STATE OF MINNESOTA

IN SUPREME COURT

A20-1304

Original Jurisdiction — Per Curiam

In re Petition for Disciplinary Action
against Howard S. Kleyman, a Minnesota
Attorney, Registration No. 0056558.

Filed: June 9, 2021
Office of Appellate Courts

Susan M. Humiston, Director, Amy M. Halloran, Assistant Director, Office of Lawyers Professional Responsibility, Saint Paul, Minnesota, for petitioner.

Howard S. Kleyman, Saint Paul, Minnesota, pro se.

S Y L L A B U S

Disbarment is the appropriate discipline for an attorney whose misconduct includes misappropriating client funds, knowingly misusing his client trust account to further fraudulent schemes, making knowingly false statements to the Director, and failing to cooperate during the disciplinary investigation.

Disbarred.

O P I N I O N

PER CURIAM.

The Director of the Office of Lawyers Professional Responsibility filed a petition for disciplinary action against respondent Howard S. Kleyman. The petition alleged

numerous acts of misconduct, including misappropriating client funds, knowingly misusing his client trust account to further fraudulent schemes, knowingly making false statements to the Director, and failing to cooperate during the disciplinary investigation. Kleyman failed to file an answer to the petition. As a result, we deemed the allegations of the petition admitted and allowed the parties to file memoranda on the appropriate discipline. Kleyman did not file a memorandum or appear at oral argument. The Director asks that Kleyman be disbarred. We agree that the appropriate discipline is disbarment.

FACTS

Kleyman was admitted to practice in Minnesota in 1971. In October 2020, the Director filed a petition for disciplinary action against Kleyman. After Kleyman failed to file an answer, we deemed the allegations in the petition admitted. *In re Kleyman*, No. A20-1304, Order at 2 (Minn. filed Dec. 9, 2020); *see also* Rule 13(b), Rules on Lawyers Professional Responsibility (RLPR) (stating that if the respondent fails to file a timely answer, "the allegations" in the petition "shall be deemed admitted").

The petition for disciplinary action is 38 pages long and sets forth detailed accounts of extensive misconduct by Kleyman. His misconduct falls into three broad categories. First, Kleyman misused his attorney trust accounts and committed other misconduct related to those accounts, including knowingly using these accounts to further fraudulent schemes. Second, he misappropriated client funds. Third, he made knowingly false statements to the Director and did not cooperate in the disciplinary investigation. We summarize the misconduct in each of these categories below.

The first category of misconduct involves Kleyman's misuse of his trust accounts, including his knowing use of those accounts to further fraudulent schemes. In July 2017, Kleyman acted as an escrow agent in the sale of a bank draft between the Hanson Group of Companies (the Hanson Group), represented by Chief Executive Officer Harold Boigues,[1] and GCM Hong Kong Limited (GCM), represented by its president K.F. Kleyman's electronic signature appeared on the contract document, his initials were on all four pages, and a scanned copy of his passport was attached to the document. The document also contained information regarding Kleyman's attorney trust account into which GCM was instructed to deposit the money. K.F. believed that the transaction was legitimate because of the use of Kleyman's trust account.

In August 2017, GCM paid the Hanson Group 50,000€ directly and deposited $168,106.43 (the equivalent of 150,000€) into Kleyman's Wells Fargo trust account. Kleyman paid himself $1,680 of the funds that GCM wired into his trust account for his role as an escrow agent in the transaction. The Hanson Group first provided GCM with a bank draft, which K.F. rejected, and the Hanson Group then presented GCM with another instrument, which K.F. also rejected, believing it to be a fraudulent and postdated personal check.

K.F. contacted both the Hanson Group and Kleyman in November 2017, requesting a refund and referencing his previous requests for a refund. In his response, Kleyman claimed that he had never seen the agreement and did not believe that he had a personal

[1] The Director's petition asserts that Boigues is a known fugitive who posted a fraudulent bail bond after being arrested for a serious felony matter in 2014.

responsibility to K.F. or GCM. He never returned the fee that he was paid for acting as an escrow agent to his trust account after K.F. disputed Kleyman's entitlement to those funds, in violation of Minnesota Rule of Professional Conduct 1.15(b).[2] Later, Kleyman tried to contract with K.F. to withdraw his complaint to the Director, in violation of Rule 8.4(d).[3]

In March 2018, Kleyman e-mailed a lending institution, Platform, to disavow any knowledge of the Hanson Group's transactions and any ongoing relationship with the Hanson Group. Kleyman also sent Platform a copy of an e-mail from December 2017, in which the Hanson Group claimed that it inserted Kleyman's signature into the contract with GCM by mistake, and that Kleyman had made no guarantees regarding the transaction. Kleyman requested that Platform assist him in investigating the fraud.

Despite acknowledging the Hanson Group's fraud, Kleyman continued to misuse his trust accounts to facilitate transactions for the Hanson Group or its agents. In September 2018, Kleyman's Wells Fargo trust account became over-drawn and the bank reported the overdraft to the Director. The Director then requested an explanation for the overdraft from Kleyman and asked to see records for the account from July to September 2018.

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[2] "If the right of the lawyer . . . to receive funds from the [trust] account is disputed" by the client or a third person claiming entitlement to the funds "within a reasonable time after the funds have been withdrawn, the disputed portion must be restored to the account until the dispute is finally resolved." Minn. R. Prof. Conduct 1.15(b).

[3] "It is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice." Minn. R. Prof. Conduct 8.4(d).

Kleyman responded in October 2018 that the overdraft was the result of an unexpected wire transfer fee from a transaction made on behalf of an alleged client;[4] the same alleged client, he claimed, who owned all of the funds within the account for that period and for whom Kleyman performed all transactions. He provided an unsigned letter—purportedly from this client—to support this statement. Kleyman also provided the check registers, which the Director believes were created in response to her request, rather than maintained contemporaneously. He did not provide any of the requested client subsidiary ledgers, trial balance reports, or reconciliation reports. Further, many of the payments from and deposits into the trust account involved the Aspen Financial Group, an entity in which Kleyman appeared to have an interest, and a variety of other persons[5] with no discernible connection to any client. None of these transfers involved the representation of a client, in violation of Rule 1.15(a).[6]

Through her investigation, the Director learned that Aspen had a bank account that Kleyman used as his law firm operating account (operating account). The Director also learned that Kleyman maintained other trust accounts, for which he also failed to maintain

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[4] The alleged client, Mark Neuhaus, had judgment entered against him by the United States Securities & Exchange Commission in 2009 for repeated acts of securities fraud totaling over $14,000,000. There were also over $1,000,000 of federal tax liens entered against Neuhaus from 2002–2007.

[5] One of these people was David Sinclair, who was found by the Financial Conduct Authority and Bank of England Prudential Regulation Authority to have set up shell corporations for fraudulent purposes in 2011.

[6] "All funds of clients or third persons held by a lawyer or law firm *in connection with a representation* shall be deposited in one or more identifiable trust accounts . . ." Minn. R. Prof. Conduct 1.15(a) (emphasis added).

the required records, such as check registers, client subsidiary ledgers, trial balance reports, and reconciliation reports, for any of his trust accounts, in violation of Rules 1.15(c)(3),[7] and 1.15(h),[8] and Appendix 1 of the Rules.

During a meeting with the Director in October 2018, Kleyman assured the Director that he would not engage in further transactions with the Hanson Group or Boigues because of their involvement in the fraudulent transaction with GCM. Kleyman presented the Director with the December 2017 e-mail from the Hanson Group and a 30-page document that he claimed was the only document that he had received regarding the transaction between the Hanson Group and GCM. The document, however, did not include any mention of Kleyman's involvement in the transaction, even though Kleyman had previously admitted to serving as an escrow agent. The Director told Kleyman explicitly that use of his trust accounts was to be limited to the representation of clients in a legal matter, but he continued to use these accounts when acting as an escrow agent, in violation of Rule 1.15(a).

Despite Kleyman's assurances to the Director, and his evident knowledge of the fraud perpetrated by the Hanson Group, he continued to engage in transactions with the

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[7] "A lawyer shall . . . maintain complete records of all funds, securities, and other properties of a client or third person coming into the possession of the lawyer and render appropriate accounts to the client or third person regarding them[.]" Minn. R. Prof. Conduct 1.15(c)(3).

[8] "Every lawyer engaged in private practice of law shall maintain or cause to be maintained on a current basis books and records sufficient to demonstrate income derived from, and expenses related to, the lawyer's private practice of law, and to establish compliance with paragraphs (a) through (f)." Minn. R. Prof. Conduct 1.15(h).

Hanson Group and Boigues over a period of 3 years. In July of 2019, Kleyman again transferred funds to Boigues and his wife in three separate transactions, two of which involved illegitimate financial institutions. In one of these transactions, Kleyman accepted a $75,000 loan application fee into his trust account from R.P., who expected that Kleyman would disburse the funds to a bank to facilitate R.P.'s application for a $5,000,000 loan. The financial institution was fraudulent, however, and Kleyman never refunded R.P.'s application fee. Kleyman's continued pattern of using his trust accounts to participate in transactions with the Hanson Group and those connected to the Hanson Group, after he knew the Hanson Group and its actors engaged in fraud, violated Rule 8.4(c).[9]

The second category of misconduct involves Kleyman's intentional misappropriation of client funds. Over the course of 4 years, Kleyman engaged in a pattern of depositing advance filing fees that he received from clients into his operating account. Kleyman used these advance filing fees to cover his own personal and business expenses, resulting in repeated periods when his operating account lacked sufficient funds to cover undisbursed advance filing fees. These shortages ranged from nominal amounts to over $200,000. On one occasion, Kleyman deposited settlement funds he received on behalf of a client into his operating account, in violation of Rule 1.15(b).

Kleyman also misappropriated funds when he received a $335 advance filing fee from M.V. for a bankruptcy petition. After depositing these funds into his operating account, Kleyman never filed a bankruptcy petition on behalf of M.V. He converted the

[9] "It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation[.]" Minn. R. Prof. Conduct 8.4(c).

advance filing fee, without M.V.'s knowledge or consent, and disbursed those funds to himself and his paralegal. This intentional misappropriation of client funds violated Rules 1.15(a) and 8.4(c).

Finally, Kleyman repeatedly failed to cooperate with the Director during the course of the investigation and provided the Director with knowingly false, incomplete, contradictory, and misleading information. Several times the Director requested copies of subsidiary ledgers and other records for his trust accounts or operating account, as well as explanations for discrepancies in the ledgers. Kleyman did not provide a complete or accurate accounting of the identity of those with whom he was conducting business. For example, he told the Director that a certain person was a client, only to later claim he never provided any legal work for this person. He also did not provide all of the requested documents, and offered explanations for some of the transfers that contradicted what he had previously told the Director. In fact, Kleyman provided the Director with contradictory ledgers or accounts of his transactions on several occasions. This conduct violated Rules 8.1(b)[10] and 8.4(c), and Rule 25 of the Rules of Lawyers Professional Responsibility.[11]

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[10] "[A] lawyer . . . in connection with a disciplinary matter, shall not . . . knowingly fail to respond to a lawful demand for information from a[]. . . disciplinary authority . . ." Minn. R. Prof. Conduct 8.1(b).

[11] "It shall be the duty of any lawyer who is the subject of an investigation . . . under these Rules to cooperate with . . . the Director, or the Director's staff . . . by complying with reasonable requests" for documents and information. Rule 25(a), RLPR.

ANALYSIS

Because we have already deemed the allegations in the petition admitted, the only remaining issue is the discipline to be imposed. *In re Lundeen*, 811 N.W.2d 602, 608 (Minn. 2012). The Director asks us to disbar Kleyman.

"The purpose of discipline for professional misconduct is not to punish the attorney but rather to protect the public, to protect the judicial system, and to deter future misconduct by the disciplined attorney as well as by other attorneys." *In re Rebeau*, 787 N.W.2d 168, 173 (Minn. 2010). To determine the appropriate discipline for the established misconduct, we consider the following four factors: "(1) the nature of the misconduct; (2) the cumulative weight of the disciplinary violation; (3) the harm to the public; and (4) the harm to the legal profession." *In re Nathanson*, 812 N.W.2d 70, 79 (Minn. 2012) (citation omitted) (internal quotation marks omitted). We also consider aggravating and mitigating circumstances and the discipline imposed in similar cases. *In re Tigue*, 900 N.W.2d 424, 431 (Minn. 2017). "Sanctions are imposed according to the unique facts of each case, but earlier cases are useful for drawing analogies." *In re Lochow*, 469 N.W.2d. 91, 96 (Minn. 1991).

I.

Kleyman's misconduct in this case was extremely serious. We have consistently considered the misappropriation of client funds to be very serious misconduct. *See, e.g.*, *In re Garcia*, 792 N.W.2d 434, 443 (Minn. 2010) ("Misappropriation of client funds alone 'is particularly serious misconduct and usually warrants disbarment absent clear and convincing evidence of substantial mitigating factors.' " (quoting *In re Rhodes*,

740 N.W.2d 574, 579 (Minn. 2007))). "Misappropriation occurs whenever funds belonging to a client are not deposited in a trust account and are used for any purpose other than that specified by the client." *In re Westby*, 639 N.W.2d 358, 370 (Minn. 2002). Kleyman's conduct is clear misappropriation. He deposited advance filing fees from his bankruptcy clients into his operating account. Over a 4-year period, he used these filings fees for his own business and personal expenses. And in one case, Kleyman converted a client's advance filing fees to earned attorney's fees without the client's consent.

In addition, Kleyman's use of his trust accounts to further fraudulent schemes is very serious misconduct. An attorney's use of her trust account to perpetrate fraud is "a serious breach of the standards of professional conduct required of an attorney licensed [to practice law] in Minnesota." *In re Engel*, 859 N.W.2d 788, 789 (Minn. 2015) (order). Kleyman continued to make transfers from his trust accounts on behalf of the Hanson Group and Harold Boigues despite knowing—and communicating with Platform and the Director—that they had defrauded K.F. In one particularly egregious example, he accepted a loan application fee from R.P. and placed the funds in his trust accounts before disbursing the majority of the money to Boigues' wife and keeping the rest for himself. The financial institution from which R.P. requested the loan was fraudulent and Kleyman never returned the $75,000 application fee. He transferred funds to fraudulent financial institutions on behalf of Boigues or an associate of Boigues on at least one other occasion. Kleyman benefited financially from these transactions because he was paid a portion of the funds that were deposited into his trust account.

Finally, Kleyman's refusal to cooperate in the disciplinary process is serious misconduct. "[N]oncooperation with the disciplinary process, by itself, may warrant indefinite suspension and, when it exists in connection with other misconduct, noncooperation increases the severity of the disciplinary sanction." *In re Nelson*, 733 N.W.2d 458, 464 (Minn. 2007). Kleyman failed to turn over trust account records upon request, and despite being admonished to keep contemporaneous records, failed to do so. Not only did he refuse to share information with the Director, but when he did share information, he provided false and contradictory information that hampered the Director's investigation. The seriousness of Kleyman's misconduct supports substantial discipline.

II.

The second factor for consideration—the cumulative weight of the misconduct—also supports substantial discipline. In determining the cumulative weight of disciplinary violations, we "distinguish between 'a brief lapse in judgment or a single, isolated incident' from 'multiple instances of mis[conduct] occurring over a substantial amount of time.' " *In re Severson*, 860 N.W.2d 658, 673 (Minn. 2015) (quoting *In re Fairbairn*, 802 N.W.2d 734, 743 (Minn. 2011)). The Director's investigatory audit revealed that Kleyman's misappropriation of client funds occurred repeatedly over a period of at least 4 years. Further, he continued to engage with Boigues and the Hanson Group for at least 3 years after the K.F. transaction. Kleyman's failure to cooperate similarly spanned over 2 years. None of his conduct, thus, can be said to be a mere lapse in judgment. Rather, Kleyman demonstrated a consistent pattern of a wide variety of misconduct that continued over a long period of time.

III.

Third, we consider the harm to the public and the legal profession. In analyzing harm, the court considers "the number of clients harmed [and] the extent of the clients' injuries." *In re Coleman*, 793 N.W.2d 296, 308 (Minn. 2011) (citation omitted) (internal quotation marks omitted).

Kleyman's misappropriation of M.V.'s filing fee caused this client financial harm. He never refunded the $335 that M.V. paid him for a filing fee, despite not filing a bankruptcy petition for this client. The petition also alleges that Kleyman was late in returning client fees to many other clients, though he did eventually return the money. Even if these clients suffered no financial harm, we have noted that "[m]isappropriation of client funds, by its very nature, harms not only the specific client, but also the public at large, the legal profession, and the administration of justice." *In re Ruttger*, 566 N.W.2d 327, 331 (Minn. 1997), *see also In re Quinn*, 946 N.W.2d 583, 589–90 (Minn. 2020) ("A lawyer misappropriates funds when funds are not kept in trust and are used for a purpose other than one specified by the client." (citation omitted) (internal quotation marks omitted)). This harm results from the erosion of the public's trust in lawyers and the legal profession more broadly. *See In re Harrigan*, 841 N.W.2d 624, 630 (Minn. 2014). The fraudulent schemes that Kleyman participated in, through the use of his trust accounts, caused financial harm to others, including non-clients such as GCM and R.P. He never refunded GCM's funds when the Hanson Group failed to deliver the agreed-upon bank draft. Similarly, R.P. lost her $75,000 application fee and never got the loan for which she applied.

We have also determined that a lawyer's failure to cooperate in a disciplinary investigation "harm[s] the legal profession by undermining the integrity of the attorney disciplinary system." *In re Brost*, 850 N.W.2d 699, 705 (Minn. 2014) (citation omitted) (internal quotation marks omitted). Kleyman did not fully cooperate with the Director's investigation; in fact, he actively thwarted it at times by presenting false information, which we have found to be harmful to the profession as a whole. Therefore, we conclude that Kleyman's misconduct has caused serious harm.

IV.

Because Kleyman did not respond to the petition, there are no mitigating factors for us to consider. *See In re Matson*, 889 N.W.2d 17, 25 (Minn. 2017) (declining to consider mitigating factors because the allegations have been deemed admitted.). The Director also does not argue that any aggravating factors are present.

V.

We consider our prior decisions to "ensure consistency" in attorney discipline decisions. *Tigue*, 900 N.W.2d at 433. We " 'generally disbar attorneys who misappropriate client funds,' in the absence of 'substantial mitigating factors.' " *In re Gorshteyn*, 931 N.W.2d 762, 770 (Minn. 2019) (quoting *Lundeen*, 811 N.W.2d at 608); *see also In re Capistrant*, 905 N.W.2d 617, 622 (Minn. 2018) (disbarring a lawyer for misappropriating a $547 filing fee, among other misconduct); *Matson*, 889 N.W.2d at 26 (disbarring a lawyer for misappropriating a $550 filing fee, among other misconduct); *In re Rodriguez*, 783 N.W.2d 170, 171 (Minn. 2010) (order) (disbarring a lawyer who misappropriated $650 from clients). The appropriate discipline in this case is disbarment.

CONCLUSION

For the foregoing reasons, respondent Howard S. Kleyman is disbarred from the practice of law in the State of Minnesota, effective on the date of this opinion. Respondent shall comply with Rule 26, RLPR (requiring notice to clients, opposing counsel, and tribunals), and shall pay $900 in costs under Rule 24(a), RLPR.

Disbarred.