In re LaCoulton Walls
Attorney-Respondent

Commission No. 2019PR00079

Synopsis of Hearing Board Report and Recommendation
(July 2021)

While representing the sellers in two real estate transactions, Respondent accepted the responsibility for holding the $2,000 earnest money in escrow. Respondent received checks for the earnest money and deposited them into his IOLTA account. The transactions failed to close. The buyer requested return of the earnest money. The sellers and Respondent believed the buyer had breached the contracts. Consistent with instructions from his client, but without obtaining the buyer's consent or following the procedures specified in the contracts, Respondent released the earnest money to the sellers and kept $200 as his fees. Subsequently, Respondent's IOLTA account became overdrawn. During the ARDC's investigation into Respondent's conduct, Respondent denied having deposited the earnest money checks.

The Hearing Board found that Respondent engaged in an improper conflict of interest and disbursed the escrow funds without proper authority, but did not act dishonestly in doing so. The Hearing Board also found that the Administrator did not prove that, when he made his statements to the ARDC, Respondent knew those statements were false. The Hearing Board recommended that Respondent be suspended for three months.

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

In the Matter of: **LACOULTON WALLS**, Attorney-Respondent, No. 6197052.	Commission No. 2019PR00079

REPORT AND RECOMMENDATION OF THE HEARING BOARD

SUMMARY OF THE REPORT

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The Hearing Board found that Respondent engaged in an improper conflict of interest and disbursed the escrow funds without proper authority, but did not act dishonestly in doing so. The Hearing Board also found that the Administrator did not prove that, when he made his statements to the ARDC, Respondent knew his statements were false. The Hearing Board recommended that Respondent be suspended for three months.

INTRODUCTION

The hearing in this matter was held on May 12, 2021, before a Panel of the Hearing Board consisting of Kenn Brotman, Chair, Alexander L. Groden and Daniel G. Samo, M.D. Michael P. Rusch and Scott Renfroe represented the Administrator. Respondent appeared at the hearing and represented himself.

PLEADINGS AND ALLEGED MISCONDUCT

The Administrator filed a two-count Complaint, alleging that Respondent failed to properly maintain funds belonging to others, represented a client despite a conflict of interest, knowingly made false statements concerning a disciplinary matter, and engaged in dishonest conduct in violation of Rules 1.15(a), 1.7(a), 8.1(a) and 8.4(c) of the Illinois Rules of Professional Conduct (2010). The charges are based on allegations that Respondent distributed escrow funds to his client and himself even though he knew of a dispute as to ownership of the funds, acted as escrowee in a transaction in which he represented the seller and made false statements to the ARDC concerning the escrow funds.

EVIDENCE

The Administrator presented testimony from three witnesses. Administrator's Exhibits 1, 2, 4, 5, 7 through 14 and 18 were admitted into evidence. Respondent presented testimony from one witness.[1]

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.

I. In Count I, Respondent is charged with improperly distributing escrow funds to his client and himself, acting as escrowee in a transaction in which he represented a party and engaging in dishonest conduct, in violation of Rules 1.15(a), 1.7(a) and 8.4(c).

A. Summary

Respondent engaged in an improper conflict of interest by acting as escrowee for the earnest money for transactions in which he represented the seller. Respondent distributed the funds without proper authority, by disbursing the earnest money based on instructions from only his client, without receiving the buyer's consent or following the procedures specified in the contracts. The Administrator did not prove Respondent acted dishonestly, as Respondent acted pursuant to his clients' instructions and based on a reasonable belief that the buyer had breached the contracts.

B. Admitted Facts and Evidence Considered

Robert Stacker owns and operates R.A.S. Realty and Investments, LLC (R.A.S.). R.A.S. agreed to purchase property at 7915 South Peoria and at 6539 South University in Chicago. Each sale was set to close on March 30, 2018. Attorney Tanya Woods represented the buyer. (Tr. 54-56, 97; Adm. Exs. 1, 4). Respondent represented the sellers, Jose Handyman Services and Dream Team Investments, Ltd. (Ans. at par. 1). Kipchoge Foster is part owner of each entity and was Respondent's primary contact for the sellers in these transactions. (Tr. 50-51, 231, 267).

Each contract provided for an earnest money deposit of $1,000, to be held in escrow for the mutual benefit of the parties. (Adm. Exs. 1, 4). The parties agreed that Respondent would hold the earnest money. (Ans. at par. 3). Respondent received two $1,000 cashier's checks, issued on February 28, 2018 payable to Respondent. The Peoria property address appeared on one check, and the University property address appeared on the other. (Ans. at par. 5; Adm. Exs. 2, 5).

The contracts contained directions for the escrowee in the event the sale did not close. Under these provisions, if either party terminated the contract, the escrowee was to refund the earnest money upon the parties' joint written direction or a court order. Absent such direction or a court order, the contract provided that the escrowee "may elect to proceed" in one of two specified ways. (Adm. Ex. 1 at 7; Adm. Ex. 4 at 7). The first option required the escrowee to give advance written notice to the parties before disbursing the escrow funds, indicating how the escrowee intended to distribute those funds. If neither party objected, the escrowee could then disburse the funds in that manner. The second option permitted the escrowee to file an interpleader action and deposit the escrow funds with the court, until the court resolved the dispute. (Adm. Ex. 1 at 7; Adm. Ex. 4 at 7).

Neither transaction closed on March 30, 2018. Neither contract had been extended. By the second week of April, Foster and Respondent had spoken a couple of times. From Foster's perspective, the buyer had breached the contracts and the earnest money belonged, in full, to the sellers. Foster told Respondent to take $200 as his legal fees and release the balance to the sellers. (Tr. 238, 243-45, 252-54, 262-63).

On April 18, 2018, Woods emailed a letter to Respondent, asking him to return the earnest money. Respondent received the letter and, as of that date, knew the buyer was requesting return of the $2,000. (Ans. at pars. 6, 7).[2]

According to Woods's letter, the contracts were null and void because the sellers had not provided certain disclosures, the buyer was not able to secure financing and an inspection revealed defects in the properties. (Adm. Ex. 8). From Respondent's perspective, these assertions were not valid, and the buyer was in default. (Ans. at pars. 6, 7; Tr. 256-60). Language in the contracts suggested that the transactions were not contingent on the buyer obtaining financing. The contracts indicated that the disclosures had not been provided, and the parties had differences of

understanding as to what disclosures were required. Stacker also had not followed the procedures specified in the contracts for addressing any defects revealed on inspection. (Tr. 56-58, 67-70, 75-83, 92-97, 101-102, 204-205, 232, 240, 256-57; Adm. Ex. 1 at 2-4; Adm. Ex. 4 at 2-4).

Respondent did not respond to Woods's letter. He did not inform Woods or Stacker that the sellers disputed the reasons Woods outlined for seeking to cancel the contracts. (Ans. at par. 6; Tr. 62, 102, 183-84, 188, 211-12).

On April 23, 2018, Respondent deposited the two earnest money checks into his IOLTA account. The next day, from those funds, Respondent transferred $1,800 into an account that belonged to Serena Ocenas, another part owner and agent of the sellers. This was consistent with Foster's instructions. (Ans. at pars. 8, 9; Tr. 50-51, 244, 250).

Neither Stacker nor Woods authorized Respondent to distribute the earnest money to the sellers or use any of those funds himself. As of April 24, 2018, Respondent had not requested or received a joint written direction from the parties. He had not sought or received any court order authorizing disbursement of the escrow funds. Nor had Respondent sent prior written notice to the parties of his intended disbursement of the funds, which would have allowed either party to object. From Respondent's perspective, he was not required to take any of these steps, and he was not willing to seek a court order resolving the matter because that would have involved filing a lawsuit against his client. (Ans. at pars. 10, 11; Tr. 62, 103, 187-88, 211-12, 308).

In December 2018, the balance in Respondent's IOLTA account dropped below $2,000, but remained above $200. On January 9, 2019, the balance in Respondent's IOLTA account was -$0.49. (Adm. Ex. 7 at 150-152).

C. Analysis and Conclusions

1. Rule 1.15(a)

A lawyer shall hold property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property. Ill. Rs. Prof'l Conduct R. 1.15(a). This applies to funds a lawyer receives to hold in escrow for a real estate transaction in which the lawyer represents one of the parties. In re Rodriguez, 2012PR00169, M.R. 26591 (May 16, 2014). A lawyer's obligations under Rule 1.15(a) include the duty to safeguard the funds, by keeping the funds in the lawyer's trust account until the funds are properly disbursed. In re Storment, 2018PR00032, M.R. 30336 (May 18, 2020). Where the funds are escrow funds, absent consent from both parties, the escrowee may disburse escrow funds only pursuant to the terms of the escrow agreement. See Rodriguez, 2012PR00169 (Hearing Bd. at 13). A Rule 1.15(a) violation occurs when the balance in the account in which the lawyer is holding entrusted funds falls below the amount due to the client or third persons. Storment, 2018PR00032 (Hearing Bd. at 5).

Here, the escrow agreement was contained within the real estate contracts. That agreement included directions for how and when to distribute the earnest money if the sale did not close and each side claimed a right to the funds, as happened here. Those directions permitted the escrowee to proceed in one of two ways. Respondent's position is that the term "may" in the agreement gave the escrowee significant flexibility in deciding what action to take. Respondent asserted that the use of the term "may" in the contract provided him with the discretion to either choose one of the two methods of distribution expressly provided for in the contract, or to elect a third option for distribution not otherwise expressly identified in the escrow agreement. We do not find Respondent's argument persuasive. Review of the contract language indicates that these provisions enabled the escrowee to choose only between two specified alternatives. Contrary to

Respondent's suggestion, the escrow agreement did not give the escrowee an option to proceed in some other manner.

One alternative involved filing an interpleader action, which Respondent did not do. The other alternative required the escrowee to give both parties advance written notice of how the escrowee intended to disburse the funds and permitted disbursement only if, after having sent that notice, the escrowee did not receive any written objection by the intended disbursement date. Respondent did not choose this option either. Instead, he disbursed the funds to the seller (his client), but did not give advance written notice of his intended disbursement, nor did he allow either party to object to that written notice. Respondent thus made the choice to disburse the funds without following the procedures required by the escrow agreement. In short, as escrowee, Respondent was limited to two options under the contract, but chose a third option instead. Indeed, nothing in the contracts permitted Respondent to unilaterally distribute the funds solely on the instruction of Foster, the sellers' agent and his client. Consequently, Respondent distributed the earnest money improperly. In re Lofchie, 90 CH 370, M.R. 9563 (Jan. 25, 1994).

Much of Respondent's presentation at the hearing focused on why, from the sellers' perspective, the buyer breached the contracts. Respondent raised various arguments to support that theory. For example, Respondent argued that the transactions were commercial, not residential and, consequently, did not require the disclosures which Woods objected were not provided. But we need not decide the underlying question of whether buyer breached. In the context of civil litigation, and depending on the contract terms, forfeiture of earnest money can be an appropriate remedy for a buyer's breach of contract. See e.g. YPI 180 N. LaSalle Owner, LLC v. 180 N. LaSalle II, LLC, 403 Ill. App. 3d 1, 933 N.E.2d 860 (1st Dist. 2010). However, the question here is whether Respondent engaged in professional misconduct, not whether the seller was ultimately entitled to the earnest money. See In re Harris, 2013PR00114, M.R. 27935 (May

18, 2016). We find that he did. Respondent, as escrowee, was not entitled to unilaterally determine the parties' respective rights to the escrow funds. Lofchie, 90 CH 370 (Review Bd. at 13). Rather, under the contracts, absent agreement of the parties that determination was for a court of competent jurisdiction.

Respondent made a motion for directed finding, predicated on the theory that the Administrator was required to prove conversion. That motion is denied. While the Complaint referred to conversion, professional discipline may be imposed only for violation of the Rules of Professional Conduct. In re Karavidas, 2013 IL 115767, ¶ 79. Consistent with that principle, the misconduct with which Respondent was charged was a violation of Rule 1.15(a). This is apparent from the face of the Complaint, regardless of any contrary suggestions in the testimony. Further, the elements that Respondent asserts the Administrator failed to prove, wrongful deprivation of property from a person with the right to its immediate possession, are elements of the tort of conversion, not conversion in the disciplinary context. See Karavidas, 2013 IL 115767 at ¶¶ 59-63. In disciplinary cases, conversion occurs whenever the balance in an account in which an attorney is holding entrusted funds falls below the amount the attorney should be holding on behalf of clients or third parties. See In re Holz, 125 Ill. 2d 546, 555, 533 N.E.2d 818 (1988). The Administrator proved those elements.

Respondent disbursed the escrow funds in a manner that was not authorized under the escrow provisions of the contracts. Respondent thereby violated Rule 1.15(a). See Rodriguez, 2012PR00169 (Hearing Bd. at 5).

2. Rule 1.7(a)

A conflict of interest is present where there is a significant risk that the lawyer's responsibilities to a third person will materially limit the representation of a client. Ill. Rs. Prof'l Conduct R. 1.7(a). The existence of such a conflict typically precludes representation. Rule 1.7(a).

Even a potential conflict falls within Rule 1.7(a). See In re Long, 2017PR00083, M.R. 30074 (Jan. 17, 2020).

In each of the two transactions at issue, Respondent represented the seller and acted as escrowee for the earnest money. As seller's attorney, Respondent was obligated to act as an advocate for the seller's interests, (see generally In re Cahnman, 2014PR00102, M.R. 28259 (Nov. 21, 2016)), and claim the earnest money if the buyer breached the contract. Conversely, as escrowee, Respondent was obligated to act impartially, without asserting the rights of one party against the other, even if his client claimed that the other party breached the contract. Lofchie, 90 CH 370 (Review Bd. at 11-12).

This situation presents a clear conflict of interest. In re Reich, 08 CH 100, M.R. 25504 (Nov. 19, 2012). The problems this conflict presents are apparent from Respondent's behavior after the parties raised competing claims to the escrow funds. Respondent made a determination, as the escrowee, as to whether the contract was or was not breached, while simultaneously being obligated to advocate in his client's best interest as the seller's counsel. Based upon this determination, Respondent then disbursed the money without adhering to the terms of the escrow, distributing the funds without prior notice, based on instructions from only one party, in a manner that benefitted his client. His expression of reluctance to seek judicial direction, by filing a lawsuit against his client, further reflects his divided loyalty.

The Administrator proved that Respondent violated Rule 1.7(a).

3. 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). Rule 8.4(c) is broadly construed, to encompass 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 Rodriguez, 2012PR00169 (Hearing Bd. at 13).

Clearly, dishonesty can be found where an attorney has distributed escrow funds without proper authority. See generally In re Menegas, 03 CH 106, M.R. 21124 (Nov. 17, 2006). However, dishonesty is not always present whenever an attorney has misused entrusted funds. See In re Mulroe, 2011 IL 111378, ¶ 23. The burden remains on the Administrator to prove that the attorney engaged in dishonest conduct, by clear and convincing evidence. See In re Bleiman, 2016PR00132, M.R. 29458 (Sept. 20, 2018). It is our responsibility to determine whether the Administrator has met that burden. Bleiman, 2016PR00132 (Hearing Bd. at 11). This involves considering both the attorney's actions and the intent with which those actions were performed. In re Moran, 2014PR00023, M.R. 27812 (Mar. 22, 2016).

By disbursing the escrow funds based solely on the instructions of his client, Respondent exceeded the bounds of his authority as escrowee. See Lofchie, 90 CH 370 (Review Bd. at 11-12). The fact that conduct is not correct, however, does not render it dishonest. Rodriguez, 2012PR00169 (Hearing Bd. at 13).

The fact that Respondent knew, when he transferred the funds, that the buyer had asserted a right to the earnest money is a serious consideration. At a minimum, this should have alerted Respondent to his responsibility, as escrowee, not to distribute the funds without following the terms of the escrow agreement. Despite that fact, we did not find clear and convincing evidence that Respondent acted with dishonest intent, rather than from a failure to understand his duties as escrowee.

Particularly after observing Respondent and his presentation at the hearing, it appeared that Respondent genuinely believed that the buyer had breached the contracts and that, therefore, the sellers were entitled to the earnest money. It also appeared that Respondent genuinely believed

his own actions were legitimate, as authorized by his clients. In distributing the earnest money, and in keeping $200 as his fees, Respondent acted consistently with Foster's instructions. If the earnest money belonged to the sellers, they could legitimately direct how to disburse it.

Respondent's subjective belief is not dispositive. See Thomas, 2012 IL 113035 at ¶ 123. Here, however, the evidence did not demonstrate that his belief was unreasonable. Compare id.

From the sellers' perspective, the buyer lacked any legitimate basis for avoiding the contracts and was not entitled to a refund of the earnest money. As discussed above, the sellers' position was not unreasonable, given the contract terms. Respondent acted, in good faith, against that background. This is not a situation in which an attorney purposefully diverted escrow funds for his or her own use or acted without any authority at all. Respondent made an error in judgment and exceeded the proper bounds for an escrowee's conduct. However, the evidence did not convince us that Respondent realized his actions were not authorized or that he acted with dishonest intent.

The Administrator did not prove, by clear and convincing evidence, that Respondent violated Rule 8.4(c).

II. In Count II, Respondent is charged with falsely stating, during a sworn statement to the ARDC, that he had not deposited the earnest money checks, in violation of Rules 8.1(a) and 8.4(c).

A. Summary

At his sworn statement during the Administrator's investigation in this case, Respondent stated that he had not deposited the earnest money checks and thought he had lost them. While those statements were not accurate, there was not clear and convincing evidence that Respondent made his statements knowing that they were false. Therefore, the Administrator did not prove that Respondent violated Rule 8.1(a) or 8.4(c).

B. Admitted Facts and Evidence Considered

We consider the following admitted facts and evidence, in addition to those stated in Section I B.

On November 27, 2018, the ARDC initiated an investigation into Respondent's conduct in these transactions. (Ans. at par. 21). Gina Abbatemarco represented the Administrator in that matter and other matters which were under investigation at the time. (Tr. 116-17, 137-38). With her initial correspondence regarding Stacker's request for investigation, Abbatemarco sent Respondent copies of the documents Stacker received when he purchased the cashier's checks at issue. Those documents did not indicate whether the checks had been negotiated. Respondent did not respond to Abbatemarco's initial letter. (Tr. 124-27, 172; Adm. Ex. 9).

On December 19, 2018, Respondent appeared at the ARDC offices for a sworn statement. Prior to the date of the sworn statement, Abbatemarco had sent Respondent notice of matters to be discussed during his sworn statement, and Respondent had communicated with Abbatemarco in writing as to some of those matters. The Stacker investigation was not included in that group or referenced in the subpoena which directed Respondent to appear for the sworn statement. A rider accompanying the subpoena directed Respondent to produce bank records for more than one account, including the account into which Respondent had deposited the checks at issue. Respondent brought some bank records, but they were not complete. At that time, Abbatemarco had not sent Respondent any further documentation concerning the Stacker matter. (Tr. 118-19, 136-43; Adm. Ex. 10 at 1, 4, 7-8, 14-18, 47-56).

At the sworn statement, when asked about Stacker's earnest money, Respondent stated that he never deposited the checks. Respondent stated that he thought neither transaction would close and put the checks in a file. Respondent moved his offices and, for a time, could not find the file.

He later found the file, but not the checks. According to Respondent, he lost the checks, never deposited the checks and did not know what happened to them. (Adm. Ex. 10 at 56-68).

Before inquiring about the Stacker matter, Abbatemarco had asked Respondent about several other transactions. Some of those transactions also involved Foster. (Adm. Ex. 10 at 37-55). At least one other transaction occurred around the same time as the transactions at issue here and involved some of the same individuals. In that transaction, Respondent had returned the earnest money checks. (Adm. Ex. 10 at 58-65, 70-71). There also were other contracts on the Peoria and University properties that failed to close in 2018. (Tr. 230, 246-47, 255-56).

By May 31, 2019, Abbatemarco had obtained bank records which showed that Respondent deposited Stacker's earnest money checks on April 23, 2018. Abbatemarco sent Respondent copies of those records and invited him to respond before she presented the matter to the Inquiry Board on June 19, 2019. (Tr. 127-32; Adm. Ex. 11).

Respondent did not respond until June 18, 2019. Based on his emails and letter to Abbatemarco that day, Respondent remembered returning some checks during that time and depositing others. As to the checks at issue, Respondent initially thought he lost the checks, as he reviewed his accounts and did not find a deposit of Stacker's checks. Respondent stated that he had looked in the wrong account. He also had lost the files in an office move. However, the seller's agent remembered receiving the funds, as Stacker was in default. After receiving Abbatemarco's May 31, 2019 letter and copies of the checks, Respondent realized that he had cashed the checks and given the funds to the property owner. (Tr. 123-24; Adm. Exs. 13, 14).

C. Analysis and Conclusions

A lawyer shall not knowingly make a false statement of material fact in connection with a disciplinary matter. Ill. Rs. Prof'l Conduct R. 8.1(a). Rule 8.4(c) prohibits lawyers from engaging in dishonest conduct.

Rule 8.1(a) applies to statements a lawyer makes during the Administrator's investigation into alleged misconduct by the lawyer. In re Field, 2018PR00015, M.R. 30536 (Jan. 21, 2021). To fall within Rule 8.1(a), the statements must be false and relate to a material fact. Field, 2018PR00015 (Hearing Bd. at 7). The lawyer also must know that the statement is false. Id. This state of mind involves actual knowledge of the fact in question. Ill. Rs. Prof'l Conduct R. 1.0(f).

While Rule 8.4(c) does not include a specific mental state, state of mind is clearly relevant to whether the attorney engaged in dishonest conduct. Storment, 2018PR00032 (Hearing Bd. at 16-17). The fact that an attorney made a statement that was factually incorrect is not enough to demonstrate that the attorney violated Rule 8.4(c). In re Quade, 2014PR00076 (Hearing Bd. Oct. 28, 2015) (reprimand).

Typically, intent is not proven directly and must be inferred from the conduct and the surrounding circumstances. Storment, 2018PR00032 (Hearing Bd. at 11). In considering the evidence, we may draw reasonable inferences and need not be naïve or impractical. Id. That said, however, the Administrator must prove the misconduct charged by clear and convincing evidence. Bleiman, 2016PR00132 (Hearing Bd. at 11-12). This standard does not allocate the risk of error equally between the parties, but requires greater proof, qualitatively and quantitatively, from the Administrator. Id. The Administrator's burden is not met merely because the evidence raises suspicious circumstances. Rodriguez, 2012PR00169 (Hearing Bd. at 14).

We considered the evidence mindful of these principles. Respondent's statements about Stacker's checks clearly were not accurate. The issue, however, is whether Respondent made those statements knowing that they were false. As to that issue, the evidence raises suspicion, but was not clear and convincing.

During his sworn statement, Respondent was asked about multiple matters. Respondent knew, in advance, some of the matters that would be discussed that day. However, it is not at all

clear that he had advance notice that he would be asked about Stacker's matter. Other transactions, with some similarities to the transactions at issue here, had occurred around the same time. Respondent's statements suggest that he had some recollection of the Stacker transactions, but also suggested some possible confusion. Given all the circumstances, we were not convinced that Respondent's statements represented an intentional lie, as opposed to a mistake as to the underlying facts.

In reaching this conclusion, we considered Respondent's behavior as a whole, including his responses to Abbatemarco's inquiries in May and June 2019 and the timing of those responses. Even with that evidence, we were not left with a firm and abiding belief, (see Storment, 2018PR00032 (Hearing Bd. at 12), that Respondent knew his statements were false. Rather, we came away with the opposite impression, that it was at least equally likely that he made a mistake.

The Administrator did not prove that Respondent violated Rule 8.1(a) or Rule 8.4(c).

EVIDENCE IN AGGRAVATION AND MITIGATION

Respondent was licensed to practice law in 1987.

Prior Discipline

Respondent has one prior disciplinary matter, in which he was suspended for one year. In re Walls, 01 CH 92, M.R. 18406 (Nov. 26, 2002). In that case, Respondent received checks totaling $9,239.69, on behalf of clients he was representing in a real estate transaction. Respondent deposited the checks into his client trust account. Before those checks cleared, Respondent issued a check to the title company for $9,239.69. One of the deposited checks did not clear, and Respondent's check to the title company was returned unpaid. Thereafter, Respondent should have been holding $8,764.69 on behalf of his clients. Eighteen months later, Respondent had not paid the title company and only $9.48 remained in his trust account. The title company sued

Respondent and obtained a judgment, which Respondent did not satisfy for several months. Respondent also made false statements to the ARDC concerning the underlying facts.

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. We may also consider the deterrent value of a sanction. Gorecki, 208 Ill. 2d at 361. 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.

The Administrator sought a one-year suspension. Respondent took the position that no misconduct had been proven and did not propose a sanction.

The sanction the Administrator suggested, and the case law on which the Administrator relied, presupposed that all the misconduct charged would be proven. However, that sanction is overly harsh as the most serious charges were not proven. Compare e.g. In re Mendelson, 95 CH 339, M.R. 12894 (Nov. 26, 1996) (six-month suspension; misconduct included false statements to ARDC).

The proven misconduct was serious, but not egregious, especially given the specific circumstances in this case. Respondent acted as escrowee for the $2,000 earnest money in two

transactions in which he represented the sellers. This violated Rule 1.7(a). Respondent then made an unauthorized distribution of those funds, without dishonest intent, which violated Rule 1.15(a).

Representation despite a conflict of interest is serious misconduct. See generally In re Elder, 2014PR00019, M.R. 27334 (May 14, 2015). However, the sanction typically is a censure or short suspension, absent additional misconduct or significant aggravating factors. In re Cahnman, 2014PR00102, M.R. 28259 (Nov. 21, 2016). A somewhat longer suspension can be appropriate where there is additional misconduct. Cahnman, 2014PR00102 (Review Bd. at 27). A failure to safeguard entrusted funds always raises serious concern, but sanctions in such cases vary considerably. In re Spak, 2017PR00061, M.R. 29935 (Sept. 16, 2019). Typically, a single incident, unaccompanied by dishonesty and involving a relatively small amount, would merit a censure or brief suspension. Spak, 2017PR00061 (Hearing Bd. at 23).

Respondent did not act with an intent to defraud the buyer or to improperly benefit himself. This is a mitigating factor. See In re Zaczek, 09 CH 81, M.R. 24836 (Nov. 22, 2011). Respondent believed, incorrectly but in good faith, that a default by the buyer entitled the sellers to the earnest money and that the sellers therefore could direct disbursement of the funds. Based on that belief, Respondent distributed the funds, consistent with instructions he received from the sellers' agent. In keeping part of the funds himself, Respondent kept only the $200 his clients had authorized as his fee.

Aggravating factors are also present. Respondent has prior discipline, which can be a significant aggravating factor. In re Storment, 2018PR00032, M.R. 30336 (May 18, 2020). We considered Respondent's prior discipline, but did not give it significant weight in aggravation, as Respondent's prior misconduct was remote in time and dissimilar to, and more serious than, the misconduct proven in this case. See Storment, 2018PR00032 (Hearing Bd. at 24).

More significantly, Respondent has failed to recognize how or why his conduct was improper. This is an aggravating factor. See In re Cobb, 2016PR00066, M.R. 29225 (June 14, 2018). Throughout the hearing, Respondent focused on the buyer's behavior. The issues here, however, involve Respondent's conduct and whether that conduct complied with ethical standards. An attorney's failure to recognize his or her errors raises significant concerns about the attorney's ability to conform to ethical norms in the future. Spak, 2017PR00061 (Hearing Bd. at 24-25).

A suspension for three months is within the range of discipline that is appropriate here. Other attorneys who have improperly represented a client despite a conflict of interest and engaged in other, limited misconduct have been suspended for ninety days. E.g. Elder, 2014PR00019 (Hearing Bd. at 31-35; see also Cahnman, 2014PR00102 (Review Bd. at 28-29). While distinctions can be drawn between those cases and this one, differences in the severity of the misconduct in Elder and Cahnman tend to be offset by the presence of greater mitigating factors. The same is true for In re Blanchard, 2015PR00025, M.R. 27795 (Jan. 21, 2016), in which the attorney was suspended for ninety days based on his dishonest misuse of $3,500 that he was holding in escrow.

Based on the nature of Respondent's misconduct and the mitigating and aggravating factors present in this case, we recommend a suspension for three months. This sanction also serves to impress upon Respondent and the broader legal community the conflict of interest and risks inherent in acting as both escrowee and counsel for one of the parties in a transaction, particularly after a dispute has arisen between the parties. A longer suspension would be overly harsh, particularly given the limited nature of Respondent's misconduct and the lack of significant actual or potential harm. Compare In re Reich, 08 CH 100, M.R. 25504 (Nov. 19, 2012) (six-month suspension).

Based on Stacker's responses during cross-examination, Respondent suggested that, in bringing this matter to the ARDC, Stacker was improperly seeking to recoup his earnest money without filing a lawsuit. The ARDC is not an appropriate forum for resolving private disputes. In re Levy, 08 CH 4, M.R. 26147 (Sept. 25, 2013). That said, this case presented legitimate issues as to whether Respondent behaved in a manner consistent with his obligations under the Rules of Professional Conduct. While we recognize Respondent's concerns, we did not consider Stacker's motivation in determining the sufficiency of the evidence or the discipline to recommend.

For the foregoing reasons, we recommend that Respondent, LaCoulton Walls, be suspended for three months.

Respectfully submitted,

Kenn Brotman
Alexander L. Groden
Daniel G. Samo, M.D.

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 July 29, 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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[1] During the hearing, Respondent offered one exhibit, which was admitted into evidence. (Tr. 272-73). Respondent failed to submit this exhibit to the Clerk's office, and in accordance with the Chair's May 25,2021 order, that exhibit is stricken and is not part of the record.

[2] The letter is dated April 18, 2017, but that is a typographical error. (Tr. 189-90; Adm. Ex. 8).