STATE OF MICHIGAN

Attorney Discipline Board

GRIEVANCE ADMINISTRATOR,
Attorney Grievance Commission,

Petitioner/Appellant,

Case No. 15-105-GA

v

DONNELLY W. HADDEN, P 14507,

Respondent/Appellee.
_____/

ORDER INCREASING DISCIPLINE FROM A 45-DAY SUSPENSION TO DISBARMENT

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

Respondent was charged in a two-count formal complaint with misappropriation and commingling in regard to his handling of two separate settlement checks totaling $63,000 that he received on behalf of clients Dr. Charles David Hunt and his wife, Carol Santangelo, for two separate matters. Washtenaw County Hearing Panel #1 found that respondent misappropriated client funds and commingled them with his own, in violation of MRPC 1.15(b)(3) and (d). In determining the appropriate sanction to impose, the hearing panel found that respondent knew or should have known that he was dealing improperly with his client's property, but did not find that there was any malice or intent to deceive his clients, thus the panel held that a 45-day suspension of respondent's license to practice law was appropriate.[1]

The Grievance Administrator filed a timely petition for review arguing that disbarment should have been imposed under the ABA Standards and relevant case law, because respondent knowingly misappropriated and commingled client funds. Respondent maintained that the panel correctly found that the misappropriation and commingling that occurred was the result of "sloppy" and negligent bookkeeping. He urged the Board to affirm the order of suspension.

The Attorney Discipline Board conducted review proceedings in accordance with MCR 9.118, on October 19, 2016. On October 9, 2017, the Board issued an order referring the case to Master Joan Vestrand for additional proceedings to determine the actual disposition of the client funds, whether respondent knew he was taking or using the funds without authorization, and, whether the issue of restitution was moot, redundant, or otherwise inappropriate in light of a federal court decision in underlying litigation filed against respondent by his clients.[2]

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[1] Appendix I.

[2] Appendix II.

The parties appeared for a hearing before the master on May 11, 2018. The master's report was issued on August 15, 2018.[3] In light of the master's report, both parties were directed to file supplemental briefs. The Attorney Discipline Board conducted supplemental review proceedings at a hearing conducted on October 16, 2018. For the reasons discussed below, we find that the hearing panel imposed insufficient discipline. Accordingly, we increase the discipline imposed from a 45-day suspension to disbarment.

The master's August 15, 2018 report made the following findings of fact:

[R]espondent "regularly funneled personal pension monies through the MSSB "client" account. . .each time commingling client monies with his own;" respondent's check registers "were key to getting to the true bottom of things;" there were at least three separate instances of misappropriation of client funds; and, the excess fees respondent took, contrary to his written fee agreement, constituted another act of misappropriation. (Report, 8/15/18, pp. 4-8.)

With regard to whether respondent knew he was converting client funds, the master specifically found that respondent:

> engaged in a pattern of kiting funds between accounts, knew what he was doing, and did so without concern for whose money was involved. Respondent's check registers for his accounts show that he kept meticulous track of the activity in both accounts.
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> The records also defy respondent's contention that any misappropriation was the result of innocent negligence due to poor record keeping. Once it was discovered that his check registers were so detailed, he was forced to acknowledge that his book keeping methods weren't the problem.
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> * * *
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> . . .it is impossible that [respondent] did not know what he was doing. He also knew it was wrong. [Report, 8/15/18, pp. 8-9.]

Finally, the master summarized her findings by indicating that respondent knowingly and intentionally engaged in a pattern of improper and deceitful conduct which included multiple instances of commingling and misappropriation, false representations to his client concerning the status of client funds, and, false statements and false testimony in the disciplinary proceedings. (Report, 8/15/18, p 12.)[4]

Before the master, and now again before the Board, respondent raises the same theories, defenses, and mitigation he offered to the hearing panel: his clients ratified his taking a fee greater than that called for in his fee agreement; he was holding a portion of the funds due to his client to "protect" those funds from a claim for subrogation by the insurance company; no money was used

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[3] Appendix III.

[4] As for the issue of restitution, the parties' stipulated that the issue was moot given the satisfaction of judgment entered in July 2017 in the federal court matter and the master concurred.

for cruises, fur coats, or any frivolities; and, his age and medical condition made him unable to do math, and, therefore, caused him to improperly calculate the 1/3 fee he was owed.[5] However, the hearing panel outright rejected these claims, and specifically found that respondent's doctor's testimony and report were not credible. (Report 6/20/16, p 6.) We also find these arguments unpersuasive on review.

As noted by the master, the check registers clearly and unequivocally show exactly where the clients' money went. Furthermore, whether or not the funds ultimately belonged to the clients or the insurance company, they never belonged to respondent. In the context of misappropriated funds, the Administrator is correct, it is completely irrelevant what the funds were used for. *Grievance Administrator v David Woelkers,* 97-214-GA (ADB 1998); *Grievance Administrator v Ronald Derocher,* 99-98-GA (ADB 2000) (The mere act of taking client's money knowing you have no authority to do so, requires disbarment).

We agree with the Administrator that there can be little question that the disbarment standard found in ABA Standard 4.11 is applicable to the facts and circumstances of this matter. In addition, the Administrator rightly relies on well established principles set forth in a long line of Board opinions dating back to at least 2001 that have held that disbarment is the appropriate sanction to impose for knowing conversion of client or third party funds, absent compelling mitigation. *Grievance Administrator v Frederick Petz,* 99-102-GA; 99-130-FA (ADB 2001); *Grievance Administrator v Rodney Watts,* 05-151-GA (ADB 2007); *Grievance Administrator v Carl Oosterhouse,* 07-93-GA (ADB 2008); *Grievance Administrator v Brent Hunt,* 12-10-GA (ADB 2012); *Grievance Administrator v Mark Tyslenko,* 12-17-GA (ADB 2013); and, *Grievance Administrator v Peter C. Mason, Jr.,* 13-4-GA (ADB 2013).

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. In the context of a misappropriation case, we have never held that characteristics such as the ones referenced above, constitute such compelling mitigation that a downward departure from the disbarment standard is warranted. *Grievance Administrator v Terry A. Trott,* 10-43-GA (ADB 2011) (2½ year suspension increased to disbarment for misappropriation of unearned fees; 30 years as a practicing attorney with no prior disciplinary offenses); *Grievance Administrator v Shawn P. Davis,* 13-21-GA (ADB 2014) (2 year suspension increased to disbarment for misappropriation from his law firm over a three year period; exemplary family, professional and community-centered life). That is likewise the case here.

We find that the findings of fact made by the master are fully supported by the record. In light of those findings, a 45-day suspension of respondent's license to practice law is insufficient discipline to impose.

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[5] Respondent even called the same doctor as a witness before the master to testify again as to respondent's alleged cognitive impairment caused by his isosorbide medication taken to control angina symptoms.

NOW THEREFORE,

IT IS ORDERED that the discipline in this case is **INCREASED** from a 45-day suspension of respondent's license to practice law in Michigan, to **DISBARMENT EFFECTIVE FEBRUARY 7, 2019**, 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 MCR 9.124. In determining the five year period of ineligibility to petition for reinstatement under MCR 9.124(D)(2), respondent shall be given credit for the 45 day period of suspension he served between July 12, 2016 and August 30, 2016.

IT IS FURTHER ORDERED that respondent shall, on or before February 7, 2019, pay costs in the amount of **$1,221.55**, consisting of costs for the hearing held before the master in the amount of $939.89 and court reporting costs incurred by the Attorney Discipline Board in the amount of $281.66 for the review proceedings conducted on August 7, 2016 and October 16, 2018. Check or money order shall be made payable to the Attorney Discipline System and 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: Michael Murray

Rev. Michael Murray , Chairperson

Dated: January 9, 2019

Board members Jonathan E. Lauderbach, Barbara Williams Forney, James A. Fink, John W. Inhulsen, Karen D. O'Donoghue, Michael B. Rizik, Jr., and, Anna M. Frushour concur in this decision.

Board members Rev. Michael Murray and Linda Hotchkiss, MD were absent and did not participate.

APPENDIX I

STATE OF MICHIGAN

Attorney Discipline Board

GRIEVANCE ADMINISTRATOR
Attorney Grievance Commission,

Petitioner,

v

ADB Case No. 15-105-GA

DONNELLY W. HADDEN, P14507,

Respondent.
_____/

REPORT OF WASHTENAW COUNTY HEARING PANEL #1

PRESENT: Jerold D. Lax, Chairperson
Donald F. Sugerman, Panel Member
Joseph C. Basta, Panel Member

APPEARANCES: Dina P. Dajani, Senior Associate Counsel,
for Petitioner

Thomas H. Blaske,
for Respondent

John F. Turck, IV,
for Respondent

I. EXHIBITS

Petitioner's Exhibits	Description
Petitioner's Ex. 1	Contingent Fee Agreement.
Petitioner's Ex. 2	Copy of check from Frankenmuth Insurance Company.
Petitioner's Ex. 3	Release.
Petitioner's Ex. 4	Bank Statement.
Petitioner's Ex. 5	Release.
Petitioner's Ex. 6	Copy of Cashier's Check from Regions Bank.
Petitioner's Ex. 7	Morgan Stanley Records.
Petitioner's Ex. 8[1]	Excel Spreadsheet Summary.
Petitioner's Ex. 10	June 14, 2015 email.
Petitioner's Ex. 11	November 14, 2012 email.

[1] Denotes break in number sequence.

Respondent's Exhibits	Description
Respondent's Ex. 9[2]	IME Report.
Respondent's Ex. 12	Blank check.
Respondent's Ex. 13	Settlement Offer, condo only.
Respondent's Ex. 14	Email regarding settlement with the Armstrongs.
Respondent's Ex. 15	Lien Letter from Hartford.
Respondent's Ex. 16	Biographical Information of Donnelly Hadden, Respondent.
Respondent's Ex. 17	September 12, 2007 email.
Respondent's Ex. 18	Email regarding Motion to Reconsider.
Respondent's Ex. 19	May 31, 2011 letter.
Respondent's Ex. 20	June 8, 2011 letter.
Respondent's Ex. 21	Email regarding Hunt decision.
Respondent's Ex. 22	November 14, 2012 email.
Respondent's Ex. 23	March 1, 2013 email.
Respondent's Ex. 24	November 13, 2012 email.

II. WITNESSES

Donnelly W. Hadden, Respondent
Dr. Ernest Chiodo
Marla Schwartz
Michael Schwartz
Michael Carl Schwartz II
Bailey Cleaver

III. PANEL PROCEEDINGS

The Grievance Administrator charged Respondent, Donnelly W. Hadden, in a two-count formal complaint with misappropriation of client funds and commingling his funds with client funds. The Grievance Administrator filed the formal complaint on September 9, 2015. Respondent filed his answer to the complaint on October 1, 2015. The panel conducted an evidentiary hearing on the allegations in the complaint at Chairman Lax's office on November 4, 2015. The panel received exhibits from the parties at the hearing and allowed the parties to file supplemental briefs on mitigating and aggravating factors, which were filed on December 30, 2015. In its letter of January 8, 2016, the panel allowed the parties to file supplemental briefs. Counsel for the Grievance Administrator filed a supplemental brief on January 22, 2016; respondent's second post-hearing brief was filed on February 4, 2016.

The underlying facts are essentially undisputed. Respondent's conduct concerns the handling of two separate settlement checks he received on behalf of Dr. Charles David Hunt and his wife, Carol Santangelo. Respondent's representation of Dr. Hunt and Ms. Santangelo began with the signing of a retainer agreement on October 19, 2007. (Pet Ex 1.) That agreement called for a "contingent fee equal to 33 1/3% of the net sum recovered from the defendant(s) on our causes of action, after all reasonable and necessary advances, costs and expenses, if any, paid or incurred by Donnelly W. Hadden, P.C. for us in connection with the preparation, prosecution and handling of said claim. Fee in no event to be greater than authorized by court rule." (Pet Ex 1.)

[2] Denotes break in number sequence.

In February 2009, Respondent filed a toxic tort lawsuit on behalf of Dr. Hunt and Ms. Santangelo against Harbor Ridge Townhouse Condominium Association and Robert and Amy Armstrong. The suit against Defendant Harbor Ridge settled for $42,000. (Pet Ex 3.) Frankenmuth Insurance issued a $42,000 settlement check on February 17, 2010. (Pet Ex 2.) Respondent deposited the $42,000 settlement check to his general business account held with National City Bank on March 12, 2010. (Tr 11/4/15, pp 45-46; Pet Ex 4.) Respondent disbursed $13,087.76 of $42,000 to Dr. Hunt by check dated March 13, 2010. Respondent wrote on the check payable to Dr. Hunt (check number 17871): "Reimburse expenses of case to date." Respondent also wrote a check in the amount of $14,912.24 to Morgan Stanley Smith Barney as "Transfer To Client's Trust Acct. Hunt." (Pet Ex 4, check number 17872.) The National City Bank Records for March 2010, however, reveal that, by March 31, 2010, there was only $3,717.54 remaining in the account.

The suit against Defendants Armstrong settled on June 7, 2010 for $21,000. (Pet Ex 5.) Regions Bank issued its $21,000 check on June 16, 2010. (Pet Ex 6.) Respondent deposited the $21,000 check to the Morgan Stanley Smith Barney Financial Management Account (MSSB account) on July 6, 2010. (Pet Ex 7.) Thus, $35,912.24 of the total $63,000 settlement was deposited to the MSSB account.

Respondent filed a second toxic tort suit on behalf of Dr. Hunt and Ms. Santangelo in December 2010 against the building developer of the Armstrong unit and a contractor. The trial court granted summary disposition on behalf of the defendants, finding the prior releases barred the claims. Respondent filed an appeal in the Court of Appeals and the Court of Appeals affirmed the grant of summary disposition in an unpublished opinion. Respondent filed an application for leave to appeal to the Supreme Court, which the Supreme Court denied on April 1, 2013. (Answer to Formal Complaint, pp 26-31.)

No separate retainer agreement was entered into regarding the second action. Respondent relied on an email he sent to Dr. Hunt regarding a fee. In the email, Respondent stated:

> OK. I have a proposition for you. You had $10,657.76 balance in your trust account. My trip to Marquette, travel and lodging cost $566.76 leaving a balance of exactly $10,095. The filing fees for the Supreme Court total $425. I will undertake the Application for Leave to Appeal, and if granted, the appeal, for a flat fee of $4,642 which will leave $5,000 in the account. If we are successful we will use that to find [sic] the trial, if not I will refund it to you. [Pet Ex 11.]

Because the application for leave to appeal was not granted, there was no appeal brief to write. Thus, Respondent was not entitled to any fee.

In accordance with the terms of the original retainer agreement, Respondent's fee for the $63,000 should have been calculated after the expenses associated with the litigation were deducted from the total settlement. According to Respondent, he incurred $16,997.55 in costs for the Armstrong litigation and Dr. Hunt was reimbursed $13,087.76 in costs for the litigation against Harbor Ridge. (Response to Formal Complaint, p 3; Pet Ex 4.) The costs totaled $30,085.31. This left a net settlement of $32,914.69. Under the terms of the retainer agreement, Respondent was entitled to one-third of this amount, or $10,861.85, and Dr. Hunt should have received $22,052.84. Respondent paid a total of only $5,000 to Dr. Hunt in April, 2013. (Pet Ex 7.)

IV. FINDINGS AND CONCLUSIONS REGARDING MISCONDUCT

For the reasons which follow, we find Respondent misappropriated client funds and commingled them with his own. These actions violated MRPC 1.15(b)(3) and (d). We also find that Respondent's actions caused injury or potential injury to his clients.

The misappropriation, a violation of MRPC 1.15(b)(3), occurred here when Respondent failed to hold inviolate the $22,052.84 that should have been paid to Dr. Hunt at the conclusion of the representation in May of 2013. Respondent paid only $5,000 to Dr. Hunt, and Respondent did not hold the $22,052.84 in trust between March of 2010, when he deposited $14,912.24 into the MSSB account, June of 2010 when he deposited $21,000 also to the MSSB account, and until May of 2013 when he paid Dr. Hunt. Petitioner's Exhibit 7 shows that the balance in the MSSB account on January 31, 2011, was only $20,208.16. By May 31, 2011, the account held only $10,991.17. The balance at the end of February 2012 was only $8,341.95. (In May 2012, the MSSB account was renamed as the Active Assets Account. This is all reflected in Petitioner's Exhibit 7).

As for commingling, Respondent's counsel "never disputed" that there was no segregation of client funds from other funds. (Tr 11/4/15, p 127.) The first instance of this misconduct occurred when Respondent deposited the $42,000 settlement check to his general business account held with National City. From that amount, Dr. Hunt was only paid the expenses he advanced. Respondent transferred $14,912.24 to the MSSB account. That left $14,000 of the $42,000 in the National City account. But, by the end of March 2010, the balance in the National City account was only $3,717.54.

Respondent admitted at the hearing, as the National City account reflects, that he made numerous transfers from two other accounts also held with Morgan Stanley Smith Barney. Respondent described the accounts as his PC's pension and profit sharing plan. (Tr 11/4/15, p 119.) He acknowledged that the funds held in these accounts were not client funds. (Tr 11/4/15, p 119.) Petitioner's Exhibit 7 shows that between May of 2010 and May of 2013, Respondent made a total of sixteen transfers from his pension and profit sharing accounts to the MSSB Financial Management Account, which was renamed an Active Assets Account in May of 2012. Those sixteen transfers from Respondent's pension and profit sharing accounts totaled $113,800 to the MSSB account.

MRPC 1.15A(a)(2) requires the lawyer to provide notice to the financial institution that an account is an IOLTA or non-IOLTA trust account. Respondent's only proffered documentary evidence in this regard was a blank check, which states "Donnelly W. Hadden PC Clients Account." (Resp Ex 12.) Respondent acknowledged that he did not inform Morgan Stanley that the account was a client trust account, "other than the check. I had to print the check." (Tr 11/4/15, p 133.) This does not constitute notice to the financial institution that the account is a client trust account. Respondent's depositing of his pension and profit sharing funds into an account holding client funds constitutes commingling and is a violation of MRPC 1.15(d).

V. REPORT ON DISCIPLINE

Under the American Bar Association Standards for Imposing Lawyer Sanctions (ABA Standards), we must determine: whether Respondent violated a duty owed to his client or the public, his mental state, the potential or actual injury caused by the violation, and the existence of aggravating or mitigating factors.

State of Mind

These violations of the Rules of Professional Conduct, by their very nature, resulted in "the potential or actual injury" to the clients within the meaning of Standard 3.0(c).

The Panel finds that Respondent knew or should have known that he was dealing improperly with his client's property. First, Respondent did not follow his own retainer agreement. Respondent's fee was to be [33 1/3%] of the *net* sum recovered, after payment of costs and expenses. Instead, Respondent took as his fee one-third of the *gross* settlement amount (i.e., one-third of $63,000, or $21,000). (See Tr 11/4/15, pp 197-198.)

Respondent claimed the clients "ratified" his taking the $21,000 as his fee and relies on a series of emails. In the email of June 14, 2010, Respondent merely states that he will "take out my (well-deserved) fee of $7,000, which will leave you $14,000." (Pet Ex 10). Respondent did not clearly state that this constituted a departure from the retainer agreement, nor did he clearly state that this was one-third of the gross amount, without noting any of the costs. When asked at the hearing why Respondent did not simply inform the clients that he was charging one-third of the gross amount, Respondent's answer was, "I can't answer that." (Tr 11/4/15, p 197.) Respondent attempted to justify his action by stating that he normally charges one-third of the gross amount in the environmental cases and may have done so in this case out of habit. (Tr 11/4/15, pp 197-198.) The claim of "ratification" is undermined by the fact that Dr. Hunt and Ms. Santangelo filed a civil action against Respondent, as well as a request for investigation. (Tr 11/4/15, pp 187-189.) Although Respondent also claimed that he retained a portion of funds due to his clients in the trust account to protect those funds from a lien of the clients' insurer, there is no basis for concluding that the clients approved this arrangement or that the account would have provided such protection.

Second, in that same June 14, 2010 email, Respondent stated that he was holding $11,856.65 in what he referred to as the trust account. (Pet Ex 10.) However, an examination of the June 2010 MSSB bank records reveal that the amount in the MSSB account on May 31, 2010, was $7,382.38, and the amount on June 30, 2010 was $6,757.42. The monthly statement reflects there were no deposits during that time. (Pet Ex 7.) Again, on May 31, 2011, Respondent represented in a letter to Dr. Hunt that there was $16,250.41 remaining in the trust account. (Pet Ex 19.) In fact, the amount of money in the MSSB account on May 31, 2011, was only $10,991.32. (Pet Ex 7.) Respondent again represented the amount he was holding in trust to his clients in an email on November 15, 2012. (Pet Ex 11.) In that email, Respondent asserted, "You had $10,657.76 balance in your trust account." (Pet Ex 11.) However, the beginning balance of the account was $8,633.89 and the ending balance was $5,726.21 for the month of November 2012. In November 2012, the only deposit to the MSSB account was a transfer from one of Respondent's pension profit/sharing accounts in the amount of $8,300 on November 15, 2012, the same day that Respondent told his client that he had $10,657.76 in the "trust" account. (Pet Ex 7.) At no time in the month of November 2012 did the MSSB account contain the amount that Respondent claimed he was holding for Dr. Hunt.

Third, between December 2012 and until April 2013, when Respondent paid $5,000 to Dr. Hunt, the MSSB account never contained the amount of money Respondent should have paid Dr. Hunt. On November 30, 2012, the balance of the MSSB account was $5,726.21 and on March 31, 2013, the balance of the account was $7,026.37. Petitioner's Exhibit 7 shows that the only funds transferred into the MSSB account between November 2012 and April 2013 consisted of money from Respondent's pension/profit sharing accounts.

The Grievance Administrator has argued in effect that this pattern of conduct evidenced a conscious attempt by Respondent to repeatedly deceive his clients. We do not so find. Rather, as Respondent and his counsel admitted, his bookkeeping was "sloppy" and the pattern of conduct here in managing cash flow was clearly negligent. He knew or should have known that his actions were improper.

When asked why he was making multiple transfers of money from his pension account the MSSB account, Respondent testified:

> Well, that was – I'm sorry but it probably shouldn't have been done but it was done as a convenience. When I became 70 and a half years old I'm required to take distributions from those pension plan accounts, all right? So they're mandatory minimums and as long as you pay taxes on it you can take whatever you want.
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> So it was a convenience to simply make a phone call or an email to the Morgan Stanley and have them transfer, you know, okay, sell 200 shares of Stryker and then transfer the money to the FMA account or whatever they call. And then immediately if you notice in the transactions like $7,000 comes in and $7,000 goes out immediately.
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> * * *
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> ... So it was just a convenient way to transfer funds from the trust account. So I used that as a vehicle, which probably was wrong. . . [Tr 11/4/15, p 149.]

In response to a follow-up question from the Panel about why Respondent could not have taken a distribution directly from the pension account, Respondent testified:

> Well, that's where, you know, where I errored I think because it could have been except then I would have had to here – or whatever it's now called, would have had to write checks and this was just easier. That's all. [Tr 11/4/15, p 203.]

There was no malice or apparent intent to deceive the clients in Respondent's conduct, but he should have, at minimum, known his conduct was improper. The nature of Respondent's conduct, as descried above, clearly resulted in "potential or actual injury" to Respondent's clients.

Aggravating or Mitigating Factors

Respondent offered as mitigating evidence the report and testimony of Dr. Ernest Chiodo, a forensic expert whom Respondent had known, and occasionally worked with, over a period of 20 years. As to Respondent's failure to properly calculate his one-third contingent fee, Chiodo testified that Respondent was an 81-year old diabetic suffering from a heart condition requiring treatment with the drug Isosorbide. A side effect of Isosorbide is cognitive impairment, and Chiodo concluded Respondent's use of the drug reduced Respondent's ability to accurately calculate mathematical sums such that Respondent erred in calculating his contingent fee.

The Panel does not find Chiodo's report or testimony credible. In handling both settlement checks, Respondent correctly calculated one-third of $42,000 and $21,000. He calculated the costs paid by Dr. Hunt and then correctly determined the amount ($14,912.24), to transfer that amount

to the MSSB account. The actual handling of the money refutes Dr. Chiodo's testimony that Respondent would not have been able to calculate one-third of $42,000. (Tr. 11/4/15, p. 90.) He did, in fact, compute the amounts properly.

The Grievance Administrator cited as aggravating factors Respondent's 45-year experience in the practice of law, his failure to make restitution to Dr. Hunt, and a 2009 admonishment from the Attorney Grievance Commission for charging a client an excessive fee and failing to place disputed funds in trust pending resolution. As to failure to make restitution, the Panel notes that Respondent's fee dispute with Dr. Hunt is the subject of pending litigation. We do not regard this as a failure to make restitution or indifference to the need to do so. Although Respondent's counsel in his supplemental brief has argued the facts underlying Respondent's admonishment, his argument does not change the fact of the admonishment and the Commission's finding which led to it.

Sanction

ABA Standard 4.12 provides: "Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client." The Panel finds that suspension is the appropriate sanction here. There was no malice, intent to deceive, or deliberate conversion of client funds here that might warrant disbarment. Respondent's conduct did not rise to the level of intentionality or deceit argued by the Grievance Administrator. Although ABA Standard 2.3 suggests a minimum suspension period of six months, we believe a suspension of 45 days is appropriate here given Respondent's age and the nature of his conduct.

VI. SUMMARY OF PRIOR MISCONDUCT

AGC File No.	Discipline	Effective Date
2806/08	Admonishment	11/16/09

VII. ITEMIZATION OF COSTS

Attorney Grievance Commission:	
(See Itemized Statement filed 06/16/16)	$ 63.09
Attorney Discipline Board:	
Hearing held 11/04/15	$1,004.50
Administrative Fee [MCR 9.128(B)(1)]	$1,500.00
TOTAL:	**$2,567.59**

ATTORNEY DISCIPLINE BOARD
Washtenaw County Hearing Panel #1

By: _____
Jerold D. Lax, Chairperson

Dated: June 20, 2016

APPENDIX II

STATE OF MICHIGAN

Attorney Discipline Board

GRIEVANCE ADMINISTRATOR,
Attorney Grievance Commission,

Petitioner,

v Case No. 15-105-GA

DONNELLY W. HADDEN, P 14507

Respondent.
_____/

ORDER REFERRING CASE TO MASTER
FOR ADDITIONAL PROCEEDINGS

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

The Grievance Administrator has petitioned the Attorney Discipline Board for review of the hearing panel's order suspending respondent for 45 days for violating MRPC 1.15(b)(3) and (d) (misappropriation and commingling), arguing in his brief and at the review hearing that the panel erred in not disbarring respondent for knowingly misappropriating and commingling client funds. Respondent argues that the panel's decision reached the correct result. After a hearing conducted in accordance with MCR 9.118 and upon careful consideration, we refer this matter to a master for further proceedings and findings.

In a comprehensive and well-written report, the hearing panel in this matter found, among other things, that respondent:

- deposited a $42,000 settlement check to his general business account held with National City Bank;
- failed to hold inviolate $22,052.84 which should have been paid to his clients Dr. Hunt, who suffered a personal injury, and his wife Carol Santangelo (sometimes referred to herein as Dr. Hunt or "clients") at the conclusion of the representation in May of 2013;
- caused the respective balances in two accounts – one at National City Bank and one at Morgan Stanley Smith Barney (MSSB) – to fall, at various times, below the amount due to Dr. Hunt;
- did not have a trust account complying with MRPC 1.15(A)(2)'s requirement that a lawyer intending to create a trust account inform the financial institution that an account is an IOLTA or non-IOLTA trust account, but proffered a blank MSSB check denominated "Donnelly W. Hadden PC Clients Account," which was received into evidence;

- sent correspondence at various times to Dr. Hunt stating that he was holding various sums in his trust account for Dr. Hunt at various times when the balance in the MSSB account was less than the sums he claimed to be holding in trust;

- could not credibly contend that his clients "ratified" his taking a fee computed on the gross settlement amount; and,

- could not credibly claim that he was retaining or withholding funds due to his clients in order to frustrate a lien of the clients' insurer with his clients' approval, or that such an arrangement would have afforded such protection.

The panel also rejected the testimony of respondent's forensic expert that a drug taken by respondent to treat diabetes "reduced respondent's ability to accurately calculate mathematical sums such that Respondent erred in calculating his contingent fee," noting that:

> In handling both settlement checks, Respondent correctly calculated one-third of $42,000 and $21,000. He calculated the costs paid by Dr. Hunt and then correctly determined the amount ($14,912.24), to transfer that amount to the MSSB account. The actual handling of the money refutes Dr. Chiodo's testimony that Respondent would not have been able to calculate one-third of $42,000. (Tr. 11/4/15, p. 90.) He did, in fact, compute the amounts properly. [HP Report, pp 6-7.]

As for the respondent's state of mind in committing the misconduct here, the panel made the following findings:

> Respondent knew or should have known that he was dealing improperly with his client's property. [HP Report, p 5.]
>
> * * *
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> The Grievance Administrator has argued in effect that this pattern of conduct [misrepresenting amounts held for his clients and that the funds were in a trust account] evidenced a conscious attempt by Respondent to repeatedly deceive his clients. We do not so find. Rather, as Respondent and his counsel admitted, his bookkeeping was "sloppy" and the pattern of conduct here in managing cash flow was clearly negligent. He knew or should have known that his actions were improper. [HP Report, p 6.]
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> * * *
>
> There was no malice or apparent intent to deceive the clients in Respondent's conduct, but he should have, at minimum, known his conduct was improper. The nature of Respondent's conduct, as described above, clearly resulted in "potential or actual injury" to Respondent's clients. [*Id.*]
>
> * * *

> ABA Standard 4.12 provides: "Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client." The Panel finds that suspension is the appropriate sanction here. There was no malice, intent to deceive, or deliberate conversion of client funds here that might warrant disbarment. Respondent's conduct did not rise to the level of intentionality or deceit argued by the Grievance Administrator. [HP Report, p 7.]

As we have explained recently, the terms "commingle" and "misappropriate," while well-known and often used, do not necessarily fully describe the nature of the conduct at issue; in particular, the state of mind of the respondent could be one of several ranging from negligent to knowing or intentional. See *Grievance Administrator v Robin H. Kyle*, 13-14-GA (ADB 2016).

With respect to respondent's mental state, some clarification or supplementation of the panel's findings would assist the Board in determining the appropriate sanction to be imposed. While "malice, intent to deceive, or deliberate conversion of client funds" or the degree of "intentionality or deceit argued by the Grievance Administrator" may certainly be relevant to the level of discipline to be imposed for misappropriation, here the essential determination to be made for purposes of imposing an appropriate sanction under ABA Standard 4.1 is whether respondent "knowingly convert[ed] client property" (Standard 4.11) or whether he simply instead "[knew] or should have know[n] that he [was] dealing improperly with client property" (Standard 4.12).

The ABA Standards contain the following definitions:

> "Intent" is the conscious objective or purpose to accomplish a particular result.
>
> "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. [ABA Standards, p 7.]

Standard 4.11 becomes relevant not only when conversion is "intentional" but also when it is "knowing." As this Board has held,

> "Knowing conversion requires proof of three elements: (1) the taking of property entrusted to the lawyer, (2) knowledge that the property belongs to another, and (3) knowledge that the taking is not authorized." [*Grievance Administrator v Edward A. Schneider*, 10-121-GA (ADB 2011), pp 5-6. Citations omitted.]

This definition ("knowing conversion") fits conceptually with the definition of "conversion" used in Michigan's civil jurisprudence, which can be committed with various states of mind, including knowingly.[1]

---

[1] See, e.g., *Hunt v Hadden*, 2015 U.S. Dist. LEXIS 70763, p 12-15; 2015 WL 3473680 (ED Mich, June 2, 2015) (discussing the elements of statutory and common law conversion); *Aroma Wines & Equip, Inc v Columbian Distribution Servs, Inc*, 497 Mich 337, 351-352; 871 NW2d 136 (2015) (conversion is "any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein" or "any conduct inconsistent with the owner's property rights").

In addition to providing supplemental findings as to whether or not respondent knew he was using his client's money for any purpose not authorized by the client, it would be helpful to the Board as it determines the appropriate sanction to have further findings on closely related issues such as where the money went and what respondent told his clients about where their money was.

The panel's findings of misappropriation and commingling are spelled out with some degree of detail in its report. For example, at page 4, the panel wrote:

> The misappropriation, a violation of MRPC 1.15(b)(3), occurred here when Respondent failed to hold inviolate the $22,052.84 that should have been paid to Dr. Hunt at the conclusion of the representation in May of 2013. Respondent paid only $5,000 to Dr. Hunt, and Respondent did not hold the $22,052.84 in trust between March of 2010, when he deposited $14,912.24 into the MSSB account, June of 2010 when he deposited $21,000 also to the MSSB account, and until May of 2013 when he paid Dr. Hunt. Petitioner's Exhibit 7 shows that the balance in the MSSB account on January 31, 2011, was only $20,208.16. By May 31, 2011, the account held only $10,991.17. The balance at the end of February 2012 was only $8,341.95. (In May 2012, the MSSB account was renamed as the Active Assets Account. This is all reflected in Petitioner's Exhibit 7).
>
> As for commingling, Respondent's counsel "never disputed" that there was no segregation of client funds from other funds. (Tr 11/4/15, p 127.) The first instance of this misconduct occurred when Respondent deposited the $42,000 settlement check to his general business account held with National City. From that amount, Dr. Hunt was only paid the expenses he advanced. Respondent transferred $14,912.24 to the MSSB account. That left $14,000 of the $42,000 in the National City account. But, by the end of March 2010, the balance in the National City account was only $3,717.54.

However, additional findings will clarify some issues which may have appeared undisputed to the panel and now seem to be in controversy. At the hearing on review, petitioner argued that "[t]he $14,000 left in the National City Bank general business account was used by Mr. Hadden." Evidence such as the March 31, 2010 check from the PC account to Mr. Hadden payable in the amount of $2,000 (Petitioner's Ex 4), along with the fact that "by the end of March 2010, the balance in the National City account was only $3,717.54" (panel report, p 4), seem to support this conclusion. Yet, there were transfers to at least one other account, and respondent asserts on review that no client monies were used to pay respondent's personal or business expenses (see respondent's brief, p 5). But, notwithstanding this, respondent admitted in paragraph 13 c) of his answer to the formal complaint that such funds were, at least, "used to pay the working expenses and overhead of the PC."[2]

---

[2] For purposes of establishing conversion, it matters not whether client funds were used for personal or business expenses. See, e.g., *Grievance Administrator v Peter C. Mason, Jr.*, 13-4-GA (ADB 2013); *Grievance Administrator v Brent S. Hunt*, 12-10-GA (ADB 2012); *Grievance Administrator v Terry A. Trott*, 10-43-GA (ADB 2011); *Grievance Administrator v David A. Woelkers*, 97-214-GA (ADB 1998).

In order to properly assess the nature and extent of respondent's misuse of client funds, the master is directed to make findings which include, but need not be limited to, answers to the following questions:

1. What was the disposition of the client funds? (Please trace the transactions in the relevant accounts after the client funds were deposited and set forth the details of the misappropriation, i.e., the payees and purposes of the funds expended.)

2. Did respondent know he was converting client funds, i.e., know he was taking or using the funds without authorization?

3. Is the sanction of restitution moot, redundant, or otherwise inappropriate in light of the decision of the United States Court of Appeals for the Sixth Circuit affirming the decision of United States District Court for the Eastern District of Michigan. See *Hunt v Hadden*, 127 F Supp 3d 780 (ED Mich 2015), aff'd 665 Fed Appx 435 (2016).

The master shall be provided with the record and briefs filed to date herein and shall have the discretion to proceed with or without the assistance of the parties in marshaling the evidence. If the master deems it appropriate, she may require additional briefing or hearings and receive additional evidence or conduct such other proceedings she deems advisable.

NOW THEREFORE,

IT IS ORDERED that this matter is **REFERRED** to Master **JOAN VESTRAND** for proceedings consistent with this order.

ATTORNEY DISCIPLINE BOARD

By: _____
Louann Van Der Wiele, Chairperson

DATED: October 9, 2017

APPENDIX III

STATE OF MICHIGAN

Attorney Discipline Board

GRIEVANCE ADMINISTRATOR,
Attorney Grievance Commission,

Petitioner,

v Case No. 15-105-GA

DONNELLY W. HADDEN, P 14507,

Respondent.
_____/

MASTER'S REPORT

On October 9, 2017, the Attorney Discipline Board referred this matter to Joan P. Vestrand, Master, for supplemental proceedings to assist the Board to "properly assess the nature and extent of respondent's misuse of client funds." The master was directed to make findings which include, but need not be limited to, answers to the following questions:

1. What was the disposition of the client funds? (Please trace the transactions in the relevant accounts after the client funds were deposited and set forth the details of the misappropriation, i.e., the payees and purposes of the funds expended.)

2. Did respondent know he was converting client funds, i.e., know he was taking or using the funds without authorization?

3. Is the sanction of restitution moot, redundant, or otherwise inappropriate in light of the decision of the United States Court of Appeals for the Sixth Circuit affirming the decision of United States District Court for the Eastern District of Michigan. See *Hunt v Hadden*, 127 F Supp 3d 7870 (ED Mich 2015), aff'd 665 Fed Appx 435 (2016).

Upon the parties' submission of a Joint Prehearing Statement setting forth a stipulation of facts and the issues of fact and law to be litigated, and the filing of prehearing briefs, the matter was set for further hearing. Proceedings were held on May 11, 2018 at the offices of the Attorney Discipline Board. At conclusion of the hearing, the parties were granted additional time to work together to redact and submit copies of respondent's check registers for the two accounts involved in this matter - his PNC business account and Morgan Stanley Smith Barny (MSSB) "client" account. These registers had been referred to quite extensively in the proceedings and were pre-admitted by stipulation as Exhibits G and H. A few weeks later, the redacted registers for the time period in question were received.

NOW THEREFORE, the following constitutes the Master's findings of fact on the basis of all testimony and exhibits presented, on the questions that are the subject of this remand.

1. **What was the disposition of the client funds? (Please trace the transactions in the relevant accounts after the client funds were deposited and set forth the details of the misappropriation, i.e., the payees and purposes of the funds expended.)**

The parties stipulate and the records support that the client funds at issue were the result of two settlements, deposited on two dates. Respondent deposited the first settlement, in the amount of $42,000, into his general business account at National City Bank ("business account") on March 12, 2010. (Tr 11/4/15, pp 45-46; Pet Ex 4; Tr 5/11/18, p 26.) Respondent deposited the second settlement, in the amount of $21,000, into what he refers to as his "client" account at MSSB on July 6, 2010. (Pet Ex 7; Tr 5/11/18, pp 43-44.) According to respondent, "The Morgan Stanley account was used as a client trust account, not just for Hunt, but for all cases, all files." (Tr 5/11/18, p 47.)

> Q. (by the master) Is it true that you treated it as your trust account?
>
> A. (by respondent) Yes. That's what it was for. (Tr 5/11/18, pp 109-110.)

On March 13, 2010, the day after the deposit of the $42,000 into the business account, respondent issued a check (no. 17871) to Dr. Hunt from that account, in the amount of $13,087.76, in reimbursement for expenses "to date" in the litigation. (Tr 5/11/18, p 29; Pet Ex 4.) That same date, he issued check no. 17872 in the amount of $14,912.24, payable to his MSSB "client" account. (Pet Ex 4.)

The $14,912.24 represents respondent's calculation of Dr. Hunt's share of the settlement, after his deduction of a one-third fee from the gross. Due to a lien arising from disability benefits paid to Dr. Hunt for illness related to his claims, Hartford Insurance Company was the true party in interest relative to these funds. In part for this reason, respondent and Dr. Hunt agreed that respondent retain these proceeds for use in funding the continued litigation against the remaining parties.

The $14,000 that respondent calculated as his fee in connection with the first settlement (which he left in his business account), was thereafter used to pay obligations of the firm (Tr 5/11/18, pp 29-42). For example, between March 13 and March 31, 2010 respondent wrote checks totaling $10,621.08 from these proceeds and a small pre-existing balance in the account, for what appear to be business-related expenses. The closing balance on the account at the end of the month was $3,717.54.

Approximately four months after respondent's transfer of the $14,912.24 from the first settlement into his MSSB "client" account to fund the continuing litigation, on July 6, 2010, he deposited an additional $21,000 into this account - the total sum of the second Hunt settlement. From these proceeds, he transferred $7,000 to his business account, representing his calculation of his one-third fee. Like with the first settlement, he took the fee from the gross proceeds, as opposed to net, and contrary to the written fee agreement. The $14,000 remaining from this

settlement, still in the "client" account, was to be used, like the client share of the first settlement, to fund further litigation efforts. The two client shares together, totaled $28,912.24.

Respondent's placement of the client share of each of these settlements in his MSSB "client" account is evidence that he viewed these funds as belonging to someone else - and not to him.

> Q. (by the master) This money, you knew well enough had to go into what you thought was a client account?
>
> A. (by respondent) Right.
>
> Q. First of all, what is the difference between a client account - in your mind at the time, what was the difference between a client account and your National City [PC business] account? Why did you think you had to treat it that way?
>
> A. Because that's what the State Bar requires. (Tr 5/11/18, p 155.)
>
> * * *
>
> Q. (by the master) What was your understanding of the reason that you had to segregate client - first of all, is that your understanding that you had an ethical obligation to segregate client funds from your own?
>
> A. (by respondent) Yeah, that came out.
>
> Q. So you did understand that?
>
> A. Yes, at this time I did. (Tr 5/11/18, p 156.)

Although respondent refers to the MSSB "client" account as a trust account, by his own admission, he did not treat it this way. According to respondent, another purpose for the account was "as a conduit" for personal pension monies. Respondent had a pension plan with MSSB which entitled him to a free checking account and it was this account that he used as his "client" account. (Tr 5/11/18, p 48.)

> Q. (by Ms. Dajani) Okay. But I believe it's been established and I think you'll agree with me that you were also depositing or transferring money from your pension account into that account, correct, which was not client funds, correct?
>
> A. (by respondent) Yes. (Tr 5/11/18, p 47.)
>
> * * *

A. (by respondent) As I said, the idea occurred that it was a convenient conduit to get funds from the stock market into the - to my wife and I for our distributions. Or the second reason was to make a loan to the PC by from the market, okay. So I would call Mr. Lister and say my PC is short. We can't pay rent this month. I'm waiting for a settlement to come in, but in the meantime I need to borrow some money. So he would write - I would get the money from them and I would - he would deposit it in this account rather than writing checks for it. So here, I'll just put it in that account, then you can write from that.

So again, it was a convenient conduit for moving the money electronically from one place to the other. But it wasn't designed to be. It was designed to be a loan to the PC, okay. Which my wife and I would have to pay back...

Unfortunately, the IRS considered it a taxable event, not a loan, and we wound up having to pay taxes on it. (Tr 5/11/18, pp 110-111.)

The bank records support that respondent regularly funneled personal pension monies through the MSSB "client" account (Tr 11/4/15, pp 118-121; Tr 5/11/18, pp 47-48; Tr 5/11/18, p 110), each time commingling client monies with his own. Again, according to respondent, these electronic transfers were made for two reasons: "one was - were loans to the PC; some were just the convenience of withdrawing money for the mandatory distributions that we have to take every year." (Tr 5/11/18, p 49.)

Throughout the proceedings, respondent has consistently denied any *intentional* or *knowing* misuse of client funds. According to respondent, the misappropriation that has been found against him, was negligent in nature. With regard to the commingling that occurred, although he knew at the time it was wrong, he contends it was harmless.

Q. (by the master) So since you understood what a trust was -

A. (by respondent) Yeah. A trust is where you hold somebody else's money.

Q. You knew then at the time you used this account as a convenient conduit for personal money to funnel through that that was wrong; you knew it at the time?

A. Well, probably, yeah, I did. That's why the Board below sanctioned me.

Q. Why did you do that when you knew it was wrong, just because it was convenient?

A. Convenient. Well, I thought it was harmless. (Tr 5/11/18, pp 110-111.)

* * *

Q. (by the master) Then as you testified earlier today, you understood at the time that monies from your pension account made a quick stop through this account, but technically that wasn't proper, right? You didn't see any harm to anybody, but you knew you had an obligation to keep client money separate from your own; isn't this true?

A. Well, I knew that, yes. That's the rule, yes. Okay. (Tr 5/11/18, p 156.)

Although respondent claims he never misused client funds, and that no one was harmed, he acknowledges that a problem arose regarding the balance in his MSSB "client" account. According to respondent, he first realized the problem on May 9, 2011 when he saw that the account was "upside down." (Tr 5/11/18, p 87.) Respondent first testified that the shortfall to Hunt at that time was $9,592.65. (Tr 5/11/18, p 105.) Later in the hearing, and following review of his check register for the account (Exhibit G), he amended his testimony, stating that the shortfall was "$5,592.65" - "$16,250.41 less $10,657.76." (Tr 5/11/18, p 113.) Respondent's check registers helped not just with this detail, but others as well. In fact, the registers were key to getting to the true bottom of things. (Exhibit G; Exhibit H.)

When asked what respondent did upon discovery of the shortfall, he testified, "I put more money in the account -- the following Monday, I think. Couple days later - I took personal money and put it in the account." (Tr 5/11/18, p 92.) When asked how much he deposited, respondent replied that he put $24,000 into the account, "...more than enough to cover Hunt." (Tr 5/11/18, p 92.) Of course, any amount beyond the shortfall to Hunt, is yet another act of commingling.

As to what caused the shortage, respondent claimed, "I don't know. I never did figure it out. I think what happened is somewhere in the processing of other lawsuits I probably overpaid somebody." (Tr 5/11/18, p 105.) When asked how many clients he was holding funds for during this period, respondent acknowledged it was only a handful of persons - two or three. (Tr 5/11/18, p 106.)

With regard to respondent's practice of running personal pension monies through this account, and whether he may have overpaid himself in this process, he denied this could ever occur, contending, once again, "...the amounts that would come in, would exactly equal the amounts that would go out each time. And they were always round numbers, like $7,000 or something in, next day out." (Tr 5/11/18, p 109.)

Although respondent claimed he had no idea what caused the May 2011 shortfall in the MSSB "client" account, the bank statement for that period establishes that on the very day he allegedly noticed the shortfall (May 9th), he had issued a check out of the account (no. 2416) in the amount of $10,000 payable to "Donnelly W. Hadden PC." (Tr 5/11/18, p 112.) When asked whether this was the missing money, respondent said he didn't know. When pressed to review his

check register, upon doing so, he advised, "I have it marked as a loan to the PC." (Tr 5/11/18, p 112.)

Respondent's position has always been that any loans to the PC (to the business account) were funded by personal pension monies via *advance* deposit of pension funds into the "client" account for swift and immediate transfer to the PC. If this is true, the bank records should show such a transaction relative to this $10,000 - we would see $10,000 in pension monies coming into the "client" account ahead of the $10,000 "loan to the PC." As to whether this could be expected, respondent testified, "Yeah, that was money that came through [the MSSB account] as a conduit... It wasn't client money..." (Tr 5/11/18, p 119.)

> Q. (by the master) So we should be able to see 10,000 in, 10,000 out very quick - a $10,000 deposit from your investment account then right out to the PC account as a loan to PC, correct?
>
> A. (by respondent) Yeah. Or within a day maybe. (Tr 5/11/18, p 119.)

However, a review of the bank records shows no such thing. On May 9, 2011, the date of the $10,000 "loan to the PC," there had yet to be any corresponding deposit from any source, including and especially, the pension account. Without any such advance deposit, there is no question that the funds used to support the "loan," were client funds. (Pet Ex 7; Tr 5/11/18, pp 160-161.)

> Q. (by the master) so, on that statement, can you show me ahead of the 9th in May, 1-8, where $10,000 came in from the MSSB [pension] account?
>
> A. (by respondent) Not during that [part of the] month, no. There's a deposit of $24,000 three days later. (Emphasis added).
>
> Q. What was the purpose of that deposit?
>
> A. That money was to make sure there was enough in the account to cover all the withdrawals and cover - make sure there was enough for the The Hartford, if Hartford came after it.
>
> Q. Was part of that to replenish the loan, the $10,000 loan?
>
> A. I'd have to look at the April statement, but it might be. (Tr 5/11/18, p 161.)

The evidence shows that when respondent took the $10,000, he had a need for an influx of cash into the PC. At the time of the "loan," there was just $435.98 in this account. (Tr 5/11/18, p 163.) As indicated, respondent did not take steps to replace the $10,000 until three days later, when, on May 13, 2011, he caused an auto-deposit of $24,000 in personal pension monies to the

MSSB "client" account. On May 31, he moved $14,000 of this deposit to his business account, leaving behind, in the "client" account, $10,000 of his personal pension monies. Clearly, this sum represents repayment to the client account of the earlier taken "loan to the PC." (Pet Ex 7.)

> Q. (by the master) Do you believe that the $10,000 on the 9th, added to the $14,000 on the 27th -
>
> A. (by respondent) Is $24,000.
>
> Q. - equals the deposit from the investment account?
>
> A. Yes it does.
>
> Q. Does that help to refresh your recollection that you took a loan of 10,000 on the 9th, you three days later replenished those funds into your trust account with personal funds, and then you owed the account 10,000 for that loan, and then the remaining 14,000 you moved over to your PC?
>
> A. I mean the arithmetic is there, yes. (Tr 5/11/18, p 162.)

This is not the only instance of misappropriation of client funds. Another occurred in March 2010 in connection with the deposit into the "client" account of the $14,912.24 Hunt/Hartford funds from the first settlement. At the time of this deposit (March 13), there was only $1,119.44 preexisting in the account. As set forth herein, beginning in May 2010, respondent began to use the Hunt/Hartford monies consistent with the parties' agreement - to fund continuing litigation. In that month, respondent wrote two checks for expenses attributable to the Hunt matter: one on May 3 in the amount of $3,100 for "DWH PC Expense Hunt," and one on May 17 in the amount of $550 for "PC Acct Hunt Dr. Kilown and Case Evaluation." Together, these checks totaled $3,650. When subtracted from the $14,912.24, the balance on hand for Hunt/Hartford was required to be $11,262.24. However, the closing balance for the account on May 31st was just $7,382.38, a $3,879.86 deficit. (Pet Ex 7.)

Respondent's check register reveals that other activity in the account in May included a May 7 "Loan to PC" in the amount of $5,000, and a May 25 "Donnelly W. Hadden PC Loan to PC" in the amount of $9,000. (Exhibit G.) Only two deposits were made to the account in May. Both occurred on May 25, and came from respondent's pension accounts. One was for $1,000 and the other for $8,000. (Pet Ex 7.) These deposits, combined, appear to have funded the May 25, 2010 "Donnelly W. Hadden PC $9,000 Loan to PC" which cleared the following day. There are no corresponding deposits to offset the $5,000 "Loan to PC" also made during the month. This loan came from client funds - another act of misappropriation - and one for which there is no replenishment of the funds; at least not that can be discerned from the records in and around that time.

Misappropriation is also evident in and around March 2011. By email dated July 7, 2010, respondent advised Dr. Hunt that $25,856.65 remained in trust on his behalf. Respondent's check registers indicate that between July 7 and March 31, 2011, respondent disbursed $9,989.44 in expenses attributable to Hunt. (Exhibit G; Exhibit H.) After deduction of these expenses, he should

have had a balance on hand for Hunt in the amount of $15,867.21. However, the balance in the MSSB "client" account on March 31, 2011 was only $11,708.43. (Pet Ex 7.)

There is also the issue of respondent's actions in taking a one-third fee off the gross of both settlements. Respondent does not dispute that his retainer agreement with Dr. Hunt specified a one-third contingent fee of the net recovery. His claim is that sometime thereafter, he made a proposal to Dr. Hunt that instead, he receive one-third of the gross. When asked whether Dr. Hunt agreed with the proposal, the best respondent could say was, "He didn't dispute that. He wanted to talk about something else." (Tr 5/11/18, p 70.)

There is no written evidence of Dr. Hunt's agreement to alter respondent's fee. For a contingent fee to be ethical, the rate and terms of the fee, and whether expenses are to be deducted before, or after the contingent fee is calculated, must be in writing. While respondent has maintained that he and Dr. Hunt were on the same page relative to the change, Dr. Hunt has denied this and, in early 2014, sued respondent in federal court to recover the excess fees, alleging statutory conversion under Michigan law.

The United States District Court for the Eastern District found in Dr. Hunt's favor, ordering that respondent return $10,028.24 in excess fees, and reimburse plaintiff's costs and attorney fees in connection with the matter. Although respondent appealed the district court decision, in December 2016, it was affirmed by the Sixth Circuit Court of Appeals. (Pet Ex B.) On July 26, 2017, the parties filed a Satisfaction of Judgment as to respondent's payment in full of the judgment. In addition to the $10,028.44 in converted fees, respondent was responsible for $131,475 in attorney fees, $400 in costs, and $6,844.08 in prejudgment interest, for a total of $148,747.52. (Pet Ex A; Pet Ex C.)

The federal court action and outcome further bolster Dr. Hunt's contention that he never agreed to the change in fees. Absent written agreement to the change, respondent's alteration of the fee can only be viewed as improper. Taking into consideration all of the evidence, it appears that this was another act of unauthorized self-help on respondent's part. One cannot escape that his ongoing financial issues would have made a greater fee very tempting, in particular because he was in constant need of ways to replenish his business and "client" accounts. The excess fees taken constitute another act of misappropriation.

2. Did respondent know he was converting client funds, i.e. know he was taking or using the funds without authorization?

Contrary to respondent's claims, the records demonstrate that this was more than quick money-in-money-out equal dollar transfers between his pension and law firm accounts (commingling) and bookkeeping negligence (unintentional misappropriation). The tracing of funds reveals that respondent engaged in a pattern of kiting funds between accounts, knew what he was doing, and did so without concern for whose money was involved. Respondent's check registers for his accounts show that he kept meticulous track of the activity in both accounts. (Exhibit G; Exhibit H.) These registers are detailed as to the "loans" respondent was taking as well as any efforts he made, to restore "borrowed" funds.

The records also defy respondent's contention that any misappropriation was the result of innocent negligence due to poor recordkeeping. Once it was discovered that his check registers were so detailed, he was forced to acknowledge that his bookkeeping methods weren't the problem.

> Q. (by the master) Were there any, in your opinion looking back, deficiencies in your bookkeeping methods, or are you - those were not an issue?
>
> A. (by respondent) Well, I think the methodology was okay...I think for a small sole practitioner with no staff, the methodology was adequate.
>
> Q. It worked?
>
> A. Yes. (Tr 5/11/18, p 170.)

The checkbook registers and their detail, together with the bank records, paint the full picture of respondent's pattern of self-help "loans" from the MSSB "client" account. These records also serve to defy his assertion that to this day, he has no idea why, in May 2011, the "client" account was suddenly upside down. As his own notations in his checkbook registers establish, it was upside down for the very same reason it was a year earlier - in direct result of his taking of client funds for personal use.

Given respondent's own hand in these "loans," and his written notations in confirmation of them, it is impossible that he did not know what he was doing. He also knew it was wrong.

> Q. (by the master) But you never misunderstood, did you, your obligation not to use [sic] a personal use of the money that didn't belong to you?
>
> A. (by respondent) No. That was never a problem for me. I never used personal money.
>
> Q. But you did understand that, right? You can't make personal use of clients' money?
>
> A. Yes. Right. That's true. It's not my money. It's somebody else's money. It may be Hartford's or Hunt's, but it's not mine. (Tr 5/11/18, pp 170-171.)

While respondent denies playing "fast and loose" with client monies (Tr 5/11/18, p 165), that he did so, is an inescapable conclusion. Given the chaotic state of his accounts, including his "client" account, it isn't surprising that he also made false statements to Dr. Hunt regarding Hunt/Hartford funds on hand. For example, on June 14, 2010, respondent sent an email to Dr. Hunt claiming there was $11,856.65 in trust on his behalf. (Resp Ex 14.) In truth, the balance in the "client" account on that date was a mere $6,757.38, and no deposits had been made into the account that month. Further, that on June 7, 2010, respondent had issued a $625 check out of the account for "D.W.H. PC Expense Hunt" (Exhibit G), establishes that when he sent the email

just seven days later, he had reason to know the true status of this account. After deduction of this expense, the balance for Hunt should have been $10,637.24, but again, at the time of the email to Hunt, it was much less.

Similarly, on May 31, 2011, respondent sent a letter to Dr. Hunt in which he represented that the Hunt/Hartford balance in trust was $16,250.41. (Resp Ex 19.) However, on that date, the entire balance in the MSSB "client" account was just $10,991.32. (Pet Ex 7.) Respondent's contention that when he sent the letter, he didn't realize his number was off, is belied by other of his testimony to the effect that on May 9, 2011, he "discovered" the account was upside down, resulting in a shortage of Hunt/Hartford funds. It is also belied by the fact that the shortfall, again, was caused that day by his own hand - the wrongful taking of $10,000 in Hunt/Hartford funds for personal use.

That respondent didn't realize his representations to Dr. Hunt were false is also discredited by his efforts, following the misappropriation, to replenish the "client" account with personal pension monies. He deposited $24,000 into the account - no small sum - and on May 27, 2011, just four days before he wrote the May 31 letter, moved $14,000 of it to his business account, leaving only $10,991.32 in the "client" account.

On October 29, 2012 respondent made another false claim to Dr. Hunt relative to Hunt/Hartford funds on hand. In an email sent that date, he claimed he was holding $10,657.76 (Resp Ex 21) when only $8,633.89 existed in the "client" account at that time (Pet Ex 7).

Respondent's pattern of deceitful communications with Dr. Hunt is consistent with the actions of someone who is "robbing Peter to pay Paul," leading to, among other things, a constant game of catch-up. It's all part-and-parcel of the cover up that often accompanies such conduct.

Respondent's use of deceit in effort to conceal his wrongdoing extends to his testimony in these proceedings. In the hearing before the master, he made numerous statements that are defied by the evidence, and therefore can only be viewed as false, and knowingly so. For example, respondent's contention that he has no idea what caused the shortage in his MSSB "client" account in May 2011 (Tr 5/11/18, p 105), is fully discredited by the very fact that *he caused the shortage* by taking, that very same day, $10,000 from the account for personal use. It follows that his further testimony - that the audit leading to the shortfall discovery was conducted simply due to "curiosity," is also blatantly false. (Tr 5/11/18, p 106.) Respondent's knowledge of the shortfall did not occur by coincidence, or discovery.

Similarly, respondent's repeated contentions that he never misused client monies are blatantly false. The evidence of the shell game he played between his accounts is indisputable. Yet, throughout these proceedings, respondent has denied any personal use of client funds.

> Q. (by Mr. Turck) Did any of your - did you ever use any of your client money, whether Hunt or Trice or anybody else, to pay you money, other than that which you were legally entitled by way of a fee or reimbursement of a cost?
>
> A. (by respondent) No, no. I never did - no, I never, no, buy a boat or anything like that with clients' money.

Q. Whether it's a boat or something much more insignificant like a Coke or something or a sandwich? Did you ever do that with any of your clients' money in a way that was inappropriate?

A. No.

Q. That was other than legitimate case expenses?

A. No, no, just case expenses. That's all. (Tr 5/11/18, p 149.)

Bank records also refute respondent's minimization of the extent of his commingling activities. He claimed it didn't happen often - that it was limited to annually required pension draws and a few loans to the PC.

> There were -- I also, during that time, borrowed money from the pension plan on one or two occasions - I don't remember what - from the pension plan to loan as loans to the PC, for business, you know, rent, and whatnot when I got behind. So the - I took those as loans to the PC and used it for PC expenses. (Tr 5/11/18, p 49.) (Emphasis added.)

However, the evidence reveals a very different story. Bank records demonstrate a regular practice and pattern of funneling pension monies through the "client" account, with it taking place several times a year. In the period 2009-2011, there are entries for more than a dozen such "loans" between the pension account and respondent's PC. The checkbook register for the business account contains corresponding entries for these transactions. (Pet Ex 7; Exhibit G; Exhibit H.)

When confronted with these records, respondent acknowledged that they demonstrate "quite a few" such transfers during the time period in question. (Tr 5/11/18, p 50.) When asked why he would think that this would be an appropriate place for profit sharing monies, respondent replied, "Oh, it wasn't." (Tr 5/11/18, p 117.)

Of equal concern is respondent's insistent claim throughout these proceedings that any loans to the PC were solely funded from his personal pension account. To the contrary, the evidence irrefutably demonstrates that he used *client money* for this purpose, as well. The very fact respondent made efforts after-the-fact to replenish the "client" account for some of these loans, is proof that these acts were knowing and intentional. At the time he committed these acts, he knew that the money taken, wasn't his.

Finally, as found by the federal court, respondent took more fees than he was entitled to in connection with the two Hunt settlements. While respondent contends he had client permission to do so, he has nothing but his word in this regard (which hasn't proven reliable), and his client denies it. Respondent's conversion of the fees was intentional and is another wrongful taking of client monies.

3. **Is the sanction of restitution moot, redundant, or otherwise inappropriate in light of the decision of the United States Court of Appeals for the Sixth Circuit affirming the decision of United States District Court for the Eastern District of Michigan. See *Hunt v Hadden*, 127 F Supp 3d 780 (ED Mich 2015), aff'd 665 Fed Appx 435 (2016).**

The master concurs in the parties' stipulation and agreement that given respondent's July 2017 satisfaction of the judgment against him in the federal court matter, the issue of restitution is moot.

Conclusion

On the basis of the testimony and exhibits in the record, and as discussed above, the master finds that respondent knowingly and intentionally engaged in a pattern of improper and deceitful conduct, as follows:

1. multiple instances of commingling and misappropriation in connection with his MSSB "client" account and client monies;

2. multiple false representations to his client concerning the status of client funds; and,

3. false statements and false testimony in the disciplinary proceedings related to the allegations.

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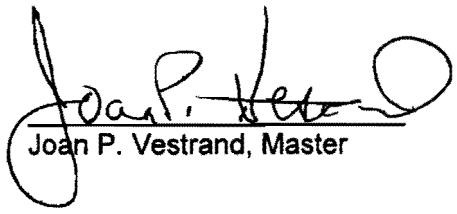
By: 
Joan P. Vestrand, Master

Dated: August 15, 2018