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JUDGMENT OF THE SUPREME COURT OF ILLINOIS ALLOWING MOTION TO STAY THE EFFECTIVE DATE OF SUSPENSION UNTIL JULY 15, 2018 (JUNE 20, 2018)

STATE OF ILLINOIS SUPREME COURT

IN RE: STEVEN ALBERT MINER

M.R.029254

Attorney Registration & Disciplinary Commission
2013PR00078

Before: Lloyd A. KARMEIER, Chief Justice,
Robert R. THOMAS, Justice,
Rita B. GARMAN, Justice,
Mary JANE THEIS, Justice,
Thomas L. KILBRIDE, Justice,
Anne M. BURKE, Justice,
P. Scott NEVILLE, JR., Justice.

Motion to stay the effective date of the Court's suspension order of May 24, 2018 from June 14, 2018 to July 15, 2018. Allowed. The suspension imposed May 24, 2018, shall be effective July 15, 2018.

ORDER OF THE SUPREME COURT OF ILLINOIS ALLOWING MOTION TO STAY THE EFFECTIVE DATE OF SUSPENSION UNTIL JULY 15, 2018 (JUNE 20, 2018)

IN THE SUPREME COURT OF ILLINOIS

IN RE: STEVEN ALBERT MINER

M.R.029254

Attorney Registration & Disciplinary Commission
2013PR00078

Motion to stay the effective date of the Court's suspension order of May 24, 2018 from June 14, 2018 to July 15, 2018. Allowed. The suspension imposed May 24, 2018, shall be effective July 15, 2018.

Order Entered by the Court.

ORDER OF THE SUPREME COURT OF ILLINOIS DENYING PETITION FOR LEAVE TO FILE, IMPOSING SUSPENSION, ORDERING REIMBURSEMENT OF PAYMENTS (MAY 24, 2018)

STATE OF ILLINOIS SUPREME COURT

IN RE: STEVEN ALBERT MINER

M.R.029254

Attorney Registration & Disciplinary Commission
2013PR00078

Before: Lloyd A. KARMEIER, Chief Justice,
Charles E. FREEMAN, Justice,
Thomas L. KILBRIDE, Justice,
Anne M. BURKE, Justice,
Robert R. THOMAS, Justice,
Rita B. GARMAN, Justice,
Mary JANE THEIS, Justice.

Petition by respondent for leave to file exceptions to the report and recommendation of the Review Board. Denied. Respondent Steven Albert Miner is suspended from the practice of law for two (2) years, as recommended by the Review Board majority.

Suspension effective June 14, 2018.

Respondent Steven Albert Miner shall reimburse the Client Protection Program Trust Fund for any

Client Protection payments arising from his conduct prior to the termination of the period of suspension.

REPORT AND RECOMMENDATION OF THE REVIEW BOARD OF THE ILLINOIS ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION (JANUARY 26, 2018)

BEFORE THE REVIEW BOARD OF
THE ILLINOIS ATTORNEY REGISTRATION
AND DISCIPLINARY COMMISSION

IN THE MATTER OF:
STEVEN ALBERT MINER,

Respondent-Appellant.

No. 6180672

Commission No. 2013PR00078

SUMMARY

The Administrator charged Respondent in a two-count second amended complaint with preparing a will that named Respondent's two children as beneficiaries, and with mishandling and dishonestly misappropriating client funds. Following a hearing at which Respondent was represented by counsel, the Hearing Board found that the Administrator had proven some but not all of the charged misconduct. It recommended that, for his misconduct, Respondent be suspended for two years.

Respondent filed exceptions. On appeal, he contends that Count I of the Administrator's complaint

failed to give him fair notice of the charges against him, and that the Hearing Board's findings of misconduct in connection with both counts were against the manifest weight of the evidence. He also challenges its sanction recommendation. He asks this Board to dismiss the charges against him, or, in the alternative, to recommend a less severe sanction.

For the reasons that follow, we reverse the Hearing Board's finding of misconduct as to Count I. A majority of this Review Board panel affirms the Hearing Board's findings of misconduct as to Count II and agrees with its recommendation that, for his misconduct, Respondent should be suspended for two years. One member of this panel dissents, finding that the Hearing Board's findings of fact and of misconduct in connection with Count II are against the manifest weight of the evidence, and recommending that the entire complaint against Respondent be dismissed.

FACTS

Respondent

Respondent was admitted to practice in Illinois in 1981. He has had a solo practice since 1999 and concentrates in family law. He has been disciplined once before, in 1998.

Respondent's Relationship with Glenn Burren

All of the misconduct with which Respondent was charged arose out of his relationship and dealings with Glenn Burren, who died in 2007. The Hearing Board's report describes their relationship in detail; we summarize it here.

Respondent met Mr. Burren in 1976 when Respondent began dating Mr. Burren's daughter, Marion. After Respondent and Marion stopped dating a few years later, Respondent and Mr. Burren maintained their close relationship. It is undisputed that, for three decades, Mr. Burren was essentially a member of Respondent's family—long-term partner to Respondent's mother, and like a father to Respondent and grandfather to Respondent's two children. Mr. Burren also had three children of his own from an earlier marriage—a son, Glenn Jr., who died in 2006; daughter Marion; and another daughter, Linda.

In addition to his close personal relationship with Mr. Burren, Respondent represented Mr. Burren in three real estate transactions. The first was in 2000, when Respondent represented Mr. Burren in the closing of the sale of property in Chicago on Winona. Also in 2000, Respondent represented Mr. Burren in the closing of the purchase of a house in Des Plaines, which Mr. Burren bought in joint tenancy with his daughter Linda. The last one occurred in 2003 when Respondent, who was hired by Mr. Burren's sister, Pearl, to handle the sale of a house that she and Mr. Burren owned in joint tenancy, completed the closing after Pearl died, leaving Mr. Burren as sole owner.

In 2006, at Mr. Burren's request, Respondent filled out three power of attorney forms for Mr. Burren. The forms named Respondent as Mr. Burren's agent for health care and property. Respondent testified that he did not consider filling out the power of attorney forms as legal work because he only filled out the blanks on the forms.

Respondent also assisted Mr. Burren with his finances, as discussed in greater detail below.

Respondent's Involvement with Mr. Burren's Will

In November 2003, Mr. Burren's sister Pearl died, and Mr. Burren, who was of modest means until then, received over $600,000 from Pearl's estate. Mr. Burren asked Respondent to help him with a will in which he planned to name Respondent's mother as a beneficiary. Respondent declined, telling Mr. Burren that he could not do that, and suggested Mr. Burren contact another attorney. Mr. Burren contacted attorney Ross Miller, with whom Respondent had previously worked. Mr. Miller drafted a will for Mr. Burren, and sent it to Mr. Burren with a cover letter dated December 31, 2003 that instructed Mr. Burren to contact Respondent "to do the execution." Respondent was copied on this letter.

On January 6, 2004, during a joint birthday party at Respondent's house for Respondent's son and Mr. Burren, Mr. Burren executed the will, with Respondent's mother, Nancy Miner, and another party guest, Walter Hladko, as witnesses. According to the testimony of both Respondent and Mr. Hladko, Respondent did nothing more than tell the witnesses where to sign the will and notarize a trust.

The will bequeathed 40 percent of Mr. Burren's estate to Respondent's children, Steven and Katy. It bequeathed the remaining 60 percent of Mr. Burren's estate to his own three children. It also contained a provision stating: "I appoint my attorney, Steven A. Miner, executor of this will."

Mr. Burren kept the will after it was executed but gave it to Respondent in June 2007, when lie was in the hospital. After Mr. Burren died in July 2007, Respondent initiated probate proceedings in Cook County Circuit Court. Mr. Burren's children contested

the validity of the will and sought to recover assets that they claimed Respondent had taken. The judge found the will to be null and void on grounds of undue influence, and ordered Respondent to pay the estate almost $500,000 plus $217,000 in interest. Respondent appealed. The circuit court's judgment was affirmed in July 2013. Respondent paid the judgment and the estate was closed.

Respondent's Involvement with Mr. Burren's Finances

MB Financial Account

In 1983, Mr. Burren opened a bank account at MB Financial and named Respondent and his daughter Linda as joint tenants with right of survivorship. In April 2004, Mr. Burren signed a check from that account made out to Respondent for $11,700. Respondent cashed it.

In August 2006, Mr. Burren signed a check from that account made out to Respondent for $55,000. Those funds were used to open a new account at MB Financial on which only Mr. Burren and Respondent were joint tenants. Between September 2006 and early July 2007, Mr. Burren signed six checks from the newer MB Financial account made out to Respondent, totaling about $54,000. Respondent cashed the checks.

Mr. Burren died on July 20, 2007. On July 30 and August 18, 2007, Respondent wrote checks to himself from the newer MB Financial account totaling about $27,000. He testified that he put the funds in a certificate of deposit in his name, and that he thought he was entitled to the funds because he was the surviving joint tenant on the account. He eventually

returned those funds to the estate pursuant to the judgment against him.

LaSalle Bank Account

In June 2003, Mr. Burren opened an account at LaSalle Bank. From June through September 2003, Mr. Burren signed five checks from that account made out to Respondent, totaling almost $44,000. Respondent testified that he cashed those checks and gave the money to Mr. Burren. In November 2003, Mr. Burren made Respondent a joint tenant with right of survivorship on the LaSalle Bank account. Between November 2003 and September 2005, Mr. Burren signed 16 checks from that account made out to Respondent, totaling about $180,000.

Smith Barney Account

Mr. Burren's sister Pearl had an investment account at Smith Barney of which Mr. Burren was a joint owner. Upon Pearl's death in November 2003, Mr. Burren became sole owner of the account, which held about $620,000 when Pearl died. In 2004, Respondent prepared three letters from Mr. Burren to Bruce Becker, Mr. Burren's financial advisor at Smith Barney, directing Smith Barney to issue checks from the Smith Barney account to Respondent. Respondent testified that he did so at Mr. Burren's request. Mr. Burren signed all three letters. The checks together totaled $169,762.

In September 2004, Mr. Becker sent a letter addressed to both Respondent and Mr. Burren at Respondent's home address with a recommendation regarding distributions to Mr. Burren from the account. Respondent faxed the letter back to Mr. Becker with

a handwritten note stating that he and Mr. Burren "went through your numbers" and giving further instructions. Mr. Burren signed the note.

In June 2007, Respondent sent a letter to Mr. Becker with instructions regarding Mr. Burren's Smith Barney account. Unlike the letters from 2004, this letter was from Respondent and was on his attorney letterhead. Mr. Burren also signed this letter, under the word "approved."

Respondent testified that he did not give legal or financial advice to Mr. Burren regarding his Smith Barney, or any other, funds, but only helped Mr. Burren communicate his wishes to Mr. Becker.

Respondent's check-cashing practices

Respondent testified that Mr. Burren regularly asked Respondent to cash checks for him. Respondent testified that he would get what he could in cash (depending on what cash the bank branch had available), sometimes pay bills for Mr. Burren, and get the remainder of the check amount in cashier's checks payable to himself with Mr. Burren as remitter, which he would set aside in a safe location that only he and Mr. Burren knew about. He would repeat the check-cashing process with the cashier's checks until he obtained all of the original amount in cash.

Between 2003 and 2007, Respondent cashed about $466,000 in checks for Mr. Burren. Respondent denied using any of Mr. Burren's cash for himself, and testified that he gave all of the proceeds to Mr. Burren (with the one exception after Mr. Burren's death, described above) or paid Mr. Burren's bills. Respondent testified that Mr. Burren never told him why he needed cash,

and Respondent never asked. Other than a few receipt letters, Respondent kept no written records of the transactions. Mr. Burren signed all of the checks that were made out to Respondent.

Mr. Burren's Mental Capacity

The evidence established that Mr. Burren remained mentally sharp and able to make his own decisions until his death, and that he was independent, stubborn, strong-willed, and not one to be swayed from his opinions.

Expert Testimony

Respondent presented an expert, certified public accountant and certified fraud examiner Ralph Picker, who testified about whether Respondent had benefitted from Mr. Burren's assets from 2003 through 2007. He concluded that Respondent had not, and that Mr. Burren had spent the funds for his own purposes.

In rebuttal, the Administrator presented an expert, certified public accountant and certified fraud examiner Jennifer Larson, who opined that the methodology used by Mr. Picker to reach his conclusion was flawed. Ms. Larson did not do an independent investigation or fraud analysis and had no opinion as to whether or not Respondent took assets from Mr. Burren.

Hearing Board's Findings and Recommendation

The Hearing Board found that Respondent had committed some but not all of the misconduct with which he was charged.

With respect to Count I, which concerned Mr. Burren's will, the Hearing Board found that Respondent

represented a client when the representation could be materially limited by Respondent's own interests, in violation of 1990 Illinois Rule of Professional Conduct 1.7(b).[1] It based this misconduct finding on Respondent's actions in "presiding over" the execution of Mr. Burren's will, which it found constituted legal representation and therefore established an attorney-client relationship between Respondent and Mr. Burren.

The Hearing Board found, however, that the Administrator did not prove that Respondent prepared Mr. Burren's will. It thus found that the Administrator failed to prove the remaining charges in Count I—that Respondent prepared an instrument giving persons related to him substantial gifts from a client in violation of Rule 1.8(c), and engaged in conduct prejudicial to the administration of justice in connection with the probate of Mr. Burren's will in violation of Rule 8.4(a)(5).

With respect to Count II, concerning Respondent's handling of Mr. Burren's funds, the Hearing Board found that Respondent failed to keep Mr. Burren's property separate from his own, in violation of Rule 1.15(a). It based this misconduct finding on its determination that, in helping Mr. Burren with his finances, including cashing checks ostensibly for Mr. Burren, Respondent was acting as Mr. Burren's attorney and therefore had to hold Mr. Burren's funds separate from his own in a client trust account, but failed to do so. It also found that Respondent acted dishonestly, in violation of Rule 8.4(a)(4), by diverting

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[1] All of the misconduct at issue in this matter involves the 1990 Illinois Rules of Professional Conduct.

a significant amount of Mr. Burren's money to himself.

The Hearing Board found, however, that Respondent did not enter into an improper business transaction with Mr. Burren or engage in the crime of theft, and therefore found no violations of Rules 1.8(a) or 8.4(a)(3).

The Hearing Board recommended that Respondent be suspended for two years.

ANALYSIS

Respondent challenges the Hearing Board's findings of misconduct. He contends that Count I failed to give him fair notice of the charges against him, and therefore that he is being disciplined for uncharged misconduct, in violation of his due process rights. He also contends that the Hearing Board's findings of misconduct are against the manifest weight of the evidence, and thus should be reversed and the complaint dismissed. We agree that Count I did not give Respondent sufficient notice of the misconduct he is alleged to have committed, and therefore recommend that Count I be dismissed. We affirm the Hearing Board's findings of misconduct in connection Count II.

1. Count I Failed to Give Respondent Fair Notice of the Charges Against Him

Count I of the second amended complaint was entitled "Preparation of an instrument of substantial gift from a client," and the charges in that count were based on the allegations that Respondent "prepared a last will and testament" and "devise[d] and prepare[d]

a personal estate plan" for Mr. Burren. (2d Am. Complt. ¶¶ 1, 3 (emphasis added).) Based on those allegations, the Administrator charged Respondent with violating Rule 1.7(b) by "representing a client when the representation may be materially limited by the lawyer's own interests, because Respondent's estate planning advice to Burren was materially limited by his interest in providing bequests to his own children." (*Id.* ¶ 10(b).)

The Hearing Board found that the Administrator failed to prove that Respondent had prepared Mr. Burren's will, but nonetheless found that he violated Rule 1.7(b) because of his "active involvement" in the execution of the will and because he functioned as the "attorney supervising execution of the will." (Hearing Bd. Report at 12, 14.) Respondent contends that he should not be disciplined for his role in the will's execution when the complaint alleged that he prepared the will and prepared and devised an estate plan for Mr. Burren. We agree.

Procedural due process requires that "attorneys receive notice of the charges against them in disciplinary proceedings and have an opportunity to defend against those charges." *In re Chandler*, 161 Ill.2d 459, 470, 641 N.E.2d 473 (1994). As our Court has noted: "Generally, an attorney may not be disciplined for instances of uncharged misconduct; to do so would violate the respondent's right to procedural due process and our own notions of candor and fairness." *Id.* (citing *In re Doyle*, 144 Ill.2d 451, 581 N.E.2d 669 (1991);*In re Ruffalo*, 390 U.S. 544, 88 S. Ct. 1222 (1968)). Thus, while a disciplinary complaint need not be drafted with the same specificity as a criminal indictment or civil complaint, it must reasonably inform the respondent of the misconduct that the res-

pondent is alleged to have committed. *In re Lavelle*, 94 CH 187 (Review Bd., Nov. 3, 1995), at 14, approved and confirmed, M.R. 11951 (March 26, 1996) (citing *In re Harris*, 93 Ill.2d 285, 443 N.E.2d 557 (1982); *Doyle*, 144 Ill.2d at 471; S. Ct. R. 753(b)). To that end, Supreme Court Rule 753(b) provides that a complaint in a disciplinary matter "shall reasonably inform the attorney of the acts of misconduct he is alleged to have committed." Ill. S. Ct. R. 753(b).

Based on the foregoing standards of due process, we find that Count I of the second amended complaint did not reasonably inform Respondent of the acts of misconduct that he is alleged to have committed. That count charged him with misconduct based on the specific action of preparing a will and preparing and devising an estate plan for Mr. Burren—which was not proved. It contained no allegations whatsoever concerning the execution of the will, which is the only aspect of the will that Respondent was involved with.

The Hearing Board's labeling of Respondent's actions as "active involvement" in or "supervision over" the will's execution does not justify disciplining him for those actions when they were not alleged in the complaint. Respondent's role during the execution of the will—which, based on the evidence of record, appears to be limited to hosting the party at which the will was executed, pointing out the signature lines on the will, and notarizing a trust—does not equate to "preparing" the will or "devising and preparing" an estate plan.

The Administrator argues that the complaint alleged that the will was executed, and that the Administrator's counsel, in her opening statement, stated that Respondent drafted and executed a will

for Mr. Burren. The Administrator thus contends that "a fair reading" of the complaint indicates that the conflict-of-interest charge against Respondent included not just drafting the will but also presiding over its execution.

We disagree. There is nothing in the complaint that would have notified Respondent that he was being accused of engaging in a conflict of interest by being present during the execution of the will. It seems to us that a reasonable person in Respondent's position would have believed that he was being charged with misconduct arising out of preparing the will, and would have defended himself against those charges by showing that he did not prepare the will. This, in fact, appears to be what Respondent did. To then discipline him for conduct that was not alleged and against which he could not defend violates the principles set forth in *Buffalo*, *Chandler*, *Doyle*, and the other due-process cases cited above.

At oral argument, counsel for the Administrator posited that this due-process issue is a "close call" that depends on whether we *see* this matter as more similar to *In re Harris*, 93 Ill.2d 285, 443 N.E.2d 557 (1982), or *In re Doyle*, 144 Ill.2d 451, 581 N.E.2d 669 (1991). The Administrator argues that, under *Harris,* Respondent was not prejudiced by having to respond to evidence adduced at trial that he engaged in a conflict of interest by arranging and presiding over the execution of Mr. Burren's will. While we respect counsel's candor, we do not see the call as particularly close. We believe this matter is analogous to *Doyle*, according to which we cannot discipline Respondent for conduct that came to light only after he and other witnesses testified about it at his hearing.

In *Doyle,* the Hearing Board censured the respondent for conduct that was not charged in the complaint against him, but about which he testified at his hearing. The Review Board disagreed with the Hearing Board's recommendation, finding that the complaint did not inform the respondent that that particular conduct was at issue, and therefore that any attempt to discipline him for that conduct would violate his due process rights.

The Illinois Supreme Court agreed with the Review Board. It noted that, under Illinois Supreme Court Rule 753(b), a complaint filed with the Hearing Board "'shall reasonably inform the attorney of the acts of misconduct he is alleged to have committed.' *Doyle*, 144 Ill.2d at 471 (quoting Ill. S. Ct. R. 753(b)). It stated that a "'complaint must contain factual allegations of every fact which must be proved in order for the plaintiff to be entitled to judgment on the complaint, and a judgment cannot be rendered on facts demonstrated by evidence at trial unless those facts shown were alleged in the complaint.'" *Id.* (quoting *In re Beatty,* 118 Ill.2d 489, 499, 517 N.E.2d 1065 (1987)). It found that the Administrator's complaint did not contain any factual allegations that the respondent's actions constituted misconduct, and that the respondent could not be disciplined for misconduct not alleged in the complaint.

We find that is precisely the case here. Thus, as in *Doyle*, we find that Respondent did not receive fair notice of charges against him, did not have an adequate opportunity to defend against them, and is being disciplined for uncharged conduct, which constitutes a clear violation of his due process rights. We recommend that Count I be dismissed.

2. The Hearing Board's Findings of Misconduct in Connection with Count II Are Not Against the Manifest Weight of the Evidence.

The remaining misconduct that the Hearing Board found Respondent to have committed arose out of Respondent's cashing of Mr. Burren's checks. The Hearing Board found that Respondent mishandled Mr. Burren's funds by not depositing them into a client trust account in violation of Rule 1.15(a) and that he dishonestly misappropriated Mr. Burren's funds in violation of Rule 8.4(a)(4). We find that Respondent has not shown that these findings are against the manifest weight of the evidence.

a. The Hearing Board's Finding That Respondent Engaged in Dishonesty with Respect to Mr. Burren's Funds Is Not Against the Manifest Weight of the Evidence

On review, we defer to the factual findings of the Hearing Board, and will not disturb them unless they are against the manifest weight of the evidence. *In re Timpone*, 157 Ill.2d 178, 196, 623 N.E.2d 300 (1993). A factual finding is against the manifest weight of the evidence where the opposite conclusion is clearly evident or the finding appears unreasonable, arbitrary, or not based on the evidence. *Leonardi v. Loyola University*, 168 Ill.2d 83, 106, 658 N.E.2d 450 (1995); *Bazydlo v. Volant*, 164 Ill.2d 207, 215, 647 N.E.2d 273 (1995). That the opposite conclusion is reasonable is not sufficient. *In re Winthrop*, 219 Ill.2d 526, 542, 848 N.E.2d 961 (2006).

We also defer to the Hearing Board's findings on witnesses' credibility. *See In re Woldman*, 98 Ill.2d 248, 254, 46 N.E.2d 35 (1983) (credibility of witnesses

"is to be determined by those who hear and observe them"); *Winthrop*, 219 Ill.2d at 542 (Hearing Board's findings regarding the credibility of witnesses are entitled to great deference because the Hearing Board "is in the best position to observe the witnesses, to assess their demeanor and credibility, to resolve conflicting testimony, and to render fact-finding judgments").

Given this deferential standard of review, we cannot say that the Hearing Board's finding of dishonesty is against the manifest weight of the evidence, because we believe the record contains evidence to support it.

The Hearing Board engaged in a thorough and painstakingly detailed analysis of Respondent's check-cashing for Mr. Burren, including the amount of each check that Respondent cashed and the date on which he cashed it. (*See* Hearing Bd. Report at 21-31, incorporated herein by reference.) We believe that its analysis as a whole makes clear that it found sufficient evidence to establish that Respondent was not entirely forthright with Mr. Burren about his funds. We also have reviewed the record, and agree that it contains evidence to support the Hearing Board's finding of dishonesty.

In all, Respondent cashed 34 checks totaling almost $466,000. Based on the exorbitant amount of cash that Respondent handled on Mr. Burren's behalf, the Hearing Board found it incredible that Respondent would not have kept records to document what had happened to the cash, and would not have asked Mr. Burren why he needed that amount of cash or what he was doing with it. It thus inferred that Respondent

was not completely candid with Mr. Burren about how that cash was being handled.

Furthermore, 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 hundreds of thousands of dollars of Mr. Burren's money with no documentation whatsoever regarding what he did with that money. The Hearing Board clearly felt similarly, which contributed to its finding that it did not believe Respondent's explanation regarding what he did with Mr. Burren's funds.

Our dissenting colleague believes that the Hearing Board's reasoning improperly imposed the burden of proof on Respondent to show that he did not engage in misconduct, and that the Hearing Board engaged in speculation about Mr. Burren's funds. We disagree. As the Court has instructed, "motive and intent are rarely proved by direct evidence, but rather must be inferred from conduct and the surrounding circumstances." *In re Stern*, 124 Ill.2d 310, 315, 529 N.E.2d 562 (1988). Moreover, neither the Hearing Board nor we "are required to be naïve or impractical in appraising an attorney's conduct," *In re Discipio*, 163 Ill.2d 515, 523, 645 N.E.2d 906 (1997), "nor blind to the intent apparent from the evidence." *In re Sturgeon*, 98 CH 10 (Review Bd., June 22, 2000), at 13, *petition for leave to file exceptions denied*, M.R. 16935 (Sept. 25, 2000) (citing *Discipio*, 163 Ill.2d at 523).

We believe the Hearing Board did as it is required to do as a fact-finding body—it made reasonable inferences and credibility determinations based upon the evidence that was presented to it. It concluded, after observing Respondent's demeanor and listening

to his lengthy testimony, that Respondent was not credible in his explanation of how he handled Mr. Burren's funds. Based on Respondent's incredible testimony, combined with ample evidence in the record regarding the frequency and amounts of checks cashed, Mr. Burren's expenses, and Respondent's purchases, the Hearing Board found that Respondent used some portion of Mr. Burren's funds without authorization for his own purposes, and thereby had engaged in dishonesty.

In short, the Hearing Board simply did not believe Respondent, and it is not our place as a reviewing body to say that it was wrong. Our standard of review does not allow us to substitute our judgment for that of the Hearing Board simply because another conclusion could have been reached. *In re Kleczek*, 05 SH 24 (Review Bd., June 1, 2007), at 7-8, *petitions for leave to file exceptions denied*, M.R. 21745 (Sept. 18, 2007) (citing *In re Tuchow*, 90 CH 305 (Review Bd., Oct. 12, 1994), *approved and confirmed*, M.R. 6757 (Jan. 25, 1995)). *See also In re Milks*, 99 CH 20 (Review Bd., July 2, 2003), at 3-4, *petitions for leave to file exceptions denied*, M.R. 18895 (Nov. 14, 2003) ("Although an opposite inference may be supportable from the circumstantial evidence, the Hearing Board's finding is not against the manifest weight of the evidence, and we will not substitute our judgment for that of the Hearing Board") (citing *In re Krasner*, 32 Ill.2d 120, 204 N.E.2d 10 (1965)).

Moreover, the Hearing Board's finding of dishonesty was based primarily on its determination regarding Respondent's credibility, or, more accurately, lack thereof. The Hearing Board was in the best position to evaluate Respondent's credibility and candor on

the issue of how he handled Mr. Burren's funds, and this reviewing body should not substitute its judgment for that of the finder of fact. While we give deference to all of the hearing Board's factual determinations, we do so particularly to those concerning the credibility of witnesses, because the Hearing Board is able to observe the testimony of witnesses—which we are not—and therefore is in a superior position to assess their demeanor, judge their credibility, and evaluate conflicts in their testimony. *Kleczek*, 05 SIT 24 (Review Bd.), at 8 (citing *In re Spak*, 188 Ill.2d 53, 66, 719 N.E.2d 747 (1999); *In re Wigoda*, 77 Ill.2d 154, 158, 395 N.E.2d 571 (1979)).

Accordingly, we cannot say that an opposite conclusion is clearly evident on this record, nor that the Hearing Board's finding of dishonesty is arbitrary, unreasonable, or not based in evidence. We therefore affirm it.

b. The Hearing Board's Finding That Respondent Mishandled Client Funds in Connection with His Cashing of Mr. Burren's Checks Is Not Against the Manifest Weight of the Evidence

In order to prove that Respondent violated Rule 1.15(a) because of the manner in which he handled Mr. Burren's funds, the Administrator was required to prove that Respondent represented Mr. Burren in connection with the checks that he cashed for Mr. Burren. *See In re Karavidas*, 2013 IL 115767, ¶ 64 (respondent's conduct did not violate Rule 1.15(a) because the funds involved were not held by respondent "in connection with a representation"). The Hearing Board found that the Administrator proved this fact. We find sufficient evidence in the record to support

that finding, and therefore affirm the finding of an attorney-client relationship as well as the finding of misconduct.

The most significant issue in determining whether an attorney-client relationship existed is whether Mr. Burren reasonably believed Respondent was acting as his attorney with respect to Respondent's handling of Mr. Burren's funds, including his check-cashing for Mr. Burren. *See In re Sax*, 03 CH 99 (Review Bd., Nov. 27, 2007), at 14, *petition for leave go file exceptions denied*, M.R. 22139 (March 17, 2008) (client's reasonable belief is a significant, if not controlling, factor in deciding whether an attorney-client relationship existed).

Even though there was no direct testimony regarding Mr. Burren's belief (for obvious reasons, as Mr. Burren is deceased), the Hearing Board inferred that Mr. Burren considered Respondent his attorney based upon its findings that (1) Respondent had represented Mr. Burren in several real estate transactions; (2) Mr. Burren initially turned to Respondent for advice in changing his will; (3) Mr. Burren's will referred to Respondent as "my attorney;" (4) some of the correspondence between Respondent and Mr. Burren regarding Mr. Burren's finances was on Respondent's attorney letterhead, suggesting that he was communicating with Mr. Burren in a professional capacity; and (5) Respondent prepared three powers of attorney for Mr. Burren in 2006.

Based upon all of this information, the Hearing Board found that an ongoing attorney-client relationship between Respondent and Mr. Burren existed and continued throughout the time of the conduct at issue in this matter. We find particularly significant

the fact that Mr. Burren's will referred to Respondent as "my attorney," which supports an inference that Mr. Burren regarded Respondent as his attorney beyond one-off representations such as the real estate closings. We also find significant that, any time Mr. Burren needed legal assistance, he always turned first to Respondent.

We believe that these facts, which are solidly based upon evidence in the record, support the Hearing Board's finding that Mr. Burren regarded Respondent as his attorney, and that Respondent and Mr. Burren had an ongoing attorney-client relationship that persisted over time, including the time of the alleged misconduct in this matter. (*See* Hearing Bd. Report at 13, 35 (citing *In re Imming*, 131 Ill.2d 239, 252, 545 N.E.2d 715 (1989); *In re Childs*, 07 CH 95 (Review Bd., July 26, 2010), at 10-11, *petition for leave to file exceptions allowed*, M.R. 24094 (Nov. 12, 2010).)

Accordingly, as with the dishonesty finding, we believe the record contains adequate evidence to support the Hearing Board's finding of an attorney-client relationship between Respondent and Mr. Burren, and, concomitantly, its finding that Respondent violated Rule 1.15(a) because of the manner in which he handled Mr. Burren's funds.

In sum, our task on review "is not to determine whether there is an alternative interpretation of the events that took place, but to determine whether Hearing Board's factual findings are against the manifest weight of the evidence. . . . . If this is not the case, then we must affirm those findings." *Sax*, at 12-13 (citing *In re Witt*, 145 Ill.2d 380, 390, 583 N.E.2d 526 (1991); *Leonardi v. Loyola University*, 168 Ill.2d 83, 106, 658 N.E.2d 450 (1995)).

It is apparent to us that the Hearing Board carefully considered, weighed, and evaluated the evidence in the record and based its findings of fact and of misconduct in connection with Respondent's handling of Mr. Burren's funds on that evidence. While there may be an alternative interpretation of what occurred between Respondent and Mr. Burren, we cannot find that a conclusion opposite from that reached by the Hearing Board is evident, or that the facts that the Hearing Board found appear unreasonable, arbitrary, or not based on the evidence. We therefore affirm the Hearing Board's findings that Respondent violated Rules 8.4(a)(4) and 1.15(a).

SANCTION RECOMMENDATION

The Hearing Board recommended that Respondent be suspended for two years. Its sanction recommendation is advisory. *In re Ingersoll*, 186 Ill.2d 163, 178, 710 N.E.2d 390 (1999). In making our own recommendation, we consider the nature of the misconduct charged and proved, and any aggravating and mitigating circumstances shown by the evidence, *In re Gorecki*, 208 Ill.2d 350, 360-61, 802 N.E.2d 1194, 1200 (2003), while keeping in mind that the purpose of discipline is not to punish the attorney but rather to protect the public, maintain the integrity of the legal profession, and protect the administration of justice from reproach. *In re Timpone*, 157 Ill.2d 178, 197, 623 N.E.2d 300 (1993). We also consider the deterrent value of attorney discipline and "the need to impress upon others the significant repercussions of errors such as those committed by" Respondent. *Discipio*, 163 Ill.2d at 528 (citing *Imming*, 131 Ill.2d at 261). Finally, we seek to recommend a sanction that

is consistent with sanctions imposed in similar cases. *Timpone*, 157 Ill.2d at 197, while also considering the unique circumstances of each case. *In re Witt*, 145 Ill.2d 380, 398, 583 N.E.2d 526 (1991).

The Administrator charged Respondent with dishonestly misappropriating all of the funds involved in his check-cashing for Mr. Burren, which amounted to about $466,000. The Hearing Board found that Respondent did not misappropriate all of those funds, but made no finding regarding how much he misappropriated. Nonetheless, it found that he diverted a significant portion of the funds to himself. It also found that, by handling Mr. Burren's funds in the manner that he did, rather than depositing them in a client trust account, Respondent mishandled the entire amount of Mr. Burren's funds. These two findings persuade us that a significant suspension is warranted.

We believe that the Hearing Board's analysis of the relevant case law regarding an appropriate sanction for Respondent's misconduct, as applied to the circumstances of this matter, is thorough and well-reasoned. (*See* Hearing Bd. Report at 48-52.) Moreover, we agree with its findings of fact regarding the countervailing factors that bear upon a sanction recommendation in this matter, including that Respondent was "inordinately careless" in how he handled Mr. Burren's funds, dishonestly siphoned off a significant amount of those funds, and had prior discipline that should have made him more aware of his ethical obligations; but also that Mr. Burren was competent, independent, and intelligent, and understood the implications of his actions; Mr. Burren's estate has been compensated; and Respondent's close relationship with Mr. Burren "likely affected Res-

pondent's judgment and perception of the degree to which his conduct was proper." (Hearing Bd. Report at 50-51.)

The Court has disbarred attorneys who have mishandled and dishonestly converted funds in amounts similar to that involved here. *See, e.g., In re Bartley*, 96 SH 879, M.R. 15179 (Sept. 28, 1998) (disbarment for attorney who dishonestly converted more than $170,000 from an elderly client over a nine-year period). However, like the Hearing Board, we do not believe disbarment is warranted here, given the unique circumstances of this case. Rather, we find this matter comparable to *In re Moran*, 2014PR00023 (Hearing Bd., Sept. 18, 2015), *approved and confirmed*, M.R. 27812 (March 22, 2016) (two-year suspension where attorney took over $360,000 from family trust).

Therefore, taking into account Respondent's misconduct as well as the mitigating and aggravating factors, and keeping in mind that the purpose of discipline is not to punish the errant attorney but to protect the public (Hearing Bd. Report at 51 (citing *In re Edmonds*, 2014 IL 117696, ¶ 90)), we find that a suspension of two years, as recommended by the Hearing Board, is commensurate with Respondent's misconduct, falls within the range of discipline that has been imposed for comparable misconduct, and is sufficient to serve the goals of attorney discipline.

CONCLUSION

For the foregoing reasons, we recommend that the Hearing Board's finding of misconduct as to Count I be reversed and that count be dismissed; that the findings of misconduct as to Count II be affirmed;

and that, for his misconduct, Respondent be suspended from the practice of law for two years.

Respectfully submitted,

Claire A. Manning

Keith E. Roberts, Jr.

James T. Eaton, dissenting in part:

I agree with my colleagues that, for the reasons expressed above, Count I of the second amended complaint failed to give Respondent fair notice of the charges against him, and therefore should be dismissed. I disagree, however, that the Hearing Board's findings of fact, and resultant findings of misconduct, regarding Respondent's check-cashing for Mr. Burren are not against the manifest weight of the evidence. Because I believe those findings are not supported by the evidence, I would reverse them, and dismiss the entire complaint against Respondent.

Dishonesty

I believe the Hearing Board's dishonesty finding suffers from two critical flaws. First, the Hearing Board based its dishonesty finding largely on speculation about what might have happened to Mr. Burren's funds, and what Mr. Burren might have intended with respect to his funds—with no evidence whatsoever to support its surmise. Second, a shifting of the burden of proof from the Administrator to Respondent pervades the Hearing Board's report, and is most notable in its dishonesty analysis. These two errors resulted in a finding that is unreasonable and not supported by the evidence, and therefore against the manifest weight of the evidence.

In its dishonesty analysis, the Hearing Board noted that, over a four-year period, checks totaling over $450,000 were issued on Mr. Burren's accounts and Respondent cashed most of them. It then stated: "There are virtually no records to document what happened to that cash and no testimony, except Respondent's, from anyone with actual knowledge of

what happened to the cash. We were convinced that Respondent was not completely candid with Burren about how the cash was being handled." (Hearing Bd. Report at 42.)

It also stated that it "did not fully credit" Respondent's testimony that Mr. Burren wanted cash and that, but for a few bills that Respondent paid for Mr. Burren, Respondent returned the check proceeds to Mr. Burren in cash. It hypothesized: "Respondent probably did give Burren some of the cash; it seems unlikely that Burren would have continued to give Respondent checks to cash in Respondent never returned any cash to him. However, it seems equally unlikely that Burren wanted, or received, all of this cash." (*Id.* at 43-44.) Pointing to the large amounts and timing of the checks that Respondent cashed, the Hearing Board stated: "Given these circumstances, the concept that Burren just wanted cash is untenable. Something more was going on." (*Id.* at 44.)

The Hearing Board noted that Respondent was the only person to testify who had actual knowledge of what happened to the cash, given that Mr. Burren was obviously not available. It then noted that, "[i]n attempting to show he did not benefit from Burren's funds," Respondent presented testimony from his attorney in the probate case and a forensic accounting expert. The Hearing Board gave limited weight to the attorney's testimony about what happened to the funds, and did not find the expert's conclusions reliable for the reasons identified by the Administrator's expert, regarding the methodology Respondent's expert used to reach his conclusions. (*id.*) The Hearing Board observed that the Administrator's expert "was not

asked to, and did not, offer an opinion on what happened to the funds." (*Id.*)

The Hearing Board's analysis highlights the dearth of evidence regarding what happened to Mr. Burren's funds. The Hearing Board itself noted there were "no records" and "no testimony" other than from Respondent to show what happened to the cash, and that the Administrator's expert offered no opinion regarding what happened to the funds. Thus, other than Respondent's testimony and the checks signed by Mr. Burren, there was no evidence in the record regarding where Mr. Burren's funds went if not to him; how much of the funds Respondent purportedly took; what Respondent did with the funds; whether or not Mr. Burren authorized Respondent to do what he did with the funds; or any other issue that would prove by clear and convincing evidence that Respondent dishonestly took any or all of Mr. Burren's funds.

Consequently, the Hearing Board's conclusions are based largely on suspicion and supposition. The Hearing Board found that Respondent was not "completely candid" with Mr. Burren, but provided no evidentiary basis for why it believed this. It found that he "probably" gave some of the funds to Mr. Burren but that it was "unlikely" that Mr. Burren wanted or received all of the cash at issue, but, again, provided no evidentiary basis for that conclusion. It found it "untenable" that Mr. Burren just wanted cash and that "[s]omething more was going on," but cited no evidence, other than the amount and timing of the checks, for its conjecture.

Something more may, indeed, have been going on, but that suspicion cannot substitute for or supplant proof. *See Winthrop*, 219 Ill.2d at 550 (quoting *In re*

Lane, 127 Ill.2d 90, 111, 535 N.E.2d 866 (1989) (while circumstances may arouse suspicion, "'suspicious circumstances, standing alone, are not sufficient to warrant discipline'").

Moreover, even if the Hearing Board did not fully credit Respondent's testimony regarding his handling of Mr. Burren's funds, the fact remains that Respondent's testimony was unrebutted. The Court has declined to reject a respondent's "suspicious," "suspect," and "difficult to believe" testimony where that testimony was unrebutted. *Winthrop*, 219 Ill.2d at 549. Because the Administrator produced no evidence to show what happened to Mr. Burren's funds or what Mr. Burren intended regarding those funds, we are left with Respondent's unrebutted testimony that he paid some bills and gave the remainder of the cash to Mr. Burren, and documents that show that Mr. Burren signed each and every check at issue and was of sound mind when he did so. That evidence simply does not support a finding that Respondent dishonestly misappropriated Mr. Burren's funds.

Ultimately, while the Hearing Board can and should draw reasonable inferences from the evidence, those inferences still must find support in the record. That support is lacking here. I do not believe that a finding of dishonesty—a very serious matter for an attorney, particularly in a case like this where the recommended sanction is a two-year suspension from the practice of law—should be based primarily on suspicious circumstances. *See Mitgang*, 385 Ill. at 324 ("In order to warrant disbarment or suspension the record must be free from doubt not only as to the act charged but also as to the motive with which it is

done. A lawyer will not be subjected to discipline merely upon suspicious circumstances.")

But, what troubles me even more than the conjecture underlying the Hearing Board's findings is the burden-shifting in which both the Hearing Board and the Administrator clearly (but, I have no doubt, unintentionally) have engaged.

In a disciplinary proceeding, the Administrator bears the burden of proving that the respondent engaged in the misconduct charged, and must meet that burden by clear and convincing evidence. *In re Landis*, 05 CH 69 (Review Bd., Dec. 24, 2008), at 8 (citing *In re Ingersoll*, 186 Ill.2d 163, 168, 710 N.E.2d 390 (1999)). "Clear and convincing evidence means a degree of proof that, considering all the evidence, produces a firm and abiding belief that it is highly probable that the proposition at issue is true." *Landis* (Review Bd.), at 8 (emphasis added) (citing Cleary & Graham, *Handbook of Illinois Evidence*, § 301.6 (8th ed. 2004)). The respondent, on the other hand, "has no burden to prove anything, let alone by a clear and convincing standard." *Landis* (Review Bd.), at 10.

Despite this unequivocal rule that a respondent in a disciplinary proceeding bears no burden of proof, some of the Hearing Board's findings in this matter appear to be based on the lack of, or shortcomings in, evidence produced by Respondent, rather than on the evidence, or lack thereof, produced by the Administrator.

For example, in support of its dishonesty finding, the Hearing Board cited Respondent's failure to keep records that would have shown what happened to Mr. Burren's funds. This seems precariously close to

expecting Respondent to produce documents to prove that he did not engage in dishonesty, rather than requiring the Administrator to prove the charge.

Similarly, the Hearing Board rejected as unreliable the conclusions of Respondent's expert, whom Respondent presented "to show he did not benefit from Burren's funds." (Hearing Bd. Report at 44.) Respondent had no burden to present an expert on this issue or show that he did not benefit from Mr. Burren's funds. The burden was entirely on the Administrator to prove that Respondent dishonestly took Mr. Burren's funds, and yet, the Administrator's expert did no analysis of her own and offered no opinion regarding what happened to Mr. Burren's funds. But rather than holding the Administrator to his burden of proof and emphasizing that his expert failed to conduct a fraud analysis and offer an affirmative opinion of her own regarding what happened to Mr. Burren's funds, the Hearing Board appeared to hold it against Respondent that his expert was deemed unreliable and use that as further support for its dishonesty finding.

Furthermore, in summarizing why it believed Respondent was not completely candid with Mr. Burren about his activity in connection with Mr. Burren's funds, the Hearing Board noted two instances of Respondent's check-cashing that "in particular reinforced our conclusion that Respondent diverted some of the check proceeds for his own purposes," and found that it was "not clear" that Mr. Burren knew about or agreed to either of the two instances. (Hearing Bd. Report at 44-45.) It also noted that Respondent drafted several letters to serve as receipts, but that, based on the wording of the letters, it was

"not at all clear" whether Burren or Respondent was the one who received the funds. (*Id.*)

Given the burden on the Administrator to prove his charges by clear and convincing evidence, it would seem that an inference that is "not clear" or especially "not at all clear" should be held against the Administrator, not Respondent. But the Hearing Board did the opposite and used these ambiguities as further proof of Respondent's dishonesty.

Even at oral argument, when asked what evidence of misappropriation the Administrator presented at Respondent's hearing, counsel for the Administrator responded that Respondent's failure to explain what happened to Mr. Burren's money made no sense. When pressed that that does not equate to the fact that Mr. Burren did not authorize Respondent to do what he did, the Administrator's counsel stated that this case comes down to "no documentation"—presumably meaning that Respondent presented no documentation to show where the funds went.

Counsel's statement illustrates what I believe is the fundamental error in the Hearing Board's dishonesty analysis: It is based upon an improper presumption that Respondent's failure to account for Mr. Burren's money proves he dishonestly misappropriated it. The burden of proof was, at all times, on the Administrator to prove his charges, not on Respondent to disprove them. The Hearing Board's dishonesty finding turns that burden on its head.[1]

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[1] In that same vein, the probate matter should have little bearing on the outcome of this disciplinary matter because of the different burdens of proof in each proceeding. In the probate matter, Respondent had the burden of showing by clear and convincing

Finally, I am hard-pressed to reconcile the Hearing Board's finding of dishonesty, which is based on its finding that Respondent misappropriated at least some of Mr. Burren's funds, with its finding that the Administrator failed to prove that Respondent committed criminal conduct by engaging in the theft of Mr. Burren's funds. In explaining the latter finding, the Hearing Board noted that, under the Illinois theft statute, a person commits theft when he or she knowingly obtains or exerts unauthorized control over property of the owner and intends to deprive the owner permanently of the use or benefit of the property. (Hearing Bd. Report at 41 (citing 720 ILCS 5/16-1(a)(1)(A)).) It then reasoned:

> From our perspective, there was not clear and convincing evidence of the elements of the theft alleged. Based on the evidence presented, including evidence of Burren's competence and his behavior, as well as the relationship between Respondent and Burren, the Administrator failed to prove the essential elements of the underlying crime charged.

(Hearing Bd. Report at 41.)

The Hearing Board found insufficient evidence to prove that Respondent obtained or exerted unauthorized control over Mr. Burren's funds with the intent to deprive him of them. I believe that finding is correct and supported by the evidence, and, consequently, that the finding of dishonesty, which

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evidence that he could account for Mr. Burren's funds. In this case, in contrast, the Administrator bore the burden to prove by clear and convincing evidence that Respondent committed the charged misconduct.

was based on the virtually identical allegation that Respondent took Mr. Burren's funds without authorization, is incorrect and against the manifest weight of the evidence.

Accordingly, I believe the Hearing Board erred in finding that Respondent violated Rule 8.4(a)(4) and would reverse that finding.

Mishandling of Mr. Burren's Funds

As an initial matter, I struggle to see how cashing checks for someone constitutes the practice of law, given that it requires no legal knowledge or skill to accomplish. *See In re Discipio*, 163 Ill.2d 515, 523, 645 N.E.2d 906 (1994) (citations omitted) (noting that, in determining whether an act constitutes the practice of law, "[t]he focus of the inquiry must be on whether the activity in question required legal knowledge and skill in order to apply legal principles and precedent"). That Respondent helped Mr. Burren manage his affairs, and also happened to be a lawyer, does not transform the check-cashing into legal work. *See In re Serritella*, 5 Ill.2d 392, 125 N.E.2d 531 (1955); *In re Feinberg*, 90 CH 240 (Review Bd., Aug. 13, 1993) (both declining to find that an attorney's cashing of checks constituted the practice of law). I would thus find that Respondent's act of cashing of checks for Mr. Burren, in and of itself, did not constitute the practice of law such that Rule 1.15(a) would apply.

Furthermore, while there is no question that Respondent acted as Mr. Burren's attorney at various points during their relationship, such as when Respondent represented Mr. Burren in real estate closings, I believe that the Hearing Board erred in extrapolating an ongoing attorney-client relationship

from these one-off representations, and in attributing Respondent's assistance to Mr. Burren as arising solely out of this ongoing attorney-client relationship rather than out of their familial relationship.

The Hearing Board relied heavily on what it called "the longitudinal relationship" between Respondent and Mr. Burren, and reasoned that their decades-long relationship supported a finding that they had an ongoing attorney-client relationship that persisted over time, including the time of the alleged misconduct in this matter. (*See* Hearing Bd. Report at 13, 35 (citing *In re Imming*, 131 Ill.2d 239, 252, 545 N.E.2d 715 (1989); *In re Childs*, 07 CH 95 (Review Bd., July 26, 2010), at 10-11, *petition for leave to file exceptions allowed*, M.R. 24094 (Nov. 12, 2010).) I believe the Hearing Board's analysis incorrectly focused on the length of their relationship and disregarded the nature of it, which, according to an abundance of uncontroverted evidence, was like that of father and son.

Both the Hearing Board in its report and the Administrator on appeal cited *Imming* and *Childs* as controlling, but those cases present starkly different scenarios than that involved here. In *Imming,* the respondent was charged with engaging in improper business transactions with multiple clients by borrowing funds from them to invest in a manufacturing company that he had started. The respondent argued to the Court that the provisions of the Code of Professional Responsibility did not apply to the loan agreements because he was not in an attorney-client relationship with any of the people from whom he borrowed money. The Court rejected his argument, noting that the investors made the loans while the respondent was performing legal services

for them or within a relatively short time thereafter. The Court noted: "Respondent's whole basis for his relations with these people was his past or present relation to them as attorney." *Id.* at 253 (emphasis added).

Similarly, in *Childs*, the Hearing Board found, and this Board affirmed, that there was "an ongoing attorney-client relationship" between the respondent and his client. The respondent first met the client when he represented the client in a criminal matter, and over the next 20 years, represented the client and his family in various other legal matters and assisted the client with his business activities. The client testified that he considered the respondent his lawyer. *Childs*, 07 CH 95 (Hearing Bd., Aug. 28, 2009), at 2, 10-11, 24.

In both *Imming* and *Childs*, the respondents' relationships with their clients were strictly business, and arose solely out of the respondents' legal work for the clients. Based on the evidence in both cases, including the clients' testimony that they believed the respondents were representing them as their attorneys at the time of the respondents' misconduct, the triers of fact found attorney-client relationships between the respondents and their clients.

In the present case, in contrast, Respondent's whole basis for his relationship with Mr. Burren was personal: They met when Respondent dated Mr. Burren's daughter; they maintained their relationship even after Respondent and Mr. Burren's daughter split up; they grew closer, with Mr. Burren becoming a surrogate father to Respondent after Respondent's own father died; Mr. Burren was like a grandfather to Respondent's two children; and Mr. Burren and

Respondent's mother were in a relationship for decades, until Mr. Burren died. During the course of their 30-year friendship, Respondent performed legal work for Mr. Burren on a few discrete occasions when Mr. Burren needed a lawyer.

Thus, it seems to me that the primary relevance of *Imming* and *Childs* lies in distinguishing them from this matter. They serve to highlight the "absence of special circumstances or arrangements which show a continuation of the [attorney-client] relationship" between Respondent and Mr. Burren. *Imming*, 131 Ill.2d at 252 (citations omitted). To the contrary, the manifest weight of the evidence depicted a 30-year personal relationship between Respondent and Mr. Burren in which Mr. Burren regarded Respondent as his son. I believe it was error for the Hearing Board to impute an ongoing attorney-client relationship from their close, familial relationship.

Moreover, I agree with my colleagues that a client's reasonable belief is the most significant factor in determining whether an attorney-client relationship existed. *See Sax*, 03 CH 99 (Review Bd.), at 14. But I disagree with them that the evidence established that Mr. Burren regarded Respondent as his attorney at all times and for all purposes, including the check-cashing that Respondent did for Mr. Burren. Rather, I see no evidence whatsoever in the record on the issue of whether Mr. Burren believed that Respondent was serving as his attorney when Respondent cashed Mr. Burren's checks, or on the many other occasions when Respondent assisted Mr. Burren with non-legal matters.

The Hearing Board found, and my colleagues agreed, that the statement in Mr. Burren's will referring

to Respondent as Mr. Burren's lawyer shows that Mr. Burren believed there was an attorney-client relationship between him and Respondent. Even if that were true—and I do not believe that it is, given that the will was drafted by an attorney who could have included that statement of his own accord and not because it accurately reflected Mr. Burren's belief—at most, it would give rise to an inference regarding what Mr. Burren believed at the time the will was drafted, not what he believed at all times thereafter or in connection with matters other than the will.

The Hearing Board also pointed to six letters drafted by Respondent on his letterhead—five that Respondent testified were receipts for cash he gave to Mr. Burren, and one to Mr. Becker at Smith Barney giving instructions about the Smith Barney account—as evidence that Mr. Burren could have believed that Respondent was acting as his attorney with respect to the check-cashing. Aside from the problem of speculation about what Mr. Burren believed, given Respondent's unrebutted testimony about these letters, they are, at best for the Administrator, ambiguous in their purpose and on the issue of whether Mr. Burren could have believed that Respondent was acting as his attorney when Respondent cashed his checks, and insufficient to bear the weight of the Administrator's burden of proof on the issue.

In sum, I believe the Hearing Board's finding that an attorney-client relationship existed between Respondent and Mr. Burren in connection with Respondent's cashing of Mr. Burren's checks is unreasonable and not based on the evidence in the record, and therefore is against the manifest weight of the evidence and should be reversed. Consequently, I

would also reverse the Hearing Board's finding that Respondent violated Rule 1.15(a) because of the manner in which he handled Mr. Burren's funds.

Conclusion

Because I believe that the Administrator did not prove the charges in Count II and that the Hearing Board's findings of fact and of misconduct in connection with that count are against the manifest weight of the evidence, I would reverse the Hearing Board findings. And because I agree with my colleagues that Count I should be dismissed as well, I would dismiss the entire complaint against Respondent.

REPORT AND RECOMMENDATION OF THE HEARING BOARD (MARCH 31, 2017)

BEFORE THE HEARING BOARD OF THE ILLINOIS ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION

IN THE MATTER OF:
STEVEN ALBERT MINER,

Attorney-Respondent.

No. 6180672

Commission No. 2013PR00078

SUMMARY OF THE REPORT

A long-time family friend executed a will under which Respondent's children were to receive forty percent (40%) of the residuary estate. Respondent had represented this individual in prior legal matters. When the will was executed, Respondent was the only attorney present; he gave instructions to the testator and the witnesses and notarized their signatures.

Numerous checks were issued, payable to Respondent, on accounts belonging to the same individual. Respondent cashed those checks, which totaled nearly $500,000. According to Respondent's testimony, as to most, but not all, of these checks, he gave his friend the cash or used it to pay the friend's bills.

Respondent did not deposit any of the checks, or their proceeds, into a client trust account or keep any records relating to these funds.

The Hearing Board found an attorney-client relationship. In relation to the will, the Hearing Board concluded Respondent represented a client despite an improper conflict of interest. In relation to the funds, the Hearing Board found Respondent failed to keep client property separate from his own and engaged in dishonest conduct.

The Hearing Board recommended that Respondent be suspended for two years. The Hearing Board determined this sanction struck an appropriate balance between the seriousness of Respondent's misconduct and the aggravating and mitigating factors present. The Hearing Board also considered the unique circumstances of Respondent's relationship with this individual, which affected the manner in which Respondent acted in this situation.

INTRODUCTION

The hearing in this matter was held on September 1 and 2, 2016, and October 20, 2016, at the Chicago offices of the Attorney Registration and Disciplinary Commission (ARDC) before a Panel of the Hearing Board consisting of Kenn Brotman, Chair, Russell I. Shapiro and Willard O. Williamson. Scott Renfroe and Rita C. Greggio represented the Administrator. Respondent appeared at the hearing and was represented by Adrian M. Vuckovich.

PLEADINGS

On July 19, 2013, the Administrator filed a two-count Complaint, charging Respondent with misconduct related to Glenn Burren. The case was heard on the Second Amended Complaint, filed on January 31, 2014. In his Answer to the Second Amended Complaint, filed on February 21, 2014, Respondent admitted some of the Administrator's factual allegations, denied other factual allegations and denied misconduct.

ALLEGED MISCONDUCT

Count I of the Second Amended Complaint charged that Respondent: 1) represented a client when the representation may be materially limited by his own interests; 2) prepared an instrument which gave Respondent's children a substantial gift from a client; and 3) engaged in conduct that is prejudicial to the administration of justice, in violation of Rules 1.7(b), 1.8(c) and 8.4(a)(5) of the Illinois Rules of Professional Conduct (1990).

Count II of the Second Amended Complaint charged that Respondent: 1) entered into an improper business transaction with Burren; 2) failed to hold property of a client or third person separate from his own; 3) committed a criminal act that reflects adversely on his honesty, trustworthiness or fitness as a lawyer; and 4) engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rules 1.8(a), 1.15(a) and 8.4(a)(4) of the 1990 Rules and Rule 8.4(b) of the Illinois Rules of Professional Conduct (2010).

EVIDENCE

The Administrator presented testimony from A. Charles Kogut, Maureen Buschek, Marion S. Stewart and Jennifer Larson, as well as Respondent as an adverse witness. Administrator's Exhibits 1 through 24 were admitted into evidence. (Tr. 37, 71, 332, 631, 692).

Respondent testified on his own behalf. He also presented testimony from Steven Albert Miner II, Clifford Lund, Suzette Elmzen, Ralph Picker, Donald Frye, Vernon Kays and Thomas W. Hunter. Respondent's Exhibits 1 through 12, 14 through 16, 18 through 20, 22 through 27, and 29 through 34 were admitted into evidence (Tr. 73-74, 101, 271, 503-504, 581, 692-93).[1]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In an attorney disciplinary proceeding, the Administrator has the burden of proving the misconduct charged by clear and convincing evidence. *In re Thomas*, 2012 IL 113035, ¶ 56. Clear and convincing evidence requires a high level of certainty, which is greater than a preponderance of the evidence, but less stringent than proof beyond a reasonable doubt. In re *Santilli*, 2012PR00029, M.R. 26572 (May 16, 2014). The Hearing Board determines whether that burden has been met, resolves conflicts in the evidence and decides factual issues. *In re Winthrop*, 219 Ill.2d 526, 542-43, 848 N.E.2d 961 (2006).

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[1] Respondent's Exhibit 34 consisted of testimony by Bruce Becker in a related probate case.

As discussed below, probate proceedings ensued dealing with the validity of the will and the transfers at issue here. The decisions reached in those proceedings are, legitimately, part of the evidence presented here. *In re Owens*, 144 Ill.2d 372, 377-78, 581 N.E.2d 633 (1991). However, in deciding the issues in this disciplinary case, we must apply a burden of proof which differs significantly from that in the probate proceedings and consider all the evidence before us. *In re Owens*, 125 Ill.2d 390, 400-401, 532 N.E.2d 248 (1988). We have reached our own conclusion in this matter.

Background

Count I involves a will of Glenn Burren, dated January 6, 2004, which Respondent filed for probate in 2007. Count II involves financial transactions, which began in 2003 and continued into 2007. The nature of Respondent's relationship with Burren aids in understanding this case.

Respondent met Burren in 1976, when Respondent was a college student. Respondent was dating Burren's daughter, now known as Marion Stewart. Burren also had a son, Glenn Jr., and another daughter, Linda Kemp. Conflicting evidence was presented concerning Burren's relationship with his children as adults. Glenn Jr. moved to Wisconsin as a young adult and lived there for the rest of his life. Burren lived with Kemp and her children for a time, beginning in June 2000. (Tr. 351-52, 361, 366-67, 373, 425; Evid. Dep. at 7, 36-39, 48).

Burren was an automobile mechanic, who operated his own gas station. He was a World War II combat veteran. Witnesses described Burren as vivacious,

intelligent, independent, decisive, strong-minded and stubborn. He was a person who did something if he wanted to do it and was not likely to be pushed around. (Tr. 279, 341-43, 364-66; Evid. Dep. at 45).

Burren and Respondent became close friends after Respondent's father died, in 1977, when Respondent was twenty-two years old. Respondent testified Burren took a real interest in him and filled the role of a father. Their friendship continued after Respondent and Stewart ended their relationship, amicably, in 1978. (Tr. 361-64; Evid. Dep. at 7-9).

Shortly thereafter, Burren met and began dating Respondent's mother, Nancy Miner. Nancy declined Burren's proposal of marriage, on religious grounds, but the two maintained a very close friendship, which lasted until Burren died. (Tr. 162, 343-44, 362-63, 400; Evid. Dep. at 8-9, 41).

Although they were not related by blood or marriage, the evidence tended to show a close, warm relationship between Burren and Respondent's family. Burren spent holidays with Respondent's family arid celebrated special occasions with them. Suzette Elmzen met Burren at Respondent's wedding and, over the next twenty years, saw him three to five times a year. Every time Elmzen saw Respondent's family, Burren was there. For quite some time, Elmzen thought Burren, whom Respondent called "Pops," was Respondent's father. Even after she learned. otherwise, Elmzen considered Burren part of the Miner family. (Tr. 162-63, 274-89, 336-44, 363, 399-401; Resp. Exs. 23-26).

Respondent was divorced in November 1995. At the time, his children were six and three years old; they

lived with Respondent after the divorce. For the next seven to eight years, Nancy and Burren went to Respondent's home each week and helped Respondent with the children. Typically, they would arrive Sunday night and stay the rest of the work week. Each of them had a separate room in Respondent's home, and there was a space for Burren's car in Respondent's garage. Burren had keys to Respondent's home and came and went at will. Burren drove Respondent's children to school, picked them up after school, helped the children with their homework, went to their sports events and practices and attended parent-teacher conferences if Respondent could not do so. (Tr. 272-73, 276-80, 359-61, 396-400).

After the need for child care decreased, Burren continued to visit often. Burren's relationship with Respondent's children was like that of a grandfather and his grandchildren. For example, after Burren's sister died, Burren gave her car to Respondent's son, Steven Miner II, and spent time with Steven working on the car. After he began college, in fall 2006, Steven maintained his relationship with Burren, frequently calling and visiting him. (Tr. 274-77, 28182, 288-89, 340-43, 373; Resp. Exs. 23, 24).

Respondent had obtained a law degree, in 1981, and an MBA, in 1982. After working at a number of firms and serving as general counsel to a corporation, Respondent began his own practice, in the early 1990's. (Tr. 148-49, 354-55).

In 2000, Respondent represented Burren, as seller, in one real estate transaction and. as buyer, in purchasing a house in Des Plaines. Burren took title to the Des Plaines house in joint tenancy with Kemp, and title remained in joint tenancy until Burren died.

Respondent sent closing letters in relation to those transactions, noting his representation in the matter was finished. Years earlier, in 1987, Respondent had prepared a deed for Burren, to transfer jointly owned property into sole ownership. (Tr. 367-70, 373-74; Evid. Dep. at 48; Resp. Ex. 5).

Before late 2003, Burren's own financial circumstances were relatively modest. He owned the house, jointly with Kemp, and a car. Burren also had an account at MB Financial Bank, which he had opened in 1983, with Respondent and Kemp as joint tenants. (Tr. 385-86, 452; Adm. Ex. 5 at 1).

However, Burren's sister, Pearl, had made Burren the joint tenant on her house and her brokerage account at Smith Barney. When Pearl, died on November 17, 2003, Burren became the sole owner of those assets. At that time, the Smith Barney account was worth approximately $600,000. In addition, a contract had been signed, with a closing date set, for the sale of Pearl's house. Pearl had retained Respondent, who had represented her in other matters before, to represent her in selling the house. The sale closed on November 25, 2003, as scheduled. At the closing, Respondent represented Burren, as the seller, and Burren received the sale proceeds, of $187,104.60. (Tr. 150, 161, 170-72, 189-90, 371-72, 385-86; Adm. Ex. 12; Resp. Exs. 3, 11). Respondent testified he did not provide Burren with legal representation in any matter after that closing. (Tr. 395-96).

At that time, Burren was able to make decisions on his own. For example, Burren bought a new car in December 2003 and handled the matter himself. (Tr. 191-92; Evid. Dep. at 54-55).

In March 2005, Burren decided to move out of the house in Des Plaines, to an assisted living facility, Burren made that decision himself, freely and voluntarily, as he no longer wanted to live with Kemp and her children. At that time, Burren did not need any significant assistance. (Tr. 373, 425; Evid. Dep. at 40-41, 55-56).

Burren had some health issues. By late 2006, Burren was slowing down physically, but was not frail; he was still sharp mentally. Burren remained able to drive and take care of his own personal needs, at least until he went into the hospital. Burren also could, and did, manage his own affairs. By 2007, Burren needed a greater level of care. He moved back and forth between care facilities and the hospital. In June 2007, Burren moved into a nursing home, but remained able to make his own decisions on healthcare and property issues. (Tr. 279, 345, 425; Evid. Dep. at 10, 55-56, 69, 71).

I. In Count I, Respondent Is Charged with Representing a Client When the Representation May Be Materially Limited by His Own Interests, Preparing an Instrument Giving His Children a Substantial Gift from a Client and Engaging in Conduct That Is Prejudicial to the Administration of Justice, in Violation of Rules 1.7(b), 1.8(c) and 8.4(a)(5)

A. Summary

Burren asked Respondent about changing his will to provide for Respondent's mother. Respondent referred him to another lawyer to prepare the will. When the will was executed. in January 2004, Res-

pondent was the only attorney present. Respondent instructed Burren and the witnesses where to sign and notarized their signatures. Under that will, Respondent's children were to receive forty percent (40%) of the residuary estate. After Burren died, in July 2007, his relatives filed proceedings to contest the will, and the will was ultimately invalidated.

Given Respondent's active involvement when the will was executed, the Administrator proved Respondent improperly represented a client when the representation might be materially limited by his own interests. The Administrator did not prove the other misconduct charged. The evidence left significant uncertainty as to who drafted the will. The fact that a court later found the will invalid did not establish that Respondent engaged in conduct prejudicial to the administration of justice by filing the will and presenting it for probate.

B. Admitted Facts and Evidence Considered

We consider the background information discussed above. We also consider the following admitted facts and evidence.

Respondent testified that, around Thanksgiving 2003, Burren told Respondent he wanted to provide for Nancy in a will. Respondent knew he could not draft a will which included a bequest to a member of his family and suggested that Burren talk with another lawyer. Respondent recommended Ross Miller, an attorney Burren knew and for whom Respondent had worked, many years earlier. (Tr. 76-78, 99, 170, 413-15).

Respondent contacted Miller, to ask if Miller could do a will for Burren. Respondent testified that was the only time he spoke with Miller about the will. On December 3, 2005, Respondent wrote a letter to Burren, on Respondent's professional letterhead, informing him of Miller's willingness to work with Burren and Miller's general availability. In this letter, Respondent reiterated that Burren should have an independent attorney handle the matter and reminded Burren, who was changing an existing will, to take that will when he met with Miller. (Tr. 418; Resp. Ex. 6 at 1).

Miller's daughter, Maureen Buschek, worked as Miller's paralegal and office manager. (Tr. 76, 78). Buschek remembered that Burren had been in Miller's office. On December 31, 2003, at Miller's direction, Buschek prepared and sent a letter to Burren, addressed to Burren at his home in Des Plaines. Buschek testified a will would have been enclosed with that letter. A secretary, not Buschek, would have performed the word processing involved in preparing the will. A copy of the letter, without enclosures, was sent to Respondent. (Tr. 81-83. 92-95, 420; Adm. Ex. 18).

The December 31, 2003 letter contained a reference line that referred to "(w)ill dated January 6, 2004" and read:

> Glenn, pursuant to our meeting, enclosed for your review is . . . (y)our will with the changes that we discussed. I am readily available for any other questions. Contact Steve to do the execution.

(Adm. Ex. 18).

As of December 31, 2003, a party was planned for January 6, 2004 at Respondent's home. Both Burren and Steven had been born on January 6, and they celebrated their birthdays together each year. That year, Burren was turning 78. (Tr. 167-68, 278-79, 282-83, 417-18).

During the party, Burren, Respondent, Nancy and another guest, Walter Hladko, went into a separate room at Respondent's house. At that time, Burren was his normal self, in full control of his faculties. Burren executed a will, which Nancy and Hladko witnessed. Respondent brought the will into the room, told Burren and the witnesses where to sign the will and Respondent notarized their signatures. Respondent testified he gave Burren the will, which Burren kept. Burren gave the will to Respondent shortly before he died. (Tr. 166-68, 415-20; Adm. Ex. 22 at 6; Resp. Ex. 30).

The will provided for distribution of Barren's residuary estate, in equal shares, between Stewart, Kemp, Glenn Jr., Respondent's son, Steven, and Respondent's daughter, Katy. In the will, Burren named, as executor, "my attorney, Steven Miner." (Ans. at par. 4; Resp. Ex. 30). There was no bequest to Nancy, which Respondent stated surprised him. (Tr. 418).

Respondent testified he did not prepare the January 6, 2004 will. He understood Miller had done so. Respondent testified he did not write the words designating him as Burren's executor or ask Miller to make him executor. (Tr. 165-66, 418).

Buschek believed this will had not been prepared at Miller's office. She based this opinion on things

such as the way the document was formatted, the level of proofreading and the lack of a reference code. Miller's staff put reference codes on documents, so they could later find documents which, at the time, were being saved on floppy discs. In addition, after Burren died, Respondent asked Buschek whether she had the floppy disc on which the will was saved. By then, Miller had passed away and Buschek had access to his files. Buschek looked, but did not find a will Miller prepared for Burren. Buschek suggested Respondent contact Miller's widow, who had worked as the office secretary, to see if she had the floppy discs. Buschek testified she did not find any file or billing for Burren, and he was not really Miller's client. From her perspective, the work Miller did for Burren was done as a courtesy to Respondent. (Tr. 76, 86-89, 93, 96-98, 120-26, 423).

In 2003-2004, Respondent was working with Miller on one case and used Miller's address on some of the pleadings filed in that case. Respondent, however, did not have keys or other access to Miller's office unless Miller or one of his staff was there. He had not had such access since 1996, when a space sharing arrangement between himself and Miller had ended. (Tr. 78, 165-66, 421-23, 481-83; Adm. Ex. 21; Resp. Exs. 2, 31).

Burren died on July 20, 2007. In August 2007, Respondent filed the January 6, 2004 will with the court and initiated proceedings to probate that will. The will was admitted to probate, and Respondent was appointed executor. (Ans. at pars. 5, 6; Tr. 164-65; Adm. Ex. 15).

Subsequently, Burren's heirs filed a petition to contest the will and remove Respondent as executor.

Attorney Charles Kogut represented the petitioners, *i.e.* Stewart, Kemp and. As Glenn Jr. had died, his children. Kogut also filed a citation to recover assets, seeking to have Respondent repay the estate for funds transferred to him, primarily during Burren's lifetime. (Tr. 24-25, 30; Adm. Ex. 22 at 1; Resp. Ex. 30). Those transfers are the subject of Count II.

Evidence regarding the probate proceedings was presented, including the positions advanced on behalf of the petitioners, the length of time the probate matter was pending and the expense the estate incurred in relation to those proceedings. Briefly summarized, in both the will contest and the citation proceeding, the court found an attorney-client relationship between Respondent and Burren. Given that relationship, the court applied a presumption of undue influence as to the will and the financial transfers. The court also concluded Respondent did not meet his burden, to rebut that presumption by clear and convincing evidence. Consequently. the court declared the January 6, 2004 will null and void, removed Respondent as executor, and ordered Respondent to repay the estate $498, 659.75, plus interest of $217,633.23. Respondent appealed, unsuccessfully. After the Appellate Court entered its order, on July 31, 2013, Respondent paid the amount he was ordered to pay and the estate was closed. (Ans. at par. 8; Tr. 29, 32-70; Adm. Exs. 16, 22, 23; Resp. Ex. 30).

C. Analysis and Conclusions

1. Existence of an Attorney-Client Relationship

To prove Respondent violated Rule 1.7 and Rule 1.8, the Administrator must prove an attorney-client relationship between Respondent and Burren. *In re Bless*, 2010PR00133, M.R. 27134 (Mar. 12, 2015). Since Respondent has denied acting as Burren's attorney, we address this issue as a threshold matter. For purposes of Count I, we discuss the attorney-client relationship in the context of the will; the relationship is discussed further below, for purposes of Count II.

Burren had very close, long-term friendships with Respondent, Respondent's mother and Respondent's children. Burren was like a member of the family. Burren and Respondent primarily related to each other like father and son.

This does not mean, however, that this was the only way Respondent and Burren related to each other. When an attorney gives legal advice or renders legal services to a relative or friend, an attorney-client relationship can be found. *See e.g. In re Worrell*, 07 CH 60, M.R. 24407 (Mar. 21, 2011) (family relationship); *In re Niforatos*, 02 CH 39, M.R. 19370 (May 17, 2004) (friendship). The fact that the client is a relative or friend does not diminish the attorney's ethical obligations. *In re Stahnke*, 08 CH 101, M.R. 25590 (Nov. 19, 2012).

In determining whether the Administrator proved an attorney-client relationship. we consider the circumstances as a whole. *See generally In re Childs*, 07 CH 95, M.R. 24094 (Nov. 12, 2010). The relationship

need not be explicit or expressed and does not depend on payment of fees or the execution of a contract. *In re Gallo*, 07 CH 110, M.R. 25259 (May 18. 2012). Both sides must consent, but consent may be express or implied, and the attorney's consent may be implied from his or her acceptance of responsibility to perform the tasks at issue. *In re Cook*, 2010PR00106, M.R. 26581 (May 16, 2014). The client's reasonable belief that an attorney is acting on his or her behalf is highly significant. *Gallo*, 07 CH 110 (Hearing Bd. at 19). We also consider the attorney's behavior and the expectations that behavior creates. *Cook*, 2010PRO0106 (Hearing Bd. at 18). An attorney-client relationship is appropriately found where the client reasonably believes the attorney is his or her attorney, the attorney performs functions supporting that belief and the attorney does not act to disavow representation. *Id.*

The Administrator proved an attorney-client relationship between Respondent and Burren when the will was signed. In reaching this conclusion, we viewed as particularly relevant the events from November 2003 to January 2004 and Respondent's active involvement when the will was executed. We also looked to the longitudinal relationship between these individuals and Burren's increasing reliance on Respondent over time.

When Pearl died, on November 17, 2003, Burren became the sole owner of her house and Smith Barney account. As a result, Burren's financial circumstances improved, significantly and suddenly. Respondent represented Burren in the sale of the house, which closed on November 25, 2003. Within days, Thanksgiving 2003, Burren spoke with Respondent about changing his will. This sequence of events suggested

Burren's changed circumstances prompted him to change his will.

In any event, faced with a need for further legal services. Burren turned, naturally. to Respondent. Respondent was a long-time close friend, as well as the attorney who had represented Burren in a number of past matters, including the very recent closing on Pearl's house. Burren clearly reposed significant confidence in Respondent, as Burren's behavior over time reflected. While the level of trust is apparent primarily from the matters described below as to Count II, much earlier conduct also reflected Burren's confidence in Respondent. In particular, Burren had made Respondent a joint tenant on his original account at MB Financial Bank.[2]

Normally an attorney-client relationship ceases upon completion of the services the attorney was hired to perform. *In re Imming*, 131 Ill.2d 239, 252, 545 N.E.2d 715 (1989). However, circumstances may be present which show a continuation of the relationship, including proximity between matters. *Imming*, 131 Ill.2d at 252-54.

Since Burren stated he wanted to leave something to Respondent's mother, Respondent referred Burren to another attorney to prepare the will. In doing so, Respondent acted properly. *See* Ill. Rs. Prof'l Cond. R. 1.8(c). In a letter to Burren dated December 3, 2003,

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[2] While most of the matters addressed as to Count H post-date the will, some occurred in 2003, before the will was executed. That includes Burren's decision, in November 2003, to make Respondent a joint tenant on Burren's account at LaSalle Bank and to deposit, into that account, the proceeds of the sale of Pearl's house.

Respondent confirmed that advice, in writing, reiterating that Burren should see Miller to prepare the will.

Subsequent events diminished the impact of this apparent break in an attorney-client relationship as to the will. Miller prepared a will for Burren. When he sent that will to Burren, Miller directed Burren to work with Respondent to have the will executed. Miller also alerted Respondent, by sending Respondent a copy of his letter to Burren. Burred executed a will, at Respondent's home on January 6, 2004. That will, in which Respondent was named executor, described Respondent as "my attorney." Use of that terminology provides some insight as to how Burren viewed Respondent and suggests that, at least for some purposes, Burren considered Respondent his attorney. Further, when the will was executed, Miller was not present. instead, Respondent functioned as the attorney supervising the execution of Burren's will. It was Respondent who made sure the document was properly signed, witnessed and notarized, By doing so, Respondent provided a legal service to Burren. *Cf. In re Peiss*, 2013PR00077, M.R. 27441 (Sept. 21, 2015) (unauthorized practice of law).

Given these circumstances, particularly considered as a whole, the Administrator proved Respondent represented Burren in relation to Burren's will.

2. Conflict of Interest, Based on Respondent's Own Interests

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's own interests, unless the lawyer reasonably believes the representation will not be adversely

affected and the client consents after disclosure. Ill. Rs. Prof'l Conduct R. 1.7(b) (1990). A conflict of interest arises whenever an attorney's independent judgment on behalf of a client may be affected by loyalty to another person. *In re LaPinska*, 72 Ill.2d 461, 469, 381 N.E.2d 700 (1978). The existence of a conflict triggers the application of Rule 1.7; the Administrator is not required to show that the attorney's professional judgment actually was compromised to prove a violation of Rule 1.7(b). *In re McCaffery*, 2010PR00153. M.R. 27200 (May 14, 2015). We analyze conflict issues based on the potential for diverging interests, not whether the persons involved might share a common purpose. *In re Gearhart*. 05 SH 19, M.R. 21335 (Mar. 19, 2007).

Here, there was an ongoing attorney-client relationship between Respondent and Burren. Given that relationship, and Burren's stated intent to make a bequest to Respondent's mother, Respondent referred Burren to another attorney to prepare the will. However, when the will was executed, Respondent was actively involved. As discussed above, that involvement caused us to find Respondent represented Burren in relation to the will.

The will Burren executed left forty percent (40%) of the residue of Burren's estate to Respondent's children. When the will was executed, in January 2004, Respondent's children were minors. A significant financial benefit to the children could, at least potentially, benefit Respondent, *e.g.*, by relieving him of some of the expense of their education. Consequently, this was a matter within Respondent's interests.

We do not ascribe evil motives to Respondent in relation to Burren's will. We do not believe the bequest

to Respondent's children resulted from any actual pressure from Respondent; the evidence demonstrated that Burren was an independent person, who enjoyed a very close relationship with Respondent's children. We also recognize Respondent referred Burren to another attorney to prepare his will. While we see these facts as mitigating, they did not cause us to reach a different conclusion as to the charge under Rule 1.7(b). The fact that Respondent was involved at all created a potential risk to the validity of the will, and Respondent did not inform Burren of that risk. Respondent thereby violated Rule 1.7(b).

3. Conflict of Interest, Based on Prohibited Transaction

A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer, as a parent, child, sibling or spouse, any substantial gift from a client, including a testamentary gift, except where the client is related to the donee. Ill. Rs. Prof'l Conduct R. 1.8(c) (1990). As discussed above, Burren was Respondent's client. The will gave Respondent's children a substantial gift—forty percent (40%) of the residue of Burren's estate. Burren was not related to Respondent's children by blood or marriage. Therefore, they were not related under the 1990 version of Rule 1.8(c). *In re Mason*, 09 CH 15, M.R. 24927 (Nov. 22, 20 11).[3] The remaining issue is whether Respondent prepared this will.

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[3] While the 2010 version of Rule 1.8(c) defines related persons more broadly, the 1990 Rules govern this case. *In re Svec*, 09 CH 28, M.R. 25306 (May 18, 2012) (Review Bd. at 8-9).

According to Respondent's testimony, when Burren first asked about changing his will. Respondent advised Burren to consult with another attorney, since Burren stated he wanted to leave something to Respondent's mother. The letter Respondent sent Burren shortly thereafter corroborates Respondent's testimony that he advised Burren to get a different attorney and recommended Miller. It appears Burren and Miller met thereafter; Buschek remembered seeing Burren in the office and Miller sent a will to Burren. The evidence includes a letter, dated December 31, 2003, which referenced an enclosed will. Buschek acknowledged that she prepared that letter, at Miller's direction, and confirmed that a will accompanied it. Miller's letter instructed Burren to contact Respondent about executing the will. Testimony from Respondent and Steven provided a reasonable explanation for the fact that Miller's letter referred to the will by a specific future date, *i.e.*, that was the day of Burren and Steven's joint birthday and, consistent with their custom, a party was planned at Respondent's home. On that date, January 6, 2004, Burren executed a will at Respondent's home, which other guests witnessed. We view this evidence as tending to corroborate Respondent's testimony that Miller prepared a will that was to be executed on January 6, 2004.

However, other evidence was presented on the issue of who prepared the will Burren actually executed. We considered that evidence, particularly Buschek's testimony indicating that the January 6, 2004 will was outside the norm for a document prepared by Miller's office. That evidence, as a whole, raises some doubt as to who drafted the will Burren signed, and whether it was different than the will Miller drafted.

The Administrator must prove the misconduct charged, by clear and convincing evidence. *In re Edmonds*, 2014 IL 117696, ¶ 35. Clear and convincing evidence requires the Administrator to establish the facts at issue with a high level of certainty. *In re Moran*, 2014PR00023, M.R. 27812 (Mar. 22, 2016). It means a degree of proof which, considering all the evidence, produces a firm and abiding belief that it is highly probable that the proposition at issue is true. *In re Kakac*, 07 SH 86, M.R. 23785 (May 18, 2010) (Review Bd. at 9). The clear and convincing evidence 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. *Moran*, 2014PR00023 (Hearing Bd. at 18). Misconduct is not established simply because circumstances in a case raise suspicion. *Id.*

Based on the evidence as a whole, we did not find sufficient evidence to support a conclusion that Respondent drafted the January 6, 2004 will that Burren executed. For that reason, we find the Administrator did not meet his burden of proving Respondent violated Rule 1.8(c).

We address one further matter, to clarify our rationale. Rule 1.8(c) prohibits attorneys from preparing instruments under certain circumstances, and the Second Amended Complaint charged Respondent with violating Rule 1.8(c) by preparing the will. As the arguments and evidence at hearing reflect, the Administrator's theory was that Respondent drafted the January 6, 2004 will. The defense, that Miller drafted the will, was specifically directed to that theory. Arguably, an attorney might be so involved in the process of preparing a will as to warrant finding

a violation of Rule 1.8(c), even though another attorney drafted the will. *See e.g. In re Colman*, 885 N.E.2d 1238 (Ind. 2008) (Colman conveyed all of the information to the attorney who wrote the will; that attorney had no direct contact with the client). The Administrator did not advance such a theory here. We considered the charge according to the theory articulated by the Administrator. *See Moran*, 2014-PR00023 (Hearing Bd. at 13). For the reasons stated above. the evidence did not establish that theory.

4. Conduct Prejudicial to the Administration of Justice

A lawyer shall not engage in conduct that is prejudicial to the administration of justice. Ill. Rs. Prof'l Conduct R. 8.4(a)(5) (1990). We consider the issues and evidence based on the manner in which the complaint charged Respondent violated Rule 8.4(a)(5). *In re Karavidas*, 2013 IL 115767 ¶ 97. According to the Second Amended Complaint, Respondent's conduct in the probate case prejudiced the administration of justice because Respondent filed the invalid will to be probated, thereby wasting judicial resources and delaying the administration of Burren's estate. The alleged basis for the invalidity of the will was that Respondent prepared the will, under which his children would have benefitted.

As discussed above, we did not find sufficient evidence to support the Administrator's theory that Respondent prepared the January 6, 2004 will. We did find a violation of Rule 1.7(b), based on Respondent's involvement when the will was executed. However, we view that as a technical violation. We were not at all convinced that, when Respondent initiated the probate

proceedings, the invalidity of the will was, or should have been, clear. We also do not see this as a situation in which an attorney presented a court with a document which he knew or should have known would likely be invalidated. Further, as the executor named in the will, and the person in possession of the will after Burren died, Respondent had certain legal obligations in relation to the will. *See* 755 ILCS 5/6-3(a); *see also* 755 ILCS 5/6-1(a). By tiling the will for probate, Respondent acted consistently with those obligations. *See* 755 ILCS 5/6-3(a).

We recognize that the will was ultimately invalidated and that protracted legal proceedings ensued in probate court. However, the fact that conduct leads to court proceedings does not require a finding that Rule 8.4(a)(5) was violated. *See Karavidas*, 2013 IL 115767 at ¶¶ 90, 96. Respondent had a legitimate basis for filing the will for probate. The fact that the probate court rejected Respondent's position does not require us to find a violation of Rule 8.4(a)(5), where the position Respondent asserted in court had an arguably legitimate legal basis. *See In re Ribbeck*, 2014PR00092 (Review Bd. Apr. 19, 2016) (complaint dismissed).

Given these circumstances, we did not find clear and convincing evidence to support the Administrator's charges that Respondent engaged in conduct prejudicial to the administration of justice. Therefore, the Administrator did not establish that Respondent violated Rule 8.4(a)(5).

II. In Count II, Respondent Is Charged with Entering into an Improper Business Transaction with Burren, Failing to Properly Keep Burren's Property Separate from His Own, Committing the Criminal Offense of Theft and Engaging in Conduct Involving Dishonesty, Fraud, Deceit or Misrepresentation, in Violation of Rules 1.8(a), 1.15(a) and 8.4(a)(4) of the 1990 Rules and Rule 8.4(b) of the 2010 Rules

A. Summary

Numerous checks to Respondent were issued on Burren's accounts between 2003 and 2007. Respondent did not deposit any of these checks, or their proceeds, in a client trust account. Respondent stated he cashed the checks and returned the cash to Burren or used it to pay Burren's bills. Respondent did not keep records of the funds received or what had been done with those funds.

The attorney-client relationship between Respondent and Burren continued. Given his improper handling of the funds, the Administrator proved Respondent failed to keep Burren's property separate from his own. The Administrator also proved Respondent engaged in dishonest conduct. The evidence did not establish that the check cashing arrangement constituted a business transaction or that Respondent committed theft.

B. Admitted Facts and Evidence Considered

The charges in Count II involve thirty-four checks, payable to Respondent, written on Burren's accounts. All but two of the checks were issued while Burren was alive. We consider the facts and evidence discussed

in Section I B, as well as the following admitted facts and evidence, beginning with evidence relevant to the attorney-client relationship during the time at issue in Count II.

Respondent sent Burren a letter, dated September 12, 2004, on Respondent's professional letterhead. Two boxes of files accompanied this letter, and Burren acknowledged receipt of the files by signing the letter. According to Respondent's testimony, the files related to Pearl. In the letter itself, Respondent stated he was returning files of Burren's and Pearl's. Respondent also used his professional letterhead for a number of additional letters he sent Burren between December 24, 2003 and March 6, 2005. Four of those letters served as receipts for funds; the fifth concerned the Smith Barney account. Those letters are discussed below, in the context of the matters they involved. (Tr. 198-99; Adm. Exs. 10, 11).

In 2006, Respondent prepared, and Burren signed, three statutory short form powers of attorney, which named Respondent as Burren's agent. Two, dated March 25, 2006 and June 1, 2006, related to healthcare; provisions of the second document differed somewhat from provisions of the first. The third power of attorney, executed on December 1, 2006, related to property. Respondent did not view this as legal representation, since it involved completing forms at Burren's direction and, according to Respondent, he never acted pursuant to the powers of attorney. (Tr. 150-53, 374-76, 382, 432-33, 465-67, 491; Adm. Ex. 8).

From Respondent's perspective, he did not act as Burren's lawyer at any time after the closing on Pearl's house. (Tr. 479). Respondent described his relationship with Burren like that of father and son. Given that

relationship, Respondent did not regard the checks, or his activity cashing checks, as action on behalf of a client or action which required formal documentation. For this same reason, Respondent did not think he could use his client trust account to deal with this money. (Tr. 220-21, 389-91, 443, 454-57).

The checks at issue in Count II were written between 2003 and 2007, payable to Respondent, on accounts of which Burren was the sole owner or a joint owner. Further detail is provided below. Burren signed most of the checks at issue and wrote some of them himself. Respondent wrote most of the others, testifying he did so at Burren's direction. Respondent received these checks, endorsed and cashed them. (Ans. at pars. 15, 16, 20, 23, 24, 27, 33, 36, 37; Tr. 194-96, 203, 214-17, 221-23, 424; Adm. Exs. 1, 2, 3, 4; Resp. Ex. 20).[4]

According to Respondent's testimony, he cashed the checks at Burren's request and for Burren's convenience. Given their relationship, Respondent stated he did what Burren asked of him, without questioning the reasons for the request. On a few occasions, Respondent used some of the cash to pay bills for Burren, particularly taxes. Otherwise, Respondent testified he always gave all the cash to Burren, right away, and never kept any of the money himself. Respondent did not have any written record of the checks or what had been done with the proceeds, except the four letter/receipts described below. Res-

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[4] In his testimony, Respondent expressed uncertainty as to one check. He also was not certain whether he cashed or deposited a couple of checks written around the time of Burren's death. (Tr. 196, 221-29). The difference does not affect our decision.

pondent acknowledged the funds were not his. but did not use his client trust account to deal with the funds. Respondent and Burren did not have any written agreement regarding these checks. (Tr. 196-97, 214-24, 386-91, 424, 441-43, 456, 464-65).

As Respondent described it, when he cashed a check for Burren, Burren generally was with Respondent or at Respondent's home. If they were not together, Respondent would deliver the cash to Burren's home. Burren's house was fifteen to twenty minutes away from Respondent's. According to Respondent's testimony, at times, the bank did not have enough cash on hand to cover the full amount of a check. On those occasions, Respondent would get as much cash as he could, take a cashier's check for the balance and return, usually the next day. to get the rest in cash. Depending on the original amount, Respondent might have to repeat this procedure to get the full amount in cash. (Tr. 217-19, 386-90, 502). Respondent testified he was willing to do whatever Burren asked of him, given their relationship and the extensive help Burren had given Respondent when Respondent's children were little. (Tr. 456-57).

Regarding his cash handling practices generally, Respondent testified he began using money orders to pay for certain purchases in the late 1990's. He did so because his then-wife had written checks on their joint checking account which were dishonored for insufficient funds, and Respondent wanted to remove check writing responsibility from her. (Tr. 209-12).

Stewart testified she was familiar with Burren's manner of dealing with money, since she had grown up in his home. Stewart never saw Burren with large amounts of cash around the house. Stewart, who had

not lived with Burren since 1979, knew that Kemp sometimes cashed checks for Burren and Burren gave Kemp cash. (Evid. Dep. at 28-31, 59).

LaSalle Bank

On June 10, 2003, Burren opened an account, of which he was sole owner. at LaSalle National Bank. (Adm. Ex. 5). Over the next three months, Burren signed five checks on this account, payable to Respondent. Those checks totaled approximately $44,000, specifically:

Date of Check	Amount of Check
June 20, 2003	$ 3,114
June 20, 2003	$ 7,879
July 25, 2003	$ 6,761.47
August 4, 2003	$ 16,191.36
September 1, 2003	$ 10,000

(Ans. at par. 15; Tr. 194-96; Adm. Ex. 1).

In November 2003, Burren added Respondent to this account as a joint tenant, with right of survivorship. Respondent testified he spoke with Burren about the impact of doing so, as did bank personnel. Respondent did not advise Burren to get independent legal advice about the matter. Respondent believed Burren understood what joint tenancy meant, as Burren had held various assets in joint tenancy before. Documents effectuating this change were finalized on November 18, 2003. (Tr. 172-76, 436-39; Adm. Ex. 5).

A week later, when the sale of Pearl's house closed, Burren received the sale proceeds, of $187,104.60. Those proceeds, less $500 received back in cash, were

deposited into the LaSalle Bank account on which Respondent was a joint tenant with Burren. This deposit was made the same day as the closing, November 25, 2003. Respondent testified he prepared the deposit ticket, which Burren signed. (Tr. 189-91; Adm. Ex. 12).

Between November 2003 and September 2005, sixteen checks were issued payable to Respondent on the LaSalle Bank account. Respondent and Burren were at the bank together on November 18, 2003, the day the first of these checks was issued. The checks in this group totaled $181,651.92:

Date of Check	Amount of Check
November 18, 2003	$ 43,000
December 10, 2003	$ 5,000
December 17, 2003	$ 9,066
January 6, 2004	$ 31,130
January 10, 2004	$ 11,000
January 25, 2004	$ 7,820
February 1, 2004	$ 3,720
February 8, 2004	$ 7,201.69
February 20, 2004	$ 26,577.41
April 10, 2004	$ 25,000
June 6, 2004	$ 2,709
January 10, 2005	$ 2,500
January 17, 2005	$ 367.82
April 11, 2005	$ 2,060
June 12, 2005	$ 2,000

September 10, 2005	$ 2,500

(Ans. at par. 27; Tr. 214-16, 488-89; Adm. Ex. 3).

Respondent prepared a letter to Burren, dated December 24, 2003, regarding the receipt of funds. Burren signed this document under the word "approved." The letter read: "(p)lease allow this letter to confirm the receipt of $62,000." (Adm. Ex. 11). Respondent testified this document was a receipt, intended to show Respondent had given Burren the proceeds of the checks he cashed for Burren. (Tr. 200-202, 426-27).

Smith Barney

Four checks, payable to Respondent, were issued on Burren's Smith Barney account. Each check was issued in accordance with written instructions to Bruce Becker, the financial advisor who handled Burren's account. In each instance, the instructions were given in a letter of direction which Respondent prepared. (Ans. at par. 19; Tr. 153-59; Adm. Exs. 2, 7; Resp. Ex. 34 at 5-6, 8).

Originally, Respondent referred Pearl and Burren to Becker; Becker was also Respondent's broker. Becker met with Pearl and Burren and, in September 2003, proposed an investment plan based on their goals for investment income. Becker did not have any doubts as to Burren's competency, his ability to understand their discussions or his ability to express himself adequately. After Pearl died, Becker and Burren met again and discussed what, if any, changes should be made since Burren was sole owner of the account. While this second meeting took place at Respondent's office,

Becker did not remember other specifics about it. (Resp. Ex. 3; Resp. Ex. 34 at 8, 30-34).

Three of the instruction letters to Becker were sent in 2004. Each letter instructed Becker to issue a check payable to Respondent. Consistent with those instructions, three checks were issued, totaling $169,762, specifically:

Date of Letter	Date of Check	Amount of Check
March 21, 2004	April 2, 2004	$ 70,000
August 1, 2004	August 5, 2004	$ 49,881
September 18, 2004	September 23, 2004	$ 49,881

(Ans. at par. 19; Adm. Exs. 2, 7).

Respondent testified, when he prepared each of the 2004 letters, Burren was present and told Respondent what to say, based on Burren's conversations with Becker. According to Respondent's testimony, after Respondent prepared each letter, he went over it with Burren, Burren signed the letter and Burren mailed it. (Tr. 157-58, 382-84). Respondent testified, beyond the mechanics of preparing these letters, he did not assist Burren with any communications with Becker and did not explain any financial matters to Burren. (Tr. 153-54). The 2004 letters of direction were phrased as if they were from Burren and were not on Respondent's letterhead. Respondent testified he did not represent himself as Burren's lawyer in dealing with Smith Barney. (Tr. 395; Adm. Ex. 7).

The letters themselves suggest they were also sent by facsimile. (Adm. Ex. 7). Respondent faxed the letters for Burren, as Burren did not have a fax

machine. (Tr. 385). Becker did not recall whether he and Burren had spoken about the requests in these letters or any specific discussions about those requests. (Resp. Ex. 34 at 14-15, 17, 19-20, 22).

Respondent received and cashed each of the Smith Barney checks issued in 2004. (Ans. at par. 20). Based on his testimony, Respondent returned the cash to Burren or used it for Burren's purposes. Respondent denied ever depositing any of those checks or any funds from them into an account of his own. (Tr. 203, 386-90, 424, 441-43).

Respondent had an account of his own at LaSalle Bank. A bank statement reflects a deposit of $70,000 into that account on April 6, 2004, which was withdrawn in full the same day. Respondent testified that, the apparent deposit was due to a bank error, and not that he intentionally deposited the April 2, 2004 $70,000 Smith Barney check into his account. Since the money was not his, Respondent said, he had the bank withdraw it immediately. Of the $70,000 withdrawn following the April 6 deposit, Respondent received $2,642.04 in cash and the balance in official checks. (Tr. 203-205, 442-43; Adm. Ex. 6; Resp. Ex. 29).

On April 12, 2004, LaSalle Bank issued a series of six cashier's checks. Of these checks, four were used to pay taxes totaling $30,250 for Burren. Respondent testified the funds for these checks came from the April 2, 2004 Smith Barney check and that these four checks were some, but not all, of the checks issued when the $70,000 was withdrawn following the mistaken deposit of that April 2, 2004 check. The other two checks in the series totaled $19,927. Respondent used those two checks for his own purposes, to

buy motorcycles. According to Respondent's testimony, he used his own funds for those items and did not use Burren's funds. Documents in evidence suggest Respondent had funds of his own to cover those purchases. (Tr. 205-209; Adm. Ex. 17; Resp. Exs. 15, 29).

All three 2004 letters of direction instructed Becker to issue a check to Respondent. The letters of August 1 and September 18 also included instructions for distributions to Burren. Both directed Becker to pay Burren the proceeds of a $20,000 certificate of deposit, when that certificate matured. In addition, the September 18, 2004 letter directed a monthly distribution to Burren. (Adm. Ex. 7).

The September 18 letter requested that $3,000 be distributed to Buren each month. Becker responded to that request in writing. Becker did not remember whether he spoke with Burren about that request or any specific conversation concerning it. In a letter dated September 20, 2004, Becker recommended limiting the monthly distribution to $2,000, to avoid invading principal, and included an explanation of his reasoning. The handwritten reply, sent the following day, accepted that recommendation, but reiterated the instructions for the lump sum distributions. (Adm. Ex. 7; Resp. Ex. 34 at 17-22).

Generally, Smith Barney sent correspondence to Burren to his home in Des Plaines. This was the address Smith Barney used for letters notifying Burren of the distributions to Respondent on August 5 and September 23. Those letters were sent consistent with Smith Barney's practice of informing the account holder 9f any distribution to a third party. (Tr. 484; Resp. Ex. 7; Resp. Ex. 34 at 24).

Becker's September 20, 2004 letter was addressed to Respondent, rather than Burren, although the salutation read "(d)ear Steven and Glenn." (Adm. Ex. 7 at 4). That letter and the reply were sent by facsimile, using Respondent's number. Based on Respondent's testimony, facsimile was used because Becker's letter related to a telephone conversation between Burren and Becker on September 20, 2004, while Burren was at Respondent's home. (Tr. 155, 484-85; Adm. Ex. 7 at 4).

The reply began "Glenn and I went through your numbers." (Adm. Ex. 7 at 4). The reply continued: "(y)ou can change the monthly from 3000 to 2000/m. He still wants the C/D and the 49,881 payable to (Respondent)." (Adm. Ex. 7 at 4). Respondent acknowledged having gone over Becker's calculations with Burren and writing the reply, which Burren signed. (Tr. 155-56). Respondent testified Burren otherwise spoke directly with Becker and had not discussed Becker's recommendations with Respondent. (Tr. 392-93).

Respondent prepared three letters to Burren, as receipts relating to the 2004 Smith Barney checks. Burren signed each of these documents under the word "approved." According to Respondent, these letters were designed to show he had given Burren the proceeds of the 2004 Smith Barney checks. (Tr. 200, 426-28; Adm. Ex. 11). That was not clear, however, from the text. Each letter read: "(p)lease allow this letter to confirm the receipt of" a specified item, as follows:

Date of Letter	Item(s) Specified
June 20, 2004	$ 70,000 "in cash and checks"

September 6, 2004	$ 50,000 "in cash and checks"
October 10, 2004	$ 50,000 "in cash and checks"

(Adm. Ex. 11).

As of early 2005, Burren expressed concerns that funds were being improperly taken from the Smith Barney account. An account statement had significantly overstated the value of the account. That was due to an error, which Becker and Smith Barney addressed with Burren. In February 2005, Burren directed Becker to close the account and send Burren a check for the balance. In response, Becker informed Burren of the cost of liquidating the assets in the account, and, ultimately, Burren did not do so. At Burren's request, Stewart contacted Respondent about the account; Stewart testified Respondent told her deductions from the account were for taxes. Burren also spoke with Respondent. In a letter dated March 6, 2005, Respondent encouraged Burren to speak with someone about his concerns with the Smith Barney account and suggested he could contact a lawyer. Respondent testified no one raised further concerns with him about the Smith Barney account. (Tr. 430-32; Evid. Dep. at 20-21; Resp. Ex. 4; Resp. Ex. 5 at 3; Resp. Ex. 34 at 10-13, 25-27).

The final matter at issue regarding the Smith Barney account occurred in 2007. On June 10, 2007, Respondent sent a letter of direction to Becker. Unlike the 2004 letters, the 2007 letter read as if it was from Respondent, rather than Burren, and was on Respondent's business letterhead. Burren's signature is on the letter, under the word "approved." The 2007

letter instructed Becker to: 1) increase Burren's monthly distribution to $6,500, 2) issue a check payable to Respondent for $6,820 and 3) send any mail for Burren to him in care of Respondent's address. (Adm. Ex. 7).

The next day, a check for $6,820 was issued, payable to Respondent. Respondent endorsed and cashed that check. (Tr. 424; Adm. Ex. 2 at 4).

In June 2007, Burren had moved into a nursing home. Based on Respondent's testimony, Burren was expected to be there for a while and the increased monthly distribution was designed to cover Burren's future bills at the nursing home, where the monthly cost was approximately $6,500. Respondent testified, as of June 10, 2007, Burren owed the nursing home $6,820 and Respondent used the proceeds of the $6,820 check for a cashier's check, with which he paid the nursing home. (Tr. 394-95, 424-25).

Burren died the following month. (Ans. at par. 5). At that time, approximately $380,000 remained in the Smith Barney account. (Tr. 254).

MB Financial Bank

As noted above, Burren had an account at MB Financial Bank on which Respondent and Kemp were joint tenants. (Adm. Ex. 5). Stewart testified Burren told her he added Respondent as a joint tenant so Respondent could pay Burren's bills, if Burren became incapacitated. (Evid. Dep. at 74).

Two checks issued on that account are relevant to this case. On April 20, 2004, a check was issued, payable to Respondent, for $11,700, which Respondent endorsed and cashed. On August 18, 2006, a check was issued, payable to Burren, for $55,000. With that

check, another account was opened at MB Financial Bank, on which Burren and Respondent were joint tenants. This account, like the original account at MB Financial Bank, was set up as a joint tenancy, with right of survivorship. Around that time, Burren closed the original MB Financial account. Respondent did not advise Burren of the implications of making Respondent a joint tenant on his account or advise Burren to seek independent legal advice about the matter. (Ans. at pars. 22-24; Tr. 184-89; Adm. Exs. 5, 14, 20).

On September 12, 2006, Burren signed a form which enrolled the new account in interne banking. Burren did not have a computer, and the e-mail address provided on the form was Stewart's. As a result, Stewart could monitor activity in the account online. (Tr. 475-77; Adm. Ex. 19; Evid. Dep. at 27-28).

Between September 2006 and July 4, 2007, six checks were issued on the new MB Financial account, payable to Respondent. These checks totaled $54,100, specifically:

Date of Check	Amount of Check
September 5, 2006	$ 2,200
January 3, 2007	$ 2,200
April 15, 2007	$ 2,200
June 1, 2007	$ 2,500
June 1, 2007	$ 15,000
July 4, 2007	$ 30,000

(Tr. 221-22; Adm. Ex. 4).

Respondent testified he gave Burren cash for some, but not all, of these checks. Respondent testified he did not give Burren cash for the $15,000 check issued on June 1, 2007 or the $30,000 check issued on July 4, 2007. Respondent testified he did not use the funds, for himself or Burren. Respondent's testimony initially suggested he might have deposited those two checks; he later stated that he did not deposit them into an account of his own and might have put them aside in a certificate of deposit. According to Respondent's testimony, Burren wanted to open another account, to prevent Stewart from monitoring his account, and Respondent was trying to keep that cash intact so Burren could do so. (Tr. 222-24, 226-27,443-44, 447-48).

Respondent learned Stewart had online access to the MB Financial account after Kemp sent him an e-mail, dated March 25, 2007. Stewart had spoken with Respondent about some of the checks issued on the MB Financial account. Based on Stewart's testimony, she did so at Burren's request. According to Stewart, Burren was concerned about some of the activity in his accounts, so Stewart helped Burren review his account statements and discussed activity in the accounts with him. Conflicting evidence was presented as to the extent and propriety of Stewart's access to Burren's accounts. (Tr. 434-35, 447-48, 476-77; Evid. Dep. at 17-19; Resp. Ex. 14).

After Burren died, Respondent issued two checks to himself on the MB Financial account. Respondent cashed both of those checks. The first, dated July 30, 2007, was for $22,000. The second, dated August 18, 2007, was for $5,000. In his Answer, Respondent admitted using the proceeds of these two checks for

his own purposes. At the hearing, Respondent testified he used the funds to open a certificate of deposit, in his name alone. Respondent considered this method of holding the funds legitimate since he was the surviving joint tenant on the account. (Ans. at pars. 36, 37; Tr. 228-29, 443, 445-48; Adm. Ex. 9).

Additional Evidence

During the disciplinary proceedings, Respondent presented evidence in an effort to show he had not benefitted from Burren's funds. The Administrator presented evidence in rebuttal. Briefly summarized, that evidence showed the following:

Clifford Lund was one of the attorneys who represented Respondent in the probate proceedings. Lund was retained late in the process. By the time Lund had entered his appearance, two days of trial had been completed on the citation to recover assets. (Tr. 230, 232-33).

Lund had gathered various records and, based on those records, prepared a summary of Burren's assets and expenses, in an effort to show where the money had gone. The probate court did not admit that summary into evidence. (Tr. 234-37, 241-44). The summary and Lund's testimony are in evidence in these proceedings. (Tr. 230-70; Resp. Ex. 27).

According to Lund, almost all the funds Respondent received from Burren were used for Burren. Lund described the process he went through in arriving at this conclusion. In essence, Lund subtracted items he considered expenses from the assets and obtained a result which was $9,142.71 short of explaining where all the money had gone. (Tr. 237-39, 241-44; Resp.

Ex. 27). In that process, there were various details of which Lund was unaware and items for which he had not been able to account. The items Lund deducted in arriving at the $9,142.71 included $60,000 from the joint tenancy account at MB Financial Bank which, according to Lund's summary, went to Respondent. (Tr. 254-59, 268-70; Resp. Ex. 27).

Evidence was presented concerning some of Burren's expenses, particularly some of the items that recurred each month. During the relevant time period, Burren's health insurance cost $300 to $442 per month. After March 2005, Burren lived in an assisted living facility, for which he paid approximately $1,449 a month. In June 2007, Burren moved to a nursing home, which charged a monthly fee of approximately $6,500. (Tr. 394, 425; Evid. Dep. at 66).

Ralph Picker is a certified public accountant and certified fraud examiner. (Tr. 504-507; Resp. Ex. 32). Picker did an investigation at the request of Respondent's attorney to determine whether Respondent had benefitted financially from Burren's assets and cash. Picker's investigation focused on the five-year period from 2003 through 2007. Picker performed an agreed upon procedures examination. Picker explained why he decided to use that method and the reasons he concluded an agreed upon procedures examination would provide the most thorough information in this case. Picker also described, in detail, the process he undertook in his investigation. The scope of Picker's examination was a matter which had been agreed upon between Picker, Respondent and Respondent's counsel, and there were some procedures which might have been, but were not, performed. (Tr. 510-80).

Based on his investigation, Picker concluded Respondent had not benefitted financially from Burren's property. (Tr. 524). Picker described Respondent's lifestyle as modest, but for a penchant for expensive automobiles, and testified Respondent's lifestyle did not change in any significant way between 2003 and 2007. During that period, Respondent's net worth had increased, based on things such as income from Respondent's law practice, Respondent's investments and substantial gifts from Respondent's mother. Picker concluded that, but for one item, the increase in Respondent's net worth did not result from keeping money Respondent received from Burren. The exception involved $50,000 which Respondent was holding in a certificate of deposit. Those funds had come from the joint tenancy account with Burren. Otherwise, according to Picker, the increase in Respondent's net worth, cash or assets was not due to funds from Burren. (Tr. 522-39, 548, 562-68, 577-80).

Jennifer Larson testified for the Administrator in rebuttal. Larson is a forensic accountant, certified public accountant and senior manager at Deloitte. (Tr. 628-32; Adm. Ex. 24). Larson reviewed Picker's report and other documents, for the purpose of expressing an opinion on Picker's conclusions. (Tr. 634-35, 653-55). Larson had not been asked to determine whether Respondent kept any of Burren's cash or assets, and she had no opinion on that issue. (Tr. 664-65).

Larson did not consider Picker's conclusions reliable and identified various elements of Picker's analysis that she considered deficient. Larson explained the reasons for these views. Larson's primary criticism involved Picker's use of an agreed upon procedures

examination. Larson testified, in a case such as this one, that method was too limited in scope to be proper and likely would not provide a complete basis for an opinion, since the investigation would be limited to what the client asked be done. According to Larson's testimony, an examiner would have to do additional independent work to obtain a reasonable basis on which to provide an opinion. Larson was not aware of any specific restrictions placed on Picker, in performing his investigation or preparing his report, and she acknowledged Picker had reviewed a substantial amount of information. Larson's opinion that Picker's conclusions were not reliable was based essentially on her disagreement with the method he used for his investigation. Larson also disagreed with the choice of 2003 as the starting point for Picker's analysis. Larson testified the analysis should have begun at a time before Respondent and Burren first met. She had thought Respondent and Burren first met in 2003. (Tr. 635-49, 651-52, 661, 667-91).

C. Analysis and Conclusions

1. Failure to Hold Burren's Property Separate from Respondent's Own

A lawyer shall hold property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property. Ill. Rs. Prof'l Conduct R. 1.15(a) (1990). Such funds must be kept in a separate account. Rule 1.15(a). An attorney holding client funds must do so in a manner that leaves no doubt that the attorney is holding the money on behalf of another and that the funds do not belong to the attorney personally. *In re Johnson*, 133 Ill.2d 516, 531, 552 N.E.2d 703 (1989).

Under Rule 1.15(a), an attorney cannot hold client funds in cash. *In re Kirby*, 2010PR00098, M.R. 26679 (May 16, 2014). Instead, client funds must be held in an identifiable trust account. *In re Betts*, 90 SH 49, M.R. 9296 (Sept. 27, 1993).

Respondent did not deposit any of the funds at issue in Count II into a separate account. According to Respondent's testimony, he cashed the checks he received and dealt with the cash, either giving it to Burren or using it for Burren. This is not a proper way to handle client funds. *See In re Spak*, 2013PR00132, M.R. 27597 (Nov. 17, 2015). Respondent also placed some of the funds into a certificate of deposit, in his name alone. This likewise is not a proper way to handle client funds. *See In re Clayter*, 78 Ill.2d 276, 280-81, 399 N.E.2d 1318 (1980).

This conduct clearly violated Rule 1.15(a). The real issue is whether Rule 1.15(a) applies. Respondent seeks to take this situation outside the scope of Rule 1.15(a) by arguing that, in dealing with these funds, he was not acting as Burren's lawyer, but in the context of their personal relationship. Rule 1.15(a) governs the conduct of a lawyer who holds funds for a client or third person in connection with a representation. *In re Birt*, 2013PR00053, M.R. 27896 (May 18, 2016). This requirement was met here.[5]

We incorporate our discussion, in Section I C 1, of the elements required for an attorney-client rela-

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[5] Our research disclosed two cases in which charges of misconduct arising out of check cashing were dismissed. *In re Serritella*, 5 Ill.2d 392, 125 N.E.2d 531 (1955); *In re Feinberg*, 90 CH 240 (Review Bd. Aug. 13, 1993). Neither Serritella nor Feinberg acted in the context of a representation.

tionship, as well as our findings concerning the attorney-client relationship between Respondent and Burren at the time at issue in Count I. Special circumstances showing continuation of an attorney-client relationship can create an exception to the general rule that the relationship ends upon completion of the services the attorney was retained to perform. *Imming*, 131 Ill.2d at 252. In some situations, a longitudinal relationship can warrant finding an ongoing attorney-client relationship, which persists over time. *Childs*, 07 CH 95 (Review Bd. at 10-11). Based on the circumstances here, as a whole, there was an ongoing attorney-client relationship between Respondent and Burren, which continued throughout the time at issue, 2003-2007.

Respondent and Burren consistently maintained contact with each other. Over time, Burren also turned to Respondent when he needed legal assistance. Respondent had represented Burren in some matters before 2003. In 2003, Respondent represented Burren in the sale of Pearl's house; he continued to represent Burren when Burren executed his will.

Burren's own financial circumstances were relatively modest, apart from the assets on which Pearl had made him a joint tenant. After Pearl died, Burren had sole access to significantly more funds and needed to make decisions as to how to manage those funds. Shortly after Pearl died, Burren initially turned to Respondent for advice in changing his will. As discussed in Section I C 1, Respondent declined to prepare that will, but was involved when Burren executed the will, in January 2004.

Burren's behavior as time went on showed his increasing reliance on Respondent and that Burren

considered Respondent his lawyer, as well as his friend. We were convinced that the very high level of trust Burren placed in Respondent arose in part from Respondent's role as Burren's lawyer. Based on Burren's relationship with Respondent as a whole, his clear trust in Respondent as his attorney and his own changed financial circumstances, we were also convinced that Burren relied on Respondent for advice concerning financial matters and for help communicating with Becker. For this reason, we reject Respondent's claim that, in relation to the 2004 letters of direction to Smith Barney, he acted only as a typist. The September 2004 correspondence with Becker provides additional support for our conclusion that Respondent had a larger role, which included advising Burren. Becker directed his September 2004 letter to both Respondent and Burren. Respondent handwrote the reply, which expressly stated that he and Burren had discussed Becker's recommendations and gave Becker revised instructions.

Respondent's conduct toward Burren contributed to our finding of an ongoing attorney-client relationship. *See generally Cook*, 2010PR00106 (Hearing Bd. at 18). Respondent used his professional letterhead for six letters he sent Burren between December 24, 2003 and March 6, 2005. In other words, over time, Respondent communicated with Burren in a professional context, and his use of professional letterhead suggests Respondent's intent, on those occasions, to communicate with Burren in a professional capacity. Four of the letters concerned the Smith Barney account, including the three letter/receipts for funds issued from that account in 2004. Respondent's use of professional letterhead for those letters would have conveyed to

Burren the impression that the subject matter of those letters was within the sphere of their professional, rather than personal, relationship. Given the importance of the client's perception, (*see Gallo*, 07 CH 110 (Hearing Bd. at 19)), the fact that the 2004 letters of direction to Becker were not on letterhead and were phrased as if they were from Burren did not change our view.

We also considered the powers of attorney Respondent prepared for Burren. In 2006, Respondent prepared, and Burren executed, three powers of attorney. Burren named Respondent as his agent in all three powers of attorney. The first two, executed in March and June 2006, related to healthcare; the second power of attorney contained slightly different provisions than the first. The third power of attorney, executed in December 2006, related to property.

Respondent argues that, in preparing these powers of attorney, he was not representing Burren, since the documents were forms and he completed them as Burren directed. We disagree. The form nature of a document is only one relevant factor in determining if its preparation constitutes the practice of law. *See In re Neuendorf*, 02 CH 31, M.R. 19441 (Sept. 24, 2004). A power of attorney is a legally significant document. *In re Fleck*, 2011PR00054, M.R. 26684 (May 16, 2014). Despite their form nature, by preparing these documents, Respondent exercised his legal knowledge and skill and provided Burren with legal services. *See Peiss*, 2013PR00077.

More fundamentally, this situation involves a licensed attorney, who successively prepared three separate powers of attorney for an individual to whom he had provided legal services over time and who

regularly sought his assistance. Burren's decisions to go to Respondent to prepare each of these documents represent additional instances in which Burren relied on Respondent to handle his legal matters. This supports our finding of an ongoing attorney-client relationship. Burren's choice of Respondent as his agent reinforces our view of the high level of confidence Burren placed in Respondent, not just as a friend, but as his attorney.

The attorney-client relationship between Respondent and Burren continued into 2007. Based on Respondent's testimony, in June 2007, Burren moved into a nursing home, since he required greater care. At that time, acting on Burren's behalf, Respondent gave additional instructions to Becker concerning funds in the Smith Barney account. Respondent's role as Burren's representative is clear from his June 2007 letter to Becker. In addition, shortly before he died, Burren gave Respondent his will. This action indicated Burren expected Respondent, his long-time attorney, to take the legal steps necessary to probate the will, and Respondent did so.

According to Respondent's testimony, Burren had Respondent cash checks on Burren's behalf, for large sums of money. We were convinced Respondent's role as Burren's lawyer contributed to Burren's willingness to repeatedly entrust Respondent with this task. Therefore, Respondent possessed the checks and cash at issue in connection with his representation of Burren in general. Consequently, those funds were within the scope of Rule 1.15(a).

In addition, there were certain funds at issue in Count II as to which we found a direct connection with specific incidents of representation. Proceeds

from the sale of Pearl's house, in which Respondent represented Burren, were deposited into the joint account at LaSalle Bank, on the same day as the closing. Subsequently, Respondent received multiple checks issued on that account. As a result of each of the letters of direction to Becker, Respondent received funds from Burren's Smith Barney account. This provides a further basis for our finding that Respondent violated Rule 1.15(a).

For the reasons stated above, Respondent possessed checks and cash at issue in Count II in connection with his representation of Burren. He did not keep those funds separate from his own property, and he did not deposit any of those funds in a dedicated trust account. The Administrator proved Respondent violated Rule 1.15(a).

2. Improper Business Transaction

A lawyer may not enter into a business transaction with a client, in which the lawyer knows or reasonably should know the lawyer and the client have or may have conflicting interests, absent the client's informed consent. Ill. Rs. Prof'l Conduct R. 1.8(a)(1) (1990). Rule 1.8(a) is designed to address the risk of a lawyer overreaching or favoring his or her interests at the expense of the client's, when the lawyer participates in a business, property or financial transaction with a client. *See* Ill. Rs. Prof'l Conduct R. 1.8(a) (2010), Comment [1].

This purpose is reflected in the types of transactions to which Rule 1.8(a) is normally applied. For example, a loan between an attorney and a client can violate Rule 1.8(a). *E.g. In re Timpone*, 208 Ill.2d 371, 382-83, 804 N.E.2d 560 (2004); *In re Shelton*,

2013PRO0039, M.R. 27712 (Jan. 21, 2016). Similarly, a violation of Rule 1.8(a) can be found where there is a sale or lease of property between an attorney and a client. *E.g. In re Haneberg*, 00 CH 22, M.R. 19673 (Nov. 17, 2004); *In re Mlade*, 99 CH 18, M.R. 17977 (Mar. 22, 2002). A lawyer's solicitation of an investment by a client in a business in which the lawyer has a financial stake, or a lawyer's investment in a client's business can also lead to a violation of Rule 1.8(a). *E.g. In re Twohey*, 191 Ill.2d 75, 727 N.E.2d 1028 (2000); *In re Sax*, 03 CH 99, M.R. 22139 (Mar. 17, 2008).

Preliminarily, each of these cases presents a fact pattern which would commonly be understood as a business transaction. We were not convinced that the check cashing here constitutes a business transaction within the scope of Rule 1.8(a). The Administrator did not allege, and the evidence did not establish, any agreement between Respondent and Burren that Respondent would cash checks for Burren in return for a fee.

More fundamentally, in considering whether the Administrator proved Respondent violated Rule 1.8(a), we must look to the manner in which the complaint alleged the violation occurred. *Moran*, 2014PR00023 (Hearing Bd. at 13). Respondent is charged with violating Rule 1.8(a), by entering into business transactions with Burren, in which Respondent knew or should have known he and Burren had or might have conflicting interests. The Second Amended Complaint charged Respondent did so "by receiving funds from Burren." In other words, the business transaction identified in the Second Amended Complaint was Respondent's receipt of funds from Burren.

Not every situation in which a lawyer receives money from a client constitutes a business transaction within the scope of Rule 1.8(a). *See generally In re Woodcock*, 2011PRO0005, M.R. 25967 (May 22, 2013). For example, a gift is not a business transaction for purposes of Rule 1.8(a). *In re Bates*, 05 CH 48, M.R. 22711 (Nov. 18, 2008). We did not find any Illinois cases in which the simple act of receiving funds from a client constituted a prohibited business transaction within the meaning of Rule 1.8(a).

The Administrator has the burden of proving all the elements of the misconduct charged, by clear and convincing evidence. *In re Svec*, 09 CH 28, M.R. 25306 (May 18, 2012). The Administrator did not meet his burden of proof as to the charge that Respondent violated Rule 1.8(a).

3. Criminal Act

The Rules of Professional Conduct prohibit a lawyer from committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects. Ill. Rs. Prof'l Conduct R. 8.4(a)(3) (1990).[6] Where an attorney has been convicted of the underlying crime, proof of conviction is conclusive proof of the attorney's guilt of that crime. Supreme Court Rule 761(f). An attorney who has not been convicted of a crime may still be

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[6] As the conduct on which this charge is based occurred before January 1, 2010, the 1990 version of the Rules control and this Report cites Rule 8.4(a)(3). In charging Respondent, the Second Amended Complaint cited the 2010 version, Rule 8.4(b). As the relevant language is the same in both versions, Respondent received adequate notice and we consider this charge on the merits. *See In re Shelton*, 2013PR00039, M.R. 27712 (Jan. 21, 2016).

subject to discipline, based on a violation of Rule 8.4(a)(3). *In re Rolley*, 122 Ill.2d 222, 233, 520 N.E.2d 302 (1988). For that to occur, however, the Administrator must meet his usual burden of proof. *See* S. Ct. R. 753(c)(6).

Where, as here, the Administrator charges an attorney with violating Rule 8.4(a)(3) and the attorney has not been charged with or convicted of the underlying crime alleged, the Administrator must plead and prove the elements necessary to constitute that criminal offense. *Spak*, 2013PR00132 (Hearing Bd. at 14). This requires the Administrator to prove the elements of the underlying crime and do so by clear and convincing evidence. *Birt*, 2013PR00053 (Hearing Bd. at 8). Clear and convincing evidence is a degree of proof which, considering all the evidence, produces a firm and abiding belief that it is highly probable that the proposition at issue is true. *Spak*, 2013PR00132 (Hearing Bd. at 3). The clear and convincing standard requires a high level of certainty. *In re Stephenson*, 67 Ill.2d 544, 556, 367 N.E.2d 1273 (1977). The fact that the Administrator proved an attorney dishonestly misused client funds does not necessarily mean the Administrator also proved the attorney committed the crime of theft. *See Spak*, 2013PR00132 (Hearing Bd. at 14); *Birt*, 2013PR00053 (Hearing Bd. at 8).

In this case, the Second Amended Complaint alleged Respondent violated Rule 8.4(a)(3) by committing theft, in violation of 720 ILCS 5/16-1(a)(1)(A). Under that statute, a person commits theft when he or she knowingly obtains or exerts unauthorized control over property of the owner and intends to deprive the owner permanently of the use or benefit of the property. 720 ILCS 5/16-1(a)(1)(A). While this is not the

only way a theft can be committed, (*see* 720 ILCS 5/16-1(a)), this is the way upon which we must focus, since this is the type of theft the Administrator charged. *See generally Karavidas*, 2013 IL 115767 at 97.

From our perspective, there was not clear and convincing evidence of the elements of the theft alleged. Based on the evidence presented, including evidence of Burren's competence and his behavior, as well as the relationship between Respondent and Burren, the Administrator failed to prove the essential elements of the underlying crime charged. Therefore, the Administrator did not prove Respondent violated Rule 8.4(a)(3).

4. Dishonest Conduct

A lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation. Ill. Rs. Prof'l Conduct R. 8.4(a)(4) (1990). Rule 8.4(a)(4) encompasses a broad range of conduct and includes anything calculated to deceive. *Edmonds*, 2014 IL 117696 at ¶ 53. This includes the suppression of truth and the suggestion of falsity. *Id.* In determining whether the Administrator proved an attorney violated Rule 8.4(a)(4), we consider each case, based on its own unique facts and circumstances. *In re Cutright*, 233 Ill.2d 474, 490, 910 N.E.2d 581 (2009). Both the attorney's actions and the intent with which those actions were performed must be considered in determining whether particular conduct violates Rule 8.4(a)(4). *See Edmonds*, 2014 IL 117696 at ¶ 55. Intent is rarely proven directly, but can be inferred, based on the attorney's conduct and the surrounding circumstances. *Id.* at ¶ 54. We can consider circumstantial evidence and draw reasonable inferences from the

evidence. *In re Discipio*, 163 Ill.2d 515, 524, 654 N.E.2d 906 (1994). In appraising an attorney's conduct, we are not required to be naïve or impractical. *Discipio*, 163 Ill.2d at 524. Dishonesty can be found where the circumstantial evidence convinces the panel that the attorney intended to deceive and took steps to suppress the truth or suggest falsity. *See Edmonds*, 2014 IL 117696 at ¶ 55. Respondent engaged in dishonest conduct here.

Over a four-year period, numerous checks were issued on Burren's accounts, payable to Respondent, totaling over $450,000. Respondent cashed the vast majority of those checks. There are virtually no records to document what happened to that cash and no testimony, except Respondent's, from anyone with actual knowledge of what happened to the cash. We were convinced Respondent was not completely candid with Burren about how the cash was being handled.

The fact that Respondent did not keep any records contributed to our finding of dishonest conduct. Respondent was dealing with someone else's money. Upon negotiating the checks, Respondent received large sums, in cash. This occurred repeatedly. The situation entailed a significant risk of loss to Burren, even from an inadvertent error. The lack of records would make it easier to conceal any misuse of the funds.

Respondent stated he did not see a need for recordkeeping because he returned all the proceeds to Burren immediately. Even if this were a valid reason for not keeping any records, it is not completely accurate. The bank did not always give Respondent the full amount of a check in cash; instead Respondent received part of the proceeds in cash with a cashier's check for the balance. Getting cash for the full original

amount necessitated further check cashing, sometimes more than once, which compounded the potential for error.

Respondent also stated he did not consider any records necessary, due to his relationship with Burren. While the relationship between Respondent and Burren played a large part in this matter as a whole, Respondent's behavior in other situations conflicted with this explanation. Respondent sent Burren letters to confirm advice he had given Buren and to report work he had completed for Burren; in those situations, Respondent did not believe the relationship dispensed with any need for formal documentation. The four letters Respondent prepared as receipts for some of the funds also contradicted the theory that no records were needed due to the close relationship between these two individuals. Frankly, too, the ambiguous language Respondent used in drafting those letters served merely to obfuscate the situation.

According to Respondent's testimony, Burren wanted cash and, but for a few bills Respondent paid for Burren, Respondent returned the check proceeds to Burren, in cash. We did not fully credit this testimony. Respondent probably did give Burren some of the cash; it seems unlikely that Bun-en would have continued to give Respondent checks to cash if Respondent never returned any cash to him. However, it seems equally unlikely that Burren wanted, or received, all of this cash.

This is particularly true given the amounts and timing of the checks. Individual checks were written for very large amounts. Nearly half were for more than $10,000; of those, several were in the $25,000 to $70,000 range. Respondent received large aggregate

amounts within short time periods. The checks Respondent cashed between November 2003 and September 2004 totaled roughly $350,000. Respondent had cashed checks totaling $54,000 by December 17, 2003, nearly $200,000 more during the first four months of 2004 and almost $100,000 additional between August 5 and September 23, 2004. Given these circumstances, the concept that Burren just wanted cash is untenable. Something more was going on.

Respondent was the only person to testify who had actual knowledge of what happened to the cash. Burren, the only other person who knew what occurred, obviously was not available. In attempting to show he did not benefit from Burren's funds, Respondent presented testimony from Lund and Picker; they expressed opinions based on information provided by others after the fact. We gave limited weight to Lund's view of what happened to the funds. Lund was one of Respondent's attorneys in the probate case and got involved after the hearing on the citation proceedings had begun. Picker testified as an expert, but we did not find his conclusions reliable. For the reasons the Administrator's expert, Larson, identified, the method of analysis Picker used did not seem likely to provide a genuinely reliable basis for assessing use of this cash. Larson herself was not asked to, and did not, offer an opinion on what happened to the funds.

Two matters in particular reinforced our conclusion that Respondent diverted some of the check proceeds for his own purposes. First, a series of six cashier's checks were issued by LaSalle Bank on April 12, 2004. The $70,000 Smith Barney check had been issued ten days earlier, and Respondent negotiated that check at LaSalle Bank a few days before these cashier's

checks were issued. Respondent testified he used proceeds from the $70,000 Smith Barney check to buy four of the six cashier's checks; Respondent paid taxes for Burren with those four checks. Respondent used the other two cashier's checks to purchase motorcycles for himself. Respondent testified he did not use Burren's funds for those two checks. However, the sequence of events convinced us all six cashier's checks were purchased with funds from the same source, the $70,000 Smith Barney check. Second, Respondent wrote himself two checks, totaling $45,000, from the MB Financial Bank account on June 1 and July 4, 2007. Respondent sought to explain this situation by stating he was setting funds aside so Burren could open another account. According to Respondent, Burren wanted to do so in order to stop Stewart from having online access to his account. We did not find this explanation credible. If indeed Burren had wanted to stop Stewart from monitoring his account, there would have been far easier ways to do so, without significant delay, including directing the bank to end Stewart's online access.

We believe Respondent was not completely candid with Burren about his activity in relation to Burren's funds. For example, it is not clear that Burren knew about or agreed to either of the two matters described above. Respondent drafted four letters to serve as receipts, but from the wording of those letters, it is not at all clear whether Burren or Respondent was the one who received the funds. It seemed that those were drafted in an intentionally ambiguous manner. Respondent repeatedly dealt with large quantities of cash, without keeping any real records, which would have made it easier to conceal diversion of funds. The

circumstances as a whole suggested an intent to conceal information from Burren.

For these reasons, Respondent engaged in dishonest conduct. The Administrator proved Respondent violated Rule 8.4(a)(4).

EVIDENCE OFFERED IN AGGRAVATION AND MITIGATION

In addition to the evidence discussed above, we consider the following evidence.

Aggravation

Due to the contested probate proceedings, Burren's estate was open for six years. The estate incurred significant expense, including a contingent attorney fee, of $300,000-400,000. (Tr. 40-41, 44-45).

Mitigation

Respondent testified he performs pro bono work, generally through his church or for members of his church community. Respondent estimated that he provided about 100 hours of pro bono legal services during the past year. (Tr. 355-56).

Rev. Donald Frye testified Respondent is an active member of his congregation and volunteers at the church. Rev. Frye described Respondent as a well-respected member of the community, honest, truthful and a person of integrity. (Tr. 139-42).

Vernon Kays served as Clerk of the Circuit Court of McHenry County for thirty years, until retiring in 2008. Kays is also married to Respondent's cousin. Kays interacted with Respondent professionally and knew others who did so. Kays described Respondent

as honest, truthful and a person of integrity, who enjoyed an exceptional reputation for honesty, veracity and truthfulness. (Tr. 144-46).

Thomas W. Hunter, an attorney who has known Respondent for thirty years, testified Respondent had an excellent reputation in the legal community for honesty, veracity and truthfulness. Hunter had handled a number of cases with Respondent and described Respondent as an excellent lawyer, who listened well to his clients, advocated strenuously for them and gave them good guidance. (Tr. 407-11).

Prior Discipline

Respondent was disciplined once before, on consent. Respondent was suspended for six months, stayed in its entirety by probation for one year, subject to conditions. *In re Miner*, 97 CH 59, M.R. 14889 (May 27, 1998).

Respondent handled a divorce case in which the wife, Diane Waltman, received the marital home as part of the settlement. Later, Waltman told Respondent she wanted the house to go to her three children upon her death. For that purpose, Respondent prepared and recorded a deed, in 1988. That deed, however, did not create a joint tenancy with right of survivorship, but a tenancy in common.

Waltman learned of the error in 1993, when she considered selling the house. Waltman contacted Respondent, who told her he would take care of the problem. Since the children were minors, the property could not be sold without establishing a guardianship and obtaining court approval of the sale. Instead of doing this, Respondent prepared a quit-claim deed,

which purported to transfer the property from the children to Waltman. Respondent had Waltman sign one child's name to the deed; Respondent signed the other children's names. At Respondent's direction, his wife, a notary, notarized the signatures. Respondent recorded that deed.

Waltman learned that deed was also defective when, in 1995, she decided to refinance the home. Waltman again contacted Respondent. Respondent told Waltman he would take care of the matter. He did not disclose that there was a conflict, since the problem had resulted from his error. Respondent filed a petition to open a minors' estate and appoint a guardian to execute the deed. Ultimately, a guardian was appointed and a proper deed was executed. Respondent settled Waltman's lawsuit against him for legal malpractice.

RECOMMENDATION

The purpose of attorney discipline is not to punish the attorney, but to protect the public, maintain the integrity of the profession and protect the administration of justice from reproach. *In re Edmonds*, 2014 IL 117696, ¶ 90. While the system seeks some consistency in sanctions for similar misconduct, each case is unique and the sanction must be based on the facts and circumstances of each individual case. *Id.* In determining the sanction to recommend, we consider the proven misconduct as well as any aggravating and mitigating factors. *In re Gorecki*, 208 Ill.2d 350, 360-61, 802 N.E.2d 1194 (2003).

The Administrator seeks disbarment. Respondent argues a censure or short suspension is the proper sanction, if the panel finds misconduct. While we do not regard this as a disbarment case, Respondent's

misconduct is more serious than the misconduct in the cases on which Respondent relies and aggravating factors are present. As a result, this case warrants significant discipline. For the reasons that follow, we recommend a suspension for two years. This case presents a unique set of circumstances. Our sanction recommendation is based on those circumstances.

Respondent's proven misconduct entailed two components. One related to Respondent's involvement in the execution of the will under which Respondent's children would have received a substantial share of Burren's residuary estate. The other concerned Respondent's mishandling and misappropriation of Burren's funds.

The first situation is less serious than the second. Given his relationship with Respondent's children, Burren may well have wanted to provide for them in his will. Burren was competent and independent, and the will was not the product of any pressure by Respondent. Respondent referred Burren to another attorney to prepare the will, had no evil motive in relation to the will and was involved solely when the will was executed. Similar misconduct, on its own, does not merit harsh discipline. *E.g. In re Peters*, 09 SH 43, M.R. 24928 (Nov. 22, 2011) (censure).

Respondent's misconduct in dealing with Burren's funds is significantly more serious. Absent mitigating circumstances, conversion of client funds can warrant disbarment. *In re Rotman*, 136 Ill.2d 401, 423, 556 N.E.2d 243 (1990). A range of sanctions is available, with the proper sanction depending on the specific circumstances. *In re Alpert*, 09 CH 104, M.R. 26028 (May 22, 2013). Generally, attorneys who intentionally convert client funds are suspended or disbarred. *Alpert*,

09 CH 104 (Review Bd. at 17). The amount involved is relevant in determining the sanction. *See In re Moran*, 2014PR00023, M.R. 27812 (Mar. 22, 2016). Misconduct which involves repeated acts over time warrants a harsher sanction than an isolated incident of misconduct. *See In re Gunzburg*, 09 CH 57, M.R. 26039 (May 22, 2013).

Determining the proper sanction also requires consideration of any mitigating and aggravating factors. *Gorecki*, 208 Ill.2d at 360-61. We considered those factors, including the favorable character testimony and Respondent's prior discipline, in deciding on the sanction to recommend.

Respondent received checks, payable to himself, totaling approximately $466,000. All of those funds originated with Burren. Respondent was inordinately careless in the manner in which he dealt with those funds, cashing the checks without keeping records of how he distributed the proceeds. The circumstances convinced us that Respondent siphoned off some of those funds for his own purposes. We do not know how much Respondent kept and note the Administrator's expert was not asked to give an opinion on that point. However, based on the total involved and the large quantities of cash obtained in a short time, we were convinced that the amount diverted was significant. Respondent acted dishonestly and without informing Burren of his use of the funds. We found Respondent's behavior significantly troubling, particularly given the enormous trust Burren reposed in Respondent. The fact that this case involves dishonest misappropriation of Burren's funds distinguishes this case from the cases on which Respondent relies. *See e.g. In re*

Saladino, 71 Ill.2d 263, 375 N.E.2d 102 (1978); *In re Biagini*, 07 SH 13, M.R. 23136 (Sept. 22, 2009).

Burren, however, was competent, independent and intelligent. This is not a situation in which an attorney took advantage of a vulnerable individual. *Compare In re Bartley*, 96 SH 879, M.R. 15176 (Sept. 28, 1998). Burren's lack of vulnerability clearly does not excuse Respondent's misconduct or avoid significant discipline, but was highly relevant in our consideration of the proper sanction. *Cf. In re Handler*, 91 CH 629, M.R. 9787 (Mar. 30, 1994) (commercial client).

We also considered Burren's behavior. Over time, Burren continued to sign checks payable to Respondent. He authorized Smith Barney to issue checks to Respondent. Burren opened an account at MB Financial Bank, with Respondent as the only other joint tenant. Burren executed a power of attorney for property, designating Respondent as his agent. Respondent was not fully candid with Burren about the funds he was diverting. However, the evidence convinced us that Burren understood the implications of his own actions and undertook those actions intentionally and of his own free will.

We also considered the relationship between Respondent and Burren. *See generally In re Stahnke*, 08 CH 101, M.R. 25590 (Nov. 19, 2012). That relationship did not diminish Respondent's ethical obligations to Burren, (*see In re Timpone*, 208 Ill.2d 371, 385, 804 N.E.2d 560 (2004)), but affected the way we saw the situation as a whole. Buren had a close relationship over many years with Respondent and his family, closer than Burren's relationship with his own children and grandchildren. Respondent and Burren related to each other primarily like father

and son. That relationship likely affected Respondent's judgment and perception of the degree to which his conduct was improper.

Particularly with this background, we did not believe Burren would have continued to give Respondent checks or other access to his funds, if Respondent was not returning any funds to Burren or if Respondent was acting completely contrary to Burren's wishes. Given those circumstances, we were convinced Respondent did not misappropriate all the cash he received.

Burren's estate has been compensated. While Burren's heirs were put through the time and expense of litigation, Respondent paid the judgment once that litigation was concluded. The judgment in the probate case required Respondent to return all the funds he received, plus interest. The probate court's conclusion that Respondent improperly took everything he received does not bind us; the issues and burden of proof in the probate case differ from those here. *In re Owens*, 125 Ill.2d 390, 400-401, 532 N.E.2d 248 (1988).

The purpose of discipline is not to punish the errant attorney, but to protect the public. *Edmonds*, 2014 IL 117696 at ¶ 90. Consistent with that purpose, in recommending a sanction, we considered the extent to which the public might be at risk of future misconduct from Respondent. *See In re Worrell*, 07 CH 60, M.R. 24407 (Mar. 21, 2011). Respondent's misconduct in this case, while serious, was limited to conduct involving Burren.

However, Respondent has prior discipline. Prior discipline is properly considered as an aggravating factor, as it should give an attorney a heightened

awareness of his or her professional obligations and the need to strictly comply with the Rules of Professional Conduct. *In re Storment*, 203 Ill.2d 378, 401, 786 N.E.2d 963 (2002). The impact of prior discipline in aggravation varies, depending on factors such as the similarity of the prior and current misconduct and the time between the incidents. *In re Harris*, 2013PR00114, M.R. 27935 (May 18, 2016).

While Respondent's prior case did not involve taking client funds, in both matters, Respondent took inappropriate short-cuts and was not completely candid about his behavior. There was some gap in time, although not as long as the date of the prior sanction would suggest. Respondent's present misconduct began in 2003, within five years of the prior sanction. Respondent's prior discipline also affected our sanction recommendation because it detracted from our perception that, since the current misconduct occurred in the context of Respondent's unique relationship with Burren, Respondent was not likely to engage in misconduct in an ordinary attorney-client relationship.

Disbarment represents the utter destruction of an attorney's professional life, character and livelihood. *Timpone*, 208 Ill.2d at 384. We have very serious concerns about Respondent's misconduct, but we do not believe that disbarment is warranted here.

None of the cases our research disclosed impressed us as genuinely similar to this one. We considered cases in which the sanctions ranged from disbarment to a short suspension, for matters which involved taking client funds. *Compare Rotman*, 136 Ill.2d at 423 (disbarment); *Biagini*, 07 SH 13 (ninety-day suspension). We settled on a two-year suspension by balancing the circumstances in this case against the

circumstances in other cases, while acknowledging that those cases involve certain clear dissimilarities. *Cf. Moran*, 2014PR00023 (two year suspension; misconduct, by attorney with no prior discipline, included taking over $360,000 from a family trust). For the reasons stated above, we recommend that Respondent be suspended for two years.

Respectfully submitted,

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Russell I. Shapiro

Willard O. Williamson