FILED
ATTORNEY DISCIPLINE BOARD
September 28, 2021

STATE OF MICHIGAN

Attorney Discipline Board

GRIEVANCE ADMINISTRATOR,
Attorney Grievance Commission,

Petitioner/Appellee,

v Case No. 19-106-GA

PHILLIP G. BAZZO, P 25243,

Respondent/Appellant.
_____/

ORDER AFFIRMING HEARING PANEL ORDER OF DISBARMENT

Issued by the Attorney Discipline Board
333 W. Fort St., Ste. 1700, Detroit, MI

Tri-County Hearing Panel #16 of the Attorney Discipline Board issued an order on February 2, 2021, disbarring respondent from the practice of law in Michigan, effective February 24, 2021. On February 10, 2021, respondent filed a petition for stay of the panel's order, in accordance with MCR 9.115(K), and, on February 17, 2021, a petition for review. The Grievance Administrator objected to respondent's request for a stay. Respondent filed two supplements to his petition for stay and a reply to the Administrator's response. Respondent then filed a Petition for Limited Relief from February 2, 2021 Disbarment Order. Both of respondent's petitions were denied by the Board, and his disbarment became effective February 24, 2021.

On review, respondent argues for a reversal of the panel's findings of misconduct, dismissal of the formal complaint, or, alternatively, that the sanction imposed be reduced to a reprimand or a 179-day suspension, or again alternatively, that the matter be remanded "to a different, morally-neutral panel for further deliberations including proper discipline with all relevant evidence." The Administrator requests that the panel's findings of misconduct and the order of disbarment be affirmed

The Attorney Discipline Board has conducted review proceedings in accordance with MCR 9.118, including review of the evidentiary record before the panel and consideration of the briefs and arguments presented by the parties at a review hearing conducted via Zoom videoconferencing on June 16, 2021. For the reasons discussed below, we affirm the decision of the hearing panel in its entirety.

The Grievance Administrator filed a two-count formal complaint against respondent on October 18, 2019. Count One of the complaint involved respondent's representation of Donna Willacker. Count Two of the complaint involved respondent's representation of Ralph Sachs.[1]

[1] Count Two of the formal complaint related to an email respondent sent to Mr. Sachs and copied to sixteen additional people that contained information about Mr. Sachs' medical condition and that revealed confidential and/or secret information about Mr. Sachs. It was alleged that respondent did not have Mr. Sachs' permission to disclose the confidential and/or secret information, nor did he speak with Mr. Sachs before sending the email. (Formal Complaint ¶¶ 46-67.) The hearing panel subsequently found misconduct as to all of the allegations set forth in the formal complaint in its entirety. Respondent's petition for review does not dispute or assert any error regarding the panel's findings as to Count Two of the formal complaint. Rather, respondent argues that Count Two should be dismissed solely on constitutional grounds - that there was a violation of his constitutional rights during the underlying hearings.

Count One specifically alleged that respondent was retained to represent Ms. Willacker in two separate civil actions (characterized as "2011 litigation" that included "O'Donnell Brothers;" and, "2013 litigation" that included "EDR" and "Farmington Hills"), related to flood damage to her apartment.

It was alleged that during the representation, respondent began a sexual relationship with Ms. Willacker, got her to retroactively approve a $6,667 loan to him from her $6,667 portion of the settlement proceeds from the O'Donnell Brothers resulting from the 2011 litigation, and thereafter, failed to advise Ms. Willacker he received settlement proceeds from EDR and Farmington Hills from the 2013 litigation, and instead took those funds as further "loans" without Ms. Willacker's knowledge and/or consent.

It was further alleged that it was not until Ms. Willacker filed a request for investigation in May 2015, that respondent repaid the remaining amount owed to Ms. Willacker and provided her an accounting she had requested years earlier. Count One charged respondent with violating MRPC 1.7(b); 1.8(a); 1.15(b)(1) and (3), and (d); 8.4(a),(b) and (c); and, MCR 9.104(1)-(3). (Formal Complaint ¶¶ 45(a)-(k).)

With regard to the charges set forth in Count One, respondent's answer noted that he researched the Rules of Professional Conduct and contacted the State Bar of Michigan's ethics hotline "before moving forward to a sexual relationship" with Ms. Willacker and he denied that the relationship caused a conflict, or influenced the settlement of the cases set forth in the complaint. Respondent also stated that Ms. Willacker had expressly agreed to loan respondent her portion of the settlement proceeds, and vehemently denied misappropriating any of the settlement funds.

Respondent also raised a number of affirmative defenses to Count One that included, in part, his representation that he "acted in good faith" and had "good intent" throughout his representation of Ms. Willacker, that he "may have been entitled to a higher fee," that his "proper attorney fee should have been 50%," and, that the panel and the Board lack jurisdiction "to resolve private loan disputes and [to] serve as a collection agency between competent persons." (Respondent's Answer, pp. 9-11.)

The matter was assigned to Tri-County Hearing Panel #16. After a number of adjournments, the hearing on misconduct was held virtually on June 24, 2020. Respondent was the only witness to testify. A total of 48 exhibits were admitted, although a number of respondent's exhibits were excluded by the panel - namely because of respondent's failure to comply with the hearing panel's June 1, 2020 scheduling order that required all proposed exhibits to be listed, summarized and electronically delivered to the case manager by June 10, 2020. The hearing panel's misconduct report was issued on September 3, 2020, in which the panel found misconduct as to all of the allegations set forth in the formal complaint in its entirety.

On September 30, 2020, a notice of virtual sanction hearing and scheduling order was issued that scheduled the sanction hearing for November 30, 2020. Like the scheduling order issued prior to the misconduct hearing, this scheduling order also required all proposed sanction exhibits to be listed, summarized and electronically delivered to the case manager by November 16, 2020. Although respondent filed his proposed sanction hearing exhibits and pre-hearing statement, he also filed a total of six amended/supplemental exhibit lists and pre-hearing statements between November 17 and 23, 2020, none of which were accepted by the panel because they were considered untimely. Both parties filed their respective sanction briefs on

November 23, 2020, as required by the scheduling order. The Administrator's brief argued for disbarment. Respondent's brief argued for "a reprimand or, alternatively, a 179 day suspension" and contained an offer to take a polygraph examination.

Hours before the start of the November 30, 2020, virtual sanction hearing, respondent attempted to electronically file a number of multi-page pleadings, (some exceeded 100 pages), titled "Respondent's Sanction Hearing Opening Statement and Motions to Dismiss" that all attached copies of the exhibits previously excluded by the hearing panel during the misconduct hearing. The panel chair advised respondent at the beginning of the hearing that those documents would not be considered by the panel. (Tr 11/30/20, p 6-8.) Respondent also offered a number of exhibits, all of which were excluded by the panel because they were either irrelevant to the issue of the appropriate sanction to impose, or because they were not provided by the deadline set forth in the panel's scheduling order. Respondent also called two character witnesses to testify on his behalf. The Administrator's counsel argued for disbarment consistent with her pre-hearing sanction brief. The sanction hearing concluded that day and the record was closed. The panel's sanction report was issued on February 2, 2021, and concluded that disbarment was appropriate under ABA Standard 4.1 (Failure to Preserve the Client's Property), and ABA Standard 4.3 (Failure to Avoid Conflicts of Interest).

On review, respondent first argues that there is insufficient evidentiary support for the panel's findings that he misappropriated settlement funds from the EDR and Farmington Hills settlements and that he engaged in a conflict of interest while representing Ms. Willacker.

When a hearing panel's findings are challenged on review, the Board must determine whether the panel's findings of fact have "proper evidentiary support on the whole record." *Grievance Administrator v August*, 438 Mich 296, 304 (1991). See also *Grievance Administrator v T Patrick Freydl*, 96-193-GA (ADB 1998). "This standard is akin to the clearly erroneous standard [appellate courts] use in reviewing a trial court's findings of fact in civil proceedings." *Grievance Administrator v Lopatin*, 462 Mich 248 n 12 (2000) (citing MCR 2.613(C)). Under the clearly erroneous standard, a reviewing court cannot reverse if the trial court's view of the evidence is plausible. *Thames v Thames*, 191 Mich App 299, 301-302 (1991), lv den 439 Mich 897 (1991). Additionally, although the Board reviews the record very closely and carefully, it does not "re-sift the evidence and weigh it anew." *Grievance Administrator v Wilson A. Copeland, II*, 09-48-GA (ADB 2011).

The hearing panel's misconduct report contains a very detailed review of the evidence presented and analysis of how they came to the conclusion that the evidence supported the allegations of misconduct set forth in the formal complaint. Our careful review of the record below reaches the same conclusion. Namely, that respondent took advantage of Ms. Willacker, who had romantic inclinations toward him, to keep funds she was entitled to from the O'Donnell settlement and months later presenting her with a "loan agreement" to retroactively approve the "loan" without providing her a reasonable opportunity to seek the advice of independent counsel; that he thereafter received two separate settlement checks on Ms. Willacker's behalf from the EDR and Farmington Hills 2013 litigation, failed to inform her that he received these settlement funds, and instead took the funds as further "loans" and used them for his own use. We therefore affirm the hearing panel's conclusions that respondent engaged in a conflict of interest and misappropriated those settlement funds by using Ms. Willacker's portion, without her knowledge, to pay down the obligation he owed to her.

Next, respondent argues that the hearing panel erroneously excluded some of his exhibits. The record below indicates that respondent offered, and the panel admitted, 29 exhibits at the misconduct hearing, many of which were duplicates of the exhibits admitted by the Administrator. In addition, respondent offered many exhibits that were objected to by the Administrator's counsel as either irrelevant, or untimely. These excluded exhibits included the "critical" IOLTA records respondent insisted needed to be reviewed, although he acknowledged that he "discovered" these exhibits 14 days before the hearing and requested them from his bank "for this hearing." Some of the "critical" exhibits respondent received via email during the misconduct hearing. (Tr 6/24/20, pp 164-165.)

Evidentiary and procedural rulings by a hearing panel are reviewed under an "abuse of discretion" standard. A trial court's decision to admit evidence is discretionary and will not be disturbed "absent a clear abuse of discretion." *People v Aldrich*, 246 Mich App 101, 113 (2001). "An abuse of discretion occurs when the [trial] court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217 (2008). Furthermore, MRE 103(a) states that "error may not be predicated upon a ruling which admits or excludes evidence, unless a substantial right of the party is affected." *Grievance Administrator v Michael E. Tindall*, 14-36-GA (ADB 2018).

The exhibits the panel excluded for untimeliness at the hearing were the ones respondent produced for the first time either days before or during the misconduct hearing. (Respondent's Exhibits E-4, E-17, D-1, D-2, F-5, F-6; Tr 6/24/20, pp 120-121, 132-135, 143-146, 148-149, 150, 155-156.) We find that it was not erroneous, or an abuse of discretion, for the panel to deny admission of exhibits that were not timely produced.

Respondent further argues that error occurred when the panel relied on the contents of the "many emails" between respondent and Ms. Willacker, contained in Petitioner's Exhibits 6, 7, and 8. With regard to Petitioner's Exhibits 6 and 7, respondent objected to Ms. Willacker's statements as unreliable because "she had drinking issues, she has other issues." However, the email messages contained in these exhibits were also part of Respondent's Exhibit A22-59, that were already admitted by the panel. (Tr 6/24/20, p 76.) Petitioner's Exhibit 8 was admitted over respondent's hearsay objection with the qualification from the Administrator's counsel that she was not offering the exhibit for the truth of the matter asserted, but rather as an admission of a party opponent under MRE 801(d)(2). (Tr 6/24/20, pp 90-91.)[2] Finally, respondent argues that the panel ignored his IOLTA statements/records admitted at the misconduct hearing, (Respondent's Exhibits E-1; E-2; E-3; F-1; and, F2), and that these "critical" records should have been admitted.[3]

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[2] The Administrator's counsel issued a subpoena on January 21, 2020 for Ms. Willacker's appearance at the then scheduled February 11, 2020 hearing, which was served on her at two separate addresses. In the Grievance Administrator's pre-hearing statement filed on June 10, 2020, it was noted that the Administrator's counsel had been unable to locate Ms. Willacker and she did not attend or testify at any of the hearings held before the panel. Given that the Administrator's counsel served a subpoena on her, Ms. Willacker's statements would arguably have also been admissible as a hearsay exception under MRE 804(a) - Declarant unavailable - "unavailability as a witness" includes situations in which the declarant-

> (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance . . . by process or other reasonable means . . .

[3] Respondent filed his pre-hearing statement on November 16, 2020, and included copies of his proposed exhibits, which included some of the exhibits that had been excluded by the panel at the June 24, 2020 misconduct hearing. Respondent's pre-hearing statement also included a request that the panel re-open the misconduct hearing to allow the admission of "Sprint Records Confirm Ethic's Helpline Counseling on December 18 prior to any sexual contact;"

Importantly, respondent does not deny that the records were untimely produced. However, he insists that "the truth is the truth regardless of when discovered," and that it was error for the panel not to admit the documents at hearing. Our review of these "critical" documents reveals that even if they were admitted, they are not helpful to respondent's position. Rather, they simply confirm that respondent contacted the State Bar Ethics Hotline before he engaged in a sexual relationship with Ms. Willacker, and that the EDR and Farmington Hills settlement proceeds were deposited into respondent's IOLTA account and later withdrawn, all facts that were not in dispute. We find that there is no evidence of a "clear abuse of discretion" in the hearing panel's evidentiary rulings during either the misconduct or sanction hearings.

With respect to the hearing panel's decision to order disbarment, the record reveals that pursuant to the Court's directive in *Grievance Administrator v Lopatin*, 462 Mich 235 (2000) to employ the ABA Standards, the panel considered the factors in ABA Standard 3.0 (duty violated, mental state, and injury or potential injury involved), the applicable ABA Standards in light of the answers to those questions, and the applicable aggravating and mitigating factors, before concluding that "the most serious misconduct is respondent's misappropriation of settlement funds" and that "ABA Standard 4.11[4] [disbarment] (knowing conversion of client's property) [is] applicable to this matter, although ABA Standard 4.31[5] [disbarment] (failure to avoid conflicts of interest) also applies and could merit disbarment independently." Next, the panel considered the applicable aggravating and mitigating factors and took into account "any other factors which may make the results of the foregoing analytical process inappropriate," including Michigan precedent in discipline cases. *Lopatin, supra*, at 248 n 13. The panel concluded that "respondent has refused to acknowledge that he committed any misconduct . . . he has no remorse for his conduct . . . and "there are no mitigating factors which would make disbarment the inappropriate sanction to be applied in this matter." (Report 2/2/21, pp 8-9.)

Traditionally, the Board will not disturb a panel's determination as to the appropriate level of discipline unless it is clearly contrary to fairly uniform precedent for very similar conduct or is clearly outside the range of sanctions imposed for the type of violation at issue. *Grievance*

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the Willacker retainer he indicated he just located; EDR IOLTA Justification Spreadsheet (Respondent's Exhibit E-4); Farmington Hills IOLTA Distribution Spreadsheet (Respondent's Exhibit F-4); Farmington Hills IOLTA Distribution Spreadsheet (Respondent's Exhibit F-5); and, Farmington Hills IOLTA Justification Spreadsheet (Respondent's Exhibit F-6).

Respondent's Exhibits E-4, F-4, F-5, and F-6, were all specifically excluded by the hearing panel at the misconduct hearing because they were produced for the first time either days before or during the hearing.

[4] ABA Standard 4.11 states that:

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

[5] ABA Standard 4.31 states that:

> Disbarment is generally appropriate when a lawyer, without the informed consent of client(s): (a) engages in representation of a client knowing that the lawyer's interests are adverse to the client's with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to the client.

Administrator v Gregory J. Reed, 10-140-GA (ADB 2014); *Grievance Administrator v Jeffrey R. Sharp*, 19-80-GA (ADB 2020); *Grievance Administrator v Christopher S. Easthope*, 17-136-GA (ADB 2021). Here, the sanction imposed by the panel has not been demonstrated to be inappropriate under either of these factors.

Finally, we conclude that the remaining issues respondent raises on review lack merit. MCR 9.115(J)(3) clearly states that a finding of misconduct must be established "by a preponderance of the evidence," not by clear and convincing evidence as respondent suggests, and there is no support in the record for respondent's claims that his right to appellate due process has been denied by the Board's brief page limitation and/or oral argument time limit, or that the Administrator's counsel engaged in prosecutorial misconduct in her handling of this matter.[6]

Upon careful consideration of the whole record, the Board is not persuaded that the hearing panel's findings of misconduct, evidentiary and procedural rulings, and decision to disbar respondent were inappropriate.

NOW THEREFORE,

IT IS ORDERED that the hearing panel's order of disbarment issued February 2, 2021, is **AFFIRMED** in its entirety.

IT IS FURTHER ORDERED that respondent shall pay court reporting costs incurred by the Board for the review hearing conducted on June 16, 2021, in the amount of $174.50. This cost shall be added to the payment plan currently in effect. Respondent's final payment shall now be due on or before May 21, 2021, in the amount of $56.50. Please refer to the attached cost payment instruction sheet for method and forms of payment accepted.

ATTORNEY DISCIPLINE BOARD

By: _____
Jonathan E. Lauderbach, Chairperson

Dated: September 28, 2021

Board members Jonathan E. Lauderbach, Barbara Williams Forney, Karen D. O'Donoghue, Linda S. Hotchkiss, MD, Michael S. Hohauser, Peter A. Smit, and Linda M. Orlans concur in this decision.

Board member Michael B. Rizik, Jr., was absent and did not participate in this matter.

Board member Alan Gershel voluntarily recused himself from participation in this matter.

[6] Respondent also argued that the Administrator "denied [his] right to confront the witnesses against [him]," by not calling Ms. Willacker as a witness at the hearings, and that the failure to do so warrants dismissal of the entire formal complaint. However, respondent never raised this issue at the hearing, thereby waiving the argument on review. Regardless, we have previously held that the Confrontation Clause does not apply to attorney disciplinary proceedings. *Grievance Administrator v Catherine A. Jacobs*, 19-132-GA (ADB 2021).