Grievance Administrator,

Petitioner/Appellant,

Stephen R. Bloom,

Complainant/Appellant,

v

Jay A. Bielfield, P 10788

Respondent/Appellee,

Case No. 87-88-GA

Decided: October 31, 1996

BOARD OPINION

The hearing panel dismissed the complaint on March 21, 1996. The panel's findings and conclusions are set forth in its report. The Grievance Administrator filed a petition for review seeking reversal of the panel's decision to dismiss Count I of the complaint. The complainant, Stephen R. Bloom, filed a separate petition for review seeking reversal of the dismissal of all three counts. The Attorney Discipline Board has conducted review proceedings in accordance with MCR 9.118, including review of the record below and consideration of the briefs and arguments of the parties.[1] For the reasons discussed below, we affirm the hearing panel order of dismissal.

Count I

A) Hearing Panel Proceedings

During the period which is relevant to this count, January 1982 through August 1985, the respondent, Jay A. Bielfield, was the managing agent of a holding company known as Ingleside General Partnership. The partnership owned a shopping center in Clinton

[1] The complainant's petition for review was accompanied by copies of documents which were not admitted into evidence. In addition, the petition refers to investigative proceedings or matters litigated in other courts which likewise do not appear in the record below. These documents were excluded from the material reviewed by the Board.

Township, Michigan. This property had initially been developed by the respondent's father, Harvey Bielfield, along with other individuals and family members. The property and the retail development were owned by Ingleside General Partnership (the holding company) and Ingleside Retail Partnership.

Following the deaths of Harvey Bielfield and others, their respective interests in the partnerships passed to the surviving spouses and children, including the respondent's mother, aunt and other family members. Respondent did not have an interest in Ingleside General Partnership but he did have an interest in Ingleside Retail Partnership and owned a fifty percent interest in a free-standing Bonanza Restaurant located in Ingleside Retail's shopping development. While his father was alive, respondent was entrusted with responsibilities as general agent/manager of the Ingleside Partnerships and continued to perform these services after his father's death in 1980.

Count I alleges that in this capacity as general agent/manager of Ingleside General Partnership, respondent misappropriated partnership funds by writing forty-six checks on the partnership account between January 1982 and August 1985 to pay his personal expenses. At the conclusion of the Administrator's direct case, the Administrator's counsel voluntarily withdrew the charges with respect to thirteen of those checks.

There was no dispute between the parties that between January 18, 1982 and August 3, 1985, respondent wrote twenty-three checks to Detroit Edison from Ingleside General Partnership's account to pay Detroit Edison bills incurred by respondent at his home. In addition, respondent wrote an Ingleside General Partnership check to Consumers' Power Company on April 16, 1982 to pay a personal utility bill.

The respondent contended that his use of partnership funds to pay his personal Detroit Edison bills was the method he employed as managing partner of the partnership to reimburse himself for expenses of Ingleside General that had been paid by the Bonanza Restaurant in which he had an interest. The hearing panel found that at some time between 1980 and 1985, the Bonanza Restaurant

permitted a power line to be run from its electrical system to Ingleside's parking lot fixtures. The panel found that there was sufficient evidence to establish that there was a diversion of electricity from the Bonanza Restaurant to Ingleside General's shopping center to the extent that the Bonanza Restaurant, or its partners, "would have been entitled to some reimbursement, although the amounts cannot be determined by the record in this case." (HP Report, p 9.)

The panel further found that on April 6, 1982, respondent issued an Ingleside General Partnership check in the amount of $458.95 to Consumers' Power Company to pay for utility services at his home. Respondent testified, and the hearing panel found, that respondent had paid a Consumers' Power bill for Ingleside General with his personal funds earlier in the year and that this was the method he used to reimburse himself for that expenditure.

The parties did not dispute that respondent issued eight checks to the Great American Insurance Company drawn on Ingleside Partnership accounts and that those checks were used to pay respondent's personal insurance bills. The panel reported:

> We find that petitioner has not proved that these checks were issued in this fashion with an intent to deprive Ingleside General of its funds but were issued inadvertently and we accept respondent's explanation that the checks were issued in error, and that when the error was brought to respondent's attention during litigation between respondent and the partners, he reimbursed the partnership for the error. [HP Report, p 9.]

Finally, the panel found that an Ingleside Partnership check written by respondent on September 20, 1984 to F. D. Stella Products Company was in fact applied to respondent's personal obligation rather than an obligation of Ingleside General. The panel concluded:

> We find that this check was written by respondent without intent to deprive Ingleside General of its funds, but was the result of an administrative error within respondent's office. [HP Report, pp 9 & 10.]

While these factual findings with regard to Count I appear to

have the panel's unanimous support, the panel members were not in complete agreement in reaching conclusions of law. Respondent's conduct described in Count I was alleged to have violated the then applicable provisions of GCR 953 (1) (2) (3) and (4); DR 1-102(A)(1), (3) (4) (5) and (6) of the then existing Code of Professional Responsibility and DR 9-102(B)(3) & (4).[2]

In support of its decision to dismiss the charges in Count I, the panel majority wrote:

> The panel has concluded that respondent's actions do not constitute misconduct within the meaning of DR 9-102(B), (3) & (4). It is apparent that these two provisions apply uniquely to attorney-client relationships, and to the funds held by a lawyer on behalf of a client in an attorney-client relationship. The evidence submitted in this case does not establish that respondent was managing partnership funds as part of an attorney-client relationship. Accordingly, we hold that these provisions are not applicable in this case.
>
> Similarly, we conclude that respondent's actions do not constitute misconduct pursuant to the provisions of DR 1-102(A)(3), (4) & (6). In our opinion petitioner has failed to prove that there was dishonest, fraudulent or deceitful intention on the part of respondent. Further, inasmuch as respondent's conduct did not occur in the context of an attorney-client relationship, we cannot say that the facts, as we have found them, reflect adversely on respondent's ability to conduct himself properly in the practice of law. [HP Report p 13.]

The dissenting panel member agreed with the majority's conclusion of law with regard to the alleged violations of DR 1-102(A)(3), (4) and (6) and DR 9-102(B)(3) and (4), but would have

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[2] The Code of Professional Responsibility was replaced in Michigan, effective October 1, 1988, with the Supreme Court's adoption of The Michigan Rules of Professional Conduct.

found misconduct under GCR 953(1) and (2).[3] The dissenting panelist emphasized the appearance of impropriety created by respondent's handling of partnership funds. However, that panelist did not find that the respondent's conduct was contrary to justice, ethics, honesty or good morals as charged under GCR 953(3), nor did he find that respondent engaged in illegal conduct involving moral turpitude; conduct involving dishonesty, fraud, deceit or misrepresentation; or conduct adversely reflecting on respondent's fitness to practice law as charged under DR 1-102(A)(3),(4) & (6).

(B) Discussion

On review, the Attorney Discipline Board must determine whether the hearing panel's factual findings have proper evidentiary support in the whole record. Grievance Administrator v August, 438 Mich 296; 475 NW2d 256 (1991). Applying that standard of review, we conclude that there is proper evidentiary support for the hearing panel's factual findings with regard to the charges in Count I.

On the one hand, it is undisputed that respondent wrote partnership checks to pay personal obligations. There is, however, evidentiary support for the panel's findings that the checks to Great American Insurance Company and F. B. Stella Products were inadvertent administrative errors which were subsequently rectified. Similarly, the respondent's testimony, if believed, provides an evidentiary basis for the panel's conclusion that the respondent wrote the questioned checks to Detroit Edison and Consumers' Power to reimburse himself for partnership expenses paid by him or the restaurant in which he had an interest.

On these factual issues, it would be inappropriate for the Board to substitute its conclusions when the panel had the first-hand opportunity to observe and assess the demeanor and credibility of each witness. Grievance Administrator v Proctor, 91-94-GA (ADB 1994).

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[3] GCR 953 was superseded by MCR 9.104, eff. March 1, 1985. The rule identified acts or omissions by an attorney which constituted misconduct and grounds for discipline, whether or not occurring in the course of an attorney/client relationship, including:

> (1) conduct prejudicial to the administration of justice;
>
> (2) conduct that exposes the legal profession or the courts to obloquy, contempt, censure or reproach. . .

It would also be inappropriate for the Board to substitute inference or speculation for tangible evidence. The complainant and the Grievance Administrator have both suggested avenues of inquiry which could, it is argued, cast considerable doubt upon some of the claims raised by the respondent in his defense. For example, in oral arguments at the review hearing, the complainant cited his personal experience with a lighting bill for a shopping center parking lot to demonstrate the alleged implausibility of the respondent's reimbursement claim. Had the record in this case been more complete, it might have established that the amounts claimed by the respondent as "reimbursement" far exceeded the amount attributable to the parking lot portion of the Bonanza Restaurant's electricity bill for that period. It is clear to us that the panel's inability to identify the amount to which respondent would have been entitled resulted from the paucity of the record rather than an indifference to its responsibility.

While we review the panel's factual findings for evidentiary support, the Supreme Court has also recognized the Board's greater discretion with regard to the ultimate result. August, supra at 304; In re Daggs, 411 Mich 304, 318-319; 307 NW2d 66 (1981). The Board is not bound by a hearing panel's conclusions of law. In exercising its overview function, the Board must determine, on a de novo basis, whether the attorney's acts or omissions are violative of the rules cited in the formal complaint.

We agree with the observations of the dissenting panel member regarding the misunderstanding, mistrust and accusation which were the foreseeable results of the respondent's handling of partnership funds. Nevertheless, we agree with the panel's ultimate conclusion that respondent's claimed misdeeds did not constitute professional misconduct under the then applicable Michigan Court Rules and Code of Professional Responsibility as charged in the Count I.

We affirm the panel's unanimous conclusion that the respondent's handling of funds belonging to Ingleside General Partnership was not governed the Code of Professional Responsibility, DR 9-102(B)(3) and (4). Those subrules required that a lawyer must:

> 3) Maintain complete records of all funds, securities and other properties of the client coming into possession of the lawyer and

> render appropriate accounts to his client regarding them.
>
> 4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in possession of the lawyer which the client is entitled to receive. [DR 9-102(B).]

Those rules applied to an attorney's handling of client funds during the course of an attorney/client relationship. There is ample evidentiary support for the panel's conclusion that Ingleside General Partnership was not a "client" of the respondent within the meaning of DR 9-102.

We emphasize that although respondent was not handling "client" funds and was therefore not subject to the specific duties charged under DR 9-102(B)(3) and (4), he was clearly bound by the requirements of honesty and integrity which are applicable to attorneys generally and to fiduciaries specifically.

In Grievance Administrator v Gary Lange, 93-81-GA (HP Report 5/25/94), for example, the respondent had no current attorney/client relationship with his wife's aunt when she entrusted him with $50,000 to invest on her behalf. Nevertheless, the panel concluded that the respondent's breach of his fiduciary relationship by failing to invest the money and retaining $25,000 for his own benefit was a flagrant violation of the woman's trust and warranted disbarment. Lange, supra, (ADB Order aff'd 1/18/95), lv den 450 Mich 1212 (1995). Similarly, a Michigan attorney's conversion of approximately $17,000 while serving as the treasurer of a neighborhood swim club, and his attempts to conceal his actions, resulted in a suspension of two and one-half years. Grievance Administrator v William V. Kokko, DP 53/82; DP 116/82 (HP Report, 8/22/82).

The numerous cases cited by the Grievance Administrator in support of the argument that misappropriation of client funds is a per se offense regardless of intent to deprive the client of his or her funds are inapplicable in this case. Mistake and inadvertence would not constitute a defense to the strict fiduciary obligations imposed under Canon 9 with regard to the segregation and maintenance of client funds. However, the panel correctly concluded that lack of intent may constitute a defense to the broader

provisions of Canon 1 and MCR 9.104 which use such terms as dishonesty, fraud, deceit and misrepresentation. The panel concluded, and we agree, that a lawyer's mistakes, sloppy accounting or bad judgment may not necessarily expose the legal profession to obloquy, contempt, censure or reproach to a degree which warrants professional sanction.

Respondent argued that he pursued the overall objectives of the general partnership, albeit in a sloppy, undocumented manner, by paying his personal utility bills out of partnership funds to reimburse himself for expenses incurred on behalf of the partnership. The panel accepted respondent's argument and found that the evidence did not establish a "dishonest, fraudulent or deceitful intention" on respondent's part. Those conclusions have evidentiary support in the record.

Count II

Count II of the formal complaint charged that the respondent improperly acted as a broker/attorney for both Ingleside General and Ingleside Retail in the sale of property between the two entities. Count II also charged that respondent took an improper fee in connection with the transactions and failed to account for disbursements from the proceeds of the sale. At the hearing, the Grievance Administrator's counsel conceded that those charges were not supported by the evidence. The Grievance Administrator voluntarily stipulated to the dismissal of those charges.

The complainant challenges the dismissal of Count II. To the extent that the Grievance Administrator made a prosecutorial decision not to proceed with that count, the Board has previously ruled that it does not have the authority to review that decision. The Attorney Grievance Commission's authority to dismiss an action is inherent in the Commission as the prosecution arm of the Supreme Court. Grievance Administrator v Richard Durant, ADB 208-88 (ADB 1990); Grievance Administrator v Kurt A. O'Keefe, ADB 90-13-GA (ADB 1992).

The Attorney Grievance Commission and the Grievance Administrator are under the direct supervisory control of the Michigan Supreme Court. The Supreme Court, not this Board, may review the Administrator's dismissal of Count II.

Count III

The complainant also seeks review of the hearing panel's dismissal of Count III. The Grievance Administrator does not challenge dismissal of this count. Count III charged that respondent forged or altered a written letter agreement dated June 15, 1973 relating to the management of Ingleside General Partnership. The Administrator introduced into evidence two versions of the agreement. The version in the respondent's possession called for a management term of twenty years. The version produced by one of the general partners included a management term of only fifteen years. The respondent denied that he altered or modified the terms of the agreement and asserted that the modification occurred before he assumed the management of Ingleside from his father.

In the proposed findings of fact submitted to the hearing panel, the Grievance Administrator argued that the respondent's claim was supported only by his own testimony. However, the burden of proof fell upon the Grievance Administrator to establish respondent's responsibility for the alleged alteration. The record supports the hearing panel's conclusion that the Grievance Administrator failed to sustain that burden.

The complainant's petition for review refers to "special exhibits" which were not received in evidence. The complainant also relies upon documents which were allegedly disclosed to the Attorney Grievance Commission during the course of its investigation. The Board has limited its review to the testimony and exhibits in the record.

Board Members George E Bushnell, Jr., C. H. Dudley, M.D., Elaine Fieldman, Albert L. Holtz, Miles A. Hurwitz, Michael R. Kramer and Kenneth L. Lewis concur in this decision.

Board Member Barbara B. Gattorn was absent and did not participate.