In re David Kyle Cooper
Attorney-Respondent

Commission No. 2021PR00082

Synopsis of Hearing Board Report and Recommendation
(September 2022)

The Administrator charged Respondent with failing to hold settlement funds belonging to his client in a client trust account, failing to deliver settlement funds the client was entitled to receive, and engaging in dishonest conduct by placing his client's signature on a $50,000 settlement check and settlement release without the client's knowledge or consent, falsely indicating that he witnessed his client's signature on the settlement release, using $36,641.39 of the settlement funds without authorization, and concealing his use of the funds. Respondent asserted, unsuccessfully, that he was entitled to the funds as fees for legal services he provided to the client in other matters.

The Hearing Panel found the Administrator proved violations of Rules 1.15(a), 1.15(d), and 8.4(c) of the Illinois Rules of Professional Conduct. Based on the serious misconduct, significant aggravation, and minimal mitigation, the Hearing Panel recommended that Respondent be suspended for three years and until further order of the Court.

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

In the Matter of:

DAVID KYLE COOPER,

Attorney-Respondent,

No. 6277289.

Commission No. 2021PR00082

REPORT AND RECOMMENDATION OF THE HEARING BOARD

SUMMARY OF THE REPORT

Respondent placed his client's signature on a $50,000 settlement check and a settlement release without the client's knowledge or permission. Respondent then used $36,641.39 of the settlement funds without authorization, concealed his use of the funds, and failed to deliver all of the settlement proceeds the client was entitled to receive. The Hearing Board did not accept Respondent's contention that he was entitled to the funds as compensation for legal services he provided to the client in other matters. The Hearing Board recommended that Respondent be suspended for three years and until further order of the Court.

INTRODUCTION

The hearing in this matter was held remotely by video conference on March 24, 2022, before a Panel of the Hearing Board consisting of William E. Hornsby, Jr., Chair, Carol A. Casey, and John McCarron. Rory P. Quinn represented the Administrator. Respondent was present and represented himself.

PLEADINGS AND ALLEGED MISCONDUCT

The Administrator filed a one-count Complaint against Respondent, alleging he placed his client's signature on a settlement release and settlement check without the client's knowledge or consent, falsely indicated on the settlement release that he witnessed his client's signature, failed to hold settlement funds belonging to the client in his client trust account, dishonestly used $36,641,39 of those funds without authorization, concealed his use of those funds, and failed to deliver settlement funds the client was entitled to receive, in violation of Rules 1.15(a), 1.15(d) and 8.4(c) of the Illinois Rules of Professional Conduct (2010). In his Answer, Respondent admitted some of the factual allegations but denied engaging in misconduct.

EVIDENCE

The Administrator called Respondent as an adverse witness and three additional witnesses. The Administrator's Exhibits 2-7 were admitted. Respondent testified on his own behalf. Respondent's Exhibits A-D, D.1-D.3, E-G, and G.1 were admitted.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Administrator bears the burden of proving the charges of misconduct by clear and convincing evidence. In re Thomas, 2012 IL 113035, ¶ 56. Clear and convincing evidence constitutes a high level of certainty, which is greater than a preponderance of the evidence but less stringent than proof beyond a reasonable doubt. People v. Williams, 143 Ill. 2d 477, 577 N.E.2d 762 (1991). The Hearing Board assesses witness credibility, resolves conflicting testimony, makes factual findings, and determines whether the Administrator met the burden of proof. In re Winthrop, 219 Ill. 2d 526, 542-43, 848 N.E.2d 961 (2006).

Respondent is charged with failing to hold settlement funds belonging to his client in his client trust account, failing to promptly deliver settlement funds the client was entitled to receive, and acting dishonestly by executing a settlement release and negotiating a settlement check without his client's knowledge or consent, using $36,641.39 of the settlement funds without authorization, and concealing his misuse of those funds.

A. Summary

Respondent engaged in misconduct by placing his client's signature on a settlement release and settlement check without the client's knowledge or consent, falsely indicating on the settlement release that he witnessed his client's signature, dishonestly transferring settlement funds to himself without authorization, failing to deliver settlement funds the client was entitled to receive, and concealing his misuse of the funds by misrepresenting to the client that he was holding the funds in escrow.

B. Admitted Facts and Evidence Considered

Respondent was licensed to practice law in Illinois in 2002. (Tr. 77). The charges in this matter pertain to his representation of Christopher McNally in a personal injury and underinsured motorist matter. McNally and Respondent have known each other since junior high school and were close friends. (Tr. 36).

Around the same time as the personal injury representation, Respondent also represented McNally in foreclosure matters related to two properties. Additionally, McNally asked Respondent to send a letter to his former employer seeking recovery of unpaid commissions, and offered to pay Respondent 15% of whatever he recovered. According to McNally, nothing came of the unpaid commission matter. McNally and Respondent did not have a written fee agreement for any of McNally's matters. (Tr. 39-41).

According to Respondent, he and McNally had a one-third contingent fee agreement for the personal injury claim. McNally, on the other hand, testified they had an understanding that McNally would "take care of" Respondent if he succeeded in recovering the full amount of the

liability coverage and the underinsured motorist coverage. McNally testified he made clear to Respondent that he would not agree to pay Respondent one-third of any recovery. (Tr. 46-47).

McNally further testified that he did not have a fee agreement with Respondent for his foreclosure matters. He offered to pay Respondent "appearance fees" but Respondent declined, "out of friendship and wanting to help." (Tr. 106). McNally testified they had a "quid pro quo" arrangement whereby he would allow Respondent to use his property in Wisconsin or he would buy Respondent dinner or bring him along on a business trip. (Tr. 37).

On December 12, 2014, Respondent filed a complaint on McNally's behalf in the Circuit Court of Cook County against Michael Laconte, the driver involved in the accident that injured McNally. In July 2015, Respondent and Laconte's insurer, Government Employees Insurance Company (GEICO), agreed to settle the matter for Laconte's policy limit of $50,000. When asked whether he informed McNally that GEICO offered to settle for $50,000, Respondent answered that McNally knew the liability case would settle for that amount because that was the policy limit. (Tr. 167-68).

On July 23, 2015, GEICO issued a settlement check for $50,000 payable to "Christopher and Amy McNally and Law Office of David J Cooper, their attorney." (Adm. Ex. 3). In addition to the settlement check, GEICO sent Respondent a settlement release. Respondent submitted an executed release to GEICO, dated September 15, 2015. The release contains a signature purporting to be that of Christopher McNally. Respondent signed the release as a witness and wrote "Counsel" under his signature. McNally could not say for sure whether the signature appearing on the release was his. (Tr. 49-50; Adm. Ex. 2). He does not think he signed the release because he does not believe he would forget doing so. McNally testified he was not fully aware on September 15, 2015 that the GEICO matter had settled for $50,000. (Tr. 50).

Respondent testified he could have signed McNally's name to the release but does not recall whether he did. He acknowledged testifying in his deposition that he placed McNally's signature on the release "for convenience." (Tr. 170). He further testified that he had no qualms about signing McNally's name because the signature was not required to be notarized and McNally knew the settlement amount would be $50,000. When asked why he signed McNally's name to the release rather than indicating he was signing on behalf of McNally, Respondent stated he "intimated" he was signing on McNally's behalf by writing "Counsel" under his witness signature. (Tr. 168-69). Respondent did not have a written power of attorney for McNally and denied knowing that GEICO would not accept his signature on McNally's behalf. (Tr. 166, 171).

Attorney Alison Coppler handled McNally's claim on behalf of GEICO. Coppler testified that, in her experience, GEICO would not accept a settlement release that an attorney signed on behalf of his or her client. (Tr. 153).

Respondent admits he signed Christopher and Aimee McNally's names to the settlement check. (Tr. 173).[1] He testified that he did so for convenience. (Tr. 173-74). McNally denied giving Respondent permission to sign the check on his behalf. (Tr. 51-52).

On December 11, 2015, Respondent deposited the settlement check in his IOLTA account at Chase Bank. (Tr. 176; Adm. Ex. 6). Respondent is the only signatory for that account. (Tr. 177).

Respondent testified that he paid himself one-third of the $50,000 settlement and kept most of the funds in reserve to litigate McNally's underinsured motorist claim. (Tr. 180). He did not prepare a settlement statement after he negotiated the GEICO check. (Tr. 173).

On an unknown date between March 10, 2016 and April 8, 2016, Respondent sent McNally a text stating in relevant part, "They just confirmed you could take GEICO as an offset to their

med pay." He further stated that reserves were needed for arbitration costs. (Tr. 54-55; Adm. Ex. 4). McNally took this text to mean that there were "monies there that could be received" but would be offset against the underinsured motorist recovery. McNally was not aware at that time that Respondent had already negotiated and deposited the GEICO settlement check and signed the release of liability. (Tr. 54-56).

On April 13, 2016, Respondent sent McNally a check for $13,350. McNally was not aware that these funds were taken out of the $50,000 check Respondent had received. (Tr. 57).

On or about December 6, 2017, Respondent sent McNally a text offering to "release" $10,000 to McNally to help him with "bank" issues. McNally responded that there was no need to release funds but asked how such a release would work. Respondent answered in relevant part, "It's in escrow. It's not an issue at all. It's in reserve for litigation costs." (Adm. Ex. 4). At the time Respondent sent this text, the balance of his client trust account was $20,359.61. Later that same month, Respondent transferred $3,600 from his client trust account to his checking account, bringing the balance of his client trust account to $16,759.61. (Adm. Ex. 6).

By July 31, 2018, Respondent drew down the balance of his client trust account to $8.61 by transferring funds to his personal checking account. (Adm. Ex. 6).

At some point, Respondent asked attorney David J. Schwaner to take over the representation of McNally's underinsured motorist claim. (Tr. 17-18). The date of this referral is not specified in the evidence before us. McNally did not agree to allow Schwaner to share part of his fee with Respondent as a referral fee. (Tr. 18).

McNally testified he learned Respondent had received the $50,000 settlement check after he retained Schwaner. (Tr. 69). Schwaner advised McNally there was a $50,000 offset from his underinsured motorist coverage for the GEICO settlement, and McNally was confused as to how

there could be an offset when he had not received those funds. Schwaner told McNally that opposing counsel had proof of the $50,000 payment. McNally then went back to Respondent to ask what had happened. (Tr. 68-69).

McNally met with Respondent on January 18, 2019. (Tr. 66-67). McNally testified that, at their meeting, Respondent admitted he had taken the settlement funds and promised to repay them. McNally sent Respondent a letter on or about February 22, 2019, memorializing their conversation. (Tr. 70; Adm. Ex. 5). The letter stated that McNally never agreed to pay Respondent one-third of his settlement. It further stated that McNally would forgive payment of $7,500 of the settlement funds owed to him if Respondent paid the remaining $28,750 by March 1, 2019. (Adm. Ex. 5). McNally testified Respondent made "a small handful of partial payments" but did not reimburse the full amount of the GEICO settlement funds. (Tr. 71).

Schwaner asked Respondent for a settlement statement for the GEICO funds but Respondent did not provide one. (Tr. 19). Without a settlement statement, Schwaner was unable to confirm that Respondent disbursed the funds to which McNally was entitled, so he reported Respondent to the ARDC. (Tr. 28-29). According to Respondent, he created a settlement statement pursuant to Schwaner's request and sent it to McNally. He acknowledged there is no settlement statement in the materials he turned over to the Administrator. (Tr. 196).

On April 19, 2019, Respondent sent McNally an email stating as follows:

> Attached are statements showing your settlement funds. I initially paid out my standard 1/3 and the $13,350 to you. It's pretty clear your lengths to prevent my 10% commission for referring your case. The fact that you would go after it when it's a payment from D.S. and not you is surprising. As standard rate is a 1/3 that is what you would have to pay no matter where you go. As D.S. would have no reason to charge you less than a 1/3 the 10% is payment to me for bringing him a case. Although I had no obligation to do so I initially told D.S. I would likely reduce my share for your sake. Now you have defamed me just to get the extra 5% which should be 0% of D.S.'s fee. Also surprising is your aggressive stance considering how much you have benefited off of me (would never ask for your insurance

> commission),but namely your unpaid legal fees for foreclosure alone, not to mention the endless work, eviction, rental property issues.
>
> Similar to personal injury having a statutory 1/3 payment structure, the foreclosure industry fees are standard. $1500 case intake and $350 per month fee the [sic] case is still pending.
>
> For instance you owe:
>
> 11 CH 35805 (Riverside) $8,500.00 ($1,500 +$7,350 (7/2013-4/2015 21 months @ 350 month)
>
> 15 CH 12996 (Hoyne) $5,000.00 ($1,500 + $3,500 (10/2016-8/2017 10 months @ 350)
>
> 15 CH 15408 (Riverside $5,700.00 ($1,500 +$3,150 (8/2016-4/2017 9 months @$350
>
> ($1,050 (10/2018-12/2018 3 months @ 350)

(Adm. Ex. 7).

Respondent acknowledges that the figures set forth in this email were not accurate and that he did not have an active license for a period of several months in 2017, during a time when he asserted McNally owed him fees. (Tr. 194).

According to Respondent, he kept the GEICO settlement funds as fees for McNally's foreclosure matters. (Tr. 181). When asked about his deposition testimony that he paid himself one-third of the settlement, then offset the mortgage foreclosure fees, then kept what he thought he was owed as a standard referral fee, Respondent stated that after he applied the settlement funds toward the purported mortgage foreclosure fees, there were no funds remaining to cover the referral fee. (Tr. 182). Respondent testified he understands that the client must approve a referral fee and has the right to refuse to approve payment of a referral fee. (Tr. 190).

Respondent submitted as an exhibit a "Ledger of Fees," which he prepared for the purpose of this hearing, indicating that McNally owed him $16,550 for the Hoyne foreclosure matter, $7,400 for the Riverside foreclosure matter, $3,000 for the unpaid commission matter, $16,500 for

the personal injury matter, and $16,650 for the underinsured motorist claim referral fee. (Tr. 193; Resp. Ex. A).

C. Analysis and Conclusions

Rule 1.15(a)

Rule 1.15(a) requires an attorney to 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, in a client trust account. We find the Administrator proved by clear and convincing evidence that Respondent violated this rule.

Respondent's bank records show that, except for the $13,350 he disbursed to McNally in April 2016, he transferred all but $8.61 of the settlement funds in his client trust account to himself by July 31, 2018. Respondent does not dispute that he did so but asserts he was entitled to the funds as fees for his services. Respondent's contention fails in several respects.

First, Respondent asserts he was entitled to one-third of the settlement funds as fees for McNally's injury claim against Laconte, but there is no evidence of such an agreement. There was no written contingent fee agreement, as required by Rule 1.5(c). We find credible McNally's testimony that he refused to agree to pay Respondent one-third of his recovery. That testimony is consistent with McNally's statement in his letter to Respondent dated February 22, 2019. Respondent has not presented any evidence refuting McNally's position that, while he offered to compensate Respondent, he never agreed to a one-third contingent fee. Without such an agreement in place, Respondent was not authorized to transfer $16,500 of McNally's settlement funds to himself. Respondent's representation to McNally that there is a "statutory" one-third contingent fee in personal injury cases is incorrect. While a one-third contingent fee is common in personal injury matters, there is no statute that requires a client to pay that percentage. Thus, Respondent

was not authorized to pay himself one-third of the GEICO settlement without McNally's knowledge or consent.

Respondent's contention that he was holding settlement funds in reserve for expenses in the underinsured motorist litigation also fails. Pursuant to Rule 1.15(f), Respondent was required to hold any client funds for costs and expenses in his client trust account. He did not do so. Instead, during the time he was purportedly holding settlement funds in reserve, he was transferring them to himself. Accordingly, we find Respondent's testimony that he held McNally's funds in reserve to be demonstrably false.

Respondent further asserts he was entitled to the settlement funds as fees for McNally's foreclosure matters. This argument lacks merit as well. Respondent admittedly had no fee agreements with McNally for those matters. It is well-settled that a lawyer may not help himself to client funds that are with the lawyer's reach and claim he took the funds as fees. In re Kitsos, 127 Ill. 2d 1, 11, 535 N.E.2d 792 (1989); In re Lohman, 2016PR00061, M.R. 029273 (May 24, 2018) (Hearing Bd. at 14-15). An attorney claiming fees from funds held on behalf of a client must provide the client with an accounting as to his or her services and a statement of the fees allegedly owed. Kitsos, 127 Ill. 2d at 11. Respondent did not provide McNally with any information about purported fees until after he had used the settlement funds, and the information he belatedly provided was not a proper accounting. Moreover, there was no evidence in the record that McNally agreed to the terms Respondent set forth in his purported accounting, such as a $1500 intake fee and $350 monthly fee for the foreclosure matters. On the contrary, McNally testified they had a "quid pro quo" arrangement whereby he compensated Respondent by paying for trips and dinners and allowing Respondent to use his lake house. Whether this was adequate compensation is not the issue before us. If Respondent believed McNally owed him fees for the

foreclosure matters, he was required to seek and obtain those fees in an appropriate manner under the Rules. He did not do so.

Accordingly, we find the Administrator proved by clear and convincing evidence that Respondent failed to hold settlement funds belonging to McNally in his client trust account, in violation of Rule 1.15(a).

Rule 1.15(d)

Rule 1.15(d) provides that, upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Further, the lawyer shall promptly deliver funds the client is entitled to receive and, upon request by the client, shall promptly render a full accounting regarding the client's property. The Administrator alleges Respondent violated Rule 1.15(d) by failing to promptly deliver the proceeds of McNally's settlement check to him. We find the Administrator proved this charge by clear and convincing evidence.

The settlement check was issued on July 23, 2015, and Respondent deposited it on December 11, 2015. The only disbursement he made to McNally was in April 2016, in the amount of $13,350. Respondent has not provided a reasonable explanation why this disbursement occurred nine months after the settlement check was issued and four months after Respondent deposited it. We find this was not prompt delivery. Further, Respondent has yet to pay the remainder of the settlement funds owed to McNally. For these reasons, we find the Administrator proved that Respondent violated Rule 1.15(d).

Rule 8.4(c)

Rule 8.4(c) prohibits an attorney from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. Rule 8.4(c) is broadly construed to include any intentional conduct calculated to deceive, including the suppression of truth and the suggestion of falsity. In re

Quitschau, 2017PR00084, M.R. 029433 (Sept. 20, 2018) (Hearing Bd. at 21); In re Edmonds, 2014 IL 117696, ¶ 53. Whether dishonesty is present is an issue of fact, to be determined based on all the circumstances. See In re Rodriguez, 2012PR00169, M.R. 26591 (May 16, 2014) (Hearing Bd. at 13). We find that Respondent's conduct surrounding the GEICO settlement, his use of approximately $36,000 of the settlement funds without authorization, and his misrepresentations that he was holding the funds in reserve were dishonest.

The evidence established that Respondent settled the GEICO matter without informing McNally and then surreptitiously obtained the settlement funds by executing a release and negotiating the settlement check without McNally's knowledge or consent. We find credible McNally's testimony that he was not aware until he retained attorney Schwaner that GEICO had paid out the $50,000 settlement. Attorney Schwaner corroborated that testimony, and there was no evidence showing that Respondent informed McNally of GEICO's settlement offer or Respondent's acceptance on McNally's behalf. Respondent, when asked whether he informed McNally of the settlement, responded evasively that McNally knew the matter would settle for $50,000. The issue, however, is not whether McNally knew what the GEICO policy limits were or expected the GEICO claim to settle, but whether Respondent informed McNally that the matter had settled and he had received the settlement funds. There is no evidence in the record that Respondent did so.

Respondent admits he signed the names of Christopher and Aimee McNally to the settlement check. Given McNally's lack of knowledge that Respondent had finalized the settlement, we find credible McNally's testimony that he did not authorize Respondent to endorse the check on his behalf.

We do not find credible Respondent's testimony that he could not recall whether he signed McNally's name to the settlement release. That testimony was impeached by Respondent's admission in his deposition that he signed McNally's name "for convenience." Respondent's testimony that he had no qualms about signing McNally's name because the release was not required to be notarized bolsters our finding that Respondent did in fact sign McNally's name to the release without permission and then falsely represented that he witnessed McNally's purported signature. In doing so, Respondent acted dishonestly toward GEICO, by presenting a release that purportedly was signed by McNally and witnessed by Respondent when it was not, and acted dishonestly toward both Christopher and Aimee McNally, by endorsing the settlement check and taking possession of funds that belonged to them without their knowledge or permission.

Respondent engaged in further dishonesty when he used the GEICO settlement funds with the knowledge that he was not entitled to them. Respondent had no valid reason to treat the funds as his own, and therefore misappropriated $36,641.39 that did not belong to him. His representations to McNally that he was holding funds in reserve for litigation expenses were dishonest because Respondent was transferring funds to himself rather than holding them in his client trust account.

Respondent engaged in all of the foregoing conduct knowingly. Accordingly, we find he acted dishonestly, and the Administrator proved that Respondent violated Rule 8.4(c).

EVIDENCE IN AGGRAVATION AND MITIGATION

Aggravation

McNally identified a text message from Respondent in which Respondent told him, "a client of mine was randomly contacted by attorney registration, not sure if bc a courtesy call or bc I registered late this year, dunno. If they even call you just ignore them." (Tr. 54; Adm. Ex. 4).

Respondent testified that when he sent the message he did not know if the ARDC was actually contacting his client or whether it was somebody harassing his client. He did not take any steps to determine whether the ARDC had actually contacted his client. (Tr. 184).

The Administrator presented evidence that Respondent failed to attend an important hearing in one of McNally's foreclosure matters and blamed his failure to appear on oversleeping because he had been prescribed sleeping pills. (Tr. 57-58). On cross-examination, Respondent admitted he had not been prescribed sleeping pills. He further testified that he did not appear for the hearing because he had spoken to McNally the previous day and was not supposed to attend. (Tr. 187-88). The Administrator also presented a text message in which Respondent called McNally a "selfish disrespectful f**k." Respondent later apologized and said he was drunk when he sent the text. (Tr. 59-60).

Mitigation

Respondent apologized for using unprofessional language with McNally and for being careless with respect to his fees. He testified he was trying to help McNally as a friend when McNally was having personal and financial difficulties. (Tr. 209).

Prior Discipline

In 2017, Respondent was disciplined for practicing law after he was removed from the master roll and making false statements during an ARDC investigation. In re Cooper, 2014PR00166, M.R. 28490 (March 20, 2017). Respondent failed to timely register and pay his registration fees for 2011 and 2012. Consequently, he was removed from the master roll for several months during each of those years until he registered and paid his past-due fees. During the periods when he was removed from the master roll, he represented a client in a dissolution matter and another client in a personal injury matter. Respondent was also found to have made false

statements to the Administrator in a sworn statement, when he denied being held in civil contempt during his divorce proceeding despite orders indicating he had been held in indirect civil contempt. For this misconduct, the Court suspended Respondent for 90 days and until he completed the ARDC Professionalism Seminar.

RECOMMENDATION

A. Summary

Having considered the serious nature of the misconduct, the considerable evidence in aggravation and minimal evidence in mitigation, the Hearing Panel recommends that Respondent be suspended for three years and until further order of the Court.

B. Analysis

The purpose of the disciplinary process is not to punish attorneys, but to protect the public, maintain the integrity of the legal profession, and safeguard the administration of justice from reproach. In re Edmonds, 2014IL117696, ¶ 90. When recommending discipline, we consider the nature of the misconduct and any factors in mitigation and aggravation. In re Gorecki, 208 Ill. 2d 350, 360-61, 802 N.E.2d 1194 (2003). We seek consistency in recommending similar sanctions for similar types of misconduct, but must decide each case on its own unique facts. Edmonds, 2014IL117696, ¶ 90.

Respondent's misconduct was very serious. The Court has held that intentional conversion of client funds is a gross violation of an attorney's oath. In re Rotman, 136 Ill. 2d 401, 423, 556 N.E.2d 243 (1990). Respondent not only took funds that did not belong to him, he obtained the funds with dishonest means and attempted to conceal his wrongdoing.

There is substantial aggravation in this case. Respondent's misconduct was not an isolated event. He transferred settlement funds to himself numerous times until he depleted them. He

deprived McNally of funds that belonged to him at a time when McNally was having financial difficulties and has made only minimal restitution since.

In further aggravation, although Respondent admitted to being careless with respect to his fees, he did not show that he comprehends why his conduct was unethical or that he has any remorse. See In re Lewis, 138 Ill. 2d 310, 347-48, 562 N.E.2d 198 (1990). We are uncertain, based on our observations of Respondent and his presentation during this hearing, whether he understands his ethical responsibilities. For example, Respondent persists in his position that he is owed a referral fee for McNally's underinsured motorist litigation despite his knowledge that McNally did not give the necessary consent to that arrangement. Respondent's instruction to McNally to ignore the ARDC investigator is another example. We do not have confidence that Respondent has a sufficient grasp of the Rules of Professional Conduct to prevent him from engaging in misconduct in the future.

In further aggravation, we give some weight to Respondent's prior discipline. His prior misconduct was similar to this case in that there were elements of carelessness and dishonesty. However, the prior matter did not involve the representation of a client or the misuse of client funds, so we do not give it substantial weight. That said, a lawyer with prior discipline is expected to have a heightened awareness of his or her ethical responsibilities. In re Storment, 203 Ill. 2d 378, 401, 786 N.E.2d 963 (2002). Clearly, Respondent's prior discipline and the ARDC Professionalism Seminar he was required to complete did not have the desired effect.

Respondent did not present evidence of good character or service to the community or the legal profession. The only mitigation before us is his participation in these proceedings and minimal efforts toward restitution. These factors have little effect on our recommendation given the serious misconduct and substantial aggravation.

The Administrator asks us to recommend that Respondent be disbarred, citing In re Harris, 2020PR00041 M.R. 030424 (Sept. 21, 2020); In re Burgess, 2017PR00077, M.R. 029103 (Jan. 12, 2018); and In re Birt, 2013PR00053, M.R. 27896 (May 18, 2016). Respondent requests a less severe sanction but has not cited any case law in support of his request.

Harris and Burgess were disbarred on consent after converting settlement funds. Harris converted $44,643.37 from two clients. Harris, 2020PR00041. Burgess converted $32,849.34 and misrepresented that she continued to hold the funds after she had used them for her own purposes. Burgess, 2017PR00077. Birt was disbarred after he converted $80,000 entrusted to him for paying an elderly woman's expenses and tried to conceal his wrongdoing from his law partner, the court, and the Public Guardian. Birt, 2013PR00053.

We recognize that Harris and Burgess involved a comparable amount of funds as this case, but other cases involving dishonest misuse of funds have resulted in sanctions less than disbarment. We bear in mind that disbarment represents the utter destruction of an attorney's professional life, character, and livelihood, and should be used in moderation. In re Yamaguchi, 118 Ill. 2d 417, 428-29, 515 N.E.2d 1235 (1987).

In In re Jones, 99 CH 69, M.R. 16708 (May 17, 2000), the attorney was suspended for two years and until further order of the Court for settling two personal injury cases without authority, making misrepresentations to a client, and converting $35,000 in settlement funds from three matters. Similar to Respondent, Jones signed his client's name on a settlement release and settlement check without the client's knowledge or consent.

In In re Smith, 2020PR00089, M.R. 030971 (Nov. 16, 2021), an attorney who had previously been suspended for converting client funds was suspended for three years and until further order of the Court after he converted $31,000 from two clients. Smith still owed restitution

of $25,000 to one of the clients at the time he agreed to discipline on consent. See also In re Wilkins, 2014PR00078, M.R. 028647 (May 18, 2017) (two-year suspension until further order of the Court for converting $21,648.55 from the proceeds of her client's real estate transaction and making false statements to the Administrator); In re Vano, 2019PR00095, M.R. 030438 (Sept. 21, 2020) (three-year suspension until further order of the Court for converting $111,642 belonging to four clients and several lienholders); In re Rosen, 2012PR00088, M.R. 27362 (Sept. 21, 2015) (three-year suspension until further order of the Court for converting more than $85,000, making misrepresentations to a police officer, and presenting fabricated bank records to the Administrator).

We find Respondent's misconduct, the amount of funds at issue, and the relevant aggravating circumstances comparable to Jones, Smith, and Wilkins. We note that Rosen and Vano were not disbarred despite converting substantially more money than Respondent did. Respondent's misconduct undoubtedly warrants a severe sanction. Being mindful of the Court's directive to recommend disbarment in moderation, we determine that a lengthy suspension until further order of the Court will serve the purposes of the disciplinary process in this matter.

We find that a suspension until further order of the Court is warranted because Respondent appears to be unable or unwilling to conduct himself according to ethical rules. See In re Houdek, 113 Ill. 2d 323, 327, 497 N.E.2d 1169 (1986). We are especially troubled that Respondent instructed McNally to ignore communication from the ARDC, as it indicates an intent to obstruct the Administrator's investigation.

We determine that a suspension of three years and until further order of the Court is consistent with discipline imposed in similar cases and will protect the public and the profession by requiring Respondent to demonstrate his ability to conform his conduct to ethical rules before

he may resume practice. Accordingly, we recommend that Respondent, David Kyle Cooper, be suspended for three years and until further order of the Court.

Respectfully submitted,

William E. Hornsby, Jr.
Carol A. Casey
John McCarron

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 September 27, 2022.

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

MAINLIB_#1545529_v1

[1] The settlement check misspelled Aimee McNally's first name as "Amy." Respondent wrote "Amy McNally" when he placed the endorsement on the check. He testified he used the incorrect spelling so it would match the check.