NO. 18-_____

In the Supreme Court of the United States

IN THE MATTER OF STEVEN A. MINER,

Petitioner,

–v–

ILLINOIS ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

PETITION FOR WRIT OF CERTIORARI

ADRIAN VUCKOVICH
COUNSEL OF RECORD
KATHRYNE HAYES
COLLINS BARGIONE & VUCKOVICH
1 NORTH LASALLE STREET, SUITE 300
CHICAGO, IL 60602
(312) 372-7813
AV@CB-LAW.COM

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QUESTIONS PRESENTED

1. In an attorney disciplinary matter in which charges against a lawyer must be proven by clear and convincing evidence, and there is no positive evidence of misconduct presented, whether the burden of proof has been shifted to an attorney, in violation of the Due Process Clause, by a determination that the lawyer's lack of records and lack of knowledge about a person's purpose in cashing checks was proof of dishonesty, subjecting the attorney to disciplines.

2. Whether it is a violation of the Due Process Clause for a tribunal in an attorney disciplinary case to find that a lawyer has acted dishonestly by misappropriating funds when misappropriation was not charged and that same tribunal has ruled that no theft occurred.

3. Whether it is a violation of an individual's First Amendment right to engage in private relationships by finding that that a lawyer who cashes a check for a friend engages in the practice of law and is therefore subject to state rules of professional conduct.

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INTRODUCTION

In this Petition, we ask the Court to consider whether a lawyer's due process rights were violated in a disciplinary proceeding by shifting the burden of proof to the lawyer to prove his innocence and by imposing discipline based on uncharged conduct and based on alleged conduct which was negated by the dismissal of other counts. We also ask the Court to determine whether a lawyer, in the capacity of a private citizen, has the right to have a friendship in which he cashes checks for another person, without "practicing law" and without being subject to state bar regulations which govern lawyers.

This Court has clearly established that attorney discipline cases are quasi-criminal proceedings. *In re Paschal*, 77 U.S. 483, 491 (1870); *In re Ruffalo*, 390 U.S. 544, 550-51 (1968). As such, procedures relating to attorney discipline proceedings must comport with the Due Process Clause. *Ruffalo*, 391 U.S. at 550-51.

The applicable burden of proof in the attorney disciplinary matter which is the subject of this Petition is that the Administrator for the Attorney Registration and Disciplinary Commission in Illinois must prove every fact of every charge against an attorney "by clear and convincing evidence." *In re Harth*, 125 Ill. 2d 281, 287 (1988) (Administrator has burden of proving each allegation of its complaint by clear and convincing evidence); *see also* Ill. Sup. Ct. Rule 753(c)(6).

This Court has held that oppressive shifting of the burden of proof violates due process of law. *Engle v. Isaac*, 456 U.S. 107 (1982); *see also In re Winship*,

397 U.S. 358, 364 (1970) ("The due process clause protects the accused against conviction except beyond proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.") Similarly, because of the nature of disciplinary proceedings, placing the burden of proof on an attorney in such a proceeding violates the due process rights of the attorney.

Here, the Illinois Supreme Court accepted the recommendation of the Review Board and Hearing Board (which conducted the trial) which determined that an attorney who cashed checks for a third party (a close friend) engaged in dishonesty and misappropriation because the attorney lacked unspecified records reflecting that the cash was given to the third party friend. App.21a, 22a, 31a-43a, 97a-98a. The friend never complained that he did not receive his money, and he freely signed all of the checks as the payor. The lawyer testified he gave all of the money from the cashed checks to his friend. App.70a, 71a, 98a, 76a. An accountant called as an expert witness supported the lawyer's testimony. There was no evidence, no witness and no documents presented by the prosecutor which refuted the lawyer or which refuted the accountant's testimony. App.31a-43a, 84a-85a. Yet, the apparent "lack" of evidence presented by the lawyer was the basis for punishment, a suspension from the practice of law for a period of two years. App.21a, 22a, 31a-43a, 97a, 98a.

We contend that disciplining a lawyer because the lawyer lacked evidence, in a circumstance where there is no positive evidence of misconduct, improperly

shifted the burden of proof to the lawyer in violation of the Due Process Clause.

Further, the determination that the lawyer violated a rule of professional conduct was based on a finding that misappropriation had occurred. App. 97a-100a, 19a-27a. But, there was no charge of misappropriation or even conversion. And, there was no finding that the attorney "misappropriated" a specific amount of money. Rather, misappropriation was found despite a contrary, but correct ruling that theft did not occur and after acknowledgment by the tribunal that the friend "must have received some of his money." App.94a-95a.

It is a basic premise of due process that the individual charged must have fair notice of the charge. Punishment of a lawyer and publicly labeling a lawyer as "dishonest" based on uncharged (and unproven) conduct violates due process of law. While no incarceration is at issue, there is unmistakable harm and unfairness to a lawyer who is incorrectly punished for being dishonest. A lawyer's work is based on the words he speaks or writes. Those words mean nothing, or very little, if a lawyer has a reputation of being dishonest.

Last, we contend that lawyers are people too, entitled to have private relationships, protected by the First Amendment, and which are not regulated by state rules of professional conduct.

In this case, the lawyer cashed checks for his friend, at the friend's request. There was no issue regarding the friend's competency. The checks were not related to any legal representation. They were all signed by the friend. Nevertheless, the lawyer was

punished for not keeping the funds in his trust account because the check cashing was deemed to be the "practice of law," only because the person who cashed the checks was a lawyer. App.96a-101a.

If the Petition in this case is accepted, this Court will be able to address due process violations in the attorney disciplinary process and particularly, the application of the burden of proof to a lawyer as it relates to a duty to maintain records of innocence, and define what is the practice of law and when a person who happens to be a lawyer is subject to state regulation.

OPINIONS BELOW

The Review Board Report and Recommendation is reported at 2013PR00078 (Review Board, January 2018). There is a dissent by Timothy Eaton found at 2013PR00078 (January 2018) at 22-23. App.30a-43a.

The Report and Recommendation of the Hearing Board is reported at 2013PR00078 (Hearing Board, March 31, 2017). App.44a-109a.

The order of the Illinois Supreme Court denying Mr. Miner's Petition for Leave to File Exceptions is reported at *In re Steven A. Miner*, M.R. 029254 (May 24, 2018). The order suspending Mr. Miner from the practice of law for a period of two years is contained in that same order. App.3a. The effective date of suspension is set forth in *In re Steven A. Miner*, M.R. 029254 (June 20, 2018). App.1a, 2a.

JURISDICTION

This Court has jurisdiction pursuant 28 U.S.C. Section 1257(a).

Although this matter arises from a State of Illinois attorney disciplinary matter, it is properly the subject of a Petition for Certiorari. A federal court is entitled "to rely on the attorney's knowledge of the state code of professional conduct applicable in that state court; the provision that suspension in any other court of record is a basis for a show cause hearing indicates that Rule 46 [Federal Rule of Appellate Procedure] anticipates continued compliance with the state code of conduct." *In re Snyder*, 472 U.S. 634, 645 (1985) n.6.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

- **U.S. Const. amend XIV**

  The Fourteenth Amendment to the U.S. Constitution provides in relevant part:

  No State shall [. . .] deprive any person [. . .] of liberty [. . .] without due process of law. The First Amendment to the U.S. Constitution states Congress shall make no law requesting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, [. . .] or the right of the people to peacefully assemble [. . .].

STATEMENT OF THE CASE

A. Factual Background

Steven Miner ("Miner") graduated from John Marshall Law School and became licensed to practice law in Illinois in 1981. App.48a, 50a.

In 1977, Miner's father died on the day that Miner graduated from college. App.49a. In 1976, Miner began dating Glenn Burren's daughter, Marion. That was when Miner first met Glenn Burren. App.48a-50a. Miner and Marion were engaged, but the engagement broke off, in 1978. App.49a. Burren was not affected by the breakup. He continued to maintain a close relationship with Miner until he passed away in 2007. App.49a-50a.

Miner's mother began a relationship with Glenn Burren in 1980. App.49a. They stayed together until Mr. Burren died in 2007. App.49a.

Mr. Miner was divorced in 1995. App.49a-50a: In the dissolution of marriage proceedings, Miner was awarded sole custody of his son Steven (age 7) and joint custody of his daughter Katie (age 5) who both lived with Miner. App.49a-50a.

Mr. Burren married, had three children, Glenn, Jr., Marion and Linda. App.48a. He divorced at some point. App.48a-50a.

In describing his relationship with his children, a close friend of Miner and Burren testified that Mr. Burren's feelings about his children were "sorrowful." App.50a. (He was estranged from his son). Marion

confirmed that after the engagement with Miner ended, her father and Miner continued to have a close relationship. App.49a. Burren lived with his daughter, Linda Kemp, for a period of time, until 2005, when Burren moved out. App.51a-52a.

Mr. Burren was strong, independent and free-thinking person. App.48a-52a. He was not frail. App.48a-49a. He drove himself. App.48a-52a. He made decisions for himself. App.52a. He did not use a walker, cane or crutches. App.51a-52a.

There was no evidence that Burren suffered from any mental frailty. He had his own apartment in an assisted living center which he selected after he decided to move from his daughter's house in 2005 because he did not get along with his daughter's children. App.52a. No guardian was ever sought for Burren. App.48a-52a.

Burren signed checks and asked Miner to cash the checks. App.68a, 70a, 71a, 73a-74a, 76a.

When Miner divorced in 1995, Glenn Burren helped raise Miner's two children, who resided with Miner. App.49a-52a. The children had no grandfather with whom they had a relationship. App.49a-52a. But, they had Glenn Burren, known as "Pops." Glenn Burren would come to Steven Miner's house and help the children with their homework. App.50a. He would attend school conferences and their games and practices. App.50a. Burren would pick them up and drop them off from school. App.50a.

Burren had his own keys to Miner's house, a special place to park in the garage and when he stayed overnight, he had his own room. App.50a.

At every holiday and birthday, Mr. Burren was at Miner's house. App.49a-50a. When Mr. Burren died, Steven Miner's mother paid for the funeral. App.49a-52a.

The nature of the relationship between Mr. Burren and Mr. Miner and his family can be seen most distinctly in two ways.

At trial, Miner presented cards which Burren had given to Miner, referring to Steven Miner as his "son." The cards were signed by Mr. Burren and admitted into evidence. Miner's Exhibit 26 from trial, admitted into evidence.

Miner's son testified that he believed that Glenn Burren was his grandfather until he was about 8-years old. App.49a-50a. There were also cards in which Burren referred to Miner's children as his grandchildren and photographs depicting the nature of Burren's relationship with the Miner children. Miner's Exhibits 24-25 from trial, admitted into evidence. They were family as that term should be defined, closer than most people who have a blood relationship. App.49a.

Prior to 2003, Steven Miner handled two real estate transactions for Glenn Burren. App.50a-51a. That was in 2000. Miner also represented Burren in the purchase of a property in Des Plaines, Illinois in which Mr. Burren purchased a house in joint tenancy with his daughter Linda. App.50a-51a.

In 2003, Glenn Burren's sister Pearl hired Steven Miner to represent her in the sale of her house. App.51a-52a. The transaction did not close before Pearl's death, in early November 2003. After Pearl

died, Mr. Miner completed the transaction in late November, 2003. He acted at the direction of Glenn Burren. App.51a-52a.

Miner returned all the files to Burren in 2004. Burren signed a receipt acknowledging the return of his files. App.69a.

There were checks written to Steven Miner on the LaSalle Bank account prior to it becoming a joint tenancy account with Mr. Miner. These checks totaled $144,000.00. Each check was signed by Burren. At the time, the account was a Burren only account. App.71a-73a. Each of these checks was cashed for Mr. Burren or deposited into his account. Between November 18, 2003 through September 2005, Miner cashed 16 checks drawn on the LaSalle Bank account. During this time, Miner was a joint tenant on the account. Each check was signed by Burren. App.68a, 70a.

Burren's sister Pearl had an investment account at Smith Barney. App.74a-75a. At Pearl's death, Glenn Burren became the account holder. App.74a-75a. There was $600,000.00 in the account at Pearl's death. App.74a-76a.

Mr. Burren had a financial advisor, Bruce Becker, at Smith Barney. App.74a, 76a-77a. Becker prepared an investment plan. App.76a-77a.

In April 2004, Mr. Burren wanted cash from some of the funds at Smith Barney. App.75a. He requested four checks from the Smith Barney account in the amounts of $49,881.00, $49,881.00, $70,000.00 and $6,800.00. App.74a-75a. The financial advisor, Becker, confirmed the requests. App.77a.

Smith Barney confirmed the transactions by writing three "third party" letters directly to Burren at his home address. App.77a. The letters confirm the checks were issued to Steven Miner, at Burren's request. App.76a-77a. Miner gave Mr. Burren the cash for the checks. App.76a. The testimony was not refuted or impeached. App.76a. Mr. Burren also signed receipts for the cash generated by the checks and given to him by Miner. App.75a-78a. The receipts were written by Mr. Miner and signed by Burren. App.69a. There was no claim, or evidence, that the signatures of Mr. Burren on the receipts were forged.

Miner testified about how he handled each of the checks Burren asked him to cash. App.68a, 70a, 71a, 76a, 81a, 82a.

Specifically, Miner testified that the process for handling the money was that all cash was immediately given to Mr. Burren. App.70a-71a. If he could not completely cash a check, he gave Mr. Burren the cash which he was able to get from the bank and the remainder was kept in the form of cashier's checks in an envelope in a secure place at Mr. Miner's home. App.70a-71a. The checks were made payable to Miner with Burren as the remitter. App.70a-71a. Mr. Miner would then return to the bank, cash whatever checks he could and give the cash to Mr. Burren. App.70a-71a.

Miner did not deposit the checks. App.87a. Mr. Miner did not put any of the funds in his attorney trust account. App.87a. Mr. Burren never asked him to make such a deposit. App.70a-71a. None of the funds related to representation of Mr. Burren. App. 30a-43a.

Miner gave Burren all of the money from the checks he cashed for him. App.68a, 70a, 71a, 76a, 81a, 82a. The testimony was not refuted. App.30a-43a.

Mr. Burren passed away on July 20, 2007. After his death, Mr. Miner filed the will, dated January 6, 2004 and opened an estate for Mr. Burren. App.56a. The will was admitted to probate. App.56a.

In civil probate proceedings, Burren's daughters, Linda and Marion challenged the will. They also filed a citation to recover assets with regard to the Smith Barney funds and checks. App.56a-57a. The forgery claim was withdrawn. There was no finding that Burren was incompetent in the probate court.

With respect to the citation to discover assets, the court determined that Mr. Miner was unable to meet his burden of proof and account for the funds and therefore entered judgment in favor of the sisters and against Mr. Miner in the amount of $384,000.00 plus $219,000.00 in interest. App.57a.

In the citation proceedings, there was no claim that any check or other document containing Burren's signature was forged. App.57a. Attorney Cliff Lund, representing Miner, prepared an exhibit to account for the funds the checks which were cashed for Burren. The court trial determined that the exhibit was not admissible and then found that Miner had not accounted for the funds. App.57a, 83a. In those civil proceedings, the burden of proof was on Mr. Miner to account for the funds based on clear and convincing evidence. App.57a.

On appeal, the trial court's orders were affirmed. App.57a. The trial court's order was affirmed on the

basis that Mr. Miner did not account and therefore, did not rebut the presumption of liability. App.57a. Mr. Miner paid the amount ordered by the probate court, $625,000.00. ("I respected the court even though I didn't like the decision.").

B. Disciplinary Proceedings

Subsequently, the Administrator for the Illinois Attorney Registration and Disciplinary Commission ("ARDC") charged Mr. Miner in a two count complaint. App.6a, 14a, 15a, 19a, 46a. The original complaint was filed on July 18, 2013. App.46a. A Second Amended Complaint was filed in 2015. App.46a. Count I of the Second Amended Complaint was dismissed by the Review Board. App.17a-18a.

In Count II of the Second Amended Complaint, Mr. Miner was charged with entering into a business transaction with Mr. Burren in violation of Rule 1.8(a), violating Rule 1.15(a) by not segregating Mr. Burren's property (money) into a client trust account, committing the criminal act of theft by taking the funds from the cashed checks in violation of Rule 8.4(b) and engaging in dishonesty in violation of Rule 8.4(a)(4)(1990) of the Illinois Rules of Professional Conduct. App.46a. Mr. Miner admitted receiving checks which he cashed for Mr. Burren but denied the misconduct. App.46a.

At trial, Mr. Miner testified that he did not take or keep any of Mr. Burren's money. App.68a, 70a, 71a, 73a, 74a, 76a. He consistently testified that he cashed the checks which Mr. Burren directed him to cash and provided all of the cash to Mr. Burren. There was no evidence that any of the funds related to legal representation. App.30a-43a, 68a, 70a, 71a, 73a, 76a.

This testimony was not refuted. Mr. Miner was not impeached.

There was expert witness testimony presented by Miner at trial. The expert, Ralph Picker, is a certified public accountant with more than 30-years of experience. App.84a-85a. Mr. Picker is also a certified fraud examiner. App.84a-85a. Mr. Picker was engaged by attorney George Collins for the purpose of analyzing whether Mr. Miner's financial records contained information to indicate that he received and kept Mr. Burren's funds. App.84a-85a. In addition, Mr. Picker also analyzed Mr. Burren's expenses and income to determine whether Mr. Burren received the funds which Mr. Miner said he paid to Mr. Burren. App. 84a-85a. Mr. Picker has substantial experience in fraud detection. App.84a-85a.

Mr. Picker testified, to a reasonable degree of certainty, that Steve Miner did not receive and/or keep for himself Mr. Burren's funds during the time period of 2003 through 2007 as charged by the Administrator. App.84a-85a. To reach this conclusion, Mr. Picker conducted a life style analysis which is the type of analysis conducted by the Internal Revenue Service to determine whether a person is concealing income or assets. App.84a-85a. It is an accepted method of detecting income and assets, used by the IRS and FBI. App.84a-85a. Mr. Picker analyzed all of Mr. Miner's bank records, assets, expenditures and information; and interviewed Mr. Miner and determined that he did not receive Mr. Burren's money and that he did in fact pay to Mr. Burren all of the money Mr. Burren from the checks cashed. App.84a-85a.

The second analysis conducted by Mr. Picker was to confirm his initial findings. Having examined Mr. Miner's financial information, Picker looked at Mr. Burren's circumstances. App.84a, 85a. Mr. Picker concluded to a reasonable degree of certainty that Mr. Burren did in fact receive the funds from Mr. Miner and that his lifestyle was consistent with receiving those funds and the funds were fully accounted for by analyzing Mr. Miner's and Mr. Burren's financial information. App.84a, 85a. The funds had been used by Mr. Burren to pay his own expenses. App.84a-85a. Picker's complete testimony is contained in the report of proceedings dated September 2, 2016 at R. 510-573.

The Administrator hired an expert witness for the purpose of rebutting Mr. Picker, but there was no actual rebuttal or substantive opinion testimony or opinion of any kind regarding Miner. App.85a-86a.

The witness, Jennifer Larsen, is an accountant, employed by Deloitte for 14-years and well qualified and able to conduct an audit, an accounting and the precise analysis which Mr. Picker performed. App.85a-86a. Ms. Larsen is a forensic account. App. 85a. Larsen did not conduct a forensic audit. App.84a-85a. She is a certified fraud examiner but was not requested by the Administrator to conduct such an exam and did not. App.84a-85a. Larsen performed no accounting procedures and no analysis of the transactions at issue. App.85a-86a. Rather, Larsen criticized the manner in which Mr. Picker conducted his analysis of Mr. Miner's income but offered nothing to counter the opinions and findings of Mr. Picker. App.85a-86a. Ms. Larsen was not able to say that any of Mr. Picker's

conclusions were wrong. She also believed, incorrectly that Mr. Miner had the burden of proof in the attorney disciplinary hearing. App.85a-86a. Larsen was unable to say that Mr. Miner took and kept any of Mr. Burren's money or that Mr. Burren did not receive the money in the form of cash from the checks which he asked Mr. Miner to cash. App.85a.

The Hearing Board determined that there was an attorney-client relationship between Miner and Mr. Burren and as a result, that Mr. Miner violated Rule 1.15(a) by not keeping Mr. Burren's money, from the cashed checks, separate from his own. App.86a-92a. The Board determined there was no theft, and no business transaction had occurred between Burren and Miner. App.92a-95a.

The Hearing Board also made a finding that Mr. Miner engaged in dishonest conduct, in violation of Rule 8.4, referring to an unspecified form of misappropriation. App.30a-43a. 96a-101a. The Hearing Board did not identify any particular funds which were misappropriated by Mr. Miner. And, the Board acknowledged that Burren did receive some of his money. App.30a-43a, 96a-101a. The Hearing Board recommended that Steven Miner should be suspended for a period of two-years. App.109a. In doing so, the Hearing Board found that Miner was not likely to engage in future misconduct. App.107a-109a. Exceptions were filed by Mr. Miner.

The Review Board affirmed the finding that Mr. Miner had acted dishonestly based on the vague misappropriation ruling with respect to Glen Burren's funds, in violation of Rule 8.4 and that Miner had violated Rule 1.15(a) because he cashed checks and

did not segregate the funds by placing them in his client trust fund account. App.25a-29a.

In ruling, the Review Board stated the following:

1. The Hearing Board found it incredible that Respondent would not have kept records to document what had happened to the cash after the checks were cashed and also found it was not credible that Miner did not ask Mr. Burren why he needed that amount of cash, or what he was doing with it. App.20a-21a.

2. Respondent was a lawyer with decades of experience "under his belt" and he should have known better than to handle Mr. Burren's money with no documentation whatsoever. App.20a-21a.

3. The Hearing Board's finding of dishonesty was based primarily on its determination regarding Respondent's credibility, which was based on Respondent's lack of records. App.21a-22a.

Each of these statements confirms that there was no actual evidence presented by the Administrator regarding misconduct involving the cashed checks. Rather, the Hearing Board relied on Miner's lack of information and lack of documents and "suspicious" conduct. Based upon that "suspicion," which was based on Mr. Miner's alleged failure to present records regarding each cashed check, the Review Board found that Mr. Miner acted dishonestly because he misappropriated some money in violation of Rules 8.4(a)(4)

Error! Bookmark not defined. and violated 1.15(a). App.22a-25a.

There was a strong dissent in the Review Board, authored by Timothy Eaton. Mr. Eaton is a well-respected, experienced attorney with extensive experience in matters before the Attorney Registration and Disciplinary Commission. In dissent, Mr. Eaton urged that the complaint against Mr. Miner should be dismissed in its entirety, and that the Hearing Board's decision reflects an improper shifting of the burden of proof to the Respondent. App.30a-43a. ("what troubles me even more than the conjecture underlying the Hearing Board's findings is the burden shifting in which the Hearing Board and the Administrator clearly (but, I have no doubt, unintentionally) have engaged").

On February 28, 2018, Miner filed a Petition For Leave to File Exceptions to the Review Board's Report and Recommendation. The Illinois Supreme Court denied the Petition on May 24, 2018 and entered an order suspending Steven Miner from the practice of law for a period of two years. App.3a. The effective date of suspension was then modified to begin July 15, 2018. App.1a, 2a.

REASONS FOR GRANTING PETITION

1. Disciplinary charges brought against a lawyer must be proven by clear and convincing evidence. By ruling that Miner violated the Illinois Rules of Professional Conduct because he lacked evidence (lacked

a records of cashed checks and did not know why Mr. Burren wanted his checks cashed), the burden of proof was shifted to the attorney in violation of Respondent's due process rights and setting a dangerous precedent that a lawyer's lack of information or documents can be "clear and convincing evidence" of dishonesty or other alleged violations of other disciplinary rules. Lawyers' rights require protection. The burden of proof should not be applied differently for lawyers such that a lawyer must present evidence of innocence.

2. In the absence of a determination of theft (not proven according to the Hearing Board which conducted the trial), and in the absence of conversion or misappropriation being charged, there can be no finding that a lawyer has acted dishonestly because he misappropriated money. Due process requires notice of charges. Lawyers are entitled to notice of charges, just as non-lawyers are.

3. The First Amendment protects the right of all individuals to have personal relationships. A lawyer must be able to function as other private citizens and have personal relationships which are not governed by the rules of professional conduct. No violation of a rule occurred by cashing a check for a friend. Cashing a check is not legal representation.

I. FINDING DISHONESTY BASED ON A LAWYER'S LACK OF RECORDS/INFORMATION IMPROPERLY SHIFTS THE BURDEN OF PROOF TO THE LAWYER

In the context of a criminal case, "[d]ue process commands that no man shall lose his liberty unless the government had borne the burden of producing the evidence and convincing the fact finder of his guilt."

Speiser v. Randall, 357 U.S 513, 526 (1958). Adherence to the burden of proof in attorney disciplinary cases is no less important. As stated, matters involving attorney discipline are quasi-criminal proceedings. *See In re Paschal*, 77 U.S. at 491; *Ruffalo*, 391 U.S. at 550-51; *In re Zisook*, 88 Ill. 2d. 321, 329 (1981).

The applicable law is that the Administrator of the Attorney Registration and Disciplinary Commission has the burden of proof and must prove charges asserted against a lawyer by clear and convincing evidence. *In re Witt*, 145 Ill. 2d 380, 391-92 (1991) (the burden is on the Administrator to prove misconduct by clear and convincing evidence). Clear and convincing evidence requires a high degree of proof. The clear and convincing standard does not allocate the risk of error equally between the parties, but requires a greater level of proof, qualitatively and quantitatively from the Administrator. *In re Moran*, 2014PR00023 (Hearing Board at 18). If the facts and circumstances are as consistent with innocence as guilt, the burden of proving a proposition by clear and convincing evidence has not been met. *McClure v. Owens Corning Fiberglass Corp.*, 188 Ill. 2d 102, 140 (1999).

If the decision in this case is allowed to stand, then the established law on the burden of proof in attorney disciplinary cases no longer exists. Or, clear and convincing evidence means something different in attorney disciplinary cases, and a lawyer has a duty to prove his or her innocence in the form of an affirmative defense in order to avoid being disciplined Either way, the burden of proof is shifted and placed on the lawyer to disprove charges, in violation of the Due Process Clause.

There are two presumptions to which every lawyer is entitled. One is the presumption of innocence. *In re Winship*, 397 U.S., 358, 363 (1970). The second, separate presumption is that members of a "respected profession are unlikely to engage in practices that deceive their clients and potential clients." *Peel v. Attorney Registration and Disciplinary Commission*, 496 U.S. 91, 109 (1995).

These presumptions were not overcome by any evidence and in fact, were disregarded in Miner's disciplinary proceeding.

The allegations of dishonesty were, in substance, that Miner received checks which his close friend and father figure, Burren, signed. Miner then negotiated (cashed) the checks and then used the funds "for his own business or personal purposes, without authority." App.46a. These same allegations were the basis for the charges of criminal theft (dismissed), violation of Rule 1.8(a) engaging in a business transaction with a client (dismissed) and violation of Rule 1.15(a), failure to separate funds received in connection with representation. App.46a. There was no evidence that Miner took money, let alone used the money for business or personal purposes (emphasis added).

The Administrator presented no document, witness or expert witness who testified that Miner misappropriated money.

Miner and an accounting expert testified that Miner did not take the money. For both the Hearing Board and the Review Board, the lack of credibility was based upon the perceived absence of some unspecified documentation concerning checks which Mr. Burren asked Mr. Miner to cash. App.21a-23a.

The precise language used by The Review Board was that: "Respondent was a lawyer with decades of experience under his belt. Because of his professional background, we believe he should have known better than to handle thousands of dollars of Mr. Burren's money with no documentation whatsoever regarding what he did with the money. The Hearing Board clearly felt similarly." App.21a-23a.

While credibility determinations are entitled to deference, cloaking the determination that misconduct occurred in credibility language misses the point and does not cure the burden shifting problem. The issue is whether the burden of proof was improperly placed on the lawyer, which is a question of law, not a credibility issue. *1350 Lake Shore Drive v. Healey*, 233 Ill. 2d 607, 627 (2006).

There are rules of professional conduct which require lawyers to maintain certain financial records, but such a rule was not the basis for the finding that dishonest misappropriation had occurred. Putting aside (for the moment) that the check cashing had nothing to do with representation, Mr. Miner was charged with dishonesty based on allegations that he took Burren's money for his own use without authority. Therefore, the Administrator had the obligation to prove that Miner acted dishonestly because he took money after cashing the checks and then used the cash in his business or for personal expenses, without authority. *In re Harth*, 125 Ill. 2d 281, 287 (1988) (Administrator had burden of proving each allegation of its complaint by clear and convincing evidence). *In re Beatty*, 118 Ill. 2d 489, 499 (1987). There was no proof that Miner had lavish expenditures or that he had money problems

and a motive to misappropriate. The Administrator called an accountant as a witness who could have conducted a forensic exam and testified about alleged misappropriation. The accountant said nothing. App. 85a-86a.

A decision which is based on a lawyer's lack of credibility, which, in turn, is based only on lack of the lawyer's documentation or lack of information, cannot stand because there was no proof presented by the Administrator that Miner used or kept the money. Any records Miner would have had would be for defense purposes and the absence of such records cannot be an evidentiary basis to prove that he took money. The Administrator's accountant did not even testify that she would expect to *see* certain records which would have been some form of positive testimony.

As an additional point, the policy of punishing lawyers for not having records is counter productive in that it would serve to discourage lawyers from testifying about alleged misconduct for fear that any perceived lack of information can be used to affirmatively prove misconduct. *In re Grosky*, 96 CH 624, P.11 (Review Board May 13, 1998) (Lawyers should not be discouraged from testifying). Miner could not assert the Fifth Amendment in the disciplinary proceedings without that being used against him, making fair application of the burden of proof critical. *In re Robert Kent Gray Jr.*, 2016PR00045 at 8-10 (Review Board, August 2018).

At trial, the Administrator presented no witness who testified that Miner acted dishonestly or that Miner took any money for himself or his business, that Miner acted without authorization, stole anything

from Glenn Burren or otherwise acted against Burren's wishes. No witness refuted Miner's testimony. Even the fact finder conceded that there was evidence that Burren did what he wanted and received money from Miner because he would not have written so many checks. App.30a-43a. Despite that, and only based because Miner's lack of unspecified evidence was Miner found to have violated the Rule 8.4(a)(4).

The burden of proof required that the charges be proven independent of civil proceedings. At trial, the Administrator made the probate decision the center piece of its case. App.47a, 56a, 57a.

It is apparent that the outcome of the underlying probate case was used against Miner and was the actual basis for his suspension from the practice of law. This too violated Miner's due process rights because he was entitled to a fair hearing and worse, the evidentiary standard in the probate case was the complete opposite of the disciplinary case. In the probate case, unlike the attorney disciplinary proceeding, the lawyer had the burden of proof. *Lemp v. Hauptmann*, 170 Ill. App. 3d 753, 757 (5th Dist. 1988) The probate court excluded admission of Miner's accounting and then found against Miner did not meet his burden of proof because he did not adequately account. App.57a.

The outcome of the probate case, although negative, is not dispositive. *In re Owens*, 125 Ill. 2d 390, 401 (1988). In *Owens*, the Illinois Court determined that a civil court's decision cannot be used to collaterally estop an attorney from the right to a hearing in a disciplinary matter. In ruling, the Court held that factual determinations are to be made in a disciplinary

proceeding because the "risk of unfairly imposed discipline is too great." *Id.* at 401. We do not pretend the civil case does not exist. It does, but it should not control the outcome of this case. Miner was entitled to an independent hearing at which the Administrator had the burden to prove the charges.

Every lawyer is presumed to be innocent and should be entitled to the benefit of the proper application of the burden of proof . . . by clear and convincing evidence. *In re Serritella*, 5 Ill. 2d 392, 396-97 (1955), (An attorney is presumed innocent until proven guilty by clear and convincing evidence). Illinois Supreme Court Rule 753(c)(6).

By finding dishonesty and misappropriation because Miner lacked evidence, the Hearing Board shifted the burden of proof to Miner in violation Miner's due process rights.

II. MISAPPROPRIATION WAS NOT CHARGED AND WAS NEGATED BY A FINDING THAT NO THEFT OCCURRED

The determination of dishonesty was based on a finding of misappropriation of funds. There are two due process violations associated with this finding.

First, misappropriation was not charged. Theft was charged, but it was charged separately and the fact finder determined that Miner did not commit theft. App.94a-95a. The dishonesty charge was not misappropriation but that Miner used the money in his business or for his personal use. App.46a.

Suspending a lawyer for uncharged conduct violates due process. " No principle of due process is more clearly established than that notice of the specific

charge and a chance to be heard in atrial of the issues raised by that charge . . . are among the rights of every accused in a criminal proceeding in all courts, state and federal." *Cole v. Arkansas*, 333 U.S. 196, 201 (1948); *see also Sprecht v. Patterson*, 386 U.S. 605, 610 (1967) (a defendant is entitled to notice of each charge made against her and afforded all safeguards which are fundamental to a defense of a claim).

Under the Illinois Code of Professional Conduct, conversion and misappropriation are treated the same. Illinois Supreme Court Rule 756(b)(8)(B)(1)(a) Neither was charged in the Second Amended Complaint. App.46a. In fact, the Administrator initially charged Miner with conversion and then eliminated that charge when it amended the complaint. Having not charged Miner with misappropriation (or conversion), Miner's punishment based on this uncharged conduct violates the Due Process Clause and cannot stand.

Similar to the burden of proof argument, if the decision to suspend Miner is permitted to stand, then it will allow the punishment of lawyers based on a diluted, weakened or non-existent notice requirements in charging instruments. This Court should reject any effort to weaken or compromise due process in attorney disciplinary proceedings.

Second, assuming the charging instrument was somehow sufficient, because Miner was exonerated on the charge of theft, he cannot be guilty of misappropriation.

In the Second Amended Complaint, the Administrator charged Miner with theft and dishonesty based upon the unauthorized use of Mr. Burren's money for Miner's benefit. App.46a. The form of theft charged

by the Administrator was the unauthorized exertion of control of another's property with the intent to deprive the owner permanently. App.46a, 94a-95a; *see also* 720 ILCS 5/16-1(a)1(a). Conversion is defined as the unauthorized taking of a person's property. *See In re Karavidas*, 2013 IL 115767, P. 61.

The Hearing Board found that there was no theft. App.94a-95a. Nevertheless, the Hearing Board found dishonesty/misappropriation based on the same conduct which was not theft. App.96a-101a. The Review Board affirmed the finding that no theft had occurred yet maintained that Mr. Miner acted dishonestly based on "misappropriation." App.19a-27a. The Illinois Supreme court accepted this reasoning.

"Misappropriation" is defined as the improper or illegal use of another person's funds. *See* BLACK'S LAW DICTIONARY, 8th ed. page 1019. There is no meaningful distinction between criminal theft as defined by the Illinois statute 720 ILCS 5/16-1(a)1(a) and the terms "conversion" and "misappropriation." As stated, Illinois Supreme Rule 756(b)(8)(b)(1)(a) confirms this point and uses the terms "conversion" and "misappropriation" interchangeably.

Having not been charged with conversion or misappropriation and having obtained a specific finding that no theft occurred, there cannot be dishonesty based upon the same conduct, pursuant Rule 8.4(a)(4). While we appreciate that inconsistent verdicts are not considered Constitutional violations, this principle should not apply to a circumstance, such as here, where the exoneration on one charge logically excludes a finding of guilt on the other. *U.S. v. Powell*, 469 U.S. 57, 69 (1984) n.8. The alleged taking of Mr.

Burren's money without his authority was inconsistent (negated) to the point of unfair absurdity by the ruling that no theft had occurred. There was no other basis to find dishonesty in this record. There was no evidence of any false statement made to Burren or anyone else about Burren's money. *In re Cutright*, 233 Ill. 2d at 489.

We contend that a lawyer who is found to have not entered into a business transaction with a client, who is not charged with conversion or misappropriation and who is found to have not engaged in theft cannot be found guilty of dishonesty by misappropriation based on precisely the same conduct. If allowed to stand, then, it appears that there is a different standard of proof, based upon some unknown, subjective belief, which can be used to determine whether a lawyer has engaged in dishonesty. There is no rational explanation for the inconsistency between the determination that a lawyer has not converted money, not stolen money, but has misappropriated and therefore acted dishonestly.

The law presumes that people act honestly, including lawyers. An act of dishonesty involves something which is criminal, untrue, or done secretly and deceptively. *In re Cutright*, 233 Ill. 2d at 489 (Proof of an intentional dishonest act is required.). The presumption of innocence and not guilty finding on the theft charge make any finding of dishonest misappropriation improper and a violation of due process.

III. LAWYERS HAVE A RIGHT TO HAVE PERSONAL RELATIONSHIPS, NOT GOVERNED BY THE RULES OF PROFESSIONAL CONDUCT

"The Constitution protects against unjustified interference with an individual's choice to enter into and maintain certain intimate or private relationships." *Board of directors of Rotary Int'l v Rotary Club of Duarte*, 481 U.S 537, 544 (1987) This includes family relationships and relationships with whom one shares "distinctively personal aspects of one's life." *Id.* at 545-46; *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984) ("The Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State.")

The Illinois Supreme Court punished Miner because he did not keep records of checks cashed for his personal friend/father figure. In doing so, the court determined that check cashing for a friend as a form of legal representation and then applied a rule of professional conduct to a private relationship. That violated Miner's First Amendment right to maintain a private relationship, free from state interference.

To begin with, finding that check cashing is the practice of law is illogical, and contrary to the law. Cashing a check is not legal representation. *In re Matter to Alan Feinberg*, 90 CH 240 (Review Board 1993); *In re Serritella*, 5 Ill.2d 392, 396-97 (1955); *HCC Historic Tax Credit Fund V.I, L.P. v. Levenfeld Pearlstein, LLC*, 2012 U.S. Dist. Lexis 167791*12 (N.D. Ill. 2012).

Miner held uncashed checks in a secure place. Holding money unrelated to representation is a secure manner is not governed by Rule 1.15(a); *See TCC Historic Tax Credit Fund VII, L.P. v. Levenfeld Pearlstein, LLC*, 2012 US. Dist. Lexis 167791*12 (N.D. Ill. 2012) (Lawyers who hold money in escrow do not render legal services and are not governed by Rule 1.15(a)).

This is not a case in which a case settled and a lawyer cashed a check and took money. The check cashing involved one person asking another person, a friend who happened to be a lawyer, to cash a check. Lawyers are individuals and are entitled to have personal relationships. *In re Lamberis*, 93 Ill. 2d 222, 227 (1982) ("We do not intend to imply that attorneys must conform to conventional notions of morality in all questions of conscience and personal life.") Every personal relationship should not be judged in the context of the Rules of Professional Conduct.

Mr. Burren, in his own handwriting, in his own words, referred to Mr. Miner as son, not lawyer. When Burren wrote the checks for Miner to cash, he did so freely, in his own writing. None of the checks say "Steve Miner lawyer or attorney." Burren's words should be sufficient to negate any finding that the check cashing related to legal representation. Rule 1.15(a) does not apply.

Being a lawyer is a privilege, but being a member of a privileged profession does not mean that a lawyer surrenders his or her right to have a private life and private relationships. The decision goes too far. Miner cashed checks for a person he considered to be family, at the repeated request of that person. That

is not practicing law and is not conduct which should be regulated by state disciplinary rules.

CONCLUSION

For the reasons stated, Steven A. Miner respectfully requests that this Petition be accepted.

Respectfully submitted,

ADRIAN VUCKOVICH
COUNSEL OF RECORD
KATHRYNE HAYES
COLLINS BARGIONE & VUCKOVICH
1 NORTH LASALLE STREET, SUITE 300
CHICAGO, IL 60602
(312) 372-7813
AV@CB-LAW.COM

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