

STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellee,

v

Brian T. Dailey, P 39945,

Respondent/Appellant.

Case No. 22-77-GA

Decided: March 24, 2025

Appearances

Kenneth E. Frazee, for Grievance Administrator, Petitioner/Appellee
Brian T. Dailey, In Pro Per, Respondent/Appellant

BOARD OPINION

On May 7, 2024, Tri-County Hearing Panel #17 issued an order of suspension and restitution, suspending respondent's license to practice law for five years, effective May 29, 2024, and ordering respondent to pay a total of \$24,478.85 (plus interest) in restitution. Respondent timely filed a petition for review and a motion for stay, which was granted on an interim basis, pending further consideration by the Board. Ultimately, respondent's motion for stay was denied by the Board on June 13, 2024, which made the effective date of his suspension June 20, 2024.

On December 11, 2024, the Attorney Discipline Board conducted a review

proceeding in accordance with MCR 9.118, which included a review of the whole record before the panel, consideration of briefs filed on behalf of respondent and the Grievance Administrator, as well as arguments presented in person by counsel. For the reasons discussed below, we affirm the hearing panel's findings of misconduct in part and vacate in part, increase the discipline imposed from a five-year suspension to disbarment, and affirm the order of restitution.

I. Factual Background

The Grievance Administrator filed a formal complaint against respondent in October 2022 and an amended formal complaint in July 2023, alleging misconduct in eleven separate legal matters.¹ To understand the breadth of the alleged misconduct requires some significant background for each count, as detailed below.

Count One

After Christopher Daya was injured in a motor vehicle accident, he hired several attorneys, including respondent, which ultimately resulted in a November 17, 2010 court order requiring respondent to reimburse another law firm, Gursten, Koltonow, Gursten, Christensen and Raitt, PC ("Gursten"), \$5,495.15 in costs. Despite the court order, respondent did not pay the money to Gursten. Over the course of the next few years, Gursten made repeated attempts to obtain payment from respondent. In 2012, Gursten filed a motion to show cause and motion for garnishment against respondent, and respondent was ordered to pay Gursten within 10 days. Nevertheless, respondent continued to refuse to pay Gursten over the next two years, even though Gursten had written to respondent numerous additional times during that period. Finally, in March 2014, a stipulated order was entered that required Gursten to be paid \$7,000.00 for the costs owed to him by respondent,

¹ Count Twelve involved respondent's failure to timely answer requests for investigation, and is not at issue in this appeal.

and for some additional costs and fees. Gursten was paid directly out of \$10,000.00 in funds that was being held for respondent pursuant to a lien, as a result of the ultimate settlement of Mr. Daya's case.

Respondent set forth several reasons for his non-compliance with the court orders, all of which the panel determined were illegitimate. As stated by the panel:

The simple undisputed facts are that respondent was ordered to pay \$5,495.15 to Gursten in two separate court orders. Respondent refused and gave Gursten the run around forcing him to take court action to get it, when respondent plainly owed the money. It took Gursten more than three years to obtain this money, and it was ultimately paid out of the Daya settlement proceeds at the conclusion of the case, instead of in November 2010 when it was supposed to be paid by respondent directly to Gursten. [Misconduct Report, pp 7-8.]

The panel found that respondent failed to promptly pay or deliver funds that a third person is entitled to receive, in violation of MRPC 1.15(b)(3); and knowingly disobeyed an obligation under the rules of a tribunal, in violation of MRPC 3.4(c). The panel also found violations of 8.4(b)² and MCR 9.104(1)-(3).³

² MRPC 8.4(b) provides that it is professional misconduct for a lawyer to “engage in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law, where such conduct reflects adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer[.]”

³ MCR 9.104 provides, in pertinent part:

The following acts or omissions by an attorney, individually or in concert with another person, are misconduct and grounds for discipline, whether or not occurring in the course of an attorney-client relationship:

Count Two

After Sultana Hermiz was injured in an auto accident, she hired attorney Lawrence Gursten to represent her, but then replaced Mr. Gursten with respondent.

In May 2010, Ms. Hermiz instructed respondent to grant Mr. Gursten a lien for his services and expenses, to ensure he received a fair share from any settlement or verdict. Respondent confirmed this arrangement, agreeing to pay Mr. Gursten a third of the attorney fees and reimburse his expenses.

In September 2011, Ms. Hermiz received a \$60,000.00 arbitration award, and the check was made jointly payable to Ms. Hermiz, respondent's firm, and Mr. Gursten's firm. Respondent agreed to pay Mr. Gursten one-third of the attorney fees and \$1,338.98 for costs, as per their earlier agreement. However, after respondent deposited the check into his IOLTA, he failed to pay Gursten any of the agreed amounts, and instead distributed the full \$60,000.00 to his own firm and Ms. Hermiz.

Over the next few years, Mr. Gursten made significant efforts to obtain payment from respondent, to no avail. After Mr. Gursten filed a request for investigation against respondent in 2013, respondent claimed Ms. Hermiz was refusing to allow payment to Mr. Gursten. Finally, in April 2015, respondent paid Mr. Gursten the \$1,338.98 owed for costs, but did so from his business account, not his IOLTA account.

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- (1) conduct prejudicial to the proper administration of justice;
 - (2) conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach;
 - (3) conduct that is contrary to justice, ethics, honesty, or good morals;
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The hearing panel found that respondent failed to promptly pay or deliver funds that a third person is entitled to receive, in violation of MRPC 1.15(b)(3); failed to hold disputed property separate from the lawyer's property until the dispute is resolved, in violation of MRPC 1.15(c); and failed to hold property of clients or third persons in connection with a representation separate from the lawyer's own property, in violation of MRPC 1.15(d). The panel also found violations of MRPC 8.4(b) and 8.4(c),⁴ as well as MCR 9.104(1) and (2).

Count Three

In 2010, respondent and attorney Steven Lehto entered into an agreement to serve as co-counsel on Michigan lemon law cases, agreeing to split net settlement funds 50/50 after costs. However, in 2012 and 2013, respondent received settlement funds for seven cases that he shared with Mr. Lehto, but failed to pay Mr. Lehto his share. Despite repeated attempts to contact respondent via phone, text, email, and regular mail, Mr. Lehto only received empty promises of payment.

In early 2014, after continued non-payment, Mr. Lehto filed a request for investigation against respondent. In response, respondent sued Mr. Lehto for alleged unpaid rent for office space Mr. Lehto was renting from respondent, though no prior demand had been made. Mr. Lehto filed a counterclaim and third-party complaint regarding the unpaid referral fees. The dispute was ultimately settled with both parties agreeing to dismiss their claims without payment.

The hearing panel found that respondent failed to promptly pay or deliver funds that a third person is entitled to receive, and failed to promptly render a full accounting regarding the funds, in violation of MRPC 1.15(b)(3). The panel further found violations of MRPC 8.4(b) and MCR 9.104(3), and dismissed alleged violations of MCR 9.104(1) and (2), and MRPC 8.1(c).

⁴ MRPC 8.4(c) provides that it is professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice[.]"

Count Four

In July 2017, Suzanne Wickett was hired as a bookkeeper at respondent's law firm. In August, she received a paycheck for \$1,480.00, but it was returned for insufficient funds. In addition, she was not paid for work during the first two weeks of September 2017, despite respondent's promises to compensate her. On September 18, 2017, she was told by respondent not to return to work.

After Ms. Wickett repeatedly requested her unpaid wages, respondent ignored her requests, and eventually told her to stop contacting him and his firm. In November 2017, she filed a claim with Michigan's Department of Licensing and Regulatory Affairs (LARA), who determined that respondent owed Ms. Wickett \$2,210.00, and ordered respondent to pay by December 21, 2017. He failed to comply, which resulted in a finding by LARA that respondent violated the Payment of Wages and Fringe Benefits Act.

Respondent appealed the LARA order, which was upheld in June 2018. When payment was still not made in September 2018, the case was referred to the Michigan Attorney General. Eventually, after prolonged collection efforts, a settlement was reached, and Ms. Wickett received payment of \$2,462.00 in September 2019 – two years after her employment ended.

The hearing panel found that respondent had no legitimate defense to support his refusal to pay Ms. Wickett:

Respondent's obligation was as simple as it gets. He was obliged to pay for the services rendered to him and his law firm by Wickett. However, respondent refused to pay until he was absolutely forced to do so and used illegitimate and irrelevant excuses to avoid that payment for as long as possible. The amount of burden, time and effort that Wickett, LARA, the administrative law judge, and the Michigan Department of Attorney General had to exert to get respondent to pay what he plainly and clearly owed at the outset for a few weeks of work by Wickett

is astounding. The exhibits relating to this count plainly show the amount of effort and burden respondent imposed upon these other people and institutions as a result of his ethical misconduct. [Misconduct Report, p 20.]

The panel found that respondent violated MRPC 1.15, which requires a lawyer to promptly disburse money to which someone else is entitled.⁵ The panel further determined respondent knowingly disobeyed an obligation under the rules of a tribunal, in violation of MRPC 3.4(c), and found violations of 8.4(b) and (c), as well as MCR 9.104(1)-(3).

Count Five

In 2017, Rodney Lloyd, an assistant at respondent's law firm, had three paychecks totaling \$2,600.00 returned for insufficient funds, and each check resulted in a \$25.00 fee imposed by the bank. Greenfield Super Market ("GSM"), which cashed the checks, contacted respondent, who promised to replace them. However, a replacement check for \$2,675.00 was also returned for insufficient funds. For the next eight months, GSM made further collection attempts, but was unable to collect payment.

In August 2018, GSM hired attorney Dalen Hanna to collect the funds. After multiple failed collection attempts which included a formal demand for payment, Mr. Hanna warned of legal action, which prompted respondent to file a lawsuit against GSM in December 2018. That same day, Mr. Hanna filed a lawsuit against

⁵ Respondent argued on review that he could not have violated MRPC 1.15 because Ms. Wickett "was never a client nor was there any fiduciary relationship" and as a result, the funds were not required to be deposited in the IOLTA. (Respondent's Brief, pp 24-25.) Although respondent's reasoning is incorrect, the hearing panel did err in concluding that respondent violated MRPC 1.15 in Count Four because it was not charged in the amended formal complaint. An attorney may only be found guilty of misconduct as charged in a complaint in disciplinary proceedings. See *Grievance Administrator v Jackson*, 390 Mich 147 (1973). Nevertheless, such an error is harmless here, because respondent's misconduct is captured and supported by the other rule violations found in Count Four.

respondent and his law firm. Ultimately, in the spring of 2019, respondent was sanctioned \$1,500.00 for filing frivolous pleadings and a judgment of \$2,805.00 was entered against respondent's law firm, both of which were never paid.

In January 2023, respondent then sued Mr. Hanna, his firm, GSM, and others, but the case was dismissed. The judge requested the parties to brief the issue of sanctions, but Mr. Hanna declined to pursue them, because he believed respondent would never pay. Attorney Robert Smith, a former employee of respondent's firm, also testified that respondent deliberately filed the lawsuit against GSM "to mess with them," and stated that respondent openly admitted to never paying debts voluntarily.

The hearing panel found that "[r]espondent clearly owed the money, refused to pay, and has caused much unnecessary, expense, burden, time and effort to be imposed upon GSM, its attorney, and the court system." (Misconduct Report, p 23.) The panel stressed that "[t]o this day, respondent has never paid GSM what it owes it from the insufficient fund checks it cashed from respondent, or for the sanctions leveled against respondent by the 48th District Court." (Misconduct Report, p 23.) The panel addressed and dismissed each of respondent's excuses as unavailing, and concluded:

Respondent's excuses do not in any way excuse his misconduct on full display in this count. Respondent issued insufficient fund checks, owed money to an innocent victim, refused to pay, and used sanctionable tactics to impose as much burden as possible on the victim so that it and its attorney would give up. Respondent weaponized the court system to avoid making payments he owed and to wear down the victim. It has been more than six years since respondent inexcusably passed this series of insufficient fund checks. Respondent has wrongly left a trail of aggravation for the victim and court system, which have had to deal with the ramifications of respondent's conduct. [Misconduct Report, pp 25-26.]

The panel found that respondent failed to promptly pay or deliver funds that a third person is entitled to receive, in violation of MRPC 1.15(b)(3); asserted a frivolous position in a proceeding, in violation of MRPC 3.1; and knowingly disobeyed an obligation under the rules of a tribunal, in violation of MRPC 3.4(c). The panel also found violations of 8.4(a),⁶ (b), and (c), as well as MCR 9.104(1)-(3), and dismissed the alleged violation of MCR 9.104(5) (illegal conduct).

Count Six

Count Six involves respondent's conduct related to the handling of settlement funds for Maria Orth, who suffered injuries in a 2011 car accident. After the case settled in 2015, respondent deposited the \$175,000.00 settlement check into his IOLTA and promptly disbursed \$57,827.94 in attorney fees to his firm, but failed to distribute any funds to Mrs. Orth before her passing in December 2015.

Aron Orth, Maria's son, testified that they had reached out to respondent for the settlement proceeds because their family situation at the time was very difficult. Mrs. Orth had been unable to work because of the auto accident, and then Aron's father, Michael Orth, was diagnosed with brain cancer, so there was no income at all. (Tr 8/8/23, p 144.) There were several times that they were facing eviction or did not have electricity or running water because they could not pay the bills. (Tr 8/8/23, p 144.) When his mother died, Aron testified that they had to borrow money to pay for the burial expenses, because they had not gotten any of the settlement funds. (Tr 8/8/23, p 145.)

Because respondent did not disburse all of the settlement funds prior to

⁶ MRPC 8.4(a) provides that it is professional misconduct for a lawyer to "violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another[.]"

Mrs. Orth's death, the remaining funds became part of the probate estate. The Orth family again reached out to respondent to ask for the settlement funds that were due to Mrs. Orth. On January 4, 2016, in response to the request, respondent sent an email to Michael Orth indicating that he would send him the amount requested out of the settlement proceeds, but that he was “a bit reticent to do so since technically we need to open an estate to distribute but if you retain my office to handle this matter I will feel more comfortable that I will not have to answer to another attorney handling the estate.” (Resp Ex 9.) Respondent included a minimum fee agreement for \$7,500.00 for this service. The proposed retainer agreement was never signed and respondent never opened a probate estate.

Nevertheless, on January 5, 2016, respondent transferred \$7,500.00 from his IOLTA (from funds that were supposed to be held in trust for the Orth estate) to his business account. (Pet Ex 35.) Over the next year, respondent transferred additional settlement funds from Mrs. Orth’s estate that were supposed to be held in trust in his IOLTA, all without opening a probate estate.

After the family retained another attorney in 2017 to open and probate the estate of Mrs. Orth, respondent failed to provide an accounting of the funds until threatened with a grievance. Respondent’s associate later falsely claimed that additional attorney fees were supposedly incurred in the probate matter (that was never filed), and respondent ultimately filed a lawsuit against the estate for additional payment. During settlement negotiations, respondent warned he would further delay payments to the Orth family by filing an appeal. A settlement was finally reached in 2019, requiring respondent to pay the Medicaid lien and disburse the remaining funds. However, he again delayed payment until legal action was taken to enforce the settlement.

The panel found that respondent neglected a legal matter, in violation of

MRPC 1.1(c); failed to act with reasonable diligence and promptness in representing a client, in violation of MRPC 1.3; failed to promptly pay or deliver any funds that a third person is entitled to receive, in violation of MRPC 1.15(b)(3); knowingly disobeyed an obligation under the rules of a tribunal, in violation of MRPC 3.4(c); and charged or collected, or attempted to charge or collect, clearly illegal or excessive fees in violation of MRPC 1.5(a) and MCR 5.313(B). The panel also found violations of 8.4(b) and MCR 9.104(1)-(3).

Count Seven

This count involves respondent's mishandling of settlement funds related to two separate lawsuits filed on behalf of his client, Arthur Orofino, following a 2016 car accident. The first case, against Travelers Indemnity Company, settled in June 2018 for \$80,000.00, but respondent failed to draft a distribution statement or issue payment to Mr. Orofino until nearly one year later, when he finally disbursed \$27,799.20.

The second case, against the driver of the other vehicle, settled for \$110,000.00 in June 2019. Respondent deposited the settlement check into his IOLTA, but later issued a check for Mr. Orofino's share (\$71,962.81) from his business account instead. This check was returned for insufficient funds on July 5, 2019. He then reissued the payment from his IOLTA on July 9, 2019.

The hearing panel determined that the settlement funds for the third-party case were properly deposited into respondent's IOLTA, and that providing Mr. Orofino a check for those funds written on respondent's business account was inadvertent, immediately corrected, and did not cause injury, and thus there was no misconduct in relation to the third-party settlement. The panel did, however, find misconduct relating to the first-party settlement, because of the one-year delay between receiving the settlement check and actually distributing the money to Mr. Orofino. As a result, the panel found that respondent failed to promptly pay or deliver

funds that a third person is entitled to receive, in violation of MRPC 1.15(b)(3).

The panel also found a violation of 8.4(b) and MCR 9.104(3). The Panel dismissed the alleged violations of MRPC 1.3, MRPC 1.5(a), and MCR 9.104(1) and (2).

Count Eight

This count involves respondent's mishandling of settlement funds and failure to comply with court orders regarding an auto accident claim filed on behalf of Stephanie Dallas. In March 2019, Ms. Dallas retained respondent's firm under a contingency fee agreement, which she claims was not clearly explained to her. Soon after, her insurer, AAA, voluntarily agreed to pay her first-party benefits. Respondent deducted one-third of these payments as attorney fees without providing any services to secure them, and then failed to pay Ms. Dallas's medical providers, forcing her to cover the costs herself.

Ms. Dallas then stopped receiving her first party benefits altogether in approximately June 2019, so she terminated respondent's representation in September 2019, then requested her case file and an accounting of the AAA payments from respondent. Her new attorney, Craig Nemier, also made repeated requests for the accounting and for respondent to release his lien, but respondent ignored him.

In February 2020, Mr. Nemier filed a lawsuit against respondent, which led to a court order in August 2020 requiring respondent to pay Ms. Dallas and her providers what they were owed, and to provide a full financial accounting.

Respondent failed to comply with the court order, forcing Mr. Nemier as well as a medical provider to file motions to hold respondent in contempt. During those proceedings, the court expressed extreme frustration with respondent's delays, and warned him of possible criminal contempt charges. Respondent finally submitted the required financial accounting on December 1, 2020 – over a year after the initial request.

The panel found that respondent failed to act with reasonable diligence

and promptness in representing a client, in violation of MRPC 1.3; failed to promptly comply with a client's reasonable requests for information, in violation of MRPC 1.4(a); failed to explain a matter to a client to the extent reasonably necessary to permit the client to make informed decisions about the representation, in violation of MRPC 1.4(b); failed to promptly pay or deliver funds that a third person is entitled to receive and failed to promptly render a full accounting of such funds, in violation of MRPC 1.15(b)(3); and knowingly disobeyed an obligation under the rules of a tribunal, in violation of MRPC 3.4(c). The panel also found violations of 8.4(b) and (c), as well as MCR 9.104(1)-(3).

Count Nine

Count Nine involves Affiliated Diagnostics, a medical provider that provided MRI services for Ms. Dallas related to her auto accident injuries. AAA issued two payments totaling \$23,242.00 to respondent for these services, which he deposited into his IOLTA no later than May 21, 2019. He failed to promptly disburse the funds to Affiliated Diagnostics, however, and refused to voluntarily pay them when contacted.

As a result, attorney John Betz was retained to collect the amount owed. In June 2020, Mr. Betz contacted respondent, who responded aggressively and stated that he would make the process difficult for Mr. Betz and his client. Mr. Betz testified that respondent engaged in stalling tactics, including filing frivolous pleadings.

As discussed above, on August 17, 2020, a court order was entered in the civil suit filed by Ms. Dallas that required respondent to pay every provider for Ms. Dallas within ten days. Mr. Betz subsequently filed a demand for payment on behalf of Affiliated Diagnostics, establishing by documents that respondent received a total of \$23,242.00 from AAA that was intended for payment to Affiliated Diagnostics. As a result of respondent's failure to comply with the August 17,

2020 court order, Mr. Betz also filed an order for show cause, which was granted on September 15, 2020. On September 29, 2020 – the day before the scheduled show cause hearing – Mr. Betz received a check from respondent for the full amount owed to Affiliated Diagnostics.

The panel found that respondent failed to promptly pay or deliver funds that a third person is entitled to receive and failed to promptly render a full accounting regarding such funds, in violation of MRPC 1.15(b)(3); and knowingly disobeyed an obligation under the rules of a tribunal, in violation of MRPC 3.4(c).

The panel also found violations of MRPC 8.4(b) and (c), as well as MCR 9.104(1)-(3).

Count Ten

Julius Harden was injured in an auto accident on October 27, 2017, and elected to pursue his first-party benefits himself, but retained respondent as his attorney to recover third-party benefits. Respondent secured a \$20,000.00 settlement from the at-fault driver's insurer (GEICO), and paid Mr. Harden his portion on March 1, 2019. Separately, respondent filed a lawsuit against Mr. Harden's insurer, Meemic, for underinsured motorist benefits.

Between October 2017 and October 2019, Mr. Harden's wife was performing replacement services for Mr. Harden, who would then submit monthly household service and replacement service statements directly to Meemic and would receive payment for these services directly from Meemic. On two occasions, however, Meemic mistakenly sent replacement service checks totaling \$700.00 to respondent instead of directly to Mr. Harden. Instead of forwarding the funds to Mr. Harden, respondent deposited them into his IOLTA and then demanded that Mr. Harden sign a new contingency fee agreement or pay an hourly fee before releasing the checks.

The underinsured motorist claim went to arbitration, and Mr. Harden was awarded \$22,500.00. Meemic paid the award to respondent on November 26, 2019, but respondent failed to disburse the funds to Mr. Harden. After waiting over

90 days without payment, Mr. Harden hired attorney Jordan Altus on March 17, 2021, to recover the settlement. Mr. Altus repeatedly attempted to contact respondent, who initially acknowledged the debt but then became unresponsive. After months of delays, Mr. Altus threatened legal action for conversion, prompting respondent to finally provide an accounting for Mr. Harden's approval.

Harden approved the settlement breakdown and requested payment on May 14, 2021. Respondent then imposed an unexpected notarization requirement, further delaying the payment. Even after Mr. Altus complied, respondent failed to issue the check, forcing Mr. Altus to file a lawsuit. Only after the suit was filed did respondent finally send a check to Mr. Harden, which led to the lawsuit's dismissal on June 28, 2021. However, because Mr. Harden had to retain Mr. Altus on a 50% contingency basis to recover his money, he ultimately received less than he would have if respondent had paid him timely.

The panel found that respondent failed to act with reasonable diligence and promptness in representing a client, in violation of MRPC 1.3; failed to promptly comply with a client's reasonable requests for information, in violation of MRPC 1.4(a); failed to explain a matter to a client to the extent reasonably necessary to permit the client to make informed decisions about the representation, MRPC 1.4(b); and failed to promptly pay or deliver funds that a third person is entitled to receive and failed to promptly render a full accounting of such funds, in violation of MRPC 1.15(b)(3). The panel also found violations of MCR 9.104(1) and (3), and dismissed the alleged violations of MCR 9.104(2) and MRPC 8.4(b).
Count Eleven

Respondent represented the plaintiff in a case in which attorney Kent Siegel was appointed as a mediator. Both parties were required to pay mediation fees.

On June 28, 2021, respondent issued a \$500.00 check to Mr. Siegel from his business account; however, on July 1, 2021, the State of Michigan garnished respondent's

account for unpaid debts, which caused Mr. Siegel's check to be returned for insufficient funds on July 7, 2021.

On July 12, 2021, Mr. Siegel informed respondent about the returned check. Respondent falsely claimed that it was a "bank error" and promised to replace it promptly. Two weeks later, when Mr. Siegel followed up, respondent feigned surprise that the payment had not arrived, despite not only knowing that he had not sent it, but also that his business account had a balance of less than \$500 at that time. He assured Mr. Siegel that payment would be sent via overnight delivery. However, after additional delays, Mr. Siegel filed a request for investigation with the Attorney Grievance Commission on August 5, 2021. Respondent finally sent payment on August 13, 2021.

The panel found that respondent failed to promptly pay or deliver funds that a third person is entitled to receive, in violation of MRPC 1.15(b)(3); and knowingly disobeyed an obligation under rules of the tribunal, in violation of MRPC 3.4(c). The panel also found violations of MRPC 8.4(b) and (c), as well as MCR 9.104(1)-(3).

II. Panel Proceedings

This matter was assigned to Tri-County Hearing Panel #17. After five days of extensive misconduct hearings – which included testimony from fifteen witnesses and arguments of the parties spanning nearly 1,000 transcript pages, as well as the admission of 198 exhibits – the hearing panel issued a very thorough, 48-page misconduct report on March 19, 2024, which reflected the above findings.

There were also two days of sanction hearings, where the panel heard testimony from eleven witnesses and twelve exhibits were admitted. In closing arguments, counsel for the Grievance Administrator argued for respondent's disbarment, while respondent argued for an order imposing no discipline.

On May 7, 2024, the hearing panel issued its sanction report. After considering the applicable ABA Standards and the aggravating and mitigating factors cited by the parties, the panel concluded that a five-year suspension was appropriate. Further, the panel ordered that respondent pay restitution in the following amounts, plus interest: \$6,181.22 to Lawrence Gursten; \$6,492.63 to Steven Lehto; \$4,305.00 to Greenfield Super Market; and \$7,500.00 to the Estate of Maria Orth.

III. Discussion

When a hearing panel's findings are challenged on review, the Board must determine whether the panel's findings of fact have "proper evidentiary support on the whole record." *Grievance Administrator v August*, 438 Mich 296, 304 (1991). See also *Grievance Administrator v Ernest Friedman*, 18-37-GA (ADB 2019). "This standard is akin to the clearly erroneous standard [appellate courts] use in reviewing a trial court's findings of fact in civil proceedings." *Grievance Administrator v Lopatin*, 462 Mich 248 n 12 (2000) (citing MCR 2.613(C)). The question before the Board is whether the record as a whole is devoid of evidence upon which the panel could reasonably have based its decision. *Grievance Administrator v Robert D. Stein*, 09-3-GA (ADB 2011).

In addition, "[d]eference is given to the special opportunity of the trial court to judge the credibility of witnesses. MCR 2.613(C)." *Thames v Thames*, 191 Mich App 299, 301-302 (1991), lv den 439 Mich 897 (1991). Because the hearing panel has the opportunity to observe the witnesses during their testimony, the Board typically defers to the panel's assessment of their demeanor and credibility. *Friedman, supra*.

Misconduct

On review, respondent argues that the record does not support any of the

panel's findings of misconduct in Counts One through Eleven. First, respondent asserts that the hearing panel erred in finding violations of MRPC 1.15(b)(3) because that rule is not implicated when the controversy is between a debtor and creditor and the funds were not required to be placed in trust. MRPC 1.15(b) provides:

(b) A lawyer shall:

(1) promptly notify the client or third person when funds or property in which a client or third person has an interest is received;

(2) preserve complete records of such account funds and other property for a period of five years after termination of the representation; and

(3) promptly pay or deliver any funds or other property that the client or third person is entitled to receive, except as stated in this rule or otherwise permitted by law or by agreement with the client or third person, and, upon request by the client or third person, promptly render a full accounting regarding such property.

In support of his argument, respondent relies on the Board's holding in *Grievance Administrator v Michael E. Tindall*, 11-111-GA (ADB 2012). In that case, Mr. Tindall had successfully defended another attorney in a legal malpractice case. At the close of the case, the trial judge awarded attorney's fees to Mr. Tindall as a sanction for the opposing party's filing of a frivolous lawsuit. However, the Michigan Court of Appeals later vacated the sanction. The plaintiff's attorney sought a refund of the fees from Mr. Tindall, but he had dissolved his practice a year earlier. A probate judge issued an opinion stating that Mr. Tindall was not individually responsible for refunding the sanction award because it was paid to his corporation. Nevertheless, the hearing panel found a violation of MRPC 1.15(b)(3), based heavily on the fact that Mr. Tindall was a sole practitioner

with “absolute control of the funds,” as opposed to working for a firm.

The Board reversed, finding that “[t]he sanctions were awarded and paid to Tindall & Company, P.C., to sanction one party and recompense another party or his attorney,” the Board wrote. “They belonged to the payee and were not in any way funds of a client or third party, and the Administrator does not contend that the deposit of these fund into a trust account was required or appropriate at the time the sanctions were paid or at any time thereafter.”

Here, the hearing panel found violations of MRPC 1.15(b)(3) in Counts One, Two, Three, and Five through Eleven. With regard to all counts except Counts Five and Eleven, the *Tindall* case can be distinguished. Counts Six through Ten all involved the mishandling of respondent’s clients’ settlement funds, which were unquestionably required to be deposited into respondent’s IOLTA and distributed promptly. Although Counts One, Two, and Three did not specifically involve client funds, there is no requirement in MRPC 1.15(b) that the property must belong to a client or be client funds. The funds at issue in these three counts were obtained in the course of a representation, did not belong to respondent, and were being wrongfully retained by respondent. Pursuant to MRPC 1.15, these funds should have been promptly paid, or, at the very least, held in trust if there was a dispute regarding the funds.

With regard to Counts Five and Eleven, we agree that MRPC 1.15 is not applicable. The funds at issue in these counts did not involve client funds, nor were they obtained during the course of a representation. As stated by the Board in *Tindall*: “We are aware of no authority, and none has been cited, for the proposition that the rule requiring client and third party monies and property to be held in trust and safeguarded contains within it a requirement subjecting an attorney to professional discipline whenever an attorney’s creditor does not receive prompt payment of a sum (not held in trust and properly so) that an attorney’s

personal creditor is ‘entitled to receive.’” *Tindall* at 3. As such, we vacate the hearing panel’s finding that respondent violated MRPC 1.15(b)(3) in Counts Five and Eleven. Such an error is harmless here, however, because respondent’s misconduct is captured and supported by the other rule violations found in Counts Five and Eleven,⁷ as further discussed below.

Respondent also claims on review that he could not have violated MRPC 3.4(c) for knowingly disobeying an obligation under the rules of a tribunal because all of the court orders requiring him to pay were not final orders. “All orders and judgments of the courts must be complied with promptly. If a person to whom a court directs an order believes that order is incorrect the remedy is to appeal, but, absent a stay, he must comply promptly with the order pending appeal.” [Misconduct Report, p 9 (citing *Maness v Meyers*, 419 US 449, 458-460 (1975).] Further, a final court judgment is not a prerequisite for a violation of the independent ethical obligations owed by an attorney under MRPC 3.4(c).

With regard to the remaining findings of misconduct, we find there is sufficient evidence to support the violations found by the hearing panel. In Count One, the record shows that respondent received funds from attorney Gursten and was obligated to repay the funds, but simply refused to do so, stretching this matter out over the course of nearly four years.

In Count Two, respondent claimed he could not share his attorney fee with Mr. Gursten because his client refused to allow it. Important here is the credibility determination the panel made on this issue and in regard to the evidence presented:

⁷ In Count Five, the panel also found violations of MRPC 3.1 (asserting a frivolous position in a proceeding) and MRPC 3.4(c) (knowingly disobeying an obligation under the rules of a tribunal), as well as violations of MRPC 8.4(a), (b), and (c), and MCR 9.104(1)-(3). Likewise, in Count Eleven, the panel found a violation of MRPC 3.4(c), as well as violations of MRPC 8.4(b) and (c), and MCR 9.104(1)-(3).

While respondent contended that Hermiz objected to Gursten receiving an attorney fee on the matter, in all of the prior correspondence, there is no hint of any objection by Hermiz to Gursten getting paid an attorney fee. Nor is there a mention of any actual objection by Hermiz or respondent. In fact, the evidence all favored Hermiz agreeing that Gursten was to be paid an attorney fee by respondent out of the ultimate settlement proceeds.

To the extent that respondent raises as an affirmative defense a purported objection by Hermiz to Gursten receiving an attorney fee, the burden of proof is on respondent. *Palenkas v Beaumont Hosp.*, 432 Mich 527, 548 (1989). Respondent has failed to meet his burden.

All of the competent, corroborating, and objective evidence is contrary to such an affirmative defense.

[Misconduct Report, p 13.]

Respondent also argues on review that he did not violate MRPC 1.15(c) or (d),⁸ claiming that his staff withdrew the sum of \$1,338.98 (the amount owed to Mr. Gursten for costs) from the IOLTA and transferred it to the law firm's business account without his knowledge. This is belied by the evidence, however, since it is undisputed that respondent had immediately written three checks totaling \$60,000.00 out of the IOLTA. Respondent was obligated to keep the funds due to

⁸ MRPC 1.15(c) states: "When two or more persons (one of whom may be the lawyer) claim interest in the property, it shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute." MRPC 1.15(d) states: "A lawyer shall hold property of clients or third persons in connection with a representation separate from the lawyer's own property. All client or third person funds shall be deposited in an IOLTA or non-IOLTA account. Other property shall be identified as such and appropriately safeguarded."

Mr. Gursten in his IOLTA until their dispute was resolved, at which time they could then be paid out, and he failed to do so. As such, the hearing panel's findings regarding Count Two are supported by the record.

With regard to Count Three involving Attorney Lehto, the hearing panel simply did not believe respondent's claims that Mr. Lehto owed him back rent. The panel believed that respondent's reliance on the back rent issue was a pretextual defense for not timely paying Mr. Lehto his referral fees, and concluded that respondent's defense in that regard was against the great weight of the evidence presented. There does not appear to be any reason in the record to disturb these findings.

With regard to Count Four, respondent argues on review that he could not have violated MRPC 3.4(c) because the rule does not apply to civil judgments or lawyers in their personal capacity. Respondent's position is untenable. The rule is not specifically limited to "judgments" or "court orders," and these words do not appear in the rule. Respondent's obligation to Ms. Wickett was very simple and straightforward – she was entitled to be paid for the time that she worked. Despite this, respondent refused to pay her until he was absolutely forced to do so, and even then relied on illegitimate excuses to avoid payment for as long as possible. "The amount of burden, time and effort that Wickett, LARA, the administrative law judge, and the Michigan Department of Attorney General had to exert to get respondent to pay what he plainly and clearly owed at the outset for a few weeks of work by Wickett is astounding." (Misconduct Report, p 20.) The record relating to this count clearly supports the hearing panel's findings of misconduct.

With regard to Count Five, respondent asserts on review that he could not have committed misconduct because the hearing panel made no findings that he knowingly or intentionally issued insufficient fund checks. Such a defense is irrelevant, however, because respondent was nevertheless aware of the insufficient

funds – and nearly six years later, he still has not paid the debt that he unquestionably owes to GSM.

With regard to Count Six, the hearing panel harshly rejected respondent's claim that he was just trying to help the Orth family:

Respondent, in testifying to the suffering he caused the Orth family at the hearing, notes: "But as a lawyer, I don't have the luxury of cutting corners. I did cut some corners in this case because I thought it was necessary to help Mr. Orth and his family survive[.]" . . . Respondent's admission of feigned compassion neglects to acknowledge that he also cut corners by improperly transferring Mrs. Orth's money into his bank account with improper legal fees in the amount of \$7,500. This was not respondent wanting to help a family in need. This is akin to extortion. Basically, respondent told the Orths I will give you money improperly if you improperly pay me to do so. This amounts to conversion of a decedent's property when done before letters of authority are issued under the Estates and Protected Individuals Code (EPIC), MCL 700.1205(4): If a person embezzles or wrongfully converts a decedent's property before the letters of authority are granted, or refuses, without colorable claim of right, to transfer possession of the decedent's property to the personal representative upon demand, that person is liable in an action brought by the personal representative for the benefit of the estate for double the value of the property embezzled, converted, or withheld.

The letter of authority is an order issued by the court following the commencement of a probate estate and the appointment of a personal representative. As respondent took money from the estate in January 2016 to disburse to himself and to Mr. Orth, respondent did this without the court's order (letter of authority) as the probate court case was not filed until February 2017.

Respondent improperly took \$7,500 from the estate of Mrs. Orth without opening a probate estate and without obtaining court approval to disburse any of the funds of her estate. This alone is clear evidence of an excessive fee, conversion, misappropriation and other improper acts. Respondent denies these allegations without legal support for his position. Moreover, the fee agreement violated MCR 5.313 because it was not signed by a representative of the estate. The estate had not been opened and a personal representative had not been appointed. Furthermore, Mr. Orth, who was suffering from debilitating brain cancer, never personally signed the agreement. Respondent had no fee agreement with the other heirs to Mrs. Orth's estate. Respondent was aware of these facts. [Misconduct Report, pp 30-31.]

In finding misconduct in this count, the hearing panel also concluded that respondent made false statements, first when he filed an account statement which stated that \$7,500.00 of respondent's fee as to the Orth estate was being retained in his IOLTA,⁹ and second, when respondent filed a lawsuit against Aron Orth and Mrs. Orth's estate, he falsely claimed that the alleged liens related to Medicaid and Medicare were "believed to be in excess of \$25,000," despite knowing that there was only a Medicare lien, and the amount due was not that high. Based on the foregoing, we find no error in the hearing panel's findings of misconduct in Count Six.

The evidence presented to the hearing panel also supports the misconduct found in Count Seven. There is no question that respondent delayed in getting Mr. Orofino his settlement funds. Respondent's defense that it "takes time" to negotiate payments of liens does not justify a one-year delay. Respondent is

⁹ Respondent's IOLTA records demonstrate this wire transfer of \$7,500.00 into respondent's business account had already occurred on January 5, 2016, prior to the filing of the account statement.

responsible for timely paying his clients and, with respect to Mr. Orofino, respondent failed to do so.

Respondent's primary argument on review regarding Count Eight revolves around whether Ms. Dallas retained respondent's firm to handle her no-fault benefits, but this issue is not in dispute. Ms. Dallas has admitted to signing a contingency agreement, but stated that it was not explained to her before she signed it. The issues here actually involve respondent's failure to respond to either Ms. Dallas or her new attorney, the unreasonable delay in paying Ms. Dallas and her medical providers, and the delay in providing an accounting as requested, all of which are supported by the record. The panel's findings with regard to these issues are supported by the record.

The panel's findings in Count Nine are also supported by the record. The evidence presented to the panel shows that respondent received checks from AAA, deposited them into his IOLTA, then sat on the funds and ignored court orders until he was forced to turn over the funds. Such evidence supports the violations found, and there is nothing in the record here that would require this Board to disturb the panel's findings regarding Count Nine.

In Count Ten, respondent attempts to defend the delay in providing Mr. Harden his money by blaming Mr. Harden, claiming that the delay was due to Mr. Harden's refusal to sign a new fee agreement regarding the first-party litigation. Such a defense is disingenuous, however, because respondent still did not promptly pay Mr. Harden, even after he acknowledged and approved of respondent's contingency fee. Because of this delay, Mr. Harden was forced to obtain another attorney to collect what was rightfully his. The panel's findings with regard to Count Ten are supported by the record.

The evidence also supports the findings in Count Eleven that respondent refused to acknowledge his obligation to pay the court appointed mediator promptly.

Mr. Siegel testified that, after the first check was returned for insufficient funds, respondent told him several times that he would be replacing the check promptly, but this never occurred. Respondent then feigned surprise when Mr. Siegel stated he had not yet received the replacement check, despite the fact that respondent knew he had not sent it, and knew his business account did not have enough money in it to cover the check at that time. Moreover, despite telling Mr. Siegel that he would be overnighting the already overdue replacement check, respondent did nothing until Mr. Siegel filed a request for investigation with the Attorney Grievance Commission. Such evidence supports the violations found, and there is nothing in the record here that requires this Board to disturb the panel's findings.

In short, the record here overwhelmingly supports the hearing panel's findings of misconduct. The evidence and testimony presented establishes that respondent's actions "are part of a proven pattern of conduct in avoiding payments that he decides he does not want to make." (Misconduct Report, p 10.) Respondent repeatedly failed to promptly pay funds he owed to either clients or third parties – funds that these clients and third parties were clearly entitled to, and had been entitled to in some cases for years. The only exception here is the finding that respondent violated MRPC 1.15(b)(3) in Counts Five and Eleven, which we vacate.

We note, however, that such an error was harmless, because of the additional professional misconduct found in each count.

The Sanction

On review, respondent challenges the appropriateness of the sanction imposed and the application of the applicable aggravating and mitigating factors. Respondent claims that the imposition of a five-year suspension and restitution

are both improper and not supported by the record here. At the sanction hearing, the Grievance Administrator argued for disbarment, while respondent argued for an order imposing no discipline.

In deciding the appropriate discipline to be imposed, hearing panels and this Board employ the American Bar Association (ABA) Standards for Imposing Lawyer Sanctions. *Grievance Administrator v Lopatin*, 462 Mich 235; 612 NW2d 120 (2000).

Pursuant to the ABA Standards, we must examine the duty respondent violated, respondent's mental state, and the actual or potential injury caused by respondent's conduct. Next, the Standards' recommended sanctions are considered based upon the answers to these questions. *Lopatin*, 462 Mich at 240; ABA Standards, pp 3, 4-5. Then aggravating and mitigating factors are to be considered. *Id.* Finally, "the Board or a hearing panel may consider whether there are any other factors which may make the results of the foregoing analytical process inappropriate for some articulated reason." *Grievance Administrator v Frederick A. Petz*, Case No. 99-102-GA (ADB 2001) (citing *Lopatin*, 462 Mich at 248 n 13).

When it comes to reviewing questions involving the level of discipline imposed, the Board possesses a relatively high measure of discretion with regard to the appropriate level of discipline. *Grievance Administrator v August*, 438 Mich 296 (1991). In other words, the Board has much more leeway to correct a sanction that may seem at odds with prior precedent for the same or similar conduct.

However, the Board also affords a certain level of deference to a hearing panel's subjective judgment on the level of discipline. *Grievance Administrator v Deutch*, 455 Mich 149, 166; 565 NW2d 369 (1997) ("attorney misconduct cases are fact-sensitive inquiries that turn on the unique circumstances of each case.")

Because the ABA Standards "do not provide rigid guidelines for a level of discipline to be imposed in every conceivable factual situation," *Grievance*

Administrator v Harvey J Zamek, 98-114-GA; 93-133-FA (ADB 1999), it is the responsibility of this Board to ensure consistency and continuity in discipline imposed under the ABA Standards and case law. This means “that we may not always afford deference to a hearing panel’s sanction decision, and that we may be required to independently determine the appropriate weight to be assigned to various aggravating and mitigating factors depending on the nature of the violation and other circumstances considered in similar cases.” *Grievance Administrator v Karen K. Plants*, 11-27-AI; 11-55-JC (2012) (citing *Grievance Administrator v Saunders V Dorsey*, 02-118-AI; 02-121-JC (ADB 2005)).

We agree with the hearing panel that respondent’s misconduct here falls under several of the ABA Standards, and we find that the most applicable are ABA Standards 4.1 [Failure to Preserve the Client’s Property], 4.4 [Lack of Diligence], and 6.2 [Abuse of the Legal Process], which provide, in pertinent part:

- 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.
- 4.41 Disbarment is generally appropriate when:
 - (a) a lawyer abandons the practice and causes serious or potentially serious injury to a client; or
 - (b) a lawyer knowingly fails to perform services for a client and causes serious or potentially serious injury to a client; or
 - (c) a lawyer engages in a pattern of neglect with

respect to client matters and causes serious or potentially serious injury to a client.

4.42 Suspension is generally appropriate when:

(a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client, or

(b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client.

6.21 Disbarment is generally appropriate when a lawyer knowingly violates a court order or rule with the intent to obtain a benefit for the lawyer or another, and causes serious injury or potentially serious injury to a party or causes serious or potentially serious interference with a legal proceeding.

6.22 Suspension is generally appropriate when a lawyer knows that he or she is violating a court order or rule, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding.

Although the hearing panel found that respondent's misconduct here falls squarely within the suspension standard under each of the above-referenced ABA Standards, we find that disbarment is more appropriate. We recognize that the Board does not often undertake the decision to increase the level of discipline in the absence of a petition for review requesting such action by the Grievance Administrator. However, MCR 9.118(D) provides that, following a review hearing conducted under MCR 9.118, the Board "may affirm, amend, reverse or nullify the order of the hearing panel in whole or in part or order other discipline." When considering this in conjunction with the determination that the Rules of Professional Conduct are to be "liberally construed" and that it is the Board's

function to ensure that these discipline proceedings advance the overriding goals of protecting the public, the courts and the legal profession, we have no doubt that our decision to increase discipline in this case is both authorized and warranted under the rules.

This case is replete with instances where respondent engaged in an intentional and continuous pattern and practice of conduct whereby he repeatedly ignored requests for payment, and willfully delayed and avoided making valid payments that he owed to clients, attorneys, and other third parties. Respondent also routinely issued checks that were returned for insufficient funds, and responded to complaints of nonpayment by filing frivolous pleadings and court actions. As succinctly stated by the hearing panel:

. . . . With little or no legitimate basis, respondent weaponized the court system to wear down his adversaries and former clients into settlements or into just giving up their rights against respondent, or as a means to delay any payments that he ultimately made in a few instances for as long as possible.

Respondent has had chronic financial issues running and managing his law practice as evidenced by, among other things, a sustained pattern of issuing checks for which there were insufficient funds. He has been unable to: properly manage and pay out client funds as they should be; pay shared attorney fee awards to other attorneys as they should be; pay debts that he owed as they should be; and keep client funds separate as required in IOLTA accounts as they should be.

Respondent has raised invalid arguments and excuses as to why he has not paid debts when owed or not provided accounting and other information as required. He has forced these arguments to be unnecessarily and unsuccessfully litigated in the court system, through a war of attrition, after which in some instances he was sanctioned and/or threatened by presiding judges. When

called upon to justify his actions, the evidence shows that respondent pivots to obfuscate and avoid the real issues – that he improperly refused to pay money he owed or provide accounting or other information that he was required to provide. Sometimes he would pay or provide information at the last minute to avoid a court hearing, and sometimes he did not ever pay or provide the information after wearing out the person to whom he owed money or information. [Misconduct Report, pp 4-5.]

Respondent's conduct here also undeniably caused serious or potentially serious injury. Respondent's clients, the court, opposing counsel, his employees, and others have been significantly and unnecessarily burdened, all because respondent decided he did not want to make payments to those that he owed. In some instances, it took these clients and third parties multiple years to obtain funds that were rightfully theirs from the beginning. When legitimate demands for payment were made, respondent retaliated by initiating baseless court actions and filing frivolous pleadings, all of which required the time, money and resources of those affected. Under these circumstances, disbarment is warranted.

Prior precedent also shows that cases involving violations of MRPC 1.15(b)(3) and dishonest conduct typically result in disbarment. *Grievance Administrator v Edward A. Schneider*, 10-121-GA (ADB 2011) (two-and-a-half-year suspension increased to disbarment where respondent failed to promptly pay funds that the client or third person was entitled to receive and failed to promptly render a full accounting upon request by the client or third party, in violation of MRPC 1.15(b)(3), and engaged in conduct involving dishonesty). See also *Grievance Administrator v John P. Lozano*, 19-31-GA (ADB 2020) (three-year suspension increased to disbarment for misappropriation, commingling, and dishonest conduct).

In addition, at least a one-year suspension under prior Board precedent is appropriate for making a false or misleading statement to a tribunal. See

Grievance Administrator v Keith J. Mitan, 06-74-GA (ADB 2008) (60-day suspension increased to one-year suspension for deliberate violation of court orders and testifying dishonestly in circuit court proceedings); *Grievance Administrator v Frederick B. Gold*, 99-35-GA (ADB 2002) (six-month suspension increased to a one-year suspension for making a false statement to a court during sentencing following a no contest plea to a charge of assault and battery). Those cases, however, involved only one instance of making a false statement; here, multiple false statements were made. This Board has found that “repeated misconduct may evidence the need for more severe discipline.” *Grievance Administrator v Stephanie A. Carson*, 22-24-GA (ADB 2024) (citing *Matter of O. Lee Molette*, 35391-A (ADB 1981)).

Because each disciplinary case involves unique facts and circumstances, we must also consider any applicable aggravating or mitigating factors. In its sanction report, the hearing panel thoroughly analyzed and addressed every aggravating and mitigating factor. The panel found that the applicable aggravating factors included: prior disciplinary record [9.22(a)]; dishonest or selfish motive [9.22(b)]; a pattern of misconduct [9.22(c)]; multiple offenses [9.22(d)]; bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency [9.22(e)]; submission of false evidence, false statements, or other deceptive practices during the disciplinary process [9.22(f)]; refusal to acknowledge wrongful nature of conduct [9.22(g)]; vulnerability of victim [9.22(h)]; substantial experience in the practice of law [9.22(i)]; and indifference to making restitution [9.22(j)]. The panel found that the only applicable mitigating factor was character and reputation [9.32(g)].

The panel also painstakingly reviewed and analyzed each individual witness who testified at the sanction hearings, and concluded:

While there are mitigating factors described above concerning respondent's character and reputation, the other factors are overwhelmingly aggravating against respondent. Many of the mitigating character witnesses testified to experiences that are quite dated, and/or are of marginal weight compared to the aggravating factors analyzed above and compared to respondent's misconduct as set forth in the Misconduct Report. Several of the mitigating factor character witnesses are also in criminal defense or other contexts, in contrast to the contexts and settings of respondent's misconduct in the Misconduct Report. [Sanction Report, p 16.]

We agree that the aggravating factors present here severely outweigh any marginal mitigation. All of these factors are interrelated and come into play when deciding how respondent's conduct reflects on his fitness to practice and what level of discipline is necessary for the protection of the public, other members of the bar and the legal system. After considering the entire record as well as the ABA Standards, prior case law, and applicable aggravation and mitigation, we find that the record provides sufficient support for disbarment.

Restitution

Respondent also very briefly asserts that the hearing panel's order of restitution was improper here. "Our Supreme Court has given hearing panels, this Board, and the Court itself discretion to require restitution as a condition of an order of discipline." *Grievance Administrator v Joel S. Gehrke*, 05-29-GA (ADB 2008) (citing MCR 9.106(5)). Restitution in the attorney discipline system serves the dual purpose of making a complainant or third party whole and protecting the public and the legal system through deterrence and sanctions.

Respondent asserts that restitution was inappropriate in Counts Three (Lehto) and Six (Orth) because those claims have already been settled. Although there are no Michigan cases that specifically address this issue, other

jurisdictions have allowed restitution in a disciplinary proceeding despite the existence of a civil settlement or judgment. See *Florida Bar v Schultz*, 712 So 2d 386 (1998); *Guam Bar Ethics Comm v Maquera*, 2001 Guam 20 (2001). It is entirely proper for a disciplinary court to address and remedy an attorney's wrongdoing, even if the same wrongdoing was addressed in a prior civil suit. See e.g. *In re Kinast*, 121 Wis 2d 25; 357 NW2d 282 (Wis 1984); *In re LaQua*, 548 NW2d 372, 377 (ND 1996) ("That an injured party may recover from a lawyer in a malpractice action is not in itself sufficient to show that a client suffered no injury or that disciplinary proceedings are no longer necessary.")

In the present case, both parties who settled their matters did so merely because they were frustrated or in desperate need of the money. In support of Count Three, the Grievance Administrator presented evidence of seven lawsuits, subsequent settlements of these lawsuits, the courts' register of actions, and respondent's bank records to show that Mr. Lehto never received the referral fees to which he was entitled under his agreement with respondent, totaling \$6,492.63.

(Petitioner's Exhibits 16-22.) With regard to Count Six, the evidence established that respondent improperly retained settlement proceeds from Mrs. Orth, then improperly withdrew \$7,500 from those proceeds for legal fees to open a probate estate, which he never opened. Ultimately, it was determined that respondent owed the Orth Estate \$57,755.89 from the original settlement proceeds.

The Personal Representative of the estate, Aron Orth, settled for \$40,755.89 out of desperation. Respondent cannot profit off his misconduct by also retaining an unearned fee.

Awarding restitution to these clients is simply an attempt at making them whole, which is one of the purposes of restitution. In addition, respondent is not entitled to unjustly profit as a result of violating the Rules of Professional Conduct. Accordingly, we affirm the hearing panel's order of restitution.

Laches

Respondent raises several additional arguments on review related to pretrial proceedings and evidentiary issues. First, prior to the misconduct hearings, respondent filed a motion to dismiss the formal complaint pursuant to MCR 2.116(C)(10), and a motion to dismiss Counts One through Four of the complaint based on laches. The motions were denied by the panel on the basis that genuine issues of material fact existed that needed to be decided by the fact-finder, and that with respect to laches, there had not been a showing of significant delay or a clear demonstration of substantial prejudice. The panel noted, however, that in deciding the case, it would consider the passage of time that had occurred since the alleged misconduct took place. Respondent is only appealing the denial based on laches.

The doctrine of laches reflects “the exercise of the reserved power of equity to withhold relief otherwise regularly given where in the particular case the granting of such relief would be unfair and unjust.” *Lothian v City of Detroit*, 414 Mich 160, 168 (1982). In order to warrant dismissal based on prosecutorial delay, at a minimum, a respondent is required to show a significant delay and a clear demonstration of substantial prejudice. See *Grievance Administrator v Eric H. Clark*, 95-59-GA (ADB 1997) (hearing panel dismissed discipline matter where misconduct was reported in 1991, but formal complaint was not filed until 1995; Board reversed, finding that respondent was unable to point to sufficient prejudice to justify dismissal).

In the present case, respondent has asserted numerous times that the delay in this case warrants dismissal, but he has failed to point to sufficient prejudice to justify a dismissal. He claims that his computer was hacked in 2019 and thus he now has an inability to retrieve emails that were sent prior to 2019, but respondent has not established that any emails existed that would have been able

to assist in his defense. Further, the requests for investigation regarding Counts One through Four were filed in 2013, 2014, and 2017. Therefore, respondent was on notice of the substance of the charges as early as 2013, and he could have investigated then and preserved evidence at that time.

Moreover, respondent testified that he requested numerous extensions to file his answers to the requests for investigation, that he was given “lots and lots of extra time,” and that there was only one occasion where he requested an extension and was denied additional time. (Tr 11/30/23, pp 479-80.) Therefore, some delay between the filing of the requests for investigation and the filing of the formal complaint is of respondent’s own doing. Nevertheless, the delay in prosecution may, if appropriate, be considered by the panel as a mitigating factor, which in this case the hearing panel did consider.

Withdrawal of Counsel

Respondent also claims that the hearing panel erred when it allowed respondent’s counsel, Philip Thomas, to withdraw after the first misconduct hearing was held. An order granting or denying a motion for withdrawal of counsel is reviewed for an abuse of discretion. *People v Traylor*, 245 Mich App 460, 462 (2001). “A trial court abuses its discretion when it selects an outcome that does not fall within the range of reasonable and principled outcomes.” *People v Young*, 276 Mich App 446, 448 (2007).

There is no evidence that the hearing panel abused its discretion in allowing Mr. Thomas to withdraw. Mr. Thomas provided competent representation at the hearing on October 2, 2023, where he cross-examined five witnesses and introduced 13 exhibits. Further, because the hearing panel allowed Mr. Thomas to withdraw, they adjourned the hearing dates that were scheduled for October 3 and 4, 2023, to allow respondent time to find new counsel. Moreover, during the hearing when the panel discussed the motion, respondent indicated that “if [Mr. Thomas] believes

that he needs to withdraw then I'm not going to dispute that, I'm not going to try to keep him in here.” (Tr 10/02/23, p 254.) There was no abuse of discretion by the panel in allowing Mr. Thomas to withdraw.

Respondent also asserts that the hearing panel erred in “refusing to allow Respondent an adjournment of the misconduct hearing” to allow new counsel to prepare. A denial of a motion to adjourn is also reviewed for an abuse of discretion. *People v Coy*, 258 Mich App 1, 17 (2003).

Initially, the panel granted an adjournment on October 2, 2023, to allow respondent time to find new counsel, and rescheduled the hearings for late October through early December. Respondent then requested another adjournment on October 24, 2023, stating that Attorney Dennis Dettmer had agreed to represent him if given ample preparation time. The panel also granted this request, but warned that no further adjournments would be allowed.

On November 22, 2023, respondent requested an additional adjournment after learning that Mr. Dettmer had declined the representation. Respondent was seeking additional time to retain another attorney, Thomas Loeb, who stated that he needed 30 to 60 days to prepare. The panel denied this request on November 27, 2023, and denied a subsequent request the next day for the same reason. There is no right to effective assistance of counsel in disciplinary proceedings. See *Grievance Administrator v Timothy H. McCarthy, Jr.*, 15-72-GA (ADB 2017). Regardless, as evident from the chronology and circumstances of this case, there was no abuse of discretion, especially where respondent was given sufficient time to obtain counsel.

In what may be an issue of first impression, respondent also argues on review that the hearing panel erred by not conducting an evidentiary hearing to determine if he was competent to represent himself in a disciplinary proceeding. Respondent claims that forcing him to appear *in pro per* would potentially lead to a violation

of MRPC 1.1, which provides that a lawyer shall not “handle a legal matter which the lawyer knows or should know that the lawyer is not competent to handle” MRPC 1.1(a).

As stated above, there is no right to counsel in disciplinary proceedings. In addition, the preamble to the Michigan Rules of Professional Conduct states that “[e]very lawyer is responsible for observance of the Rules of Professional Conduct,” and all lawyers appearing before the courts are expected to conduct themselves in accordance with such rules. In other words, the Rules of Professional Conduct state the minimum acceptable level of lawyer conduct. While pro se parties are often entitled to more leniency in their understanding of rules and procedures, the same cannot be said for a licensed attorney with regard to the Rules of Professional Conduct.

Evidentiary Issues

At the November 30, 2023 misconduct hearing, the hearing panel denied respondent’s request to compel counsel for the Grievance Administrator to provide all emails between respondent and anyone from the Grievance Commission. (Tr 11/30/23, p 479.) On review, respondent argues that the hearing panel erred in failing to compel production of these emails, because they were necessary for his defense in relation to Count Twelve. Such an argument here is irrelevant, however, because the panel dismissed all of the alleged violations in Count Twelve, with the exception of MCR 9.104(7), failure to answer a request for investigation in conformity with MCR 9.113, which the panel determined respondent “technically” violated in one instance. Respondent is not appealing that finding, so the argument in this regard is superfluous.

Respondent also claims that the hearing panel should not have admitted evidence of a non-final order granting an interim suspension of respondent’s license to practice law in the State of Illinois. (Petitioner’s Sanction Exhibits 5-6.)

Although respondent includes this issue in his “Statement of Questions Involved,” he fails to address it in his brief. Accordingly, this issue is abandoned on review. *Grievance Administrator v Frederick A. Patmon*, Nos. 93-47-GA; 94-157-GA (ADB 1997). See also *Mitcham v City of Detroit*, 355 Mich 182, 203 (1959) (“It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims”).

IV. Conclusion

For the foregoing reasons, we affirm the hearing panel’s findings of misconduct in part and vacate in part. The record here overwhelmingly supports all of the hearing panel’s findings of misconduct, with the exceptions of the findings that respondent violated MRPC 1.15(b)(3) in Counts Five and Eleven, which we vacate.

Further, while the hearing panel’s sanction report is thorough, well reasoned, and supported by the record, we do not believe that a five-year suspension is adequate to protect the public, the courts, and the legal profession. As such, we increase the discipline imposed from a five-year suspension to disbarment, and affirm the order requiring payment of restitution in its entirety.

Board Members Peter A. Smit, Rev. Dr. Louis J. Prues, Linda M. Orlans, Jason M. Turkish, Katie M. Stanley, Tish Vincent, and Kamilia Landrum concur in this decision.

Board Member Andreas Sidiropoulos, MD was absent and did not participate in this decision.

Board Member Alan Gershel is recused from this matter and did not participate in this decision.