

STATE OF MICHIGAN  
Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellee,

v

Lance A. Fertig, P 27476,

Respondent/Appellant,

Case Nos. 97-246-GA; 97-264-FA

Decided: July 31, 2000

**BOARD OPINION**

Respondent, Lance A. Fertig, was defaulted by the Grievance Administrator for failing to file an answer to the formal complaint which included charges that respondent commingled and misappropriated funds entrusted to him by a client; failed to take action on that client's behalf; made misrepresentations to a third person during the course of his representation and failed to answer two requests for investigation. Following several hearings which included the taking of testimony from respondent and employees of his office, the hearing panel denied the respondent's motion to set aside the default. Three additional hearings before the panel were devoted to the appropriate level of discipline. On August 18, 1999, the hearing panel entered its report and order suspending respondent's license to practice law for four years. Respondent petitions for review. We affirm the findings and conclusions of the panel as well as its decision to impose a four year suspension.

**Panel Proceedings**

Unlike a typical default case in which a respondent's default for failure to answer the formal complaint is deemed to constitute an admission to the well pleaded charges, the pleadings, transcripts and exhibits in this case are voluminous. Virtually every decision by the hearing panel was subject to a motion for reconsideration. Respondent filed interlocutory appeals to the Board on the issues of the panel's denial of his motion to set aside default and on the question of whether or not the panel

was properly constituted when a substitute panelist was not appointed and the matter proceeded before the remaining two members of the panel.

The proceedings before the panel may be divided into two distinct phases. The hearings on January 9, 1998, March 5, 1998 and May 12, 1998 were devoted to respondent's motion to set aside his default for failure to answer the complaint. That phase was ended by the entry of the panel's opinion on July 29, 1998 denying the motion to set aside default.

The second phase, consisting of hearings held on October 27, 1998, January 14, 1999 and April 16, 1999, was devoted to the appropriate level of discipline to be imposed. Notwithstanding respondent's default, the panel received a substantial amount of testimony and documentary evidence bearing upon respondent's personal and professional relationship with the complainant, Harvey Warnick, and the specific acts or transactions alleged in the complaint to constitute professional misconduct.

Both the hearing panel's opinion with regard to the motion to set aside default, entered August 3, 1998, and its opinion on the appropriate level of discipline, entered August 18, 1999, are thorough and well organized. Taken together, they impart the full flavor of the legal and factual issues considered by the panel. The panel's written decisions are therefore attached to this opinion as appendices and are incorporated by reference.<sup>1</sup>

### **Issues Presented**

Respondent's petition for review and supporting brief raise four questions:

1. Is Michigan's discipline system constitutionally infirm because it fails to provide respondents with adequate pretrial discovery, including discovery prior to the filing of the formal complaint?
2. Was respondent denied due process of law because his case was heard by a hearing panel composed of two members? In the alternative, is a hearing panel composed of three members a strict jurisdictional requirement?
3. Did the hearing panel's denial of respondent's motion to set aside the default constitute a denial of due process?

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<sup>1</sup>The hearing panel's opinion with regard to the motion to set aside default, entered August 3, 1998, is attached as Appendix A. The panel's opinion, entered August 18, 1999, in support of the order of discipline is attached as Appendix B.

4. Should the Attorney Discipline Board reduce the four year suspension imposed by the hearing panel?

We answer each of these questions in the negative.

### **Discussion**

#### **The Constitutionality of the Discipline System**

Respondent argues generally in arguments V and VI of his brief that chapter 9.100 of the Michigan Court Rules grants broad pre-complaint investigative powers to the Attorney Grievance Commission but does not afford similar pre-complaint investigation authority or discovery to a respondent. This is essentially an accurate statement of the Attorney Grievance Commission's investigative authority under those rules. Indeed, our Court has recognized as much in its holding that "the Michigan Court Rules specify a broad grant of power to the Administrator to investigate misconduct." Anonymous v Attorney Grievance Commission, 430 Mich 241, 246; 422 NW2d 648 (1988). However, respondent has failed to establish that a grant of broad investigative power to the Attorney Grievance Commission and the Grievance Administrator violates a fundamental constitutional safeguard nor has respondent shown how such investigative authority was used or abused in his case.

For example, respondent complains that the Grievance Administrator has the power to obtain an investigative subpoena from the Attorney Grievance Commission commanding a respondent to give a deposition in connection with the charges against himself. It is true that MCR 9.112(D) does authorize the Attorney Grievance Commission to issue a subpoena requiring the appearance of a witness during the investigative phase of these proceedings and it is true that the Court has held that for purposes of that rule a respondent is a witness and is subject to a subpoena. Anonymous v Attorney Grievance Commission, *supra*. But respondent does not allege that he was subject to such a subpoena nor has he shown how the issuance of such a subpoena, standing alone, would have violated a fundamental constitutional right. If respondent means to suggest that the Administrator's power to subpoena an attorney under investigation intrudes upon an attorney's constitutional right against self incrimination, that argument does not square with MCR 9.113(B)(1) or the unambiguous

rulings of the United States and Michigan Supreme Courts that the self incrimination clause of the Fifth Amendment to the United States Constitution extends its protection to lawyers during the course of discipline proceedings. It is well established that a lawyer may assert the privilege against self incrimination as a basis for refusing to answer a request for investigation. See Spevack v Klein, 385 US 511 (1967); In re Posler, 393 Mich 38; 222 NW2d 511 (1970).

Respondent continues in this vein by asserting “It has been the practice of Petitioner Commission to deny attorneys compelled to give depositions against themselves the right to secure transcripts of such depositions.” (Respondent’s brief, p 12.) We take notice that this may have been the policy of the Grievance Commission at one time.<sup>1</sup> However, respondent makes no claim that this is the Grievance Commission’s current policy, that respondent himself was compelled to give a deposition or that respondent was denied access to the transcript of such a deposition.

The concept of a disciplinary investigation agency that acts as a grand jury with power to issue subpoenas and compel testimony during a confidential investigation is not inherently at odds with fundamental notions of due process. On the contrary, such a concept was adopted by the U.S. Supreme Court in Anonymous Nos. 6 & 7 v Baker, 360 US 287 (1959) in holding that the use of investigative subpoenas by New York authorities investigating possible attorney misconduct was constitutional.

Respondent also argues generally that,

Respondent is also denied the ability to engage in meaningful post-complaint discovery because discovery is extremely limited after Petitioner files a formal complaint with [the] Michigan Attorney Discipline Board, since MCR 9.115(F)(4) restricts post-complaint discovery to the exchange of witness lists and inspection of documents which are intended to be introduced in evidence at the disciplinary trial. [Respondent’s brief, p 13.]

This is an accurate description of Michigan’s discovery rule in attorney discipline matters

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<sup>1</sup>As recently as August 1992, it was the policy of the Attorney Grievance Commission to vigorously oppose a respondent’s request for a copy of his or her own statement taken by the Grievance Administrator during the Administrator’s pre-complaint investigation. See GA v Marshall D. Lasser, Case No. 92-85-GA.

In December 1992, counsel for the Grievance Administrator in Lasser, *supra*, delivered to the respondent a copy of his own sworn statement. The Board has not been made aware of any case since December 1992 in which a respondent was refused a copy of his/her sworn statement taken by the Administrator during an investigation.

as applied to this case.<sup>2</sup> Indeed, one observer of Michigan's discovery rule has written that the limited post-compliant discovery allowed under MCR 9.115(F)(4) contrasts starkly with Michigan case law requiring broad disclosure to the defense in criminal cases, is inconsistent with the broad discovery applicable in civil cases, contrasts with the law and practice in licensing proceedings involving other licensed professionals in Michigan, and is out of step with the statutes, rules and common practice in virtually all other states' attorney discipline proceedings.<sup>3</sup> Once again, however, respondent has not established that he was prejudiced by a denial of a legitimate discovery request or that Michigan's limited discovery in attorney discipline cases is facially unconstitutional.

#### Constitution of the Hearing Panel

The formal complaint in this case was filed by the Grievance Administrator on September 30, 1997. On the same day, the Board assigned the case to Ingham County Hearing Panel #3, then consisting of Lansing attorneys Lawrence J. Emery, Patrick R. Hogan and Patricia Sherrod. A hearing was scheduled in East Lansing for November 24, 1997. On October 27, 1997, the Grievance Administrator filed a default based upon respondent's failure to answer the formal complaint within the 21 day period specified in MCR 9.115(D)(1). On or about October 29, 1997, panelist Sherrod advised the Board that she would be working primarily in the Detroit area and would not be able to sit with a panel in Ingham county. With approximately two weeks before the scheduled hearing and no answer having been filed by respondent, a substitute panelist was not appointed.

The relevant portion of MCR 9.111(A) states:

The Board must annually appoint three attorneys to each hearing panel and must fill a vacancy as it occurs . . . two members constitute a quorum. A hearing panel acts by a majority vote. If a panel is unable to reach a majority decision, the matter shall be referred to the Board for reassignment to a new panel.

Respondent concedes that a quorum of two panel members may hear a discipline case and may make a binding decision. Indeed, respondent stipulates that there is case law to support this

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<sup>2</sup>The complaint against respondent Fertig was filed in September 1997. An amendment to MCR 9.115(F)(4)(b) which became effective in all matters commenced after April 1, 1998 further allows either party to request written or recorded witness statements, but only of witnesses to be called at the hearing.

<sup>3</sup>Mogill, Discovery and Disclosure in Attorney Discipline Cases, 74 Mich Bar Journal 898 (1995).

proposition.<sup>4</sup> Respondent argues, however, that a hearing panel consisting of fewer than three members is not a legally constituted body under MCR 9.111. Respondent argues that an improperly constituted panel could not issue a decision in this case without violating respondent's right to due process.

All discipline proceedings conducted under subchapter 9.100 are subject to that portion of MCR 9.107(A) which states,

An investigation or proceeding may not be held invalid because of a nonprejudicial irregularity or an error not resulting in a miscarriage of justice.

Respondent first raised the issue of the make-up of the panel in a motion filed October 8, 1998, less than three weeks before a scheduled hearing on October 27, 1998. At that point in the proceedings, this matter had been pending for over one year and the two member hearing panel had conducted hearings on November 24, 1997, January 9, 1998, February 24, 1998, and March 5, 1998 without any objection from respondent regarding the make-up of the panel. This acquiescence was noted by the panel in its order denying respondent's motion for disqualification of the panel. Respondent's interlocutory appeal to the Attorney Discipline Board was denied.

Respondent does not claim that he was actually prejudiced by the make-up of the panel. The panel apparently acted with unanimity and the absence of a third member did not slow the process. We are unable to find a violation of respondent's constitutional right to due process. In Dohany v Rogers, 281 US 362, 369 (1930), the U.S. Supreme Court held:

The due process clause does not guarantee to the citizens of a state any particular form or method of state procedure. Under it he may neither claim a right to trial by jury nor a right to appeal. Its requirements are satisfied if he has reasonable notice and reasonable opportunity to be heard and to present his claim or defense . . . .

Simply put, the due process clause does not guarantee respondent a right to a hearing before three hearing panelists. Respondent would apparently concede that if panelist Sherrod had called in sick on the morning of every hearing in this case, the panel could have proceeded as scheduled before a quorum consisting of panelists Emery and Hogan. He insists, however, that the same

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<sup>4</sup>State Bar Grievance Administrator v Grubbs, 396 Mich 275; 240 NW2d 233 (1976).

hearings conducted before the same two hearing panelists amounted to a deprivation of his constitutional right to due process because panelist Sherrod moved from Lansing to Detroit two weeks before the first hearing and was not replaced. We do not agree with this analysis and we will not void the proceedings below on that basis.

#### The Panel's Denial of the Motion to Set Aside Default

Except as otherwise provided in chapter 9.100 of the Michigan Court Rules, the rules governing practice and procedure in a non-jury civil action apply to a proceeding before a hearing panel. MCR 9.115(A). Rule 9.115(D) further directs that the respondent in a discipline matter must file and serve a signed answer within 21 days after a complaint is served and that a default, with the same effect as a default in a civil action, may be entered against a respondent who fails to respond within the time permitted.

Formal complaint 97-246-GA was filed in this case on September 30, 1997 and was served on respondent by regular and certified mail at his address registered with the State Bar of Michigan on October 3, 1997. Respondent's default for failure to file a timely answer was filed October 27, 1997. The circumstances surrounding respondent's failure to file a timely answer, the grounds asserted by respondent's motion to set aside default filed on January 2, 1998 and the basis for the hearing panel's decision to deny that motion are set forth in detail in the panel's opinion entered August 3, 1998, attached to this opinion as Appendix A.

A motion to set aside default is considered by a hearing panel under the guidelines of MCR 2.603(D)(1).<sup>5</sup> Grievance Administrator v Clyde Ritchie, ADB 52/87 (ADB 1988). Our Supreme Court has held that an appellate court will not set aside a trial court's ruling on a motion to set aside a default judgment unless there has been a clear abuse of discretion. Alken-Zeigler, Inc. v Waterbury Headers Corp., 461 Mich 219, 227; 600 NW2d 638 (1999). Applying that standard solely to the

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<sup>5</sup>MCR 2.603(D)(1) provides:

A motion to set aside a default or a default judgment, except when grounded on lack of jurisdiction over the defendant, shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed.

hearing panel's decision to deny the motion to set aside default, we conclude that the panel's decision was manifestly an exercise of judgment and not grossly violative of fact and logic. The panel devoted three separate hearings to this issue, considered the credibility of the witnesses presented, including respondent, his employees and a recognized handwriting expert, and weighed the issues in a reasoned manner.

Nor are we persuaded that the hearing panel's decision on the motion to set aside default resulted in a denial of respondent's right to due process. In a frequently cited opinion, the U.S. Supreme Court declared that:

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. Mullane v Central Hanover Bank & Trust, 339 US 306; 94 LEd 865 (1950).

This due process requirement was recognized by the Board in Grievance Administrator v Leonard R. Eston, 90-91-GA (ADB 1992), citing Mullane, *supra*, and is the applicable standard for determining the adequacy of notice in Michigan. See Bunner v Blow-Rite Instillation Co., 162 Mich App 669 (1987).

Under MCR 9.115(C), service of the complaint and all subsequent pleadings may be made by registered or certified mail addressed to the respondent attorney's address on file with the State Bar as required by Rule 2 of the Supreme Court Rules concerning the State Bar of Michigan. In this case, the hearing panel determined that a copy of the complaint was sent by certified mail to respondent's Rule 2 address and that receipt was acknowledged by a member of his staff. For purposes of a due process analysis, service was accomplished in this case by a method reasonably calculated to give the respondent actual notice of the proceeding and an opportunity to be heard.

#### Level of Discipline

Finally, the Board has considered respondent's claims that the hearing panelists' decision to impose a suspension of four years should be set aside because it is "excessive," "shocks the conscience" and "constitutes cruel and unusual punishment."

The charges of misconduct in the Grievance Administrator's seven count complaint are summarized in the first two pages of the hearing panel's opinion of August 18, 1999 (Appendix B). The misconduct includes respondent's misappropriation of \$21,834 in his capacity as a fiduciary for Harvey Warnick; his deposit of an additional \$10,644.19 from checks issued to Warnick into respondent's own business account or his trust account and his misappropriation or failure to timely account for the proceeds of those checks; his failure to inform Warnick that creditors had not been paid, contrary to Warnick's instructions; his false statements to a creditor that Warnick had filed bankruptcy proceedings; his failure to communicate with Warnick to the extent necessary to permit his client to make informed decisions regarding certain litigation; and respondent's failure to timely answer two requests for investigation. While all of the misconduct found by the hearing panel must be considered in weighing the appropriate level of discipline, it is the respondent's misappropriation of funds which warrant discussion here.

Since their adoption by the American Bar Association's House of Delegates in February 1986, the ABA's Standards for Imposing Lawyer Sanctions have been utilized by hearing panels and the Board when considering the appropriate level of discipline. As the Board noted in a recent opinion,

While they do not provide rigid guidelines for a level of discipline to be imposed in every conceivable factual situation, the American Bar Association's Standards for Imposing Lawyer Sanctions provide a useful framework within which to categorize misconduct and to identify the appropriate sanction. [GA v Harvey J. Zameck, 98-114-GA; 93-133-FA (ADB 1999), lv den \_\_\_ Mich \_\_\_ (2000).]

On June 27, 2000, the Michigan Supreme Court entered an opinion in Grievance Administrator v Lopatin, \_\_\_ Mich \_\_\_ (2000) which explicitly directs the Board and hearing panels to follow the ABA Standards when determining the appropriate sanction for lawyer misconduct.

Following that charge in this case, we consider respondent's unauthorized misappropriation of client funds under ABA Standard 4.1 (Failure to Preserve the Client's Property). That standard draws the following distinctions:

Absent aggravating or mitigating circumstances, upon application of the factors set out in 3.0, the following sanctions are generally appropriate in cases involving the failure to preserve client property:

4.11 - Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client.

4.12 - Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client.

4.13 - Reprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client.

Applying the general factors in Standard 3.0, it is apparent that respondent violated his duty to preserve his client's property. He acted with knowledge and he caused actual injury to his client, Mr. Warnick. It is clear in this case that respondent's misappropriation of client funds was not merely negligent and that a reprimand, as indicated by Standard 4.13, would not be appropriate. The Grievance Administrator has not petitioned for review of the hearing panel's decision and we do not consider whether disbarment is warranted. Within the theoretical framework of the ABA Standards, suspension of respondent's license is clearly appropriate.

However, our analysis does not end there. In Michigan, a suspension imposed by a hearing panel or the Board may not be less than 30 days. MCR 9.106(2). Although no upper limit is specifically stated in that sub-rule, the Board is not aware of any suspension greater than five years imposed in Michigan since the creation of the present bifurcated discipline system in October 1978.<sup>6</sup> Obviously, a finding within the framework of the ABA Standards that a certain kind of misconduct warrants "suspension" provides limited guidance since suspensions can range from 30 days to at least five years.

Fortunately, for purposes of our review, there is no dearth of authority in Michigan identifying the presumptive range of discipline for an attorney who has willfully misappropriated client funds entrusted to his/her care. In Grievance Administrator v David A. Woelkers, 97-214-GA (ADB 1998) (lv den \_\_\_ Mich \_\_\_ (1999), we said,

During the 20 years of its existence, the Attorney Discipline Board has

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<sup>6</sup>Under MCR 9.123(D)(2), an attorney whose license to practice law has been revoked may file a petition for reinstatement after five years have elapsed since revocation.

regularly declared that willful misappropriation of client funds, absent compelling mitigation, will generally result in discipline ranging from a suspension of three years to disbarment. As recently as our November 3, 1998 opinion in Grievance Administrator v T Patrick Freydl, 96-193-GA (ADB 1998) we stated:

While discipline must always be imposed in light of the unique factors in each case, the seriousness of an attorney's misuse of funds entrusted by a client is reflected in a long line of decisions in which outright misappropriation of client funds has resulted in discipline ranging from a suspension of three years to disbarment. See, for example, Grievance Administrator Charbonneau, DP 103/83; DP 126/83 (ADB 1984) (increasing discipline from a one-year suspension to disbarment); Grievance Administrator v Edwin C. Fabre, DP 84/85; DP 1/86 (ADB 1986) (increasing discipline from a 60-day suspension to three years); Grievance Administrator v Muir B. Snow, DP 211/84 (ADB 1987) (increasing discipline from a suspension of two years to three years); Grievance Administrator v Paul Wright, ADB 126-87 (ADB 1998) (increasing discipline from a one-year suspension to three years); Grievance Administrator v Kenneth M. Scott, DP 178/85 (ADB 1988) (increasing discipline from a six-month suspension to three years); Grievance Administrator v Fernando Edwards, 437 Mich 1202; 466 NW2d 281 (1990) (ADB increased discipline from a two-year suspension to disbarment; SC peremptorily reduced discipline to a three-year suspension); Grievance Administrator v Richard E. Meden, 92-106-GA (ADB 1993) (increasing discipline from a 18-month suspension to disbarment); Grievance Administrator v John T. McCloskey, 94-175-GA; 94-189-FA (ADB 1995) (increasing discipline from a 130-day suspension to a three years). [Grievance Administrator v T. Patrick Freydl, *supra*, pp 11-12.]

In Woelkers, the Board increased discipline from the 30 days imposed by the hearing panel to three years noting that upon application of all of the relevant aggravating and mitigating factors, protection of the courts, the public and the legal profession nevertheless mandated imposition of discipline at a level required to convey the message that it is never acceptable for an attorney to place his or her financial need above the obligation to safeguard client funds.

In this case, modification of the discipline imposed by the hearing panel is not warranted. The four year suspension ordered by the hearing panel is well within the range generally recognized in Michigan for cases involving misappropriation of client funds. While compelling mitigation may warrant the imposition of discipline below that range, mitigation of that nature is not present here. Both the mitigating and aggravating factors considered by the hearing panel are discussed at length and in detail in Appendix B, pages 7 - 22. The aggravating and mitigating factors discussed by the

hearing panel are taken from sections 9.2 (aggravation) and 9.3 (mitigation) of the ABA Standards.

In summary, we find that the four year suspension imposed by the hearing panel was appropriate under the ABA Standards for Imposing Lawyer Sanctions and is consistent with a line of Board opinions stretching over at least 20 years.

### **Conclusion**

We are not persuaded that the well reasoned decisions of the hearing panel resulted in an infringement upon respondent's constitutional rights. The hearing panel properly concluded, based not only upon respondent's default but upon the substantial evidence which was introduced, that respondent engaged in serious misconduct which, when considered under all of the aggravating and mitigating circumstances, warrants a suspension of respondent's license for four years. The panel's decisions are affirmed.

Board Members Grant J. Gruel, Michael R. Kramer, Kenneth L. Lewis, Wallace D. Riley and Theodore J. St. Antoine concurred in this decision.

Board Member Nancy A. Wonch was recused.

Board Members C.H. Dudley, M.D., Diether H. Haenicke and Ronald L. Steffens did not participate.

STATE OF MICHIGAN  
ATTORNEY DISCIPLINE BOARD

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GRIEVANCE ADMINISTRATOR,  
Attorney Grievance Commission

**APPENDIX A**

Petitioner,

v

ADB File Nos. 97-246-GA  
97-264-FA

LANCE A. FERTIG, P-27476

Respondent.

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**OPINION WITH REGARD TO MOTION TO  
SET ASIDE DEFAULT**

**Issued: August 3, 1998**

**INTRODUCTION**

Respondent seeks to set aside a default taken pursuant to MCR 9.115(D)(2). It is undisputed that Respondent failed to file an answer to the formal complaint in case no. 97-246-GA. In his motion to set aside default, Respondent claims that there was good cause for his failure to answer because he never received actual notice of the complaint and that service of the complaint was defective. He has also presented evidence designed to show a meritorious defense.

This panel previously ruled that the manner of serving the formal complaint complied with the provisions of MCR 9.115(C) thereby vesting this panel with personal jurisdiction over Respondent. We determined that a copy of the complaint was sent by certified mail to Respondent's Rule 2<sup>1</sup> address and that receipt was acknowledged by a member of his staff. (1-9-98 Tr 33-35)

## **GOOD CAUSE**

### **A. Factual Background.**

Respondent claims that he did not receive actual notice of the formal complaint as a basis for setting aside the default. He testified that he presently operates out of four (4) offices located in Lansing, Owosso, Brighton and Waterford. The Owosso office is his Rule 2 address. (3-5-98 Tr 308-309) Having received 50-60 grievances in the past, he was well aware of his responsibilities with regard to answering requests for investigation and formal complaints. (3-5-98 Tr 311-314) He claims that he was never aware of either the underlying grievance or the formal complaint until December 17, 1997, well after the date the default was taken. (3-5-98 Tr 316)

Despite testimony by Respondent's business manager<sup>2</sup>, Teria Wilhelm, that she never prepared or observed key documents showing that Respondent's office did actually receive grievance documents, analysis of the documents by Respondent's own expert establishes the contrary. Ms. Wilhelm testified under oath that she did not receive and did not sign the mail receipt for Exhibit 4, Final Notice of Request for Investigation. (1-9-98 Tr 76-77) Respondent's expert concluded that Ms. Wilhelm, aka Lentz, did sign the mail receipt attached to Exhibit 4. (Report of Leonard Speckin, dtd May 14, 1998) Ms. Wilhelm testified under oath that she did not type or sign Exhibit 5A, a letter to the Grievance Commissioner dated June 6, 1996 acknowledging receipt of the grievance that is the subject matter of this case. (1-9-98 Tr 88-89) Respondent's expert concluded that the type font used on Exhibit 5A is most probably done by a word processor at Respondent's Owosso office and that the signature on that letter was in fact the handwriting of Teria Lentz.

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<sup>1</sup> See Rule 2 of the Supreme Court Rules Concerning the State Bar of Michigan.

<sup>2</sup> Ms. Wilhelm worked exclusively out of the Owosso office.

(Report of Leonard Speckin dtd May 14, 1998) Ms. Wilhelm testified that Respondent looks at or reviews all such letters before they are sent out as a normal course of business. (1-9-98 Tr 104, 106) Ms. Wilhelm testified under oath that she did not recognize Exhibits 12 and 13 and that she did not sign Respondent's name to Exhibit 13. (1-9-98 Tr 140, 154) Respondent's expert concluded that the letter was probably done by a word processor at Respondent's Owosso office and that the signature of Respondent was placed on the document by Ms. Wilhelm. (Report of Leonard Speckin dtd May 14, 1998) Exhibit 13 contains an acknowledgment by Respondent's office of receipt of a grievance regarding J.C. Bowen, which is also the subject matter of this case. Ms. Wilhelm testified under oath that she did recall preparing or signing Respondent's signature to Exhibit 15A, a letter requesting additional time to answer the J.C. Bowen request for investigation. (1-9-98 Tr 163, 164) Respondent's expert concluded that Exhibit 15A was probably prepared by Respondent's word processor and that the signature of Respondent on the document was the handwriting of Ms. Wilhelm. (Report of Leonard Speckin dtd May 14, 1998)

Ms. Wilhelm testified that she and other staff members routinely place Respondent's signature on documents after Respondent has reviewed and approved them. (1-9-98 Tr 155) She also testified that the only time she did not follow this procedure was when she typed up and signed Exhibit P-2, the Emergency Motion for Adjournment filed on or about November 24, 1997. (1-9-98 Tr 156) Respondent testified that while he was advised as early as May, 1996 that Harvey Warwick was going to file a grievance, he never was given a copy of one. (3-5-98 Tr 318) He claimed that he questioned Ms. Wilhelm about the matter in May, 1996 and again in July 1997 and that he was told there was no grievance received. (3-5-98 Tr 323) Respondent also acknowledged that in October, 1996 he was told by his friend, Bruce Garber, that Harvey Warnick had claimed that not only had he filed a grievance, a hearing had been scheduled. (3-5-98 Tr 343-344) He did not question anyone with the Attorney Discipline Board or the Grievance Administrator about this information. (3-5-98 Tr 345) According to Respondent he confronted Ms. Wilhelm about the matter after discovering the grievance and that she admitted that she had received a notice of hearing with regard to the November 24, 1997 hearing, that she could not determine who the grievant was, that

she sent a letter to obtain clarification and then forgot about it until the day of the hearing. (3-5-98 Tr 325)

Ms. Wilhelm acknowledges signing for documents from the Grievance Administrator on October 6, 1997. She identified her signature on the mail receipt attached to a proof of service of the Notice of Hearing, Parties of Record, Formal Complaint, Discovery Demand and Instruction Sheet. See Exhibit 16. (1-9-98 Tr 165-167) However, despite the office policy of placing all such documents on Respondent's desk for his review, Ms. Wilhelm claims that she did not do so with respect to these documents. She explained that this omission was due to her inability to recognize the complaint number. (1-9-98 Tr 176) Moreover, she claims that she recalls receiving only the proof of service and the instruction sheet and has no recollection of receiving the formal complaint or request for discovery. (1-9-98 Tr 175-176) Even though all of the above described documents were sent by both certified and regular mail, Ms. Wilhelm claims she never received the formal complaint, notice of hearing and request for discovery. (1-9-98 Tr 177) However, in a letter she composed to the Attorney Grievance Administrator dated November 5, 1997, she indicated that "this office received yet another Notice of Hearing and Formal Complaint". (Exhibit F) (1-9-98 Tr 184-185) In a letter dated October 8, 1997, a day after receiving the original notice of hearing, Ms. Wilhelm made reference to having received "a Notice of Hearing and Discovery Demand". (Exhibit B) (1-9-98 Tr 186)

The Default and Affidavit were sent by the Grievance Administrator to Respondent on October 27, 1997. (Exhibit 17) The return receipt dated October 29, 1997 bears the printed name of Teria Lentz, Ms. Wilhelm's alias. Ms. Wilhelm testified that she never saw the default or the mail receipt and that the mail receipt was not signed by her. She also testified under oath that the printing of her name on the receipt was not hers. (1-9-98 Tr 177-178) While Respondent's expert is unable to identify the handwriting on this receipt, the printing was done by the same person who placed the names on two other mail receipts. (Report of Leonard Speckin dtd May 14, 1998) Ms. Wilhelm did acknowledge receiving Exhibit 18, a proof of service of a notice of hearing and a consolidation of formal complaint sent October 31, 1997. While she said the signature on the attached mail receipt

did not look like hers, she acknowledged: “Since I got this stuff -- I would have to say its my signature since I have the stuff.” (1-9-98 Tr 193) If she signed this receipt she probably also printed her name on it. Since this printing matches the other printing on the other mail receipts, Ms. Wilhelm’s denial of having received and signed the mail receipt for the Default and Affidavit and the mail receipt for Exhibit 16 is highly suspect and more probably false. Moreover, Janelle Wilhelm, a niece, testified that the mail receipt for Exhibit 16 appears to be the signature of her aunt, Teria Wilhelm. (3-5-98 Tr 270-271)

This panel has been provided with no direct information which explains the false, misleading and apparently perjurious testimony of Respondent’s business manager, Teria Wilhelm. According to Respondent he has taken no action against her for falsifying the Emergency Motion to Adjourn the November 24, 1997 hearing scheduled before this panel. (3-5-98 Tr 332) The failure to take such action may in part be explained by Respondent’s recognition that only Ms. Wilhelm’s testimony might prevent some adverse impact upon his privilege of practicing law.

#### **B. Legal Standards.**

*MCR 9.115(A)* provides that this panel is to reference rules relating to nonjury civil actions except as to matters for which a more specific rule or procedure is provided. The procedure for setting aside defaults against parties over whom jurisdiction was obtained is set forth in *MCR 2.603(D)(1)* which requires a showing of both good cause and an affidavit of facts showing a meritorious defense. Courts have recognized good cause to include excusable neglect, substantial defect in or irregularity in the proceedings upon which the default is based, or some other reason showing that manifest injustice would result from permitting the default to stand. *Glasner v Griffen, 102 Mich App 445 448 (1980)*. In addition, *MCR 2.603(D)(3)* permits the setting aside of a default in accordance with *MCR 2.616*. *MCR 2.612(B)* provides that:

“A defendant over whom personal jurisdiction was necessary and acquired, but who did not in fact have knowledge of the pendency of the action, may enter an appearance within 1 year after final judgment, and if the defendant shows reason justifying relief from the judgment and innocent third parties will not be prejudiced, the court may relieve the defendant from the judgment, order or proceedings for which personal jurisdiction was necessary, on payment of costs or on conditions the court deems just.”

This case presents a claim that the Respondent is entitled to have the default against him set aside based upon a claimed lack of actual notice.

Service of requests for investigation and formal complaints is different than service in other civil matters. **MCR 9.115(C)** provides:

“Service of the complaint and all subsequent pleadings and orders must be made by personal service or registered or certified mail addressed to the person at the person’s last known address. An attorney’s last known address is the address on file with the state bar as required by Rule 2 of the Supreme Court Rules Concerning the State Bar of Michigan. A respondent’s attorney of record must also be served, but service may be made under MCR 2.107. Service is effective at the time of mailing, and nondelivery does not affect the validity of service.”

This panel has already relied on this rule in denying Respondent’s request to set aside the default on the grounds that no personal jurisdiction had been obtained. In our ruling we specifically found that the formal complaint was properly sent by registered mail to Respondent’s Rule 2 address in Owosso, Michigan and that any claim by him or his staff that they did not receive the documents did not preclude personal jurisdiction.

The more difficult issue is whether any lack of actual knowledge of the grievance ought to be considered good cause for purposes of allowing a default to be set aside under **MCR 2.603(D)(1)**. On the one hand, the court rules in civil cases recognize lack of actual notice as a basis for setting aside a judgment or order. *See MCR 2.612(B)*. On the other hand, the goals of the disciplinary system focus on the need to have reasonable accessibility of attorneys and the expeditious processing of grievances. The Attorney Discipline Board has suggested that the special rule of service set forth above establishes a rebuttable presumption of notice. *In the Matter of Melvin R. Smith, NO. 35229-A, 4-26-79*. **MCR 9.102(A)** provides that the provisions of Chapter 9 are to be construed liberally for the “protection of the public, the courts and the legal profession” and that “proceedings must be as expeditious as possible.”

With these guidelines in mind, this panel concludes that a claimed lack of actual notice of a grievance may be a basis for setting aside a default, but not under the circumstances presented in this case. We believe that the suggestion of the Attorney Discipline Board in *Smith, supra*, ought to be applied and a rebuttable presumption of actual notice created upon evidence of valid service

on an attorney's Rule 2 address. To rebut this presumption, an attorney must present evidence of lack of actual notice and demonstrate that the failure to receive notice was not due to the attorney's inexcusable neglect. We believe this rule is one that insures that the goals of the disciplinary system of accessibility, accountability and expeditious processing of grievances are met with due regard to the attorney's right to a full presentation of his defense to allegations of wrongdoing.

In light of the reality of modern law office reliance upon support staff, this panel believes that an attorney may be properly charged with actual notice where the staff he or she employs receives actual notice of a grievance. Where that agent receives actual notice while acting within the scope of his or her agency, that actual notice will be imputed to the attorney who is the subject matter of the grievance. *Chelsea Associates v Reopens*, 527 F 2d 1266 (CA 6, 1975); *Schram v Burt*, 111 F 2d 557, 564 (CA6, 1940 *Westinghouse Electric & Manufacturing Co. V Hubert*, 175 Mich 568, 579 (1913); *Thornton v City of Flint*, 39 Mich App 260, 270 (1972) We believe that this rule properly apportions the consequences for the incompetent secretary or legal assistant on the attorney hiring and supervising that individual and not on the public who has no means of control over these individuals and who stand to suffer for the attorney's breach of his ethical duties.

### **C. Conclusion Re: Good Cause**

Respondent testified that he never saw either the Request for Investigation or the Formal Complaint filed against him by the Grievance Administrator. While there is no direct evidence in this record to contradict this assertion, there are surrounding circumstances which suggest that Respondent should have investigated the possibility that such documents had been filed. Respondent acknowledged that one or more of his friends advised him that Harvey Warnick had filed or was going to file a grievance at about the time one was actually filed. Respondent admits that he was also advised by his friend Bruce Garber in late October 1997 that a hearing was "coming up" on Harvey Warnick's grievance. This information came to Respondent at a time when he was obviously having a "falling out" with Warnick. Warnick had demanded the return of substantial sums of money he claimed Respondent unlawfully took. Under these circumstances, Respondent was put on notice to investigate the possibility that a grievance had been filed and/or that a hearing

had been scheduled. While he claims that he asked his staff about the existence of any grievances, no testimony supporting this claim was offered by Ms. Wilhelm or any other witness for the Respondent. In any case, his failure to inquire of the Grievance Administrator and/or the Attorney Discipline Board under these circumstances was the kind of neglect that precludes setting aside a default. For an attorney with as many as 60 interactions with the disciplinary system, it is difficult to believe Respondent would not know how to check into the persistent rumors offered by his friends.

This panel concludes that actual notice of the request for investigation and the formal complaint was received by Respondent's staff. Respondent's own expert has provided convincing evidence that Teria Wilhelm, aka Lentz, received Exhibit 4, the June 3, 1996 final notice regarding the request for investigation. While she denied under oath signing the mail receipt for this document under oath, handwriting analysis demonstrates just the opposite. Other documents Ms. Wilhelm claimed to have never seen before were prepared on Respondent's word processor and Ms. Wilhelm was proven to be the author of Respondent's signature on them. Ms. Wilhelm did acknowledge receipt of documents regarding the grievance on October 6, 1997, but claimed to have never seen the formal complaint or discovery demand. Not only were these documents a part of the packet sent to Respondent, in later correspondence Ms. Wilhelm makes reference to having received them. The false and misleading testimony of Ms. Wilhelm regarding actual receipt of the charging documents convinces this panel that Respondent's office did in fact receive them and that she deliberately lied in an attempt to cover up this fact. Her testimony fails to convince this panel that there were any unusual circumstances surrounding the service of charging documents and any inference that these documents were not received is expressly rejected.

Both Respondent and Ms. Wilhelm acknowledged that the normal procedure for handling information regarding grievances was to present the charging documents to Respondent so that a response could be prepared. This panel has concluded that Ms. Wilhelm lied in denying actual receipt of the relevant grievance documents. We have no reason to accept as true Ms. Wilhelm's claims that she disregarded office practice and we refuse to rely upon her testimony to support

Respondent's claim that he did not receive actual notice. While we do not have direct evidence contradicting Respondent's claim that he did not receive the grievance documents, the circumstances cast considerable doubt on his claim. Respondent has not sustained his burden of proving that he was not provided with actual notice.

Even if we were to accept Respondent's assertion that he did not actually know about the grievance and attendant proceedings until December 1997, we would hold that such notice is imputed to him by the actual notice given his secretary and business manager, Teria Wilhelm. It is apparent from this record that Ms. Wilhelm was Respondent's agent and that on the dates when various grievance documents were received was acting within the scope of her employment when receiving them. Under agency principals, actual receipt upon Ms. Wilhelm is imputed to her principal, Respondent Fertig.

In this case, we find that Respondent has failed to demonstrate good cause to set aside the default. He has failed to present sufficient evidence to rebut the presumption of actual notice created by the properly served request for investigation and formal complaint. His claim that he did not receive actual notice has not been supported by surrounding circumstances which justify relief from his default. Finally, we find that Respondent's business manager and agent, Teria Wilhelm, while acting within the scope of her employment, did receive the charging documents and that her having received actual notice must be imputed to Respondent. This result is consistent with Respondent's duty to hire and train a competent staff, a duty which cannot be delegated to the public.

### **MERITORIOUS DEFENSE**

Since we have concluded that the Respondent has failed to establish good cause to set aside the default, we do not need to decide whether the information offered to demonstrate a meritorious defense meets that burden. While these submissions do create questions concerning the various transactions that are complained of in the formal complaint, they do not suggest that Respondent has established overwhelming evidence that he is not responsible for the alleged violations set forth in the formal complaint. Much of the information offered would be properly admissible by way of



**STATE OF MICHIGAN**  
**ATTORNEY DISCIPLINE BOARD**

GRIEVANCE ADMINISTRATOR,

Petitioner,

Case Nos. 97-246-GA  
97-264-FA

v

LANCE A. FERTIG, P-27476,

**APPENDIX B**

Respondent.

**OPINION**

Issued by Attorney Discipline Board  
Ingham County Hearing Panel #3

August 18, 1999

**I. JURISDICTION AND PANEL PROCEEDINGS**

Respondent, Lance A. Fertig, P27476 ("Fertig"), was licensed to practice law in the State of Michigan on July 6, 1979. He is therefore subject to the jurisdiction of the Attorney Discipline Board and the Supreme Court of the State of Michigan in matters of discipline for misconduct.

On or about September 30, 1997, an initial Formal Complaint [Case No. 97-246-GA] was made against Fertig. That complaint contains seven (7) counts, summarized as follows<sup>1</sup>:

1. Count I alleges that Fertig was retained in 1994 to provide legal representation pertaining to Complainant, Mr. Harvey Warnick's ("Warnick") business, finances, and civil litigation; that Fertig became a signer on Warnick's personal checking account; and that, contrary to his duties as a fiduciary, Fertig misappropriated a total of \$21,834 from the account over the course of nine (9) months, in violation of MCR 9.104(1)-(4) and the Michigan Rules of Professional Conduct ("MRPC") 1.15(a)-(c) and 8.4(a)-(c);
2. Count II asserts that, contrary to Warnick's instructions, Fertig deposited nine (9) separate checks totaling \$10,644.19 issued to Warnick in connection with Warnick's trucking business and deposited them in either Fertig's general business account (one check) or his trust account (eight checks); misappropriated the proceeds of the checks deposited into his business account and failed to timely account for those checks deposited in the trust, all of which are alleged to violate MCR 9.104(1)-(4) and MRPC 1.2(a); 1.4(a) and (b); 1.15(a)-(c); and 8.4(a)-(c);
3. It is alleged in Count III that, being retained to handle Warnick's financial matters, Fertig violated his duties by failing to pay Warnick's creditors with available funds; failing to inform Warnick that creditors had not been paid; and falsely informing one creditor that

Warnick had filed bankruptcy proceedings. These acts or omissions are alleged to have resulted in a negative credit report regarding Warnick, and Fertig is further alleged to have failed to take necessary steps to clear the adverse credit report. Violations of MCR 9.104(1)-(4) and MRPC 1.1(c); 1.2(a); 1.3; 1.4(a); and 8.4(a)-(c) are alleged in the Count;

4. Count IV alleges that Fertig engaged in conduct involving dishonesty, fraud, deceit or misrepresentation and knowingly made a false statement of fact to a third person regarding the subject matter of the representation when he informed a creditor of Warnick in writing that Warnick had filed for bankruptcy protection, with such conduct being alleged as violating MCR 9.104(1)-(4); and MRPC 4.1 and 8.4(a)-(c);
5. Count V asserts that Fertig breached duties owed Warnick in a litigation matter in which he had been retained by failing to advise Warnick of the viability of the defenses asserted on his behalf; assuring Warnick that the litigation was "easily winnable"; and failing to explain the litigation to the extent reasonably necessary to permit Warnick to make informed decisions regarding it, all of which are alleged to be in violation of MCR 9.104(1)-(4); and MRPC 1.1(a)-(c); 1.2(a); 1.4(b); and 8.4(a) and (c);
6. Count VI alleges that, even though he was granted an extension of time to do so, Fertig failed to timely answer the request for investigation underlying this matter, in violation of MCR 9.103(C); 9.104(1)-(4) and (7); 9.113(A); 9.113(B)(2); and MRPC 8.1(b); and 8.4(a) and (c); and
7. In Count VII Fertig is alleged to have failed to timely answer a request for investigation filed by a second Complainant, Mr. J.C. Bowen, despite having been granted an extension of time to do so, in violation of the same provisions as identified in Count VI.

On or about October 27, 1997, a second Formal Complaint [Case No. 97-264-FA] was filed against Fertig, alleging that he had failed to timely answer the formal complaint in Case No. 97-246-GA. Consequently, it was asserted that he violated MCR 9.104(1)-(2), (4) and (7); MRPC 8.1(b) and 8.4(a) and (c).

Both complaints were consolidated for hearing on November 24, 1997. Following Fertig's failure to appear at that time, a default was entered on the complaints. Hearings upon Fertig's motion to set aside the default were held on January 9, March 5 and May 12, 1998. In an Opinion dated July 29, 1998, this panel denied that motion.

Further hearings on the disciplinary phase of these proceedings were held on October 27, 1998, January 14 and April 16, 1999.

## II. SUMMARY OF EVIDENCE

The default of Fertig is treated as his admission of all well-pleaded allegations contained in the complaints. American Central Corp v Stevens Van Lines, Inc, 103 Mich App 507, 512; 303 NW2d 234 (1981). This panel is mindful, however, that a default is not an admission of legal conclusions unsupported by the factual allegations of a complaint, nor is it an admission that any level of discipline is appropriate. American Central, 103 Mich App at 512, 514.

Notwithstanding the default, evidence bearing upon the substance of the allegations of the complaints, as well as upon the discipline question, was presented by the parties. In this opinion the panel makes no attempt to discuss all of the evidence before it, but only that which is deemed most important to the decision on discipline. The panel emphasizes, however, that it has considered all the evidence in making the determinations presented in this opinion.

Warnick testified that he and Fertig had been friends since high school (10/27/98 Tr., p. 624). In 1994, Warnick was just coming out of a failed franchise business in Florida involving the leasing of boats (Warnick, 10/27/98 Tr., pp. 549-50). Given the business failure, Warnick needed another line of work and decided to pursue a job as a truck driver (10/27/98 Tr., pp. 588, 608-09). He came to Michigan to work with Roberts Express (10/27/98 Tr., pp. 588-589). At about that time, Warnick took up residence in Owosso, Michigan with Mr. and Mrs. Fertig for a few months.

Warnick testified that, knowing he would be on the road for long stretches of time, he requested Fertig to pay his bills out of a checking account established at Michigan National Bank (10/27/98 Tr., pp. 611, 616-17, 625). The account was initially established with all or a portion of \$5,500 received by Warnick from Fertig (Warnick, 10/27/98 Tr., pp. 611, 613-14). Warnick characterized the funds as a loan (10/27/98 Tr., pp. 588-610), while Fertig testified it was seed money for their joint venture in the trucking business (Fertig, 4/16/99 Tr., pp. 19-20, 167).

The account was in Warnick's name only, with Fertig having signing authority (Warnick, 10/27/98 Tr., p. 611). Warnick testified that the account was to be replenished with payments he received from Roberts Express (10/27/98 Tr., p. 612). According to Warnick, Fertig had no authority

to withdraw funds from the bank account except to pay Warnick's expenses (10/27/98 Tr., p. 581). Fertig acknowledged that he did withdraw funds from the account to pay his own personal and business expenses, but that such withdrawals were authorized (Fertig, 4/16/99 Tr., pp. 19, 134). Fertig denied that the use of the account funds was limited to paying Warnick's bills (Fertig, 4/16/99 Tr., pp. 19-20). He testified that the account was a joint one and that the funds were freely available to him for use for any purpose he wanted (Fertig, 4/16/99 Tr., pp. 87, 134).

Fertig testified that Warnick had come to him as a friend to join him in a "joint venture" (Fertig, 4/16/99 Tr., pp. 15-20). The venture would involve Warnick driving the truck and Fertig taking care of business related to the driving (e.g., hiring and firing of co-drivers, preparing necessary documents, and paying bills) (*Id.*). To that end, Fertig said that he put the \$5,500 into the joint venture and performed some of the functions relating to the business, such as placing a want ad for a co-driver (Fertig, 4/16/99 Tr., pp. 35-37). Warnick denied that there was any joint venture with Fertig (Warnick, 10/27/98 Tr., p. 587).

There were no corporate, partnership or other documents prepared or signed evidencing a joint venture or other business relationship between Warnick and Fertig (Fertig, 4/16/99 Tr., pp. 18, 127). A durable power of attorney was prepared by Fertig, however, which granted him powers to act on Warnick's behalf (Warnick, 10/27/98 Tr., p. 621; Fertig, 4/16/99 Tr., pp. 21, 127).

As mentioned, Fertig did use the funds in the account for purposes unrelated to payment of Warnick's bills. This use resulted in the allegations contained in Count I of Case No. 97-246-GA. Fertig also failed to deposit Warnick's checks from Roberts Express into the Michigan National Bank account in Warnick's name, but instead deposited one into his own business account and others into his trust account. Those actions, and a lack of accounting for them, resulted in Count II of Case No. 97-246-GA.

At about the same time that the Michigan National Bank checking account was established in his name, Warnick had Fertig representing him pertaining to the claims of various creditors arising out of the failed Florida business (10/27/98 Tr., p. 621). Fertig acknowledged being in contact with

the creditors, but denied that he was doing so as a lawyer for Warnick, except as to the claim of one creditor, i.e., the "Manifest Group" (Fertig, 4/16/99 Tr., pp. 27-28, 51-52).

Exhibit 110 was admitted into evidence (10/27/98 Tr., pp. 558-561). The exhibit contains letters Fertig wrote in 1994 to Warnick's creditors in Florida (Fertig, 4/16/99 Tr., p. 148). The letters state that Fertig's office was representing Warnick and was in the process of preparing a Chapter 7 bankruptcy petition for him (Fertig, 4/16/99 Tr., pp. 148-149). These letters (and other evidence) bear on the allegations of Counts III and IV of Case No. 97-246-GA, as does Fertig's failure to pay some of Warnick's creditors out of the account, and his admitted writing of insufficient funds checks (Fertig, 4/16/99 Tr., pp. 51, 170).

Other evidence bearing upon the allegations of misconduct in Case No. 97-246-GA was also presented, and some of it will be discussed in connection with the issue of discipline. Addressed first is the evidence offered in aggravation.

### III. AGGRAVATION

Petitioner advances the following as aggravating factors (Counsel's Argument, 4/16/99 Tr., pp. 193, 199-203):

- A. Fertig's friendship with Warnick;
- B. Prior discipline of Fertig;
- C. Dishonest or selfish motive on the part of Fertig;
- D. A pattern of misconduct;
- E. Submission of false evidence and false statements in this proceeding by Fertig;
- F. Fertig's refusal to acknowledge the wrongful nature of his conduct; and
- G. The vulnerability of Warnick because his job as a truck driver often required him to

be out-of-state for significant lengths of time.

#### A. Prior Friendship

The panel agrees with Petitioner that the prior friendship between Fertig and Warnick is an aggravating factor. Fertig testified extensively regarding the history of the friendship (Fertig, 4/16/99

Tr., pp. 203-215), apparently in an effort to explain his actions pertaining to Warnick's checking account.

When Warnick moved from Florida to Michigan, he took a job as a truck driver for Roberts Express. The testimony is consistent that he wanted Fertig to have access to his checking account due to the fact that he would be on the road for substantial lengths of time. The purpose of the access was in dispute.

Fertig described the account as a "joint account", out of which either he or Warnick could freely draw funds. According to Fertig, the account was established to hold funds and pay bills for his and Warnick's "joint venture"; i.e., the trucking business. The parties agree that Fertig did advance \$5,500 in 1994 to help Warnick get started in the business.

More than once in his testimony, Fertig described the arrangement with Warnick as being "loosey goosey." (Fertig, 4/16/99 Tr., p. 50). He used the funds in the account for his own business and personal needs, as well as those associated with Warnick's trucking needs (Fertig, 4/16/99 Tr., pp. 87-88). Fertig justified his use of the funds because of the "joint venture", pointing also to the fact that Warnick had granted him power of attorney (Fertig, 4/16/99 Tr., pp. 21-22, 27).

The power of attorney granted to Fertig was prepared by him.<sup>2</sup> It was admitted into evidence as Exhibit I (5/12/98 Tr., p. 405). It offers no support for his testimony that Warnick knew about, and authorized, his indiscriminate use of the funds in Warnick's checking account (See, e.g., Fertig testimony, 4/16/99 Tr., pp. 133-34). The power of attorney is complete in what it did permit, but it is also clear and unambiguous in what it did not, Exhibit I, p. 5:

#### RESTRICTIONS ON AGENT'S POWERS

\* \* \*

My agent cannot divert my assets to himself/ herself, his/her creditors of his/her estate (sic).

\* \* \*

My agent is a fiduciary; possession (sic) no general or limited power of appointment.

The panel finds that the funds in the checking account were Warnick's; there was no authority given Fertig verbally or in writing to use the funds in the account for his own business or personal purposes;<sup>3</sup> and there was no "joint venture".

Fertig denied ever having an attorney-client relationship with Warnick, except pertaining to one matter referred to in the record as the "Manifest Group" litigation. Fertig took that tact in what appears to the panel in part to have been an effort to avoid a conclusion that he had plainly violated MRPC 1.15(c) relating to providing timely accountings. If that was the strategy, it was grossly ill-conceived.

First, the requirements of MRPC 1.15 apply to lawyers holding client and nonclient funds or property; the lawyer acts in a fiduciary capacity in either case. Formal Ethics Opinion R-7 reads in part:

Client and Third Party Property Protected. MRPC 1.15 is intended to protect client funds as well as nonclient property in the possession of the lawyer, Schwartz v Cummins, ADB 159-88, 12/5/88, settlement check must be placed in trust account; Schwartz v Davey, ADB 27-88, 44-88, 12/6/88, funds held as a fiduciary must be placed in trust account; Grievance Administrator v House, ADB 219-87, 247-87, 6/28/89, lawyers serving as trustees or other fiduciaries must abide by trust account prescriptions.

\* \* \*

No Personal Use of Trust Account. The lawyer trust account may not be used as a depository for the lawyer's business or personal property, CI-477; Schwartz v Scott, ADB #DP178-85, 2/8/88 (using trust account as business account to avoid IRS attachment of firm assets for back taxes results in three-year suspension) or as a substitute for an operating account. Funds of the lawyer or law firm must be segregated from client funds. A lawyer may not deposit personal funds into the lawyer trust account for any reason.

\* \* \*

Commingling. Failure to keep client funds and third party funds separate from the funds of the lawyer and the law firm is commingling and misconduct in violation of MRPC 1.15(a). In the Matter of Reibel, ADB #DP141/80, 7/29/81, 90-day suspension for failing to segregate funds of the client; Schwartz v Hunter, ADB #DP197/84, 176/85, 1/30/87, 2-year suspension for failing to segregate and for converting third party funds. See also, 94 ALR 3d 846 (1979).

Second, it is clear to this panel that Warnick was in fact a client of Fertig and that Fertig's denial of that relationship on matters other than the Manifest Group litigation was false.

Exhibit 110 contains a series of letters from Fertig to creditors of Warnick, and his testimony regarding those letters appears in the 4/16/99 transcript, pp. 148-156. Despite the fact that the letters are on Fertig's office letterhead and contain statements to creditors such as, "[p]lease note that this office is currently representing Warnick . . . and [we] are in the process of preparing a Chapter 7 bankruptcy petition . . .", during the hearings before this panel Fertig denied representing Warnick as a lawyer. Fertig testified variously that his office, not he, was representing Warnick; that he was representing Warnick as a friend, and he just happened to be an attorney who had an office; and that he wrote the letters to get creditors off Warnick's "back and I wanted to do what was necessary." (4/16/99 Tr., pp. 150, 152, 154). During this testimony, Fertig volunteered that he was not "trying to be disingenuous" (4/19/99 Tr., p. 154).

This panel finds that contrary to his protestation, Fertig was being disingenuous. It is striking that Fertig apparently believes that a lawyer is free to choose in his own mind in what capacity, friend or lawyer, he will act and that such a choice is binding on all others, despite plain written representations to the contrary.

Warnick came to Fertig because he was a friend and a lawyer. He trusted Fertig to handle his affairs and pay his bills out of his sole--not joint--account.<sup>4</sup> This panel finds that Warnick did not give permission to Fertig to use the funds in the account for any purpose Fertig wished.

The friendship between Fertig and Warnick is an aggravating factor. It cannot be employed by Fertig to somehow diminish the scope or quality of the duties owed Warnick, or the discipline imposed for violation of those duties. The evidence shows that Fertig used his friendship with Warnick as a ready-made excuse for blatant violation of his duties as a fiduciary and lawyer.

#### B. Prior Discipline

Evidence of prior misconduct was admitted. Exhibits 101-108 show that Fertig was previously admonished six times and reprimanded twice.

Exhibit 101 contains an Opinion and an Order of Reprimand entered in 1989 by an Oakland

County hearing panel. That panel concluded that, without the knowledge or authority of opposing counsel, Fertig changed the terms of a judgment of divorce and had it entered by the court. This panel considers the misconduct involved in that case to be serious, and the relatively modest discipline imposed perhaps sent the wrong message to Fertig about the importance of complying with the Rules of Professional Conduct.

In 1992, an admonishment was issued for Fertig's failure to obtain a written contingent fee agreement (Exhibit 103), while another issued in May of 1994 was based on his failure to appear for a pretrial hearing and for attempting to charge his client an excessive fee (Exhibit 104). A second admonishment in 1994 was based upon Fertig's continued attempt to resolve or settle his client's worker's compensation claim after being discharged (Exhibit 105).

Fertig's second reprimand came in October 1995, for failure to timely answer a Request for Investigation. It is noteworthy that the reprimand was issued by the Attorney Discipline Board upon an appeal by Fertig of a hearing panel's order suspending his license to practice for sixty (60) days (Exhibit 102).

In 1997 an admonishment was issued to Fertig for failing to provide a timely accounting regarding advanced costs received from, and a refund owed to, a client (Exhibit 106). His latest admonishment was in 1998 for receiving a twenty-five percent (25%) contingency fee in a social security case without receiving prior approval of the Social Security Administration; not reducing the contingency fee agreement to writing; and failing to timely surrender the client's file relating to an insurance claim.

This record of prior discipline is an aggravating factor. This panel has concluded from his disciplinary history that Fertig takes significant latitude with his professional responsibilities, and has accepted prior discipline with little resolve to improve his professional conduct.

### C. Dishonest or Selfish Motive

The panel finds that, in using the funds from Warnick's account, it is plain that Fertig had a dishonest or selfish motive, and this is an aggravating factor.

#### D. Pattern of Misconduct

The violations of the Rules of Professional Conduct in this case might be said to be a pattern, or to present multiple offenses. Characterized as either, they are considered in aggravation. ABA Standards for Imposing Lawyer Sanctions, p. 49, (Feb. 1986).

Count I of the complaint in Case No. 97-246-GA sets out over 100 separate unauthorized checks drawn by Fertig on Warnick's account from June 10, 1994 to March 15, 1995, inclusive. See also, that portion of Petitioner's Exhibit 164 labeled "Report III". The amounts of the checks ranged from under \$10.00 to over \$1,100.00, and totaled \$21,834.00. Moreover, as alleged in Count II of the same complaint, nine checks issued to Warnick from Roberts Express were not deposited directly into his account at Michigan National Bank, but diverted either to Fertig's business account or to his trust account.

Fertig's repeated use, commingling and diversion of the funds was contrary to the instructions of Warnick, and in violation of his fiduciary duty as a lawyer and his contractual duties under the durable power of attorney.

#### E. Submission of False Evidence and Statements

Petitioner argues that Fertig's secretary falsely testified in the sessions devoted to hearing the Motion to Set Aside the Default, and that Fertig "knew what was going on" (4/18/99 Tr., p. 202). This panel did conclude in its July 29, 1998 Opinion With Regard to Motion to Set Aside Default that the secretary did not testify truthfully, but did not conclude that Fertig was aware of that fact. We will not revisit that issue at this point.

The panel unhesitatingly determines, however, that Fertig's testimony during the disciplinary phase was peppered with episodes of a lack of candor bordering on deceitfulness. Three areas of testimony provide examples.

Fertig insisted time and again that an attorney-client relationship had not been established with Warnick, while at the same time acknowledging authorship of letters to creditors saying that there was such a relationship.

Further, Fertig relied on the durable power of attorney (Exhibit I) as providing him with the

authority to use the funds in Warnick's sole checking account for his own purposes but, in doing so, he deliberately ignored the language in it which clearly prohibits such behavior.

Finally, Fertig repeatedly described himself as being in a "joint venture" with Warnick pertaining to the latter's work with Roberts Express. This panel finds that testimony to be fabricated and believes Warnick's statements that there was never any joint venture agreement (Warnick, 10/27/98 Tr., p. 587; Exhibit 167).

This panel believes that the denial of the existence of an attorney-client relationship was a strategy developed by Fertig despite having no basis in fact. We have concluded that the strategy was used by Fertig so that he could advance his "joint venture" fabrication without potentially running afoul of MRPC 1.8(a), which prohibits a lawyer from entering into a business transaction with a client unless, among other requirements, the transaction and terms are fully disclosed in writing to the client. It was undisputed in this case that there was no writing whatever stating the terms of any purported "joint venture".

#### F. Refusal to Acknowledge Misconduct

Other than characterizing his actions as falling within a "loosey goosey" arrangement, Fertig never acknowledged that any of his conduct was wrongful. A lawyer's refusal to recognize the wrongful nature of his or her conduct may be considered in aggravation, ABA Standards for Imposing Lawyer Sanctions, p. 49, (Feb. 1986).

#### G. Warnick's Vulnerability

It was argued that Warnick was vulnerable due to his job as a truck driver requiring him to be on the road for extended time periods. This panel is persuaded that Warnick's extended absences, coupled with the trust Warnick placed in Fertig to perform the functions requested of him as a friend and lawyer, did result in Warnick's heightened vulnerability to Fertig's misconduct. Where Fertig takes advantage of a person's vulnerability, that conduct should be taken into account as an aggravating factor, ABA Standards for Imposing Lawyer Sanctions, p. 49, (Feb. 1986).

#### H. Substantial Experience in the Practice of Law

Although not specifically advanced by counsel for the Petitioner, this panel determines that Fertig's substantial experience in the practice of law is an aggravating factor. ABA Standards on Imposing Lawyer Sanctions, p. 49, (Feb. 1986).

At the time of the events giving rise to this case, Fertig had been a member of the State Bar of Michigan for approximately 16 years. July of this year marked his 20th anniversary.

Given the years Fertig has been a lawyer and the number of disciplinary actions he has suffered, there is little excuse for what occurred in this case. Unless deliberately indifferent to basic rules of professional conduct, every lawyer of Fertig's experience should know that a client or third party's funds or property coming into a lawyer's hands must be kept separate from the lawyer's own funds or property. Further, every lawyer of Fertig's experience knows that timely accounting for funds or property received must be made. It is not the client or third party's duty to make the accounting.

The accounting provided by Fertig was introduced as Exhibit 150, prepared by him shortly before, and in preparation for, the April 16, 1999 hearing (Fertig, 4/16/99 Tr., pp. 108-109). The panel has reviewed the accounting, and finds that it is based largely on information supplied and records maintained by Warnick, not Fertig. Fertig's contribution to the accounting is to argue that Warnick's figures disclose "an alleged deficiency" owed by Fertig to Warnick of \$8,362.88 (see p. 2 of Exhibit 150). Fertig then goes on to adjust that alleged deficiency by giving himself credit for other items (see p. 3 of Exhibit 150). For instance, one credit Fertig would give himself is for a \$4,000 check from his trust account made payable to and cashed by Warnick in May of 1994 (Exhibit 126).

It appears that the accounting evidenced by Exhibit 150 is the first time Fertig ever claimed a credit based upon the \$4,000 check against any deficiency he owed Warnick for the unauthorized use of Warnick's funds,<sup>5</sup> and it is troubling that this purported \$4,000 "loan" to Warnick came directly from Fertig's trust account. Aside from Fertig's assertion that the funds were his, there was no evidence of that fact.<sup>6</sup> Thus, it would be difficult to know whether the funds had been earned and

were payable to Fertig and, without taking the step of paying himself the funds, he loaned them directly to Warnick.

The point to be made is that questions regarding the use of trust funds cannot blithely be answered, as was argued on Fertig's behalf in closing argument, that (4/16/99 Tr., p. 210-211):

Money goes into the trust account, money comes out of the trust account. Commingled? Some of it's Harvey's [Warnick] money, some of it is Lance's [Fertig]. It should go into the joint account and it does. As a matter of fact, more goes into the joint account than came into the trust account and more goes into the joint account and out for Harvey's benefit than came into the general account.

The argument is similar to the testimony made by Fertig (see endnote 6). An attorney must be able to account for trust account monies. Fertig testified that he puts his own money into his trust account for a "rainy day" and does not necessarily move it to his business account when earned because, at that point, "it's taxable". If he, in fact, wrote a check for \$4,000 of his funds in his trust account to Mr. Warnick, was he thereby making a loan of "his" funds while at the same time avoiding paying taxes on the amount loaned? Because questions like these can be asked, complete and accurate accountings of trust funds must be made. An attorney of Fertig's experience knew or should have known that his manner of dealing with and accounting for Warnick's money blatantly violated rules of professional conduct.

#### IV. MITIGATION

The panel views some of the evidence in mitigation to apply to most or all counts of the complaint. The evidence included charitable and volunteer work performed by Fertig, pro bono legal services he provided, marital problems he experienced, and his close and nurturing relationship with his children. Each of these areas is considered.

Much testimony and a number of exhibits were offered pertaining to the charitable and volunteer work of Fertig. He testified that since 1990 he has taught Hebrew classes and tutored in that subject, and now teaches three times a week (1/14/99 Tr., pp. 167-169). Currently he gets paid a "not substantial" amount for his efforts, but he began as a volunteer. Indeed, he has received awards in that capacity (1/14/99 Tr., p. 169). In addition to teaching, Fertig is involved in other Temple activities including planning for youth groups, the installation of computers, and committee

work to assist AIDS victims (1/14/99 Tr., pp. 170-71).

Fertig has been involved in many other civic activities, such as community actors organizations, conservation clubs, assisting the homeless and drug addicts, and D.A.R.E. (1/14/99 Tr., pp. 171-194). The Reverend Rodney Reinhart, an Episcopal priest, corroborated Fertig's volunteer and charitable efforts in some areas (1/14/99 Tr., pp. 39-65).

Closely connected to the volunteer work done by Fertig is the pro bono legal services he has provided. Rev. Reinhart testified to such work (1/14/99 Tr., pp. 45-46), as did many other witnesses who testified either in person or by affidavit.

The panel finds that Fertig indeed has given of his time and efforts to individuals or groups in need of assistance. While such activities are praiseworthy, and are considered by this panel as having a mitigating effect, that effect is minimal. Charitable efforts by an attorney do not justify or excuse violations of the rules of the profession and they are not a substitute for compliance with those rules.

A number of clients of Fertig testified in person or by affidavit of their satisfaction with his legal work. Mr. Steven Jahner, the manager of Capital City Comics and Books in Lansing, Michigan, testified that Fertig was one of the store's "top echelon customers" because of the amount of money he spent at the store (1/14/99 Tr., p. 28). He also testified that Fertig did legal work for him and the store on some matters and that they were very satisfied with his services (1/14/99 Tr., pp. 13-16). Rev. Reinhart testified about the successful effort Fertig put into employment litigation involving a friend (1/14/99 Tr., pp. 41-43). Similar testimony of the satisfactory nature of Fertig's legal work was given by other clients and persons familiar with that work. All of the testimony pertaining to Fertig's satisfactory work in particular matters has been taken into account by this panel in determining the discipline imposed.

Fertig offered testimony of marital difficulties which affected his practice (1/14/99 Tr., pp. 196-199). He said the marriage was a "constant battle" since about 1990, and that his wife left him on September 16, 1996 (1/14/99 Tr., pp. 196-199). The precise impact these difficulties had on his practice, or how they contributed to the conduct complained of in this case, was never explained.

Nevertheless, the panel has taken the difficulties into account as a mitigating fact.<sup>7</sup>

Fertig and other witnesses testified about his relationship with his daughters. He is very involved with their lives, and the panel is convinced that he makes much effort to be a good father. This panel is of the view that Fertig's love and caring for his children should be taken into account in determining the appropriate discipline.

A mitigating factor relevant to Counts I and II of the Complaint in Case No. 97-246-GA, each alleging misappropriation or commingling of funds, is that restitution was made. The evidence shows that Fertig started misappropriating or commingling funds of Warnick in about June of 1994. After discovering Fertig's conduct, Warnick and his wife, Rachelle Anne DeMunck-Warnick, had a meeting with Fertig in March, 1995 (Warnick, 10/27/98 Tr., pp. 568-569). At that time Fertig and the Warnicks identified the unauthorized expenditures made from Warnick's account over which Fertig had control (see, Exhibit 109), and Fertig agreed to repayment.

It is undisputed that Fertig did repay a substantial portion of the amount he took for his own purposes from Warnick's account. A dispute arose in late 1995 about the amount remaining owed at that time and Warnick and Fertig debated the issue in the letters admitted as Exhibits 154-158 and 165-169. During the hearings, Warnick testified that his accounting showed \$2,100 to \$2,200 remained owing, but there remained an issue as to any credit which might be due Fertig for unpaid rent for the time Warnick stayed with Fertig at his home in 1994 and 1995 (Warnick, 10/27/98 Tr., pp. 571-572). There was also a question as to unpaid attorney fees due Fertig for the Manifest Group litigation (*Id.*), as well as any credit for the \$4,000 check written from Fertig's trust account, discussed above.

Timely good faith effort to make restitution is a mitigating factor, but forced or compelled restitution is neither mitigating nor aggravating, ABA Standards on Imposing Lawyer Sanctions, pp. 50-51, (Feb. 1986). It is undisputed in this case that Fertig did agree to repay the funds wrongfully withdrawn from Warnick's account. Disputes later arose between Fertig and Warnick over the timeliness of the repayment, and the amount (if any) still owed.

Upon reflection, this panel has determined that Fertig did initially make a good faith effort at repayment. That fact is taken in mitigation.



**ENDNOTES**

1 The text of all Michigan Court Rules cited in this Opinion are quoted below.

**MCR 9.103(C) provides:**

(C) **Duty to Assist Administrator.** An attorney shall assist the administrator in the investigation, prosecution, and disposition of a request for investigation or complaint filed with or by the administrator.

**MCR 9.104(1)-(4), (7) provide:**

The following acts or omissions by an attorney, individually or in concert with another person, are misconduct and grounds for discipline, whether or not occurring in the course of an attorney-client relationship:

(1) conduct prejudicial to the proper administration of justice;

(2) conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach;

(3) conduct that is contrary to justice, ethics, honesty, or good morals;

(4) conduct that violates the standards or rules of professional responsibility adopted by the Supreme Court;

\* \* \*

(7) failure to answer a request for investigation or complaint in conformity with MCR 9.113 and 9.115(D);

**MCR 9.113(A) and (B)(2) provide:**

(A) **Answer.** Within 21 days after being served with a request for investigation under MCR 9.112(C)(1)(b), the respondent shall file with the administrator a signed, written answer in duplicate fully and fairly disclosing all the facts and circumstances pertaining to the alleged misconduct. The administrator may allow further time to answer. Misrepresentation in the answer is grounds for discipline. The administrator shall provide a copy of the answer and any supporting documents to the person who filed the request for investigation unless the administrator determines that there is cause for not disclosing some or all of the documents.

(B) **Refusal or Failure to Answer.**

\* \* \*

(2) The failure of a respondent to answer within the time permitted is misconduct. See MCR 9.104(7).

All Michigan Rules of Professional Conduct cited in this opinion are quoted below.

**MRPC 1.1(c) provides:**

A lawyer shall provide competent representation to a client. A lawyer shall not:

\* \* \*

(c) neglect a legal matter entrusted to the lawyer.

**MRPC 1.2(a) provides:**

(a) A lawyer shall seek the lawful objectives of a client through reasonably available means permitted by law and these rules. A lawyer does not violate this rule by acceding to reasonable requests of opposing counsel that do not prejudice the rights of the client, by being punctual in fulfilling all professional commitments, or by avoiding offensive tactics. A lawyer shall abide by a client's decision whether to accept an offer of settlement or mediation evaluation of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, with respect to a plea to be entered, whether to waive jury trial, and whether the client will testify. In representing a client, a lawyer may, where permissible, exercise professional judgment to waive or fail to assert a right or position of the client.

**MRPC 1.3 provides:**

A lawyer shall act with reasonable diligence and promptness in representing a client.

**MRPC 1.4(a) and (b) provide:**

(a) A lawyer shall keep a client reasonably informed about the status of a matter and comply promptly with reasonable requests for information. A lawyer shall notify the client promptly of all settlement offers, mediation evaluations, and proposed plea bargains.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

**MRPC 1.8 provides:**

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquired the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be reasonably understood by the client;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing thereto.

**MRPC 1.15(a)-(c) provides:**

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. All funds of the client paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in an interest-bearing account in one or more identifiable banks, savings and loan associations, or credit unions maintained in the state in which the law office is situated, and no funds belonging to the lawyer or the law firm shall be deposited therein except as provided in this rule. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in

dispute shall be kept separate by the lawyer until the dispute is resolved.

**MRPC 4.1 provides:**

In the course of representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person.

**MRPC 8.1(b) provides:**

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

\* \* \*

(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information protected by Rule 1.6.

**MRPC 8.4(a)-(c) provides:**

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) engage in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer;

(c) engage in conduct that is prejudicial to the administration of justice;

2 . There was a dispute in the testimony regarding if it was Warnick or Fertig who suggested and prepared the power of attorney (Fertig, 4/16/99 Tr., pp. 20-22; Warnick, 10/27/98 Tr., pp. 631-633). This panel finds that the document was suggested and prepared by Fertig.

3 . Mr. Warnick did testify that Mr. Fertig could take money out of the account as it was available to pay back the \$5,500 he loaned to Mr. Warnick (Warnick, 10/27/98 Tr., pp. 616-617) and to pay him rent for Warnick's staying at the Fertigs' house. That cannot justify the withdrawal of as much as Mr. Fertig did, or the indiscriminate use of Warnick's funds.

4 The fact that Fertig has signing authority on Warnick's  
checking account could, as a legal matter, qualify the account  
as a "joint account" under some definitions. For instance, for  
purposes of the Statutory Joint Account Act, a "joint account"  
means a deposit account "in which two or more persons have an  
interest, either by way of ownership or right of withdrawal".  
MCL 487.713(b); MSA 23.295(3)(b). While Fertig's signing  
authority gave him a right to withdraw funds, he had no  
ownership interest in the funds. This panel's finding that  
the account was not a joint one relates to the ownership  
interest, not the right of withdrawal.

5 Admitted as Exhibits 154-158 and 165-169 are a series of  
letters exchanged between Warnick and Fertig from late 1995  
and into 1996. In letters sent by him, Fertig never mentions  
a "credit" due him for the \$4,000 check, although he does  
identify other credits he believes should be granted.

6 Some of Fertig's testimony on the question, and the use to  
which he puts his trust account, appears in the 4/16/99  
Transcript, pp. 171-175:

Q. (By Mr. Vella): You've testified that there  
was money in a client trust account and you  
were--you used an exhibit showing that at one  
time it was \$17,000 and a month earlier it  
was, I don't know, 15,000.

You said that was all your money?

A. (Mr. Fertig): It's not a client trust  
account. It's labeled Lance Fertig trust  
account. That's a trust account I set up to  
hold money that I haven't earned yet. The  
client pays a fee, I earn it and I draw it  
out.

Q. That's a client trust account, an IOLTA  
account?

A. I don't think so. I could be wrong. I'm  
not expert.

Q. You have a business account and a trust  
account, correct?

A. That's correct.

Q. Okay. When do you put money in your  
business account versus your trust account?

A. If I earned the fee completely, it goes  
into the general account. If I draw it out of  
the general account--some of my practices are  
probably not up to specs but I try to keep

them there. But I put things in the trust account until I earn them but I also was told--

Q. And then when you earn them you pull them out and put them in your business account, do you not or do you not (sic)?

A. Sometimes I don't because I was told--and I was referring to Larry Fowler who helped get me admitted to the bar--and he said you can put money in trust but until it comes out, it's not earned income so keep it in there. So I do that.

Q. How can you be certain that the \$4,000 that you paid to Mr. Warnick from your trust account was not some client's money or a portion thereof?

A. Because I am.

Q. How?

A. Simple. I don't have any grievances on that. And second, I know that it was my money.

Q. How do you know it was your money?

A. I guess I can tell you I know.

Q. How?

A. I knew at the time it was. I probably was anticipating money to be given to him but it was my money.

Q. Why did you have your money sitting in that account?

A. Because until it comes out, it's not earned income.

\* \* \*

Q. But once it becomes your income, you're supposed to remove it and put it into your business account, right?

A. No. I don't think there's any rule that says that.

Q. There are ethics opinions that say you must do that. You're not allowed to leave

earned income in your client trust account. Are you aware of that?

A. No, I'm not.

Q. All the thousands of dollars that you removed from your trust account over the last year to two years to reimburse Mr. Warnick, how do you know that any of those monies were not client monies?

A. Because I was careful at the time to make sure it wasn't.

Q. How were you careful at the time to make sure it wasn't?

A. I checked. I made sure it was my money. I didn't touch client's money.

Q. How did you make sure it was your money as opposed to a client's money?

A. I would look at the balance, I would see if there was any client's money that was outstanding or anything that would be used.

Whatever--I don't remember exactly what I did four or five years ago but, rest assured, it was my money.

\* \* \*

Q. What kind of money do you put in your client trust account?

A. Well, if it's a settlement, before we distribute the money to the clients, we put it into the trust account with their permission and knowledge or agreement by retainer or I put in unearned fees. But sometimes I put money into the trust account, again, something that Larry Fowler taught me, just to have a buffer in case you need extra money. Just throw it in there.

Q. Some of your own money?

A. Yes.

Q. From your business account?

A. From wherever it would come in from.

Q. Why would you need a buffer?

A. Because sometimes--you're not in private practice but in private practice sometimes clients don't show up all the time so you want to have a buffer so you can pay your bills. I always have a buffer.

Q. You would pay your bills out of your client trust account?

A. No. But I would have my own money sitting in the trust account so in case of a rainy day I could transfer it out and pay bills.

Q. Why don't you leave that money in your business account for a rainy day?

Because if I put it in my business account, it's taxable. It's considered a benefit from it.

Q. Is that why you're supposed to remove earned income from your client trust account to your business account?

A. I don't know. I haven't seen that opinion. You might be right.

Q. So, in other words, you're defrauding the government by leaving money in the client trust account longer than you should so you could avoid tax on it?

A. No, I don't think so. That's not what I was told.

Q. I'm not asking what you were told. Is that what you're doing?

A. I'm not defrauding anybody. And I've already--the IRS knows where I am. If they thought there was a problem, they would have dealt with me as they did.

\* \* \*

Q. Well, you were making payments to Mr. Warnick on a regular basis for about a two-year period of time, right?

A. Not all out of trust, no. Some of it was out of trust, some of it wasn't.

7 . Mr. Fertig denied any alcohol, drug or financial problems (4/16/99 Tr., p. 168). He did acknowledge having filed a Chapter 13 bankruptcy, but denied that he had any major

financial difficulties. We find the denial relating to financial difficulties troublesome. The Chapter 13 was initially prompted by the IRS seizure of \$5,000 to \$6,000 from Fertig's "general account" (Fertig, 4/16/99 Tr., pp. 103-106; 161-162). He had not paid some or all of the FICA and FUTA taxes for some years prior to the June, 1996 seizure. The IRS claimed a lien in the amount of \$250,000, but Fertig testified that it was later acknowledged he only owed \$39,000 to \$55,000. Whatever the number, a failure to pay taxes would seem to be an obvious indication of financial difficulties, which can be considered in mitigation. Grievance Administrator v Woelkers, ADB 97-214-GA (1998). It was not asserted as a mitigating factor in this case, however, and will not be considered as one.