

STATE OF MICHIGAN

Attorney Discipline Board

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ATTORNEY DISCIPLINE BOARD
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GRIEVANCE ADMINISTRATOR,
Attorney Grievance Commission,

Petitioner/Appellee,

v

Case Nos. 08-44-GA; 08-72-FA

RUSSELL L. SWARTHOUT, P 21193,

Respondent/Appellant.

ORDER AFFIRMING HEARING PANEL ORDER OF REVOCATION & RESTITUTION

Issued by the Attorney Discipline Board
211 W. Fort St., Ste. 1410, Detroit, MI

Tri-County Hearing Panel #14 of the Attorney Discipline Board entered an order in this matter on June 2, 2010, revoking respondent's license to practice law in Michigan effective June 24, 2010, and ordering respondent to make restitution to complainant Nash Kesto in the amount of \$55,100.00.

The Attorney Discipline Board has conducted review proceedings in accordance with MCR 9.118, including a review of the testimony and exhibits submitted to the panel and consideration of the briefs and arguments presented to the Board at a review hearing conducted September 8, 2010.

The gravamen of Count One of the complaint is that respondent received \$55,100.00 from client Nash Kesto in 2001-2002 for the ostensible purpose of investing those funds in highly profitable "offshore investments." Noting that its members had an extensive opportunity to observe the demeanor of the witnesses during the course of the hearings, the panel stated explicitly in its report that it found complainant Kesto to be a credible witness, while finding that respondent's testimony was not credible. Indeed, the panel pointedly reported that "this panel finds respondent's testimony to be completely incredible and completely lacking logic." (12/17/09 Hearing Panel Report, p 2.)

The Standard of Review in attorney discipline proceedings in Michigan is well established, as stated in *Grievance Administrator v Edgar J. Dietrich*, Case No. 99-145-GA (ADB 2001), p 2;

In reviewing a hearing panel decision, 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; 475 NW2d 256 (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 n12 (2000) (citing MCR 2.613(C)).

Because the hearing panel has the opportunity to observe the witnesses during their testimony, the Board defers to the panel's assessment of their demeanor and credibility. *Grievance Administrator v Neil C. Szabo*, 96-228-GA (ADB 1998); *Grievance Administrator v Deborah C. Lynch*, No 96-96-GA (ADB 1997). See also *In re McWhorter*, 449 Mich 130, 136 n 7 (1995).

In short, "it is not the Board's function to substitute its own judgment for that of the panels' or to offer a *de novo* analysis of the evidence." *Grievance Administrator v Carrie L. P. Gray*, 93- 250-GA (ADB 1996), lv den 453 Mich 1216 (1996).

There is no question in this case that there is proper evidentiary support in the record before the panel to support its conclusion that the charges of misconduct in the complaint were established by a preponderance of the evidence presented or that there was proper evidentiary support for the panel's decision on the question of restitution.

The Board is not unsympathetic to respondent's argument that the proofs in this case do not include any "paper trail" or other documentary evidence from a bank or financial institution corroborating the complainant's testimony that he used cash advances from credit cards to raise this amount.¹ Nevertheless, while the presence of such documentary evidence of the complainant's cash transactions would have been helpful, the absence of such documents from the record is not fatal to the case presented by the Administrator. All parties agree that a resolution of the sharply conflicting testimony in this case turns on the issue of the respective credibility of respondent Swarthout and complainant Kesto. As noted above, we defer to the panel's decision in that regard.

Finally, with respect to the hearing panel's decision to order the revocation of respondent's license to practice law, we find that the hearing panel appropriately looked to the American Bar Association's Standards for Imposing Lawyer Sanctions for guidance and then ordered the level of discipline called for under the facts in this case. While it certainly bears noting that respondent's license is currently suspended² as the result of an order for suspension of 18 months for misconduct involving the misappropriation of client funds, the panel found that it did not need to decide respondent's argument that the suspension in that case should not be considered as an aggravating factor since the misconduct found in this case substantially predated the conduct for which he was suspended in Case Nos. 06-6-GA; 06-46-FA. Having stated that it need not rule on that issue, the panel wrote:

Simply put, the panel believes that the misappropriation of client funds in the amount of \$55,100.00, is the most egregious breach of

¹ It does not appear that the Grievance Administrator attempted to obtain such records by issuing an investigative subpoena under MCR 9.112(D) after receiving Mr. Kesto's request for investigation in August 2006 or by using a subpoena for the production of documents pursuant to MCR 9.115(I) after the formal complaint was filed in April 2008. At the review hearing, counsel for the Administrator conceded that documentary evidence would have been helpful but stated her understanding that such financial records are no longer available after seven years.

² *Grievance Administrator v Russell L. Swarthout*, Case Nos. 06-6-GA; 06-46-FA, 18 month suspension effective July 18, 2006.

the Michigan Rules of Professional Conduct that any attorney can commit. Accordingly, the panel does not take into consideration any of the alleged aggravating factors which were introduced by the Attorney Grievance Commission. In addition, the respondent's written agreement to share attorney fees with Mr. Kesto constitutes another blatant violation of the Michigan Rules of Professional Conduct. Finally, the panel believes that the written agreement to share attorney fees was merely an attempt by the respondent to stave off the increasing demands of Mr. Kesto for a return of his \$55,100.00, which was theoretically an investment. [Hearing Panel Report on Discipline 06/02/10, p 2.]

NOW THEREFORE,

IT IS ORDERED that the hearing panel order of revocation and restitution entered June 2, 2010, is **AFFIRMED**.

IT IS FURTHER ORDERED that respondent shall, on or before October 23, 2010, pay costs incurred by the Attorney Discipline Board for the transcript of review proceedings conducted on September 8, 2010 in the amount of \$121.33. This amount is in addition to costs previously assessed in the hearing panel order of June 2, 2010 in the amount of \$4,219.76, and for which respondent has received a Certification of Non-Payment of Disciplinary Costs. Check or money order shall be made payable to the State Bar of Michigan, but submitted to the Attorney Discipline Board [211 West Fort St., Ste. 1410, Detroit, MI 48226] for proper crediting. (See attached instruction sheet).

ATTORNEY DISCIPLINE BOARD

By:



William J. Danhof, Chairperson

DATED: September 24, 2010

Board members William J. Danhof, Thomas G. Kienbaum, William L. Matthews, Andrea L. Solak, Carl E. Ver Beek, Craig H. Lubben, James M. Cameron, Jr. and Sylvia P. Whitmer, Ph.D. concur in this decision.

Board member Rosalind E. Griffin, M.D. did not participate.