a potential risk of detection. Even after that occurred, Respondent did not investigate to determine how much he may have taken incorrectly, but replenished only the amount needed to cover the overdraft. It was only months later, when ATG was auditing his files, that Respondent reviewed his records and fully repaid the amount he had improperly transferred. These circumstances as a whole, combined with Respondent's statements that he was struggling financially and took money to cover expenses, led us to conclude that Respondent knew, when he made the transfers, that the money he was using did not belong to him.

We also considered the fact that Respondent continued to use the real estate escrow account for his ATG transactions after he was informed, in 2015, that he was not using the proper type of account. A properly established client trust account would have required Respondent's bank to notify the ARDC when a check was presented for payment and the account lacked sufficient funds to cover the check. Ill. Rs. Prof'l Conduct R. 1.15(h). Respondent's decision not to change the form of his escrow account avoided such oversight.

We accepted Respondent's testimony that he found the business aspects of private practice challenging and that he sometimes failed to keep up with bookkeeping tasks. We also believe that poor bookkeeping may have contributed to the situation here. However, based on Respondent's admissions and behavior, we concluded that this case involved more than simply inadvertent errors. Rather, when he made the transfers at issue, Respondent knew the money was not his. The Administrator proved that Respondent violated Rule 8.4(c).

EVIDENCE IN AGGRAVATION AND MITIGATION

Respondent has been practicing law since 1989. From 1989 until 2008, Respondent worked for a legal aid organization. In 2008, Respondent took over a practice from an attorney in Alpha, Illinois, who was planning to retire. Since then, Respondent has remained in Alpha, as a sole practitioner, doing real estate, family law and probate work. (Tr. 99-100, 162-63).

Respondent handles his own office accounting. In October 2020, Respondent completed the ARDC webinar on client trust accounts and changed the way he manages his accounts. He now follows the procedures recommended in that webinar. (Tr. 100, 187-90; Resp. Ex. 4).

Respondent began doing title work as an attorney agent with ATG in 2010. Given the transfers at issue here, ATG terminated Respondent's services. Respondent no longer does any title work. (Tr. 92, 102, 163-69, 185-87).

Respondent replenished all the funds he had improperly transferred. Ultimately, no one lost money due to Respondent's errors. (Tr. 97, 185).

Three individuals, who have known Respondent for many years, provided favorable character testimony. Based on their testimony, Respondent is an honest, trustworthy and caring person, who enjoys a good reputation in the local community. (Tr. 130-36, 138-43, 150-54).

Respondent performs regular volunteer work and has done so over time, serving nursing home residents, victims of domestic violence, his church and a high school parents' group. Respondent also regularly advises individuals on landlord tenant issues on a pro bono basis. (Tr. 140-42, 151-53, 191-96).

Prior discipline

Respondent has no prior discipline.

RECOMMENDATION

A. Summary

The panel recommends that Respondent be suspended for three months.

B. Analysis and Conclusions

In determining the sanction to recommend, we consider the proven misconduct, as well as any aggravating and mitigating factors. In re Gorecki, 208 Ill. 2d 350, 360-61, 802 N.E.2d 1194 (2003). We also consider the purpose of discipline, which is not to punish the attorney, but to protect the public, maintain the integrity of the profession and protect the administration of justice from reproach. In re Edmonds, 2014 IL 117696, ¶ 90. While the system seeks some consistency in sanctions for similar misconduct, each case is unique and the sanction must be based on the circumstances of the specific case at issue. Edmonds, 2014 IL 117696 at ¶ 90.

Discipline in cases involving conversion of funds ranges significantly, from censure to disbarment. In re Adesina, 2017PR00097, M.R. 29549 (Nov. 15, 2018). Generally, censure is imposed for an unintentional misuse of funds with no dishonest motive, (e.g. In re Clayter, 78 Ill. 2d 276, 399 N.E.2d 1318 (1980); In re Mayster, 99 CH 59, M.R. 18008 (May 24, 2002)), while attorneys who knowingly misappropriate client funds, particularly to their own use, usually are suspended. E.g. In re Knowles, 2015PR00073, M.R. 28744 (Sept. 22, 2017).

We found that Respondent took funds he knew did not belong to him and used those funds for his own purposes. This misconduct is aggravated by the fact that Respondent acted on multiple occasions over time, making several transfers over the course of three months. See generally In re Wildermuth, 2015PR00080, M.R. 29456 (Sept. 20, 2018). Consequently, this case warrants suspension rather than censure. See Knowles, 2015PR00073 (Hearing Bd. at 24-25).

That said, the purpose of discipline is not punishment, (Edmonds, 2014 IL 117696 at ¶ 90), and this case presents significant mitigating factors. The total amount taken, while not

insignificant, was not unduly large. Even though Respondent knew he was using funds that did not belong to him, poor bookkeeping practices contributed to Respondent's misconduct. Respondent fully replenished the escrow account. Respondent has practiced law for over thirty years with no prior discipline. For many years, Respondent has performed *pro bono* legal work and provided other volunteer service to the community. The character witnesses, who have known Respondent over time, described him as honest and caring. Respondent expressed regret and has taken steps to correct the conditions that led to his misconduct, including educating himself as to the proper procedures for holding funds that belong to others. These factors are appropriately considered in mitigation. See Edmonds, 2014 IL 117696 at ¶ 95. We also concluded, based on our assessment of Respondent, that he is not likely to repeat this type of misconduct.

Given these circumstances, the six-month suspension requested by the Administrator would be unduly harsh. Some of the cases in which six-month suspensions were imposed entailed greater aggravating factors and less mitigation. E.g. In re Kowalski, 2015PR00032, M.R. 28804 (Sept. 22, 2017) (attorney evaded service of the complaint, failed to express remorse or accept any responsibility); In re Bittner, 2010PR00121, M.R. 24869 (Nov. 22, 2011) (false statements to clients, lengthy delay in repayment, funds were taken from clients with serious financial difficulties). Other cases on which the Administrator relies are more like this one, but still entail some differences. E.g. In re Bazianos, 2015PR00127, M.R. 29012 (Jan. 12, 2018) (greater amount taken, attorney withdrew large sums immediately after each improper transfer).

We considered cases in which the sanction was a thirty-day suspension, but concluded that this case warrants a somewhat longer suspension. E.g. Knowles, 2015PR00073 (Hearing Bd. at 22-23). Unlike Knowles, who lacked experience and the guidance of a mentor, (id.), at the time of his misconduct, Respondent had been practicing law for many years. He also opted to continue

using the escrow account, even though he had ample notice that he should have been using an IOLTA account instead.

Three-month suspensions have been imposed in cases involving misappropriation of funds in amounts comparable to that here. E.g. In re Merriwether, 138 Ill. 2d 191, 561 N.E.2d 662 (1990) ($2,250 owed to a lienholder on behalf of a client); In re Blanchard, 2015PR00025, M.R. 27795 (Jan. 21, 2016) ($3,500 in escrow funds for a real estate transaction). Despite some distinguishing factors, these cases demonstrate that a three-month suspension is within an appropriate range for Respondent's misconduct. It is not always possible to reconcile every case. See In re Gaubas, 95 SH 520, M.R. 13056 (Jan. 30, 1997). Rather, we strive to recommend a sanction that is within the appropriate range, which considers the strength of the relative mitigating and aggravating circumstances in the case before us.

For these reasons, we recommend that Respondent, Mark Vincent Kelly, be suspended for three months.

Respectfully submitted,

John L. Gilbert
Jolene Danielle Carr
Peggy Lewis LeCompte

CERTIFICATION

I, Michelle M. Thome, Clerk of the Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois and keeper of the records, hereby certifies that the foregoing is a true copy of the Report and Recommendation of the Hearing Board, approved by each Panel member, entered in the above entitled cause of record filed in my office on June 17, 2021.

/s/ Michelle M. Thome
Michelle M. Thome, Clerk of the
Attorney Registration and Disciplinary
Commission of the Supreme Court of Illinois

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