STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellant,

v

Harvey J. Zameck, P 22687 ,

Respondent/Appellee,

Case No. 07-34-GA

Decided: July 28, 2008

Appearances:

Kimberly L. Uhuru, for Grievance Administrator, Petitioner/Appellant
Harvey J. Zameck, Respondent/Appellee

BOARD OPINION

The Grievance Administrator petitioned for review of the order of Tri-County Hearing Panel #60 issued November 6, 2007. The panel ordered the suspension of respondent's license to practice law for a 120 day period to be served consecutive to a three year suspension that has been in effect since August 24, 2005. The Attorney Discipline Board has conducted review proceedings in accordance with MCR 9.118, including review of the record before the hearing panel and consideration of the briefs and arguments submitted by the parties. For the reasons articulated by the Grievance Administrator, and discussed further below, the Board is persuaded that respondent's prior disciplinary history is a sufficiently aggravating factor in this case that revocation of respondent's license is warranted.

Respondent's misconduct in this case, established by his default for failure to answer the formal complaint, includes his failure to enter a Qualified Domestic Relations Order on behalf of his client in a divorce case and, more seriously, his false statements to the client eight years later that the lack of such an order was attributable to a court error and not his own inaction. Respondent was also found to have failed to respond to a lawful demand for information from the Attorney Grievance

Commission, in violation of MRPC 8.2(A)(2), by failing to appear for a sworn statement at the office of the Attorney Grievance Commission pursuant to a subpoena requesting that he appear with certain documents.

When the hearing panel convened on September 7, 2007 for the separate hearing on discipline required by MCR 9.115(J)(2), respondent was suspended from the practice of law and was, in fact, then subject to three separate suspension orders - a 30 day suspension effective February 28, 2005 in *Grievance Administrator v Harvey Zameck*, Case No. 03-174-GA; a 180 day suspension in *Grievance Administrator v Harvey Zameck*, Case No. 03-115-GA; and a three year suspension (by consent) in *Grievance Administrator v Harvey Zameck*, Case No. 05-30-GA. In reaching its decision to impose a suspension of 120 days to run consecutive to the three year suspension then in effect, the issues of whether respondent should be suspended for a sufficient period of time to trigger reinstatement proceedings under MCR 9.124 (180 days) or of sufficient length to require respondent's recertification by the Board of Law Examiners (3 years) were not before the panel. Those reinstatement requirements had been established, indeed agreed to by respondent, with the entry of the three year suspension (by consent) in Case No. 05-30-GA. Rather, the question before the hearing panel was how much additional time should elapse, after August 23, 2008 before respondent should be eligible to petition for reinstatement.

The Grievance Administrator has presented two arguments for the imposition of increased discipline. Both are meritorious. First, it is argued that under precedent established in prior opinions of the Attorney Discipline Board, a suspension of at least 180 days, the minimum suspension that triggers the reinstatement process described in MCR 9.124, is appropriate when a lawyer has knowingly deceived his or her client about the status of the client's case. For this proposition, the Administrator has cited prior Board opinions including *Grievance Administrator v Ann Beisch*, DP 122/85 (ADB 1988) [respondent's false statement to a client regarding the status of his criminal appeal required reinstatement proceedings]; *Grievance Administrator v Gary Wojnar*, Case No. 91-174-GA (ADB 1994) [suspension increased to 180 days for falsely telling a client that an appeal had been filed]; and *Grievance Administrator v Perry T. Christy*, Case No. 94-125-GA (ADB 1996) [one year suspension for falsely telling a client that his case was still pending when, in fact, it had been dismissed].

As noted above, it would not be necessary to increase discipline in this case to 180 days if the sole purpose was to ensure that respondent will have to undergo further scrutiny in reinstatement proceedings under MCR 9.124 before he is allowed to regain his license. Nevertheless, to the extent that uniformity among cases involving similar misconduct is recognized as a legitimate goal of review proceeding before the Board, we would be inclined, absent a showing of mitigation that does not appear to be present in this case, to increase discipline to a suspension of at least 180 days. However, it is the Grievance Administrator's second argument, based on the aggravating effect of respondent's prior misconduct, that prompts this decision to increase discipline.

In its report on discipline, the hearing panel expressed its satisfaction with the analysis presented by the Grievance Administrator's counsel at the sanction hearing that, absent aggravating or mitigating circumstances, respondent's lack of diligence on behalf of his client, his lack of candor to his client and the violation of his duty to the legal profession to cooperate with the Grievance Administrator's investigation would generally warrant suspension under Standards 4.42(a), 4.62 and 7.2 of the American Bar Association's Standards for Imposing Lawyer Sanctions. However, the panel did not accept the Administrator's argument that respondent's prior history of misconduct constitutes an aggravating factor of sufficient magnitude to warrant revocation. We disagree with the panel's conclusion on that point and therefore exercise our "overview function" by increasing discipline to revocation.

The hearing panel's report on discipline contains this summary of prior misconduct:

AGC File No.	**Discipline**	**Effective Date**
1557/00	Admonishment	10/29/01
2377/03	Admonishment	11/01/04
3114/03	Admonishment	09/24/04
2992/03	Admonishment	06/27/05

ADB File No.	**Discipline**	**Effective Date**
91-233-GA	Reprimand	11/06/93
98-114-GA	Suspension (90 Days)	07/17/00
03-115-GA	Suspension (180 Days)	03/02/05
03-174-GA	Suspension (30 Days)	02/28/05
05-30-GA	Suspension (Three Years) (By Consent)	08/23/05

Prior disciplinary offense are recognized in the ABA Standards as a factor which may be considered in aggravation when determining the appropriate level of discipline. Standard 9.22(a). In a 2004 memorandum opinion, the Board recognized that there are some aggravating factors which will generally warrant greater consideration than others. *Grievance Administrator v Karega*, Case No. 00-192-GA (ADB 2004). By way of example, the Board noted in *Karega* that the presence of prior disciplinary offenses [Standard 9.22(A)] will generally be afforded greater weight than an attorney's substantial experience in the practice of law [Standard 9.22(i)]. More recently, the Board increased discipline from a one year suspension to revocation in a case involving an attorney's misappropriation of funds held on behalf of a third party. *Grievance Administrator v Rodney Watts*, Case No. 05-151-GA (ADB 2007). Prominent among the aggravating factors discussed by the Board in that opinion was respondent's "abysmal" record of prior misconduct which included 10 admonishments between 1992 and 1996; separate orders of reprimand in 1980 and 1993; a suspension of 30 days in 1997; and suspensions of 60 days and 90 days (each followed by a probationary period) in 2005.

By comparison, respondent Zameck's prior misconduct of four admonishments and five public orders of discipline, while slightly less extensive than in *Watts*, was accumulated in a somewhat shorter period of time. We note, for example, the respondent received a confidential admonishment and three public orders of suspension in the year 2005 alone.

While we understand, and are sympathetic to, the hearing panel's observation that respondent's four admonishments and four of his orders of discipline were considered by the Attorney Grievance Commission and another hearing panel in 2005 when they approved a stipulated proposal for a three year suspension, that approval of respondent's consent discipline in 2005 did not wipe his disciplinary slate clean. If anything, respondent's subsequent failure to appear for a sworn statement at the Attorney Grievance Commission in October 2006 and his failure to answer the formal complaint served in this case in February 2007 raise additional concerns.

Michigan Court Rule 9.103 [Standards of conduct for attorneys] states, among the general principals enumerated in MCR 9.103(A):

> It is the duty of every attorney to conduct himself or herself at all times in conformity with standards imposed on members of the bar as a condition of the privilege to practice law. Theses standards include, but are not limited to the rules of professional responsibility and the rules of judicial conduct that are adopted by the Supreme Court.

Despite his prior experience with the discipline process as the result of misconduct which included multiple instances of failing to timely respond to requests for investigation, respondent's conduct in this case demonstrates that he is unwilling or unable to conform his conduct to the standards expected of all Michigan lawyers.

It is axiomatic that discipline for misconduct is not intended as punishment for wrongdoing, but is for the protection of the public, the courts and the legal profession. MCR 9.105. Of these duties, the duty to protect the public ranks as a first among equals. "Regardless of our feelings of sympathy for a disbarred attorney, our paramount concern must always be to safeguard the public." *In the Matter of Trombley*, 389 Mich 377, 382; 247 NW2d 873 (1976).

As in *Grievance Administrator v Watts*, *supra*, the Board must occasionally confront the inescapable reality that protection of the public may require the revocation of an individual's license to practice law when that individual has, over a period of time, engaged in multiple acts of misconduct without demonstrating a change of attitude toward his or her obligations to clients or duties to the legal system, or both. Sadly, that situation is presented here.

We therefore increase discipline to revocation of respondent's license to practice law. Because this decision is based to a great extent on respondent's continuing pattern of failing to provide timely responses to the Grievance Administrator's legitimate inquiries, the effective date of revocation will be October 9, 2006, the date of respondent's failure to appear for a sworn statement at the Attorney Grievance Commission in response to a subpoena, as described in Count Two of the complaint.

Board members Lori A. McAllister, William J. Danhof, Billy Ben Baumann, M.D., Hon. Richard F. Suhrheinrich, Andrea L. Solak and Eileen Lappin Weiser concur in this decision.

Separate concurrence of Board member William L. Matthews:

For the reasons stated by the majority, I concur in the decision to increase discipline in this case to revocation. However, I would follow the normal procedure for determining the effective date. The suspension order issued by the panel was entered November 6, 2007. Under MCR 9.115(J)(3), a panel's order is to take effect 21 days after it is served on the respondent unless there is good cause for the order to take effect on a different date. I would have ordered an effective date of revocation of November 28, 2007.

Board members George H. Lennon and Thomas G. Kienbaum dissenting:

We do not disagree with our colleagues on the majority that respondent's misrepresentations to his client warrant an increase in the suspension ordered by the panel to a suspension of greater than 180 days in light of Board precedent in similar cases nor do we disagree that substantial weight should be given to respondent's prior history of misconduct as an aggravating factor. Respondent's license was suspended in an unrelated matter for a period of three years effective August 24, 2005. Because a lawyer whose license has been revoked may not petition for a period of five years (MCR 9.123(D)(3)), a period of over seven years will have elapsed from the time of respondent's suspension on August 23, 2005 in Case No. 05-30-GA until the conclusion of the five year period of ineligibility to petition for reinstatement in this case. In the event that respondent does petition for reinstatement he will face a number of hurdles, not least of which is the requirement for recertification by the Board of Law Examiners under MCR 9.123(C). However, in that event, the public's interest will be served by the reinstatement and recertification procedures in MCR 9.123 and 9.124 and not by the passage of additional time. Increased discipline in this case to a suspension of one year to be served consecutive to the three year suspension imposed in Case No. 05-30-GA would, in our opinion, appropriately recognize the gravity of respondent's misconduct in this case.