STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellant,

v

Darryl W. Eason, P 54991,

Respondent/Appellee,

Case Nos. 17-25-GA

Decided: November 19, 2018

Appearances:

Sheldon G. Larky, Special Counsel, (before the hearing panel) and
Jordan D. Paterra, (on review), for the Grievance Administrator, Petitioner/Appellant
Timothy E. McDaniel, for the Respondent/Appellee

BOARD OPINION

Washtenaw County Hearing Panel #1 of the Attorney Discipline Board issued an order of discipline on February 21, 2018, that imposed a condition that required respondent to attend a trust account seminar. The Grievance Administrator filed a petition for review arguing that the hearing panel's order was not only insufficient, but also improper. The Administrator specifically requested that the Board impose at least a reprimand, or alternatively, remand the matter to the panel to address the applicable aggravating and/or mitigating factors, and to consider relevant precedent. In response, respondent asks the Board to affirm the hearing panel's order.

The Attorney Discipline Board has conducted review proceedings in accordance with MCR 9.118, including review of the evidentiary record before the panel and consideration of the briefs and arguments presented by the parties at a review hearing conducted on June 20, 2018. For the reasons set forth below, we affirm the hearing panel's order of discipline imposing condition.

I. Background of Underlying Proceedings and Proceedings Before the Panel

On or about July 1, 2014, a Grievance Administrator's Request for Investigation (GARI) was served on respondent as a result of the Attorney Grievance Commission's receipt of an $800 overdraft notification from Comerica Bank for respondent's Comerica IOLTA account. Respondent filed an answer to the GARI on August 11, 2014. On or about October 8, 2014, a second GARI was served on respondent as a result of the Commission's receipt of a $451 overdraft notification from Chase Bank for respondent's Chase IOLTA account. Respondent filed an answer to the GARI on October 31, 2014.

On November 17, 2014, the Grievance Administrator filed a request for investigation against respondent with the Michigan Supreme Court, pursuant to the provisions of MCR 9.131(A), because respondent had been employed as an associate counsel with the Attorney Grievance Commission from approximately 1996 to 1998, and at the time, respondent's wife was employed as a secretary at the Commission.[1] On February 4, 2015, the Court entered an order appointing volunteer legal counsel "to investigate this matter as outlined in MCR 9.131(A)(4) and to take further appropriate action pursuant to MCR 9.131(A)(4) through (6)." Approximately two years later, on March 20, 2017, volunteer counsel ("Special Counsel") filed a three-count formal complaint against respondent, pursuant to MCR 9.131(A)(5) and (6).[2]

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[1] MCR 9.131(A), in relevant part as to the filing of the request for investigation, states:

> (A) Investigation of Commission Member or Employee. If the request is for investigation of an attorney who is a member or employee of the commission, the following provisions apply:
>
> > (1) The Administrator shall serve a copy of the request for investigation on the respondent by ordinary mail. Within 21 days after service, the respondent shall file with the administrator an answer to the request for investigation conforming to MCR 9.113. The administrator shall send a copy of the answer to the complainant.
> >
> > (2) After the answer is filed or the time for answer has expired, the administrator shall send copies of the request for investigation and the answer to the Supreme Court clerk.
> >
> > (3) The Supreme Court shall review the request for investigation and the answer and shall either dismiss the request for investigation or appoint volunteer legal counsel to investigate the matter.

[2] MCR 9.131(A)(5) and (6) states:

> (5) If, after conducting the investigation, appointed counsel determines that the request for investigation warrants the filing of a formal complaint, he or she shall prepare and file a complaint with the board under MCR 9.115(B).

Respondent filed an answer to the formal complaint on April 18, 2017. In his answer, respondent maintained that the overdraft notifications were the result of accounting and interoffice errors and noted that the errors were immediately corrected once discovered. Respondent denied that he committed misconduct as charged in the complaint. Respondent also filed affirmative defenses noting the unexplained three-year time period from the filing of the GARIs to the filing of the formal complaint and advised that during that time period, on January 1, 2016, a necessary witness had passed away and was now unavailable to testify.

A hearing was held before the panel on July 18, 2017. The testimony of a counsel for the Attorney Grievance Commission (AGC), and of respondent, addressed certain topics, including the disposition of overdraft notification cases by counsel or the AGC in various situations, as well as the mistakes in respondent's office which led to the inadvertent overdrafts and trust accounting violations (see Report of Washtenaw County Hearing Panel #1 attached).

At the conclusion of the hearing on misconduct, the panel made the following ruling on the record:

> **CHAIRPERSON LAX**: I think it is our conclusion that at least in a technical sense under various provisions of the Rules of Professional Conduct 1.15 that technically there was misconduct as a result of the way that the accounts were kept and monitored over periods of time . . . we will move directly to the penalty phase, but without telegraphing where we will ultimately be based on our view of the entire situation, despite the fact that we think there was technically misconduct, we are likely to be inclined to recommend simply a reprimand and attendance at the class that you indicated a willingness to attend anyway. [Tr 7/18/17, p 108.]

Then, the parties gave arguments as to the appropriate level of discipline to impose. Special Counsel elicited testimony that respondent had no prior misconduct during his then 20-year career as an attorney. After some initial reluctance to suggest a level of discipline "without . . . taking it before the [Attorney Grievance Commission]," Special Counsel recommended that the panel reprimand respondent and order him to attend the State Bar of Michigan's course on trust accounting. Respondent's counsel argued for an admonishment with the condition that respondent attend the trust accounting class.

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(6) Further proceedings are as in other cases except that the complaint will be prosecuted by appointed counsel rather than by the administrator.

Both counsel then alluded to the fact that, in light of the appointment of Special Counsel, the AGC, which deals with overdraft cases frequently, did not see or determine the appropriate disposition of this matter. Respondent's counsel argued it was unfair that respondent was "being singled out" for formal prosecution when he had corrected his mistakes and, referring to the testimony of AGC counsel regarding the disposition of the approximately 3,000 overdraft matters by the AGC since the adoption of MRPC 1.15A, and respondent's counsel's own research, suggested that respondent would have been an appropriate candidate for no action, caution, or admonition. Special Counsel responded that, "Mr. Eason is not being singled out. I have a single case. I don't have multiple cases for the commission. This is the first time the Supreme Court has appointed me as a special prosecutor." Special Counsel continued:

> I don't think we're really in a position to articulately (sic) indicate whether this case is being handled differently from others or what the reasons may be. It could stem anywhere from the fact that there is, because of the unusual circumstances, a special prosecutor appointed. And, unfortunately, we're confronted with - procedurally with what we're confronted with. And we simply have to take into account all that we've heard and know and make our decision based on that.
>
> And I'm not suggesting that if we examined all of the 3,000 cases we might not conclude that this is the least egregious of the bunch. I'm simply saying that on behalf of the panel we have to deal with how it has come to us procedurally and what we are presented with as the factors to take into account for making a decision. [Tr 7/18/17, pp 117-118.]

The panel concluded the hearing by stating on the record that:

> **CHAIRPERSON LAX**: It will be our recommendation that [respondent] be admonished and be required to attend the class [Lawyers Trust Account Management Principles and Record Keeping Resources] that you have described to us. [Tr 7/18/17, p 122.]

On February 21, 2018, the panel's report on misconduct and discipline was issued. In the report, the panel, having considered further the type of sanctions it could and could not impose, made the following findings:

In the present case, while respondent rectified each of the two overdrafts promptly after becoming aware of them and does not appear to have intentionally created the situations giving rise to the overdrafts, and while there is no way to know whether these situations would have been dismissed or handled by Commission admonishment if it had not been deemed necessary to appoint a special counsel to pursue the matters, this panel concludes, after fully having heard the matter and considered the testimony and documentary evidence presented, that respondent did commit misconduct, and that the matter of appropriate sanction must be addressed. The factors leading to this conclusion are:

> (1) respondent's failure to reconcile his client ledgers and bank statements more frequently resulted in the overdrafts, and can reasonably be viewed as a failure "to preserve complete records of such [IOLTA] account funds" as required by MRPC 1.15(b)(2), and
>
> (2) respondent's failure to maintain accurate accounts resulted, albeit inadvertently, in the use of funds attributable to the Gerald Wilson Estate to pay an IRS obligation of James Moss, and can reasonably be viewed as a failure to "promptly pay or deliver any funds or other property that the client or third person is entitled to receive," as required by MRPC 1.15(b)(3).

The panel does not find that petitioner meet [sic] its burden of proof showing that respondent failed to properly supervise persons employed by him, in violation of 5.3(b). The panel does not find that these actions of respondent necessarily rose to the level of "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(a); "conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach, in violation of MCR 9.104(2);" or "conduct that is contrary to justice, ethics, honesty, or good morals, in violation of MCR 9.104(3)," as charged in the formal complaint, but MCR 9.104(4) also provides that "conduct that violates the standards or rules of professional conduct adopted by the Supreme Court" constitutes grounds for discipline, and, as indicated above, the panel has found that two such rules have been violated by respondent. [HP Report 2/21/18, p 4.]

As for discipline, the panel found that respondent's actions were most closely described in the admonishment standard set forth in ABA Standard 4.14, as his conduct was "negligent at worst," and caused little or no actual or potential injury to a client. While recognizing that they could not admonish respondent, the panel found that the most appropriate sanction was to impose a condition that required respondent to attend a trust account seminar.

II. Discussion

On review, the Administrator argues that the level of discipline that the hearing panel imposed is insufficient for the misconduct found and that there is no basis under the rules and prior precedent for a hearing panel to issue an order of discipline that only imposes a condition. The Administrator further argues that the panel "grossly mischaracterized the nature of respondent's misconduct," but he does not seek review of the hearing panel's finding that respondent only violated MPRC 1.15(b)(2) and (3). (Petitioner's Brief in Support, p 5.)

In reviewing a claim that a panel has imposed the wrong sanction, we "examine the factors affecting the assessment of the appropriate level of discipline in light of the American Bar Association Standards for Imposing Lawyer Sanctions (ABA Standards) and applicable Michigan precedents and attempt to ensure continuity and proportionality in discipline." *Grievance Administrator v Paul A. Carthew*, 10-74-AI; 10-81-JC (ADB 2011). However, we do not usually disturb a panel's assessment as to the appropriate sanction "unless it is clearly contrary to fairly uniform precedent for very similar conduct or is clearly outside the range of sanctions imposed for the type of violation at issue." *Grievance Administrator v Gregory J. Reed*, 10-140-GA (ADB 2014).

The panel found that respondent's failure to reconcile his client ledgers and bank statements more frequently led to the overdrafts and resulted "albeit inadvertently" in the use of funds from one client to pay an obligation of another in violation of MRPC 1.15(b)(3). However, the panel expressly found that there was no dishonesty, fraud, deceit, or the like, and found that there was not a violation of MCR 9.104(2) or (3). Special Counsel acknowledged that the violation was unintentional, and it is not disputed that the errors were promptly rectified and that no clients were harmed.

Petitioner correctly notes that there is precedent of this Board holding that a negligent failure to safeguard funds, leading to an unintentional misuse of client funds, is likely to result in the

imposition of a reprimand. See, e.g., *Grievance Administrator v William W. Swor*, ADB 118-87 (ADB 1989). In *Swor*, the Board agreed that the record supported the panel's finding that the conduct there was negligent and not intentional. In noting that the lack of intent was not a defense but could be considered in mitigation, the Board reversed the panel's dismissal and imposed a reprimand. Other cases cited by petitioner, such as *Grievance Administrator v Brian D. Albritton*, 00-200-GA (ADB 2002) (90-day suspension for misappropriation due to gross negligence accompanied by a prior disciplinary history) are inapposite.

In a related argument, petitioner asserts that a hearing panel has neither the ability nor the authority to impose an admonition or only a condition, and that a panel is required to impose one of the enumerated types of discipline set forth in MCR 9.106. The panel's report reflects that this issue was of importance to them and thoughtfully considered:

> The ABA Standards list a number of possible sanctions: disbarment, suspension, interim suspension, reprimand, admonition, probation, restitution, assessments of costs, limitation of practice, appointment of a receiver, requirement that the lawyer take the bar examination or professional responsibility examination, requirement that the lawyer attend continuing education courses, other requirements that the state's highest court or disciplinary board deems consistent with the purposes of lawyer sanctions (ABA Standards 2.2 - 2.8). While the ABA Standards discuss in somewhat greater detail when certain of these sanctions are appropriately to be imposed, the Standards do not provide specific guidance as to the applicability of other sanctions, thus suggesting that disciplinary bodies retain a degree of discretion in determining which sanctions to apply, and, indeed, such discretion is also emphasized by the Supreme Court in *Lopatin*.
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> It might also be noted that the Michigan Supreme Court in MCR 9.106 has provided its own list of possible sanctions, a list which to some extent overlaps the sanctions listed by the ABA Standards:
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> > Misconduct is grounds for:
> >
> > (1) disbarment of an attorney from the practice of law in Michigan;
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> > (2) suspension of the license to practice law in Michigan for a specified term, not less than 30 days, with such additional conditions relevant to the established misconduct as a hearing panel, the board,

> or the Supreme Court may impose, and, if the term exceeds 179 days, until the further order of a hearing panel, the board, or the Supreme Court;
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> (3) reprimand with such conditions relevant to the established misconduct as a hearing panel, the board, or the Supreme Court may impose;
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> (4) probation ordered by a hearing panel, the board, or the Supreme Court under MCR 9.121(C); or
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> (5) requiring restitution, in an amount set by a hearing panel, the board, or the Supreme Court, as a condition of an order of discipline.

The comments to MCR 9.106 indicate that admonition is also a possible sanction, but may only be imposed by the Grievance Commission and not a hearing panel. Also noteworthy is that the Supreme Court in *Grievance Administrator v Deutch*, 455 Mich 149, held that after a finding of misconduct, a hearing panel could "include an order which essentially imposes no discipline on an attorney." 455 Mich at 163. The Board in [*Grievance Administrator v Ralph E. Musilli*, 98-216-GA (ADB 2000)], while acknowledging the possibility that a "no discipline" order could be entered pursuant to *Deutch*, states, "For an order finding misconduct but imposing no discipline to be appropriate, the misconduct would have to be so highly technical, the mitigation so overwhelming, or the presence of other special circumstances to be so compelling that the imposition of a reprimand would be practically unfair." One implication of *Deutch*, aside from its authorization of "no discipline" orders in appropriate misconduct cases, is that the list of sanctions in MCR 9.106 is not exclusive, and it would therefore be permissible for a hearing panel to consider the imposition of sanctions listed in the ABA Standards even if not listed in MCR 9.106 . . . In the panel's view, respondent's actions are most closely described in Standard 4.14 . . . his conduct appears to have been negligent at worst, and his prompt restoration of funds to his IOLTA account provided some assurance that his negligence caused little or no actual or potential injury to a client.

As earlier indicated, the possibility of admonition as a sanction was initially precluded by the appointment of a special counsel, and while the panel does not believe a public reprimand is warranted, a "no discipline" order would also be inappropriate under the Standard enunciated in *Musilli*. The sanction most appropriate, as included in

> the ABA's list of possible sanctions, is continuing legal education in the form of required attendance by respondent at the account management seminar provided by the State Bar. The parties did not suggest aggravating or mitigating factors which would alter this conclusion. [HP Report 2/21/18, pp 5-7.]

Contrary to the Administrator's position that the panel attempted to either "step in the place of the Commission and issue an admonishment with conditions to respondent," or to "fashion a sanction akin to an admonishment when it was required to impose MCR 9.106 discipline," we find that the panel's report specifically reflects a recognition that a hearing panel cannot impose an admonishment, but also a recognition that the Court, in *Lopatin*, cautioned the Board and its hearing panels not to abdicate their responsibility to exercise independent judgment in determining the appropriate discipline to impose.

Petitioner also argues that the hearing panel "inappropriately commented on the special counsel's charging decision both at the hearing and in its report," and let such "questioning divert the hearing panel's duty to impose discipline." We categorically reject this interpretation of what took place below. As we have noted, the panel conducted itself honorably and with great circumspection and, indeed, a perfect blend of practicality and scholarship with regard to this case which was acknowledged by all (including Special Counsel) to be unusual. Special Counsel himself did a commendable job with this case, and frankly acknowledged that he was perhaps hampered by the process which precluded an assessment by the staff and body which would know most about the appropriate disposition of a case such as this. We conclude that this matter has nothing whatsoever to do with a panel's encroachment on petitioner's role; it is all about a panel trying to be fair to a respondent under the specific circumstances and the applicable law (including procedural precedents with varying degrees of clarity).

What must be kept in perspective here is that we are dealing with misconduct on the low end of the spectrum in terms of *scienter*, impact on clients or the system of justice, and reflection on the respondent's fitness to practice. A case could be made for a reprimand. A case could also be made for dismissal with a caution. And a case could be made for some things in between. Here, a very capable volunteer counsel may not have even considered the possibility of actions other than the filing of a formal complaint because of his unfamiliarity with the practices, policies, and unwritten precedents utilized by the AGC in disposing of the 3,000 or more overdraft notifications it had received between the effective date of MRPC 1.15A in 2010 and the time of the hearing in 2017.

Having given this panel the difficult task of sorting out what is appropriate in such a case, and having reviewed its excellent work, we are not inclined to reverse its decision to take an extra step to protect the public by requiring some continuing education for respondent rather than imposing no discipline or even a reprimand alone.

This is not to say, however, that such a result may ever be appropriate again. From the inception of the current discipline system in 1978 until 1997, when a plurality of the Court rendered its opinion in *Deutch*, this Board has viewed the options available to hearing panels and the Board following a finding of misconduct to be exclusively those set forth in MCR 9.106. See *Grievance Administrator v William R. McFadden*, 95-200-GA (ADB 1998), pp 2, 8-9. Then, in 1997, the *Deutch* plurality announced that, while MCR 9.115(J)(3) says that, "If the hearing panel finds that the charge of misconduct is established by a preponderance of the evidence, it must enter an order of discipline," this does not necessarily mean that a reprimand (the lowest form of discipline set forth in MCR 9.106) must be imposed. Rather, *Deutch* concluded that "no discipline" was also an option:

> Again, it should be noted that the order of discipline may, in fact, order no discipline at all. MCR 9.106 echoes the language in MCR 9.104, which states that a finding of "misconduct" is only "grounds for discipline," not that a finding of misconduct requires the imposition of discipline in every case. Where notions of justice and fairness require, we hold that the order of discipline, required under MCR9.115(J)(1) and (3), could include an order that effectively imposes no discipline on an attorney. [*Grievance Administrator v Deutch*, 455 Mich at 163. Footnotes omitted.]

In *McFadden*, *supra*, we examined *Deutch* and early Board decisions and concluded that panels and the Board should "strongly presume" that discipline will follow a finding of misconduct and that the "no discipline" option should be exercised "quite sparingly." The Court agreed, quoting these observations in *McFadden*, in *Grievance Adm'r v Bowman*, 462 Mich 582, 589 n 14; 612 NW2d 820 (2000), in connection with its interpretation of *Deutch*: "Generally, a finding of misconduct should result in a sanction. See ABA Standard 1.3 comment. However, in the rare case where the mitigating factors clearly outweigh the aggravating factors as well as the nature and harm of the misconduct, an order of no discipline may still be appropriate. *Bowman*, 462 Mich at 589.

In *Musilli*, *supra*, we offered even more guidance to panels, emphasizing the rare types of instances in which no discipline may be appropriate. Here, as we have noted, the panel heeded these authorities and determined that it would impose some discipline in the form of a requirement that respondent take a continuing education course. Although this sanction could have been attached as a condition to a reprimand, which is the proper sanction for even minor misconduct, we cannot, as we have said, conclude that the panel's decision under the circumstances here was inappropriate.

Among the factors undoubtedly considered by the panel, although they may not have all been expressly addressed, were factors in aggravation and mitigation. The Administrator's final argument on review is that the panel committed a procedural error when it did not give the parties an opportunity to suggest any applicable aggravating or mitigating factors, and thus did not consider these factors during the sanction phase of the hearing. It is argued, in the alternative to simply vacating the order and imposing a reprimand, that this "lost opportunity requires remand."

The record is clear, however, that the parties were given an opportunity, once the panel made a finding of misconduct, to argue their respective positions as to discipline. Both parties availed themselves of that opportunity, but neither specifically referenced any of the aggravating or mitigating factors set forth in the Standards. (Tr 7/18/17, pp 108-120.) Perhaps the failure to reference any aggravating factors was simply a consequence of having appointed counsel, who is arguably less experienced in the nuances of attorney disciplinary proceedings, handle this matter. This does not amount to preclusion by the panel, or even a lost opportunity. Indeed, special counsel examined respondent during the discipline phase of the hearing and elicited the fact that he had no record of prior misconduct. Other factors, such as the delay in proceedings, respondent's quick response to remedy the mistakes he and his assistant made, and his intent (evidencing a lack of bad motives) were alluded to during argument.

On review, petitioner fails to indicate which factors should have been considered and how these factors, had they been considered, would have affected the level of discipline imposed. Arguably, the only applicable aggravating factor that could apply is ABA Standard 9.22(i) (substantial experience in the practice of law), and we find that consideration of that factor alone does not outweigh the number of mitigating factors which appear appropriate to consider, such as: 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 rectify

consequences of misconduct); ABA Standard 9.32(e) (full and free disclosure to the panel or cooperative attitude toward proceedings); ABA Standard 9.32(j) (delay in disciplinary proceedings); and ABA Standard 9.32(l) (remorse).

III. Conclusion

The hearing panel correctly assessed the gravamen of respondent's conduct in this matter; his failure to reconcile his client ledgers and bank statements more frequently resulted in the overdrafts and his failure to maintain accurate accounts resulted, inadvertently, in the use of funds attributable to a client's estate to pay an IRS obligation of another client. Upon careful consideration of the whole record, the Board is not persuaded that the hearing panel's decision to order that attendance at a trust accounting course be imposed was inappropriate under the unique circumstances of this case. Accordingly, the hearing panel's order of discipline imposing condition is affirmed.

Board members Louann Van Der Wiele, Rev. Michael Murray, Barbara Williams Forney, James A. Fink, Karen O'Donoghue, and Michael B. Rizik, Jr., concur in this decision.

Board members John W. Inhulsen, Jonathan E. Lauderbach, Linda Hotchkiss, MD, were absent and did not participate.

STATE OF MICHIGAN

Attorney Discipline Board

GRIEVANCE ADMINISTRATOR,
Attorney Grievance Commission,

Petitioner,

v Case No.17-25-GA

DARRYL W. EASON, P 54991,

Respondent.
_____/

REPORT OF WASHTENAW COUNTY HEARING PANEL #1

PRESENT: Jerold D. Lax, Chairperson
Donald F. Sugerman, Member
Karen S. Sendelbach, Member

APPEARANCES: Sheldon G. Larky, Special Counsel
for the Attorney Grievance Commission

Timothy E. McDaniel,
for the Respondent

I. EXHIBITS

Petitioner's Exhibit 1 Accounting of funds held in Trust for James Moss, June 18, 2013 through May 22, 2014.

Petitioner's Exhibit 2 Correcting accounting of funds held in Trust for James Moss, June 18, 2013 through May 22, 2014.

Petitioner's Exhibit 3 Check 5029 to James Moss for $3,000 from respondent, dated January 10, 2014.

Petitioner's Exhibit 4 Statement of Estate Account of Gerald Wilson from respondent, dated January 31, 2014.

Petitioner's Exhibit 5 Copy of Stubs # 5037-5041 from respondent's IOLTA account provided to the Attorney Grievance Commission.

Petitioner's Exhibit 6 IOLTA Lawyers Trust Checking statement for Better Days Legal Counsel PLLC (respondent's account) for April 1, 2014 through April 30, 2014.

Petitioner's Exhibit 7 Affidavit of James L. Moss, dated July 17, 2017.

II. WITNESSES

Rhonda Spencer Pozehl
Darryl Eason, Respondent

III. PANEL PROCEEDINGS

On March 20, 2017, the Grievance Administrator filed Formal Complaint 17-25-GA, against respondent, Darryl W. Eason, consisting of three counts. Count One charged that respondent failed to account accurately for funds in his Comerica IOLTA account, which resulted in a notice of overdraft by Comerica on June 24, 2014, because the IOLTA was deficient by approximately $20 at the time a check for $800 had been presented for payment. It was alleged that respondent engaged in professional misconduct in violation of MCR 9.104(2) and (3); MRPC 1.15(b)(2) and (3); and MRPC 8.4(a).

Count Two charged, that as a result of the failure to account accurately for funds in the Comerica IOLTA account, funds in that account properly attributable to respondent's client "The Estate of Gerald Wilson," were used to pay an obligation to the Internal Revenue Service for James Moss, another of respondent's clients, whose funds were maintained in the account. It was alleged that respondent engaged in professional misconduct in violation of MCR 9.104(2) and (3); MRPC 1.15(b)(2) and (3); and MRPC 8.4(a).

Count Three charged that, in September 2014, respondent's secretary mistakenly prepared a check in the amount of $451 on respondent's Chase IOLTA account to pay for her services rather than preparing the check on respondent's general Chase account, and, since at that time the Chase IOLTA account had no funds, Chase Bank issued a notice of overdraft when the IOLTA check was submitted for payment. It was alleged that respondent engaged in professional misconduct in violation of MCR 9.104(2) and (3); MRPC 1.15(b)(2); MRPC 5.3(b); and MRPC 8.4(a).

In 2010, the Supreme Court adopted MRPC 1.15A, Trust Account Overdraft Notification, which among other things, requires banks holding IOLTA accounts to report overdrafts on such accounts to the State Bar, and upon receipt of such a report, the Grievance Administrator sends a request for investigation to the attorney whose IOLTA account was involved, to which the attorney is directed to respond within 21 days with "a full and fair explanation of the cause of the overdraft and how it was corrected." Senior Associate Counsel, Rhonda Spencer Pozehl, of the Grievance Commission testified at the hearing in this matter that since the adoption of MRPC 1.15A in 2010, some 3,000 overdraft notices have been sent. Upon receipt of an attorney's response to a notice of investigation, the Grievance Administrator or the Commission makes an initial determination based on the facts of the case, but not pursuant to any clearly articulated criteria, as to whether the matter may be dismissed administratively, with or without a caution, or admonition, and with or without required attendance by the attorney at a Bar-sponsored seminar regarding management by attorneys of their trust accounts. (Tr, pp 16-17, 24.)

Because respondent is a former employee of the Attorney Grievance Commission and his wife is a present employee, a special counsel was appointed by the Michigan Supreme Court to represent the Grievance Administrator to avoid any appearance of conflict of interest in this matter.

Based on the testimony of Ms. Pozehl, the appointment of a special counsel had the procedural effect of eliminating the possibility of the Grievance Administrator or the Commission considering dismissal of this matter administratively or admonition of respondent in lieu of commencement of formal discipline proceedings. (Tr, pp 13-14, 27-28, 30-31.)

The appointed special counsel issued the formal complaint summarized above, and a hearing was then held to consider whether misconduct had occurred and, if so, what sanction would be appropriate.

IV. FINDINGS AND CONCLUSIONS REGARDING MISCONDUCT

Respondent does not deny that the two overdrafts described in the formal complaint occurred, nor that because his Comerica IOLTA, at the time of payment to the IRS of an obligation of client Moss, had insufficient funds of Moss in the account, funds of another client, the Wilson Estate, were inadvertently used toward payment of the Moss IRS obligation. Respondent, however, characterizes these matters as accounting errors, not as misconduct and not, more specifically, of misappropriation. In explaining the overdraft on the Comerica account, he testified that he kept a separate ledger of the amounts attributable to each client with funds in the IOLTA account, and that in January 2014, he inadvertently failed to record a check in the amount of $3,000 issued by him to Moss, ultimately resulting in Comerica determining in June 2014, that the account was deficient by some $20 to cover the full $800 check written by respondent to pay Moss' IRS obligation. (Tr, pp 50, 54-55, 63, 65, 74.) Respondent promptly deposited $20 of his own funds in the Comerica IOLTA account to cure this deficiency, explaining to Moss what had occurred. (Tr, pp 64, 100-101.)

With regard to the later Chase overdraft, respondent testified that his secretary, in preparing a check to cover her salary, inadvertently wrote the check on respondent's IOLTA account rather than his general account, and when this error became apparent, he promptly cancelled the IOLTA check and wrote a new check on the proper account. (Tr, p 92.)

In the case of the Comerica overdraft, respondent acknowledges that more frequent reconciliation of his client ledgers with his periodic bank statements would more promptly have revealed his failure to have recorded the $3,000 check written to Moss in January, 2014 and thereby likely avoided the June 2014 overdraft. Respondent indicated that he now reconciles his client ledgers and bank statements more frequently and has contemplated attendance at the Bar-sponsored account management seminar to which attorneys are now frequently directed under MRPC 1.15A. (Tr, pp 81, 101-102.)

The special counsel has suggested that any overdraft is in fact misappropriation, citing language in *Grievance Administrator v Schneider*, 10-121-GA, to this effect. He also indicated, however, that respondent's conduct did not rise to the level of the sort of knowing and unauthorized use of a client's property for the attorney's own purposes which has typically resulted in the imposition of severe sanctions. Indeed, in light of the testimony of the Commission's senior associate counsel as to the number of situations which have resulted in the issuance of trust account overdraft notices under MRPC 1.15A, and the opportunity for certain of these cases to be dismissed administratively or with minimal sanctions, it does not appear likely that the Supreme

Court intended to equate every overdraft with serious misappropriation. Nonetheless, the fairly recent adoption of MRPC 1.15A does not seem intended to preclude the possibility that an overdraft, or series of overdrafts, may be indicative of serious misconduct; hence each case must be examined on the basis of its particular facts.

In the present case, while respondent rectified each of the two overdrafts promptly after becoming aware of them and does not appear to have intentionally created the situations giving rise to the overdrafts, and while there is no way to know whether these situations would have been dismissed or handled by Commission admonishment if it had not been deemed necessary to appoint a special counsel to pursue the matters, this panel concludes, after fully having heard the matter and considered the testimony and documentary evidence presented, that respondent did commit misconduct, and that the matter of appropriate sanction must be addressed. The factors leading to this conclusion are:

(1) respondent's failure to reconcile his client ledgers and bank statements more frequently resulted in the overdrafts, and can reasonably be viewed as a failure "to preserve complete records of such [IOLTA] account funds" as required by MRPC 1.15(b)(2), and

(2) respondent's failure to maintain accurate accounts resulted, albeit inadvertently, in the use of funds attributable to the Gerald Wilson Estate to pay an IRS obligation of James Moss, and can reasonably be viewed as a failure to "promptly pay or deliver any funds or other property that the client or third person is entitled to receive," as required by MRPC 1.15(b)(3).

The panel does not find that petitioner meet its burden of proof showing that respondent failed to properly supervise persons employed by him, in violation of 5.3(b). The panel does not find that these actions of respondent necessarily rose to the level of "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(a); "conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach, in violation of MCR 9.104(2);" or "conduct that is contrary to justice, ethics, honesty, or good morals, in violation of MCR 9.104(3)," as charged in the formal complaint, but MCR 9.104(4) also provides that "conduct that violates the standards or rules of professional conduct adopted by the Supreme Court" constitutes grounds for discipline, and, as indicated above, the panel has found that two such rules have been violated by respondent.

V. REPORT ON DISCIPLINE

In *Grievance Administrator v Lopatin*, 462 Mich 235 (2000), the Supreme Court directed hearing panels to employ the American Bar Association Standards for Imposing Lawyer Sanctions (ABA Standards) in determining the appropriate level of discipline upon a finding of misconduct. The process to be used is summarized by the Attorney Discipline Board in *Grievance Administrator v Musilli*, Case No. 98-216-GA, as follows:

The inquiry begins with three questions:

(1) What ethical duty did the lawyer violate? (A duty to a client, the public, the legal system or the profession?)

(2) What was the lawyer's mental state? (Did the lawyer act intentionally, knowingly, or negligently?)

(3) What was the extent of the actual or potential injury caused by the lawyer's conduct? (Was there a serious or potentially serious injury?) *Lopatin*, 462 Mich at 239-240 (quoting ABA Standards, p 5).

Next, the hearing panel examines recommended sanctions based the answers to these questions. *Lopatin*, 462 Mich at 240; ABA Sanctions, pp 3, 4-5.

Then, aggravating and mitigating factors are considered. *Id.*

And, in Michigan, the final step of the process involves a consideration of other factors, if any, which may make the results of the foregoing analytical process inappropriate for some articulated reason. As the Court explained in directing this Board and the panels to follow the Standards:

> We caution the ADB and hearing panels that our directive to follow the ABA standards is not an instruction to abdicate their responsibility to exercise independent judgment. Where, for articulated reasons, the ADB or a hearing panel determines that the ABA standards do not adequately consider the effects of certain misconduct, do not accurately address the aggravating or mitigating circumstances of a particular case, or do not comport with the precedent of this Court or the ADB, it is incumbent on the ADB or the hearing panel to arrive at, and explain the basis for, a sanction or result that reflects this conclusion. [*Lopatin*, 462 Mich at 248 n 13.]

A preliminary discussion of available sanctions might be useful prior to addressing the factors summarized in *Musilli*. The ABA Standards list a number of possible sanctions: disbarment, suspension, interim suspension, reprimand, admonition, probation, restitution, assessments of costs, limitation of practice, appointment of a receiver, requirement that the lawyer take the bar examination or professional responsibility examination, requirement that the lawyer attend continuing education courses, other requirements that the state's highest court or disciplinary board deems consistent with the purposes of lawyer sanctions (ABA Standards 2.2 - 2.8). While the ABA Standards discuss in somewhat greater detail when certain of these sanctions are appropriately to be imposed, the Standards do not provide specific guidance as to the applicability of other sanctions, thus suggesting that disciplinary bodies retain a degree of discretion in determining which sanctions to apply, and, indeed, such discretion is also emphasized by the Supreme Court in *Lopatin*.

It might also be noted that the Michigan Supreme Court in MCR 9.106 has provided its own list of possible sanctions, a list which to some extent overlaps the sanctions listed by the ABA Standards:

> Misconduct is grounds for:
>
> (1) disbarment of an attorney from the practice of law in Michigan;
>
> (2) suspension of the license to practice law in Michigan for a specified term, not less than 30 days, with such additional conditions relevant to the established misconduct as a hearing panel, the board, or the Supreme Court may impose, and, if the term exceeds 179 days, until the further order of a hearing panel, the board, or the Supreme Court;
>
> (3) reprimand with such conditions relevant to the established misconduct as a hearing panel, the board, or the Supreme Court may impose;
>
> (4) probation ordered by a hearing panel, the board, or the Supreme Court under MCR 9.121(C); or
>
> (5) requiring restitution, in an amount set by a hearing panel, the board, or the Supreme Court, as a condition of an order of discipline.

The comments to MCR 9.106 indicate that admonition is also a possible sanction, but may only be imposed by the Grievance Commission and not a hearing panel. Also noteworthy is that the Supreme Court in *Grievance Administrator v Deutch*, 455 Mich 149, held that after a finding of misconduct, a hearing panel could "include an order which essentially imposes no discipline on an attorney." 455 Mich at 163. The Board in *Musilli*, while acknowledging the possibility that a "no discipline" order could be entered pursuant to *Deutch*, states, "For an order finding misconduct but imposing no discipline to be appropriate, the misconduct would have to be so highly technical, the mitigation so overwhelming, or the presence of other special circumstances to be so compelling that the imposition of a reprimand would be practically unfair." One implication of Deutch, aside from its authorization of "no discipline" orders in appropriate misconduct cases, is that the list of sanctions in MCR 9.106 is not exclusive, and it would therefore be permissible for a hearing panel to consider the imposition of sanctions listed in the ABA Standards even if not listed in MCR 9.106.

Turning to the application of *Lopatin's* directives to the present case, it would appear that ABA Standards 3.0 and 4.1 are most relevant to the ethical duties involved and the states of mind and potential harms requiring consideration in determinating appropriate sanctions. Those Standards provide:

> **C. FACTORS TO BE CONSIDERED IN IMPOSING SANCTIONS**
>
> 3.0 Generally
>
> In imposing a sanction after a finding of lawyer misconduct, a court should consider the following factors:

(a) the duty violated;
(b) the lawyer's mental state;
(c) the potential or actual injury caused by the lawyer's misconduct; and
(d) the existence of aggravating or mitigating factors.

4.0 Violations of Duties Owed to Clients

4.1 Failure to Preserve the Client's Property

Absent aggravating or mitigating circumstances, upon application of the factors set out in 3.0, the following sanctions are generally appropriate in cases involving the failure to preserve client property:

4.11 Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client.

4.12 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.

4.13 Reprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client.

4.14 Admonition is generally appropriate when a lawyer is negligent in dealing with client property and causes little or no actual or potential injury to a client.

In the panel's view, respondent's actions are most closely described in Standard 4.14. While respondent could likely have averted overdrafts by more frequent reconciliation of client ledgers with bank statements, his conduct appears to have been negligent at worst, and his prompt restoration of funds to his IOLTA account provided some assurance that his negligence caused little or no actual or potential injury to a client.

As earlier indicated, the possibility of admonition as a sanction was initially precluded by the appointment of a special counsel, and while the panel does not believe a public reprimand is warranted, a "no discipline" order would also be inappropriate under the Standard enunciated in *Musilli*. The sanction most appropriate, as included in the ABA's list of possible sanctions, is continuing legal education in the form of required attendance by respondent at the account management seminar provided by the State Bar. The parties did not suggest aggravating or mitigating factors which would alter this conclusion.

VI. SUMMARY OF PRIOR MISCONDUCT

None.

VII. ITEMIZATION OF COSTS

Attorney Grievance Commission:		
See Itemized Statement filed 7/31/17		$ 89.11
See Itemized Statement filed 7/21/17		$ 48.85
Attorney Discipline Board:		
Hearing held 7/18/17		$ 560.50
Administrative Fee		$1,500.00
	TOTAL:	**$2,198.46**

ATTORNEY DISCIPLINE BOARD
Washtenaw County Hearing Panel #1

By: _____
Jerold D. Lax, Chairperson

Dated: February 21, 2018