STATE OF MICHIGAN

Attorney Discipline Board

GRIEVANCE ADMINISTRATOR,
Attorney Grievance Commission,

Petitioner/Appellant,

v Case No. 18-83-GA

JOHN J. KOSELKA, P 48740,

Respondent/Appellee.
_____/

ORDER INCREASING DISCIPLINE FROM A ONE-YEAR SUSPENSION WITH RESTITUTION TO DISBARMENT WITH RESTITUTION

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

This case involves conversion of client and estate funds discovered as a result of a trust account overdraft notification sent from respondent's bank to the Attorney Grievance Commission. Washtenaw County Hearing Panel #6 of the Attorney Discipline Board issued an order on January 30, 2020, suspending respondent's license to practice law in Michigan for one year and ordering restitution in the amount of $2,000.00. The Grievance Administrator has petitioned for review of the hearing panel's order of suspension, arguing that, based upon the undisputed evidence and the panel's findings that respondent knowingly converted estate funds from one client and settlement funds from another, the appropriate sanction is disbarment under ABA Standard for Imposing Lawyer Sanctions 4.11 and *Grievance Administrator v Frederick A. Petz*, 99-102-GA; 99-130-FA (ADB 2001).

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 June 17, 2020. For the reasons discussed below, we increase the discipline imposed to disbarment.

The hearing panel thoroughly considered this matter along with a consolidated case involving respondent's father (who served as personal representative of the estate involved) at several hearings and in substantial and thoughtful reports. However, the undisputed evidence and the panel's key findings compel us to adjust the discipline imposed to be consistent with Standard 4.11, *Petz, supra*, and a long line of cases following *Petz* which stand for the proposition that disbarment is the appropriate sanction to impose for knowing conversion of client funds, absent compelling mitigation.

The facts are not in dispute here. The panel summarized the misconduct found at page 2 of its Sanction Report, reiterating that respondent

> committed misconduct in violation of, *inter alia*, MRPC 1.15(a)(3), MRPC 1.15(d), MRPC 1.15(f), MRPC 8.4(a), MCR 9.104(2), MCR 9.104(3), and MCR 9.104(4), in that he held funds other than client or third party funds in the firm IOLTA account - he made repeated deposits to replace estate funds improperly used for personal and business matters, failed to hold property of clients or third persons separate from his own, i.e., the funds from his father's legal matter, the Estate of Rose Damon; he deposited his own funds into an IOLTA in excess of the amount reasonably necessary to pay financial institution service charges or fees, failed to safeguard third party funds, and finally used the estate funds from the to IOLTA account to pay personal and business expenses.

With respect to Count One, the record establishes that on October 22, 2015, Harvey Koselka attended the real estate closing on the sale of Ms. Damon's home, which sold for $80,000. He was given two checks, totaling $66,946.88, representing the net proceeds. On December 22, 2015 (nearly two months later), both checks were deposited into the Koselka Devine PLC IOLTA at Old National Bank, bringing the balance of the account to $66,947.88 (Petitioner's Ex 15). Over the next two months, John Koselka removed the Damon Estate funds from the Old National Bank IOLTA, by electronically transferring the funds out of the account and into two other accounts: (1) a personal account he held in his name, and (2) a business account held in the name of Koselka Devine PLC over which John had sole control. (Petitioner's Ex 11.)

Following these transfers, respondent used the funds to pay both his own personal expenses as well as the business expenses of Koselka Devine, PLC. Neither Harvey Koselka nor the heirs of the Damon Estate were aware of the transfer of funds. (Petitioner's Ex 12.) As of February 23, 2016, the balance of the IOLTA at Old National Bank was $0. That same day, respondent deposited a $45,000 check written from his personal account, into the new Koselka Devine IOLTA at Bank of Ann Arbor, presumably to replenish a portion of the Damon Estate funds. However, these funds were again transferred from the IOLTA to respondent's personal account and the firm's business account at Bank of Ann Arbor. (Petitioner's Ex 13 and 14.)

As for Count Three, the record shows that on May 19, 2016, respondent received a settlement check in the amount of $140,000, made jointly payable to a client, Whispering Pines Condo Association, and Koselka Devine PLC. Respondent deposited the check, splitting it between the IOLTA and the firm's business account: $20,000 was deposited into the IOLTA, and $120,000 was deposited into the firm's business account. Respondent testified that the $20,000 was put into the IOLTA to cover the shortage from the Damon Estate, plus a check in the amount of $11,527.74, payable to Bank of America for Rose Damon. (Tr 2/15/19, p 172; Petitioner's Ex 13.)

Respondent also testified that he deposited the $120,000 directly into the business account because he was writing a $100,000 check to Whispering Pines that same day. (Tr 2/15/19, p 173; Petitioner's Ex 20.) However, bank records show he actually transferred $70,000 on May 19, 2016, from the firm's business account to his own personal account, but then transferred $55,000 from

his personal account back to the business account the next day. (Petitioner's Ex 20.) The $100,000 check to Whispering Pines was presented and paid on June 1, 2016, from the firm's business account.

With regard to the respondent's mental state, the panel concluded that, "[i]n using the Damon estate funds, [respondent] acted negligently, as well as knowingly and deliberately, which he acknowledged from the beginning." (Sanction Report, p 5.) The same must be said of the misappropriation established as alleged in Count Three. We agree with the Administrator that by its very nature this conduct is deceitful and dishonest. As the panel found, respondent "intended to take the Damon Estate money 'secretly, albeit temporarily.'" (Sanction Report, p 5.)

The 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 2010), citing *Grievance Administrator v Handy*, 95-51-GA; 95-89-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).

In this case, the conduct established with regard to Counts One and Three alone compel us to increase the level of discipline to disbarment. We recognize that the panel struggled with the fact that respondent may have some positive attributes, such as his activities on behalf of the Humane Society and conservation organizations. But these and other mitigating factors cited, along with the fact that he luckily had sufficient funds to cover his misappropriations and pay those entitled to the funds during, and at the conclusion of, the shell game do not constitute compelling mitigation. See, e.g., *Grievance Administrator v Peter C. Mason*, 13-4-GA (ADB 2013).

Accordingly, we modify the panel's order of misconduct to reflect that MRPC 8.4(b) is among the rule violations committed by respondent, and we increase the discipline imposed to disbarment.

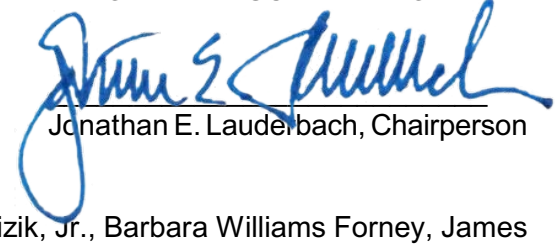
NOW THEREFORE,

IT IS ORDERED that the discipline in this case is **INCREASED** from a one-year suspension of respondent's license to practice law in Michigan, to **DISBARMENT EFFECTIVE FEBRUARY 21, 2020**, and until further order of the Supreme Court, the Attorney Discipline Board or a hearing panel, and until respondent complies with the requirements of MCR 9.123(B) and (C) and MCR 9.124.

IT IS FURTHER ORDERED that restitution in the amount of $2,000.00 to the heirs of the Rose Damon estate, as ordered by Washtenaw County Hearing Panel #6, is **AFFIRMED**. Respondent shall file written proof of payment with the Attorney Grievance Commission and the Attorney Discipline Board within 10 days of the payment of restitution.

IT IS FURTHER ORDERED that respondent shall, on or before , pay costs incurred by the Attorney Discipline Board for the transcript of the review proceedings conducted on August 26, 2020, in the amount of **$159.00**. 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: September 29, 2020

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

Board member John W. Inhulsen was absent and did not participate.