STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellee,

v

Michael E. Tindall, P 29090,

Respondent/Appellant,

Case No. 11-111-GA

Decided: October 10, 2012

FILED
ATTORNEY DISCIPLINE BOARD
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Appearances:
Kimberly L. Uhuru, for the Grievance Administrator, Petitioner/Appellee
Michael E. Tindall, Respondent/Appellant, In Pro Per

BOARD OPINION

Tri-County Hearing Panel #101 issued the attached report finding, by a majority, that respondent committed misconduct as alleged in the formal complaint. Panel member Robert J. Curtis dissented. Respondent filed a petition with this Board seeking interlocutory review. After briefing on whether interlocutory review should be granted, we granted review and conducted proceedings in accordance with MCR 9.118, including additional briefing and a hearing on July 11, 2012. We now reverse the panel's findings and conclusions and, for the reasons set forth in the dissenting statement, dismiss the formal complaint.

Respondent represented attorney Mark A. Chaban in a dispute with his client, Shirley Getsinger, in Wayne County Probate Court. Sanctions in the amount of $31,284.85 were awarded and then paid to respondent's professional corporation, Tindall & Company, P.C. As the panel report explains in more detail, the sanctions award was appealed and ultimately reversed. Ms. Getsinger sought to enforce the appellate order in the probate court by filing a petition "seeking repayment from Chaban, Tindall or Tindall's professional corporation."[1] As will be discussed at

[1] Order Granting Motions for Summary Disposition, *In the Matter of the Estate of Margaret A. Jacobs, Deceased*, File No 2001-641,587-DE (December 9, 2011).

greater length below, the probate judge granted the motions of respondent and Chaban for summary disposition pursuant to MCR 2.116(C)(8).

After the probate court denied the relief requested against respondent, a request for investigation was filed with the Attorney Grievance Commission. The Commission thereafter filed a formal complaint alleging that respondent engaged in misconduct by "failing to promptly pay or deliver funds that a third person is entitled to receive, in violation of MRPC 1.15(b)(3)," and by violating other, more general, rules.

Following briefing and argument on respondent's motion for summary disposition, the hearing panel filed its report on misconduct and by a 2-to-1 majority granted summary disposition for the Administrator under MCR 2.116(I)(2). Respondent filed a petition for interlocutory review of the panel's report on misconduct and this Board, in its March 30, 2012 order, granted the petition for interlocutory review and stay of proceedings. The order further provided for briefing and a hearing, and stated:

> The briefs of the parties should include, but are not limited to, discussion of the following issues:
>
> 1. The applicability of MRPC 1.15(b)(3) under the facts presented in this case.
>
> 2. May the hearing panel or the Board enter an order of restitution in this case in light of the order granting summary disposition entered December 9, 2011, by Wayne County Probate Court Judge Terrence A. Keith?

As noted above, we reverse the grant of summary disposition and conclusion that misconduct has been established.

First, MRPC 1.15 has no application here. The sanctions were awarded and paid to Tindall & Company, P.C., to sanction one party and recompense another party or his attorney. 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 funds into a trust account was required or appropriate at the time the sanctions were paid or at any time thereafter.[2] Rather, it is argued that MRPC 1.15 applies for the reason that, immediately upon entry of the Court of Appeals order reversing the probate court's award of sanctions to Tindall & Company, P.C., a sum of money in the amount of

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[2] Tr 11/10/2011, pp 47-49.

the sanctions award became "funds that a third person is entitled to receive" from respondent, personally.[3] This analysis breaks down at several points. Initially, we are presented with no authority applying MRPC 1.15 with regard to a lawyer's claimed personal obligations as opposed to funds required to be held in trust. Further, there has been no showing or allegation that funds were in existence at the time of the Court of Appeals' order that a claimant might be "entitled to receive." Finally, it has been determined by a court of competent jurisdiction that respondent is not personally liable to Ms. Getsinger for repayment or restitution.

We agree with the Commission's argument at the November 10, 2011 hearing before the panel, during which counsel assured panel member Curtis that a hypothetical he posited about a lawyer not paying a vendor or a landlord would *not* entail the application of MRPC 1.15 because "The rule under 1.15 goes to attorneys acting in their . . . role as attorneys with respect to client matters or in a fiduciary capacity. . . . [I]n that situation with his landlord, there is no attorney-client relationship, obviously, and there's no fiduciary capacity, so I don't think 1.15 would apply to him."[4]

This is the correct reading of MRPC 1.15. 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."

Model Rule 1.15 has a similar paragraph which, if divorced from its context, could also be read literally in this way. Model Rule 1.15 requires a lawyer to "hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property."[5] And, like the Michigan Rule, the Model Rule also contains a paragraph requiring that, except as permitted by law or agreement, "a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to

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[3] Tr 11/10/2011, p 49.

[4] Tr 11/10/2011, p 48. We recognize that petitioner has taken a different position in a subsequent brief and at the argument on review, at which counsel stated: "This is a rule that we recognize has traditionally been applied to cases where funds are held in trust. The specific language of the rule, though, does not limit the duties in that regard, it essentially says that an attorney has the duty to promptly pay or deliver funds a third party is entitled to receive." Tr 7/11/2012, p 13. See also petitioner's February 13, 2012 brief opposing interlocutory review, at page 3, stating: "the duty to pay under MRPC 1.15(b)(3) is not limited to those to whom a lawyer owes a fiduciary duty. The rule simply requires lawyers to pay third persons monies to which they are entitled."

[5] Model Rule 1.15(a); compare Michigan Rule 1.15(d).

receive."[6] But, neither rule specifies *in that paragraph* that the monies must be held in trust. Rather, another part of the rule requires that a lawyer must hold all such funds separate from his or her own. In other words, the money of others held by a lawyer must be held in a trust account. Thus, the only way to make sense of the rule is to read it as applying to funds held in trust, and that is how it has been consistently interpreted. See, for example, the text of a leading commentator on the professional responsibility of lawyers:

> When the lawyer receives funds belonging in a trust fund account, the lawyer must promptly notify the client, or third party. The lawyer must then "promptly pay or deliver" to the client any trust funds or property that the client requests and to which the client is entitled.[7]

Michigan's version of this rule has been significantly reconfigured in recent years so that definitions applicable to IOLTA provisions come before the central provisions of the rule, but there is no doubt that Michigan Rule 1.15, like every other similar rule, is intended to require – first, foremost, and in all cases to which the rule applies – separation of client and third party funds with which a lawyer is entrusted from the lawyer's own business or personal funds. Subparagraph (d) sets forth this primary obligation under the rule:

> 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.

In addition, the rule also requires various other basic obligations of a fiduciary, such as notification upon receipt of such funds, prompt disposition of and accounting for same, record-keeping, etc. These rules are set forth in subparagraphs actually preceding the foregoing foundational tenet of this rule:

> (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;

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[6] Model Rule 1.15(d); compare Michigan Rule 1.15(b)(3).

[7] Rotunda & Dzienkowski, The Lawyer's Deskbook on Professional Responsiblity (2012-2013), §1.15-1(d), p 671, quoting DR-9-102(B)(4) but explaining concepts carried over into Model Rule 1.15(d).

> (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.
>
> (c) 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.

Additionally, after subparagraphs (b), (c) and (d), there is a rather technical paragraph on IOLTA relating to a lawyer's choice between IOLTA and non-IOLTA trust accounts, followed by two other important substantive provisions, one allowing a limited exception to the anti-commingling rule set forth in subparagraph (d) for service fees, and another simply elaborating upon subparagraph (d) with respect to fees and expenses paid in advance. They provide, respectively:

> (f) A lawyer may deposit the lawyer's own funds in a client trust account only in an amount reasonably necessary to pay financial institution service charges or fees or to obtain a waiver of service charges or fees.
>
> (g) Legal fees and expenses that have been paid in advance shall be deposited in a client trust account and may be withdrawn only as fees are earned or expenses incurred.

Thus, notwithstanding the sequence of these subrules and the interspersed technical provisions, there is no doubt that MRPC 1.15 applies only to funds required to be held in trust. *See also, State Bar of Michigan Ethics Opinion R-21* (June 8, 2012) (The specific fiduciary obligations under MRPC 1.15 and MRPC 1.15A [the trust account rules] are only triggered when the lawyer receives client or third person funds or other property in the course of a representation).

With respect to the other grounds upon which the panel majority found misconduct, such as engaging in conduct contrary or prejudicial to justice, it must be noted that the system of justice has addressed the legal claims here: the probate court judge issued an opinion thoroughly considering the personal liability of respondent in light of the Court of Appeals' 2010 order vacating the award

of sanctions to the professional corporation in 2006. In granting the motions of the two individuals (Chaban and respondent) for summary disposition, the probate court noted:

> The rudimentary problem with Petitioner's argument to recover against Tindall and Chaban, individually, and Tindall, as a successor to the defunct corporation, is that the Judgment upon which Petitioner seeks repayment of was *not* entered in favor of either Chaban or Tindall individually, but only Tindall & Company. Petitioner has not sought to enforce the Judgment directly against Tindall & Company, in a post judgment proceeding.
>
> The Petitioner's current attempt to state a cause of action for piercing the corporate veil within the present action for restitution is inappropriate. This Court stated on the record, *if* the facts warrant such an action, then the proper way for Petitioner to assert an action against Tindall in his individual capacity for repayment of this Judgment is through a separate post judgment action. The mere termination of a corporation's existence is insufficient, in and of itself, to pierce a corporate veil. Fraud or illegality must be shown.[8]

At the review hearing, respondent represented that no appeal has been taken from the probate court decision and that no proceedings to pierce the corporate veil had been initiated.

On this record, we find insufficient evidence to support a finding that respondent committed conduct prejudicial to the administration of justice, or acted contrary to justice as proscribed by MRPC 8.4(c) and MCR 9.104(A)(1) and (3). Nor is there any evidence of fraud or dishonesty in the record. For all of the foregoing reasons, we will issue an order vacating the findings of misconduct and dismissing the formal complaint.

Board members Thomas G. Kienbaum, James M. Cameron, Jr., Rosalind E. Griffin, M.D., Andrea L. Solak, Carl E. Ver Beek, Craig H. Lubben, and Dulce M. Fuller concur in this decision.

Board member Lawrence G. Campbell was voluntarily recused and did not participate.

Board member Sylvia P. Whitmer, Ph. D., was absent and did not participate.

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[8] Opinion accompanying Order Granting Motions for Summary Disposition, *In the Matter of the Estate of Margaret A. Jacobs, Deceased*, File No 2001-641,587-DE (December 9, 2011), p 10 (emphasis in original; citations omitted).

STATE OF MICHIGAN

Attorney Discipline Board

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GRIEVANCE ADMINISTRATOR,
Attorney Grievance Commission,

Petitioner,

v Case No. 11-111-GA

MICHAEL E. TINDALL, P 29090,

Respondent.
______________________________/

MISCONDUCT REPORT OF TRI-COUNTY HEARING PANEL #101

PRESENT: James W. Rini, Chairperson
Kimberly R. Mitseff, Member
Robert J. Curtis, Member

APPEARANCES: Kimberly L. Uhuru, Senior Associate Counsel,
for the Attorney Grievance Commission

Michael E. Tindall, Respondent,
in pro per

I. EXHIBITS

None.

II. WITNESSES

None.

III. PANEL PROCEEDINGS

On September 16, 2011, the Attorney Grievance Commission ("AGC") filed a complaint against Michael E. Tindall ("Tindall") alleging that he violated the rules of professional conduct by failing to refund a sanctions award of $31,284.85 paid to Tindall pursuant to a probate court order subsequently vacated by the Court of Appeals.

This matter comes to us on Tindall's Combined Motion and Brief for Summary Disposition and to Dismiss Complaint ("Motion"). The parties submitted briefs and supporting documents and a hearing was held on November 10, 2011, on Tindall's Motion. The panel adjourned the hearing and requested that the parties provide additional briefs. The parties filed their supplemental briefs and supporting documents and the panel considered additional arguments on December 13, 2011.

At the hearing, the parties stipulated that an evidentiary hearing was not necessary as no issue of material fact was in controversy and that the facts as stated in their briefs and supported by the documents attached to their briefs contained an accurate reflection of the facts, which are summarized as follows.

FACTS

On August 8, 2005, Tindall began representing attorney Mark A. Chaban in connection with a charge of legal malpractice and professional misconduct arising against Chaban as a defense to Chaban's claim for a common law attorney-lien against funds distributed to Shirley Getsinger from the estate of Getsinger's mother, Margaret Jacobs. Chaban was ultimately successful in his lien and his defense for malpractice and professional misconduct. Chaban subsequently filed a motion requesting an award for sanctions against Getsinger for filing and maintaining frivolous claims and defenses against Chaban. On March 8, 2006, the probate judge entered an order awarding a judgment in favor of Tindall's law firm, Tindall & Company, P.C. in the amount of $31,284.85. On March 28, 2006, Chaban appealed the case in pro per. Tindall did not represent Chaban on appeal. On March 30, 2006, Getsinger paid the judgment by check issued to Tindall & Company, P.C. Tindall, on behalf of Tindall & Company, P.C., signed a satisfaction of judgment that was filed with the probate court.

On May 14, 2008, the Michigan Court of Appeals vacated the probate court's order awarding sanctions. Tindall was then contacted by Getsinger's counsel demanding that her payment of $31,284.85 be refunded. It is not clear from the record, but apparently Tindall intervened and appealed the Court of Appeals' order to the Michigan Supreme Court. The Michigan Supreme Court remanded the case to the Court of Appeals directing the court to reconsider its May 14, 2008 order vacating the sanctions award in light of Tindall's arguments. On June 1, 2010, the Court of Appeals, after considering Tindall's arguments, reaffirmed its earlier decision to vacate the sanctions award. On March 8, 2011, the Michigan Supreme Court denied Tindall's application for leave to appeal.

On or about July 15, 2010, Tindall & Company, P.C. automatically dissolved for failure to file annual reports. On April 19, 2011, Getsinger filed a petition for a judgment of restitution with the probate court. On December 9, 2011, Judge Keith issued an order and opinion holding that Tindall was not individually responsible for repaying the sanctions award. To this date, Getsinger has not been refunded the money.

IV. FINDINGS AND CONCLUSIONS REGARDING MISCONDUCT

Majority Opinion

A. Denial of Respondent's Motion for Summary Disposition

Respondent relies heavily upon the distinction between his PC and Respondent individually. This distinction is critical in many civil actions. The distinction allows a person to limit his/her liability in business transactions and aids in the financial structure and the risks imposed in operating a business. However, this does NOT apply in Attorney Discipline Board ("ADB") matters. The ADB seeks to maintain the integrity of the legal profession and enforce the Rules of Professional Responsibility. While Respondent elects to interpret the disciplinary action brought by the AGC as acting as a Collection Agency, the ADB (and this Panel) has no authority requiring the Respondent to pay or refund any sum whatsoever.

Moreover, Respondent relies upon the Circuit Court dismissal of the civil action to attempt collection as a basis for dismissal of this disciplinary action. Respondent's reliance is misplaced. The civil action regards the rights between the litigants with respect to the vacating by the Court of Appeals of the lower Court's Order of Sanctions, specifically attorney fees. Disciplinary proceedings, as stated before, involve violation of ethical standards imposed upon attorneys.

Accordingly, this panel finds that the Grievance Administrator's Complaint states a cause of action and the facts and evidence do NOT support a dismissal of the matter. Therefore, Respondent's Motion for Summary Disposition is **DENIED**.

B. Finding of Misconduct

Under MCR 2.116(I)(2), this Panel may find for the party opposing a Motion for Summary Judgment if we find that the party opposing the Motion is entitled to a Judgment.

In the matter before this Panel, it is obvious that all of the evidence has been presented to this Panel in the form of written documents. A hearing would not likely produce any additional evidence. Both parties have agreed that no additional testimony or witnesses will be called at the hearing.

Therefore, based upon everything before this Panel, we find and conclude that Respondent has violated his professional responsibility by failing to repay the attorney fee sanctions when the lower Court Order was vacated.

The distinction found by the civil court between the Respondent individually and his PC is not relevant here. While a fictitious entity may shield an attorney from civil liability, it does not absolve him/her from professional responsibility. The ADB enforces the Rules of Professional Responsibility. Specifically MRPC 1.15 requires an attorney to promptly pay over funds to a third person who is entitled to receive the funds; and MRPC 8.4 and MCR 9.104(1), prohibits conduct that is prejudicial to the administration of justice. Moreover, Respondent's conduct presents the legal profession as "above the law", contrary to MCR 9.104(2).

Although it may be difficult, if not impossible, for an attorney, employed by a firm who received the fees, to enforce repayment, this is not the case here. Respondent was the sole member of his dissolved firm. He had absolute control of the funds. His attempt to hide behind the fictitious entity is permissible in civil actions but not ADB misconduct proceedings. Respondent had a duty to return the attorney fees after the Court of Appeals vacated the original Order. Not doing so is equivalent to violating a Court Order, contrary to the administration of justice.

In *Grievance Administrator v Ralph Musili and Walter Baumgardner*, ADB Case Nos. 07-88-JC; 07-89-JC ,[1] the ADB found the principals of the firm responsible for failing to comply with a Court Order. In that case, although the facts somewhat differ, the principals of the firm were in control of the money.

As in *Musili and Baumgardner*, Respondent had the ability to comply with the intent of the Order vacating the attorney fees. Respondent violated his professional obligation to refund the attorney fees.

[1] This Panel #101 handled the reinstatement proceeding of Ralph Musili and is well familiar with the facts.

Accordingly, we find misconduct by the Respondent.

James W. Rini, Chairperson
Kimberly R. Mitseff, Member

Dissenting Opinion

I write this opinion respectfully dissenting from my colleagues. I would find Respondent Tindall to have committed no professional misconduct in this case.

A. MRPC 1.15(b)(3)

The AGC alleges that Tindall's failure to refund the money violates MRPC 1.15(b)(3), which states:

> A lawyer shall... **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. (Emphasis added).

The AGC argues that, on its face, the rule requires Tindall to return the money to Getsinger. Tindall argues that the rule, when read in the context of the Comments section, only applies to an attorney in a fiduciary relationship with a client or third party. In this case, Tindall argues that he was never in a client relationship nor a third-party fiduciary relationship with Getsinger, and, therefore, owes no professional duty to Getsinger. Because there is no duty, Tindall argues that, at best, Getsinger is merely a judgment creditor of the law firm—as it was Tindall & Company, P.C. that the probate judge awarded sanctions to and to whom Getsinger issued the check.

In my opinion, the rule does not apply to this case, however, for a reason other than the one argued by Tindall. The rule applies to property that clearly belongs to a client or a third-party and for which an attorney is obligated to hold in trust for the client or third party. At the time that Getsinger paid the funds to Tindall & Company, P.C., the funds belonged to Tindall & Company, P.C. The funds continued to belong to Tindall & Company, P.C. for two years before the Court of appeals issued its order vacating the award. When the case was appealed, no escrow order was issued requiring that the funds be set aside. Tindall had no duty to hold those funds in trust. Tindall was free to do what he wished with the funds. In my opinion, when the Court of Appeals vacated the probate judge's sanction award, MRPC 1.15(b)(3) was not triggered. The AGC's suggested application of the rule would create misconduct issues every time an attorney failed to pay his or her cell phone bill in a timely manner. The AGC has not presented sufficient evidence that MRPC 1.15(b)(3) applies.

B. MRPC 8.4 and MCR 9.104(A)(1)-(4)

The AGC alleges that Tindall's failure to refund the money violates MRPC 8.4(a) and (c) by "violating the Rules of Professional Conduct" and "engaging in conduct that is prejudicial to the administration of justice," and violates MCR 9.104(A)(1)-(4) by engaging in "conduct that is prejudicial to the proper administration of justice;" "conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach;" "conduct that is contrary to justice, ethics, honesty, or good morals;" and "conduct that violates the standards or rules of professional responsibility adopted by the Supreme Court." The AGC argues that the June 1, 2010 Court of

Appeals Order vacating the probate court's sanction award was in effect an order that Tindall return the payment.

In arguing that he has not violated a rule of professional conduct, Tindall relies upon probate judge Terrance Keith's order granting his motion for summary disposition. In that order, Judge Keith found that the original judgment awarding sanctions was drafted to "Tindall & Company;" that the Satisfaction, too, was signed only by Tindall, and upon doing so, he signed "For The Firm;" and that no other party was named in the judgment or the satisfaction of judgment. Accordingly, Judge Keith found that Tindall, individually, was never a party to the judgment and therefore, was not personally responsible for returning the funds. Tindall argues that his exoneration of personal liability in the probate court exonerates him from professional misconduct.

The AGC argues that incorporation does not shield an attorney from misconduct and that Tindall, as the sole director, stockholder and employee in Tindall & Company, P.C., directed and controlled the corporation's assets and personally benefitted from the payment. The AGC alleges that Tindall allowed his company to dissolve to avoid having to refund the money. Accordingly, the AGC argues that the corporate veil should be pierced to hold Tindall personally responsible.

In my opinion, the panel does not have to address a question of piercing the corporate veil. The question before this panel is not whether Tindall or Tindall's company is legally required to return the money, but whether Tindall is ethically obligated to return the money. In this case, the question is whether an attorney can be found ethically responsible for conduct for which he was legally found non-responsible. Does his conduct "expose the legal profession or the courts to obloquy, contempt, censure, or reproach" despite being legally exonerated by Judge Keith? MCR 9.104(A)(2). Is his conduct contrary to justice, ethics, honesty, or good morals? MCR 9.104(A)(3).

There is no question that an attorney commits professional misconduct by disobeying a court order. See *Grievance Administrator v Ralph Musili and Walter Baumgardner, supra*. In this case, the question before Judge Keith was whether the June 1, 2010 Court of Appeal's order vacating the probate court's sanction award required Tindall to return the money. The Court of Appeals' order merely vacated the sanctions award. Judge Keith found that Tindall was not personally liable. While the panel is not bound by Judge Keith's decision, I have trouble finding that an attorney has "exposed the legal profession or the court to obloquy, contempt, censure or reproach" or is "contrary to justice, ethics, honesty or good morals" or which is "prejudicial to the proper administration of justice" when the issue of personal responsibility has been litigated in another court to that attorney's favor. Absent Judge Keith's decision, I might have found misconduct. However, in this case, I will defer to Judge Keith.

Accordingly, I dissent and would not find Tindall to have committed misconduct in this case.

Robert J. Curtis, Member

Pursuant to these findings, a hearing shall be scheduled for the sanction phase of this matter.

ATTORNEY DISCIPLINE BOARD
Tri-County Hearing Panel #101

DATED: January 23, 2012

By:
James W. Rini, Chairperson