STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellee/Cross-Appellant,

v

Robert D. Stein, P 20953,

Respondent/Appellant/Cross-Appellee,

Case No. 09-3-GA

Decided: January 18, 2011

Appearances:

Nancy R. Alberts, for the Grievance Administrator, Petitioner/Appellee/Cross-Appellant
Donald D. Campbell, for the Respondent/Appellant/Cross-Appellee

BOARD OPINION

Tri-County Hearing Panel #66 of the Attorney Discipline Board entered an order suspending respondent's license to practice law for 179 days, with a condition that respondent submit a physician's evaluation of his fitness to practice. The Grievance Administrator seeks review of that order on the grounds that the hearing panel erred in its dismissal of certain charges of misconduct in the formal complaint. The Grievance Administrator also seeks the imposition of greater discipline, an increase in the amount of restitution to be paid, and the addition of a condition requiring respondent to demonstrate financial responsibility as a condition of reinstatement. The respondent has also petitioned for review, arguing that a reprimand, rather than a suspension, is appropriate in this case.

For the reasons discussed below, the hearing panel's findings and conclusions with regard to the charges of misconduct are affirmed. However, discipline in this case is increased from a suspension of 179 days to a suspension of 180 days and until respondent has established his eligibility for reinstatement in accordance with MCR 9.123(B) and MCR 9.124.

Summary of Misconduct Charges

The formal complaint filed by the Grievance Administrator consisted of seven separate, largely unrelated, counts charging professional misconduct. Respondent filed an answer in which he admitted many (although not all) of the factual allegations but denied that his conduct, as alleged, violated the enumerated provisions of the Michigan Rules of Professional Conduct. We begin with a brief summary of the charges of misconduct which are at issue here.

In Count One, the Grievance Administrator alleged that respondent withheld state and federal taxes from the wages of two employees, but never paid those funds to the appropriate state or federal authorities. It was also alleged that respondent failed to pay Social Security withholding taxes on behalf of the two employees or to provide them with W-2 forms. Additionally, respondent was alleged to have issued paychecks to those employees which were not honored when presented to respondent's bank, either because there were not sufficient funds in the account or because the account on which the checks were drawn had been closed.

The charges in Count Two fall into two categories. First, it was alleged that, while subleasing office space, respondent wrote a check for his rent payment which was returned unpaid because the bank account had been closed and that another check to a subsequent landlord was returned unpaid because it was drawn on a closed account. It was further alleged in Count Two that when the individual to whom he had delivered the first check filed a request for investigation with the Attorney Grievance Commission, respondent failed in his obligation to assist the Administrator in his investigation by knowingly making a false statement of material fact and by making knowing misrepresentations.

The factual allegations in Count Three described respondent's failure to satisfy a judgment entered against him in February 1997 directing him to pay $295.00 to the clerk of the Oakland County Circuit Court, and his subsequent failure to pay court ordered penalties of $475.00 for failure to pay case evaluation fees in two matters. Count Three also cited an unpaid judgment obtained by Ameritech Publishing against Robert D. Stein & Associates, PLLC, in the amount of $52,470.12 for failure to pay for advertisements in the Yellow Pages. In addition to the broader allegations that the failure of respondent or his firm to satisfy these judgments exposes the legal profession to obloquy, contempt, censure, or reproach, MCR 9.104(A)(2), and is contrary to justice, ethics, honesty, or good morals, MCR 9.104(A)(3), the complaint charged in Count Three that respondent engaged in professional misconduct by "failing to comply with court orders, in violation of MRPC 3.4(c)." Formal Complaint 09-3-GA, Count Three, paragraph 74(a).

Count Four charged that in his representation of a couple in a bankruptcy matter, respondent failed to comply with a court order and charged a clearly excessive fee. Specifically, it was alleged that respondent accepted a fee of $500.00 in the matter but the bankruptcy petition was dismissed because of respondent's failure to file necessary documents. Respondent filed a new petition for bankruptcy and charged an additional $500.00 for filing the new matter. Respondent and another lawyer were subsequently ordered to return $500.00 to the clients by a date certain. Respondent's failure to return his share of the court ordered refund by the specified date resulted in a court ordered fine of $240.00.

Count Five of the formal complaint dealt with respondent's handling of an unrelated bankruptcy matter for another client. The Grievance Administrator does not seek review of the hearing panel's dismissal of that count and Count Five requires no further discussion.

The charges of misconduct in Count Six were focused on respondent's failure to file a signed written answer to a request for investigation served by the Grievance Administrator as required under MCR 9.113(A).

Finally, Count Seven alleged that respondent regularly misused his client trust account by depositing his own funds in that account or, conversely, by failing to deposit legal fees and expenses paid in advance into the trust account. Count Seven included charges that respondent regularly received advance cash payments from bankruptcy clients which were not deposited into his trust account; that he used his client trust account as a repository for personal and corporate funds; that he issued a check from his client trust account to pay rent for office space; that he repaid the fee to his bankruptcy client (as described in Count Four) from the client trust account, although the client's fees had never been deposited into that account; and that his payment of the personal fine imposed by the bankruptcy court, described in Count Four, was paid from the trust account.

Panel Proceedings

Following evidentiary hearings over two days, the hearing panel issued its report that respondent had committed misconduct as alleged by the Grievance Administrator in Counts One, Six and Seven, but that misconduct had not been established with regards to Counts Three, Four and Five. With regard to Count Two, the panel concluded that by delivering checks drawn on an account that had insufficient funds or had been closed, respondent engaged in conduct that violates the criminal laws of the State of Michigan. However, the panel did not find that his responses during the Grievance Administrator's investigation involving those checks constituted knowingly made false statements or knowing misrepresentations, as charged in Count Two.

At the separate hearing on discipline conducted September 9, 2009, both parties were given an opportunity to present evidence establishing aggravation or mitigation bearing upon the appropriate sanction. At this hearing, the panel heard favorable testimony concerning respondent's reputation and competence as a lawyer from a friend and former client, from a lawyer who worked for respondent from 1998 to 2000, and from two lawyers who were acquainted with respondent's work in the bankruptcy court. During this phase of the proceeding, the Grievance Administrator called respondent for further cross-examination and produced evidence of respondent's prior admonitions from the Grievance Commission in 1992 and 1994, as well as a public reprimand (by consent) in 1996. Finally, the panel received documentary evidence submitted by respondent including a list of his cases before the United States Bankruptcy Court in Detroit from 1991 to 2000 (Exhibit A); a letter in support of respondent from an attorney, dated December 3, 2009, (Exhibit B); and a collection of articles and documents relating to respondent's activities in support of civil rights during the 1960's.

The hearing panel's discipline order of March 22, 2010, directed that respondent should be suspended for a period of 179 days with the condition that although he would not be required to petition for reinstatement under the procedures described in MCR 9.124, his eligibility for reinstatement would be conditioned upon his submission of a written report from a psychiatrist reflecting an evaluation of his physical and mental health "as those conditions may bear upon respondent's fitness to engage in the practice of law." The panel also ordered that respondent would not be able to return to the practice of law until he had reimbursed the merchants where his employee, Ms. Rogensues, cashed paychecks which were dishonored for payment when presented to respondent's bank.

Discussion

A. Review of the Hearing Panel's Findings and Conclusions Regarding Misconduct

In considering the Grievance Administrator's argument that the hearing panel erred in its dismissal of Counts Three and Four, as well as that portion of Count Two which charged that respondent made knowingly false statements during the Grievance Administrator's investigation, the Board must employ the standard of review enunciated by the Supreme Court - that is, whether or not there is proper evidentiary support in the whole record for the panel's findings. *Grievance Administrator v August*, 438 Mich 296, 304; 475 NW2d 256 (1991). It is not the Board's function

to substitute its own judgment for that of the panels' or to offer a *de novo* analysis of the evidence. *Grievance Administrator v Carrie L.P. Gray*, 93-250-GA (ADB 1996), *lv den* 453 Mich 1216 (1996). *Grievance Administrator v Sue E. Radulovich*, 06-50-GA (ADB 2007). Upon application of the standard of review, and for the reasons discussed below, the Board is not persuaded that reversal of the panel's findings with regards to Counts Two, Three and Four is warranted.

B. Count Two

With regard to the charges of misrepresentation in Count Two, the fact that the hearing panel did not specifically address those charges in its report does not require reversal. The hearing panel's report is relatively detailed with regard to those specific allegations of misconduct that the panel found had been established by the evidence but the panel chose to say little or nothing about those charges that were not established. In Count Two, respondent is charged with "knowingly" making a false statement of material fact in connection with a disciplinary matter (Count Two, Paragraph 54b) and making a "knowing misrepresentation of facts or circumstances surrounding a request for investigation." (Count Two, Paragraph 54c.) The panel heard and observed respondent over the course of three hearings. The panel heard respondent's occasionally rambling testimony and heard evidence suggesting that respondent's business accounts were in disarray and that his office records were sometimes incomplete or non-existent. Under the proper standard of review, the issue before the Board is not whether there is some evidence, perhaps even much evidence, tending to support a specific charge. Rather, the question is whether the record as a whole is devoid of evidence upon which the panel could reasonably have based its decision. The record in this case provides a sufficient basis for the panel's apparent conclusion that even if respondent's statements about a replacement check were not necessarily accurate, those statements were not shown to have been deliberately or knowingly false under the cited rules.

C. Count Three

Without elaboration, the hearing panel found as to the charges in Count Three that there was "no violation." As noted by the Administrator, respondent has never denied the entry of the civil judgments against him, including a judgment against his professional corporation in the amount of $52,470.12 for unpaid advertising in the Yellow Pages. Respondent did, however, deny that by failing to pay a civil judgment, he engaged in professional misconduct by "failing to comply with court orders, in violation of MRPC 3.4(C)." Count Three, Paragraph 74a.

We note first that MRPC 3.4(c) does not refer directly to "court orders," or even use those words. MRPC 3.4(c) states that a lawyer shall not "knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists."

The Board has considered the opposing positions of the parties in this case on the question of whether intentional failure to satisfy a civil judgment against a lawyer is, *per se*, a violation of MRPC 3.4(c) or other provisions of the Rules of Professional Conduct. While cogent arguments were presented to the Board on this point, no authority has been offered in support of the Grievance Administrator's position on this point.[1]

D. Count Four

As with its findings on Count Three, the hearing panel's report stated that as to those allegations, "the panel finds no violation." As the Administrator has pointed out, respondent offered a plea of no contest to the factual allegations in that count dealing with a contempt order in a bankruptcy court in 2007, the resulting $250.00 fine and a $140.00 late fee subsequently assessed against him. However, respondent denied the specific charges of professional misconduct, including those under MRPC 3.4(c) and MCR 9.104(A)(2) (conduct exposing the legal profession to obloquy, contempt, censure and reproach). Upon review, it is the Board's function to determine whether the panel's conclusion that the specific rule violations lacked evidentiary support was so clearly erroneous as to require reversal. That showing has not been made in this case. The Administrator argues that "Respondent is in violation of MRPC 3.4(c), for "failure to comply with a court rule." (Grievance Administrator's Brief in Support of Petition for Review, p 14.) We have not been presented with authority for the proposition that every instance of failing to comply with a court order is professional misconduct. Based on the evidence before it, the hearing panel found that the contempt order and resulting fines described in Count Four did not rise to the level of knowing disobedience required under MRPC 3.4(c) and we decline to reverse that finding.

E. Level of Discipline

The hearing panel declined to adopt the Grievance Administrator's recommendation that the

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[1] Questioned on this point at the review hearing, the Administrator's counsel asserted that a civil judgment is a "rule of a tribunal" within the meaning of MRPC 3.4(a), but conceded that a lawyer's failure to pay a civil judgment would not always constitute a violation of that rule, saying, "Always, no. I think there could be some excuses for not doing so, but I think that he has - I think that if he completely ignores it and goes out of his way to evade the judgment, yes it is . . . let's put it that way, ignoring the judgment, a civil judgment, yes it is a violation because the judgment is a court order." (Tr July 14, 2010, p 10.)

respondent's license to practice law in Michigan should be revoked under an application of the American Bar Association's Standards for Imposing Lawyer Sanctions. In its report on discipline, the hearing panel concluded that a suspension, rather than revocation, was called for in this case, stating:

> We do not believe, however, that respondent's misconduct is of a type or degree that is commensurate with the offenses enumerated in Standard 5.11 of the ABA Standards. Counsel for the Grievance Administrator acknowledged that issues involving respondent's trust account are not the "big issue" in this case. (Tr 09/09/09, p 164). Rather, counsel characterized this as a case about respondent's "bad checks," his collection and distribution of withholding taxes, and his alleged misrepresentations during the course of the Commission's investigation. While serious, respondent's conduct is not in the same category as "fraud," "extortion," "theft," "distribution or importation of controlled substances," "the intentional killing of another," etc., which are specifically listed ABA Standard 5.11.
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> The parties have called the panel's attention to evidence in support of various aggravating or mitigating factors recognized in ABA Standard 9.0 and the panel has weighed the impact of these factors. During the course of these proceedings we stop short of a finding that respondent engaged in deliberate bad faith obstruction of the disciplinary proceedings. [Hearing Panel Report 03/22/10, p 8.]

The panel went on to conclude that respondent's license to practice should be suspended for 179 days, subject, however, to the condition that he should not be eligible to submit an affidavit for automatic reinstatement under MCR 9.123(A) until he has provided a written report from a psychiatrist "reflecting an evaluation of respondent's physical and mental health as those conditions may bear upon respondent's fitness to engage in the practice of law," and until he has made restitution to three merchants in the total amount of $3,067.67.

On review, the Attorney Discipline Board affords some deference to panel determinations as to the level of discipline imposed, but this deference is less than that given to a finding of fact because this Board has an "overriding duty to provide consistency and continuity in the exercise of its overview function" with regard to sanctions. *Grievance Administrator v Rodney Watts*, 05-151-GA (ADB 2007). In this case, it is argued by the Administrator that, "The hearing panel abused its discretion in imposing a 179 day suspension for respondent's criminal conduct and failing to require

a showing of financial responsibility before reinstatement."[2]

In a 1999 opinion, the Board itself acknowledged that it may have been careless in its use of the term "abuse of discretion" in such a way as to imply that an abuse of discretion standard is employed by the Board in its review of hearing panel decisions. That is not the appropriate standard, as the Board pointed out in *Grievance Administrator v Arthur C. Kirkland*, 98-236-GA (ADB 1999):

> That issue was decided by our Supreme Court in 1981 in *Matter of Daggs*, 411 Mich 304; 307 NW2d 66 (1981). In that case, the Court affirmed an abuse of discretion standard for its review of Attorney Discipline Board decisions and concluded that the Board acted properly in reducing the suspension imposed by a hearing panel from two years to one year. However, with regard to the Board's review of a panel's decision, the Court said:
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> > Finally, the administrator challenges the standard of review employed by the board. The administrator contends that abuse of discretion should be the appropriate standard and that the consequence of the existing standard is exemplified by the instant case where the board substituted its judgment for that of the panel.
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> > While not inconsistent with the powers granted in GCR 1963, 967.4 [now MCR 9.118(D)], an abuse of discretion standard would operate to prevent the board from effectively carrying its overview function of continuity and consistency in discipline imposed. [*State Bar Grievance Administrator v Williams*, *supra*, p 15, 228 NW2d 222.] Hearing panels meet infrequently and are exposed to a relatively small number of discipline situations. The board suffers from no such disadvantage. [*Matter of Daggs*, *supra*, 307 NW2d at p 71.]
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> Rather, in discussing its discretion to modify a hearing panel's decision to impose a certain level of discipline, the Board has said:
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> > Where the ultimate issue to be reviewed is the appropriate sanction, the Board's review is not limited to the question of whether there is proper evidentiary support for the panel's findings. In exercising its

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[2] Grievance Administrator's Brief in Support of Petition for Review, p 14.

> overview function on questions of discipline, the Board has a greater degree of discretion with regard to the ultimate result. [*Grievance Administrator v Eric S. Handy*, 95-51-GA; 95-89-GA (ADB 1996), citing *Grievance Administrator v August*, 438 Mich 296, 304; 475 NW2d 256 (1991). See also *Grievance Administrator v Ivan D. Brown*, 97-136-GA (ADB 1998); *Grievance Administrator v Diane E. Xagoraris*, 99-105-GA (ADB 2000).]

While the Board is not persuaded that revocation of respondent's license is appropriate in this case, we do agree with the Grievance Administrator that the discipline ordered by the panel should be increased and that respondent's license should be suspended for a sufficient period of time to trigger the reinstatement requirements of MCR 9.123(B) and MCR 9.124.

First, there is precedent for this level of discipline from the Supreme Court in a case involving a lawyer's failure to pay federal and state taxes withheld from employee wages. In *Grievance Administrator v Thomas A. Nickels*, 422 Mich 254; 373 NW2d 528 (1985), the Supreme Court considered the appropriate discipline for an attorney who agreed to pay an office employee $140.00 per week under a federal work program. He told the employee that he would pay her $100.00 in cash at the end of each week and would retain $40 per week for withholding taxes and social security payments. A hearing panel found that respondent never remitted funds to the appropriate taxing authorities and refused to reimburse any portion of the monies withheld during his secretary's employment. The hearing panel and the Attorney Discipline Board rejected respondent's claim that the matter was nothing more than a simple wage dispute beyond the purview of the Code of Professional Responsibility then in effect. Respondent Nickels was suspended for 120 days which was, under the General Court Rules existing at the time, the minimum period of suspension requiring reinstatement proceedings before a panel. On appeal, the Court forcefully reaffirmed the principle that attorney misconduct may be found outside of an attorney-client relationship and, indeed, may include activities unrelated to the practice of law.[3]

Noting that the focus of the Grievance Administrator's complaint was respondent's alleged misrepresentation and fraud, the Court found in *Nickels* that respondent's actions "evidenced a

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[3] "The rules of professional conduct adopted by this Court evidence a commitment to high standards and behavior beyond reproach. We cannot stress too strongly the responsibility of members of the Bar to carry out their activities, both public and private, with circumspection." (*Nickels*, 422 Mich 254, 259, citing *Matter of Grimes*, 414 Mich 483; 326 NW2d 380 (1982).)

pattern of conduct which brought disrepute upon himself as a member of the Bar and brought disrepute upon his profession." The Court concluded,

> After review of the record, we believe that respondent's representations and the retention of funds constituted misconduct. Furthermore, in light of respondent's prior reprimands, we are satisfied that a 120 day suspension was justified under the facts of this case. [*Grievance Administrator v Thomas A. Nickels*, 422 Mich 254, 261; 373 NW2d 528 (1985).][4]

Although the *Nickels* opinion was not cited to the hearing panel or the Board by either party in this case, the opinion has been cited as precedent by the Grievance Administrator in at least one other case involving a lawyer's failure to remit withholding taxes. In *Grievance Administrator v James P. Majkowski*, 06-173-GA (Hearing Panel Order 3/15/07), a hearing panel ordered a suspension of 180 days, noting the Grievance Administrator's argument that the panel should look to *Nickels, supra*, for guidance. (In *Majkowski*, the respondent failed to withhold employment taxes from his secretary's wages for approximately 12 years and falsely represented to her that withholding taxes had been paid to the government.)

While *Nickels* provides guidance, we recognize, as the Court itself did in *Nickels*, that attorney misconduct cases are often not comparable beyond a limited and superficial extent and that "cases of this type generally must stand on their own facts." *Nickels, supra* at 259, citing *State Bar Grievance Administrator v Del Rio*, 407 Mich 336, 350; 285 NW2d 277(1979). Apart from Michigan precedent, the fundamental question before the Board is whether or not automatic reinstatement, without further scrutiny by a hearing panel in proceedings conducted under MCR 9.124, would be appropriate in this case.

Under MCR 9.123(A), an attorney whose license in Michigan is suspended for 179 days or less may be automatically reinstated by filing an appropriate affidavit and satisfying any conditions which may have been imposed in the discipline order. In this case, the hearing panel included a condition that respondent may not file an affidavit for automatic reinstatement until he has provided a written report from a psychiatrist "reflecting an evaluation of respondent's physical and mental health as those conditions may bear upon respondent's fitness to engage in the practice of law."

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[4] At the time of his 120 day suspension in 1985, respondent Nickels' prior discipline record consisted of reprimands in 1980 and 1982. Respondent Stein's prior misconduct consists of admonishments issued by the Attorney Grievance Commission in 1992 and 1994 and a reprimand (by consent) in 1996.

Based upon our review of the whole record, we understand and appreciate the panel's desire that respondent provide some assurance that he is mentally and physically able to engage in the active practice of law. However, the panel's order, as written, provides no mechanism by which the Grievance Administrator or a hearing panel could assess or, if necessary, question such an evaluation. Moreover, in a reinstatement proceeding under in MCR 9.124, a suspended lawyer seeking reinstatement must establish more than just physical or mental fitness - he or she must establish, by clear and convincing evidence, all of the criteria in MCR 9.123(B), including "a proper understanding of and attitude toward the standards that are imposed on members of the Bar" (MCR 9.123(B)(6)) and a showing that he or she "can safely be recommended to the public, the courts, and the legal profession as a person fit to be consulted by others and to represent them and otherwise act in matters of trust and confidence . . ." (MCR 9.123(B)(7))

We believe that respondent's failure to remit withholding taxes, coupled with the issuance of bad checks to his employee, is sufficient grounds to increase discipline to a suspension of 180 days. We note that all of the misconduct found by the hearing panel in this case, taken as a whole, establishes a pattern of personal, professional and financial irresponsibility. We are not able to affirm a suspension order in this case that does not require respondent to come before a hearing panel to establish his mental, physical and ethical fitness before he is again allowed to hold himself out as one who is proclaimed by our Supreme Court as a person "fit to be entrusted with professional and judicial matters." MCR 9.103(A).

Conclusion

For all of these reasons, we increase discipline in this case to a suspension of 180 days and until respondent has established his fitness and obtained an order of reinstatement under the procedure described in MCR 9.123(B) and MCR 9.124. The hearing panel's order of restitution is affirmed and the condition requiring presentation of a physician's report is vacated.

Board Members William J. Danhof; William L. Matthews; Andrea L. Solak; Carl E. Ver Beek; Craig H. Lubben; James M. Cameron, Jr.; and Sylvia P. Whitmer, Ph.D., concur in this decision.

Board Members Thomas G. Kienbaum and Rosalind E. Griffin, M.D. were absent and did not participate.