Grievance Administrator,
State of Michigan
Attorney Grievance Commission,

Petitioner/Appellant,

v

James H. Ebel, P-13086,

Respondent/Appellee.

Case No. 94-5-GA

Decided: April 20, 1995

BOARD OPINION

The Grievance Administrator filed a petition for review of a hearing panel Order of Reprimand and Restitution. That order is based on the panel's findings that respondent signed the name of deceased client to a bail bond receipt; endorsed the name of the deceased client to a $5,000 check; took possession of the instrument; misappropriated the $5,000; and failed to return the $5,000 to the estate of his deceased client.

The Administrator argues that the panel erred as a matter of fact and law by finding that respondent did not commingle the $5,000 he misappropriated, in finding that it did not constitute a misrepresentation when respondent stated in his answer to the Request for Investigation that he "thought the $5,000 check was endorsed"; by failing to return appropriate discipline based upon findings of misappropriation and forgery; and by not requiring the $5,000 restitution to be paid directly to the complainant.

The Board affirms the panel's factual findings, including those dismissing allegations of commingling and misrepresentation in the answer to the Request for Investigation, and affirms the panel's decision to direct respondent to make restitution to the estate of William Mork. However, we increase discipline in this matter to a suspension of 180 days.

The Formal Complaint alleges that on May 19, 1992, respondent met with William Mork and Mr. Mork's niece, Patricia Peters, at which time he was retained to represent Mr. Mork in a criminal proceeding. Mr. Mork agreed to pay respondent a $5,000 fee for representation through the pretrial proceedings. On May 27, 1992, Mr. Mork died and valuables in his apartment were secured by the police. Later that day, after Ms. Peters informed respondent of Mr. Mork's death, he told her that he would assist her in obtaining the return of Mr. Mork's valuables and accompanied her to the police station. The valuables recovered from the police included an unendorsed bond receipt for $500 and a credit union check, made payable to Mr. Mork, in the amount of $5,000.

Count One alleges that on May 27, 1992, respondent signed the name of his deceased client, William Mork, to the bail bond receipt, and placed on the bail bond receipt the further language: "Pay to the order of Petricia [sic] Ann Peters"; informed Ms. Peters that she could keep the bond monies of her deceased uncle; falsely represented to Ms. Peters that her husband had agreed that respondent be entitled to received the $5,000 credit union check that was among Mr. Mork's personal effects; endorsed the name of his deceased client to the $5,000 check and placed on the draft the further language: "Pay to the Order of James H. Ebel"; and took possession of the instrument.

Count Two alleges that on May 28, 1992, respondent deposited the $5,000 check into his personal bank account. Count Two further alleges that he commingled the $5,000 with his personal funds by depositing the monies into his personal account; failed to maintain the funds in trust in that from May 28, 1992 until November 19, 1992, he issued checks against his personal account, misappropriating $4,765.68; and failed and neglected to return the $5,000 to the estate of William Mork or its heirs or assigns.

Count Three alleges that, in his answer to the Request for Investigation, respondent stated the following: He represented

that he "thought the $5,000.00 check was endorsed" before he received it, thereby denying that he had endorsed it himself; represented that Ms. Peters' husband told him to ask Ms. Peters for payment of his fee; and represented that thereafter, Mr. Peters asked his wife if she had paid respondent and that she replied, "Yes, I'm all set." Count Three further alleges that these statements were false, and were known by respondent to have been false at the time they were made for the reasons that respondent endorsed the check, and the Peters had not given him authority to retain the proceeds.

In an order and report issued July 6, 1994, Tri-County Hearing Panel #78 found that the misconduct alleged in Count One, in its entirety, had been established by a preponderance of the evidence. As to Count Two, the panel dismissed the charge of commingling, finding only misappropriation and failure to return the $5,000 to the estate. The panel dismissed the charges of willful misrepresentation in Count Three. Following a separate hearing to determine the appropriate discipline, the panel ordered a reprimand and restitution to the estate of William Mork in the amount of $5000.00.

On review, the factual findings of a hearing panel are to be reviewed by the Attorney Discipline Board for proper evidentiary support in the whole record. Grievance Administrator v August, 438 Mich 296; 475 NW2d 256 (1991). Based upon its review of the whole record, the Board concludes that there is proper evidentiary support for the hearing panel's findings. The Board therefore affirms the panel's findings of misconduct as well as its dismissal of the charges of commingling contained in Count Two and the charges of willful misrepresentation contained in Count Three.

While the Board reviews a panel's findings for proper evidentiary support, it possesses at the same time a greater measure of discretion with regard to the appropriate level of

discipline. August, supra at 304; In Re Daggs, 411 Mich 304, 318-319; 307 NW2d 66 (1981).

We conclude that respondent's misconduct warrants a suspension of sufficient length to trigger the reinstatement proceedings described in MCR 9.123(B) and MCR 9.124. Discipline in this case is therefore increased to a suspension of 180 days.

It is axiomatic that "the seriousness of the misconduct is a factor to be considered in deciding on a sanction." In re Robertson, 618 A2d 729, 725 (DC App 1993). (Six month suspension for an attorney who smuggled a reporter into a prison). This is true whether the misconduct in a particular case falls within broad easily described categories such as neglect of client matters and misrepresentation to a tribunal or, as in this case, presents a fact situation for which there are few precise precedents. Indeed, our Supreme Court has stated that:

> In reviewing the discipline imposed in a given case, we are mindful of the sanctions meted out in similar cases, but recognize that analogies are not of great value.
>
> > As a hypothetical proposition, we find dubious the notion that judicial or attorney misconduct cases are comparable beyond a limited and superficial extent. Cases of this type generally must stand on their own facts.

Matter of Grimes, 414 Mich 483; 326 NW2d 380 (1982) citing State Bar Grievance Administrator v DelRio, 407 Mich 336, 350; 285 NW2d 277 (1979).

In its report, the hearing panel concluded:

> After Mr Mork's death, respondent accompanied Mr and Ms Peters to the police station and Mr Mork's house. At the house, respondent reminded Ms Peters that he had not yet been paid. Ms Peters found and gave respondent a $5000.00 check drawn on Mr Mork's bank account which appearaed to be the check intended for

> respondent. While at the house, respondent signed Mr Mork's name to the bail bond receipt to assist Ms Peters in obtaining a refund of the $500.00 she had posted for Mr Mork's bond. Ms Peters subsequently obtained a refund of the $500.00 without showing the receipt.
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> At some point, respondent learned that the $5000.00 check was payable to Mr Mork, not to himself, Respondent decided to write "pay to the Order of James H Ebel" on the back of the check, then he signed Mr Mork's name, and then he signed his own name on the check. Respondent then deposited this check in his general account.

Hearing Panel Report, 7/6/94, p 2.

These findings that the respondent signed the name of his deceased client to the bail bond receipt and as an endorsement on a $5000 check made payable to the client are not disputed by the respondent. He argued to the hearing panel and the Board that he signed his client's name to the bail bond receipt because the receipt was mistakenly issued in Mork's name. Respondent's claim that he endorsed name to the check because he knew it had been obtained for the express purpose of paying the respondent's legal fee does not minimize the seriousness of the respondent's misconduct.

There is nothing particularly unusual about the situation in which a client dies leaving an unpaid debt to a lawyer for legal fees. Leaving aside any issues of whether or not the respondent had a right to charge a "non-refundable fee" in this case or whether or not he was entitled to a $5000 fee for the services he actually performed for Mork, and assuming that Mork had been indebted to the respondent for a legal fee of $5000 at the time of his death, the respondent enjoyed a status no greater than any other creditor of Mork's estate when he accompanied Ms. Peters to Mork's house.

Let us assume further that, at the time of his death, Mork had also promised to pay $5000 to a physican for services rendered and

$5000 to a retailer for furniture already delivered. Would the respondent, or any other attorney, have allowed the physician or the retailer into Mork's house to search for unendorsed checks and then allow the decedent's name to be endorsed on those checks? We think not.

This case is clearly distinguishable from Matter of Helm, 36292-A (Brd. Opn. 7/7/80) cited by the respondent and relied upon by the panel. In Helm, the respondent had negotiated a settlement of a client's claim for damage to the client's automobile. Further negotiations were concluded with a bank which claimed a lien on the vehicle and Helm ultimately received a check from the bank payable to himself and his client. Unable to locate his client, the respondent admitted that he caused his client's name to be endorsed on the settlement check and that he then deposited the check into his clients' trust account where the funds remained until the client reappeared. In reducing a fifteen-day suspension to a reprimand, the Board noted the delay in the complainant's protest, the lack of harm to the complainant and the lack of any intent to defraud or unlawfully profit from an act which the Board described as "technical misconduct."

In Helm, the funds belonging to the client were held for the client's benefit in an appropriate trust account pending communication from the client. By contrast, the respondent's actions in this case were designed to benefit only one person--the respondent himself. It is undisputed that the respondent knew when he went to Mork's house that his client was dead. It required no sophisticated legal training for the respondent to know that the sole right and title to Mork's personal property had passed to Mork's estate. Notwithstanding the respondent's assumption that the bail bond receipt had been mistakenly made out to Mork and that the $5000 check payable to Mork from his credit union was intended for payment of respondent's legal fees, there were no notations on

either instrument which would support a claim that they were payable to any person other than William Mork.

While we do not believe, on the one hand, that the respondent's conduct in this case may be characterized as a mere "technical violation," neither did it rise to the level of deliberate forgery or embezzlement of client funds which would require the imposition of discipline in the range of a suspension of three years to revocation. While the respondent exhibited an astonishing lack of professional judgment in signing the name of his deceased client to the bail bond receipt and the check, there is no evidence in the record suggesting that this was other than an isolated incident in a legal career of more than twenty-five years.

Finally, we have considered the Grievance Administrator's request to reverse the hearing panel's order that the respondent reimburse the sum of $5000 to the Estate of William Mork, and, if there is no estate, to open a decedent's estate at his own cost. In its report, the panel noted:

> Respondent shall then be entitled to make a claim against the estate for the funds as may Ms Peters, who also claims that the funds were hers under the joint account. From the information provided to the panel, the panel was unable to determine who has the right to this property and in what amounts and thus feels that the only workable result would be require payment to an estate so that all potential creditors and claimants may have an opportunity to claim the funds.

Hearing Panel Report, 7/6/94, p 5, footnote 4.

The Grievance Administrator seeks an order from the Board requiring the respondent to waive any claim to a fee of $5000 and ordering the respondent to stipulate that the money should be turned over to Mork's niece, Patricia Peters. The hearing panel acted appropriately in declining to adjudicate claims which are properly within the jurisidiction of a probate court.

Board Opinion re: James H Ebel; 94-5-GA

Board Members, John F Burns, C Beth DunCombe, Marie Farrell-Donaldson, Elaine Fieldman, Barbara B Gattorn, Linda S Hotchkiss and Miles A Hurwitz.

Board Member Albert L Holtz dissents and would affirm the hearing panel's order of reprimand.

Board Member George E Bushnell, Jr did not participate.