Grievance Administrator,

Petitioner/Appellant,

v

Thomas K. Ziegler, P 32340,

Respondent/Cross-Appellant

95-226-GA

Decided: January 15, 1999

BOARD OPINION

The formal complaint in this case contains two counts, pled in the alternative. Respondent, a patent attorney and a member of the intellectual property section of a large law firm, performed legal services on behalf of a corporation on an hourly fee basis. Respondent was one of the partners in the firm responsible for the preparation of client billings to that corporate client. Count One identified 25 instances during the years 1992 to 1994 where respondent allegedly participated personally in the preparation and approval of bills to the client for services that were not actually performed. In the alternative, Count Two charged that respondent had supervisory authority over the non-lawyer assistant at the law firm who prepared the bills to that client but that respondent failed to properly supervise the employee and failed to review the billings to insure their legitimacy and accuracy.

Following five evidentiary hearings and its review of the record, the panel found that the amounts billed to the client were clearly excessive, either because the work described was not performed or because amounts were billed in excess of the value of the work performed. In its report on discipline, the panel determined that a suspension of 60 days was the appropriate level of discipline for the professional misconduct alleged in either of the two counts. The Grievance Administrator petitioned for review, seeking a suspension of 180 days or more. Respondent filed a cross-petition for review on the grounds that the panel erred by

entering findings of misconduct as to both of the alternatively pled counts. We affirm the hearing panel's findings of misconduct and increase discipline to a suspension of 179 days.

The facts of this case are summarized in the hearing panel's report which is attached to this opinion as an appendix. Under the applicable standard of review, the Board must determine whether or not the panel's findings have proper evidentiary support in the whole record. Grievance Administrator v August, 438 Mich 296; 475 NW2d 256 (1991).

We first consider respondent's argument on appeal that there is a lack of evidentiary support for the allegations of misconduct in Count One of the formal complaint, including the charged violation of MRPC 1.5 which prohibits an attorney from charging or collecting a "clearly excessive" fee. While conceding that respondent or his firm billed for certain specific tasks which turned out not to have been performed, respondent argues that those billings were merely inaccurate descriptions of the services covered and that "the total bills presented were reasonably reflective of the value of the extensive services that respondent actually performed." (Respondent's Brief in Support of Petition for Review, p 37.) This argument was made to the hearing panel and is cited in the panel's report. Having conducted our own review of the voluminous record in this case, we are persuaded that the hearing panel's findings with regard to Count One do, in fact, have evidentiary support. While respondent is entitled to ask the panel and the Board to draw certain inferences as to motive and intent (or lack thereof), the evidence marshalled by the Administrator in this case amply supports the charges in paragraphs 8(a) through (y) of the formal complaint that respondent's client was billed on specific dates for specific services which were not actually performed and that respondent was personally involved in the preparation and/or review of those billings.

We have also considered respondent's argument that if the evidence supported any misconduct, the panel was required to find that respondent's conduct was better described under either Count One or Count Two and to then dismiss the other count.

First, we are unable to agree with respondent's characterization of Count Two as the Administrator's "fall back position" if the supposedly more serious charges under Count One could not be sustained. Whether or not the Administrator intended Count Two to be a "fall back" position is both speculative and irrelevant. As the record amply illustrates, the billing practices and procedures at respondent's firm were somewhat complex and it is hardly surprising that the Grievance Administrator could not, at the time the complaint was drafted, identify the precise level of respondent's personal involvement in the preparation of each specific billing. Furthermore, from the client's point of view it makes little difference whether an inaccurate billing was prepared by an attorney or an improperly supervised employee. We decline to speculate on the Administrator's strategy in pleading Counts One and Two in the alternative.

Of greater importance to our review of the hearing panel's decision is the question of whether or not the panel was precluded from finding that the evidence supported the charges in both counts. We conclude that the panel's decision was not erroneous in that regard.

Although pled in the alternative, Counts One and Two are not fundamentally inconsistent. Both counts are based on the premise that the client, Auto Sense Limited, was billed during the period August 1992 through May 1994 for services that were not actually performed by respondent and/or his law firm and that the amounts charged were therefore "clearly excessive." The billings in question are described with specificity in paragraphs 8(a) through (y). Count One charges that "he [respondent] billed Auto Sense Limited attorney fees and costs for services that were not actually performed and thereby charged the client clearly excessive fees. . .." (Formal Complaint paragraph 8.) Count Two incorporates the billings in paragraph 8(a) through (y) by reference and charges that respondent violated his duties and responsibilities by failing to supervise his non-lawyer assistant in her preparation of those billings, by failing to review the billings to insure their

accuracy and legitimacy and by allowing the client to be charged clearly excessive fees.

It was not established in the record below that if respondent personally authorized a billing to the client then there was no involvement by his non-lawyer employee, Ms. Tennant, or that if Ms. Tennant prepared the specific description on a particular billing that it could not subsequently have been reviewed by respondent. On the contrary, the panel's decision appropriately recognizes the close working relationship between respondent and his employee in the preparation of billing statements. The panel's decision also recognized that whether respondent carefully scrutinized an improper billing or merely gave vague instructions to Ms. Tennant, the ultimate responsibility for the violations of the charged rules was his and his alone. In connection with these billings, the panel pointedly noted:

> Also, the billings which were the subject of paragraphs 8(q), (r), (s), (u), (v), (w) and (x), although addressed to Auto Sense, were issued under arbitrarily assigned invoice numbers, some of which duplicated invoice numbers assigned by Dykema, Gossett to clients other than Auto Sense and some of which appeared to be invoice numbers invented by the respondent or his secretary, indicating that the firm's customary billing process was being intentionally bypassed in the course of issuing inaccurate bills. [HP Report, p 6.]

LEVEL OF DISCIPLINE

While the Board reviews a hearing panel's findings and conclusions for evidentiary support in the record, the Board possess a greater measure of discretion with regard to the ultimate decision. Grievance Administrator v August, supra, p 304; Matter of Daggs, 411 Mich 304, 381, 318-319 (1981). This discretion allows the Board to carry out what the Court has described as the Board's "overview function of continuity and consistency in discipline imposed." State Bar Grievance Administrator v Williams, 394 Mich 5 (1976).

In this case, we agree with the Grievance Administrator that a suspension of 60 days does not sufficiently convey the legal

profession's approbation of respondent's improper billing practices over a period of almost two years. On the other hand, the record does not support a comparison to the cases cited by the Grievance Administrator in which calculated falsehoods or forgeries resulted in discipline in the range of lengthy suspensions to revocation. Moreover, we are not persuaded that the reinstatement requirements of MCR 9.123(B) and MCR 9.124 are necessary in this case to achieve the protection of the public, the courts and the legal profession which is the ultimate goal of the discipline process. We therefore order an increase in discipline in this case to a suspension of 179 days, the maximum suspension which will not trigger the reinstatement proceedings under MCR 9.124. In reaching this decision, we are aware that respondent has completed the 60-day suspension originally ordered by the hearing panel and has been automatically reinstated pursuant to MCR 9.123(A). Respondent is entitled to credit for the period of suspension already served in accordance with the hearing panel's order; however, respondent must fully comply with all applicable provisions of MCR 9.119.

Board Members Elizabeth N. Baker, Albert L. Holtz, Michael R. Kramer and Nancy A. Wonch concur in this decision.

Dissenting Opinion

C. H. Dudley and Roger E. Winkelman

We concur with the majority opinion with regard to the evidentiary support for the hearing panel's findings on misconduct. We also agree that a 60-day suspension is insufficient in this case. We believe, however, that the 179-day suspension ordered by the majority does not go far enough and we would increase discipline to a suspension of 180 days. The findings of the hearing panel leave little doubt that the egregious overbilling suffered by this client was not the result of mere inattention or overwork on the part of respondent or his assistant. By his conduct over a period of well over a year, respondent demonstrated a fundamental disregard for his obligation to act forthrightfully toward his client in his claims for fees. Additional scrutiny of

respondent's understanding of and attitude toward those obligations in reinstatement proceedings conducted under MCR 9.124 would be appropriate.

Board Member Grant J. Gruel was recused.
Board Members Barbara B. Gattorn and Kenneth L. Lewis did not participate in this decision.