Grievance Administrator,

Petitioner/Appellant,

v

Michael A. Conway, P 12165,

Respondent/Appellee.

97-156-GA

Decided: November 30, 1998

MEMORANDUM OPINION

Tri-County Hearing Panel #84 entered an order of dismissal in this matter on July 15, 1998. The Grievance Administrator petitioned for review. The Board conducted review proceedings in accordance with MCR 9.118 which included review of the whole record below. MCR 9.118(C)(2) authorizes the Board to refer a case to a hearing panel or a master if the Board believes that additional testimony should be taken. We have concluded that this matter should be remanded to the hearing panel with instructions to conduct a further hearing and to make a supplemental report addressing the concerns set forth in this opinion.

Respondent admitted the general allegations in the complaint that his client, Thomas E. Tyrrell, provided respondent with a cashier's check on July 27, 1994 made payable to Conway and Mossner Client Trust in the amount of $10,000. This money was to be held in escrow pending resolution of Mr. Tyrrell's dispute with his former employer, National Bank of Detroit (NBD), over the repayment of certain benefits. In October 1994, respondent returned $2500 of this sum to Mr. Tyrrell. He returned an additional $2500 to Mr. Tyrrell in February 1995.

Respondent also admitted the general allegation that Mr. Tyrrell's workers' disability compensation claim against National Bank of Detroit was redeemed for $35,000 in July 1995. Mr. Tyrrell

received $34,900 directly from the Workers' Compensation Bureau.[1] Respondent also settled a wrongful termination claim against National Bank of Detroit in July 1995 for the amount of $25,000. Following a discussion between the parties regarding the deduction of applicable income taxes, NBD returned a $12,467.78 settlement draft to respondent. The draft, dated July 26, 1995, was made payable to the order of Thomas E. Tyrrell and Conway and Mossner, P.C. and was returned to respondent on or about September 19, 1995.

Mr. Tyrrell submitted a request for investigation to the Attorney Grievance Commission in 1996 requesting a review of Mr. Conway's conduct. In answering the request for investigation, respondent advised that all of the funds which he held on behalf of Mr. Tyrrell had been claimed by respondent and/or his firm as legal fees. This consisted of the check from NBD of $12,467.78 and the remaining $5000 from Mr. Tyrrell's July 1994 cashier's check to "Conway and Mossner Client Trust" for a total of $17,467.78. It is respondent's position in this proceeding that although he had no written fee agreements with Mr. Tyrrell and did not enter into a written "modification" of his original agreement to hold his client's funds in the firm trust account, he was entitled to (and had taken) fees and costs of $17,477, broken down as follows:

15% of the worker's compensation redemption. . .	$ 5,250
Costs in the worker's compensation case.	561
1/3 contingent fee--$25,000 wrongful discharge settlement.	8,333
1/3 contingent fee--NBD forgiveness of a $10,000 debt.	3,333
Total	$17,477

Count One of the complaint contains five charges of misconduct--1) that respondent failed to promptly advise his client that NBD had returned the $12,467.78 check; 2) that although he deposited both the $10,000 cashiers' check from Mr. Tyrrell and the $12,467.78 check from NBD into his firm's trust account, he failed

[1] Petitioner's Exhibit 7 is a copy of the redemption order signed by a workers' disability compensation magistrate July 5, 1995. It shows that the magistrate approved a redemption in favor of Mr. Tyrrell in the amount of $35,000. According to the order, the only payment approved by the magistrate was a $100 statutory redemption fee to be paid directly to the State of Michigan leaving a balance of $34,900 payable to Mr. Tyrrell.

to maintain his client's funds in that account as required by MRPC 1.15(a) and (b); 3) that he failed to promptly pay to Mr. Tyrrell the funds to which he was entitled; 4) that he failed to keep his client informed concerning the status of the funds; and, 5) that he misappropriated those funds. The hearing panel's report contains its detailed findings of fact and conclusions with regard to each of these allegations. We address them in turn.

Sub-Paragraph 15(a)

In dismissing sub-paragraph 15(a), which alleged respondent's failure to notify his client that NBD had returned the original check, the panel commented on its evaluation of the differing testimony of respondent and Mr. Tyrrell, the complainant. On review, the Board must determine whether a hearing panel's factual findings have proper evidentiary support in the record Grievance Administrator v August, 438 Mich 296; 475 NW2d 256 (1991). When these findings involve issues of credibility, the Board has traditionally deferred to the panel which has a first-hand opportunity to observe and assess the demeanor of the witnesses Grievance Administrator v Neil C. Szabo, 96-228-GA (ADB 1998). See also In re McWhorter, 449 Mich 130, 136 n.7 (1995). In keeping with that standard of review, we are prepared to affirm the hearing panel's conclusion that the Grievance Administrator did not establish by a preponderance of the evidence that respondent failed to advise his client of his receipt of funds from NBD as alleged in paragraph 15(a). However, for the reasons discussed below, we question the hearing panel's conclusion in this section of the panel report that "respondent's explanation of the fee breakdown is a reasonable one."

Sub-Paragraph 15(b)

The panel dismissed the allegation in Count One, paragraph 15(b) that respondent failed to keep client funds in his trust account, saying:

> This panel finds that petitioner did not establish by a preponderance of the evidence that respondent failed to keep both Mr. Tyrrell's $10,000 check and NBC $12,467.78 check in a trust account. Respondent testified that his firm moved client funds

> back and forth from the firm's sole checking account to client trust-savings accounts at MGB [Midwest Guaranty Bank] and Comerica. (T 137-38; 150-53.) Nothing in the rules prohibits a lawyer from keeping client funds in more than one account or bank. Charles Penzion, MGB records custodian, testified that he did not know and did not investigate whether Conway and Mossner had other client trust accounts at MGB or any other institution. (T 36, 39.) Therefore, petitioner's allegation is not sufficiently supported. (HP Report 7/15/98, pp 8 and 9.)

The hearing panel correctly noted that nothing in the rules prohibits a lawyer from keeping client funds in more than one account or bank. Of course, each account must meet the requirement of MRPC 1.15(a) that it is an interest-bearing account containing client funds separate from the lawyer's business or personal funds. That sub-rule further requires a lawyer to keep complete records for such account funds and he or she must preserve those records for a period of five years after termination of the representation.

We are unable to find evidentiary support in the record for the panel's conclusion that respondent did, in fact, transfer funds belonging to his client Thomas Tyrrell to another client trust account at Midwest Guaranty Bank (MGB) or another financial institution.

The evidence presented by the Grievance Administrator established, with regard to the $10,000 check delivered to respondent by Mr. Tyrrell in July 1994, that the check was deposited into the Conway and Mossner "IOLTA Client Trust Fund" at Midwest Guaranty Bank on July 27, 1994 and that by the end of August 1994, the balance in that account was $58.87. Respondent did not return any of those funds to Mr. Tyrrell until October 1994 when he returned $2500. He returned an additional $2500 in February 1995.

On appeal, the Administrator relies appropriately on an unbroken line of Board opinions which hold that misappropriation of client funds is a per se offense which does not require the elements of scienter or intent. Since our 1988 opinion in Grievance Administrator v Steven J. Lupiloff, DP 34/85 (ADB 1988),

this Board has employed a definition of misappropriation used by the District of Columbia Court of Appeals:

> Misappropriation of client funds is any unauthorized use of clients' funds entrusted to an attorney including not only stealing, but also unauthorized temporary use for the lawyer's own use, whether or not he derives any personal gain or benefit therefrom . . . This is consistent with the language of DR 9-102 [now MRPC 1.15] which, unlike other disciplinary rules, does not require scienter; rather it is essentially a per se offense. Consequently, once the running balance of Harrison's . . . account fell below the amount held in trust for [the client], misappropriation had occurred. In re E. David Harrison, 461 A2d 1034 (1983).

In Lupiloff, the Board noted that this definition was not new in this jurisdiction and was entirely consistent with earlier Board decisions, including the matter of Grievance Administrator v Barry R. Glaser, DP 106/84 (ADB 1985) in which Board held that "the repeated depletions of the professional account which was used to hold client funds constitutes, at the very least, prima facia misconduct".

In this case, the Administrator established, prima facia, misappropriation of Mr. Tyrrell's funds. The $10,000 check from Mr. Tyrrell to Mr. Conway in July 1994 was clearly client money when it was deposited into respondent's client trust account. That account was depleted long before any possible claim by respondent that his verbal agreement with his client was "modified" by the client's request for the return of a portion of those funds.

We reach a similar conclusion with regard to respondent's handling of the settlement draft from NBD made payable to respondent and his client in the amount of $12,467.78. Upon receipt of that draft, respondent was obligated under MRPC 1.15 to deposit those funds in an interest-bearing account separate from his own money, to keep complete records of those funds, to promptly notify his client of his receipt of the funds and, upon request, to promptly render a full accounting. Respondent has offered no evidence showing that he explained his claim for fees to his client

or obtained his client's consent to withdraw those funds before the end of September when the balance of the trust account was only $278.41.

Although respondent testified to the existence of other accounts which could be described as client trust accounts, he was unable to provide any information at the hearing regarding the account numbers nor did he provide specific information with regard to the location of those accounts. Although he testified that there was a "possibility" that funds which had been deposited into the IOLTA account at MGB were later transferred to other client trust accounts (T p 153), we find no testimony in the record that funds belonging to Mr. Tyrrell were actually transferred to another trust account. On the contrary, respondent indicated that there was no such transfer. For example, in this exchange, respondent was asked:

> Q. Whose money then were you providing to Mr. Tyrrell when you wrote that check in October 1994?
>
> A. Funds were held in savings accounts and other accounts <u>where Mr. Tyrrell's offset would be</u>.
>
> Q. Are you indicating to me that Mr. Tyrrell's money that was deposited into this trust account on July 27, 1994 was transferred to a different account?
>
> A. <u>Not transferred</u>. Money would be issued out of this account, and the money in the savings account would remain the same. This was the only account that we had where checks could be written. The others would be held in a savings account.
>
> * * *
>
> Q. Are you indicating to us that the client savings account at Midwest Guaranty Bank contained Mr. Tyrrell's funds at some point?
>
> A. <u>Money to offset Mr. Tyrrell's money</u>. (T 136-137; emphasis added)

As the Administrator points out, the Board has emphatically rejected the argument that depletion of a client trust account is not misappropriation if there is other money belonging to the lawyer or to other clients in some other account. See, for example, Grievance Administrator v David A. Nelson, DP 127/86; DP 165/86 (ADB 1987). Respondent's claim that his use of funds belonging to Mr. Tyrrell was "offset" by the existence of funds in other trust accounts is not only unsupported by any evidence in the record but must fail as a cognizable defense as a matter of law. If the other, unidentified, trust accounts were properly maintained, they only held money belonging to other clients. By claiming that he was allowed to deplete the IOLTA trust account containing Mr. Tyrrell's money because those funds were "offset" or "covered" by money in other trust accounts, respondent is apparently claiming that there was sufficient money in the various trust accounts to cover either all of his clients' money some of the time or some of his clients' money all of the time. That is not what the rules require. MRPC 1.15 requires that all client funds be maintained in identifiable trust accounts until they are properly disbursed and that, until then, there must be sufficient money in the trust accounts to cover all of the clients' funds, all of the time.

Having established prima facia misappropriation by introducing the bank records for the account into which Mr. Tyrrell's funds were deposited, the Administrator was not required to introduce records from every other financial institution in Michigan to establish that Mr. Tyrrell's funds were not in another trust account. Such evidence, if available, should have been produced by respondent.

Given the seriousness of the charge of misappropriation and the possible disciplinary consequences in such cases, we are willing to give respondent the opportunity to account for Mr. Tyrrell's funds from the time they were entrusted to respondent

until the time they were appropriately disbursed.[2] We assume that respondent will welcome this opportunity. Moreover, the production of such records should not present an undue burden in light of the requirement of MRPC 1.15 that complete records of trust account funds must be preserved for a period of five years after termination of the representation.

Sub-Paragraph (c)

The hearing panel found that the Administrator did not establish by a preponderance of the evidence that respondent failed to promptly pay to Mr. Tyrrell the funds to which he was entitled, as alleged in Count One, Sub-paragraph 15(c). The panel specifically found:

> Respondent testified credibly that he was entitled to 1/3 of the $25,000 gross settlement of the wrongful discharge matter, 1/3 of the $10,000 debt forgiveness, and 15% of the $35,000 workers' compensation redemption, plus costs associated with the workers' compensation case. (T 141-43) These figures add up to $17,477, which is approximately $10 more than the total respondent collected from Mr. Tyrrell and NBD. Accordingly, petitioner did not take more fees than he was entitled to take. (R Exh 1) (HP Report 7/15/98, p 9).

We also remand this case to the panel for a further hearing and a supplemental report on the evidentiary support for the panel's conclusion that respondent did not take more fees than he was entitled to take. In several specific respects, this conclusion appears to be in error as a matter of law.

For example, the panel appears to have accepted respondent's testimony that it is the accepted practice in workers' compensation matters to compute the attorney fee on the gross recovery before deduction of the attorney's out-of-pocket expenses. (T 173, 174) and his testimony that he was entitled to an attorney fee of 15% of

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[2] At the panel hearing, respondent testified that his firm or the predecessor firm of Conway and Mossner, had as many as three other client trust accounts during the periods in question. Although asked, he could not provide the account numbers. Each of these accounts would be subject to the five-year record retention requirement of MRPC 1.15(a). At the Board review hearing, respondent's counsel expressed a belief that respondent would be able to produce records showing other client trust accounts.

the total workers' compensation redemption of $35,000. Both positions appear to be contrary to Bureau of Workers' Disability Compensation Rule 408.44(3) which states:

> In a case involving a redemption of liability, the attorney, before computing the fee, shall deduct the reasonable expenses incurred on plaintiff's behalf from the total settlement. The fee that the administrative law judge may approve shall be as follows:
>
> a) of the first $25,000, a fee of not more than 15%;
>
> b) of any amount more than $25,000, a fee of not more than 10%. (emphasis added)

Assuming that respondent was entitled to any fee from the workers' compensation redemption, respondent's fees and costs under that rule would have been limited to $4693.90, not $5,811 as respondent claimed and the panel found.

More importantly, we harbor serious doubt that respondent was entitled to any fee from the workers' compensation redemption and we instruct the hearing panel to address this issue in its supplemental report. Specifically, we question respondent's ability to circumvent what appears to be the requirement that all attorney fees and costs in a workers' compensation matter must be approved by the magistrate. The Administrator cites MCL 418.858(1) which states: . . . "the payment of fees for all attorneys . . . for services under this act shall be subject to the approval of a workers' compensation magistrate." We note also the language in Worker's Disability Compensation Rule 408.44(3), cited above, which places limitations on "the fee that the administrative law judge may approve . . .."

The Attorney Discipline Board is not a fact-finding tribunal. There is no expert testimony in the record on this point nor was the issue briefed beyond the Administrator's recitation of what appears to us to be the applicable statutory restriction. In the absence of a supplemental report on this issue, we are unable, at this time, to accept the panel's conclusion that respondent did not

take more fees than he was entitled to, at least with respect to the workers' compensation matter.

Respondent concedes that his claims for contingent fees of 1/3 of the $25,000 settlement of the wrongful discharge matter and 1/3 of the $10,000 debt forgiveness were not supported by written fee agreement. We agree with respondent's argument to the hearing panel that this apparent violation of MRPC 1.5(c) was not charged in the formal complaint and that respondent is therefore not subject to discipline for a violation of that rule. Rather, our concern focuses on the question of whether or not there is evidentiary support for the panel's conclusion that after respondent computed his fees, his client was not entitled to any portion of the funds which had been entrusted to respondent on Mr. Tyrrell's behalf.

Count One of the formal complaint does charge violations of MRPC 1.15(a) and (b). Therefore, with or without appropriate contingent fee agreements, respondent was required to promptly deliver to Mr. Tyrrell all funds the client was entitled to receive. We request that the panel revisit its finding that "petitioner did not take more fees than he was entitled to take." (HP Report 7/15/98, p 9.) In this regard, the panel may wish to entertain further argument from the parties on the question of whether the absence of a written contingent fee agreement which was otherwise required by the applicable rules had any bearing, as a matter of fact or law, on respondent's entitlement to those contingent fees.

We specifically request further identification of the evidentiary support for the conclusion that respondent was entitled to a fee equal to 1/3 of the "$10,000 debt forgiveness." Mention of this amount is conspicuously absent in those portions of respondent's testimony regarding the package settlement with NBD for $60,000 consisting of a $35,000 workers' compensation redemption and a $25,000 settlement of the wrongful discharge claim. According to respondent, the agreement with NBD to forgive a debt of $10,000 was specifically mentioned in the record of the workers' compensation redemption before the magistrate. (T 160) At

the panel hearing, counsel for both parties referred to the transcript of that redemption hearing but neither party moved its admission into evidence. It is conceivable that review of that transcript could shed light on the basis for respondent's claim for a fee based on the debt forgiveness as well as the absence of any award for statutory attorney fees in the workers' compensation award itself.

Sub-Paragraph 15(d)

This sub-paragraph charged that respondent failed to keep Mr. Tyrrell informed concerning the status of the funds in his possession. To the extent that the panel's dismissal of this charge was based upon its ability to weigh and assess the differing testimony of respondent and Mr. Tyrrell, we defer to the panel's conclusions with regard to credibility.

Sub-Paragraph 15(e)

This sub-paragraph charged simply that respondent misappropriated funds belonging to Mr. Tyrrell. For the reasons discussed above in connection with sub-paragraph 15(b), we conclude that this charge was established, prima facia by the evidence. In remand proceedings before the panel, this conclusion should stand unless respondent is able to introduce competent evidence which establishes that Mr. Tyrrell's funds were, at all times, on deposit in an appropriate trust account which met the requirements of MCR 9.115 from the time those funds were delivered to respondent until they were appropriately disbursed.

Counts Two and Three

The hearing panel dismissed Counts Two and Three which charged that respondent made false statements to the Attorney Grievance Commission in his answer to request for investigation filed July 31, 1997 and in his further response of December 17, 1997. The panel found "Nothing in respondent's testimony contradicted this or any other statement he made in his written responses to petitioner, and because we find his testimony credible, we find that petitioner

has failed to establish any material misrepresentations or omissions." (HP Report 7/15/98, p 12.) This remand to the hearing panel for further evidence and a supplemental report is limited to the findings and conclusions with regard to Count One. The panel is not asked to revisit its findings with regard to Counts Two and Three.

Board Members C. H. Dudley, Barbara B. Gattorn, Grant J. Gruel, Michael R. Kramer, Kenneth L. Lewis, Nancy A. Wonch concur in this decision.

Board Members Elizabeth N. Baker, Albert L. Holtz and Roger E. Winkelman did not participate in this decision.