Grievance Administrator,

Petitioner/Appellant,

v

Deborah Lynch, P 33418

Respondent/Appellee.

96-96-GA

Decided: September 30, 1997

BOARD OPINION

The Grievance Administrator seeks reversal of the hearing panel's decision to dismiss two of the three counts in the formal complaint. The Administrator also argues the insufficiency of the discipline imposed, a reprimand with conditions, in light of the panel's findings that respondent received an $8000 settlement check on behalf of a client, allowed those funds to be deposited in her regular checking account, failed to maintain the funds held on behalf of her client and failed to account for those funds, all in violation of MCR 9.104(1), (2), (3) and (4) and the Michigan Rules of Professional Conduct 1.15(a), (b) and (c). A dissenting panelist would have sustained the charges in Count 3 of the complaint and imposed a suspension of two years. For the reasons discussed, we affirm the hearing panel's dismissal of Counts 1 and 3 and increase discipline to a suspension of 180 days.

THE DISMISSAL OF COUNTS 1 AND 3

In February 1994, respondent was retained to represent complainant Helen Sanabria in a suit to quiet title to real property she had purchased. Complainant held a title insurance policy with a face amount of $8000. In May 1994, respondent attorney contacted the title company to make a claim under the policy.

Count 1 of the complaint alleged that respondent entered into a settlement with the title company in May 1994 for the full policy

amount of $8000 without the prior authorization of her client and failed to promptly inform her client of the settlement.

Count 3 alleged that respondent filed an answer to the complainant's Request for Investigation containing intentional misrepresentations regarding the handling of her client's funds.

During the hearing, a panel receives the evidence and has "the opportunity to judge credibility by way of first-hand observation of the character and demeanor of the witnesses who testified before them." For that reason, the Board has traditionally afforded "deference to the panel in matters of credibility." Grievance Administrator v Sheldon L. Miller, 90-134-GA, (ADB 1990). See also Grievance Administrator v Paul R. Jackman, 189-87 (ADB 1987); Grievance Administrator v David N. Walsh, DP 16/83 (ADB 1984).

In this case, there is conflicting testimony on certain key issues, for example, whether or not respondent advised her client that the title company had delivered a check in settlement of the claim. Proper evidentiary support in the whole record for the hearing panel's findings constitutes the appropriate standard of review. State Bar Grievance Administrator v DelRio, 407 Mich 336, 349; 285 NW2d 277 (1979); In re Grimes, 414 Mich 483; 326 NW2d 380 (1982). Deference to the hearing panel's findings as to credibility supports the Board's conclusion that there is adequate evidentiary support for the panel's findings that the charges in Counts 1 and 3 were not established by a preponderance of the evidence.

THE CHARGES OF MISCONDUCT--COUNT 2

The evidence before the panel established that Lawyers' Title Company issued a settlement check payable to respondent's client in the amount of $8000 on June 2, 1994. The respondent received the draft on June 4, 1994. In her answer to the Request for Investigation, respondent stated:

> I admit depositing the settlement check into the Old Kent Bank account. I intended to hold the funds for [complainant], pending her instructions.

At the hearing, respondent testified to the panel that she placed the check in plain view on her desk on June 2, 1994. Respondent testified that she forgot about the check until January 1995 when the complainant called demanding an accounting for the funds. At that time, respondent conducted a review of her bank records which revealed that the settlement check for $8000 had been deposited in her general office checking account on June 8, 1994. Respondent professed no knowledge as to the individual who actually deposited the check and she was unable to identify the handwriting on the deposit slip. Respondent testified that she gave no instructions to her staff to deposit or safeguard the check and that she was unaware, until January, 1995 that it had been deposited in her office account.

The hearing panel heard conflicting testimony concerning whether respondent notified the client, at the time, that the settlement check had been received. The unrebutted evidence established that the check was deposited, unendorsed, in respondent's general office account. Respondent admittedly did not maintain a client trust account.

Within a few days after she was contacted by the complainant in January 1995, respondent personally delivered a check to her client for the entire $8000. The exhibits in this matter include the checking account statements for respondent's office account. Those records establish that by August 31, 1994, the account balance had dropped well below the $8000 settlement amount to $3488.08 and had fallen to $2711.50 by November 30, 1994.

The hearing panel concluded that respondent's violation of her fiduciary obligations to her client constituted professional misconduct in violation of MCR 9.104(1), (2), (3) and (4) and the Michigan Rules of Professional Conduct 1.15(a), (b) and (c). A two-member majority voted to impose a reprimand, citing respondent's previous unblemished record and respondent's repayment of $8000 to the client after she was contacted in January 1995. The panel also credited respondent with deducting $1000 from the client's bill to compensate the client for lost interest. The panel majority also noted that:

> Respondent had very poor business practices; she did not reconcile her checkbook or obtain monthly financial statements. From the testimony, it appears that the respondent did not have a dishonest or selfish motive or actually intended to deposit this check in the bank and use it for her personal purposes.

In addition to a reprimand, the panel imposed conditions that respondent complete an ethics course or seminar within six months and that, for a period of one year, she practice under the supervision of a monitor to review her office procedures, including procedures for handling client funds.

The hearing panel's report does not specifically address two of the charges of misconduct which appear in Count 2 of the complaint. In paragraph 13(A) the complaint charged respondent failed to promptly advise her client of her receipt of the client's funds. Count 2, paragraph 13(B) charged that respondent endorsed and negotiated the check without her client's consent.

Uncontroverted evidence indicated the check was deposited to respondent's account without a signed endorsement. A fair inference can be drawn that the panel included respondent's failure to discuss her receipt and deposit of the check with her client under its general conclusion that respondent disregarded her fiduciary obligations. The panel's focus was upon the relatively more serious charges of commingling and misappropriation of client funds. We emphasize, however, that respondent's failure to notify her client when the check was received and her failure to advise the client that the check had been deposited were not trivial violations in any sense. MRPC 1.15(a) explicitly sets forth a lawyer's duty to promptly notify the client of the receipt of funds in which the client has an interest. Similarly, respondent ignored her duty to render a full accounting to her client regarding those funds. MRPC 1.15(b).

DISCIPLINE

While the Board reviews a hearing panel's findings for adequate evidentiary support, the Board possesses a measure of discretion with regard to the ultimate decision with regard to the

level of discipline. Grievance Administrator v August, 438 Mich 296, 304 (1991). Exercise of this discretion is appropriate in light of the Board's overview function to assure a level of continuity and consistency in the imposition of discipline. See Matter of Daggs, 411 Mich 304; 307 NW2d 66 (1981), citing State Bar Grievance Administrator v Williams, 394 Mich 5, 15; 228 NW2d 222 (1975).

We adopt, in part, the conclusions of the dissenting hearing panelist that respondent's commingling and misappropriation of client funds established in Count 2 warrants increased discipline. Specifically, we hold that protection of the public and courts includes maintenance of public confidence in the legal profession as a repository for client funds. Respondent's indifference and failure to understand her fiduciary obligations in this case not only adversely reflects upon her, but threatens to undermine the public's confidence in the legal profession as a whole.

It is well-established in this state, as in most jurisdictions, that commingling and misappropriation are essentially per se offenses. As we stated in Grievance Administrator v Robert R. Cummins, 159/88 (ADB 1988):

> There should be no question as to the nature of the misconduct in this case. We can perceive of no excuse for an attorney's failure to be aware of the requirement under Rule 1.15 of the Michigan Rules of Professional Conduct [formerly DR 9.102(A)] that client funds be held separately from the lawyer's own money. There are no exceptions in either the former or present rule which allow an attorney to commingle client funds in a business or personal account for reasons of convenience or expedience. . ..
>
> Nor should there be any question that the facts of this case establish that client funds were misappropriated. As this Board has ruled in a recent case, misappropriation is essentially a per se offense; once the running balance of the office account fell below the amount held in trust for the client, misappropriation had occurred. See Matter of Steven J. Lupiloff, DP 34/85 (Opn. 3/24/1988), citing In re E. David Harrison, 461 A2d 1034 (1983).

In both Lupiloff and Cummins, supra, the Board recognized the lack of harmful intent and/or lack of intent to defraud as a significant mitigating factor which could contribute to a decision to limit discipline to a reprimand. Similarly, a lack of selfish motive or intent was considered by the Board in those cases cited by respondent in which reprimands were imposed for an attorney's inadvertent misuse of client funds, i.e. Grievance Administrator v Philip H. Weaver, 91-61-GA (ADB 1991); Grievance Administrator v Clinton C. House, ADB 114/89 (1989). On their facts, Cummins, Weaver and House, supra, are each distinguishable from the instant case to a significant degree.

The Lupiloff case is closely analogous to the matter at hand. In both cases, funds belonging to a client or third party were deposited into the lawyer's general account; the funds were not distributed for a period of seven to eight months; and, during that period, the account balance fell below the required level. In Lupiloff, the Board affirmed the hearing panel's decision to impose a reprimand, over the strongly worded dissenting view of Board Members Doctoroff and Gurwin that the attorney's misuse of client funds warranted a suspension.

Despite similarities, each case must turn on its own facts. State Bar Grievance Administrator v DelRio, 407 Mich 396; 285 NW2d 277 (1979). In reviewing the discipline imposed in a given case, we must be mindful of the sanctions meted out in similar cases. But, we must also recognize analogies are not necessarily of great value. Matter of Grimes, 414 Mich 483; 326 NW2d 380 (1982).

The most glaring, and troubling, distinguishing characteristic in this case is respondent's own testimony that she placed an $8000 check payable to her client on her desk on or about June 4, 1994 and then simply "forgot" about the check until her irate client demanded her money more than six months later in January 1995. According to the record, respondent was the sole authorized signator on her general office checking account. From June 1994 to January 1995, numerous charges for returned check were assessed against the account by respondent's bank. Respondent testified that she was renovating her office during that period. The individual

who was to share in the renovation expenses was not paying his share of those expenses. Referring to this individual, respondent testified,

> He would go for long periods of time, six, seven, eight, twelve weeks, and so he would leave me these checks, and I was supposed to deposit them as time went on. I would and they would bounce and then he would send me another check, and it would be a large check to cover all the bad checks, and I would deposit that and that would also bounce. It was a nightmare. I didn't have the money to cover 100% of the renovation costs. I was struggling. [Tr p 71]

Respondent's own testimony eloquently sets forth the rationale for the requirement of MRPC 1.15(a) that a lawyer must hold client funds separate from his or her own funds. As a result of respondent's financial struggles, the funds which rightfully belonged to the complainant were used to pay for respondent's office renovation and to cover her associate's bounced checks. Unbeknownst to the client, respondent's financial nightmare could have become the client's nightmare.

Fortunately, respondent was financially able to pay the full $8000 to her client upon the demand for the money. While prompt restitution on demand was appropriately considered in mitigation, we warn against the over-emphasis of restitution as mitigation in these cases. We have cited the importance of maintaining public confidence in the legal profession as a repository of client funds. When client funds have been commingled with the attorney's funds and then spent, whether by mistake or design, some attorneys will be in a position to rectify the situation. Some, unfortunately, will not. The client entrusting funds to an attorney's care should not have to gamble on that attorney's future financial well-being. Compliance with MRPC 1.15 assures that regardless of the attorney's personal financial situation, the client's money will remain intact and inviolate in a segregated account. As the Illinois Supreme Court stated: "It is the risk of the loss of the funds while they are in the attorney's possession, and not only their actual loss, which the rule is designed to eliminate. . . ." In re Bizar, 97

IL2d 127; 454 NE2d 271 (1983). We agree with the Grievance Administrator's argument that respondent giving a $1000 credit against the complainant's outstanding amount owed for attorney fees is entitled to relatively little weight in mitigation. That was essentially a self-help remedy proposed by the complainant.

The mitigating factors warranting consideration include respondent's prior unblemished record and the lack of a dishonest motive. A suspension of 180 days is appropriate under the facts and circumstances in this case.

Board Members C. H. Dudley, Miles A. Hurwitz and Kenneth L. Lewis.

Concurring Opinion of Barbara B. Gattorn

Except for the decisions to affirm the dismissal of Count 3 and to limit discipline in this case to a suspension of 180 days, I do not disagree with the sentiments expressed in the Board's opinion, especially with regard to the importance of safe-guarding client funds. However, these are important exceptions. I am persuaded by the dissenting panelist's analysis in this case, both with regard to the charges in Count 3 and the appropriate level of discipline. In light of respondent's admitted cash flow and checking account problems, I am troubled by her insistence that she "forgot" about an $8000 check and failed to notice that it had somehow been deposited in her office account. I concur in the result in this case. However, for the reasons stated in the dissenting panelist's opinion, I would further increase discipline to a suspension of two years.

Dissenting Opinion of Nancy A. Wonch and Albert L. Holtz

Despite the majority attempts to distinguish this case from those cases in which an attorney's inadvertent or mistaken misuse of client funds resulted in a reprimand, we believe that greater deference should have been afforded the hearing panel's decision. The panel's first-hand opportunity to observe and assess the credibility and character of the respondent is important not only with regard to its factual findings but with regard to the sanction

which should be imposed. Having heard all of the evidence and having considered respondent's explanations, the panel majority determined that a suspension of her license to practice law was not necessary to insure protection of the public. We would defer to that decision and affirm the reprimand with conditions ordered by the panel.

Board Members Elizabeth N. Baker, Michael Kramer and Roger E. Winkelman did not participate.