STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellee,

v

Ralph E. Musilli, P 18132 ,

Respondent/Appellant,

Case No. 98-216-GA.

Decided: September 29, 2000

BOARD OPINION

Tri-County Hearing Panel #103 found that respondent committed misconduct by failing to ascertain the trial date after substituting into a civil case, but found that respondent's "neglect and/or lack of diligence" was "of a slight degree," and entered an order finding misconduct but imposing no discipline. The Grievance Administrator has petitioned for review seeking the imposition of a reprimand. We agree that an order imposing no discipline is not appropriate, and a reprimand is the appropriate level of discipline in this matter.

Respondent was retained by a defendant in litigation pending in Oakland County Circuit Court to represent her following the withdrawal of her former counsel. The case had been filed on September 23, 1994. In July, 1995, the court set March 21, 1996 as the trial date. Respondent filed a substitution of attorneys on October 3, 1995. Respondent attended two pretrial conferences in front of the trial judge, F.X. O'Brien, and was on his way to attend facilitative mediation in front of former circuit judge Robert Webster on March 7, 1996, when he encountered a family emergency. Respondent's partner, Walter Baumgardner, attended the facilitation instead. Respondent failed to appear for trial on March 21, 1996, and a default was entered. After an unsuccessful motion to set aside the default, the court entered a default judgment against respondent's client in the amount of $72, 391.38. Respondent appealed, arguing that the failure to set aside the default was an abuse of discretion, but the Court of Appeals disagreed. Ultimately, respondent's client paid $56,000 to settle with the plaintiff.

Some witnesses testified that the trial date was discussed in the presence of respondent during the pretrial conferences, but respondent does not recall such discussions. His partner cannot exclude the possibility that it was mentioned at the facilitation. The panel found, however, that there was no credible evidence that respondent had actual knowledge that the trial date had been set. The panel's findings of fact, including this one regarding the respondent's lack of knowledge of the trial

date, are not challenged by the Administrator on review. In fact, we are not presented with conflicting interpretations of material evidence in this review proceeding. Rather, the issue in this case is the appropriate level of discipline for respondent's failure to know of the trial date.

I.

Framework for Deciding Level of Discipline under the ABA Standards for Imposing Lawyer Sanctions and *Grievance Administrator v Lopatin*

In Grievance Administrator v Lopatin, 462 Mich 235; 612 NW2d 120 (2000), the Supreme Court directed the Board and hearing panels to employ the American Bar Association (ABA) Standards for Imposing Lawyer Sanctions in determining the appropriate level of discipline. In Lopatin, the Court summarized the Standards' theoretical framework for deciding the level of discipline to be imposed after a finding of misconduct.

> The inquiry begins with three questions:
>
> (1) What ethical duty did the lawyer violate? (A duty to a client, the public, the legal system or the profession?)
>
> (2) What was the lawyer's mental state? (Did the lawyer act intentionally, knowingly, or negligently?)
>
> (3) What was the extent of the actual or potential injury caused by the lawyer's conduct? (Was there a serious or potentially serious injury?)
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> Lopatin, 462 Mich at 239-240 (quoting ABA Standards, p 5).

Next, the hearing panel examines recommended sanctions based the answers to these questions. Lopatin, 462 Mich at 240; ABA Sanctions, pp 3, 4-5.

Then, aggravating and mitigating factors are considered. Id.

And, in Michigan, the final step of the process involves a consideration of other factors, if any, which may make the results of the foregoing analytical process inappropriate for some articulated reason. As the Court explained in directing this Board and the panel's to follow the Standards:

> We caution the ADB and hearing panels that our directive to follow the ABA standards is not an instruction to abdicate their responsibility to exercise independent judgment. Where, for articulated reasons, the ADB or a hearing panel determines that the ABA standards do not adequately consider the effects of certain misconduct, do not accurately address the aggravating or mitigating circumstances of a particular case, or do not comport with the precedent of this Court or the ADB, it is incumbent on the ADB or the hearing panel to arrive at, and explain the basis for, a sanction or result that reflects this conclusion. [Lopatin, 462 Mich at 248 n 13.]

II.
Application of the Standards & *Lopatin*

A. Duties Violated, Lawyer's Mental State & Injury or Potential Injury

The ethical duties at issue in this case are respondent's duties to represent his client with reasonable diligence (MRPC 1.3), with adequate preparation (MRPC 1.1(b)), and without neglect (MRPC 1.1(c)). The hearing panel's report aptly describes some of respondent's particular duties upon accepting the representation and appearing as counsel for the defendant:

> [T]he panel finds that the respondent did exhibit some lack of diligence in not specifically reviewing the court file or doing something more to find out if there was a trial date pending at the time he substituted in for the prior attorney. The Panel further finds that when he received the box of documents from his client and found no Scheduling Order with a trial date within that box as he testified, it would be incumbent upon him to at least make serious inquiry as to whether there was a pending trial date. Even if he did not feel it was necessary to review the actual court file in Oakland County Circuit Court, it did not appear that he inquired from the other counsel as to what the pending trial date would be or if, in fact, there was a standing trial date. The panel also concludes from the testimony that this was a very difficult client for any attorney and that Mr. Musilli was at least the third or fourth attorney representing [the client]. On the other hand the panel concludes that it was rather surprising that the trial judge did not see fit to grant a Motion to Set Aside the Default and perhaps levy some costs against [the client] and/or her attorneys, but instead chose to refuse to set aside the Default. [Hearing Panel report on misconduct, pp 8-9.]

The mental state of respondent is that of negligence. It is discussed more fully below in connection with the analysis of the panel's reasons for not applying Standard 4.43's recommendation for reprimand (Section II, D – Other Considerations Regarding the Level of Discipline). Injury and potential injury are also discussed below, in Section II, D. The relative significance of these three factors (duties violated, mental state, and injury or potential injury) may vary depending upon the specific facts of a case. In this case, the panel's analysis, and respondent's argument on review, both emphasized the second and third factors.

B. Applicable ABA Standard

The hearing panel identified two potentially applicable standards, and explained some of its reasons for concluding that a sanction less than reprimand would be consistent with the Standards:

> The Grievance Administrator has recommended the imposition of a reprimand. Respondent argues that this case is indeed the rare case in which an order of discipline imposing "no discipline" would be appropriate. The concept of an order of discipline imposing "no discipline" was explicated by the Supreme Court in its

1997 opinion in Grievance Administrator v Deutch, 455 Mich 149 (1997). The Grievance Administrator has argued the Grievance Commission's position that the "no discipline" option is available only in cases instituted by the filing of a judgment of conviction under MCR 9.120. The Administrator concedes, however, that the current controlling authority on this issue is found in the Attorney Discipline Board's opinion in Grievance Administrator v William R. McFadden, Case 95-200-GA (Board 1998), lv. den. 459 Mich 1232 (1999).

We conclude, therefore, that we are not precluded as a matter of law from entering an order of discipline which effectively imposes "no discipline." We then addressed the issue of whether or not such an order would be appropriate in this case.

The Grievance Administrator's counsel has cited the applicability of Standard 4.43 of the ABA Standards for Imposing Lawyer Sanctions in support of her request for a reprimand. That Standard states:

> 4.[4]3. Reprimand is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes injury or potential injury to a client.

However, the ABA Standards themselves recognize that a lawyer's negligence may result in a sanction lower than reprimand. Specifically, Standard 4.44 states:

> Admonition is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes little or no actual or potential injury to a client.

This panel understands that it does not have the power to admonish an attorney for professional misconduct. That authority is reserved for the Attorney Grievance Commission. See MCR 9.114(A)(2). However, for purposes of considering the appropriate level of discipline within the theoretical framework provided by the ABA Standards, the term "admonition" used in the ABA Standards and the "no discipline" option which appears to be unique to Michigan are roughly analogous. ABA Standard 2.6 defines admonition as "a form of non-public discipline which declares the conduct of the lawyer improper, but does not limit the lawyer's right to practice." A "no discipline" order under Deutch is a public declaration that the lawyer's conduct was improper but does not limit the lawyer's right to practice. [Report on Discipline, pp 1-2.]

The panel's analysis is not unreasonable. However, for reasons explained below, we must reject the analogy between "no discipline" and an admonishment.

This case also points out the very real possibility that a given case may fall under more than one standard. It may be impossible or inefficient or unwise for any sanction standards to attempt to eradicate such overlap. The Standards are designed to promote consistency by prompting, in every case, the analysis of certain important factors which may then be compared to other cases so as to establish a rough continuum along which to place or categorize ethics violations. However, the Standards recognize that some cases will be difficult to categorize. Given the infinite number of fact

patterns which could occur, it is simply not possible to articulate in advance all of the factors which may make one level of discipline more appropriate than another in a particular case. On the other hand, the framework adopted by the Court should give particular focus to the hearing on discipline, and by doing so, ensure that the record contains information helpful to the panels and the Board in drawing lines even when the result isn't clear cut under the Standards or Michigan precedent.

C. Aggravating and Mitigating Factors

The Administrator introduced two admonitions, one from January, 1993, and another in August, 1994. These are properly considered under MCR 9.115(J)(3) and ABA Standard 9.22(a). The Administrator also argued that respondent had substantial experience in the practice of law. ABA Standard 9.22(i). Respondent argued, on the other hand, that two admonitions in 31 years of practice (which respondent testified was relatively high volume) should be considered favorably. The Administrator conceded that respondent does not have an extensive disciplinary history, and that this was a factor in the decision to request a reprimand.

D. Other Considerations Regarding the Level of Discipline

In the final step of the process of determining the appropriate discipline, panels and the Board must consider whether the ABA Standards have, in their judgment, led to an appropriate recommended level of discipline in light of factors such as Michigan precedent, and whether the Standards adequately address the effects of the misconduct or the aggravating and/or mitigating circumstances. Lopatin, 462 Mich at 248 n 13.

Although the panel's decision in this case preceded Lopatin, the panel did consider the Standards, and chose to impose no discipline rather than a reprimand.

The panel explained its reasons for imposing no discipline:

> We decline to follow the suggested guideline in ABA Standard 4.43 for two reasons. First, there is insufficient evidence in the record concerning the degree of injury or potential injury to the client. Secondly, the standard necessarily implies a degree of discretion depending upon the facts of the individual case in light of all of the aggravating and mitigating circumstances. We choose to exercise that discretion.
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> At the close of the discipline hearing on February 25th, the panel chairman summarized the panel's reason's for deciding to impose an order of "no discipline" and those reasons are re-stated as follows:
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> Although the panel found that there was a lapse of judgment to a slight degree, we found that there was no evidence of malice or any serious lapse of judgment on the part of Mr. Musilli. We felt that there was some confusion regarding the scheduling order. This lapse of judgment was of a minor degree. We specifically found that there was no credible evidence that Mr. Musilli had actual

knowledge that the trial date had been set.

> The panel considered respondent's 31 years of practice with two confidential admonishments, both more than five years ago. We find that there was no evidence of actual economic harm to the complainant who, in fact, was not called as a witness in this matter. There was no evidence of a breakdown in the attorney-client relationship. Finally, the panel considered respondent's candor and sincerity in his dealings with his client as well as his candor and cooperation during the course of this investigation and prosecution.
>
> So there is no misunderstanding, the hearing panel has carefully considered the Attorney Discipline Board's admonition in GA v William R. McFadden that the "no discipline" option should be issued only in the rare case. We believe that this is such a case. [Report on Discipline, pp 2-3.]

The panel was correct in stating that the Standards did not compel them to impose a certain type of discipline. That statement remains true after Lopatin. The Supreme Court has made it clear that hearing panels and the Board may, indeed must, exercise independent judgment as to the appropriate level of discipline. 462 Mich at 248 n 13. The ABA Standards are not to be mechanistically applied in an attempt to achieve uniform sanctions for a given type of misconduct. Rather, the Court has said that:

> The ABA Standards will guide hearing panels and the ADB in imposing a level of discipline that takes into account the unique circumstances of the individual case, but still falls within broad constraints designed to ensure consistency. [Lopatin, 462 Mich at 246.]

However, the Court has also said that panels and the Board must articulate reasons supporting a conclusion that a sanction other than that recommended by the Standards should be imposed. Lopatin, 462 Mich at 248 n 13. Moreover, the Court has reaffirmed the Board's traditional overview function of ensuring "'continuity and consistency in discipline imposed.'" Lopatin, 462 Mich at 245. For the reasons explained more fully below, we conclude that a reprimand is required rather than an order imposing no discipline.

1. The Availability of the "No Discipline" Option

Although the panel's reasoning in applying the Standards, and imposing no discipline instead of a reprimand, is not unreasonable, it does not take into account the exceptional nature of an order finding misconduct but imposing no discipline. An order finding misconduct and imposing no discipline will rarely be entered. Grievance Administrator v Bowman, 462 Mich 582, 589 (2000), citing Grievance Administrator v McFadden, No. 95-200-GA (ADB 1998), lv den 459 Mich 1232 (1998). A "no discipline" order is not a milder, gentler form of reprimand. For an order finding misconduct but imposing no discipline to be appropriate, the misconduct would have to be so highly

technical, the mitigation so overwhelming, or the presence of other special circumstances so compelling that the imposition of a reprimand would be practically unfair. A reprimand need not always heap the scorn of the profession upon a practitioner. Since a reprimand *can* simply amount to a declaration that a Rule was violated – essentially reiterating what was already said in a finding of misconduct – it will be an exceedingly rare case in which a reprimand should not be imposed upon a finding of misconduct. Admonitions are not so sparingly employed. Discipline agencies may impose them instead of a public reprimand for any number of reasons, some of which may have been worthy of consideration here. But, the fact that it appears to a panel, or even to this Board, based on what is in the record, that admonition would have been appropriate does not justify entry of an order of no discipline. Admonitions and reprimands are in essence both declarations by the profession that a violation of the Rules of Professional Conduct has occurred.[1] A reprimand may convey sympathy or strong condemnation depending on the circumstances. However, an order imposing no discipline sends an odd and mixed message that misconduct has occurred, but that discipline – even a simple declaration affirming the purpose of the rule – is not warranted. Therefore, "no discipline" orders should be reserved for situations in which it would be utterly pointless to impose professional discipline notwithstanding that misconduct exists under the letter of the law. We presume that through the exercise of sound prosecutorial discretion few of these cases will reach hearing panels. Accordingly, for all of the foregoing reasons, we conclude that Michigan's "no discipline" option is not analogous to an admonition for purposes of applying the ABA Standards.

2. Respondent's State of Mind

Although state of mind and injury or potential injury are discussed earlier in the process, in light of the panel's emphasis we consider them here as well to determine whether there is some significant circumstance which may affect application of the Standards.

As noted above, the panel "found that there was no evidence of malice or any serious lapse of judgment" on the part of respondent. Moreover, the panel noted "confusion regarding the scheduling order," and insufficient evidence from which to conclude that respondent had actual knowledge of the trial date. The Administrator does not challenge these findings, but argues that respondent should have known of the trial date, and that his failure to ascertain the scheduled date constitutes misconduct warranting a reprimand.

Respondent obtained his predecessor's file via his client a few weeks before the initial pretrial conference in October 1995 (7/27/99 Tr, p 153). Respondent testified that he did not see a scheduling order (or other notice of the trial date) in the file. He does not recall discussion of the

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[1] An admonition is confidential, a reprimand is not. As this panel recognized, hearing panels are not empowered to admonish a respondent in Michigan.

trial date at the pretrial conferences before Judge O'Brien. At the time he entered the case, he knew that discovery was closed and that mediation was set for November, 1995. Another attorney handled mediation, and his partner attended the facilitation before Judge Webster. We accept the panel's finding that respondent lacked actual knowledge of the trial date, but do not find that this supports the imposition of no discipline.

Based on respondent's testimony regarding his knowledge of pretrial civil procedure in Oakland County, it is evident that he knew, as he should have, that a trial date had been set. He did not, however, know what the date was. Notwithstanding this, respondent did not review the court file, review the docket sheet, inquire of opposing counsel or inquire of court personnel as to the trial date. Although predecessor counsel discussed the case with him, respondent did not bring up the trial date. Respondent testified that he has never had a case go to trial on the date initially scheduled, and that in his experience, a certain type of trial notice always preceded trial. Also, respondent points out that his partner, while at the court building for facilitation, checked with Judge O'Brien's clerk "about a *new* trial date" (respondent's brief on review; emphasis added). Respondent's partner testified that the clerk told him "in essence . . . 'you will be hearing from us and getting a new scheduling order'" (7/27/99 Tr, p 125). Still, apparently, no thought was given to asking about the then-operative trial date.

We also accept the panel's assessment of respondent's mental state. Without question this case does not involve a deliberate act to harm the client. In fact, the panel seems to have decided that respondent did not knowingly disregard his client's interests. But, the panel also correctly concluded that respondent's "lapse in judgment" constituted a violation of MRPC 1.1(b) & (c) and 1.3. We conclude that respondent's failure to ascertain the trial date before or within a reasonable time after undertaking the representation is not the type of misconduct for which no discipline may be imposed.

3. Injury and Potential Injury

Injury or potential injury resulting from misconduct may be considered with respect to the level of discipline imposed even though harm to a person or entity is not an element of misconduct. In this matter, it may well be that the merits of the client's case, or any number of other factors which could intervene, would ultimately have produced a judgment against her in the amount she paid in settlement or some greater figure. Respondent thus may have caused no financial injury to the client.[2] We are presented with no evidence to contradict the panel's finding that actual economic harm to the client has not been adequately established. However, economic harm, or harm to a client, does not exhaust the definition of "injury." See ABA Standards, p 7 ("'injury' is harm to a

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[2] From respondent's testimony it appears that he bore the expense of efforts to set aside the default.

client, the public, the legal system or the profession which results from a lawyer's misconduct . . .").

Through respondent's omission, his client was deprived of her day in court, a scheduled trial did not take place, and proceedings to set aside the default were required. The panel's report also suggests that the default should have been set aside by the trial judge. Perhaps a more just sanction could have been imposed by the judge, but refusal to set aside a default, and the attendant consequences, including possibly placing one's client in a poorer negotiating posture, were not unforeseeable. We conclude that there was at least slight injury and there was clearly potential injury which make a reprimand appropriate. Compare Grievance Administrator v David H. Fried, 94-223-GA (ADB 1997) (misconduct found although financial harm not proven; reprimand imposed by consent after remand).

4. Michigan Precedent

Although some isolated instances of neglect or lack of diligence may result in no action or an admonition by the Attorney Grievance Commission, there is ample authority in Michigan for the proposition that a reprimand is generally appropriate for an instance of neglect or lack of diligence. See, e.g., Grievance Administrator v Alvin McChester, Nos. 93-132-GA; 93-168-FA (ADB 1994) ("Considered separately, the panel's decisions to impose a reprimand for the neglect and non-communication charged in 93-132-GA, Count I, [and] a reprimand for similar misconduct charged in Count II . . . would appear to be appropriate, absent aggravating or mitigating factors."); Grievance Administrator v Elliot B. Allen, Nos. 92-219-GA; 92-237-FA (ADB 1994) (citing McChester and the Standards); Grievance Administrator v C. Frederick Robinson, Nos. DP-113/82; 206/82 (ADB 1984); Grievance Administrator v Sandra Schultz, ADB 149-89 (1991) (neglect matter increased from reprimand to 30-day suspension due to failure to answer R/I and repetition of misconduct); Grievance Administrator v Clinton Lovett, No DP 51/83 (ADB 1984); Grievance Administrator v Donald W. Teichman, Jr, No. 92-31-GA (ADB 1993) (failure to file an appearance, appear for trial, and communicate with client); Grievance Administrator v Ben D. Tubergen, Nos. 92-235-GA; 92-255-FA (ADB 1993) ("the ABA standards suggest that a reprimand may be generally appropriate when a lawyer does not act with reasonable diligence when representing a client").

III.
Conclusion

As we said in McFadden:

> Even a competent and ethical attorney may suffer an uncharacteristic lapse and find himself or herself in violation of the Rules of Professional Conduct. When such an attorney is reprimanded, it does not necessarily brand him or her as "unethical," nor

> does it necessarily connote an intentional violation of the rules in that instance. But a reprimand does serve the important function of marking the boundaries of ethical conduct for that attorney as well as others.

The imposition of no discipline for established misconduct is an exceedingly rare event. For all of the foregoing reasons, we conclude that a reprimand is the appropriate discipline for the misconduct established in this case. Accordingly, we modify the panel's order and impose a reprimand.

Board Members Kenneth L. Lewis, Wallace D. Riley, Nancy A. Wonch, Grant Gruel, Diether H. Haenicke, Ronald L. Steffens, and Theodore J. St. Antoine concurred in this decision.

Board Members Michael R. Kramer and C.H. Dudley, M.D., were absent and did not participate.