IN THE MATTER OF PETER R. BARBARA,
A Member of the State Bar of Michigan,
Respondent
No. DP-195/80

Decided: January 8, 1981

OPINION OF THE BOARD

Respondent Peter R. Barbara was charged by the Grievance Administrator with fifteen counts of failure to promptly deliver to clients their share of settlement or judgment proceeds. Such conduct was alleged to violate GCR 1963, 953(4),[1] DR 1-102(A)(1),[2] and DR 9-102(B)(4).[3] In an Agreement dated October 4, 1980, and clarifying letter of September 26, 1980 (both documents are hereafter jointly referred to as "Agreement"), Respondent admitted the charges in the Formal Complaint in exchange for stipulation by the Grievance Administrator to a suspension of three years and one day, beginning February 15, 1981. This discipline by consent was presented to the Board for approval, as required by GCR 1963, 964.6(e).[4] We approve the discipline as stipulated, subject to the conditions set forth in our Order.

I. REASON FOR APPROVAL

Respondent shall be suspended from the practice of law beginning February 15, 1981, for three years and one day. As a condition of any possible future reinstatement, he must establish, pursuant to GCR 1963, 972.2, that all clients with genuine monetary claims have been fully reimbursed, with interest where appropriate; this condition applies whether or not Respondent's indebtedness to the former clients was disclosed to the Grievance Commission under the Agreement.

In approving this consent discipline, we keep in mind the purpose of these proceedings as explained in GCR 1963, 954: "Discipline for misconduct is not intended as punishment for wrongdoing, but for the protection of the public, the courts, and the legal profession."[5] Our predecessor, the State Bar Grievance Board, observed in In re Dunn, (No. 35169-A Mich St B Grievance Bd, 1978), that

> [t]he purpose of the grievance machinery, as long recognized by the Bar, is not to punish the lawyer, but to protect the public and to demonstrate to the general public that those within our profession should be made to atone for their mistakes by making the aggrieved complainant whole, which might be considered as the first and foremost Canon of Ethics.[6]

In negotiating the Agreement for immediate discipline, the Attorney Grievance Commission has acted in accord with these purposes to protect all the interests of Respondent's former clients. The Commission is an agency separate from the Attorney Discipline Board. It is the "prosecution am of the Supreme Court for discharge of [the Court's] constitutional responsibility to supervise and discipline Michigan attorneys." GCR 1963, 957.1. Rules 957 and 958, which describe the powers

and duties of the Commission and the Grievance Administrator, together with 965.6(e), make clear the commission's independent authority to enter into such agreements with Respondents when it is in the public's best interest.[7] The Board, while fulfilling its duty to scrutinize agreements between the Grievance Administrator and Respondents, properly gives substantial weight to the Grievance Commission's carefully studied recommendations when considering approval of consent discipline agreements on a case-by-case basis.

The Commission's principal concern in this case was the possibility of protracted disciplinary proceedings should a consent discipline agreement not be reached. At the hearing before the Board, the Grievance Administrator remarked:

> [I]f this [consent discipline] is not approved, Mr. Barbara will be entitled to be and will be entitled to hold himself out as a member in good standing of the State Bar of Michigan for a consideration period of time to come. . . . I can assure you that proving the case would present problems, not problems in the proof itself, problems in the procedure. . . .[I] am further sure that if Mr. Barbara were required to defend himself that he would do so to the absolute utmost of his capacity, which would literally take years.

Tr. at 42-43. The Grievance Commission and its Administrator have the prosecutorial expertise to determine the likelihood of success and length of time and resource required to pursue such a case; they are to be commended for the considerable efforts made to safeguard the property of as many complainants as possible, and arrange for quick restitution. This consent Agreement, providing for substantial suspension, recertification by the Board of Law Examiners, and restitution to clients, is in the public's best interest.

II. DISCLOSURES MADE BY RESPONDENT

The unusually large volume of Respondent's client caseload, the size of many of the monetary claims made in the suits and the number of complaints led the Attorney Grievance Commission to undertake extraordinary measures to accurately assess the extent of Respondent's improprieties and the degree of ham to the clients. With the eventual cooperation of Respondent and his attorneys, the Attorney Grievance Commission contacted a number of clients for verification of amounts owed and dates of settlement of their cases; the Agreement to withhold further disciplinary prosecution is based upon information provided by Respondent, verified by those clients who respond to the Commission's inquiries, but was also confirmed by a thorough audit of Respondent's records. Not all clients who may have been affected by Respondent's misconduct responded to the inquiries of the Commission; indeed, not all potential grievants have necessarily been afforded an opportunity to submit a complaint. Nevertheless, the Commission has gone to great lengths to notify all individuals concerned and verify Respondent's disclosures.

The Agreement required Mr. Barbara to make appropriate admissions to violations of the disciplinary rules, in particular DR 9-102.[8] If any client expressly indicated a desire not to make a complaint, no admission had to be made in that case. The Agreement did not require admissions to

criminal conduct, if any, which Respondent may have committed. Mr. Barbara was required to disclose all matters concerning money received by his firm up to August 15, 1980, for the benefit of clients, but which was not paid to clients by that date. He did not have to reveal cases, if any, in which clients were not given their money on time, as long as those clients had been completely paid by August 15, 1980. But where those clients notified the Attorney Grievance Commission, a disclosure was then necessary.

Of the clients mentioned in the Formal Complaint all have since been paid money due from settlements or judgments, some with interest. Respondent, under the Agreement, revealed the names of additional clients to whom payment had not been made by August 15, 1980. The amounts involved varied, but Respondent divulged how much he received for each client, and when payment should have been made. Mr. Barbara has continued to make payments to those clients during the investigation of his activities by the Grievance Commission. The Commission has informed the Board that it believes Respondent has disclosed everything touching on the subject of late payments to clients. Tr. at 26.

III. FURTHER DISCIPLINARY ACTION

The Agreement sets out certain cases in which the Grievance Commission will not pursue further discipline beyond that approved today. Where, for example, funds were not paid on time to clients before August 15, 1980, and Respondent had not by then reimbursed the client, it was agreed that no additional disciplinary action would be taken as long as Respondent disclosed the details of the case to the Grievance Administrator; it is for this reason that the Board has conditioned any possible future reinstatement upon actual payment of all amounts owed to clients (see VII below). The Commission also agreed not to pursue disciplinary complaints involving a future criminal conviction of Mr. Barbara which arises from late payments to "disclosed" clients. This understanding not to proceed extends to convictions for solicitation, income tax violations, forgery, or any other matter of a criminal nature arising out of the subject matter of the disclosures made by Respondent. See Tr. at 28. Any matter, whether resulting in a criminal conviction or not, stemming from business debts owed to doctors, court reporters, and other non-clients may not be the basis for further discipline. But any future misconduct such as perjury occurring at a trial during the suspension period, which does not arise from these previously described exceptions, may be the basis for the filing of additional complaints. Tr. at 28-29.

This Agreement does not preclude future action by the Commission in cases involving the non-payment of money to clients, or the misappropriation of client's funds, which might have occurred after August 15, 1980. This is true whether or not such conduct was revealed by Mr. Barbara. Cases which should have been disclosed under the Agreement, but were not, and which result in criminal convictions, may be the basis of discipline in addition to the suspension we approve today. Cases resulting in criminal convictions due to misuse of clients' funds after August 15, 1980, may also be acted upon by the Commission. Any criminal convictions arising out of conduct that did not have to do with the late payment of money to clients may also be the basis of future discipline.

In summary, it is the intent of both parties that all disciplinable acts arising out of those

transactions listed in the Formal Complaint, are included under this suspension. Tr. at 27. In addition, any future complaint of this type fall under this suspension, unless they should have been disclosed, but were not. Tr. at 26. Also, any criminal convictions arising from these named transactions, for any act of misconduct omitted at the time, and touching at all upon them, will not be the basis of further discipline. Entirely separate, non-related offenses, are not included under the Agreement, and may be pursued by the Commission even after the suspension approved today becomes effective.

IV. REASONABLENESS OF THE DISCIPLINE

The discipline approved today, a suspension of three years and one day, is reasonable in light of all attendant circumstances and when only the charges in the Formal Complaint are considered. In In re Thomas, No. 34942-A (Oakland County Hearing Panel No. 2, 1980), an attorney was charged with having been convicted of a criminal offense; neglect of many personal injury cases, resulting in dismissal or loss of several clients' causes of action; failure to properly manage a number of other cases; failure to prepare for trial or make appearances with clients; failure to begin litigation despite promises to clients; misrepresentations to clients and courts; and making false statements in response to Requests for Investigation. Upon a recommendation of the Commission, made for reasons similar to those behind the present Agreement, Thomas was suspended for three years and one day. However, subsequent to that suspension, Thomas was charged in a new Formal Complaint citing more recently-discovered misconduct which occurred prior to his suspension.

In In re Geralds, 402 Mich 387, 263 NW2d 241 (1978) (per curiam), the Michigan Supreme Court imposed a three-year suspension on a Respondent who had violated DR 9-102(A) and (B) by commingling funds, and converting clients' money to his own use. The hearing panel had revoked Respondent's license, but the Supreme Court decreased to a suspension of three years due to various mitigating factors.

Cases from other jurisdictions are parallel. An attorney who misused client trust funds was suspended for two years by the Washington Supreme Court in In re Salvesen, Wash, 614 P2d Adv Sh 1264 (1980). Commenting that such misuse of client funds usually results in a disbarment, the court said "[i]t is not the inevitable result, however, and the appropriate sanction should be determined on a case-by-case basis after consideration of all the circumstances." 614 P2d Adv Sh at 1265. A Louisiana attorney who was charged with delaying turning over funds to clients and commingling client funds, was given a three-year suspension by the Louisiana Supreme Court. Noting that the primary objective of disciplinary action is the protection of the public, the court said "'[n]o greater penalty should be imposed than that which is required to accomplish this purpose.'" Louisiana St. B. Ass'n v Stinson, 368 So 2d 971, 974 (La 1979), appeal dismissed, 444 US 803 (1980), quoting Louisiana St. B. Ass'n v Cox, 252 La 978, 215 So 2d 513 (1968). An attorney in New Jersey was suspended for three years for misappropriation and misuse of substantial trust funds, in violation of DR 9-102. In re Hickey, 69 NJ 69, 350 Aid 483 (1976) (per curiam). The Board feels that a suspension for three years and one day for fifteen counts of failure to make timely payments to clients is appropriate in light of demonstrated cooperation with the Grievance Commission, and efforts at restitution.

The most severe disciplinary measure that may be taken in Michigan is the revocation of an attorney's license, subject to a right of petition for reinstatement after five years. GCR 1963, 972 2(2).[9] "The ultimate purpose of disciplinary proceedings is, as the literature states, to protect the public and to maintain the integrity of the legal profession." Note, Disbarment in the United States, 12 Colum. J. L. & Soc. Prob. 1, 71 (1975).

Mr. Barbara was charged with fifteen counts of late payments to clients. He was not charged with conversion, embezzlement, or misappropriation. We are not to "look behind" the charges in the Formal Complaint to draw inferences of further misconduct. This would be a denial of respondent's right to due process. See In re Ruffalo, 390 US 544 (1968); State B. Grievance Administrator v Jackson, 390 Mich 147, 211 NW2d 38 (1973); In re Freid, 388 Mich 711, 202 NW2d 692 (1972).

Under GCR 1963, 964.6(e)[10] respondents may admit the allegations in the Formal Complaint in exchange for a stated degree of discipline. Consent discipline is comparable to plea bargaining in a criminal context, and for many of the same reasons is sometimes desirable. It has been said of plea bargaining that,

> [p]roperly administered, it is to be encouraged . . . Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons ... It leads to prompt and largely final disposition . . . it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty. Santobello v New York, 404 US 257, 260-61 (1971).

The American Bar Association also encourages the use of consent discipline. "The public is immediately protected from further misconduct by the lawyer, who otherwise might continue to practice until a formal proceeding is concluded. The [Commission] is relieved of the time-consuming and expensive necessity of prosecuting a formal proceeding." Standards for Lawyer Discipline and Disability Proceedings, Commentary to Standard 11.1 [11] at 76.

V. Reinstatement

Before reinstatement, Respondent must be recertified by the Board of Law Examiners. GCR 1963, 972.2 (8).[12] This will involve a formal inquiry into his knowledge of the law, and may require him to retake the Bar Examination. He must comply with the other strict requirements of GCR 1963, 972.2 and 973 [13] , including an appearance before a hearing panel which must rule on Respondent's fitness for reinstatement. GCR 1963, 973.3.

It is not a certainty that Respondent will be reinstated, should he choose to petition to re-enter the Bar. Panels have denied reinstatement in the past. See In re Albert, No. 34422 (Reinstatement Petition 1979); In re Freedman, No. 35266-A (Reinstatement Petition), Aff'd, 406 Mich 256, 277

NW2d 635 (1979). The Michigan Supreme Court in Freedman ruled that a petitioner has the burden of establishing eligibility for reinstatement by clear and convincing evidence. In addition,

> The rule requires that a lawyer seeking reinstatement carry the burden of showing that he can be "safely recommended," . . . that burden is discharged when the suspended lawyer addressed the concerns which gave rise to his discipline and any other substantial claim of misconduct which may surface before he is reinstated.

(Emphasis added.) 406 Mich at 274, 277 NW2d at 642 (Levin, J., dissenting). In other words, the panel, the Board, or the Supreme Court, in considering a respondent's petition for reinstatement, may note criminal convictions during the period of suspension, or "any other substantial claim of misconduct," even though the Grievance Administrator agreed not to press further disciplinary charges under them.

Several recent cases involving reinstatement in other jurisdictions are illuminating. In Committee on Professional Ethics v Wilson, 290 Nw2d 17, 23 (Iowa 1980), the Iowa Supreme Court denied the reinstatement petition of an attorney. The court decided that misconduct antedating a suspension which is probative of present fitness cannot be ignored, even though such information was not before the disciplinary agency at the time the original discipline as imposed. In addition, misconduct during the time of suspension is considered relevant in deciding whether a respondent should be reinstated. The Washington Supreme Court directed that the criteria used in assessing a petition for reinstatement including the making or failure to make restitution where required, and the attitude, conduct, and reformation of the attorney following discipline. In re Egger, 93 Wash 2d 706, 611 P2d 1260 (1980). A Delaware respondent's petition was denied in In re Clark, 406 A2d 28 (Del 1979). The Delaware court thought that each case would have to stand or fall on its own facts and circumstances. Restitution would not be the sole factor, nor the decisive consideration. "'A thoroughly bad man may make restitution ,.. and a thoroughly good man may not be able to make any restitution at all.'" 406 A2d at 33, quoting In re Hawkins, 27 Del 200, 87 A 243 (Super Ct 1913).

Finally, if Respondent chooses to file a petition for reinstatement, at the time of a reinstatement hearing, any person whose complaint may not have been acted upon by the Commission due to the Agreement, or for any other reason, may oppose Respondent's petition through the Grievance Administrator.[14]

VI. Mitigation

In mitigation of the serious and extensive misconduct in this case, we note first Respondent's cooperation with the Grievance Commission. The Board understands that an independent certified public accountant has been monitoring Respondent's law firm records for several months, and will remain until Mr. Barbara's suspension takes effect on February 15, 1981. Tr. at 16. Cooperation with disciplinary authorities has been recognized as a mitigating factor in the assessment of discipline. In re Dunn, No. 35169-A (Mich. St. B. Grievance Bd. 1978); In re Salvesen, Wash 2d, 614 P2d Adv Sh 1264 (1980);[15] In re Marks, 44 App Div 2d 290, 354 NYS2d 647 (Sup Ct 1974)

(per curiam); In re Soba, 22 App Div 2d 789, 253 NYS2d 813 (Sup Ct 1964)(mem.).

Respondent's restitution is a second factor in mitigation. He has paid substantial amounts to former clients during the commission's investigation, and continues to do so. Restitution, even after discipline proceedings have begun, is widely accepted as mitigation. In re Dunn, No. 35169-A (Mich. St, B. Grievance Bd. 1978); In re Kumbera, 91 Wash 2d 401, 588 P2d 1167 (1979); In re Ritger, 80 NJ 1, 401 AId 1094 (1979) (per curiam); In re Mahoney, 78 NJ 248, 394 A2d 89 (1978) (per curiam); In re Marks, 44 App Div 2d 290, 354 NYS2d 647 (Sup Ct 1974) (per curiam); In re Soba, 22 App Div 2d 789, 253 NYS2d 813 (Sup Ct 1964) (mem.).

VII. Condition to Reinstatement

As a condition to reinstatement expressly accepted by Respondent, we direct Respondent to reimburse all complainants with genuine claims against him concerning client funds, whether or not these have been disclosed by Respondent.

The power of the Board to fashion appropriate conditions for reinstatement has been upheld by the Michigan Supreme Court. Where, for example, a respondent delayed for several years in the probating of an estate, the Board suspended him for sixty days and until the estate was closed. In re Ruebelman, No. 33692-A (Mich. St. B. Grievance Bd. 1977), aff'd 402 Mich 501, 264 NW2d 161 (1978); see Schwartz v Smith, No. 35166-A (Mich. Att'y Discip Bd. 1980).

The ABA Standards note:

> Whenever possible, the disciplinary process should facilitate restitution to the victims of the respondent's misconduct .. . If the dollar value of the client's loss resulting from the respondent's misconduct is established, he should be ordered to make restitution in that amount as promptly as circumstances permit . . . Restitution when ordered should be made a part of the disciplinary order as a condition of reinstatement.

Commentary to Standard 6.12[16] at 41-42. Such a condition is a common one in disciplinary proceedings throughout the United States. See, e.g., People v Hilgers, - Colo -, 612 P2d 1134 (1980); Florida B. v West, 380 So Id 431 (Fla 1980)(per curiam); In re Jones, SD - , 294 N42d 651 (1980); In re Privette, 92 NM 32, 582 P2d 804 (1978); In re Cornelius, 521 P2d 497 (Alaska 1974); In re Francess, 39 App Div 2d 199, 333 NYS2d 294 (Sup Ct 1972)(per curiam). See also Annot., Power of Court to Order Restitution to Wronged Client in Disciplinary Proceeding Against Attorney, 75 ALR3d 307 (1977).

The suspension of three years and one day, accepted by Respondent, as set forth in the order, is approved.

FOOTNOTES

1. GCR 953(4): conduct that violates the standards or rules of professional responsibility adopted by the Court;

2. DR 1-102(A)(1): A lawyer shall not (1) Violate a Disciplinary Rule.

3. DR 9-102(B)(4): A lawyer shall (4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

4. GCR 964.6(e): Discipline by Consent. A respondent may admit the allegations of the complaint or any of its counts in exchange for a stated form of discipline and on the condition it is accepted by the board. The admission must be approved or rejected by the board. If approved, the board must enter a final order of discipline.

5. The Supreme Court of Washington recently echoed this reasoning. "Attorney discipline does not have as its object the imposition of punishment of the offending lawyer. Rather, its purpose is to protect the public, and preserve confidence in the legal profession and judicial system." In re Salvesen, - Wash 2d - , 614 P2d Adv Sh 1264, 1265 (1980).

6. This is not to suggest that reimbursement to clients absolves a respondent of misconduct. This position was urged upon our predecessor Board, and was rejected. In re Ziegler, No. 33442-A (Mich St. B. Grievance Bd. 1976).

7. GCR 957.4: Powers and Duties. (ATTORNEY GRIEVANCE COMMISSION) The commission has the power and duty to (1) appoint an attorney as administrator; (2) supervise the investigation of attorney misconduct, including requests for investigation of and complaints against attorneys; (3) supervise the administrator and his staff; (4) seek an injunction from the Supreme Court against an attorney's misconduct when prompt action is required, even if a disciplinary proceeding concerning that conduct is not pending before the board; (5) annually write a budget for the commission and the administrator's office (including compensation) and submit it to the state bar board of commissioners for approval; (6) submit to the Supreme Court proposed changes in these rules; and (7) perform other duties provided in these rules.

   GCR 958.1: Powers and Duties. (GRIEVANCE ADMINISTRATOR) The administrator has the power and duty to: (1) employ or retain legal counsel, investigators, and staff with the approval of the commission; (2) supervise legal counsel, his staff and investigators; (3) assist the public in preparing requests for investigation; (4) maintain the commission records created as a result of these rules; (5) investigate alleged misconduct of attorneys, including serving a request for investigation in his own name if necessary; (6) prosecute complaints the commission authorizes; (7) prosecute or defend reviews and appeals as the commission

   authorizes; and (8) perform other duties provided in these rule or assigned by the commission.

8. DR 9-102 concerns preserving the identity of funds and the property of a client.

9. This rule, allowing application for reinstatement after five years, provides a possibility of reinstatement even in cases of the most serious misconduct and discipline where circumstances (i.e.:mitigation and rehabilitation) might so indicate. Michigan has no definitely final "disbarment" although denial of reinstatement, regardless of the length of suspension, may in some cases have the effect of irrevocable disbarment.

10. GCR 964.6(e): Discipline by Consent. A respondent may admit the allegations of the complaint or any of its counts in exchange for a stated form of discipline and on the condition it is accepted by the board. The admission must be approved or rejected by the board. If approved, the board must enter a final order of discipline.

11. 11.1 Admission of Charges Required. A respondent should notable to consent to being disciplined while a disciplinary proceeding is pending against him unless he admits in writing the truth of the charges that are the subject of the proceedings. COMMENTARY: Acceptance of stipulated discipline by a lawyer who has been guilty of misconduct and desires to avoid the trauma and expense of a proceeding is in the interest of the public and the agency. The public is immediately protected from further misconduct by the lawyer, who otherwise might continue to practice until a formal proceeding is concluded. The agency is relieved of the time-consuming and expensive necessity of prosecuting a formal proceeding.

    The respondent should be required to admit the charges before discipline is stipulated, so that evidence of guilty will be available if he later claims that he was not, in fact, guilty. Petitions for reinstatement are often filed years after discipline has been imposed, and if there is no admission it may be difficult for the agency to establish the misconduct because relevant evidence and witnesses may not longer be available.

12. GCR 972.2(8): for a suspension of 3 years or more, he has been re-certified by the Board of Law Examiners,

13. GCR 972.2: Revocation or Suspension More Than 120 Days. An attorney whose license to practice law has been revoked or suspended for more than 120 days is not eligible for reinstatement until he has petitioned for reinstatement under rule 973 and has established by clear and convincing evidence that:

    (1) he desires in good faith to be restored to the privileges of practicing law in Michigan;

    (2) the term of the suspension ordered has elapsed or 5 years have elapsed since revocation of the license;

    (3) he has not practiced or attempted to practice law contrary to the requirement of his suspension or revocation;

    (4) he has complied fully with the order of discipline;

    (5) his conduct since the order of discipline has been exemplary and above reproach;

    (6) he has a proper understanding of and attitude toward the standards that are

imposed on members of the bar and will conduct himself in conformity with those standards;

(7) he can safely be recommended to the public, the courts, and the legal profession as a person fit to be consulted by others and to represent them and otherwise act in matters of trust and confidence, and in general to aid in the administration of justice as a member of the bar and as an officer of the court;

(8) for a suspension of 3 years or more, he has been recertified by the Board of Law Examiners; and

(9) he has reimbursed or has agreed to reimburse the Client Security Fund any money paid from the fund as a result of his conduct. Failure to fully reimburse as agreed is ground for revocation of a reinstatement.

GCR 973.3: The Hearing Panel's Responsibilities. A reinstatement hearing may not be held earlier than 60 days after the petition was served on the administrator. The proceeding on a petition for reinstatement must conform as nearly as practicable to a proceeding for hearing on a complaint. The petitioner shall appear personally for cross-examination before the hearing panel and answer fully and fairly under oath all questions on his eligibility for reinstatement. The hearing panel shall enter an order granting or denying reinstatement or conditioning reinstatement on compliance with sub-rule 972.2(8) or 972.2(9) and make a written report signed and certified by the chairperson, including a transcript of the testimony taken, pleadings, exhibits and briefs, and its findings of fact. The report and order must be filed and served under subrule 967.5.

14 GCR 973.2 provides that at least thirty days before a reinstatement hearing, the Grievance Administrator have published in the State Bar Journal a notice of the hearing, so that interested parties may attend. The section also directs the Administrator to investigate the petitioner's eligibility for reinstatement before the hearing, and report his findings to the hearing panel. The report is to "summarize the facts of all previous misconduct and the available evidence bearing on the petitioner's eligibility for reinstatement." This is to include information received from members of the public who may oppose petitioner's reinstatement request due to past misconduct which may not have been acted upon by the Administrator.

15 In Salvesen, as here, the attorney's violations were "extremely serious" both in nature and in number, but the court found significant mitigation in the attorney's complete cooperation with the bar in its investigation. He had stipulated to all acts of misconduct, and allowed the bar to monitor his practice between the filing of charges and beginning of the suspension, as has Mr. Barbara. The court suggested that, conversely, lack of cooperation may be an aggravating factor in the imposition of discipline.

16. 6.12 Restitution. The court may require a respondent to make restitution to persons financially injured by his wilful conduct and to reimburse the client security fund.

CONCURRING OPINION OF LYNN H. SHECTER, VICE-CHAIRPERSON:

I have concurred in today's result because, based on the nature of the violations charged, the extent of the discipline imposed in not unreasonable. I have also been extremely impressed with the

alertness and creativity of the Attorney Grievance Commission in acting with dispatch and imagination to insure that the offended clients received the funds to which they were entitled.

However, I am terribly concerned with what I regard as the excessive scope of the immunity granted Mr. Barbara as part of the terms of this agreement.

I am concerned about bargaining away the rights of individuals to file grievances against Mr. Barbara, when those people have never had an opportunity to consent to such a bargain. The consent discipline process is not a plea-bargaining procedure as used in the criminal law system. Most relevant to the present situation, the criminal prosecutor knows of all pending charges against the individual. The Attorney Grievance Commission knows only those instances in which individuals have already filed complaints. Unknown to them, in the case of Peter Barbara, some individuals may have been deprived of their right to file such a complaint. We have also approved an agreement not to institute grievance procedures for criminal convictions, broadly construed to have arisen out of the actions for which the respondent is now being disciplined. This is rationalized by the implication that at the time Mr. Barbara seeks reinstatement, any such convictions would be raised as a barrier to his obtaining a license, should the rehearing panel choose to adopt that position.

I am not that sanguine about this legal analysis. It is sufficiently arguable that if Mr. Barbara is granted immunity for convictions, should they occur in one context, that this immunity should apply, albeit in a slightly different context, in a proceeding before the same body.[1]

Further, there is sufficient difference in the quality of the offenses charged, that a criminal conviction might not be given the same treatment as a delay in turning over the client's award. The same rationale which has led this Board to apply interim suspensions to attorneys convicted of a crime, prior to any disciplinary hearing, is certainly applicable here.

It is clear, as the principal opinion has noted, that this Board may impose an additional penalty on an already suspended attorney who is convicted of actions which have occurred during the period of his or her law practice. By not rejecting this covenant, we have, I suggest, deprived the public of this additional protection. (I leave open the question of by whom and how the matter of whether a conviction is covered by the Agreement will be determined.)

There may very well be no convictions arising or resulting from these circumstances. In that event, Mr. Barbara has nothing to be immune from. The possibility that there may be conviction and that the Board has consented to bargaining away the grievance machinery's ability to protect the public by proceeding against Mr. Barbara on this basis, leads me to question whether, in our anxiety to insure that discipline was swift, it may not, after all, have been sure. And we may have given away too much.

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1. Agreement By and Between Peter R. Barbara and the Attorney Grievance Commission, Para 15: It is expressly agreed that the term of suspension provided for by the consent order of discipline referred to herein shall not be enhanced nor shall further disciplinary action be

taken against Peter R. Barbara in the event of a criminal conviction following the date of this agreement, involving any matter which, under the terms of this agreement, were disclosed by Peter R. Barbara.