FILED
ATTORNEY DISCIPLINE BOARD
March 21, 2022

STATE OF MICHIGAN

Attorney Discipline Board

GRIEVANCE ADMINISTRATOR,
Attorney Grievance Commission,

Petitioner-Appellee,

v Case No. 20-49-GA

GIL WHITNEY MCRIPLEY, P 41150,

Respondent-Appellant.
_____/

ORDER AFFIRMING HEARING PANEL FINDINGS OF MISCONDUCT AND REDUCING 30-DAY SUSPENSION TO REPRIMAND

Issued by the Attorney Discipline Board
333 W. Fort St., Ste. 1700, Detroit, MI

On August 11, 2021, Tri-County Hearing Panel #71 issued an order in this matter suspending respondent's license to practice law in Michigan for a period of 30 days, effective September 2, 2021. On August 30, 2021, respondent filed a timely petition for review and for stay of discipline pursuant to MCR 9.115(K), which resulted in an automatic stay of the suspension ordered by the hearing panel.

Respondent petitioned for review on the grounds that the evidence in the record did not support a finding of misconduct, and that the 30-day suspension imposed by the panel was excessive because it was imposed for misconduct that was either not charged in the formal complaint or for "conflated conduct." On review, respondent requests that the Board reverse the findings of the hearing panel, and dismiss the formal complaint. The Administrator requests that the hearing panel's findings of misconduct and order of suspension be affirmed.

The Attorney Discipline Board has conducted review proceedings in accordance with MCR 9.118, including review of the evidentiary record before the panel and consideration of the briefs and arguments presented by the parties at a review hearing conducted via Zoom videoconferencing on February 16, 2022. For the reasons discussed below, we affirm the hearing panel's findings of misconduct, but reduce the discipline imposed from a 30-day suspension to a reprimand.

With regard to factual findings, the Board must determine whether the panel's findings of fact have "proper evidentiary support on the whole record." *Grievance Administrator v August*, 438 Mich 296,304; 475 NW2d 256 (1991). See also, *Grievance Administrator v T. Patrick Freydl*, 96-193-GA (ADB 1998). The formal complaint filed by the Grievance Administrator alleged, in relevant part, that respondent committed misconduct while acting as an employer/manager of Bookie's Ham and Soul (Bookie's) a bar/restaurant located in Detroit. Respondent was an owner of Bookie's and worked as a weekend manager and from 2015 to 2017, Shanti Davis was employed at Bookie's as a bartender. The complaint alleged that on three occasions, respondent knowingly issued payroll checks to Ms. Davis for which there were insufficient funds to cover the

checks. The complaint also charged that after Ms. Davis quit in April 2017, respondent offered to pay Ms. Davis without paying employment taxes or issuing her a 1099, and that respondent failed to pay employment taxes on behalf of K-LAW, the corporation respondent and his partners formed to purchase Bookie's. Respondent was charged with violating MCR 9.104(2) and (3).

On review, respondent argues that the panel was required to find that he had an intent to defraud Ms. Davis at the time the insufficient checks were issued, and that in the absence of such a finding, the violations found by the panel should be vacated. However, neither MCR 9.104(2) nor 9.104(3) requires a showing of fraudulent intent or knowing conduct in order to find a violation of either rule. Rather, the panel need only find that respondent's conduct exposed the legal profession or the courts to "obloquy, censure, contempt and reproach" and was "contrary to justice, ethics, honesty, or good morals."

With regard to subsection 2, the panel found that:

> The fundamental issue is whether the conduct "exposes" the legal profession or the courts to disrepute. That means whether it presents a risk, if the conduct is observed, that the negative effect on the profession will occur. The panel finds that respondent's behavior did present this risk. [Misconduct Report 2/26/21, p 8.]

Furthermore, with regard to subsection 3, the panel noted that: "[T]he issuance of multiple checks for which there were insufficient funds falls squarely within subsection 3 of MCR 9.104 because it is conduct that is '. . . contrary to justice, ethics, honesty or good morals.'" (Misconduct Report 2/26/21, p 7.) The panel also noted that their "decision does not include a finding that there was any criminality involved or that a finding of misconduct should be based upon the commission of a crime," as the potential criminality of intentionally issuing checks for which there are insufficient funds was not charged in the formal complaint. (Misconduct Report 2/26/21, p 7.)

Our review of the record indicates that there is sufficient evidence to support a finding that respondent knew or should have known that the checks he issued to Ms. Davis would be dishonored and that he did in fact offer to pay her "under the table" if she returned to work. Ms. Davis testified at the December 15, 2020 misconduct hearing that on several occasions, respondent advised her either to wait, or not to cash her paychecks, because there was not enough money in the Bookie's business account to cover the checks. (Tr 12/15/20, pp 17-18, 22-25, 29, 45, 48.) Despite respondent's claims to the contrary, Ms. Davis further testified that she never intentionally held onto a check she received from respondent. (Tr 12/15/20, p 25.)

Respondent also testified at the December 15, 2020 misconduct hearing. Although he acknowledged that he sent a memo in June 2016 to his other business partners regarding, in part, a biweekly payroll shortage of $1,500 to $2,000, he denied that he was aware that there were insufficient funds in the Bookie's business accounts to cover paychecks when they were provided to Ms. Davis in October 2016 and beyond. (Tr 12/15/20, pp 59-61; Respondent's Exhibit 2.) However, the Administrator's counsel impeached respondent at the hearing noting that during his sworn statement taken during the investigation of Ms. Davis' request for investigation, respondent testified that he told Ms. Davis not to cash the checks in question, but "she tried to cash them anyway," and that Ms. Davis was told not to cash the checks because "maybe we didn't know if something was in there." (Tr 12/15/20, pp 62-63; Petitioner's Exhibit 9, p 15.) The panel specifically found "[Ms. Davis'] position [on this issue] far more credible." (Misconduct Report 2/26/21, p 7.)

The Board has traditionally deferred to a hearing panel's assessment of witnesses' demeanor and credibility, because the hearing panel has the opportunity to observe the witnesses during their testimony. *Grievance Administrator v Ernest Friedman*, 18-37-GA (ADB 2019), citing *Grievance Administrator v Neil C. Szabo*, 96-228-GA (ADB 1998); *Grievance Administrator v Deborah C. Lynch*, 96-96-GA (ADB 1997). We find that the record below reveals no reason to disturb the panel's above referenced credibility assessments.

Respondent also argues that the panel found that he committed misconduct because they "conflated the charged offense of insufficient funds with the uncharged alleged offense of offering to engage in a tax evasion scheme." As a matter of due process, a respondent may not be found guilty of misconduct that is not alleged in the formal complaint. *Grievance Administrator v Thomas J. Shannon*, 91-76-GA (ADB 1992), citing *In re Freid*, 388 Mich 711 (1972), and *In re Ruffalo*, 390 US 544 (1968). However, the formal complaint here not only provided respondent with sufficient notice of the charges he needed to defend, but also specifically charged that respondent offered to pay Ms. Davis without taking employment taxes out of her pay or providing her with a 1099; conduct which arguably could be characterized as tax evasion.

The formal complaint specifically charged that respondent knowingly issued payroll checks to Ms. Davis without sufficient income to cover the checks (Formal Complaint ¶ 11). In addition, paragraph 13 of the formal complaint specifically states: "On May 8, 2017, respondent sent a text to Ms. Davis stating, 'Come back to work. No taxes, no 1099. Get ur pay from the drawer at the end of the night.'" Furthermore, the actual text message was admitted as Petitioner's Exhibit 4 and paragraph 13 quotes the text verbatim. In his answer to the formal complaint, respondent admitted sending the quoted text, but claimed that it was a joke. While the panel's misconduct report mentioned that they were deeply troubled that a member of the State Bar invited an employee to engage in "a scheme involving tax evasion," again, they specifically noted that any finding of misconduct would not be based on the commission of a crime. Thus, the panel's subsequent conclusion that this conduct constituted misconduct did not violate respondent's due process rights. The alleged misconduct was clearly contained within the four corners of the complaint and provided respondent sufficient notice of what charges he needed to defend.

The record further reflects that respondent was not disciplined for engaging in conduct not charged in the complaint or for "conflated conduct," as he argues on review. Rather, as they did when determining whether misconduct occurred, the panel specifically indicated that they "[did] not believe they could fairly apply discipline on the assumption that a crime has been committed . . . [because] the complaint did not charge criminal conduct . . . [and] there was insufficient evidence of criminal intent." (Sanction Report 8/11/21, pp 2-4.)

The Administrator argued that respondent knowingly violated duties owed to the public and the legal profession and that his conduct caused actual injury to Ms. Davis; that ABA Standards 5.12 and 7.2, both calling for suspension, were applicable; and, that the applicable aggravating factors under ABA Standard 9.22, included 9.22(a) (prior disciplinary offenses);[1] 9.22(b) (dishonest or selfish motive); 9.22(d) (multiple offenses); 9.22(i) (substantial experience in the practice of

[1] Respondent was previously admonished by the Attorney Grievance Commission on four separate occasions in 1991, 1993, 1998, and 2014. (Petitioner's Exhibits 12-15.)

law); 9.22(j) (indifference to making restitution); Standard 9.22(k) (illegal conduct);[2] that the applicable mitigating factors under ABA Standard 9.32, included 9.32(g) (character and reputation); and, 9.22(m) (remoteness of prior offenses). The Administrator specifically argued for the imposition of a suspension of at least 180 days.

Respondent argued for the imposition of a reprimand under ABA Standard 5.13, emphasizing the fact that he was not charged with having engaged in criminal conduct, and that the applicable mitigating factors under ABA Standard 9.32, included 9.32(a) (absence of a prior formal order of discipline); 9.32(d) (timely good faith effort to make restitution); 9.32(e) (cooperative attitude); 9.32(g) (character or reputation); 9.32(k) (imposition of other penalties or sanctions); 9.32(l) (remorse); and, 9.32(j) (delay in disciplinary process). As for the cases relied on by the Administrator,[3] respondent noted that they all included a multitude of serious ethics violations including misuse of client trust accounts, misappropriation and a long-standing pattern of conduct evidencing financial irresponsibility warranting the imposition of suspensions of various lengths.

The panel rejected the Administrator's argument that ABA Standards 5.12 and 7.2, both calling for suspension, were the relevant Standards to apply. Rather, the panel agreed with respondent that ABA Standard 5.13, which references "knowing" conduct and calls for a reprimand, "is the one that fits the misconduct found."[4] However, the panel rightfully recognized that the level of discipline could still adjust once applicable aggravating and mitigating factors were considered and weighed.

The panel's decision to increase discipline from reprimand to suspension, despite the "impressive mitigating evidence submitted,"[5] appears to have resulted from their assessment of

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[2] Although the Administrator's counsel referenced this aggravating factor, counsel acknowledged that the panel could not base their discipline decision on a crime having been established. (Tr 5/26/21, pp 78-79.)

[3] The Administrator's sanction brief cited the following cases in support of the request that the panel impose a 180 day suspension: *Grievance Administrator v Robert D. Stein*, 09-3-GA (ADB 2011) (179-day suspension with restitution increased on review to a 180-day suspension and restitution for, in part, failing to remit withholding taxes and issuing bad checks to employees); *Grievance Administrator v Kenneth M. Scott*, DP-178/85 (ADB 1988) (180-day suspension increased on review to three year suspension for, in part, knowingly delivering two NSF checks to clients); and *Grievance Administrator v Nancy Kelleen Zednik*, 10-58-AI; 10-103-JC; 11-45-GA (ADB 2011) (Two-year suspension (by consent) for felony conviction of issuing a NSF check of $500 or more while acting as joint owner of a real estate title company).

[4] ABA Standard 5.13 states:

> Reprimand is generally appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law.

[5] Respondent submitted thirteen letters of recommendation from various lawyers and judges who all personally know and/or worked with him over the last 30-50 years. (Respondent's Exhibits A-M). Additionally, two witnesses, including Hon. Prentis Edwards (ret), both testified on respondent's behalf at the sanction hearing. Both witnesses acknowledged that they had read the panel's misconduct report and testified that the panel's findings did not change their opinions regarding respondent's integrity or reputation within the community.

respondent's credibility and demeanor during the misconduct hearing, which they explained ultimately became for them, the weightiest factor in aggravation. The panel was therefore "unable to accept at face value the unqualified insistence by respondent's endorsers that his character was beyond reproach" and, the panel believed that "the mitigating evidence was sufficient to prevent the suspension from being a more lengthy one, but not enough to prevent it altogether." (Sanction Report 8/11/21, pp 6-7.)

With regard to discipline, the Board's review is not limited to the question of whether there is proper evidentiary support for the panel's findings, rather, it possesses "a greater degree of discretion with regard to the ultimate result." *Grievance Administrator v Benson*, 08-52-GA (ADB 2009), citing *Grievance Administrator v Handy*, 95-51-GA (ADB 1996). See also *Grievance Administrator v August*, 438 Mich 296, 304; 304 NW2d 256 (1991). Furthermore, the Board's responsibility to ensure consistency and continuity in discipline imposed under the ABA Standards and caselaw necessarily means that we may not always afford deference to a hearing panel's sanction decision, and that we may be required to independently determine the appropriate weight to be assigned to various aggravating and mitigating factors depending on the nature of the violation and other circumstances considered in similar cases. *Grievance Administrator v Saunders V. Dorsey*, 02-118-AI; 02-121-JC (ADB 2005).

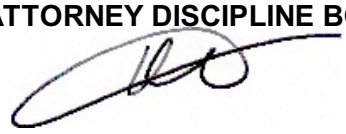
We are mindful that in this matter, the hearing panel undertook a careful and thorough consideration of the ABA Standards and applicable aggravating and mitigating factors to reach their conclusion that a 30-day suspension was appropriate, and we agree with the panel that the appropriate standard to apply to the facts and circumstances of this particular matter is ABA Standard 5.13, calling for a reprimand. However, we respectfully disagree with the hearing panel's conclusion that the aggravating factors so outweighed the mitigating factors to warrant an upward shift from a reprimand to a suspension. For that reason, we affirm the hearing panel's findings of misconduct, but reduce the discipline imposed by the panel from a 30-day suspension to a reprimand.

NOW THEREFORE,

IT IS ORDERED that the hearing panel's findings of misconduct are **AFFIRMED**.

IT IS FURTHER ORDERED that the discipline imposed by the hearing panel is **REDUCED** from a suspension of 30 days to a **REPRIMAND EFFECTIVE APRIL 19, 2022**.

ATTORNEY DISCIPLINE BOARD

By: 

Michael B. Rizik, Jr., Chairperson

Dated: March 21, 2022

Board members Michael B. Rizik, Jr., Linda Hotchkiss, M.D., Karen D. O'Donoghue, Linda M. Orlans, and Jason M. Turkish concur in this decision.

Dissenting Statement of Board Member Alan Gershel:

I respectfully dissent. I would affirm the hearing panel's decision imposing a 30-day suspension. I agree with the majority and with the panel that the focus should be ABA Standard 5.13 which states:

> Reprimand is generally appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law.

However, it is in the consideration and balancing of the applicable aggravating and mitigating factors where I believe the majority erred. These need to be reiterated. The aggravating factors include the respondent's issuance of multiple checks to an employee which he knew contained insufficient funds after he asked her to delay cashing them. Thus, this was not episodic but rather a pattern. After she quit, in order to entice her to return to work, he offered to pay her in cash and that no taxes would be taken out. This offer was memorialized in a text message sent by the respondent to the employee. I recognize that the respondent was not charged in the complaint with criminal conduct. Nonetheless, the issuance of NSF checks was charged. Moreover, as the panel correctly pointed out, it is permissible to consider this conduct inasmuch as it exposed the legal profession to disrepute under MCR 9.104(2). That provision makes it grounds for discipline when an attorney has engaged in "conduct that exposes the legal profession to obloquy, censure or reproach."

Regarding applicable mitigating factors, the respondent presented an array of character witnesses and certainly has made contributions to his community. However, this does not suffice to reduce the discipline from a suspension to a reprimand. The purpose of discipline is to protect the public. The respondent not only engaged in serious misconduct, but he was also found not to be truthful by the panel which was in the best position to evaluate his credibility. He declined to acknowledge wrongdoing, show remorse or accept responsibility in any meaningful way.

The respondent's offense conduct was deceitful, fraudulent and clearly reflects on his fitness to practice law. The panel carefully evaluated and considered the aggravating and mitigating factors and concluded that a suspension was warranted. I agree. In my view, a reprimand minimizes the seriousness of the conduct and consequently places the public at risk.

Board members Rev. Dr. Louis J. Prues, and Peter A. Smit concur with the dissenting statement of Board member Gershel.

Board member Michael S. Hohauser was absent and did not participate.