IN THE MATTER OF RONALD J. PREBENDA,
A Member of the State Bar of Michigan,
File No. DP-165/80

Decided: December 3, 1981

PLURALITY OPINION

COTE, Chairperson, SHECTER, Vice-Chairperson, and McDEVITT, Board Member:

Respondent was charged in a three-count Formal Complaint with participation in fraudulent attorney fee and stock-sale schemes, and with either perjuring himself before a grand jury or falsely answering a Request for Investigation. Wayne County Hearing Panel E found misconduct relating to the fee and stock-sale schemes, and suspended Respondent for one hundred twenty-one days. Both the Grievance Administrator and Respondent moved for review. The Grievance Administrator argued on review that the count which charged Respondent with perjury, or in the alternative with making untrue responses to the Request for Investigation, had been proved and that discipline should be more severe. Respondent claimed that mitigating circumstances relating to his emotional state should have been given greater weight by the hearing panel. We would affirm the findings of the panel on Counts I and II, which charge participation in fraudulent attorney fee and stock-sale schemes, and reverse dismissal of Count III which charges either perjury or making false statements in the Request for Investigation. We would increase Respondent's suspension to one year.

Prebenda has been an attorney for almost twenty-five years and has no prior record of misconduct. These disciplinary charges resulted from his relationship with several trucking firms from 1971-75.

Prebenda's father was a member of the Teamsters Union, and had worked with Frank Fitzsimmons before Fitzsimmons became President of the Union. Respondent knew Frank Fitzsimmons' son, Richard, as they were growing up. He had little contact with Richard Fitzsimmons until about 1971. At an informal meeting during that year, the two discussed Respondent's career. Fitzsimmons put Prebenda in touch with officials of a large Chicago trucking concern, Freight Consolidation Systems [FCS], in order to consider Prebenda's retention as the firm's Detroit attorney. Under an oral agreement made with FCS officials, in Richard Fitzsimmons' presence, Prebenda was made counsel both for FCS and for a Detroit trucking firm [Kubach] which FCS effectively controlled. Kubach received almost all of its business from FCS,

although there was no formal corporate connection. As part of his retainer agreement with FCS, the firm was to turn over to Respondent 5% of Kubach's monthly gross receipts. The fee paid to Respondent bore no reasonable relation to the amount of legal services to be performed by Respondent for FCS and Kubach.

Respondent began to see Fitzsimmons on a more frequent basis. Fitzsimmons began to send Prebenda some of his hotel, restaurant, and other bills for payment by Respondent. Fitzsimmons told Respondent he was 'short of cash' and asked that his bills be paid temporarily by Prebenda. Respondent complied with these requests, and this bill-paying arrangement evolved into a direct monthly bonus to Fitzsimmons, who was at the time an active Teamsters official. Fitzsimmons testified before the panel that Respondent never objected to this arrangement. Panel tr. at 407-08.

In addition, an FCS official named Klein, who at Fitzsimmons request had helped arrange Prebenda's retention as counsel, directed Respondent to pay him a monthly kickback out of Respondent's fee. Prebenda would meet Klein each month at a prearranged spot in Detroit, and hand him the kickback in cash. Panel tr. at 63. In 1972, a year after the 'retainer' agreement was executed, Respondent became disturbed with the arrangement and told Fitzsimmons he wished to withdraw. Subsequently, Respondent testified that Fitzsimmons and others threatened him and his wife and children with physical harm unless he continued to cooperate in the kickback scheme. Panel tr. at 262; 269; 277; 282-83. Finally, the kickback and 'retainer' arrangement was ended at the direction of Fitzsimmons and an FCS official in 1975. Panel tr. at 72-73.

Respondent owned 150 shares of Freight Consolidation [FCS] stock when he decided to sell in 1976. Prebenda entered into a stock-sales agreement with five purchasers; two of the purchasers were FCS officials and one of these officials was Klein. These two officials handled the stock-sale transaction with Prebenda and Fitzsimmons on behalf of themselves and the three other purchasers. They obtained Prebenda's signature on a sales agreement. According to Respondent, however, the purchase price agreed on, $750 per share, or a total of $112,500, was not written into the agreement at the time Prebenda executed it. The FCS officials actually paid Respondent $112,500 for the stock, and later inserted the figure "$225,000" in the sales agreement, thus falsely indicating that this higher figure was Prebenda's offer and was the combined price to be paid by all five purchasers.

On the basis of this higher figure, the two officials fraudulently convinced their three co-purchasers (who did not know the actual offer/sales price) that each buyer's payment was to be at the rate of $1,500 per share of stock. The FCS officials kept the difference between the amount actually paid Respondent for his

stock and the price the other purchasers were induced to pay. Prebenda testified that he wrote the figure "$112,500" on the back of the document to warn the purchasers. Although Respondent claimed he did not have actual knowledge that a fraud was to be perpetrated when he signed the sales agreement, he later learned of the fraudulent transaction. Panel tr. at 291-99.

The FBI eventually contacted Respondent in connection with an investigation concerning violations of 29 USC Section 198, which provides that it is a misdemeanor for officers of a company which does or may employ members of a union to make payments to officials of that union, and of 18 USC Section 1962, which makes it a felony to make two or more such illegal payments. While Richard Fitzsimmons was the focus of an investigation by a subsequently empaneled Federal Grand Jury, Prebenda agreed to testify before the Grand Jury.

The Grand Jury heard Prebenda's testimony concerning his relationship with Kubach, but only peripherally considered his services for FCS. Prebenda told both the Grand Jury and the hearing panel that he performed little work for Kubach. Panel tr. at 49-52. By contrast, Respondent stated in his answer to the Request for Investigation that he had earned "every dime" of the money received from Kubach. Memorandum of Respondent's Reply to Request for Investigation at 19.

Prebenda began to see a psychiatrist in 1970, prior to the events stated above. Respondent told his doctor in 1971, the year he entered into the retainer agreement, that he was happy with the arrangement and hoped it would advance his career. Panel tr. at 561. By early 1972, however, Prebenda told his psychiatrist that he felt he was in a "mess." Panel tr. at 570-71. The psychiatrist testified before the panel that Prebenda, beginning in 1972, was afraid of Richard Fitzsimmons. Panel tr. at 577. Testimony also showed that, for a time, Respondent suffered a sharp deterioration in his ability to function, and sometimes could not get out of bed to go to work. Panel tr. at 620. This was two to three years after Prebenda entered into the FCS agreement.

I.

Count I of the Formal Complaint contained allegations of dishonesty, and collection of an illegal or excessive fee. The panel found that these allegations were proved, and we would affirm this finding.

There is no question that Respondent received monthly fees from Kubach, and paid a portion of those fees to Fitzsimmons and the FCS official. The panel found that when Respondent entered into the agreement in 1971, he did not know that he would become a "pawn" for the passing of money from Kubach to Fitzsimmons and the

FCS official, Klein. The panel further found that Prebenda should have taken steps to end the money-passing arrangement when he became aware of his role.

Despite the later threats that Respondent and his family received, Prebenda was fully culpable. Respondent did not enter the arrangement with wholly clean hands; he had practiced law for many years and he realized the possibility of coercion, intimidation and, as Respondent admits, even violence when dealing with certain of the parties involved. Panel tr. at 353. Even if Respondent did not fully appreciate that he was to become a party to illegal conduct, the arrangement was highly suspect. He knew that the agreement with FCS called for him to receive a retainer based on a percentage of the gross receipts of a trucking firm, regardless of the worth of any legal services to the firm. There was no written retainer agreement detailing the work to be performed, or tying the quantum of legal service to monthly profits of the company.

Respondent apparently willingly took a calculated risk. He realized the dangers, but balanced them against a lucrative fee arrangement. This does not shield Respondent from his participation in the illegal money-passing scheme, although he later may have participated under some duress. Even then, he did not extricate himself from the situation; it was Fitzsimmons who ended the scheme. Further Prebenda never reported these matters to law enforcement officials.

II.

The allegations in the Second Count as argued before the panel may be paraphrased as follows:

> 1. That Mr. Prebenda met with Klein, Fitzsimmons, and another FCS official and agreed with them that Respondent's 150 shares of FCS stock would be sold for $225,000;
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> 2. That Respondent executed a purchase offer for the sale of his shares which agreement cited a sales price of $225,000;
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> 3. That contrary to the terms of the written sales agreement, and with knowledge of the intended fraud, Respondent orally agreed to accept $112,500 for the stock;
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> 4. That Mr. Prebenda executed later agreements to sell his shares to five purchasers, including the two FCS officials and three other individuals;

> 5. That based on Respondent's written offer which recited a sales price of $225,000 the two FCS officials induced the three other purchasers to buy their shares from Respondent at a cost of $1,500 per share, although Respondent had actually accepted $750 per share from the two FCS officials;
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> 6. That, at the closing, Respondent accepted payments from the three unwitting purchasers at the inflated price, and accepted payments from the FCS officials at the lesser price.
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> 7. Finally, although Mr. Prebenda was aware of the fraud against three of the five purchasers, he made no further inquiries and took no further action regarding he

The hearing panel did not accept all of the charges as alleged in Count II but found as follows:

> 1. That Respondent had initially agreed with Klein, Fitzsimmons, and the other FCS officer to sell for $112,500, not for $225,000;
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> 2. That Respondent executed a purchase offer which, at the time of execution, was blank as to the sales price, although Mr. Prebenda knew he was to receive $112,500;
>
> 3. That, at the time he executed the stock agreement, Respondent knew something was "amiss" since he wrote the figure "$112,500" on the back of the sales agreement;
>
> 4. That Mr. Prebenda had a duty to inform the other three purchasers of the actual amount he was to receive for the stock.

The Complaint charged, in effect, a conspiracy between Respondent, Fitzsimmons, and the two FCS officials to defraud the other purchasers - - the panel found this was not proved. However, the panel found the Grievance Administrator proved the allegation that Respondent knew when he accepted payment that three of the purchasers (not present when Respondent signed the sales agreement) paid a disproportionate amount and that Respondent took no further action to warn them. Report of Hearing Panel at 3.

We would affirm the findings and conclusions of the panel on Count II. Testimony shows that Respondent did know something was unusual when he was asked to sign a sales agreement on which the space for the sales price was left blank. Panel tr. at 293. Respondent wrote the actual price on the back of the document, which indicates he had some anticipation of fraud. Panel tr. at 293. Respondent admitted that he suspected that a fraud would likely be perpetrated upon some of the stock purchasers. Although Respondent made no fraudulent or deceptive statements himself, he failed to take effective action to protect the purchasers, and merely wrote the actual price on the back of the document, which was hardly a sufficient warning to an unsuspecting subsequent purchaser.

We note with interest the provision of MSA 19.776(101); MCL 451.501:

> "It is unlawful for any person, in connection with the offer, sale, or other purchase of any security or commodity contract, directly or indirectly: (1) To employ any device, scheme, or artifice to defraud. (2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading. (3) To engage in any act, practice, or course of business which operates or would operate as a fraud upon any person."

It has been held that the duties of full disclosure and fair dealing imposed under this Act are legal duties which remain constant upon a person in connection with the offer, sale, or purchase of any security. The Act requires full and fair disclosure of all material facts in connection with the offer, sale, and purchase of securities, and a material fact is one that a reasonable investor might have considered important to his investment decision. People v Cook, 98 Mich App 72, 279 NW2d 579, leave to appeal denied (1979). It does not appear from the record that Respondent met his duties under this Act.

Respondent told his psychiatrist at the time of the stock-sale that he knew "[o]ther people would then be cheated * * * and they would have to pay more for * * * what [Respondent] was selling." Panel tr. at 582. There is a preponderance of evidence to support the findings of misconduct relative to Count II.

III.

Count III charged Respondent with perjury before the Federal Grand Jury or, in the alternative, with falsely answering the Request for Investigation, Before the Grand Jury, Prebenda testified that he had performed no significant legal services for Kubach, Grand Jury tr. at 15-16, 51. However, in his answer to the Request for Investigation he asserted that all of his fees were earned. Memorandum of Respondent's Reply to Request for Investigation at 2, 12, 19. The hearing panel dismissed this Count, commenting:

> "it is not up to the Panel to determine whether in fact the fee agreement between the client and his attorney are [sic] unconscionable where the client is not objecting to the same [and because] the Government was interested in only the minimum proof necessary to prove those elements for an indictment from the grand jury and would not delve into each and every aspect of the arrangement between Prebenda and the other members of the "program" that existed here." Report and Order of the Hearing Panel at 4.

These comments do not touch the gravamen of Count III, the "inconsistencies" between the Answer to the Request for Investigation and the Grand Jury testimony of Respondent. It was apparent that Respondent never reconciled the two.

In his testimony before the Grand Jury on January 31, 1979, Respondent testified as follows:

> "Q. [by the U.S. attorney] Now, when you were billing Kubach Trucking for legal fees on a retainer basis, were you, in fact, performing legal services for Kubach Trucking?
> A. No. * * * At that point in time I was told I may be doing minor things for Kubach Cartage. In fact, I did, on one or two occasions, go out there and spend a half hour on something.
> Q. [by Grand Juror] In other words, just so you're available when they would need you?
> A. It was not that, really. What it really was, the money was being given to me to pass on to Fitzsimmons and Klein [the FCS official]." Grand Jury tr. at 15-16, 51 (emphasis added).

In stark contrast to his Grand Jury testimony, Respondent in his

answer to the Request for Investigation asserted, writing in the third person:

> "* * * the monies he [Prebenda] received were pursuant to a lawful retainer agreement and he did, in fact, perform extensive legal services for those monies. * * * There can be no question that the Respondent earned each and every dime of the monies that he received from the three companies in question [collectively call "Kubach"] and that this retainer paid by [Kubach] was not a method of passing money through to Mr. Richard Fitzsimmons." Memorandum of Respondent's Reply to Request for Investigation at 2, 19 (emphasis added).

A fair reading of Prebenda's Grand Jury testimony in comparison to his answer can only lead to the conclusion that both stories -- presented to the Grand Jury or in his reply to the Request for Investigation could not be true, The panel's findings should therefore be reversed, and we would find all disciplinary rules alleged in Count III were violated.

IV.

In its Report, the hearing panel found under Count I that:

> "when Mr. Prebenda was approached for the direct payment of cash * * * he should have taken action to cease and desist the situation which existed. It is this inaction on his part that the Panel specifically finds him guilty of, under Count I." Report and Order at 2.

In its findings under Count II, the panel wrote:

> "his misconduct [occurred] at the point when he [knew] that that agreement would be used for the purposes of selling that stock * * * to other stockholders and that he had a duty at that point to either verbally or in writing, notify the other stockholders as to the actual amount he was receiving for his share."

Respondent attacks these findings as erroneous on the grounds that the disciplinary rules with which he was charged contemplate only action, not inaction as subject to discipline. This argument

is without merit. The discipline rules encompass "conduct" consisting both of action and inaction. In any case, the Board is empowered under GCR 1963, 967.3(a) to "make a final decision on consideration of the whole record." The record before us amply sustains the allegations of affirmative misconduct in the Formal Complaint sufficient to sustain the panel's finding of violation of the discipline rules.

V.

There is some difficulty in assessing the probative value of the psychiatrist's testimony. The doctor kept note-taking to a minimum during Prebenda's therapy, which is the normal practice of many psychiatrists, Unfortunately any notes and medication records the psychiatrist made during Prebenda's therapy were destroyed in an office fire in 1975 or 1976. Panel tr. at 623-24. Consequently, the psychiatrist's testimony was entirely from memory about statements which were made almost a decade before. The doctor was unable to recall specific dates regarding the onset of the various phases of Respondent's emotional crises and the administration of anti-depressive drugs.

The hearing panel noted in its Report that Respondent's judgment may have been "clouded" due to his medication and psychological problems, but that this does not serve to exculpate him entirely. It is not error that the panel did not place greater emphasis on the psychiatrist's testimony for even unchallenged expert testimony may be disregarded by the trier of fact.

> "When the trier [of fact] * * * receives opinion testimony of mental incapacity or illness on the one hand, as against lay testimony of facts indicating knowledge of right, or wrong, of capacity and of fair understanding of the result and impact of emotional attitudes and changes thereof, there is no legal obligation to accept the former over the latter." Vial v Vial, 369 Mich 534, 536-37, 120 NW2D 249 (1963).

We agree with the panel's determination that Respondent, despite his mental difficulties, was not so ill as to remove his culpability. His judgment was clear enough to enter into the retainer agreement and stock-sale, to participate in these arrangements over several years' time, and to tell his psychiatrist of his doubts about the propriety of these activities.

VI.

We would suspend Respondent for one year. His misconduct is severe, and his actions show him to be culpable. We would Impose greater discipline but for the lack of prior misconduct, Reibel v Schwartz, No. DP-141/80 (Mich ADB 1981); his record of public service, Drew v Schwartz, No. DP-32/80 (Mich ADB 1981), and the probability that threats and psychological difficulties lessened the quality of his judgment to some degree.

We would decline to place Prebenda on probation under GCR 1963, 955 and 970 (as amended in 1981). These court rules permit a hearing panel of the Board to place a Respondent on probation if Respondent asserts in mitigation and demonstrates that: (1) during the period of misconduct his ability to practice law competently was materially impaired by reasons of mental disability; (2) the impairment was the cause of, or substantially contributed to, that misconduct; (3) the cause of the impairment is susceptible to treatment; and (4) he in good faith intends to undergo treatment, and submits a detailed plan for such treatment.

Even assuming arguendo that parts (1), (3), and (4) of the probation rule have been satisfied, something which we do not decide here, we do not think that part (2) has been met. There is no evidence in the record that Respondent's misconduct (his participation in the retainer kickback scheme, the fraudulent stock-sale, or his false answers) was caused by or substantially contributed to by any alleged mental disability. Indeed, the testimony of Prebenda's psychiatrist was that after the retainer scheme began Respondent's functioning improved, panel tr. at 568, and that only after pressure from Fitzsimmons and others was placed on him did his mental condition decline. Although Mr. Prebenda attended psychiatric sessions before the misconduct occurred, and was diagnosed as a neurotic-depressive, his pre-misconduct problems related to childhood difficulties, not to contemporaneous stress. Panel Tr. at 564-65. Respondent possessed the mental competence to know the impropriety of his conduct; therefore Respondent is not an appropriate candidate for probation.

VII.

Integrity is the cornerstone on which public trust is built. Lawyers, due to their special opportunities and varied roles in society, sometimes stand to benefit financially through opportunities to engage in dishonest conduct. They must scrupulously avoid even an appearance of impropriety to meet the trust placed in them. It is the duty of this Board to impose a degree of discipline, where misconduct is found, commensurate with that misconduct. Respondent here was, or should have been, placed on notice that he was embarking upon a course of conduct

thatEwould alert an attorney of ordinary prudence. Because his retainer was paid for the purposes of a kickback, it was illegal and because Respondent failed to demonstrate a correlation between fees charged and legal services provided, the record supports a finding that the fees were excessive. More egregious are the fraudulent schemes which involved substantial funds and lasted over a period of years.

We would suspend Respondent for one year.

COTE, Chairperson, SHECTER, Vice-Chairperson, and McDEVITT, Board Member, concur, and would affirm the findings of fact on Counts I and II, reverse the findings in Count III, and increase the suspension.

MINORITY OPINION

LEWIS, Secretary, and REAMON, Board Member:

We affirm the findings of fact on Count l, the fraudulent fee arrangement, reverse the findings on Count II, the fraudulent stock-sale scheme, reverse the dismissal of Count III, and affirm the order of discipline. No majority of the Board concurring In the disposition of discipline, the order of the panel is affirmed.

We concur with the analysis of the Plurality Opinion on Counts I and III. The panel's finding of misconduct under Count II, however, is error, and should be reversed. There is no evidence that Respondent conspired to defraud the three unwitting purchasers of his stock. It is no misconduct that he signed a sales agreement in which a price was left out; the Freight Consolidation Systems [FCS] officials expressly told him they would have the figure "$112,500" typed into the space. Panel tr. at 292-93. Whatever duty he may have had to warn subsequent purchasers was discharged by endorsement on the agreement of the price orally reached. To retrospectively Impose on him further duties is an exercise In ex post facto decision-making. The record does not support a finding of misconduct under Count II.

The record in this case is among the longest ever compiled by a panel since the creation of this Board in 1978. For this reason particularly, special caution should exist where the Board seeks to substitute its judgment for the panel's ultimate decision. "[G]ood practice dictates that the Board refrain from amending panel decisions which have a rational basis and adequate support in the record." Schwartz v Grimes, No. 35939-A (Mich ADB 1981) (Lewis, Secretary, dissenting); see also Schwartz v Kennedy, No. 36454-A (Mich ADB 1980) (Lewis, Secretary, dissenting).

The order of discipline should be affirmed.

AFFIRMED IN PART AND REVERSED IN PART.

LEWIS, Secretary, and REAMON, Board Member, concur.

DISSENTING OPINION

MSGR. KERN, Board Member:

I would affirm the findings of the panel, but reduce discipline to a suspension of sixty days. Mr. Prebenda's father was a member of the Teamsters Union for many year-and was well-acquainted with the late Frank Fitzsimmons. It was quite natural and simple for Respondent to accept a job position arranged by Richard Fitzsimmons. His background and professional interest made such employment attractive to him; when he entered the arrangement his motives were, I believe, above reproach.

When Respondent later became caught-up in illegal activity, he was threatened. These threats seem very real, given the reputation of Mr. Fitzsimmons and some Teamsters officials. Mr. Prebenda was also under great psychological stress, and at one point contemplated suicide to protect his family from the threats being made against them. Surely, a man in this situation suffers from diminished culpability.

Mr. Prebenda has accomplished significant work for the community, and has a reputation for honesty, integrity, and helpfulness, as outlined at the panel hearing by the testimony of two attorneys and a priest. Panel tr. of June 19, 1981 at 3-22. I take this also to be important mitigation. However, Mr. Prebenda was involved in a fraudulent fee-taking and stock-sale, and is to some extent culpable. I think he should be disciplined, and would impose a suspension of sixty days.