In re Philip Edwin Koenig
Attorney-Respondent

Commission No. 2020PR00076

Synopsis of Hearing Board Report and Recommendation
(August 2021)

Respondent received settlement funds on behalf of his client, which he deposited into his client trust account. Over a four-month period Respondent withdrew and used a total of $70,076.80 from that account, even though he knew the funds belonged to his client and he had no authority to use them. Respondent failed to safeguard client funds and engaged in dishonest conduct. The Hearing Board recommended that Respondent be suspended for eighteen months.

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

In the Matter of: **PHILIP EDWIN KOENIG,** Attorney-Respondent, No. 1498606.	Commission No. 2020PR00076

REPORT AND RECOMMENDATION OF THE HEARING BOARD

SUMMARY OF THE REPORT

Respondent received settlement funds on behalf of his client, which he deposited into his client trust account. Over a four-month period Respondent withdrew and used a total of $70,076.80 from that account, even though he knew the funds belonged to his client and he had no authority to use them. Respondent failed to safeguard client funds and engaged in dishonest conduct. The Hearing Board recommended that Respondent be suspended for eighteen months.

INTRODUCTION

The hearing in this matter was held on June 15, 2021 before a Panel of the Hearing Board consisting of John L. Gilbert, Chair, Stuart H. Shiffman and Joseph C. Vallez. Tammy L. Evans 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 client 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 knowingly and without authority used $70,076.30 belonging to a client.

EVIDENCE

The Administrator presented testimony from Respondent as an adverse witness and one additional witness. Administrator's Exhibits 1 through 13 were admitted into evidence. Respondent testified on his own behalf and presented testimony from two character witnesses.

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 failing to safeguard client funds and engaging in dishonest conduct by using funds that Respondent knew belonged to his client and he had no authority to use, in violation of Rules 1.15(a) and 8.4(c).

A. Summary

Respondent deposited settlement funds into his client trust account and issued a check to the client for the client's portion of the funds. Before the client negotiated that check, Respondent used $70,076.30 of the client's funds for himself. Respondent knew the money belonged to his client and he was not authorized to use it. Respondent thereby violated Rules 1.15(a) and 8.4(c).

B. Admitted Facts and Evidence Considered

Respondent represented Kenneth Harrison in a lawsuit, which settled. Respondent received settlement funds of $187,500, on Harrison's behalf, which he deposited into his client trust account. (Answer at pars. 3, 4, 6).

From those funds, Respondent was entitled to $95,826.20 as fees and costs, which he withdrew from the account. The balance, $91,673.80, belonged to Harrison. On January 4, 2019, Respondent sent Harrison a check, issued on his client trust account, for $91,673.80. When Harrison attempted to negotiate the check, on December 7, 2019, the check was returned due to insufficient funds. (Ans. at pars. 5, 7, 8, 9, 12; Tr. 22).

In the meantime, Respondent took funds from his client trust account, which he used for his own purposes, as follows:

Date	**Transaction type**	**Amount**
7/26/19	Check payable to Respondent	$15,000.00
7/30/19	Cash withdrawal	$46,249.32
8/23/19	Check payable to Respondent	$7,500.00
8/26/19	Check payable to Respondent	$15,000.00
9/17/19	Check payable to Respondent	$7,500.00
10/31/19	Check payable to Respondent	$5,000.00
11/22/19	Check payable to Respondent	$5,000.00

As a result, the account balance fell below the $91,673.80 that Respondent should have been holding for Harrison. By November 22, 2019, the balance in Respondent's client trust account was $21,597.50 and Respondent had used at least $70,076.30 that belonged to Harrison. Harrison had not authorized Respondent to use any of those funds himself, and Respondent knew he was not entitled to that money. (Ans. at pars. 9, 10, 11, 13; Tr. 24-32).

C. Analysis and Conclusions

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). Rule 1.15(a) obligates attorneys holding client funds to safeguard those funds. In re Woods, 2014PR00181, M.R. 28568 (Mar. 20, 2017). An attorney violates Rule 1.15(a) where the attorney uses client funds without authority, thereby causing the balance in the account into which those funds were deposited to fall below the amount the attorney should be holding for the client. In re Gallo, 2017PR00101, M.R. 30139 (Mar. 13, 2020).

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). A lawyer who knowingly uses client funds without authority engages in dishonest conduct. Woods, 2014PR00181 (Hearing Bd. at 5).

Respondent withdrew funds from the account into which he had deposited Harrison's settlement proceeds, causing the balance in that account to fall below the amount Respondent should have been holding for Harrison. By that conduct, Respondent violated Rule 1.15(a). Gallo, 2017PR00101 (Hearing Bd. at 28). Respondent knew that the money belonged to Harrison and that he did not have authority to use those funds for himself. Therefore, Respondent engaged in dishonest conduct, in violation of Rule 8.4(c). Woods, 2014PR00181 (Hearing Bd. at 5).

EVIDENCE IN AGGRAVATION AND MITIGATION

Respondent is 72 years old. He was licensed to practice law in Illinois in 1975. Since 1998, Respondent has operated a solo practice, concentrated in estate planning and administration, probate litigation, real estate, bankruptcy, tax and commercial litigation. (Tr. 15-16, 66).

Respondent's bank notified him that the check to Harrison had been returned for insufficient funds. Respondent began looking for funds to make restitution immediately thereafter. On January 8, 2020, Respondent deposited $80,000 into his client trust account, consisting of $25,000 from his own funds and a $55,000 loan from his wife. On January 9, 2020, Respondent sent Harrison a certified check for $91,673.80. (Tr. 33-34; Adm. Ex. 11).

Respondent knew that his check to Harrison was outstanding when he made each of the withdrawals. According to Respondent's testimony, he did not anticipate that Harrison would negotiate that check, particularly as Harrison had been dissatisfied with the settlement. Respondent stated he did not intend to permanently deprive Harrison of his funds. Respondent used part of the funds he took to pay his debts and deposited part into a retirement or investment account. (Tr. 17, 38-39, 69-71).

Shortly before he began withdrawing the funds, Respondent was diagnosed with Stage 4 prostate cancer. This diagnosis and concerns about his prognosis caused Respondent significant anxiety. Respondent had experienced depression and anxiety for many years. The cancer diagnosis exacerbated those conditions. At the time, Respondent was very upset and hopeless. However, while his concentration and attention were somewhat diminished, Respondent remained able to work effectively. Respondent did not attribute his conduct to his depression. Respondent testified that he knew his conduct was wrong, but his good judgment slipped away. (Tr. 35-36, 48-51, 54-55, 72-77).

Respondent considered his misconduct serious and very shameful. He testified that he would never do anything like this again. (Tr. 78, 85).

Psychiatrist Ryan Finkenbine examined Respondent on behalf of the Administrator. Dr. Finkenbine diagnosed persistent depressive disorder with anxious distress and intermittent major depressive episodes. Dr. Finkenbine did not see a causal relationship between Respondent's mental condition and his misconduct. While it might diminish his productivity or accuracy somewhat, Dr. Finkenbine concluded that Respondent's mental condition did not impede his ability to practice law. (Tr. 44, 48-52, 58-59).

Marcia Lee and Roger Ray, both of whom have known Respondent over time, testified as character witnesses. Based on their testimony, Respondent is very honest, ethical and a good lawyer, who enjoys a good reputation. (Tr. 87-90, 92-94).

Respondent has been active in bar association activity, continuing legal education and legislative advocacy. Over the past forty years, Respondent has provided *pro bono* legal services. Respondent provides additional volunteer service through various organizations, including the Rotary Club and Respondent's church. (Tr.79-84).

Prior Discipline

Respondent has no prior discipline.

RECOMMENDATION

A. Summary

The panel recommends that Respondent be suspended for eighteen 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 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.

In this case, the proven misconduct is extremely serious. Respondent intentionally took funds, that he knew belonged to his client and he was not authorized to take, and used those funds

for his own purposes. Such misconduct can warrant disbarment. E.g. In re Rotman, 136 Ill. 2d 401, 423, 556 N.E.2d 243 (1990). The amount taken is relevant in determining the proper sanction. See In re Loveless, 00 CH 65, M.R. 18838 (Sept. 19, 2003). Here, that amount exceeds $70,000. Respondent's misconduct also is aggravated because his misconduct involved a series of acts over time. See In re Meacham, 2016PR00018, M.R. 28730 (Sept. 22, 2017).

Respondent requested lenity but did not propose a specific sanction. Less severe sanctions are warranted where the attorney acted without a dishonest or self-serving motive. E.g. In re Mayster, 99 CH 59, M.R. 18008 (May 24, 2002) (censure); see also In re Lenz, 108 Ill. 2d 445, 484 N.E.2d 1093 (1985) (censure). Respondent, however, acted intentionally and used the funds he took for his own benefit. A more serious sanction is warranted where an attorney took client funds intentionally and purposefully, particularly in a series of multiple acts over time. See In re Woods, 2014PR00181, M.R. 28568 (Mar. 20, 2017) (disbarment). That is the situation here.

The Administrator suggested a suspension for at least three years. However, the cases the Administrator cited primarily demonstrate the serious nature of the misconduct and the severity of possible sanctions. E.g. Rotman, 136 Ill. 2d at 423 (disbarment). The only case the Administrator cited in which the attorney was not disbarred involved more egregious misconduct, including taking more than $95,000 from an elderly and infirm client over a three-year period. In re Helmig, 2013PR00019, M.R. 27163 (Mar. 12, 2015) (suspension for three years and until further order). Further, despite some similar mitigating evidence, there were fewer mitigating factors and greater aggravating factors in Helmig. For example, Helmig significantly delayed making restitution, his misconduct harmed his client and his exceedingly poor financial circumstances jeopardized the potential for repayment. Helmig, 2013PR00019 (Review Bd. at 8-9). The circumstances in Helmig as a whole support a much harsher sanction than would be appropriate here.

Our job is to recommend a sanction that is based on the unique circumstances of this case, while within the range of precedent. See Edmonds, 2014 IL 117696 at ¶ 90. Respondent's misconduct is serious and accompanied by some aggravating factors. For that reason, the sanction must be sufficiently serious to send a strong message that misconduct such as Respondent's is not, and cannot be, tolerated. At the same time, sanctions in disciplinary cases are not designed to be punitive. Edmonds, 2014 IL 117696 at ¶ 90. This case presents significant mitigating factors, which led us to conclude that Respondent's misconduct was an aberration and to recommend a shorter suspension than that requested by the Administrator.

Respondent acknowledged his misconduct, accepted responsibility for it and expressed genuine remorse. Respondent cooperated in the disciplinary proceedings. He has no prior discipline over a long legal career. These are all mitigating factors. See generally In re Gurvey, 2017PR00092, M.R. 30215 (May 18, 2020). Respondent made full restitution and did so promptly. He has served his community as a volunteer, provided *pro bono* legal services and been active in bar association work. These likewise are mitigating factors. See In re Knowles (Scott), 2015PR00073, M.R. 28744 (Sept. 22, 2017). Respondent presented favorable character testimony, which is also mitigating. See In re Harris, 2017PR00044, M.R. 30449 (Sept. 21, 2020).

Evidence was presented regarding Respondent's health. We did not give significant mitigating weight to Respondent's health problems *per se*, as neither Respondent nor Dr. Finkenbine suggested that those conditions caused or significantly contributed to his misconduct. See In re Deer, 2015PR00037, M.R. 29565 (Jan. 29, 2019). However, the evidence indicated that Respondent's overall mental state contributed to a situation in which Respondent behaved differently from the way he normally behaved. Therefore, Respondent's health problems were an additional factor contributing to our conclusion that his misconduct was an aberration.

A suspension for eighteen months is within the range of discipline imposed on other attorneys who dishonestly and intentionally converted large amounts of client funds. E.g. In re Miller, 2014PR00134, M.R. 28618 (May 18, 2017) (one year; over $85,000 taken from three clients); Loveless, 00 CH 65, M.R. 18838 (two years; at least $100,000 taken); Gurvey, 2017PR00092 (Review Bd. at 19) (two years; over $70,000 taken). Despite some distinguishing characteristics, these cases provide guidance as to the range of possible discipline for misconduct similar to Respondent's. We concluded that an eighteen-month suspension properly balances the severity of Respondent's misconduct, the aggravating factors and the substantial mitigating factors present in this case.

We therefore recommend that Respondent, Philip Edward Koenig, be suspended for eighteen months.

Respectfully submitted,

John L. Gilbert
Stuart H. Shiffman
Joseph C. Vallez

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 August 20, 2021.

Michelle M. Thome

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

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