STATE OF MICHIGAN

Attorney Discipline Board

GRIEVANCE ADMINISTRATOR,
Attorney Grievance Commission,

Petitioner,

v Case No. 15-105-GA

DONNELLY W. HADDEN, P 14507

Respondent.
_____/

ORDER REFERRING CASE TO MASTER
FOR ADDITIONAL PROCEEDINGS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The ABA Standards contain the following definitions:

> "Intent" is the conscious objective or purpose to accomplish a particular result.
>
> "Knowledge" is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result. [ABA Standards, p 7.]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

NOW THEREFORE,

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

ATTORNEY DISCIPLINE BOARD

By: _____
Louann Van Der Wiele, Chairperson

DATED: October 9, 2017