FILED
ATTORNEY DISCIPLINE BOARD
March 11, 2022

STATE OF MICHIGAN

# Attorney Discipline Board

GRIEVANCE ADMINISTRATOR,
Attorney Grievance Commission,

Petitioner/Appellee,

v Case No. 19-60-GA

SCOTT E. COMBS, P 37554,

Respondent/Appellant.
_____/

**ORDER AFFIRMING IN PART AND REVERSING IN PART HEARING PANEL'S FINDINGS OF MISCONDUCT AND AFFIRMING ORDER OF DISBARMENT AND RESTITUTION**

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

On September 7, 2021, Tri-County Hearing Panel #14 of the Attorney Discipline Board issued an order of disbarment and restitution, disbarring respondent from the practice of law in Michigan, effective September 29, 2021.[1] On September 23, 2021, respondent timely filed a petition for review.

On review, respondent argues for a reversal of the panel's findings of misconduct, a reversal of the order of restitution, and that the sanction imposed be reduced to, at most, a brief period of suspension. The Administrator requests that the panel's findings of misconduct and the order of disbarment and restitution 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 February 16, 2022. For the reasons discussed below, we affirm in part and reverse in part the hearing panel's findings of misconduct, and affirm the order of disbarment and restitution.

The Grievance Administrator filed a formal complaint against respondent on June 14, 2019. The complaint involved respondent's representation of Mark Allen, who retained respondent to represent him in an employment claim against Mr. Allen's former employer. It was alleged that during the representation, respondent reached a settlement with Mr. Allen's former employer for $9,000, and contrary to the original contingency fee agreement, respondent offered to give Mr.

[1] Although respondent's disbarment in this case became effective on September 29, 2021, an order of disbarment was issued in a prior discipline matter, *Grievance Administrator v Scott E. Combs*, 15-154-GA (ADB 2021), that was effective October 14, 2020.

Allen all of the settlement proceeds.[2] It was further alleged that, despite this modification of the fee agreement, respondent kept the $3,600 check and deposited it into his personal business account, and that even after depositing the money into his personal account, respondent continued to tell Mr. Allen that the check was "on the way." The complaint charged respondent with violating MRPC 1.4(a) and (b); 1.5(a) and (b); 1.15(b)(3), (c), and (d); 8.4(b) and (c); and MCR 9.104(1)-(3). (Formal Complaint ¶¶ 30(a)-(m).)

Respondent asserted that he never intended to modify the original contingency fee agreement, and thus he was entitled to the money he deposited into his personal account. Respondent claimed that the original attorney fee agreement was binding on Mr. Allen and that it had not been waived by respondent in either verbal or email discussions with Mr. Allen.

The matter was assigned to Tri-County Hearing Panel #14. The hearings on misconduct were held virtually on July 16, 2020, and December 18, 2020. Mark Allen and respondent were the only witnesses. A total of 23 exhibits were admitted. The hearing panel's misconduct report was issued on April 2, 2021, in which the panel found misconduct as to all of the allegations set forth in the formal complaint.

On June 3, 2021, both parties filed their respective sanction briefs. The Administrator's brief argued for disbarment. Respondent spent the majority of his brief disagreeing with the findings of misconduct, but eventually argued that an admonishment would be appropriate.

The sanction hearing was heard virtually on June 10, 2021. Respondent testified on his own behalf and submitted transcripts of prior testimony of several character witnesses that testified on his behalf in a prior discipline matter. Respondent argued that several mitigating factors applied, and urged the panel to consider imposing an admonishment or reprimand. The Administrator did not call any witnesses, but presented argument regarding the appropriate discipline to impose, asking for disbarment under ABA Standards 4.1 (Failure to Preserve the Client's Property) and 4.6 (Lack of Candor). The Administrator also cited several applicable aggravating factors.

The panel's sanction report was issued on September 7, 2021, and concluded that disbarment was appropriate under ABA Standard 4.11 and ABA Standard 4.61. The panel found that respondent was intentionally dishonest and Mr. Allen suffered an actual injury as a result, and ordered respondent to pay restitution in the amount of $3,100.00 to Mr. Allen.

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), lv den 439 Mich 897 (1991).

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[2] The settlement was divided into two checks: $5,400 (less taxes) made out to Mr. Allen, and $3,600 made out to respondent's law firm, based on the original contingency fee agreement. However, it was alleged that respondent offered to give Mr. Allen the entire settlement amount, thereby waiving his contingency fee.

Furthermore, "[d]eference is given to the special opportunity of the trial court to judge the credibility of witnesses. MCR 2.613(C)." *Id.* Because the hearing panel has the opportunity to observe the witnesses during their testimony, the Board typically defers to the panel's assessment of their demeanor and credibility. *Grievance Administrator v Ernest Friedman*, 18-37-GA (ADB 2019), citing *Grievance Administrator v Neil C. Szabo*, 96-228-GA (ADB 1998); *Grievance Administrator v Deborah C. Lynch*, No 96-96-GA (ADB 1997).

On review, respondent first argues that there is insufficient evidentiary support for the panel's findings that there was a modification of the fee agreement. We disagree.

A contract, including a written contract, may be modified orally or in writing. *Chatham Super Markets, Inc v Ajax Asphalt Paving, Inc*, 370 Mich 334, 339; 121 NW2d 836 (1963). Here, the hearing panel's misconduct report contains a very detailed review of the email correspondence between respondent and Mr. Allen regarding respondent's offer to give Mr. Allen all of the settlement proceeds and his repeated statements that the check was "on the way," thus waiving his fee and modifying the terms of the original contingency fee agreement. Although respondent contends he never agreed to modify the original agreement, Mr. Allen's testimony and the emails directly contradict this contention, and the hearing panel found Mr. Allen to be more credible. We see no reason to disturb the panel's assessment in this regard.

The hearing panel report also contains a thorough 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, with one exception.

First, we agree that the record, specifically the emails and testimony of Mr. Allen, supports the hearing panel's conclusion that respondent failed to communicate with Mr. Allen in violation of MRPC 1.4(a) and (b). Respondent never told Mr. Allen of his intent to keep the $3,600 check. To the contrary, respondent indicated he was going to give Mr. Allen the entire settlement, and repeatedly told Mr. Allen that the check was "on the way," even after respondent deposited the check into his own personal account.

We also agree the record supports the hearing panel's finding that respondent violated 1.15(b)(3) by failing to promptly deliver the funds owed to Mr. Allen and failing to render a full accounting to Mr. Allen regarding the funds in his possession, MRPC 1.15(c), by failing to keep disputed funds separately in trust until the dispute was resolved, and MRPC 1.15(d), by failing to hold property of a client separate from the lawyer's own property. Pursuant to the modification of the original contingency agreement, the $3,600 check (less $500 that Mr. Allen offered to give to respondent) represented client funds that should have been deposited into the IOLTA. To date, Mr. Allen has not received any of those funds. By depositing the $3,600 check into his business operating account, respondent converted the money into his own funds. Accordingly, we affirm the hearing panel's finding of misconduct regarding MRPC 1.15.

We also agree with the hearing panel's finding that respondent engaged in conduct involving dishonesty, fraud, deceit or misrepresentation, in violation of MRPC 8.4(b), and that respondent's conduct was prejudicial to the administration of justice (MRPC 8.4(c) and MCR 9.104(1)), constitutes conduct that exposes the legal profession to obloquy, contempt, censure

or reproach (MCR 9.104(2)), and is contrary to justice, ethics, honesty or good morals (MCR 9.104(3)). After having the opportunity to observe the demeanor and behavior of the witnesses during the hearing, the hearing panel firmly concluded that Mr. Allen was forthright and truthful, while respondent "was not truthful, was not forthcoming, or candid and, in fact, intentionally attempted to mislead the panel with respect to the matters associated with the Formal Complaint." (HP Report, p 9.) Again, we see no reason to disturb this assessment.

The only exception we take with the hearing panel's findings of misconduct is the conclusion that respondent violated MRPC 1.5(a) and (b). We find that there is insufficient evidence in the record to make an "excessive fee" determination. With regard to the MRPC 1.5(a) charge (that respondent charged an excessive fee), the nature of the conduct established is that respondent did not comply with the modified fee agreement, not that the amount agreed upon was excessive. As to the MRPC 1.5(b) charge, the allegation was that respondent did not communicate the rate or basis of the fee. But the misconduct here was not that respondent failed to communicate about the fee – he repeatedly affirmed the modification of the fee agreement and said the check was in the mail – he simply lied in those communications. Therefore, we reverse the hearing panel's finding that respondent violated MRPC 1.5(a) and (b).

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. In determining the appropriate sanction, the hearing panel determined that the most severe violations were those involving respondent's dishonesty, namely MRPC 8.4(b) and MCR 9.104(1) and (3), and that disbarment is the most appropriate sanction under ABA Standard 4.11 (Failure to Preserve Client Property) and Standard 4.61 (Lack of Candor).

Next, the panel considered the applicable aggravating and mitigating factors and concluded that "no credible mitigating factors for respondent's conduct has been presented to the Panel," and that "[u]nfortunately in reviewing the ABA Standards on aggravating factors found in Section 9.22 of the ABA Standards, the Respondent does not fare well." (HP Report, p 4.) The hearing panel emphasized the fact that respondent was already disbarred in a prior discipline proceeding, but also found the following aggravating factors applicable: dishonest or selfish motive [9.22(b)]; a pattern of misconduct [9.22(c)]; 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)]; vulnerability of the victim [9.22(h)]; and substantial experience in the practice of law [9.22(I)]. The panel concluded that Mr. Allen suffered an actual injury as a result of respondent's intentional misconduct, and thus ordered restitution in the amount of $3,100.00.

The Board's standard of review in this case is set forth in *Grievance Administrator v Mark J. Tyslenko*, 12-17-GA (ADB 2013) at pp 5-6:

> [O]ur responsibility to ensure consistency and continuity in discipline imposed by panels and the Board sometimes requires us "to independently determine the appropriate weight to be assigned to various aggravating and mitigating factors depending on the nature

> of the violation and other circumstances considered in similar cases." *Grievance Administrator v Karen K. Plants*, 11-27-AI; 11-55-JC (ADB 2012), p 18, citing *Grievance Administrator v Saunders V. Dorsey*, 02-118-AI; 02-121-JC (ADB 2005). Further, as we have said previously:
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> > [T]he same aggravating or mitigating factor may warrant different degrees of consideration, depending upon the facts and circumstances of a case . . . [For] example, the mitigating effect of certain factors identified in Standard 9.32 may be sufficient to warrant a decrease in the level of discipline in a case involving relatively minor misconduct while the same mitigating factors may not warrant consideration of discipline less than revocation in cases involving the "capital offenses" of law discipline, such as intentional theft of client funds held in trust or deliberate presentation of a forged document during a proceeding. [*Grievance Administrator v Che A. Karega*, 00-192-GA (ADB 2004) (Memorandum Opinion, After Remand), p 8.]

Here, the panel's findings regarding mitigation and aggravation have proper evidentiary support, and we find no error in the weight assigned to these factors and balanced by the panel.

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 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.

Upon careful consideration of the whole record, the Board is not persuaded that the hearing panel's findings of misconduct (with the exception of finding a violation of MRPC 1.5), and decision to disbar respondent and order restitution were inappropriate.

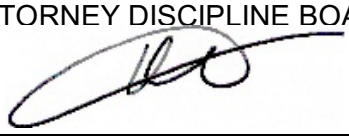
**NOW THEREFORE**,

**IT IS ORDERED** that the hearing panel's findings of misconduct are **AFFIRMED** in part and **REVERSED** in part. The findings of a violation of MRPC 1.4(a) and (b), 1.15(b)(3), (c), and (d), 8.4(b) and (c), and MCR 9.104(1)-(3) are **AFFIRMED**. The findings of a violation of MRPC 1.5(a) and (b) are **REVERSED**.

**IT IS FURTHER ORDERED** that the hearing panel's order of disbarment and restitution issued September 7, 2021, is **AFFIRMED**.

**IT IS FURTHER ORDERED** that respondent shall pay court reporting costs incurred by the Board for the review hearing conducted on February 16, 2022, in the amount of $153.50. This amount is in addition to the costs previously assessed in the hearing panel order of September 7, 2021, together with interest pursuant to MCR 9.128. Total costs assessed and owed are **$3,622.29**. Please refer to the attached cost payment instruction sheet for method and forms of payment accepted.

ATTORNEY DISCIPLINE BOARD

By: 

Michael B. Rizik, Jr., Chairperson

Dated: March 11, 2022

Board members Michael B. Rizik, Jr., Linda Hotchkiss, M.D., Karen D. O'Donoghue, Peter A. Smit, and Linda M. Orlans concur in this decision.

Board members Rev. Dr. Louis J. Prues and Jason M. Turkish concur in the findings of misconduct, but respectfully dissent as to the imposed sanction and would have ordered a three-year suspension.

Board Member Alan Gershel recused himself and did not participate.

Board Member Michael S. Hohauser was absent and did not participate.