

I. Facts

The following facts are established by substantial and material evidence:

1. On February 4, 2009, Ms. Barry represented Miranda Adams in a custody dispute in juvenile court. Ms. Adams gave Ms. Barry a \$1,650.00 retainer which was deposited in the Respondent's trust account. Ms. Barry was to bill against the retainer at \$200.00 per hour and provide Ms. Adams. with periodic statements.

2. The defendant in the juvenile court case died shortly thereafter, covered by a \$100,000.00 life insurance policy designating Ms. Adams as the beneficiary. The decedent's ex-wife made a claim that she was entitled to a portion of the insurance proceeds, and Ms. Barry agreed to represent Ms. Adams in that dispute and agreed to apply the original retainer to her representation in the insurance dispute.

3. On May 4, 2009, Ms. Barry collected the insurance proceeds and placed the \$100,000.00 in the trust account to be held until the dispute with the ex-wife was resolved. After the \$100,000.00 deposit, the balance in the trust account was \$100,005.00.

4. The record shows the following deposits to and withdrawals from the trust account:

- a. On May 15, 2009 a \$7,691.50 check to Jennifer Duke, a former client, whom Ms. Barry had previously represented in a divorce action. Apparently the \$7,691.50 represented money owed by Ms. Barry to Ms. Duke arising out of a sale of some property in the divorce settlement. Ms. Barry testified that she did not remember why the check was written.
- b. A \$1,000.00 check on October 11, 2009 to Ms. Barry.
- c. A \$1,500.00 cash deposit on October 20, 2009.
- d. A \$600.00 check on December 17, 2009 to Ms. Barry.
- e. A \$264.50 check to the Circuit Court Clerk on December 23, 2009. The memo line contained the word "Messick." This check was the filing fee in Ms. Messick's divorce case.

- f. A \$1,500.00 check on January 7, 2010 to Ms. Barry.
- g. A \$1,200.00 check on February 5, 2010 to Ms. Barry.
- h. A \$300.00 check on February 12, 2010 to Ms. Barry.
- i. A \$1,000.00 check on April 7, 2010 to Ms. Barry.
- j. A \$50.00 check on July 16, 2010 to Ms. Barry.
- k. A \$3,000.00 deposit on February 24, 2011. This deposit came from a fee paid Ms. Barry from another client.

5. On March 2, 2011, Ms. Adams agreed to pay Ms. Harris \$95,000.00 of the insurance proceeds. Ms. Barry wrote the check to Ms. Harris' attorney on March 24, 2011.

6. At various times in 2010 and 2011, Ms. Barry deposited in the trust account a total of \$6,854.33 from other clients as retainers or as earned fees. These deposits helped raise the balance in the account to the level where the \$95,000.00 settlement check would clear the bank.

7. The balance in the trust account on December 31, 2011 was \$0.96. At least \$5,000.00 was still owed to Ms. Adams. There is no accounting for the funds of other clients that were deposited in the trust account.

8. Ms. Barry moved to Texas a few weeks prior to the Harris settlement. She did not inform Ms. Adams of her move.

9. Beginning in March of 2011, Ms. Adams asked Ms. Barry in various e-mails about her case. Ms. Barry replied with various excuses for not getting the matter finalized, but she did not tell Ms. Adams that she had moved to Texas. Finally, in October of 2011, Ms. Adams learned that Ms. Barry had moved to Texas and called her office. She told Ms. Adams that the file was at her home and that she would review it that weekend. Ms. Adams never heard from Ms. Barry again. Ms. Adams attempted to contact Ms. Barry again in November of 2012 but received no reply.

10. In July of 2015, after the BPR filed this petition for discipline and it had been set for a hearing, Ms. Barry paid Ms. Adams \$5,000.00.

The hearing panel concluded that Ms. Barry knowingly converted client property causing injury to Ms. Adams 1) by the payment of \$7,691.50 to Ms. Duke and 2) by paying herself \$7,150.00 from the trust fund. The panel further concluded that Ms. Barry deposited her own funds in the trust account, thereby commingling her funds with those of her clients, a violation of §1.15(a) of the Rules of Professional Conduct (RPC). By failing to promptly account to Ms. Adams after the Harris settlement, Ms. Barry violated RPC §1.15(d) (Safekeeping property and funds) and by failing to communicate with Ms. Adams after moving to Texas, she violated RPC §1.4 (Communication).

Based on all the proof, the panel found the five aggravating factors listed in the first part of this Memorandum. The Court concludes that the aggravating factors are established by substantial and material evidence. The prior discipline was a 2010 incident involving a lack of diligence in representing a client and failing to adequately communicate with that client.

The panel did not find any mitigating factors.

II. The American Bar Association's Standards for Imposing Lawyer Sanctions

Rule 9 §8.4 of the Rules of our Supreme Court requires a hearing panel to consider the applicable provisions of the ABA Standards in determining the appropriate type of discipline.

With respect to preserving a client's property, the ABA Standards provide:

4.1 Failure to Preserve the Client's Property

Absent aggravating or mitigating circumstances, upon application of the factors set out in 3.0, the following sanctions are

generally appropriate in cases involving the failure to preserve client property:

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

4.12 Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client.

The ABA Standards are not absolute. The Supreme Court said in *Lockett v. Board of Professional Responsibility*, 380 S.W. 3d 19, 26 (Tenn. 2012) that they are guideposts. But this Court has difficulty finding any authority for imposing a sanction less than disbarment when the lawyer knowingly converts client funds causing injury to the client without any mitigating factors and a finding of five aggravating factors.

The Court finds the cavalier treatment of Ms. Adams the most troubling. By moving to Texas without informing Ms. Adams and avoiding her inquiries for years, it seems that Ms. Barry had decided to stonewall Ms. Adams in the hope that Ms. Adams would just go away.

III. Standard of Review

Under Supreme Court Rule 9, the court may reverse or modify the panel's decision "if the rights of the petitioner have been prejudiced because of the panel's findings, inferences, conclusions or decisions are: ... 4) arbitrary and capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion ..." Tenn. S. Ct. R. 9, §1.3.

A decision is arbitrary and capricious if it "is not based on any cause of reasoning or exercise of judgment, or ... disregards the facts or circumstances of the case without some basis that would lead a reasonable person to reach the same conclusion." *Jackson Mobile Phone Co. v. Tennessee Public Service Commission*, 876 S.W. 2d 106, 110-111 (Tenn. Ct. App. 1993).

The Court concludes that the panel acted arbitrarily and capriciously by failing to consider and apply the ABA Standards in light of the undisputed facts. Based on this record, the only appropriate sanction is disbarment.

ORDER

Based on all of the above, the Court hereby orders that the respondent be disbarred from the practice of law in this state.

This the 25th day of August, 2016.



Special Judge

CERTIFICATE OF SERVICE

I certify that I have sent a copy of the foregoing to counsel for the Board of Professional Responsibility, William Moody, Esq. at 10 Cadillac Drive, Suite 220, Brentwood, Tennessee 37027 and to counsel for the Respondent, William W. Hunt, Esq. at 1409 Hampshire Place, Nashville Tennessee 37221 on this 25th day of August, 2016.



Ben H. Cantrell