STATE OF MICHIGAN

Attorney Discipline Board

GRIEVANCE ADMINISTRATOR,
Attorney Grievance Commission,

Petitioner/Appellee,

v Case No. 19-53-GA

SCOTT ROBERT REIZEN, P 63724,

Respondent/Appellant.
_____/

ORDER AFFIRMING HEARING PANEL ORDER OF REPRIMAND

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

Tri-County Hearing Panel #76 of the Attorney Discipline Board issued an order on April 20, 2020, reprimanding respondent for entering into an agreement that a client shall withdraw a request for investigation filed with the Attorney Grievance Commission, in violation of MCR 9.104(10)(b). Respondent filed a petition for review, arguing that the settlement and release agreements respondent entered into with his former clients did not constitute misconduct, and thus the Formal Complaint should have been dismissed in its entirety.

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 virtual review hearing conducted on August 19, 2020. For the reasons discussed below, we affirm the decision of the hearing panel that respondent committed misconduct and the panel's imposition of a reprimand.

This case involves two former unrelated clients who filed requests for investigation against respondent. After the requests for investigation were filed, respondent met with each client separately to resolve their issues. Respondent entered into settlement and release agreements with both clients, and drafted the agreements himself. (Petitioner's Exhibits 3 and 6.) Each release contained the following provision:

> It is further understood that [client] will dismiss the pending grievance filed against Scott Reizen as result of this resolution. But it is further understood that the agreement to dismiss the grievance against Scott Reizen was not and is not a quid pro quo for payment of the above funds.

Respondent also drafted affidavits and letters requesting the withdrawal of the grievances that he had the former clients sign, and that respondent then sent to the Attorney Grievance Commission (AGC) on their behalf. (Petitioner's Exhibits 1, 2, 4, and 5.) The settlement payment to the former clients, the execution of the affidavits, and the signing of the letters sent to the AGC occurred contemporaneously at respondent's office.

Michigan Court Rule 9.104 provides, in pertinent part:

> The following acts or omissions by an attorney, individually or in concert with another person, are misconduct and grounds for discipline, whether or not occurring in the course of an attorney-client relationship:
>
> * * *
>
> (10) entering into an agreement or attempting to obtain an agreement, that:
>
> (a) the professional misconduct or the terms of a settlement of a claim for professional misconduct shall not be reported to the administrator;
>
> (b) the plaintiff shall withdraw a request for investigation or shall not cooperate with the investigation or prosecution of misconduct by the administrator; or
>
> (c) the record of any civil action for professional misconduct shall be sealed from review by the administrator.

On review, respondent argues that the agreements do not violate MCR 9.104 because they do not require the clients to dismiss their grievances. Respondent testified at the hearing before the panel that he purposely used the word "will" instead of "shall," to reflect that the clients merely planned to dismiss the grievances at a future time, not that they were required to do so.

When a hearing panel's findings of misconduct are challenged on review, the Board must determine whether the panel's findings have "proper evidentiary support on the whole record." *Grievance Administrator v August*, 438 Mich 296, 304 (1991). "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)). However, the Board reviews questions of law de novo. *Grievance Administrator v Geoffrey N. Fieger*, 94-186-GA (ADB 2002).

A settlement agreement is a contract and is governed by the principles of contract construction and interpretation. *Michigan Mutual Ins Co v Indiana Ins Co*, 247 Mich App 480, 484 (2001). The goal in contract interpretation "is to give effect to the intent of the parties, to be determined first and foremost by the plain and unambiguous language of the contract itself." *Wyandotte Electric Supply Co v Electrical Technology Systems, Inc*, 499 Mich 127, 144 (2016). Unless defined otherwise, terms of a contract are given their commonly used meanings. *Group Ins Co v Czopek*, 440 Mich 590, 596 (1992).

Shall means "has a duty to." See Bryan A. Garner, A Dictionary of Modern Legal Usage, 940-41 (2d ed, Oxford U Press 1995). "Will" is used to create a promise – a contractual obligation. Id at 941-42. Although the words are different, the effect is the same.

Michigan courts have held that usage of the term "will" denotes mandatory action. For example, in *Kuhlman v Tdp Capital Access*, 2010 Mich App LEXIS 1361, Docket No 291348 (July 13, 2010), the plaintiff argued that the phrase "will lie in" in a forum-selection clause was permissive rather than mandatory. The Court rejected this argument, pointing to courts in other jurisdictions that have held the term "will" denotes a mandatory action. *Id* at 8 (citations omitted). See also *RVP Development Corp v Furness Golf Construction Inc*, 2004 Mich App LEXIS 2060 at *14 n 7 (Mich Ct App August 3, 2004) (acknowledging that the word "will" is defined as "an auxilliary verb commonly having the mandatory sense of 'shall' or 'must.'") (citations omitted); *Orvis v Degroot*, 2012 Mich App LEXIS 2044 (Mich Ct App October 16, 2012) (recognizing that the use of the term "will" indicates a mandatory duty rather than the ability to exercise any sort of discretion).

The inclusion of the phrase "as a result" also supports the hearing panel's interpretation of mandatory action. In the paragraph relating to the grievances, the agreements state: "It is further understood that [the client] will dismiss the pending grievance filed against Scott Reizen as a result of this resolution." The implication is that the settlement and release agreements are conditioned upon the withdrawal of the grievances. If the withdrawal of the grievances was not part of the agreement or conditioned upon the settlement money, there would be no reason to include that provision in the agreements at all.

The term "will" is also used in other parts of the settlement agreement, such as the hold harmless clause, which provides: "I further agree, for the consideration paid, that I will hold harmless the parties released from and for all damages, legal fees or expenses, fees and costs, actual attorney fees, judgments, verdicts or awards, demands, rights, causes for action, losses, claims and actions which may arise regarding my alleged injuries . . . ." Under respondent's interpretation of the term "will," the clients' duty to hold respondent harmless would not be mandatory. Certainly that was not respondent's intent.

Both "shall" and will" indicate an intent to make the provisions mandatory. Respondent testified that at the time he met with the former clients to resolve their issues, he "absolutely" did not know that it would be improper under 9.104 to cause a client to withdraw a grievance. (Tr 7/23/19, p 66.) Respondent now says, however, that when he prepared the settlement agreements, he consciously chose to use "will" instead of "shall" so that the document would not be construed as requiring the clients to withdraw their grievances. He cannot have it both ways, and the panel did not determine that respondent's testimony in this regard was credible.

Here, the panel's finding of misconduct has proper evidentiary support and is correct as a matter of law. The admitted exhibits and testimony given at the hearing show that respondent entered into agreements with two former clients, each of who had filed separate requests for investigation, that the respective grievances would be dismissed following a financial settlement agreement with each client. This conduct is specifically prohibited by MCR 9.104(10)(b). Accordingly, we affirm the hearing panel's finding of misconduct and order of reprimand.

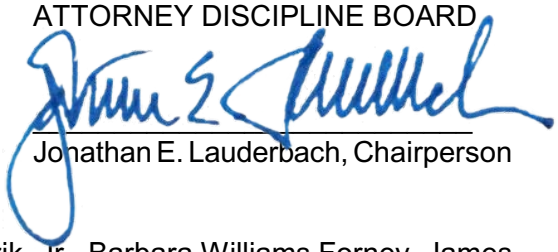
NOW THEREFORE,

IT IS ORDERED that the hearing panel's Order of Reprimand issued on April 20, 2020, is **AFFIRMED.**

IT IS FURTHER ORDERED that respondent, Scott Robert Reizen, is hereby **REPRIMANDED**, effective **October 30, 2020**.

IT IS FURTHER ORDERED that respondent shall, on or before October 30, 2020, pay costs in the amount of $2,453.00, consisting of costs assessed by the hearing panel in the amount of $2,282.00 and court reporting costs incurred by the Attorney Discipline Board in the amount of $171.00 for the review proceedings conducted on August 19, 2020. Check or money order shall be made payable to the Attorney Discipline System and submitted to the Attorney Discipline Board [333 West Fort St., Ste. 1700, Detroit, MI 48226] for proper crediting. (See attached instruction sheet.)

ATTORNEY DISCIPLINE BOARD

By: 

Jonathan E. Lauderbach, Chairperson

DATED: October 1, 2020

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