IN THE MATTER OF ALPHONSE LEWIS JR.,
A Member of the State Bar of Michigan,
Respondent.
No. DP-11/80

December: March 18, 1981

OPINION OF THE BOARD

Respondent was charged with one count of converting and commingling the funds of the Complainants, his former clients. The hearing panel found Respondent had violated the disciplinary rules alleged, as well as two sections of the Michigan Criminal Code, MCLA Sec. 750.181 and Sec. 750.274, relating to embezzlement and the cashing of a note with intent to defraud. Respondent was suspended for one hundred forty days. He petitioned for review on three grounds: 1) that the record and report of the hearing panel did not support the conclusions reached by the panel; 2) that the chairperson of the hearing panel was biased against him; 3) that the panel did not demonstrate how his alleged conduct violated the Criminal Code. It is not necessary to decide the merits of these assertions because, pursuant to the agreement of the parties, we dismiss the Complaint with prejudice.

Respondent was retained by Complainants in 1971 to represent them in a suit. Respondent assisted Complainants in settling the suit and, as a result of the settlement, Complainants entered into an option agreement with the defendants. Tr. at 77-78. Eventually, the defendants failed to fulfill the option agreement, and Respondent began another suit on behalf of Complainants in this second action for $2,600. Counsel for the defendants then sent a money order to Respondent for the full amount of the judgment. This money order was made out jointly to Respondent and Complainants. Tr. at 78. Respondent received this money order in June, 1976. He testified that he notified Complainants on receipt of the money order. Tr. at 79. However, Complainants refused to endorse the money order because of a fee dispute with Respondent.

Early in 1977, Respondent went to court and obtained an ex-parte order authorizing him to endorse the money order with Complainant's names and cash it on condition that he deposit $1,000 of the $2,600 with the clerk of the court within fifteen days of cashing. Tr. at 87-88. However, Respondent did not deposit the $1,000 with the court, apparently because he expected to have the fee dispute settled within the fifteen day period. Respondent put the money in an envelope and locked it in his office. The fee dispute was later settled with Complainants for $1,000.

In its report, the hearing panel found that Respondent did not inform the Complainants for a substantial period that he had received their money order in satisfaction of the judgment. It also found that Respondent held the money order for eight months before obtaining the ex-parte order authorizing his endorsement and cashing of the money order. No funds were deposited with the clerk of the court, and the panel also found that the evidence showed that all of the $2,600 was commingled with Respondent's personal account. No mitigating circumstances were discovered.

Respondent argued on appeal that the facts in the record and report did not sustain the conclusion that he violated the disciplinary rules and criminal statutes alleged. He also argued that the chairperson of the hearing panel exhibited bias against him in his rulings during the proceedings. The transcript shows that there were an unusual number of objections made by both parties and that most of these were resolved by the chairperson against Respondent. This is not a basis for a finding of bias; because the Complaint is to be dismissed, this question need not be considered further. Finally, Respondent claimed that there was insufficient evidence to establish his violation of the two criminal statutes alleged.

Counsel for the Grievance Administrator, at the hearing before the Board, conceded that Respondent had not been afforded due process by the panel.

> I can say to you that we, on behalf of the Grievance Commission, do not disagree with the substance of the appeal filed by Mr. Lewis . . . The fact of the matter is he seems to have been disciplined for misconduct which I think is clearly on the record, but not alleged in the Formal Complaint Mr. Lewis was not afforded due process of law for the conclusions and the Order of Discipline as they appear on the record.

Tr. of Bd. hearing at 2.

We do not necessarily agree with Respondent that there was no factual support for the findings of the panel, but the findings did go beyond the scope of the Formal Complaint, and in that manner abridged Respondent's due process rights. The sole material allegations of misconduct in the Formal Complaint were:

> (1) that Respondent retained possession of the money order from June 1976 to February 1977, despite his clients' repeated inquiries and requests for its release;
> (2) that Respondent signed the names of the clients to the money order without their knowledge or consent;
> (3) That Respondent cashed the money order and co-mingled and converted all or part of the proceeds; and
> (4) that the clients were not informed by Respondent that he had cashed the money order and had obtained the proceeds until July 1977.

In its Report, the 36th Circuit Hearing Panel "A" found that

> (1) Respondent did not inform the clients for a substantial period that he had received the money order; and another long period then passed in which the clients inquired about the status of the money order and the possibility of its release to them;
> (2) eight months after receiving the money order, and without the clients' knowledge, Respondent received an ex-parte order authorizing his endorsement;
> (3) Respondent co-mingled `the $2,600 with his personal account;
> (4) Respondent failed to deposit the $1,000 with the clerk of the court as directed in the court order; and
> (5) Respondent never kept a trust account and had no record concerning the proceeds of the money order.

The only findings of the panel that corresponded to the material allegations in the Formal Complaint were that Respondent kept the money order for a time while the clients inquired about it, and that Respondent co-mingled the proceeds of the money order with his own funds. We think there is insufficient evidence in the record to support these particular findings.

Respondent kept the money order from June 1976 to February 1977, a period of eight months. Insofar as he was charged in the Formal Complaint with violation of DR 9-102(B)(4), failure to "promptly pay or deliver to the client as requested the funds . . . in the possession of the lawyer which the client is entitled to receive," it cannot be said that Respondent was not on notice of this allegation. Respondent, due to a fee dispute with the Complainants, had obtained a lien on

the money order, and eventually obtained an ex-parte order authorizing him to endorse and cash the instrument. In light of the fee dispute in the present case, and the lien on the money order, we do not think a violation of DR 9-101(B)(4) has occurred.

The evidence is also insufficient to establish a violation of DR 9-102(B)(1-3), involving the mishandling of a client's funds. Respondent put the proceeds of the money order in a safe in his office. Tr. at 111. Although Respondent did not comply with the directive of DR 9-102(A) that funds of clients paid to an attorney must be deposited in a separate bank account, this disciplinary rule was not charged, and there is no evidence that Respondent actually converted the funds to his own use, or co-mingled them in another account.

Sections of the Michigan Criminal Code involving conversion and commingled were also charged. Violations of statutory provisions alone, however,"are not the basis for discipline proceedings against members of the Bar. Although some sections of the Code of Professional Responsibility correspond to parts of the Criminal Code, it is the former which are to be charged in a Formal Complaint. In re Ryman, 394 Mich 167, 229 NW2D 311, 315-16 (1975).

It is a violation of constitutional due process provisions to impose discipline for findings not alleged in the Formal Complaint. See In re Ruffalo, 390 US 544 (1968); In re Crane, 400 Mich 484, 255 NW2d 624 (1977); State Bar Grievance Administrator v Jackson, 390 Mich 147, 211 NW2d 38 (1973); State Bar Grievance Administrator v Freid, 388 Mich 711, 202 NW2d 692 (1972); Schwartz v Barbara, No. DP-195/80 (Mich. Att'y Discip. Bd. 1981). There is no evidence to support those findings which were alleged in the Formal Complaint. The Complaint must therefore be dismissed.

REVERSED.