FILED
ATTORNEY DISCIPLINE BOARD
September 29, 2020

STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellant,

v

James Lawrence, P 33664,

Respondent/Appellee,

Case No. 18-130-GA

Decided: September 29, 2020

Appearances

Kimberly L. Uhuru, for Grievance Administrator, Petitioner/Appellant
Paul H. Stevenson, for Respondent/Appellee

BOARD OPINION

On May 20, 2020, Tri-County Hearing Panel #101 issued an order of suspension and restitution with conditions, suspending respondent's license to practice law for 100 days, effective June 11, 2020. The Grievance Administrator filed a timely petition for review and the Attorney Discipline Board conducted a virtual proceeding via Zoom video-conferencing, in accordance with General Order ADB 2020-1, and MCR 9.118, on August 26, 2020, which included a review of the whole record before the panel, consideration of the parties' briefs and the argument presented by the parties' respective counsel. For the reasons discussed below, we increase the discipline imposed from a 100-day suspension to disbarment and restitution and we vacate the conditions imposed by the hearing panel.

I. Panel Proceedings/Background

On November 28, 2018, the Grievance Administrator filed a formal complaint against respondent which alleged that respondent committed professional misconduct in his representation of Eric Nowman who contacted respondent to file a motion for relief from judgment. Mr. Nowman sought reversal of a 1981 conviction for first degree felony murder for which he was sentenced to

life in prison. The complaint specifically alleged that respondent requested and received a $3,500 fee from Mr. Nowman on November 12, 2014, to conduct preliminary research into his matter. On March 24, 2015, respondent advised Mr. Nowman in writing that he believed they could file a motion for relief from judgment on several grounds and recommended that Mr. Nowman hire a private detective to investigate a conflict of interest issue that arose with the judge who presided over Mr. Nowman's criminal trial. Respondent requested a $12,000 advance fee to file the motion and specifically advised Mr. Nowman he would receive credit for the $3,500 paid for the case review.

On May 7, 2015, respondent received a $12,000 check from Mr. Nowman's sister, Ronda Kuhens. On the same date, respondent deposited the check into his business checking account at Chase bank, which had a balance on that date of -$829.94. Thereafter, it was alleged that withdrawals were made from the account for personal expenses and that a significant portion of the funds were misappropriated by June 30, 2015.[1] In August 2016, and early March 2017, respondent encouraged Mr. Nowman to continue to pursue the matter and recommended other detectives to hire when the first could not substantiate a conflict of interest with the presiding judge.

On March 26, 2017, Mr. Nowman informed respondent that he no longer wished to proceed with the motion, he requested the return of his client file, and he requested a refund of the $12,000 advanced fee. On May 9, 2017, respondent acknowledged in writing that Mr. Nowman did not want to proceed and asked where and to whom he should make payment. Ms. Kuhens also emailed respondent requesting a refund to which respondent responded on July 5, 2017 that ". . . there is something wrong, a lack of money on our end."

On August 6, 2017, respondent met with Mr. Nowman at Ionia Correctional Facility and the two agreed on a payment plan of $1,500 per month until $10,000 was paid back. They further agreed that respondent would retain $2,000 of the $12,000 advance fee for his time spent on the file. Respondent failed to make the monthly payments as agreed. On October 11, 2017, Mr. Nowman filed a request for investigation against respondent. On November 8, 2017, respondent sent Ms. Kuhens a $5,200 cashier's check. The formal complaint alleged that respondent made no further payments[2] and that respondent violated MRPC 1.15(b)(3), (d), and (g); 8.4(b); and, MCR 9.104(1), (2), and (3).

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[1] The records show that as of May 31, 2015 (approximately three weeks after receiving payment), $8,567.38 of the $12,000 had been withdrawn from the account and spent on personal expenditures.

[2] In a later pleading, the Administrator's counsel noted that since he was served with Mr. Nowman's request for investigation, respondent has made payments to Ms. Kuhens totaling $10,000, and that $2,000 was still owed.

Respondent filed an answer to the formal complaint, *in pro per*, on December 26, 2018, in which he did not dispute that funds were withdrawn from the account for personal expenditures, but claimed that "most of the expenditures were made by respondent's wife, Mrs. Lisa Lawrence . . ." (Answer ¶ 5.) Respondent noted that both he and his wife had access to the account in question. Respondent admitted that payment to Ms. Kuhens was not done promptly and stated that he "believed that other clients were going to pay amounts they promised to pay, and that all debts to Mr. Nowman or his family would thus be cleared." (Answer ¶ 10.) Respondent asserted that his actions did not justify discipline and characterized the matter as a "fee dispute." (Answer, p 6.)

The next day, December 27, 2018, respondent filed an amended answer, through his then newly retained counsel, in which he admitted, and pled no contest, to all but three of the paragraphs of factual statements, but denied as untrue that he engaged in professional misconduct as charged in the formal complaint. The matter was assigned to Tri-County Hearing Panel #101 and scheduled for hearing on January 23, 2019. After a number of administrative adjournments, the hearing was rescheduled to June 27, 2019.

On June 13, 2019, the Administrator's counsel filed a motion for summary disposition requesting a finding of misconduct based on MCR 2.116(C)(10), as there was no genuine issue of material fact presented by respondent's answer. The June 27, 2019 hearing was adjourned to allow respondent time to respond to the Administrator's motion. Respondent did not contest the motion and on July 12, 2019, the hearing panel entered an order granting summary disposition and finding misconduct as to all of the allegations of professional misconduct set forth in the formal complaint. Specifically, the panel found that respondent engaged in the following violations of the Michigan Rules of Professional Conduct:

> a) Failure to promptly pay or deliver funds in which a client or third person is entitled to receive, in violation of MRPC 1.15(b)(3);
>
> b) Failure to hold property of clients or third persons in connection with a representation separate from the lawyer's own property, in violation of MRPC 1.15(d);
>
> c) Failure to deposit legal fees and expenses that have been paid in advance into a client trust account, in violation of MRPC 1.15(g);
>
> d) Withdrawing fees paid in advance prior to earning the fees, in violation of MRPC 1.15(g);

> e) Engaging in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer, in violation of MRPC 8.4(b);
>
> f) engaged in conduct prejudicial to the proper administration of justice, in violation of MCR 9.104(1);
>
> g) engaged in conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach, in violation of MCR 9.104(2); and,
>
> h) engaged in conduct that is contrary to justice, ethics, honesty, or good morals, in violation of MCR 9.104(3).

At the November 26, 2019 sanction hearing, respondent testified on his own behalf and presented the testimony of two character witnesses, attorneys who testified to respondent's experience, knowledge, work ethic, and reputation for integrity and good legal work. Respondent also offered a number of letters of support, (Respondent's Exhibit K), in addition to other exhibits showing his extensive practice experience over the past 37 years. (Respondent's Exhibits H-I; L-M.)

He also testified regarding his relationship with his client, his office practices, where the money went, and other matters. Documentary evidence was also introduced. The evidence at the sanction hearing was consistent with the findings of misconduct previously entered by the panel.

On September 26, 2014, in response to Mr. Nowman's request for assistance, respondent advised Mr. Nowman in writing of the following:

> If you can provide me with all the documents from your case, my fee for a case review, not including a prison visit, will be $3500.00, plus costs if any . . . If you want to proceed, please arrange to send me all the transcripts and other documents from the case, and arrange for someone to send me the full case review fee, and/or the full visit fee. [Petitioner's Exhibit 1.]

Thereafter, respondent received $3,500 from Mr. Nowman to conduct a full case review of his matter. (Tr 11/26/19, pp 61-63.) On March 24, 2015, respondent sent Mr. Nowman a 19-page report following his review of all of the materials. (Petitioner's Exhibit 3; Tr 11/26/19, p 59.) The report indicated that respondent believed there were approximately five issues "that could be raised in a motion for relief from judgment, with a reasonable chance of success." (Petitioner's Exhibit 3,

p 17.) Respondent's report further advised, in relevant part, that the fee for filing the motion would be as follows:

> Give information to private detective (to be paid for by you) that will guide him in finding newly discovered evidence about any connection between Warshawsky and Morett and his family. File Circuit Court motion raising issues as specified above. FEE for filing Circuit Court motion: $12,000, plus costs if any, plus $2000.00 per day or partial days of hearings in western Michigan. **You get credit for the $3500.00 already paid for case review.** FEE FOR DETECTIVE: to be set by detective company. [Petitioner's Exhibit 3, p 18. Emphasis added.]

The letter continued on to explain additional fees for appellate proceedings if the motion in circuit court was unsuccessful, and further explained that other proceedings (such as new trial, representation in the United States Supreme Court, or Habeas Corpus proceedings) were not included and any fees for those services would be quoted at the relevant time. Finally, the detailed fee portion of this letter concluded: **"You will not have to pay for services I do not perform, and I will not have to perform services that are not paid for."** (*Id.*, p 19. Emphasis added.)

On May 7, 2015, respondent received and deposited a $12,000 check he received from Mr. Nowman's sister, Ronda Kuhens, into his personal/business checking account at Chase bank. (Petitioner's Exhibit 5.) As noted by the Administrator's counsel, and confirmed by respondent at the hearing, respondent had a client trust account at Comerica Bank at the time, but purposely chose not to deposit the check there. (Tr 11/26/19, pp 73, 99.)

Respondent also acknowledged that he never gave Mr. Nowman credit for the $3,500 already paid nor did he advise Mr. Nowman or Ms. Kuhens after he received the check, that with the credit, his advance fee should have been $8,500, not $12,000. (Tr 11/26/19, p 66.)

The Chase account was not "very well defined." Respondent described it as a personal account, and he and his wife had no other personal account at the time, but Chase designated it a business account. Personal and business expenses were both paid from the account. (Tr 11/26/19, pp 73-74, 76, 97-99.) But, if the purpose of the account was muddled, the bank records are clear. The $12,000 was deposited into the business checking account at Chase on May 7, 2015, and by May 29, 2015, the balance of the account was $3,432.62. The records showed that $8,567.38 of the $12,000 was either withdrawn from the account from a non-Chase ATM or used for personal

expenditures, such as the casino, Netflix, Hulu, Uber, etc., within 22 days of its receipt. (Petitioner's Exhibit 6.) Respondent testified that his wife had access to the account via a debit card, that the records correctly described the account activity, but that the expenditures referenced in the records for the casino, and non-Chase ATM withdrawals, among other charges, were all done by his wife. (Tr 11/26/19, pp 75-76.)

Meanwhile, the record reflects that respondent sent an email to the private detective (Mr. Clatterbuck) on May 7, 2015, transmitting his assessment of the case and focusing the detective on the first possible ground for the motion - a potential conflict of interest arising from a possible social relationship between the trial judge (who was by then deceased) and the murder victim. (R's Exhibit F.) Respondent did not follow up with the investigator until December 11, 2015 (Petitioner's Exhibit 8), who responded, in part: "What is your time frame? The problem with this type of case is that it is easy to put on the back burner and I know all too well." Respondent replied: "We do not have a specific time frame, only that we cannot file anything on his behalf until you come up with something. I recognize the difficulty of this job, and that it will take time. Proceed doing the best job you can."

After prompting from his client's sister, Ms. Kuhens, on July 19, 2016, respondent again emailed the detective for a status update on July 20, 2016. (Petitioner's Exhibit 9.) On August 25, 2016, respondent sent a letter to his client acknowledging receipt of a letter, discussing a possible visit from the detective or retaining a new detective, and concluding: "As I indicated before, unless we find some good newly discovered evidence, I do not see that you have a chance with the courts. You should advise whether you have visited with Clatterbuck, whether you want me to get someone else on board as investigator, and how we will arrange to pay that person." (Petitioner's Exhibit 10.) On September 11, 2016, respondent wrote to his client that he was glad the visit with Detective Clatterbuck went well, and concluded: "I want him to find some actual evidence of the conflict of interest before we start speaking to your former trial attorney." (Petitioner's Exhibit 11.) But, the detective's efforts apparently did not bear fruit, and on March 21, 2017, respondent wrote to his client that it was unfortunate that Clatterbuck "was unable to find useful information for your case;" respondent suggested other investigators and pressing on:

> I recommend that we continue to investigate, even though the investigator found by your family was unable to come up with useful information. Your case was from 1981. As each year goes by, the

> trail gets colder, and witnesses die or disappear. Delay will only make things worse. [Judge] Warshawsky has been dead for years, and in my opinion you need to proceed now with finding the information you need, or you might never find it. [Petitioner's Exhibit 12.]

He then revisited other issues he had suggested raising previously, and concluded:

> Therefore, it would be possible to proceed with a Motion for Relief from Judgment (also known as a 6.500 motion) even without new information showing a conflict of interest of Warshawsky. However, if proven, a conflict of interest would be the strongest type of issue. We can proceed with conflict of interest by Clarke without any investigation needed. [*Id*.]

On March 26, 2017, after several years and being no closer to the filing of a motion challenging the then 36-year-old conviction, respondent was notified that his client had decided not to move forward with the case and had requested a refund. (Petitioner's Exhibit 13.) As mentioned above, between May 7 and May 29, 2015, the bulk of the money was spent. After some emails back and forth, including one explaining that his client's mother had been diagnosed with cancer and the family needed the refund, respondent acknowledged, in July 2017, "a lack of money on [his] end." (*Id.*)

The Grievance Administrator's counsel argued that respondent violated duties owed to the client, the legal system, and the profession; that his mental state was knowing; and, that respondent's client suffered actual financial injury. (Tr 11/26/19, pp 130-132.) Counsel argued that ABA Standard 4.1 (Failure to Preserve the Client's Property) applied, and specifically referenced Standard 4.11, which provides for disbarment as the appropriate level of discipline. (Tr 11/26/19, p 132-133.)

Counsel cited *Grievance Administrator v Petz*, 99-102-GA; 99-130-FA (ADB 2001), for the proposition that, absent compelling mitigation, a knowing conversion of client funds for a lawyer's personal or business use presumptively requires disbarment under ABA Standard 4.11. (Tr 11/26/19, pp 133-135.) Counsel also cited *Grievance Administrator v Terry A. Trott*, 10-43-GA (ADB 2011) (2½ year suspension increased to disbarment after finding no compelling mitigation for failing to return, and misappropriating, an unearned fee paid in advance); and *Grievance Administrator v William L. Fette*, 10-70-GA (ADB 2011) (120-day suspension increased to disbarment for depositing $20,000 paid in connection with a potential criminal representation in a business checking account,

misappropriating the unearned fee, and failing to return it when the investigation was dropped two years later).

As for aggravating factors, the Administrator's counsel argued that the factors found in ABA Standard 9.22(b) (dishonest or selfish motive); and ABA Standard 9.22(i) (substantial experience in the practice of law), applied and finally urged the panel to order that respondent pay $2,000 in restitution to Ronda Kuhens, who paid respondent's fee. (Tr 11/26/19, pp 138-139.)

Respondent's counsel advocated for a reprimand under ABA Standard 4.13, arguing that respondent's misconduct was a result in his deficiencies in law practice management, the fact that professional responsibility was not required when he went to law school, changing IOLTA rules, and lack of awareness of fee agreement types. (Tr 11/26/19, p 141.) As for mitigating factors, counsel argued that the factors found in ABA Standard 9.32(a) (absence of a prior disciplinary record); ABA Standard 9.32(b) (absence of a dishonest or selfish motive); ABA Standard 9.32(d) (timely good faith effort to make restitution); ABA Standard 9.32(g) (character or reputation); and 9.32(l) (remorse), applied. Counsel noted the time respondent spent on his client's matter even though respondent has already made a commitment to repay the funds to Ms. Kuhens and that to date, respondent had refunded $10,000 to her. Finally, counsel referenced other cases in which the AGC consented to lesser sanctions for mishandling funds in support of his request for a reprimand. (Tr 11/26/19, pp 142, 145-147.)

Both parties filed post-hearing briefs and we will address some of their arguments in the analysis below.

The hearing panel's report was issued on May 20, 2020, in which the panel found that disbarment was "too extreme given the particular facts and circumstances of this matter," and that "a reprimand is too lenient for the misconduct that occurred." Finding that "respondent did not act with a fraudulent or larcenous intent. Rather, his misconduct occurred as a result of gross mismanagement and ignorance," the panel ordered a 100-day suspension of respondent's license to practice law subject to conditions that included restitution of $2,000 to Ronda Kuhens; ordering respondent to work with an attorney-mentor to establish sound law office management practices; ordering respondent to not continue as a sole practitioner; not handle fee arrangements or fees; and, to only provide legal services through an established law firm or agency and to provide evidence such an arrangement has been established.

An order of suspension and restitution with conditions was issued suspending respondent's license to practice law in Michigan for 100 days, effective June 11, 2020. The Grievance Administrator filed a timely petition for review arguing that the hearing panel imposed insufficient discipline.

II. Discussion

The only issue on review is whether the hearing panel's order of suspension can be reconciled with governing precedent in cases imposing discipline for misconduct similar to that found by the panel.[3] We are guided by a standard we have set forth many times, as we did in *Grievance Administrator v Robin H. Kyle*, 13-14-GA (ADB 2016), at p 9:

> In reviewing the sanctions imposed we "review and, if necessary, modify a hearing panel's decision as to the level of discipline" in light of the our "responsibility to ensure a level of uniformity and continuity" in disciplinary matters. *Grievance Administrator v Brent S. Hunt*, 12-10-GA (ADB 2012), p 7, citing *Grievance Administrator v August*, 438 Mich 296, 304; 475 NW2d 256 (1991).

This is not (or need not be) a complicated case. MRPC 1.15(g) provides: " Legal fees and expenses that have been paid in advance shall be deposited in a client trust account and may be withdrawn only as fees are earned or expenses incurred." The presumptively appropriate sanction for a knowing violation of this rule is disbarment. See *Fette*, *supra*, (120-day suspension of a well-regarded attorney increased to disbarment for accepting a $20,000 advance fee and failing to place the funds in a trust account and spending the unearned fee). As *Fette* and numerous other cases explain, many mitigating factors ordinarily considered in most discipline cases (such as inexperience, character and reputation, no prior discipline, etc.) do not move the needle with regard to this presumptive sanction. Rather, under *Petz* and ABA Standard 4.11, and because the duty of honesty is so fundamental, and the fiduciary status of a lawyer and the need for the public to be able to trust in it are so important, disbarment is the appropriate sanction absent a demonstration of compelling mitigation. Despite a valiant effort by respondent's counsel, the mitigation offered in this case does

[3] The panel's order requiring respondent to pay restitution in the amount of $2,000 appears to have been satisfied. Respondent's Brief on Review, at page 5, indicates that respondent "made a final payment of $2,000 to Ms. Kuhens on April 29, 2020." It should be noted that the $3,500 fee for review of Mr. Nowman's case is not at issue here. There has been no claim by petitioner that the work was not done competently or that this fee should be disgorged.

not rise to that level under our cases. We will now examine the mitigation and other arguments offered at greater length.

Respondent testified, and his counsel urges us to consider, among other things, that:

- his law school did not require professional responsibility and he did not take it (Tr 11/26/19, pp 77-76);
- that "no one ever told [him] that there was something wrong" with spending advance fees rather than placing them in trust (Tr 11/26/19, p 76);
- he is a poor business person who doesn't pay attention to details regarding finances and office management (Tr 11/26/19, pp 84-85);
- this only happened because he didn't have a "nonrefundable fee" clause in his fee agreement (Tr 11/26/19, pp 99, 141-142), but he did not intend the fee to be nonrefundable and he always refunds fees that he doesn't earn (Tr 11/26/19, pp 83-84); and
- "he thought the money was his because he was proceeding with the work" (Tr 11/26/19, pp 83-84), but he uses his trust account for unearned hourly fees and has always "removed it as the hours were spent" (Tr 11/26/19, pp 85).

None of this adds up to a credible claim that he was entitled to deposit the money into his hybrid personal/business account and spend it. And this is not a case about changing rules. As counsel for the Administrator has pointed out in her post-hearing sanctions brief, the law has consistently required unearned fees to be deposited in trust since he started practicing in 1982. At that time, Canon 9 applied.[4] Thereafter, in 1988, the Rules of Professional Conduct were adopted

[4] DR 9-102 provided:

> (A) All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in one or more identifiable bank accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:
>
> (1) Funds reasonably sufficient to pay bank charges may be deposited therein.
>
> (2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

and each iteration of MRPC 1.15 provided as much in substance. At all applicable times, respondent's conduct was governed by MRPC 1.15(d) and (g). And, it goes without saying, lawyers have a duty to keep up with rule changes in any event.

Nor is there a change in caselaw that is responsible for respondent's plight. Although some cases prior to *Petz* did not require mitigation to be compelling and relevant in terms of explaining conduct that fails to meet fiduciary standards and basic principles of honesty, there were ample precedents for imposing the most serious sanction dating back to the inception of this Board with respect to attorneys who disclaimed the requisite scienter for such a sanction because they were out of touch with their finances. See, e.g., *In Re Matter of Leonard A. Baun*, 32207-A (ADB 1979) ("Whether the commingling and conversion of funds was done as a result of some planned, conscious scheme or was a result of careless bookkeeping [the latter claim is Respondent's position], the evidence remains uncontroverted that Respondent knew, or very certainly should have known, that he was failing to carry out his duties as fiduciary.").

In *Petz*, we clarified the sanctions analysis in light of the Supreme Court's adoption of the ABA Standards in the year prior. Specifically, Standard 4.11, providing that "Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client," was discussed along with the Standards' definition of an important term: "'Knowledge' is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result."

Since that time, this Board has rejected numerous attempts to claim that the particular respondent was unaware of where the money was going. But, that is not really the claim here. Respondent argues that his ignorance of the long-standing law should be mitigating. Were we to accept such an argument, it would have a devastating impact on the public and upon the reputation of attorneys. Moreover, notwithstanding testimony by respondent and others that he didn't pay attention to money and the business aspects of practice, we are not persuaded that respondent, despite his reputation as an excellent criminal lawyer, was utterly clueless with regard to the business aspects of the law. For example, his letters contain a great deal of detail with regard to setting fees and touting his past successes. He certainly had the capacity to ascertain the appropriate practices.

Respondent testified that "the State Bar should set up a program so that new lawyers and even existing lawyers can be told the basics of how to run a business which is something that I never

knew." (Tr 11/26/19, p 108). Of course, the State Bar has offered many such programs over the years, and even has a Practice Management Resource Center with a wealth of online resources dealing with things such as client relations, insurance, financial management, risk management, law office management, and, yes, trust accounts. There is even a helpline one can phone for individual consultations, there are webinars, there is a lending library (with ebooks and audiobooks). With respect to ethics, there are similar resources, including a half-day course titled "Lawyer Trust Accounts Seminar: Management Principles & Recordkeeping Resources." We recognize that respondent took this class in June 2019, while the proceedings below were pending, and found that "it only scratche[d] the surface" and "was only marginally helpful." (*Id.*) If such a course did not meet his needs, he could have delved more deeply in any number of ways. The ethics helpline is well-known to practitioners.

Other resources exist, as well. Legal publishers sell books on professional responsibility and fees, free blawgs (legal blogs) cover various topics regarding law office management and ethics, the ADB website contains our opinions in a searchable format, and various practitioners could quickly and economically provide advice. In short, anyone who wants to know what to do can readily find the answers.

Therefore, we are not persuaded by respondent's argument that the panel correctly found his conduct to be the result of "gross mismanagement and ignorance," or if it was, that this could be mitigating. We have had occasion to address similar arguments before:

> Attempts to blame misuse of client funds on poor bookkeeping practices seldom make any sense. With respect to the handling of trust funds, "poor bookkeeping" is often actually a refusal to assign priority to the lawyer's role as a fiduciary. The public is asked to trust lawyers with their confidences, their liberty, and their fortunes. The public is also asked to trust lawyers as repositories of funds. The duty to keep client and third party funds safe and separate from lawyer funds is a fundamental one. [*Trott*, *supra*, at p 3.]

Moreover, the concepts at play here are not that difficult to grasp. Simply put, the money deposited with a lawyer to secure payment for work to be done is not the lawyer's until the work is done. This is not complicated or obscure. And we have explained it over and over. See, e.g., *Fette* and *Trott*. Indeed, to underscore the significance of this duty and its necessary consequences, Board Member Kienbaum authored a concurring opinion in *Trott*:

I concur with my colleagues, but write separately because the disbarment of respondent may seem unduly harsh to some. After all, respondent has practiced law without discipline or even reprimand for over 30 years. By all accounts, he has been a respected member of his legal community. And, some might say, he "only borrowed" money from "his" client trust account - which surely cannot be the same thing as stealing money from a client. But, as unfortunate as respondent's situation is, our precedents, consistent with decisions in other jurisdictions, do not recognize such a distinction - nor should they.

Client trust accounts contain funds originating with clients, and the lawyer assumes the responsibility of a fiduciary to safeguard those funds. The lawyer initially has no claim whatsoever to funds in a client trust account. Only when a fee is earned may an equivalent amount be withdrawn from the account with the client's approval. The expectation that a fee will be earned may blur this important truth in some lawyers' minds, but a lawyer who ignores this bright line may find himself facing the equivalent of a charge of theft.

Did respondent fully understand the nature of his conduct - its venality and the potential penalty - when he withdrew funds from the trust account for personal expenses, likely intending to return the monies as soon as he could? I am almost certain he did not. One may ask, then, why lack of intent should not be considered a mitigating factor. After much reflection I, and my colleagues, have again concluded that the profession cannot afford the slippery slope that such an approach would create. Respondent knew what he was doing, and any lawyer must conclusively be presumed to have understood the nature of such acts and their consequences.

Respondent relies on the dispositions in some cases that have been summarized in notices of discipline appearing in the Michigan Bar Journal and on our website. Some of these decisions predate the Michigan Supreme Court's adoption of the ABA Standards and our opinion in *Grievance Administrator v Petz*, 99-102-GA (ADB 2000), some are simply factually distinguishable, and some are the result of stipulations for consent discipline which have not always spelled out the facts and mitigating factors.

On the same day we heard this Respondent's case, another case - *Grievance Administrator v Fette*, 10-70-GA (ADB 2011) - was before us. In that case, the Grievance Administrator asked for an increase of the 120 day suspension imposed on that Respondent - but he did not seek disbarment, only a one year suspension. The facts

> were almost identical - certainly there were no material distinctions - and we were compelled there to increase the penalty to revocation, just as we did in this case. We have not done so lightly in either case, and can only hope that the message this Board sent to the profession in *Grievance Administrator v Petz*, *supra*, is again heard clearly.

It is also suggested that this discipline case arose only because respondent failed to use "magic words," just "one sentence in his fee agreement," based on the order in *Grievance Administrator v Patricia Cooper*, 482 Mich 1 (2008), saying that the fee was "nonrefundable." (Tr 11/26/19, p 141). This is not accurate. Saying "nonrefundable" or some other incantation would not have allowed him to commingle and misappropriate these unearned fees. We do not read the *Cooper* order as our Court's decision to allow lawyers to obtain money from the public on the pretense - actually, the express promise - that the money will be used to pay for legal work, and retain that money if the work is not performed. That has never been the law in Michigan. See, e.g., State Bar of Michigan Ethics Opinions R-7 and RI-10. And we are aware of no other jurisdiction that would countenance such a rule. See, e.g., John Wesley Hall, Jr., *Professional Responsibility in Criminal Defense Practice*, § 7:9.50 (Nonrefundable retainers - State by state analysis). In fact, respondent testified that he never intended the fee to be nonrefundable, has never claimed that it was, that his practice has always been to refund unearned fees, and, "in the back of [his] mind" he thought "if I was going to be discharged at any point I just pay a refund." (Tr 11/26/19, pp 83-84, 92, 104). Indeed, in a case such a this, "his sense of duty," "his reputation for integrity and honesty," and "his personal sense of morality and ethics would compel him to make a refund." (Respondent's brief on review, p 4; Tr 11/26/19, p 142.)

Finally, to the extent respondent attempts to compare this matter to failure-to-return unearned fee cases (not involving commingling and misappropriation charges), that would not change the result here. As we have explained, "'it is not difficult to argue that an attorney's refusal to refund the unearned portion of such a fee becomes, at some point after the termination of the representation, tantamount to knowing conversion.'" *Grievance Administrator v William L. Fette*, 10-70-GA (ADB 2011), p 5. Here, respondent testified in response to a panel member's question in this regard:

> MEMBER WEIER: Well, did you have the ability to pay him $1500 a month when you promised to pay him $1500 a month?
>
> THE WITNESS: Probably.

> MEMBER WEIER: But you never made any of those payments?
>
> THE WITNESS: Yes, not at first.
>
> MEMBER WEIER: And how long did it take to you [sic] make any payment?
>
> THE WITNESS: Until he complained. I guess I would like to explain. I know this doesn't sound right. But I simply forgot, you know. You're doing this and you're doing that. I have to go to the post office, I have to un-jam the copier, I have to install ink in the printer, and I just forgot. I wish I hadn't forgot, then I wouldn't be sitting here right now. [Tr 11/26/19, p 112.]

III. Conclusion

Recently, we had occasion to write: "Unfortunately, this is not the first time, and likely will not be the last time, that a 'good lawyer' and 'respected member of the legal community,' who has no prior disciplinary offenses has been subject to harsh discipline because he or she has engaged in the knowing conversion of client funds." *Grievance Administrator v Donelly W. Hadden*, 15-05-GA (ADB Order dated 1/9/2019), p 3.

Other cases involving the strictest discipline in order to protect the public despite the presence of mitigation, include, in addition to *Fette*, *supra*, and *Trott*, *supra*: *Grievance Administrator v Anthony T. Chambers*, 12-80-GA (ADB 2013), (180-day suspension increased to disbarment and restitution for, among other things, violating MRPC 1.15(g) and spending two advance fees in criminal representations for personal purposes, failing to do the work or refund the unearned fees, despite various mitigating factors and recognition as one of the premier criminal defense attorneys in Michigan); *Grievance Administrator v Shawn P. Davis*, 13-21-GA (ADB 2014); *Grievance Administrator v Mark Tyslenko*, 12-17-GA (ADB 2013); and, *Grievance Administrator v Peter C. Mason, Jr.*, 13-4-GA (ADB 2013), (increasing discipline from two years imposed by panel to disbarment notwithstanding 39 years of practice without discipline, cooperative attitude in discipline proceedings, remorse, and personal health and family issues).

The opinion in *Mason* explains the necessity of imposing discipline in accordance with ABA Standard 4.11, *Petz* and its progeny, and numerous other precedents of this Board we have been directed by the Court to apply[5]:

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[5] *See Grievance Administrator v Lopatin*, 462 Mich 235, 247 n 13; 612 NW2d 120 (2000).

> "When client funds have been commingled with the attorney's funds and then spent, whether by mistake or design, some attorneys will be in a position to rectify the situation. Some, unfortunately, will not. The client entrusting funds to an attorney's care should not have to gamble on that attorney's future financial well-being. Compliance with MRPC 1.15 assures that regardless of the attorney's personal financial situation, the client's money will remain intact and inviolate in a segregated account." [*Mason*, at pp 6-7; citations omitted.]

Accordingly, we will enter an order modifying the hearing panel's order of discipline. Specifically, we shall vacate the suspension and conditions, provide credit for any further restitution paid to date, and increase discipline to disbarment.

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

Board member Peter Smit was absent and did not participate in this decision.

Concurring Opinion of Board Member Linda S. Hotchkiss, MD:

I concur in the decision of my colleagues in the majority, but write separately to highlight the standard of review for sanctions determinations in general, and to discuss its application in misappropriation cases decided under ABA Standard 4.11 and *Grievance Administrator v Petz*, 99-102-GA; 99-130-FA (ADB 2001).

A hearing panel's findings of fact are reviewed for "proper evidentiary support on the whole record," which we have consistently interpreted as consistent with the highly deferential clearly erroneous standard. *Grievance Administrator v Ernest Friedman*, 18-37 -GA (ADB 2020). We review questions of law *de novo*. *In Re Reinstatement of Jose A. Sandoval*, 15-17 -RP (ADB 2017). And we have recently discussed the standard of review for a sanction imposed by a hearing panel:

> The standard of review for a panel's determination as to the appropriate level of discipline was discussed in *Grievance Administrator v David A. Reams*, 06-180-JC (ADB 2008), at p 2, which said:
>
> > Although we afford a certain degree of deference to panel determinations as to the level of discipline imposed, this deference is less than that given to a finding of fact because this Board has an "overriding

> duty to provide consistency and continuity in the exercise of its overview function" with regard to sanctions. *Grievance Administrator v Rodney Watts*, 05-151-GA (ADB 2007). *See also, Matter of Daggs*, 411 Mich 304, 319-320 (1981).
>
> However, the Board traditionally does not disturb a panel's assessment 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. The Court similarly defers. *Grievance Administrator v Lopatin*, 462 Mich 235, 247 [n12]; 612 NW2d 120 (2000). *Grievance Administrator v Gregory J. Reed*, 10-140-GA (ADB 2014), at p 15. [*Grievance Administrator v Jeffrey R. Sharp*, 19-80-GA (ADB 2020), p 4.]

And, in our review of sanctions determinations, we are required "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). This can mean that "the same aggravating or mitigating factor may warrant different degrees of consideration, depending upon the facts and circumstances of a case." *Grievance Administrator v Che A. Karega*, 00-192-GA (ADB 2004) (Memorandum Opinion, After Remand), p 8, (explaining that certain mitigating factors may warrant a decrease in 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" such as conversion of client funds).

The Board does understand that the hearing panels take seriously their duties, including their obligation to impose discipline that is fair, proportional, and takes into consideration mitigating factors offered by the respondent. However, as the majority opinion points out, the duty to hold client funds separate from the attorney's is fundamental and long-standing, and attorneys have been on notice for decades that breach of this duty subjects an attorney to the most serious of sanctions. In light of the weighty nature of the fiduciary obligation to keep sacrosanct client funds, including fees not yet earned, so that clients can ultimately have what belongs them and lawyers will be trusted as repositories, disbarment has been consistently imposed and our opinions have just as consistently announced that this will be the rule in the absence of compelling mitigation. See, e.g., *Grievance*

Administrator v Mark J. Tyslenko, 12-17-GA (ADB 2013), pp 8-9, (noting that decisions in Michigan and elsewhere have "minimized the importance of many mitigating factors traditionally offered in discipline cases when they are offered in a misappropriation case" in light of the basic requirements of honesty and the fundamental nature of this duty owed by an attorney).

I urge panels to familiarize themselves with our opinions on this topic, which, to date, have not found compelling mitigation to exist. If a panel considers diverging from the presumptive sanction, I hope that it will distinguish the case before it from our many opinions considering the same issues and specifically address what makes the mitigating factors in the case so compelling that it is necessary and appropriate to impose a lesser sanction.