Grievance Administrator,
State of Michigan
Attorney Grievance Commission,

Petitioner/Appellant

v

Richard E. Meden, P 17580,

Respondent/Cross-Appellant.

92-106-GA

Issued: July 30, 1993

BOARD OPINION

Based upon the evidence presented, the hearing panel concluded that the respondent misappropriated funds entrusted to him, that he failed to respond to the legitimate inquiries of the parties who had an interest in those funds, was not truthful, with those parties and that he did not fully and fairly disclose the facts and circumstances pertaining to the alleged misconduct in response to the Request for Investigation served by the Grievance Administrator.

Respondent's conduct was found to be in violation of MCR 9.104(1-4,6); MCR 9.113(A) and the Michigan Rules of Professional Conduct, MRPC 1.15; 4.1; 8.1 and 8.4(a,b). The panel's order suspending the respondent's license to practice law in Michigan for eighteen months was accompanied by a majority opinion on discipline which summarized the aggravating factors considered by the panel and noted the absence of relevant mitigating factors. A dissenting opinion on discipline was filed by a third panel member in favor of disbarment.

Having considered the separate petitions for review filed by the Grievance Administrator and the respondent and having reviewed the entire record before the panel, we are persuaded that revocation of the respondent's license to practice law is warranted.

The Findings of Misconduct:

Our review of the file is governed by the standard enunciated by the Supreme Court in Grievance Administrator v Irving August, 438 Mich 296; 475 NW2d 256 (1991). Applying that standard, it is clear that the hearing panel's findings and conclusions have ample evidentiary support.

The allegations in this formal complaint arise out of the respondent's representation of the sellers in a real estate transaction. The respondent's clients held the property as vendees under the terms of a land contract. In connection with his representation of the sellers, the respondent received a check from GMAC Mortgage Company on August 17, 1990 in the amount of $48,223.15. It is undisputed that the respondent undertook the responsibility of an escrow agent for the purpose of distributing the appropriate funds to those persons holding an interest in the property upon his receipt of the necessary warranty deeds. The funds from the mortgage company were deposited into his trust account. After disbursement of funds to his client and for closing costs, there remained in the trust account approximately $24,000 which was to be used to discharge his client's obligation under the land contract. It is not disputed that funds to discharge the land contract were not distributed by the respondent for almost one year. On August 6, 1991, the respondent distributed the necessary payoff checks, including the payoff on his client's land contract.

While there is conflicting evidence in the record as to those charges in the complaint that the respondent failed to provide timely notice to the land contract vendor or her attorney of his receipt of the proceeds, that he failed to promptly deliver those proceeds, that he failed to respond to legitimate inquiries concerning the funds and that he was not truthful in his answer to the Request for Investigation, there is proper evidentiary support in the record for the panel's conclusion that those charges were established. To the extent that the panel's findings suggests that the panel was not persuaded by the respondent's testimony as to the reasons for the delay and the extent of his communication with the interested parties, we defer to the hearing panel which had the first-hand opportunity to judge credibility. Matter of Leonard R. Eston, DP 48/85, Brd. Opn. (1/28/87); Schwartz v Walsh, DP 16/83 Brd. Opn. p. 333 (1984).

In support of the charge that the respondent misappropriated the funds entrusted to him, the bank records admitted into evidence clearly establish the steady depletion of the respondent's trust account from October 1990 when the balance first fell below the amount necessary to payoff the land contract until August 6, 1991 when the account was overdrawn by $319. On that date, the respondent wrote and distributed the payoff checks and they were covered by a deposit of approximately $48,000 on August 8, 1991.

The respondent admitted the intentional depletion of the trust account to discharge his own personal or professional obligations but testified in his defense that in October 1990 he maintained personal funds of approximately $55,000 in cash in his office, that he placed $48,000 in cash in a separate envelope entitled "Biggs, Richards, Lewis, escrow money", and that that cash was maintained

in his office safe from November 5, 1990 until August 1991. In rejecting this wholly unsubstantiated testimony, the hearing panel reported:

> "Testimony of respondent Richard E. Meden was offered, regarding isolation of escrowed funds in his office safe which, if believed, might establish or tend to establish a defense on the part of respondent. However, it is the factual finding of the panel that Mr. Meden's explanation was not credible". (Hrg. Pnl. Opn. dated 9/17/92).

On this issue, we also defer to the hearing panel's assessment of credibility and we note further that the panel's skepticism of this defense was wellfounded. In Matter of Wilfred C. Rice, 90-85-GA, Brd. Opn. (10/11/91) we cited the Louisiana Supreme Court's opinion of such a defense:

> "Indeed when an attorney relies on a 'black box' defense, viz., that he kept client funds secretly but securely in a private safe or similar unregulated depository, the likelihood of actual embezzlement is so great, and the policy of professional responsibility in protecting the client from such risks so strong that it should be presumed that the attorney is guilty of embezzlement unless he successfully carries both the burden of going forward with the evidence and the burden of persuasion otherwise". Louisiana State Bar Association v Krasnov, 488 SO2d 1002, (LA 1986)

Level of Discipline:

Increased discipline is warranted in this case in light of two factors. Interestingly, both factors were cited in nearly identical language by the hearing panel majority which imposed a suspension of eighteen months and the panel's minority member who concluded that disbarment was required. We are unanimous in our decision to adopt the reasoning of the dissenting panel member.

First, we must consider the gravity of the respondent's misconduct. The Board has previously stated that discipline ranging from a suspension of three years to disbarment is appropriate in misappropriation cases. Grievance Administrator v Charbonneau, DP 103/83 and DP 126/83 (1984) [increasing discipline from a one-year suspension to revocation]; Matter of Arthur Porter, Jr., ADB 204-87 (1989) [reducing revocation to a suspension of five years]; Matter of Muir B. Snow, DP 211/84 (1987) [two-year suspension increased to a three-year suspension]; Matter of John D. Hasty, ADB 1-87 (1988) [affirming three-year suspension]; Matter of Kenneth M. Scott, DP 178/85 (1988) [six-month suspension increased to a three-year suspension].

In those cases in which misappropriation of funds has resulted in discipline less than revocation, the Board has specifically identified those mitigating factors which warranted consideration. In this case, the hearing panel properly rejected the respondent's belated attempt to claim that his conduct should be mitigated by an impairment of alcohol use. The Board does note the respondent's prior unblemished record and evidence of service to the profession and his community. The mitigating effect of those factors is outweighed, however, by the aggravating effect of the respondent's repeated misrepresentations to the panel during the course of these disciplinary proceedings.

Other aggravating circumstances were properly recognized by the hearing panel: A prior admonishment, a dishonest or selfish motive, substantial experience in the practice of law and refusal to acknowledge the wrongful nature of his conduct [ABA Standards for Imposing Lawyer Sanctions, Standards 9.22(a,b,g,i)]. However, it is the panel's finding that the respondent submitted false statements and engaged in other deceptive practices during the proceedings which must be given the greatest weight.

At the original hearing on misconduct conducted on June 17, 1992, the respondent testified that he was never addicted to alcohol or any other substance and he testified affirmatively that he had never received psychological treatment for any type of addiction. At the hearing on discipline on November 2, 1992, it was established that the respondent had attended Alcoholics Anonymous following a 1990 conviction of impaired driving. At that hearing, respondent admitted that he is an alcoholic and that his prior testimony to the contrary was false. This discrepancy, standing along, could be discounted to some extent inasmuch as denial has long been recognized as a hallmark of alcoholism. Of far greater concern, is the respondent's admission at the hearing on discipline that he had received psychological treatment for his alcoholism. Whether the respondent was prepared to recognize and deal with an impairment, his prior testimony on the factual issue of whether or not he had ever received psychological treatment was simply false.

At the hearing on June 17, 1992, the respondent testified affirmatively that he had never been sued for collection of a debt. This testimony was shown to be false by the submission of evidence of approximately five law suits for collection of debts filed against respondent between 1986 and 1988.

Lack of candor during the disciplinary process has been recognized by the American Bar Association's Standards for Imposing Lawyer Sanctions as an appropriate factor to be considered in aggravation. In fact, we can conceive of few factors deserving of greater weight in aggravation than a finding that an attorney has given false testimony during disciplinary proceedings.

Respondent's Request for Relief Under MCR 9.121:

In support of his petition for review, the respondent, through his counsel, has raised the issues of the respondent's eligibility for a transfer to inactive status in accordance with MCR 9.121(B) or, in the alternative, the entry of an order of probation as described in MCR 9.121(C).

The Court Rules authorize the Board to transfer an attorney to inactive status on grounds of incompetency or disability only if the attorney has been judicially declared incompetent or involuntarily committed, [MCR 9.121(A)] or if a compliant has been filed by the Administrator alleging that an attorney is incapacitated because of mental or physical infirmity or disability or because of an addiction to drugs or intoxicants. [MCR 9.121(B)]

The record in this case is devoid of any competent medical evidence pertaining to the respondent's mental or physical condition. The Board is without authority to transfer an attorney to inactive status under that rule based solely upon the unsupported assertions of the respondent or his counsel.

The Board may, in a proper case, consider an assertion of impaired ability as grounds for the entry of an order of probation as described by MCR 9.121(C). However, that rule requires satisfaction of the criteria set forth in MCR 9.121(C)(1)(a-d) by a

preponderance of the evidence, submission to a physical or mental examination by a physician if the respondent has alleged physical or psychiatric disability and, finally, a determination that an order of probation is not contrary to the public interest. Upon fulfillment of those requirements, a hearing panel, the Board or the Supreme Court may, as a matter of discretion, enter an order placing a respondent on probation for a specific period. The necessary grounds for such an order have not been established in this case.

Conclusion:

As the adjudicative arm of the Michigan Supreme Court for discharge of its responsibility to supervise and discipline Michigan attorneys, the Attorney Discipline Board has been given the authority to review orders of discipline issued by a hearing panel. Keeping in mind the general principle enunciated in MCR 9.103(A) that the license to practice law in Michigan is a continuing proclamation that the holder is fit to be entrusted with professional matters and to aid in the administration of justice as an attorney and counselor, we cannot, in good faith, make such a proclamation with regard to this respondent. It is therefore our decision that the suspension of eighteen months imposed by the panel should be vacated and the respondent's license to practice law in Michigan should be revoked.