Grievance Administrator,

Petitioner/Appellee,

v

T. Patrick Freydl, P 13705

Respondent/Appellant.

96-193-GA

Decided: November 3, 1998

BOARD OPINION

The Grievance Administrator filed an 11-count complaint which charged that respondent engaged in various acts of professional misconduct arising from his representation of three separate clients. Each of those clients filed a request for investigation which was served on Respondent by the Grievance Administrator. Respondent admits that he failed to answer those requests for investigation as alleged in Counts Five, Nine and Eleven. The hearing panel found that the Grievance Administrator failed to establish the charges of misconduct in Counts Three, Four, Seven and Ten. Dismissal of those counts is not challenged by either party.

The respondent's challenges to the panel's findings and conclusions in this case are related solely to the findings of misconduct in Counts One, Two, Six and Eight. Respondent further argues that the panel erred in its decision to order a suspension of three years together with restitution to a former client in the amount of $16,429.58. For the reasons discussed below, we reverse the hearing panel's findings of misconduct with regard to Count Six, paragraph 33(a), and Count Eight. We affirm the panel's findings with regard to Counts One and Two. We further conclude that respondent's misconduct as established in Counts One, Two, Five, Six, Nine and Eleven, including misappropriation of client funds, when considered in light of all of the aggravating and

mitigating factors, warrants a suspension of three years. The discipline imposed by the panel is affirmed.

In his brief, respondent addressed the disputed counts in reverse numerical order, starting with Count Eight and concluding with Count One. We will discuss those counts in the order presented by respondent.

Count Eight

The complaint charged that respondent agreed to represent Lawrence Shinoda in approximately January 1995 with regard to a contractual matter. In January 1996, respondent requested and received a $10,000 loan from Shinoda. In Count Eight, the Administrator charged that on January 13, 1996 respondent prepared, executed and delivered, or caused to prepared, executed and delivered a check in the amount of $10,000, payable to Shinoda Design, Inc., which was dishonored by respondent's bank upon presentment. Count Eight, paragraph 43, specifically charged:

> 43) Respondent violated his duties and responsibilities in that at the time he prepared, executed and delivered the check or caused the check to be prepared, executed and delivered, he knew or should have known that the account had been closed and that the bank would not honor the draft. [emphasis added.]

The panel found that the allegations in Count 8 were established by a preponderance of the evidence, saying in its report that respondent committed misconduct for the following reasons:

> (A) In Mr. Freydl having caused a check to be prepared, executed and delivered and that he should have known that the account had been closed and that the bank would not honor such a check;
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> (B) In Mr. Freydl knowing, or that he should have known, that such a check would have been dishonored upon presentment. [HP Report, 4/14/98, p 26.]

Respondent argues persuasively that he was not charged with issuing a check to this client at a time when he knew or should have known that the check would not be honored for reasons other

than that the account had been closed, i.e., for such reasons as insufficient funds or uncollected funds. We agree with respondent that he was charged with the duty to defend only those allegations presented in the complaint, in this case the allegation that he wrote a specific check at a time when he knew or should have known that the account was closed.

In reviewing a hearing panel decision, the Board must determine whether those findings have proper evidentiary support in the whole record. Grievance Administrator v August, 438 Mich 296 (1991); In re Grimes, 414 Mich 483 (1982). Applying that standard to count eight, we are unable to find evidentiary support in the record for the panel's finding that respondent wrote the check in question at a time when he "knew or should have known that the account had been closed."

The panel's report refers to exhibit 23--respondent's check to Shinoda Design, Inc. dated January 13, 1996 in the amount of $10,000. Respondent testified that he actually wrote the check on January 6, 1996 and asked Shinoda to hold it for a week because he knew that there were insufficient funds in the account to honor the check. The exhibit bears on its face the stamp "account closed." This exhibit was offered by the Administrator over respondent's objection. Respondent identified the check and his signature but objected to the "account closed" stamp for the reason that, without any authentication as a business record, that stamp was classic hearsay--an out-of-court statement by an unknown person made at an unknown time offered for the purpose of showing that the account was, in fact, closed.

It is not necessary for the Board to rule on the panel's evidentiary ruling. Respondent's point is well taken that even if the account was closed at some (unknown) point in time, the exhibit itself does not establish the crucial element that the account was closed and that respondent knew it was closed when he wrote the check on January 6, 1996. Without any other record from the bank or any testimony from a bank employee, there is only respondent's unrebutted testimony that he thought the account was open but that it had insufficient funds on that particular date.

The panel's report also refers to "exhibit 2." This is either another copy of exhibit 23 or a different check given to Shinoda on January 13, 1996. However, respondent correctly notes that exhibit #2 was never received into evidence. When it was offered, the Administrator's counsel agreed that it had not been properly authenticated. Counsel told the panel that he would move for its admission at a later date, when he had a witness to verify the check (Tr p 47). That did not occur.

The Grievance Administrator's reply brief in this review proceeding states:

> Count Eight charged respondent with preparing, executing and delivering a check or causing a check to be prepared, executed and delivered to Mr. Shinoda, at a time which he knew or should have known that there were insufficient funds to honor the draft. [GA Brief, p 11, emphasis added.]

This is a mischaracterization of the charge in Count Eight.[1] Respondent was not charged with delivering a check when he knew or should have known that there were insufficient funds--he was charged with delivering a check on an account which he knew or should have known was closed. (See Count Eight, paragraph 43, cited above.) The Administrator's reply brief cites evidence in the record to support a charge that respondent knew there were insufficient in the account--a charge which was not in the complaint. The Administrator's brief does not cite any evidence in the record tending to show that respondent knew or should have known, at the time he wrote or delivered the check, that the account was closed. In the absence of such evidentiary support, the panel's findings with regard to Count Eight must be reversed and that count is dismissed.

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[1] Respondent's brief plainly states his objection to the panel's finding on this charge. The Grievance Administrator's representation in his reply brief that Count Eight charged respondent with preparing the check "at a time which he knew or should have known that there were insufficient funds to honor the draft" is simply not an accurate recitation of the language in the complaint. The precise wording in the complaint was directly material to respondent's claim on appeal. As the reviewing tribunal, the Board should have been able to rely on the Administrator's representation that the complaint said what the Administrator claimed it said.

Count Six

Count Six is based upon respondent's attorney/client relationship with Lawrence Shinoda in connection with Shinoda's negotiation of a contract with the Gibson Guitar Company. Count Six charged that respondent violated his duties and responsibilities through his neglect of the matter, his disregard for his professional obligations by failing to take all appropriate and necessary legal action to protect Mr. Shinoda's interest in the matter and his failure to keep Mr. Shinoda reasonably informed concerning the status of the matter. Respondent's conduct as set forth in Count Six was alleged to be in violation of MCR 9.104(1)-(4) and the Michigan Rules of Professional Conduct, MRPC 1.1(c); 1.3; 1.4; 3.2; and 8.4(a) and (c).

With regard to respondent's alleged failure to keep his client reasonably informed about the status of the matter in violation of MRPC 1.4(a), Mr. Shinoda's testimony provides ample evidentiary support for the panel's finding of misconduct. The finding of misconduct in Count Six, paragraph 33(b) is sustained.

The charge in paragraph 33(a), that respondent failed "to take all appropriate and necessary legal action to protect Mr. Shinoda's interests in the matter," presents a more difficult question.

In its findings of fact, the panel found that the client, Shinoda, "assumed Mr. Freydl had not worked on the matter because his phone calls to Mr. Freydl were not returned . . . Mr. Shinoda further believed that Mr. Freydl had not performed any services whatsoever in connection with the Gibson contract matter . . . respondent admitted no evidence of any work that he performed on behalf of Mr. Shinoda regarding Gibson. The entirety of respondent's testimony regarding Gibson was that he helped negotiate a contract for Mr. Shinoda with Gibson Guitar." (HP Report, 4/14/98, p 17.)

We detect a tendency by the panel and the Administrator in discussing this count to shift the burden of proof to respondent by focusing on respondent's failure to provide documentary evidence of his efforts on his client's behalf. Respondent's failure in this regard was clearly relevant to the finding, discussed above, that

he failed to reasonably inform his client of the status of the matter in violation of MRPC 1.4(a). The record is not clear, however, as to the precise nature of the legal services which respondent allegedly failed to perform. Nor does the lack of communication with the client necessarily establish that respondent did not, in fact, "negotiate" with Gibson on his client's behalf. We realize that it may sometimes be difficult to prove a negative, i.e., that respondent did not perform certain services. Testimony from an employee or agent of the Gibson Guitar Company might have been helpful in that regard. Nevertheless, we are unable to find evidentiary support for the charge in Count Six, paragraph 33(a), that respondent failed to take all appropriate and necessary legal action to protect his client's interest in violation of MRPC 1.3.[2]

Count Two

Count Two alleges that respondent failed to take all appropriate and necessary legal action in his representation of M&M Creations, d/b/a "Magnolias" with regard to the stock redemption of a 50% shareholder. This Count also charges that respondent failed to respond to his client's inquiries and failed to keep her reasonably informed concerning the status of the matter. While there is testimony to support respondent's argument that he did perform some services with regard to the stock redemption (respondent's brief refers to the testimony of the corporation's accountant and the attorney for the selling shareholder), we find adequate evidence in the record to support the panel's conclusion that respondent did not take specific actions requested by his client, Melissa Christie, and her mother and that, ultimately, he did not achieve his client's goals. Furthermore, there is ample evidentiary support in the testimony of the accountant, Ms. Christie and her mother for the panel's finding that respondent failed to keep his client reasonably informed concerning the status of the matter. We affirm the panel's conclusion that respondent's

[2] In addition to the panel's findings that respondent's conduct violated MRPC 1.4 and 8.4(a), which we affirm, and MRPC 1.3, which we reverse, Count Six of the complaint also charged violations of MCR 9.104(1), (2), (3) and (4) and MRPC 1.1(c); 3.2 and 8.4(c). The Administrator did not appeal the panel's conclusions that respondent's conduct did not constitute violations of those rules.

conduct as alleged in Count Two constituted professional misconduct in violation of MCR 9.104(4), and MRPC 1.1(c), 1.3, 1.4 and 8.4(a).

Count One

Whether by accident or design, respondent's brief on appeal discusses the disputed counts in an ascending order which corresponds to the egregiousness of the charged misconduct. In approximately April 1995, respondent was retained to represent Melissa Christie in the dissolution of her business, "Magnolias." In May 1995, respondent advised Ms. Christie to remove the remaining $25,000 then in the company's account and to tender those funds to him to be held in escrow pending the dissolution of the corporation. A Magnolias company draft in the amount $25,000 made payable to the order of T. Patrick Freydl, Esquire was delivered to respondent on or about May 15, 1995. Count One charges that respondent violated MCR 9.104(1), (2), (3) and (4) and MRPC 1.4(a) and (b); 1.5(a) and (b) and 8.4(a), (b) and (c) by failing to deposit and maintain the funds in a segregated trust account, by failing to promptly pay those funds to his client when she was entitled to them, by failing to keep his client reasonably informed concerning the status of the funds, by failing to provide his client with an accounting and by misappropriating those funds.

The hearing panel's findings that the charges of misconduct in this Count were established by a preponderance of the evidence are set forth in detail in the panel's report on misconduct at pp 9-12 and 23. Those findings are detailed, persuasive and well supported by appropriate citations to the record.

The following extracts from the panel's report impart the flavor of respondent's conduct:

> Melissa Christie testified that in April of 1995, she went to see Mr. Freydl, asking him to represent Melissa Christie and the corporation in a buyout of a 50% stockholder of the business known as "Magnolias" (M&M Creations, Inc., a Michigan Corporation) and that Freydl accepted. (M. Christie - Tr.212)
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> Ms. Christie testified that during the negotiations for the buy out of the 50%

stockholder, Mr. Freydl suggested that the remaining balance on a line of credit, $25,000, be withdrawn and placed into an escrow account so that [the other stockholder's husband] would not do anything to disturb the access which Magnolias had to the funds. (M. Christie - Tr. 237-238) However, Ms. Christie did not immediately withdraw such funds, instead deciding to discuss this idea with her parents and her certified public accountant, Richard Keil. (M. Christie - Tr. 241) Ms. Christie testified that Mr. Freydl suggested privately, with some urgency, that the funds should be withdrawn from the bank. So, at 9 a.m. on May 15, 1995, the day or so after the meeting with Ms. Christie's parents and accountant, Mr. Freydl came to Magnolias and secured a Magnolias' check written by Ms. Christie, (Petitioner's Exhibit 9), for $25,000 payable to "T. Patrick Freydl" with the word "escrow" written in the lower left corner, which was intended to be placed into Mr. Freydl's trust account. (M. Christie - Tr. 243-244). . . Ms. Christie testified that Mr. Freydl indicated the money would be placed in an escrow or trust account. (M. Christie - Tr. 244)

* * *

Mr. Freydl deposited this $25,000 check to his personal account at NBD Bank, Account No. 28236315 on May 15, 1995 (Petitioner's Exhibit 20). NBD Keeper of the Records Bret Keefe testified that this account was not an Escrow or IOLTA Account, but a regular checking account; (Keefe - Tr. 437-438). The name on the account was Respondent's, individually, not the business name "Freydl & Associates", nor in the name of Mr. Freydl as an attorney. In addition, the address for this account was listed as Respondent's home address and not his business address. (Petitioner's Exhibit 20)

* * *

Melissa Christie, a day or so after delivering the check, asked Mr. Freydl for the account number and the bank in which the check had been deposited, along with a receipt. Mr. Freydl advised he would get that information right out, but no information was given to Ms. Christie.

Ms. Christie called Mr. Freydl at least 5 times during the month of June, 1995, leaving messages, but no response was forthcoming, except that Mr. Freydl expressed concern that the information previously requested had not gotten to Ms. Christie. (M. Christie - Tr. 246-247) Ms. Christie even wrote to Mr. Freydl (Petitioner's Exhibits 14 and 15) requesting the information. The accountant, Richard Keil, testified he tried to get an accounting of the $25,000 by calling Mr. Freydl and writing him. (Keil - Tr. 383-384) Mr. Keil, on behalf of Magnolias, sent letters requesting an explanation. (Petitioner's Exhibits 10 and 12)

Judith Christie, Melissa Christie's mother, also unsuccessfully attempted to obtain an accounting from mr. Freydl. (J. Christie - Tr. 462-463) She also sent correspondence to Mr. Freydl requesting an explanation. (Petitioner's Exhibit 17) Ms. Christie's successor counsel, Robert Berlow, testified that he, too, sent a letter to Mr. Freydl inquiring as to the escrowed funds. (Petitioner's Exhibit 16)

After delivering a $12,500 check to Ms. Christie payable to "Magnolias", which was returned because of "uncollected funds," Mr. Freydl brought $12,500 in cash to Ms. Christie.

* * *

Mr. Richard Keil was present when the purpose for writing the $25,000 check was discussed with Mr. Freydl and Ms. Christie. (Keil - Tr. 382). Mr. Keil also spoke with Mr. Freydl concerning using a 10% interest factor that Mr. Freydl could repay the interest that Magnolias had to pay on the $25,000 taken from the line of credit. (Keil - Tr. 386)

* * *

Mr. Freydl's assertion that the $25,000 was a retainer for services to be rendered is not substantiated by the exhibits nor the testimony. Mr. Freydl indicated he was given the $25,000 to prevent the other 50% stockholder of Magnolias from being able to have access to the funds and so that there would be funds available to defend any actions

> asserted by that 50% stockholder or her husband. Mr. Keil's unrefuted testimony was that interest on the funds was discussed, which is entirely **inconsistent** with the notion that the funds were to be used to apply to fees. (Keil - Tr. 386-388)
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> Mr. Freydl suggests that at least the $12,500 was for attorney fees earned by him. However, Mr. Freydl has **never** provided a billing to Magnolias or Ms. Christie with respect to this $12,500. (Freydl - Tr. 753)
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> No correspondence was presented to suggest that the $12,500 was earned. No testimony was presented, except for Mr. Freydl, that the $12,500 was earned fees. No one testified that any suggestion had ever been made that the $12,500 was for earned fees. (Freydl - Tr. 755-757) [HP Report 4/14/98, pp 9-12.]

The record is quite clear that respondent, contrary to his representations to his client, did not place the funds in an escrow or trust account but deposited the money in a personal checking account on May 15, 1995. That account was depleted by May 24, 1995. Respondent's claim that he was entitled to any portion of those funds as attorney fees was found to be not credible by the panel and is entirely unsupported by any documentary evidence. The panel's findings and conclusions with regard to Count One are affirmed.

Level of Discipline

The respondent argues that a three-year suspension in this case is excessively harsh in view of his thirty years at the bar with one prior order of discipline.[3] Respondent emphasizes the mitigating effect of his pro bono service to the legal profession and the community at large. He also argues that he was prejudiced by the panel's reference in its report to respondent's "proclivity for writing checks which are not good for whatever reasons,"[4]

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[3] Grievance Administrator v T. Patrick Freydl, 96-18-GA; 96-36-FA. Thirty day suspension effective April 22, 1998.

[4] HP Report 4/14/98, p 28

when, in fact, two of the counts involving returned checks had been dismissed. [5]

We do not believe the panel committed prejudicial error by including respondent's check-writing habits in the list of factors which it considered in reaching a decision on the level of discipline. Irrespective of whether specific charges of misconduct were established, respondent is not in a position to deny that the record as a whole establishes that he delivered checks to one or more clients which were subsequently dishonored by respondent's banking institution(s). Moreover, while respondent's "proclivity" for writing checks of this nature was mentioned in the panel's report, the weight given to that factor by the panel is speculative at best.

In any event, it is the egregiousness of the misconduct itself which leads us to a decision to affirm a three-year suspension in this case. Were we to give the maximum possible weight to the mitigating factors cited by respondent while virtually overlooking respondent's prior suspension of thirty days for failing to answer a request for investigation, his failure to answer three requests for investigation in connection with this case and the established counts dealing with respondent's failure to impart timely information to his clients, we would still be left with respondent's commingling and misappropriation of client funds as established in Count One of this complaint.

While discipline must always be imposed in light of the unique factors in each case, the seriousness of an attorney's misuse of funds entrusted by a client is reflected in a long line of decisions in which outright misappropriation of client funds has resulted in discipline ranging from a suspension of three years to disbarment. See, for example, Grievance Administrator v Charbonneau, DP 103/83; DP 126/83 (ADB 1984) (increasing from a

[5] Count 4 charged that respondent delivered a check to Melissa Christie at a time when he knew or should have known there were insufficient funds on deposit to honor the check. Count 10 charged that respondent delivered a check to one Robert Cristello at a time when he knew or should have known that the account on which the check was drawn had been closed. The panel found that those counts were not established by a preponderance of the evidence.

one-year suspension to disbarment); Grievance Administrator v Edwin C. Fabre', DP 84/85; DP 1/86 (ADB 1986) (increasing 60-day suspension to three years); Grievance Administrator v Snow, DP 211/84 (ADB 1987) (increasing suspension from two years to three years); Grievance Administrator v Paul Wright, ADB 126-87 (ADB 1988) (increasing one-year suspension to three years). Grievance Administrator v Kenneth M. Scott, DP 178/85 (ADB 1988) (increasing six-month suspension to three years); Grievance Administrator v Fernando Edwards, 437 Mich 1202; 466 NW2d 281 (1990) (ADB increased two-year suspension to disbarment; Sup Ct peremptorily reduced to a three-year suspension); Grievance Administrator v Richard E. Meden, 92-106-GA (ADB 1993) (increasing 18-month suspension to disbarment); Grievance Administrator v John T. McCloskey, 94-175-GA; 94-189-FA (ADB 1995) (increasing 130-day suspension to three years).

The three-year suspension ordered by the panel in this case is an appropriate sanction under the circumstances and it is affirmed.

Board Members Elizabeth N. Baker, C. H. Dudley, Barbara B. Gattorn, Grant J. Gruel, Albert L. Holtz, Roger E. Winkelman and Nancy A. Wonch concur in this decision.

Board Members Michael R. Kramer and Kenneth L. Lewis did not participate in this decision.