STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellee,

v

Michael R. Carithers, Jr., P 45614,

Respondent/Appellant,

Case No. 11-95-RD

Decided: January 31, 2014

Appearances:

Patrick K. McGlinn, for the Grievance Administrator, Petitioner/Appellee
Michael R. Carithers, Jr., In Pro Per, Respondent/Appellant

BOARD OPINION

This reciprocal discipline proceeding is based upon an order of disbarment entered by the Maryland Court of Appeals in a matter titled *Attorney Grievance Commission of Maryland v Michael Robert Carithers, Jr.*, 421 Md 28; 25A3d 181 (2011). Pursuant to MCR 9.104(B)[1] the only issues to address before the panel were whether respondent was afforded due process of law in the course of the original proceedings and whether imposition of identical discipline in Michigan would be clearly inappropriate.[2] Respondent raised no due process issues, so the only issue addressed by the panel was whether identical or comparable discipline would be clearly inappropriate. The hearing panel entered an order of disbarment. We affirm.

A hearing was held in this matter on October 3, 2011, and briefs as requested by the panel were filed in September 2012. The hearing panel found that the appropriate sanction to impose was

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[1] Effective September 1, 2011, reciprocal discipline proceedings are governed by MCR 9.120(C). This proceeding was filed and argued to the panel under MCR 9.104(B), which was then in effect.

[2] MCR 9.104(B), in addition to being changed to MCR 9.120(C), was modified to the extent that the word "identical" was changed to "comparable."

disbarment and that to do so would not be clearly inappropriate. On April 22, 2013, the panel's report (attached) and an order of disbarment was issued. Respondent filed a petition for review, arguing that the panel did not use the ABA Standards for Imposing Lawyer Sanctions; that the panel erred in imposing a per se disbarment rule for misappropriation when discipline less than disbarment has previously been imposed in similar cases; that the panel failed to address alleged inconsistency in the factual findings in Maryland; and that disbarment is unduly harsh where there was no client injury and no prior discipline. We find no basis for reversal.

Pursuant to MCR 9.104(B), now MCR 9.120(C): "Proof of adjudication of misconduct in a disciplinary proceeding by another state or a United States court is conclusive proof of misconduct in a disciplinary proceeding in Michigan." The Maryland Court of Appeals found by clear and convincing evidence that respondent willingly and knowingly misappropriated funds while acting as of counsel to the Maryland firm of Brown & Sheehan, LLP (B&S) and that he deceived both B&S and the clients involved, in violation of Maryland Rules of Professional Conduct 1.15(a) and 8.4(a)-(d).

The panel carefully considered whether discipline identical, or comparable, to that imposed in Maryland would be clearly inappropriate. In so doing, the panel specifically addressed respondent's argument that the ABA Standards somehow render disbarment inappropriate in Michigan. The panel examined the generally appropriate sanction in Maryland for respondent's conduct and compared it to the sanctions generally imposed in Michigan under the ABA Standards and our case law, and concluded that disbarment is appropriate here as well as in Maryland. We agree. As we have articulated in numerous prior decisions, intentional misappropriation of client or third party funds generally warrants disbarment. See, e.g., *Grievance Administrator v Frederick A. Petz*, 99-102-GA (ADB 2001) (30-month suspension increased to disbarment where lawyer "invested" his client's funds in his own partnership and paid his aunt's nursing home bills, etc.; disbarment declared to be the presumptively appropriate sanction to be imposed for intentional conversion of client funds absent compelling mitigation); *Grievance Administrator v Carl Oosterhouse*, 07-93-GA (ADB 2008) (affirming disbarment of lawyer who converted client and firm funds and submitted false expense reports, etc., and lied when confronted); *Grievance Administrator v Rodney Watts*, 05-151-GA (ADB 2007) (increasing one-year suspension to disbarment where lawyer lied to court to obtain release of funds to be shared with predecessor counsel and

misappropriated the funds, concluding that disbarment is the presumptive sanction for misappropriation of third-party funds notwithstanding the technical inapplicability of ABA Standard 4.1); *Grievance Administrator v Mark J. Tyslenko*, 12-17-GA (ADB 2013) (45-day suspension with conditions increased to disbarment where lawyer, in five separate incidents over one year, converted a total of $9,200 in fees paid to him by clients owed to the law firm that employed him); and, *Grievance Administrator v Anthony T. Chambers*, 12-80-GA (ADB 2013) (180-day suspension with condition increased to disbarment where lawyer, among other things, improperly, and repeatedly used his IOLTA account for personal and business purchases).

Thus, as the panel aptly noted in its report, Michigan cases are in accord with Maryland's:

> In Maryland, "Absent compelling extenuating circumstances, intentional misappropriation of client funds or another's funds is deceitful and dishonest conduct, which justifies disbarment." *Carithiers*, [sic] *supra* at 58. In Michigan the rule is much the same. See *Grievance Administrator v Brent S. Hunt*, 12-10-GA (ADB 2012) (disbarring respondent for misappropriating estate funds and citing, with approval, Board decisions requiring "compelling mitigation" to avoid the presumptive sanction of disbarment when client funds are knowingly converted). [HP Report, at p 8.]

Respondent seeks to distinguish the foregoing authorities from the "facts" of this case and analogize his circumstances to various other Michigan cases. However, respondent loses sight of the fact that this is a reciprocal proceeding, not an original proceeding filed pursuant to MCR 9.115(B). He is not free to argue, or re-argue, the facts as if the Maryland court's findings, and MCR 9.120(C) did not exist. Finally, we conclude that his attacks on the decision of the Maryland court do not undermine the panel's conclusion that comparable or identical discipline is appropriate.

For all of the foregoing reasons, and for the reasons argued in the petitioner's brief, we will enter an order affirming the hearing panel's order of disbarment.

Board members Thomas G. Kienbaum, James M. Cameron, Jr., Sylvia P. Whitmer, Ph. D., Rosalind E. Griffin, M.D., Carl E. Ver Beek, Craig H. Lubben, and Lawrence G. Campbell concur in this decision.

Board members Dulce M. Fuller and Louann Van Der Wiele did not participate.

STATE OF MICHIGAN

Attorney Discipline Board

GRIEVANCE ADMINISTRATOR,
Attorney Grievance Commission,

Petitioner,

v Case No. 11-95-RD

MICHAEL R. CARITHERS, JR., P 45614,

Respondent.
_____/

REPORT OF TRI-COUNTY HEARING PANEL #63

PRESENT: Gary K. August, Chairperson
Robert E. Toohey, Member
Emily J. Eichenhorn, Member

APPEARANCES: Patrick K. McGlinn, Senior Associate Counsel
for the Attorney Grievance Commission

Michael R. Carithers, Jr., Respondent
in pro per

I. EXHIBITS

Exhibit No. 1 (September 7, 2011 Self-Report Letter)

II. WITNESSES

Michael R. Carithers, Jr., Respondent

III. PANEL PROCEEDINGS

This reciprocal discipline proceeding under MCR 9.104(B)[1] was instituted by the Grievance Administrator on August 8, 2011. On that date, the Administrator filed a petition for order to show cause, accompanied by a copy of an Opinion and Order issued July 18, 2011, by the Court of Appeals of Maryland disbarring Respondent for misconduct described below, *Attorney Grievance Commission of Maryland v Michael Robert Carithers, Jr.*, 421 Md 28; 25 A3d 181 (2011).

[1] Effective September 1, 2011, reciprocal discipline proceedings are governed by MCR 9.120(C). This proceeding was filed and argued to the panel under MCR 9.104(B), which was then in effect.

On August 11, 2011, this matter was assigned to Tri-County Hearing Panel #63 and Respondent was ordered to show cause to the panel why a reciprocal order of discipline should not be entered. Citing MCR 9.104, the Board's order referenced that portion of the court rule which states:

> (B) Proof of adjudication of misconduct in a disciplinary proceeding by another state or a United States court is conclusive proof of misconduct in a disciplinary proceeding in Michigan. The only issues to be addressed in the Michigan proceeding are whether the respondent was afforded due process of law in the course of the original proceedings and whether imposition of identical discipline in Michigan would be clearly inappropriate.

The Michigan Court Rules governing reciprocal discipline were amended effective September 1, 2011. See MCR 9.120(C). The Board has recently affirmed a panel's use of the prior reciprocal discipline rule, former MCR 9.104(B), in a case similarly postured in terms of timing, i.e., commenced and adjudicated under the former rule although amendments became effective during the pendency of the action. *Grievance Administrator v David A. Binkley*, 11-32-RD (ADB 2012). However, it might also be argued that use of the current rule, MCR 9.120(C), is appropriate under, or by analogy to, MCR 1.102.[2]

The Parties agree, and the Panel has concluded, that analysis and resolution of the dispositive issues in this case are the same under the current or former rule. The critical issue is whether comparable discipline is clearly inappropriate. Under the former rule, the term "identical" was used instead of "comparable." However, the Board applied the term "identical" in a flexible manner that took into account differences between jurisdictions with respect to the nature, duration and consequences of discipline. *See, e.g., Grievance Administrator v Mark L. Davis*, ADB 47-89 (1990) (one-year suspension in original jurisdiction yielded 119-day suspension in Michigan in light of the fact that reinstatement proceedings such as those under MCR 9.123(B) were not required in original jurisdiction).

IV. FINDINGS AND CONCLUSIONS REGARDING MISCONDUCT

In accordance with Maryland procedure, the Maryland Court of Appeals (the court of last resort in that state) appointed a circuit judge to hold an evidentiary hearing and make findings of fact and recommended conclusions of law. Numerous specific and detailed findings were made. The following passage from the Court of Appeals' opinion in Respondent's matter reflects the essence of the misconduct in this case while he was of counsel to Brown & Sheehan, LLP (B&S):

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[2] Rule 1.102 (Effective Date), reads as follows:

> These rules take effect on March 1, 1985. They govern all proceedings in actions brought on or after that date, and all further proceedings in actions then pending. A court may permit a pending action to proceed under the former rules if it finds that the application of these rules to that action would not be feasible or would work injustice.

> [Respondent] was hired by Mr. Brown as "of counsel" at the firm of B&S. There was no written contract regarding the Respondent's employment at B&S, including any written contracts or memoranda regarding the Respondent's "of counsel" position at the firm. The Respondent was hired as a full-time employee of B&S, with a full-time salary of approximately ninety thousand dollars per year ($90,000), including vacation and sick days, and various benefits including health, disability, life insurance, malpractice insurance, and a 401k plan. This was the same arrangement for associates at B&S. However, during the Respondent's interview with B&S, it was determined that considering the Respondent's experience, the Respondent would hold an "of counsel" designation at the firm in order to denote a more senior status than an associate. There was no agreement between the Respondent and Mr. Brown or Mr. Sheehan, that Respondent could maintain a side practice. On December 13, 2007, the Respondent signed an acknowledgment form, indicating that he had received the B&S personnel handbook.
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> * * *
>
> The Respondent did not disclose, either in writing or orally, to anyone at B&S that he was retaining clients on his own, outside of the firm, or that he was regularly depositing client fees into his personal account, while being employed as a full-time salary attorney at B&S. The Respondent never requested permission from B&S to retain clients for himself, maintain an outside practice for himself or retain payments for himself, even though he had multiple opportunities to discuss the matter with Mr. Brown or Mr. Sheehan. Even after Mr. Sheehan informed the Respondent to withdraw from the cases where clients had failed to pay B&S legal fees, the Respondent 'decided to keep [the clients] as a side practice to avoid withdrawing from the cases.' Further, the Respondent admitted that he knew there was going to be a problem if he informed Mr. Brown and Mr. Sheehan that he was not withdrawing from the cases and instead continued to represent the clients as a side practice.
>
> The Respondent was never given authorization by either Mr. Brown or Mr. Sheehan to retain his own clients or have a side practice during his employment with B&S. The Respondent was not given authorization to use B&S letterhead, billing statements, or resources for the purposes of retaining his own clients. Furthermore, the Respondent was not given authorization to retain his own clients and accept payments from those clients directly for himself. [*Carithers*, *supra* at 34, 37.]

The Court of Appeals further summarized the misconduct of Respondent as follows:

> Judge Ausby found by clear and convincing evidence that Respondent's acts and omissions constituted a violation of Rules 8.4(a)-(d) and 1.15(a) of the MRPC . . .

> In this case, the Respondent never maintained a trust account while representing clients at his side practice. In addition, the Respondent deposited the initial retainers for Ms. Stewart and Mr. Lennon into his personal account prior to earning all of the legal fees. There is clear and convincing evidence that the Respondent violated Rule 1.15(a) of the MRPC and the Maryland Business Occupations and Professions Code § 10-304(a) by failing to place the initial retainers of clients into a separate trust account until such fees were earned by the Respondent. See *Attorney Grievance v. Thomas*, 409 Md. 121, 165, 973 A.2d 185 (2009) (finding that Respondent's placement of the entire retainer fee from the client including at least a portion not yet earned into his general operating account violates § 10-304(a) and MRPC 1.15(a)).

As to MRPC 8.4(b), engaging in criminal conduct that reflects adversely on a lawyer's honesty, trustworthiness and fitness as a lawyer, the hearing judge made the following conclusions of law:

* * *

> There is clear and convincing evidence that the Respondent deposited payments from clients into his personal account. Several of the clients were previously B&S clients that had been terminated because of outstanding balances to B&S. The Respondent continued to represent these clients despite Mr. Sheehan's orders to terminate the attorney-client relationship. The payments received directly by the Respondent represented legal fees still owed to B&S. The Respondent was never authorized to receive and deposit any payments directly from clients. The Respondent willingly and knowingly deposited checks from previous B&S clients that had outstanding balances with B&S. There is clear and convincing evidence that the Respondent willfully exerted control over checks and intended to deprive B&S of the checks. Theft is criminal conduct that explicitly and adversely reflects on a lawyer's honesty, trustworthiness, and fitness as a lawyer. Therefore, there is clear and convincing evidence that the Respondent has violated Rule 8.4(b) of the MRPC by engaging in criminal conduct that reflects adversely on his honesty, trustworthiness and fitness as a lawyer.

As to MRPC 8.4(c), engaging in conduct involving dishonesty, fraud, deceit and misappropriation, the hearing judge made the following conclusions of law:

* * *

> While employed as an attorney at B&S, the Respondent deposited retainers and payments from clients into his personal account. The Respondent was never authorized to retain former clients of B&S and continue representing them as part of his side practice. The Respondent was never authorized to receive any payments directly from clients to deposit into his personal account. Moreover, the Respondent was never authorized to use B&S resources in order to maintain his side practice. The Respondent's intentional misconduct reflects adversely on his honesty, trustworthiness and fitness as a lawyer. There is clear and convincing evidence that the Respondent has violated Rule 8.4(c) of the MRPC by misappropriating payments received from his clients that represented [legal fees still owed to B&S] and using B&S resources to maintain his side practice. Furthermore, there is clear and convincing evidence that the Respondent violated Rule 8.4(c) of the MRPC by depositing Ms. Stewart's and Mr. Lennon's initial retainers into his personal account prior to earning the legal fees. See *Attorney Grievance v. Moore*, 301 Md. 169, 482 A.2d 497 (1984); *Attorney Grievance v. Ezrin*, 312 Md. 603, 541 A.2d 966 (1988). [*Carithers*, *supra* at 39-40.]

The judge also found that respondent committed conduct prejudicial to the administration of justice, in violation of Maryland Rule of Professional Conduct 8.4(d). And, with regard to aggravating and mitigating factors, the Court of Appeals noted:

> The hearing judge noted several mitigating circumstances. Judge Ausby found that Respondent cooperated with the Attorney Grievance Commission's investigation by submitting a letter to Bar Counsel describing his billing practices and use of B&S resources. Respondent also informed Bar Counsel that he signed an agreement with B&S to pay B&S an amount representing the fees that B&S clients had paid directly to Respondent, while Respondent was employed at B&S. The hearing judge further found that Respondent had not engaged in any previous known acts of misconduct, and that his prompt issuance of checks to B&S for CJA legal fees indicated that he did not intend to deceive B&S, with regards to the CJA cases.

> The hearing judge also noted several aggravating circumstances. Judge Ausby found that Respondent had intentionally deceived B&S by maintaining a side practice while a full-time salaried employee of B&S. The hearing judge found that Respondent had represented and personally accepted payments from terminated B&S clients after B&S expressly prohibited such representation. In addition, the hearing judge found that Respondent failed to disclose his side practice to B&S, and used B&S resources to maintain his side practice. According to the hearing judge's findings, Respondent intentionally deceived his side practice clients by using B&S letterhead, stationary, retainer agreements and billing statements, and thereby purported to represent these clients as an attorney of B&S. The hearing judge stated that "Respondent's motives were dishonest because he purposefully and intentionally did not disclose to anyone at B&S that he was accepting payments directly from clients and retaining clients outside of B&S to supplement his full-time salary at B&S." In addition, the hearing judge noted that, even if Respondent had been authorized by B&S to maintain a side practice, Respondent still failed to maintain a trust account for his side practice clients. Finally, the hearing judge pointed out that, "Respondent has been practicing law since 1991 and should be considered to have substantial experience in the practice of law." [*Carithers, supra* at 41-42.]

Respondent filed 14 exceptions to the hearing judge's findings of fact, and the Court of Appeals overruled them all. Among these was the contention that the firm knew he maintained a side practice; the Court held that there was evidentiary support for the hearing judge's finding, by a clear and convincing standard of proof, that Respondent "intentionally concealed his side practice from B&S." *Carithers, supra* at 50. The Maryland Court of Appeals found that Respondent willingly and knowingly misappropriated funds and deceived both B&S and the clients involved. Ultimately, the Maryland Court of Appeals determined the appropriate sanction for Respondent is disbarment. Respondent sought reconsideration of the Maryland Court of Appeals Opinion, and reconsideration was denied.

The Respondent also held a license to practice law in Washington, D.C. during the pendency of these proceedings. On August 16, 2012, the District of Columbia Court of Appeals issued its Opinion on Report and Recommendation of the Board on Professional Responsibility. While the Court of Appeals in Washington, D.C. determined that it appears the Respondent did not misappropriate any funds that were owed to his clients, it determined the "entire course of conduct falls within the range of misconduct that would be met by disbarment in this jurisdiction." *In re Michael R. Carithers, Jr.*, No. 11-BG-1405, Dist. Columbia Ct. of App. at 11 (August 16, 2012). This Panel has considered both the sanction and analysis of the District of Columbia Court of Appeals in rendering this report.

In a Michigan discipline proceeding commenced based upon attorney discipline ordered in another jurisdiction, the misconduct is conclusively established for purposes of the proceeding in this state. The only issues to be determined by a hearing panel are whether the attorney was afforded due process in the original jurisdiction, and whether identical or comparable discipline for the misconduct would be clearly inappropriate. Respondent raises no due process issues. We will discuss the appropriate discipline to be imposed in the following section of this Report.

V. REPORT ON DISCIPLINE

Respondent cites *Grievance Administrator v Davis, supra*, for the proposition that "it would be 'clearly inappropriate' to impose the same discipline in Michigan if the discipline as applied in Michigan would impose a harsher form of punishment than the original disciplining jurisdiction."[3] This, we think, somewhat misstates the holding in *Davis*. While it is true that the Board took account of the differing procedural rules and, consequently, different impact on the respondent of forms of discipline which seem similar on the surface, the Board did not, as we read *Davis,* state that reciprocal discipline in Michigan may never be more severe than that imposed in the original jurisdiction.

While there is some merit to Respondent's argument, we read *Davis* as taking into account more than the original jurisdiction's sanction and its impact on the respondent. In particular, we note the discussion of the relevant factors in *Davis*:

> In this case, we are persuaded by respondent's argument that if we are to give full faith and credit to the disciplinary sanction imposed by the Supreme Court of Colorado, we should be equally willing to give full faith and credit to that Court's decision that respondent's suspension should be terminated without the additional time and expense of a lengthy reinstatement process.
>
> We hasten to emphasize that there is considerable merit to the Grievance Administrator's argument that the nature of the respondent's misconduct could support a more severe form of discipline. If the respondent had been subject to discipline in Michigan solely on the basis of his drug-related conviction, it is entirely possible that this Board might have imposed a longer suspension. Our decision in this case is based upon our recognition of the "extraordinary mitigating circumstances" described by the Supreme Court of Colorado and our recognition of the difficulty in imposing "identical" reciprocal discipline. Our decision to affirm the hearing panel's action in this case should not be construed as a decision to set a precedent in future cases involving attorneys found to have participated in the distribution of an illegal drug. [*Davis, supra,* at p 3.]

Thus, panels and the Board should also consider the generally appropriate discipline for similar conduct in Michigan. *See Grievance Administrator v Eric P. Von Wiegen*, ADB 27-89 (ADB 1990). Respondent himself acknowledges this by virtue of his reliance on the American Bar Association Standards for Imposing Lawyer Sanctions which have been adopted by our Supreme Court and are part of the fabric of Michigan's jurisprudence with regard to the level of discipline for various forms of misconduct.

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[3] Respondent's Supplemental Brief, p 10.

Although certain differences may exist between the procedural rules of Maryland and the District of Columbia regarding disbarment and reinstatement on one hand and those of Michigan on the other hand, given the nature and circumstances of the misconduct, we have not been persuaded by Respondent that he will in fact attain reinstatement in Maryland or the District of Columbia sooner than he would in Michigan. Moreover, as set forth below, Respondent's misconduct would have led to disbarment in Michigan.

Respondent argues that the use of the ABA Standards contributes to making disbarment inappropriate in his case. But, in fact, the Michigan cases are in accord with the Maryland decisions. In Maryland, "Absent compelling extenuating circumstances, intentional misappropriation of client funds or another's funds is deceitful and dishonest conduct, which justifies disbarment." *Carithiers, supra* at 58. In Michigan the rule is much the same. See *Grievance Administrator v Brent S. Hunt*, 12-10-GA (ADB 2012) (disbarring respondent for misappropriating estate funds and citing, with approval, Board decisions requiring "compelling mitigation" to avoid the presumptive sanction of disbarment when client funds are knowingly converted). *See also*, *Grievance Administrator v Carl Oosterhouse*, 07-93-GA (ADB 2008) (disbarment for conversion of client and firm funds), and *Grievance Administrator v Rodney Watts*, 05-151-GA (ADB 2007) (disbarment for conversion of attorney fees belonging to another attorney).

Accordingly, we conclude that disbarment is the appropriate sanction in this case and would not be clearly inappropriate.[4]

The goal of reciprocal discipline proceedings is to protect the public in the various states in which a lawyer is licensed by an efficient yet fair means of recognizing one jurisdiction's decision that a lawyer has committed misconduct, while affording assurance to the lawyer that due process was observed in the original jurisdiction and acceding to the second jurisdiction's important role in setting the generally appropriate level of discipline for a given ethical violation. A disbarment under MCR 9.106(1) in this case serves these objectives and is consistent, in our view, with the current and former rules on reciprocal discipline.

Based on Respondent's undisputed representation that he closed his practice in Michigan at the time his disbarment in Maryland became effective (August 17, 2011), we will order that Respondent be disbarred from the practice of law in Michigan, effective August 17, 2011.

VI. SUMMARY OF PRIOR MISCONDUCT

None

[4] This is our considered view whether we view this as a determination that the two types of disbarments are comparable, or as a judgment that the features of a Michigan disbarment which are lacking in Maryland (e.g., a period before which a petition may be filed specified in the rules rather than discerned from practice), are important enough for us to conclude that the Maryland-type disbarment (without these features) is clearly inappropriate.

VII. ITEMIZATION OF COSTS

Attorney Grievance Commission:	
(See Itemized Statement filed 10/28/11)	$ 7.23
(See Itemized Statement filed 03/29/12)	$ 21.65
Attorney Discipline Board:	
Hearing held 10/03/11	$ 191.00
Hearing held 03/07/12	$ 359.50
Administrative Fee [MCR 9.128(B)(1)]	$1,500.00
TOTAL:	**$2,079.38**

ATTORNEY DISCIPLINE BOARD
Tri-County Hearing Panel #63

By: _____
Gary K. August, Chairperson