STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellee/Cross-Appellant,

v

Harold C. MacDonald, P16912,

Respondent/Appellant/Cross-Appellee,

Case No. 17-59-GA

Decided: March 19, 2019

Appearances

Stephen P. Vella, for Grievance Administrator, Petitioner/Appellee/Cross-Appellant
Harold C. MacDonald, In Pro Per, Respondent/Appellant/Cross-Appellee

BOARD OPINION

Tri-County Hearing Panel #105 of the Attorney Discipline Board issued an order on February 22, 2018, disbarring respondent from the practice law in Michigan, and requiring him to pay restitution in the amount of $160,545.33. Respondent filed a petition for review, seeking a reversal of one of nine findings of misconduct, and a decrease in restitution. The Grievance Administrator filed a Cross-Appeal, seeking an additional condition in the Order of Disbarment requiring respondent to take reasonable steps to safeguard his closed client files, and an increase in restitution to account for forfeited attorney fees. On June 20, 2018, the Attorney Discipline Board conducted review proceedings in accordance with MCR 9.118, which included a review of the whole record before the hearing panel and consideration of the briefs and arguments presented to the Board at a review hearing. For the reasons discussed below, we affirm the order of disbarment, but amend the order of restitution to reflect a computation error and the inclusion of forfeited attorney fees.

I. Background and Proceedings Before the Hearing Panel

This case involves the admitted misappropriation of a significant amount of funds from respondent's Interest on Lawyers Trust Account (IOLTA). Specifically, Count One of the formal complaint alleges respondent represented the Gerich Family Joint Revocable Living Trust ("Gerich Trust") beginning in 2010, and the Estate of Valentina Grimme, Deceased ("Grimme Estate"), in 2015 and 2016.

With regard to the Gerich Trust, a death benefit of $182,100.96 was deposited into respondent's IOLTA on September 29, 2010. Over the next two and a half years, legitimate disbursements of funds were made from the IOLTA, leaving a balance of $21,895.70 on June 1, 2015. However, on June 3, 2015, the balance dropped to $1,895.70, as a result of respondent's conversion of the funds. The total amount respondent converted from the Gerich Trust was $19,787.07. Respondent has admitted to converting these funds.

With regard to the Grimme Estate, $161,684.78 was deposited into respondent's IOLTA on behalf of the Estate. On July 6, 2015, respondent wrote a check to "The Law Offices of Harold MacDonald" in the amount of $7,500.00. On June 1, 2016, a disbursement was made to Douglas Grimme in the amount of $15,000.00. By November 1, 2016, respondent converted the remaining funds in the Trust and Estate, leaving a balance of $74.69 in the IOLTA. The total amount converted from the Grimme Estate was $112,946.06. Respondent has admitted to converting these funds.

Count Two of the formal complaint involves respondent's failure to respond to two requests for investigation in 2016, and two other requests for investigation in 2017. Although respondent sought and was granted an extension to answer the 2016 requests for investigation, he ultimately failed to respond. All requests for investigation were properly served.

The matter was assigned to Tri-County Hearing Panel #105 and misconduct hearings were held on August 28, 2017 and October 24, 2017. Respondent appeared at the hearings, testimony was taken from eight witnesses, and thirty exhibits were produced. Over the course of the misconduct hearings, respondent admitted to the misappropriation of funds and admitted he failed to respond to the requests for investigation.

After closing arguments, the panel deliberated and determined respondent committed the professional misconduct alleged in the formal complaint. The panel then moved to the sanction phase of the proceedings. Respondent testified on his own behalf. The Grievance Administrator argued for disbarment; respondent specifically stated for the record that he was not contesting disbarment. Therefore, the only issue during the sanction phase was the amount of restitution owed. Although the Grievance Administrator agreed with respondent's calculations as to the amounts taken from the IOLTA, the Grievance Administrator also sought forfeiture of the attorney fees respondent received in the Gerich and Grimme matters, $3,000 and $7,290.25, respectively.

The hearing panel deliberated for a short time and returned to announce the sanction. The panel determined that disbarment was appropriate, and ordered respondent to pay a total of $143,023.38 in restitution. However, when the hearing panel's report was issued on February 22, 2018, the amount of restitution ordered was $160,545.33.[1]

II. Discussion

A. There Was Sufficient Evidence to Conclude Respondent Failed to Safeguard His Client's Estate Documents in Violation of MRPC 1.15(d)

At the time of the misconduct at issue, respondent owned and operated the "Law Offices of Harold C. MacDonald, PLLC" in Troy, Michigan. His practice consisted of mostly estate planning. Respondent employed several associates and support staff, and received the majority of his clients from his landlord, Richard James, who owned and operated an employee benefit consulting and investing firm.

In late November and early December 2016, respondent was confronted by his secretary, Mr. James and two associate attorneys regarding respondent's misappropriation of client funds from the Gerich Trust and Grimme Estate. After respondent admitted to the misappropriation of funds, Mr. James required him to leave the building.

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[1] It appears that during the preparation of the hearing panel report, the calculation of $160,545.33 was taken from a prior restitution request filed by the Grievance Administrator, but later determined to be inaccurate.

In December of 2016, respondent sent a written "Notice of Leave of Absence" to his clients and advised them to immediately seek alternative representation, suggesting attorney Benjamin T. Vader. Mr. Vader was a former associate of respondent who had left the firm several years prior to establish his own practice in Royal Oak. Many of respondent's former clients became the clients of Mr. Vader, and eventually, the "Law Offices of Benjamin T. Vader" took over the office space formerly occupied by respondent. Some of respondent's former employees accepted employment with Mr. Vader; however, at no time did Mr. Vader purchase or merge with respondent's law firm. At that point, respondent had stopped practicing law.

It was later discovered that respondent had as many as 4,500 closed client files stored at an off-site storage facility in Royal Oak. (Tr 10/24/17, pp 128-29.) At the time respondent gave up his practice, there was an outstanding balance owed to the storage facility for past due rent. As a result, the storage facility froze access to the client files, and was threatening to destroy them if the rent was not paid. There are also approximately 100 client files still in respondent's former office, which is now occupied by Mr. Vader.

In reviewing a hearing panel decision, 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 T. Patrick Freydl*, 96-193-GA (ADB 1998). "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)). Under the clearly erroneous standard, a reviewing court cannot reverse if the trial court's view of the evidence is plausible. *Thames v Thames*, 191 Mich App 299, 301-302 (1991), lv den 439 Mich 897 (1991). Additionally, although the Board reviews the record very closely and carefully, it does not "re-sift the evidence and weigh it anew." *Grievance Administrator v Wilson A. Copeland*, 09-48-GA (ADB 2011).

Petitioner argues respondent violated MRPC 1.15(d) by failing to safeguard client files and failing to settle his bill with the storage facility. Although respondent acknowledges an outstanding bill at the storage facility, he asserts the files were properly safeguarded at the facility, and ultimately he gave control of the files to Mr. Vader.

Michigan Rule of Professional Conduct 1.15(d) provides: "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." A lawyer's duty to safeguard client property pursuant to this rule does not articulate any particular mode of handling confidential information; nor does it prohibit the use of third-party vendors that may handle documents or data containing client information, as long as appropriate measures are taken to protect client property from the risk of loss and minimize the risk of inadvertent or unauthorized disclosure of confidential client information. Because the ethical responsibility to do what is "reasonably practicable to protect a client's interests" persists even in the case of a former client, see Rule 1.16(d), there is no hard and fast rule that resolves this issue in all cases.

In the present case, it appears on the surface that respondent did what he could to safeguard his client files after he abandoned his practice. Respondent's firm had a process of closing files and sending them to a storage facility, thereby technically safeguarding those files. After respondent abandoned his firm, he made sure Mr. Vader had access to the files in the storage facility, in his former office, and on his computer. However, it is undisputed that respondent failed to pay rent to the storage facility. Although the parties dispute the amount past due, the fact remains that the storage facility had frozen access to the files and threatened to destroy them if payment was not made. Respondent has the ethical obligation to make sure that does not happen. Although respondent argues Mr. Vader has taken over many of respondent's files and thus should be responsible for paying rent, there is no evidence Mr. Vader took over any or all of the files in storage. Furthermore, the files still in respondent's former office belong to clients whose representation was not taken over by Mr. Vader. Therefore, the client files are not properly safeguarded as required by MRPC 1.15.

This Board agrees with the Grievance Administrator's request to include a condition in the order of disbarment, requiring respondent to safeguard his clients' files in the off-site storage facility and his former office space. With regard to the files at the storage facility, respondent has conceded that he is "prepared to pay $92.09 [per month] going forward" to safeguard the files. (Tr 6/20/18, p 22.) As such, respondent is directed to pay rent to the storage facility each month, until such time

that the client files at the off-site facility are transferred to Mr. Vader or returned to the clients. With regard to any other client files, including those that remain at respondent's former office, respondent is directed to contact the former clients and make arrangements to have the files returned to those clients.

B. The Hearing Panel Erred in Calculating Restitution

At the October 24, 2017 hearing, both parties agreed the amounts taken out of the IOLTA were as follows: Gerich Trust, $19,787.07; Grimme Estate, $112,946.06. (Tr 10/24/17, pp 28, 56-57, 145.) At the hearing, the panel announced it would be ordering respondent to pay a total of $143,023.38 in restitution. In the hearing panel's report, however, the amount of restitution ordered was $160,545.33. It appears this was merely a computation error. The only dispute regarding restitution is whether it should include the attorney fees paid to respondent in each case.

C. Forfeited Attorney Fees Should Be Included in the Amount of Restitution

In is unclear from the panel report whether the Grievance Administrator's request for fee forfeiture in the amount of $10,290.25 was considered by the hearing panel, because the panel did not specifically address the issue or identify any part of the restitution award as forfeited attorney fees. Regardless, this Board has the discretion to modify the amount of restitution.

Fee forfeiture is well-established as an equitable remedy employed by the Michigan courts and disciplinary bodies. Michigan Court Rule 9.106(5) provides that misconduct is grounds for "requiring restitution, in an amount set by a hearing panel, the board, or the Supreme Court, as a condition of discipline." This rule is also accompanied by the common law rule providing that fee forfeiture may be ordered in instances of misconduct. See *Grievance Administrator v Thomas J. McCallum*, 90-18-GA; 90-42-FA (ADB 1990) (citing *Rippey v Wilson*, 280 Mich 233 (1937)). Restitution in the attorney discipline system

third party whole and protecting the public and the legal system through deterrence and sanctions. *Grievance Administrator v Joel S. Gehrke*, 05-29-GA (2008). Appellate decisions reaffirm that it is appropriate to bar payment of attorney fees "when an attorney engages in misconduct that results in representation that falls below the standard required of an attorney (e.g., disciplinable misconduct

under the Michigan Rules of Professional Conduct) or when such recovery would otherwise be contrary to public policy." *Reynolds v Polen*, 222 Mich App 20, 26 (1997), citing *Hightower v Detroit Edison*, 262 Mich 1 (1933) and *Rippey, supra.*

This Board has cited *Hightower v Detroit Edison Co*, 262 Mich 1 (1933), for the proposition that it would be inequitable for an attorney to commit misconduct during the course of representation and still collect fees. See *Grievance Administrator v Peter C. Schaberg*, 98-50-GA (ADB 2000). In *Hightower*, the Court held:

> To say that, although such misconduct may justify disbarment or contempt proceedings, the court must award compensation to an attorney for services tainted thereby would put the court in a position of approving or ignoring gross breach of duty to client and court. Something may be said in favor of denial of fees on the ground that plaintiff could not be forced to pay because appellant was not in fact her attorney. But we lay denial upon the broader ground that the judgment of the court will not be given in aid of or to encourage unprofessional conduct infringing the integrity of judicial proceedings. *Hightower, supra* at 13.

This is not to say that any violation of a rule, no matter how minor or technical, justifies forfeiture of all attorney fees. Misappropriation of client funds, however, is a very serious offense. See *Grievance Administrator v Robert G. Vaughan*, 00-125-GA (ADB 2002) ("[E]mbezzlement of client funds is one of the most serious offenses that an attorney can commit . . ."); *Grievance Administrator v Muir B. Snow*, DP 211/84 (ADB 1987) (Misappropriation "is widely considered one of the most serious offenses which can be committed by a lawyer."). In this case, respondent's betrayal of trust instilled in him by his former clients and as a member of the legal profession is unquestionable. It would be inequitable to allow respondent to profit from his admitted misconduct. As such, respondent's misconduct warrants substantial restitution, including the forfeiture of attorney fees.

III. Conclusion

For the reasons discussed above, we conclude that the hearing panel's finding of misconduct regarding MRPC 1.15 has proper evidentiary support and, therefore, should be affirmed. With regard to restitution, we conclude that the amount of restitution ordered by the hearing panel was

erroneously calculated, and thus should be amended from $160,545.33 to $132,733.13. Furthermore, we order respondent to forfeit attorney fees in the amount of $10,290.25. Accordingly, we amend the total amount of restitution to $143,023.38.[2] Finally, because respondent conceded he was prepared to pay rental fees for the off-site storage going forward, respondent is directed to pay rent to the storage facility each month, from the date of this opinion until such time that the client files at the off-site facility are transferred to Mr. Vader or returned to the clients. With regard to any other client files, including those that remain at respondent's former office, respondent is directed to contact the former clients and make arrangements to have the files returned to those clients.

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, and Linda Hotchkiss, MD, were absent and did not participate.

[2] The total amount of restitution includes $112,946.06 to the Grimme Estate for conversion of client funds, $7,290.25 to the Grimme Estate for forfeiture of attorney fees, $19,787.07 to the Gerich Trust for conversion of client funds, and $3,000.00 to the Gerich Trust for forfeiture of attorney fees.