STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellee/Cross-Appellant,

v

Scott E. Combs, P-37554,

Respondent/Appellant/Cross-Appellee,

Case No. 15-154-GA

Decided: April 1, 2021

BOARD OPINION

Appearances: Dina Dajani, for Grievance Administrator, Petitioner/Appellee/Cross-Appellant
Paul J. Dillon and Gregory Rohl, for Respondent/Appellant/Cross-Appellee

Tri-County Hearing Panel #7 of the Attorney Discipline Board issued an order on June 19, 2020, suspending respondent's license to practice law in Michigan for a period of three years and ordering restitution in the amount of $19,752.10. Respondent timely filed a petition for review and requested an interim stay of 60 days to allow respondent's new counsel sufficient time to prepare a complete petition for stay. The Grievance Administrator timely filed a cross-petition for review.

On July 10, 2020, the Board entered an order granting, in part, respondent's request for an interim stay. The Board's order stayed the order of discipline on an interim basis and respondent was given 14 days to supplement his request for a stay. After respondent's supplement was filed, the Board issued an order denying in part, and granting in part, respondent's petition for stay of order of suspension and restitution, staying the panel's decision regarding restitution only and denying respondent's motion for a stay of his three-year suspension.

Respondent filed a motion for reconsideration regarding the stay, which was denied. On October 13, 2020, the Board entered an order granting a stay of the suspension of respondent's license to practice law in Michigan *nunc pro tunc* from October 8, 2020, to October 13, 2020, ordering that the interim stay of the Order of Suspension be dissolved, and ordering respondent's three-year suspension to become effective October 14, 2020.

On October 21, 2020, the Attorney Discipline Board conducted a virtual proceeding via Zoom video-conferencing, in accordance with General Order ADB 2020-2 and MCR 9.118, which included a review of the evidentiary record before the panel and consideration of the briefs and arguments presented by the parties. For the reasons discussed below, we affirm the hearing panel's findings of misconduct, modify the order of restitution, and increase the discipline imposed from a three-year suspension to disbarment.

I. Panel Proceedings and Background

This matter arises out of respondent's alleged difficulty in operating his law practice because of a tax debt owed to the IRS. In 2004 and 2005, respondent and/or respondent's wife owed personal income tax debts to the IRS totaling approximately $194,510.00. Because of this, the IRS would levy any personal or business bank account that respondent opened, in an attempt to collect on the tax debt. As a result, respondent opened an IOLTA, and used this account exclusively from 2007 through 2010 for all his banking needs.

The Grievance Administrator filed a four-count formal complaint on December 28, 2015, followed by an amended formal complaint on February 18, 2016.[1] Specifically, Count One alleged that respondent regularly misused his IOLTA, in violation of MRPC 1.15(a)(3), (c), (d), and (f). Count One, as well as the other three counts, also alleged that respondent violated or attempted to violate the Rules of Professional Conduct in violation of MRPC 8.4(a) and MCR 9.104(4), and engaged in conduct involving dishonestly, fraud, deceit or misrepresentation, in violation of MRPC 8.4(b). Further, it was alleged that this conduct was prejudicial to the administration of justice (MCR 9.104(1)), constituted conduct that exposes the legal profession to obloquy, contempt, censure or reproach (MCR 9.104(2)), and was contrary to justice, ethics, honesty or good morals (MCR 9.104(3)).

Count Two involved respondent's representation of Robert Miller in an employment discrimination action. It was alleged that shortly after respondent deposited Mr. Miller's settlement funds into his IOLTA, these funds were levied by the IRS to pay a portion of respondent's tax debt. It was also alleged that respondent filed suit against the United States on behalf of Mr. Miller,

[1] The Amended Complaint did not add any additional counts, but rather only contained additional facts to support the allegations against respondent.

without Mr. Miller's consent, in violation of MRPC 1.2(a). It is further alleged respondent failed to keep Mr. Miller reasonably informed, in violation of MRPC 1.4(a); failed to sufficiently explain the matter to Mr. Miller, in violation of MRPC 1.4(b); engaged in a conflict of interest, in violation of MRPC 1.7(b)(1) and (2); misused his IOLTA, in violation of MRPC 1.15(a)(3), (c), (d) and (f); and knowingly made a false statement of fact to a tribunal, in violation of MRPC 3.3(a)(1).

Count Three involved respondent's representation of Carl Novick in a personal injury lawsuit. It was alleged that respondent deposited a portion of Mr. Novick's settlement proceeds that were marked to be held for claims of third parties, into his IOLTA, and that thereafter, respondent failed to safeguard these funds because he used them to pay personal and business expenses, and because a portion of those funds were levied by the IRS to pay respondent's tax debt. It was further alleged respondent took action on behalf of Mr. Novick without authority to do so, in violation of MRPC 1.2(a); failed to keep Mr. Novick reasonably informed, in violation of MRPC 1.4(a); failed to sufficiently explain the matter to Mr. Novick, in violation of MRPC 1.4(b); engaged in a conflict of interest, in violation of MRPC 1.7(b)(1) and (2); misused his IOLTA, in violation of MRPC 1.15(a)(3), (b)(3), (c), (d) and (f); and knowingly made a false statement of fact to a tribunal, in violation of MRPC 3.3(a)(1).

Count Four was based upon two overdraft notifications issued against respondent's IOLTA. It was alleged that respondent wrote two checks – $5,000 to Mr. Novick to satisfy a civil judgment, and $5,000 for office rent – from his IOLTA. Subsequently, respondent transferred $5,000 of his personal funds from his business account to his IOLTA, and then the bank transferred an additional $5,000 (as a result of respondent's overdraft protection), in order to return the IOLTA balance to zero. It was alleged respondent misused his IOLTA, in violation of MRPC 1.15(a)(3), (c), (d) and (f), and that he failed to fully and fairly disclose all the facts and circumstances pertaining to the alleged misconduct in his written signed answer to the request for investigation, in violation of MCR 9.113(A).

The matter was assigned to Tri-County Hearing Panel #7, and became an extensive discipline case that took place over the course of nearly two years. Seven hearings on misconduct were held, eleven witnesses testified, and hundreds of exhibits were admitted into evidence. After hearing all of the evidence, including testimony from the respondent himself, the hearing panel issued a 15-page misconduct report, meticulously laying out the allegations and evidence to support

their findings. The hearing panel found that respondent committed misconduct as alleged in Counts One, Two, and Three of the amended formal complaint. The panel dismissed Count Four, finding that it was the result of sloppy office procedures rather than misconduct.[2]

A sanction hearing was held on November 14, 2019, where respondent testified on his own behalf and called a number of witnesses to testify as to his character and reputation in the community. The Administrator's counsel had no witnesses but presented argument regarding the appropriate discipline to impose. Counsel referred the panel to the theoretical framework of the ABA Standards for Imposing Lawyer Sanctions (ABA Standards), noting that respondent violated duties owed to his clients, the legal system and the courts, that his mental state was both intentional and knowing, and that his clients suffered actual serious injury as a result of his conduct.

Counsel for the Grievance Administrator argued that ABA Standards 4.11, 4.61, 6.11, all calling for disbarment, applied. Counsel cited the following aggravating factors set forth in ABA Standard 9.22: dishonest or selfish motive [9.22(b)]; multiple offenses [9.22(d)]; submission of false evidence, false statements, or other deceptive practices during the discipline process [9.22(f)]; refusal to acknowledge the wrongful nature of the conduct [9.22(g)]; and substantial experience in the practice of law [9.22(i)]. Counsel requested that the panel enter an order of disbarment, and require respondent to pay $19,752.10 in restitution to Mr. Novick.

Respondent's counsel argued that the following mitigating factors set forth in ABA Standard 9.32 applied: absence of a prior disciplinary record [9.32(a)]; absence of a selfish motive [9.32(b)]; personal or emotional problems [9.32(c)]; cooperative attitude toward the proceedings [9.32(e)]; character or reputation [9.32(g)]; physical disability [9.32(h)]; delay in disciplinary proceedings [9.32(j)]; and remorse [9.32(l)]. Counsel argued that respondent's conduct was an "anomaly. . . in an otherwise excellent career," and urged the panel to consider imposing a reprimand or short suspension that would not require respondent to have to petition for reinstatement before a hearing panel.

Based upon the arguments made by counsel for the Grievance Administrator and respondent's own admissions, the hearing panel found that ABA Standards 4.11, 4.61, and 6.11 – all requiring disbarment – applied. The panel found that the only applicable mitigating factor was

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[2] The Grievance Administrator is not appealing the dismissal of this count, so it is not an issue in this appeal.

that in 34 years of practice, respondent's only other disciplinary offense is an admonishment. The panel found that fact to be so compelling that it warranted a downward departure to a suspension for a period of three years, noting "that the only reason this panel did not disbar respondent is because of his minimal prior disciplinary history." (HP Report 6/19/20, p 5.) The panel also ordered respondent to pay restitution in the amount of $19,752.10 to Carl Novick.

On July 6, 2020, respondent filed a timely petition for review, arguing that the disciplinary proceedings were conducted in a manner that violated his due process rights, the findings of misconduct are not supported by either the facts of the case or the applicable law, the order of restitution is not supported by either the facts of the case or the applicable law, and that the discipline imposed is excessive in light of all of the circumstances. The Grievance Administrator filed a cross-petition for review, arguing that the hearing panel's imposition of a three-year suspension is insufficient given the misconduct established and is inconsistent with proper application of the ABA Standards for Imposing Lawyer Sanctions and precedent of the Attorney Discipline Board.

II. Discussion

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 Ernest Friedman*, 18-37-GA (ADB 2019). "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), Iv den 439 Mich 897 (1991).

A. Due Process

In the "questions involved" section of his brief on review, respondent claimed he was denied due process because one of the hearing panelists was not present for the sanction hearing and his

whereabouts were not disclosed. We find that this issue, raised in the questions involved but not briefed, is abandoned.[3] See *Seifeddine v Jaber*, 327 Mich App 514, 520 (2019).

B. Count One

Count One alleged that respondent misused his IOLTA from 2008 to 2010, by knowingly issuing checks and making electronic withdrawals from his IOLTA for payment of his personal and/or business expenses, in violation of MRPC 1.15(a)(3), (c), (d) and (f). Examples include payment to sports camps, department stores, garden supply store, health club, appliance store, restaurants, grocery stores, gas stations, and a pharmacy.

Michigan Rule of Professional Conduct 1.15 provides that an IOLTA account shall include only client or third party funds, and that a lawyer is required to promptly distribute all portions of the property that are not in dispute. MRPC 1.15(a)(3) and (c). Furthermore, the rule states that "[a] lawyer shall hold property of clients or third persons in connection with a representation separate from the lawyer's own property." MRPC 1.15(d). A lawyer may deposit the lawyer's own funds into the IOLTA only in an amount necessary to pay the bank's service charges or fees. MRPC 1.15(f).

Here, it is undisputed that respondent deposited client funds into the IOLTA and allowed his earned fees to remain in the IOLTA.[4] Respondent admitted to paying personal and business expenses directly from his IOLTA account, but claimed that he only used earned fees from his IOLTA because he did not have a separate business or personal account to transfer fees into once they were earned. As a result, respondent engaged in commingling. Furthermore, by using his IOLTA in this way, he exposed the client funds to his own personal creditors, including the IRS. The rule prohibiting the commingling of funds is designed to insure against any invasion of client

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[3] In any event, this argument lacks factual and legal support. At the start of the hearing, the chairperson explained that a member of the panel had a family emergency and could not be present at the hearing, but that they would go forward with two hearing panelists, and then confer with the absent panel member at a later date. Michigan Court Rule 9.111(A) provides that two panel members constitutes a quorum. Furthermore, respondent's counsel never objected to conducting the proceedings in this manner; therefore, the issue was waived below. See *Napier v Jacobs*, 429 Mich 222, 227 (1987).

[4] Although respondent emphasized that he never deposited any of his own funds into the IOLTA, the Grievance Administrator did not allege that respondent ever put his own funds, other than the fees he earned, in the IOLTA account.

funds. *Grievance Administrator v Robert R. Cummins*, 159-88 (ADB 1988). As recognized by the hearing panel:

> The IOLTA is for one purpose only: to safeguard client and third party funds. See State Bar of Michigan Ethics Opinion R-21 (2012) ("A lawyer's personal expenses must not be paid directly out of an IOLTA account or non-IOLTA account."); State Bar of Michigan Ethics Opinion R-7 (1990) (an IOLTA cannot be used to directly pay personal expenses, even if paid with earned fees). Here, the bank records show that funds well in excess of client funds were in the account. Respondent acknowledged that he kept earned funds in the account until they were needed to pay personal or business expenses, and also acknowledged that he deposited all client funds, whether obtained as a retainer or from a settlement, in his IOLTA. As a result, respondent committed misconduct by commingling client funds with personal earned funds. See *Grievance Administrator v Robert R. Cummins*, 159-88 (ADB 1988). It is the belief of this panel that respondent did so in an attempt to avoid another levy from the IRS. (Footnote omitted.) [HP Report 7/31/19, p 4.]

Based on respondent's own admissions, we find that the hearing panel's findings with respect to Count One of the formal complaint have proper evidentiary support on the whole record.

C. Count Two

Count Two involves respondent's representation of Robert Miller in an employment discrimination action against IGA. Respondent was retained on a one-third contingent fee agreement. A settlement was eventually reached in the case for payments totaling $128,000, plus debt forgiveness of $24,398 that Mr. Miller owed to IGA. Under the terms of the settlement agreement, Mr. Miller was to receive $50,000 by July 1, 2010, and then $3,000 per month beginning August 1, 2010 and continuing for 26 months until the remaining balance of $78,000 was paid in full.

Pursuant to the settlement terms, respondent received a $50,000 check from IGA payable to himself and Mr. Miller, which he deposited into his IOLTA at TCF Bank on July 7, 2010. On July 14, 2010, respondent sent Mr. Miller a settlement breakdown identifying the gross settlement amount of $152,398 ($128,000 plus $24,398 debt forgiveness), and attorney fees and costs totaling $51,373. Mr. Miller disputed respondent's intent to apply the entire $50,000 payment from IGA to

the outstanding attorney fees. Therefore, the $50,000 deposited into respondent's IOLTA constituted disputed funds.

The IRS subsequently levied respondent's IOLTA account at TCF Bank, which contained $93,987 at that time. On August 14, 2010, respondent sent a letter to Mr. Miller explaining only that a governmental agency had taken "improper, illegal actions" as to the IOLTA account, and that he would protect Mr. Miller's interests. Respondent did not, however, explain that the IRS had actually levied the account, nor did he explain how Mr. Miller's interests would be protected, or what his interests were that had been affected.

On August 16, 2010, TCF Bank filed an interpleader action in the United States District Court and turned over the $93,987 levied from respondent's IOLTA. Respondent filed an answer to the interpleader action, maintaining that all funds in the IOLTA were client funds and thus the IRS levy was improper. Respondent did not inform Mr. Miller about the interpleader action or that his settlement funds were no longer in the IOLTA. Ultimately, the court dismissed the interpleader action and ordered the $93,987 to be turned over to the IRS in satisfaction of its levy. Importantly, throughout the proceedings, respondent maintained that the funds at issue were all client funds, even though at the same time he told Mr. Miller that the $50,000 in the IOLTA belonged to respondent as payment for his earned attorney fees and costs.

Respondent then filed a new lawsuit in federal court against the United States, originally on behalf of seven unnamed plaintiffs, including Mr. Miller, that were clients of respondent, again alleging that the IRS improperly seized client funds from respondent's IOLTA. Mr. Miller did not know about the filing of the lawsuit and never consented to the filing of the action on his behalf. Respondent represented to the court that $50,000 was owed to Mr. Miller, but never indicated that these funds were in dispute. In direct contradiction to the position taken in the interpleader action, here respondent repeatedly asserted that the $50,000 constituted his earned attorney fee from Mr. Miller's matter. Ultimately, the federal claim was dismissed because the court found that Mr. Miller did not have any interest in the levied property. The end result was that the IRS kept all the funds per its levy.

There was ample evidence introduced to find that respondent violated MRPC 1.2(a) by taking action on behalf of Mr. Miller without the authority to do so. Respondent filed a federal

lawsuit against the IRS, naming Mr. Miller as a plaintiff, even though Mr. Miller testified that he had no knowledge of the lawsuit filed against the IRS in his name, he was not in favor of suing the government, and he did not want to continue with the lawsuit.

There was also sufficient evidence produced to establish that respondent failed to keep Mr. Miller reasonably informed, in violation of MRPC 1.4(a), and failing to explain a matter to the extent reasonably necessary for Mr. Miller to make an informed decision regarding the representation, in violation of MRPC 1.4(b). On review, respondent relied on communication he had with Mr. Miller prior to the settlement of Mr. Miller's claim. The allegations, however, are that he failed to communicate with Mr. Miller *after* the settlement, regarding the interpleader action and the IRS levy.

There are several instances where respondent violated MRPC 1.4(a) and (b). First, although respondent sent a letter to Mr. Miller informing him that "a government agency has taken improper, illegal actions," as to respondent's IOLTA account, respondent did not explain it was the IRS that had levied the funds in the IOLTA account, did not explain what action was being taken, and said he would protect Mr. Miller's interests, but never explained what interest Mr. Miller had in the levied funds. Respondent also failed to inform Mr. Miller that TCF Bank had filed an interpleader action, and that the bank removed all the funds from the IOLTA account and redeposited those funds into the court's account. In fact, respondent actually assured Mr. Miller that the $50,000 settlement check remained in the IOLTA, despite the fact that he knew the funds had already been removed from the IOLTA and had been turned over to the court. Finally, the evidence establishes that respondent also failed to inform Mr. Miller about the dismissal of the interpleader action and that the court ordered the IOLTA funds to be turned over to the IRS. Based upon all of these facts, there was sufficient evidence for the hearing panel to conclude respondent failed to keep Mr. Miller reasonably informed in violation of MRPC 1.4(a), and failed to explain the matter to the extent reasonably necessary for Mr. Miller to make an informed decision regarding the representation, in violation of MRPC 1.4(b).

There was also sufficient evidence to conclude respondent violated the general rule regarding conflict of interest, MRPC 1.7(b)(1) and (2), when he filed an action against the IRS in Mr. Miller's name to recover the levied IOLTA funds, without advising Mr. Miller that respondent

may also have a claim to some of the funds. In fact, respondent has taken the position on review that the entire $50,000 belonged to respondent as earned fees, whereas in the federal court action, he repeatedly argued the funds were entirely client funds. At no time did respondent advise Mr. Miller that their interests were materially adverse to one another, and such conflict was not waived. Therefore, there was proper evidentiary support to find respondent violated MRPC 1.7.

Multiple violations of MRPC 1.15, the rule regarding safekeeping property, are also supported by the evidence. Specifically, respondent violated: MRPC 1.15(a)(3), which provides that an IOLTA shall include only client or third party funds, by admitting that some of the money in the IOLTA represented earned fees from litigation involving Mr. Miller; MRPC 1.15(c), which provides that disputed funds must be kept separately until the dispute is resolved, by admitting to leaving his earned fees in the IOLTA along with the $50,000 that was in dispute, in order to pay personal and business expenses; MRPC 1.15(d), which provides that a lawyer must hold client funds separately from his own, by failing to safeguard his clients' funds by using the IOLTA to pay personal and business expenses, which resulted in the funds being levied by the IRS; MRPC 1.15(f), which provides that a lawyer can only deposit his own funds into a client trust account in an amount reasonably necessary to cover service charges, by admitting he kept earned fees in his IOLTA.[5]

Finally, there was proper evidentiary support for the panel's finding that respondent violated MRPC 3.3(a)(1) by knowingly making a false statement to a tribunal. The evidence shows that respondent filed a federal lawsuit in Mr. Miller's name, without his consent, thereby misrepresenting to the court that he had the authority to represent Mr. Miller in the lawsuit. Respondent also asserted to the court numerous times in both the interpleader and federal court action, that the $50,000 constituted client funds and belonged to Mr. Miller – while at the same time, he told Mr. Miller that the funds belonged to respondent for payment of his attorney fees.

D. Count Three

Count Three involves respondent's representation of Carl Novick in a personal injury lawsuit after he was injured at his workplace. For a period of time after his injury, Mr. Novick was paid worker's compensation benefits by Travelers Insurance Company (Travelers). While the civil action

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[5] Respondent claimed he removed the fees as they were earned, but there was no proof presented to the hearing panel to support his claim.

was pending, respondent received two written notifications from Travelers that it was or would be asserting a lien on any proceeds derived from that action.

Respondent negotiated a settlement of the civil action with three defendants, in the aggregate amount of $165,000.00. At that time, there had not been any resolution of the Travelers' lien. Each of the defendants issued checks on behalf of their respective clients, which respondent deposited into his IOLTA; respondent then drafted three checks made payable to Mr. Novick, for a total of $85,000.00. Respondent also told Mr. Novick he was withholding $35,000.00 in his IOLTA, to deal with the lien being asserted by Travelers. Respondent also indicated that he would challenge the lien. Mr. Novick testified that he asked respondent for an accounting but he never received one, and respondent did not identify his costs and fees to him.

Subsequent to these disbursements, the attorney for Travelers filed a motion in the circuit court to recover its lien, and respondent filed an answer to the motion, challenging Travelers' request for apportionment. The motion was denied based on standing, and Travelers was instructed that it would have to file a separate action to recover the lien. Travelers twice attempted to settle the lien for a lesser amount, but ultimately decided to cease pursuing the matter.

Just as he did with Mr. Miller, respondent sent a letter to Mr. Novick advising him about the IRS levy of the funds in the IOLTA account, and indicated that he would protect Mr. Novick's interests. After TCF Bank filed the interpleader action, respondent filed a motion in that action, which contained his personal affidavit that claimed the funds in the IOLTA account included $15,000.00 which was being held for "Client John Doe 2," who was later identified as Mr. Novick. Mr. Novick was also one of the named plaintiffs in respondent's federal court action filed on October 20, 2010 against the IRS, in which he alleged that the funds in the IOLTA were client funds. In an affidavit respondent filed in support of a motion for summary judgment in that case, he again alleged that he was holding $15,000 in the IOLTA account to cover a lien which was in dispute with Travelers, on behalf of Mr. Novick. Respondent later filed an amended complaint in that case, in which he alleged that all of the monies in the IOLTA account were client monies.

On May 3, 2011, respondent sent Mr. Novick a letter which indicated he was resolving all claims with the IRS for its wrongful levies on his IOLTA account. It further stated that respondent wanted to resolve Mr. Novick's claim without having him deposed, and included two affidavits for

Mr. Novick to review and then decide which one he wanted to sign. Mr. Novick testified that he called respondent and asked him to explain why he needed to sign one of the affidavits, but respondent failed to provide any explanation. Mr. Novick did not sign either one of the affidavits, but later spoke to respondent on several occasions, seeking an explanation as to why he needed to sign an affidavit, but he never received one. Ultimately, respondent stipulated to a dismissal of the lawsuit he filed against the IRS on behalf of Mr. Novick, but did not advise Mr. Novick of this action.

On September 4, 2012, Mr. Novick sent respondent an e-mail, in which he requested that respondent send him a portion of the money which he owed him. The correspondence also made reference to Mr. Novick's unsuccessful attempts to contact respondent on multiple occasions. In response, respondent stated that the amount he withheld for the lien was not $35,000, but rather was only "slightly above $10,000." Respondent then went on to mention a number of other of other matters for which he had provided legal representation to Mr. Novick over the years, for which he supposedly had not been paid.

Mr. Novick then retained another attorney to file a lawsuit against respondent, in order to recover the money which he believed respondent was withholding and not entitled to keep. During the pendency of that litigation, respondent alleged that Mr. Novick was not entitled to any of the funds being withheld. Ultimately, that lawsuit was settled for $5,000.00 via a consent judgement. Mr. Novick testified that he settled it for $5,000 because his attorney told him the statute of limitations was running out, and "something [was] better than nothing."

The hearing panel found that respondent converted client funds in violation of MRPC 1.15(d), by failing to advise Mr. Novick of the amount of money that was being held in the IOLTA to cover the lien, and how much of the amount being withheld represented respondent's fees and expenses. The panel found that this, combined with respondent's payment of personal and business expenses out of that account, subjected Mr. Novick's funds to the levy executed by the IRS. We find that the hearing panel's findings in this regard are fully supported by the record. Mr. Novick's matter settled for $165,000, and the bank records reflect that three settlement checks totaling $165,000 were deposited into respondent's IOLTA, and Mr. Novick received three separate checks totaling $85,000. This left $80,000 of the settlement funds in the IOLTA, some of which was

legitimately respondent's attorney fee. The lien asserted by Travelers was between $48,000 and $50,000, and respondent told Mr. Novick that he set aside $35,000 in his IOLTA to go towards the lien. It is undisputed that, at some point after February 19, 2009, Travelers decided to cease enforcement of the lien.

The IOLTA records establish that Respondent converted the remaining funds owed to Mr. Novick. As of July 18, 2008, three weeks after informing Mr. Novick that $35,000 of the settlement proceeds were being held in the IOLTA to protect against the lien, the balance in the IOLTA was only $24,525.98. The IOLTA records confirm that every monthly statement from August 2008 through February 2, 2009, the balance in the IOLTA consistently stayed below $35,000, and dipped to as low as $2,169.42 on February 2, 2009. The IOLTA records also confirm respondent was using the account to pay personal and business expenses.

Additionally, Mr. Novick testified that he was never provided an accounting of the funds, despite asking respondent repeatedly for an accounting. Respondent lied to Mr. Novick on several occasions about the money purportedly being held on his behalf for the Travelers' lien. Importantly, respondent never identified these funds as his own. In both the interpleader action and the federal lawsuit, respondent repeatedly represented to the court in his pleadings and affidavits that, at the time of the IRS levy, $15,000 of the IOLTA funds belonged to Mr. Novick, and respondent made no claim to these funds. Later, respondent claimed the money being held in the IOLTA was not $35,000, but was slightly above $10,000. Based upon the band records, and respondent's representations to both Mr. Novick and the federal court, sufficient evidence was presented to support the panel's finding that respondent converted Mr. Novick's funds for his personal and business use.

On review, respondent asserted that the hearing panel erroneously determined that the funds at issue belonged to Mr. Novick rather than respondent, because the hearing panel miscalculated the settlement amount by failing to include Travelers' lien as part of the settlement. This argument has no merit, because it is based upon a ruling in the Miller matter discussed above – a ruling that is not related to the Novick matter in any way, and is not factually similar. Although respondent insists that the dismissal of the lien is the same as the discharge of a debt and thus should be included as part of the settlement, he ignores the fact that he did not negotiate the discharge of the lien as part of the settlement like he did with the debt in Mr. Miller's case. In reality, respondent

merely thwarted Travelers first attempt at collecting on the lien when Travelers' motion for apportionment of the settlement was denied based upon lack of standing. Travelers was instructed that it would simply have to file a new cause of action to obtain recovery on the lien, and could have done so at any time within the 6-year statute of limitations. There is no evidence there was ever an agreement or ruling that the lien was extinguished, discharged, or forgiven, or that Travelers had agreed to a waiver of the lien.

Respondent claimed the $35,000 he set aside to cover the lien was always his money. However, the hearing panel simply did not find respondent's testimony to be credible in this regard.[6] Respondent also argued that he incurred over $18,000 in costs that were not included in the fee calculations. However, there was no evidence or proof presented of his actual costs, because he admitted he destroyed that portion of his file.

Respondent also asserted that he gave Mr. Novick several breakdowns of the settlement during the facilitation of Mr. Novick's lawsuit against respondent, but Mr. Novick testified that, despite asking respondent for an accounting of his attorney fees and costs many times, respondent

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[6] One section of respondent's testimony stands out as being particularly incredible:

> Q. So you're representing in this affidavit to the Federal Court that $15,000 in your IOLTA account that was levied are client funds?
> A. Absolutely and that's what I told Mr. Novick, "If we get sued, these funds are there and I'm going to pay them and then I'm going to come after you."
> Q. And so how is that consistent with telling the Court that these are client funds?
> A. Because I had already told him -- I had already represented to him that these are funds to cover that claim. These are your funds that are available. It's my money, but if we get sued which she was saying –
> Q. How can it be your money and be client funds at the same time?
> A. Because when we walked through those tenets do you understand, Mr. Vella, the tenets that we go through?
> Q. I asked a very simple question, Mr. Combs, How can client funds be your money?
> A. It was my cash, my money, my money that I had earned.
> Q. Why didn't you tell the Court the $15,000 was my money, instead you told the Court the $15,000 is the client's money?
> A. It is his money, I had already covered that with him. I had already told him, "If we get sued, that is your money, it's going to be paid."
> That does not mean it's his funds. It's not his money. He didn't earn that, it wasn't from him . . . . [5/31/18 Tr, pp 224-25.]

never gave him an itemization of costs or a breakdown of the settlement. Respondent was also unable to produce these alleged settlement breakdowns. Therefore, although the hearing panel recognized that respondent would have incurred costs associated with Mr. Novick's case, the panel properly determined there was no evidence presented to support respondent's assertion of $18,000 in costs.

Based upon all of the above, the hearing panel's conclusion that respondent converted Mr. Novick's funds is fully supported by the record, and respondent's claim that all of the money in the IOLTA represented his fees and costs was properly rejected by the hearing panel. Accordingly, the hearing panel's findings of misconduct regarding Count Three are affirmed.

E. Petitioner's Cross-Appeal Regarding Level of Discipline

The hearing panel determined that ABA Standards 4.11, 4.61, and 6.11, all of which require disbarment, applied. Nevertheless, the panel ordered a three-year suspension, relying on respondent's lack of disciplinary record as "compelling mitigation." For the following reasons, we find that the absence of a prior disciplinary record, in and of itself, is insufficient mitigation to overcome the presumptive discipline of disbarment.

This Board's review of sanctions imposed by a hearing panel is not limited to the question of whether there is proper evidentiary support for the panel's findings. Rather, the Board possesses "a greater degree of discretion with regard to the ultimate result." *Grievance Administrator v Benson*, 08-52-GA (ADB 2009), citing *Grievance Administrator v Handy*, 95-51-GA (ADB 1996). See also *Grievance Administrator v August*, 438 Mich 296, 304; 304 NW2d 256 (1991). This greater discretion to review and, if necessary, modify a hearing panel's decision as to the level of discipline, is based upon a recognition of the Board's overview function and its responsibility to ensure a level of uniformity and continuity. *Grievance Administrator v Brent S. Hunt*, 12-10-GA (ADB 2012), citing *Matter of Daggs*, 411 Mich 304; 307 NW2d 66 (1981).

Absent compelling mitigation, the presumptive level of discipline for conversion of client funds is disbarment under Standard 4.11, which provides: "Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client." See *Grievance Administrator v Frederick Petz*, 99-102-GA; 99-130-FA (ADB 2001). "Compelling mitigation" has not been defined, but this Board has the ability to look to other cases for guidance. In *Grievance Administrator v Peter C. Mason*, 13-4-GA (ADB 2013), a case involving conversion

of funds, the hearing panel concluded a suspension was warranted because the attorney in question had practiced law "without blemish for approximately 39 years." The Board reversed, determining that despite the mitigation cited, it did not rise to a level of compelling mitigation warranting discipline less than disbarment. See also *Grievance Administrator v Anthony T. Chambers*, 12-80-GA (ADB 2013) (determining that testimony of medical experts confirming respondent suffered from alcohol dependency, major depression, avoidant personality disorder, multiple stresses in his life, did not rise to the level of "compelling mitigation," even when respondent also cited absence of disciplinary record, absence of dishonest or selfish motive, good faith effort to rectify the consequences of misconduct, and remorse as additional mitigation), and *Grievance Administrator v Donnelly W. Hadden*, 15-105-GA (ADB 2019) (45-day suspension increased to disbarment for knowing conversion of client funds by a "respected member of the legal community" with no prior disciplinary offenses, citing numerous Board opinions).

In the present case, the factors cited in mitigation by respondent also do not rise to the level of compelling mitigation warranting a downward departure in the level of discipline imposed. The evidence in the record clearly establishes the applicability of Standard 4.11 in conformity with prior precedent of this Board. Therefore, we find that discipline should be increased to disbarment.

F. Restitution

The hearing panel ordered restitution in the amount of $19,752.10, which represented a portion of the money levied by the IRS belonging to Mr. Novick. Respondent argued that this was an error, because Mr. Novick had already filed a civil suit against respondent to recover the money levied by the IRS, and agreed to settle that civil suit for $5,000.

"Our Supreme Court has given hearing panels, this Board, and the Court itself discretion to require restitution as a condition of an order of discipline." *Grievance Administrator v Joel S. Gehrke*, 05-29-GA (ADB 2008) (citing MCR 9.106(5)). Restitution in the attorney discipline system serves the dual purpose of making a complainant or third party whole and protecting the public and the legal system through deterrence and sanctions.

Respondent argued that res judicata and collateral estoppel apply, thereby preventing the hearing panel from awarding restitution. However, in Michigan, both of these doctrines require either the same parties or same issues. Neither exist here. Mr. Novick is not a party in the discipline action; it is the Attorney Grievance Commission that is acting to enforce sanctions in its

own right, for violation of the Michigan Rules of Professional Conduct, which was not the same issue involved in the civil suit.

Although there are no Michigan cases that specifically address this issue, other jurisdictions have allowed restitution in a disciplinary proceeding despite the existence of a civil settlement or judgment. See *Florida Bar v Schultz*, 712 So 2d 386 (1998); *Guam Bar Ethics Comm v Maquera*, 2001 Guam 20 (2001). It is entirely proper for a disciplinary court to address and remedy an attorney's wrongdoing, even if the same wrongdoing was addressed in a prior civil suit. See e.g. *In re Kinast*, 121 Wis 2d 25; 357 NW2d 282 (Wis 1984); *In re LaQua*, 548 NW2d 372, 377 (ND 1996) ("That an injured party may recover from a lawyer in a malpractice action is not in itself sufficient to show that a client suffered no injury or that disciplinary proceedings are no longer necessary.")

The proceedings at issue here were distinct: one civil cause of action based on legal malpractice, and the other an attorney discipline proceeding, seeking sanctions for the violation of the Michigan Rules of Professional Conduct. In calculating the restitution amount, the hearing panel properly reduced the amount by $5,000, which was the amount of the settlement in the legal malpractice case. By doing so, there is no windfall for Mr. Novick, he is simply made whole, which is the purpose of restitution. Accordingly, we affirm the hearing panel's order of restitution.[7]

III. Conclusion

The knowing conversion of client funds is a serious offense that warrants disbarment. Based upon the facts of this case and the misconduct established, the hearing panel's order of suspension cannot be reconciled with governing precedent in cases imposing discipline for misconduct similar to that found here. For all of the reasons stated above, we affirm the hearing panel's findings of misconduct regarding Counts One, Two, and Three, and we will enter an order modifying the hearing panel's order of discipline to vacate the suspension, modify the order of restitution to $19,252.10, and increase discipline to disbarment.

Board members Jonathan E. Lauderbach, Michael B. Rizik, Jr., Barbara Williams Forney, Karen O'Donoghue, Linda Hotchkiss, M.D., Michael Hohauser, and Peter Smit concur in this decision.

Board member Linda M. Orlans would have affirmed the hearing panel's decision in its entirety.

Board member Alan Gershel was recused and did not participate.

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[7] The parties agree that the amount should be reduced to $19,252.10 to reflect the $500 payment from respondent to Mr. Novick that was unaccounted for previously.