STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellant,

v

John D. Baker, P 33120,

Respondent/Appellee,

Case No. 06-66-GA

Decided: September 11, 2007

Appearances:

Emily A. Downey, for the Grievance Administrator, Petitioner/Appellant
John T. Glaser, for the Respondent/Appellee

BOARD OPINION

The hearing panel ordered a reprimand in this case based upon its determination that respondent, John D. Baker, failed to act with reasonable diligence and promptness in his representation of a client in a personal injury matter; failed to keep his client reasonably informed about the status of the matter; failed to answer a request for investigation and failed to comply with a subpoena served by the Grievance Administrator. Respondent also failed to answer the formal complaint in this matter but did appear at the public hearing before the panel. The Grievance Administrator has petitioned the Attorney Discipline Board for review of that order. For the reasons discussed below, we cannot affirm a reprimand under the situation presented in this case where an attorney has committed misconduct in his representation of a client and has then ignored all subsequent efforts by the Grievance Administrator to investigate that conduct. Accordingly, we vacate the order of reprimand and enter an order suspending respondent's license to practice law in Michigan for 30 days.

Panel Proceedings

Respondent failed to answer the formal complaint filed by the Grievance Administrator on June 9, 2006. Respondent's default was filed July 13, 2006. At the public hearing conducted before Jackson County Hearing Panel #1 on September 19, 2006, respondent and his counsel acknowledged that no answer or other pleading had been filed and stated that there was no objection to the entry of the default. That default was deemed to constitute an admission to the charges of misconduct in the complaint.

Respondent was retained in July 2002 by Vicky Beaubien to represent her in a personal injury matter. (Ms. Beaubien suffered a broken tailbone and a broken arm when she was struck by an automobile on or about June 14, 2002.) Respondent advised Ms. Beaubien that it would take about six months to file the lawsuit and that the statute of limitations was three years. In August 2005, Ms. Beaubien sent respondent a certified letter advising that she had been unable to reach him for over 10 months, that he had cancelled several appointments and that she had learned that no action had been filed on her behalf although the three year period under the statute of limitations had expired. On November 29, 2005, Ms. Beaubien spoke to respondent who advised her that he had "messed up" her case by failing to file suit within three years of the accident. According to the formal complaint, Ms. Beaubien heard nothing further from respondent. The panel found that the conduct as alleged in Count One constituted violations of MCR 9.104(A)(1)-(4) and Michigan Rules of Professional Conduct 1.1(c); 1.2(a); 1.3; 1.14(a); 3.2 and 8.4(c).

In September 2005, Ms. Beaubien submitted a request for investigation to the Attorney Grievance Commission. On September 30, 2005, that request for investigation was served on respondent in accordance with MCR 9.112(C)(1)(b). Under MCR 9.113(A), a respondent served with a request for investigation must file a signed, written answer with the Grievance Administrator within 21 days. That rule further directs that the answer must fully and fairly disclose all the facts and circumstances pertaining to the alleged misconduct. Rule 9.113(B)(2) and Rule 9.104(7) specify that the failure of a respondent to answer within the time permitted is misconduct.

On October 26, 2005, the Grievance Administrator sent a Final Notice, with another copy of the request for investigation attached, advising respondent that his failure to answer by November

5, 2006 would subject him to formal charges of misconduct. When no answer was forthcoming, the Grievance Administrator next obtained a subpoena as provided under Rule 9.112(D). The subpoena, personally served on respondent on December 20, 2005, directed respondent to appear at the office of the Attorney Grievance Commission on January 13, 2006. Respondent failed to comply with that subpoena. The panel found that by his failure to answer the request for investigation or to honor the subpoena, respondent violated MCR 9.104(A)(1)-(4) and Michigan Rules of Professional Conduct 8.1(a)(2) and 8.4(a).

Respondent failed to answer the Grievance Administrator's Formal Complaint filed June 9, 2006. Thus, according to the record, when respondent appeared before the panel on September 19, 2006, he was responding for the first time to the matters contained in the request for investigation served almost one year earlier.

The hearing panel received testimony from the complainant and respondent, along with documentary evidence from respondent's file, to establish aggravating and mitigating factors during the sanction phase of the proceeding. Although the factual allegations in Count One of the Formal Complaint were limited to the period July 2002 (when respondent was retained by Vicky Beaubien) to November 2005 (when respondent admitted to Ms. Beaubien that he had "messed up" her case), a more complete picture was painted for the panel by this testimony. The panel learned, for example, that Ms. Beaubien had been advised of settlement offers of $3,000 and $6,000 from the other parties' insurance company, which she refused. In December 2005, respondent advised Ms. Beaubien that, although the statute of limitations had passed, he had managed to negotiate a settlement on her behalf in the amount of $6,000 from the automobile driver's insurance company. At that time, he offered to pay Ms. Beaubien an additional $19,000 of his own money, for a total recovery for her of $25,000.

The panel received into evidence a copy of the $6,000 check from Auto Owner's Insurance dated December 5, 2005, made payable to Vicky Beaubien and John D. Baker (Exhibit A); respondent's promissory note dated March 31, 2006 to Ms. Beaubien in the amount of $14,000 (Exhibit B); and a settlement agreement, also dated March 31, 2006, signed by Ms. Beaubien acknowledging receipt of $5,000 and the promissory note from respondent in settlement for any "claims of legal malpractice arising from the auto accident of June 13, 2002." (Exhibit C) In the section of the panel's report summarizing its findings and conclusions regarding misconduct, the

panel noted that "the testimony of complainant, Vicky Beaubien, and respondent, John D. Baker, while providing some background information did not materially contradict the factual allegations in the complaint. The panel finds therefore, that the charges of misconduct in the formal complaint have been established . . ." (Hearing Panel Report, January 15, 2007, p 3.)

We agree with this observation but we also note that the material from respondent's file regarding his settlement with the insurance company, and his further settlement of his client's potential malpractice claims, was apparently disclosed to the Grievance Administrator's counsel for the first time when it was offered into evidence at the hearing on October 3, 2006. These were, of course, documents that respondent was obligated to disclose to the Grievance Administrator in response to the request for investigation served September 30, 2005 and the Attorney Grievance Commission subpoena served December 20, 2005. By failing to answer these demands, respondent impeded the Grievance Administrator's ability to weigh and consider all of the evidence prior to the hearing.

With regard to this failure to cooperate, the hearing panel summarized respondent's testimony in its report:

> The panel received testimony from respondent, John D. Baker. He was first asked why he did not answer the grievance. In response, he mentioned his feeling that he and Ms. Beaubien could come to a satisfactory resolution as well as his embarrassment but he acknowledged that there was "no good justification for doing it." However, he did not recall receiving the subpoena which directed him to appear at the office of the Grievance Administrator. In that regard, he referred to "... some depression issues, some difficulties-I have lost both parents in the last three years. I have had some marital difficulty . . ." and ". . . I'm taking Wellbutrin and some other medication,..." but he again stated that he did not have a good explanation of why he did not answer. He also acknowledged receiving but failing to answer the formal complaint, referring to the same reasons. When asked about seeking treatment, respondent indicated that he had consulted professionals in the past, and was being treated for depression. He indicated that he was not aware that these problems affected any other clients.

Level of Discipline

The Attorney Discipline Board reviews a hearing panel's findings for proper evidentiary support but possesses a greater measure of discretion with regard to the appropriate level of discipline. *Grievance Administrator v August*, 438 Mich 296 (1991); *Matter of Daggs*, 411 Mich 304 (1981). In this case, the panel's findings of misconduct are not challenged by either party. The only issue before the Board is the Grievance Administrator's argument that a reprimand is insufficient discipline under the facts and circumstances of this case.

For the misconduct found in Count One, the hearing panel declined to adopt the Grievance Administrator's analysis under ABA Standard 4.42 which suggests that, absent aggravating or mitigating circumstances, suspension is generally appropriate when a lawyer "knowingly" fails to perform services for a client or the lawyer engages in a pattern of neglect with resulting injury or potential injury to a client. Instead, the panel found that Standard 4.43 is appropriate in this case. Under that Standard, 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 the client. There is evidentiary support in the record for that conclusion and we decline to disturb it. Rather, our decision to increase discipline in this case to a suspension is based upon respondent's complete failure to cooperate with the Grievance Administrator's investigation.

In its instructions in *Grievance Administrator v Lopatin*, 462 Mich 235, 612 NW2d 120 (2000), that the Board and hearing panels are to employ the American Bar Association's Standards for Imposing Lawyer Sanctions, our Supreme Court further explained,

> 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 248 n 13.1.]

We have previously held that failure to answer a request for investigation or to comply with an Attorney Grievance Commission subpoena is a violation of a duty owed to the legal profession and would therefore fall under ABA Standard 7.0 [Violations of Duties Owed to the Profession]. *GA v Mark L. Brown*, Case No. 0074-GA (ADB 2002). Under this Standard, absent aggravating or mitigating circumstances, suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed to the profession [Standard 7.2], while reprimand is generally appropriate when a lawyer negligently engages in such conduct [Standard 7.3]. In Michigan, however, failure to answer a request for investigation is the subject of a body of Board precedent that specifically addresses the appropriate sanction for that misconduct.

More than 20 years ago, in an opinion issued March 1987, the Attorney Discipline Board issued a pointed warning:

> The lawyer who ignores the duty imposed by court rule to answer requests for investigation and formal complaints does so at his or her own peril and, absent exceptional circumstances, an attorney may expect a discipline greater than a reprimand. [*Grievance Administrator v David A. Glenn*, DP 91/86 (ADB 1987) (increasing discipline from a reprimand to suspension of 30 days).

Citing the earlier case of *Schwartz v Kennedy*, DP 48/80 (ADB 1981), the Board stated in *Glenn*:

> Where even a technical violation of the discipline rules is established, discipline must follow . . . failure to fulfill this dual duty of responding is in itself substantive misconduct and should never be ignored by a hearing panel, or excused as a peccadillo unworthy of drawing discipline. *Kennedy*, *supra*.

In subsequent cases, the Board has explained that the *Glenn* opinion is not to be rigidly applied as grounds for a 30 days suspension if a hearing panel, in its discretion, finds mitigating circumstances. See for example, *Grievance Administrator v Lawrence A. Baumgartner*, ADB Case No. 91-91-GA; 91-108-FA (1992) (reprimand affirmed).

In a post-*Lopatin* case, the Board took the opportunity in *Grievance Administrator v Mark L. Brown*, *supra*, to discuss the continuing vitality of *Glenn* in light of the Court's direction to employ the ABA Standard.

Among the cases cited in that opinion was the matter of *Grievance Administrator v Walsh*, ADB Case No. 90-102-GA; 90-112-FA (1991) in which the Board held that suspension may be the

appropriate sanction when a lawyer fails to respond to a request for investigation even when evidence has been presented (as suggested in this case) that the respondent "froze" upon receipt of a request for investigation:

> In *Walsh*, the Board affirmed the hearing panel's decision to impose a suspension, rather than a reprimand, finding that there was no "evidence or exceptional or compelling circumstances directly related to the respondent's failure to answer the requests for investigation." (*Id*.) The Board, while sympathetic to the lawyer who "freezes" upon receipt of a requests for investigation, reiterated that:
>
> > The fact remains that just as every citizen has an unavoidable duty to respond to inquiries to the Internal Revenue Service, no matter how frightening or distasteful the prospect, the members of the bar have an unavoidable duty to answer requests for investigation [*Walsh*, *supra*, p 3.] . . .
>
> The question addressed by the Board in *Walsh* is the same question faced by the Board in this case, [*Brown*]: whether the mitigating factors presented by the respondent constitute "exceptional circumstances" such that the appropriate level of discipline is reprimand, rather than suspension. [*GA v Brown*, *supra*, p 11.]

Under the facts and circumstances presented in *Brown*, the Board ultimately concluded that a suspension was appropriate, rather than a reprimand as ordered by the panel.

In *Brown*, the Board noted that respondent failed to answer three requests for investigation and found it "most disturbing" that respondent failed to appear to give a sworn statement pursuant to a subpoena issued by the Attorney Grievance Commission. The Board noted that respondent Brown had expressed remorse, was candid with the panel and, unlike respondents in other cases cited in that opinion, had filed an answer to the formal complaint. Nevertheless, the Board concluded:

> Although the mitigating factors presented by Mr. Brown might seem to outweigh the aggravating factors presented by the Grievance Administrator, the Board is not simply charged with balancing the aggravating factors against the mitigating factors, instead, under *Glenn* and its progeny, the question to be addressed is whether there is sufficient evidence to support the panel's finding that this case presents "exceptional circumstances." We conclude that Mr. Brown has not offered sufficient evidence to support such a finding in this case. [*Grievance Administrator v Mark L. Brown*, *supra*, p 16.]

There are, of course, some differences between this case and the *Brown* matter cited above. Unlike Mr. Brown, respondent failed to answer one request for investigation, not three. On the other hand, unlike respondent, Mr. Brown did file an answer to the formal complaint. In both cases, it is indeed disturbing that a respondent would simply fail to honor a subpoena issued by the Attorney Grievance Commission. In the end, we cannot ignore respondent's total lack of cooperation with the Grievance Administrator and his staff during the period of almost one year that this matter was under investigation.

While the Board is not without sympathy for respondent in light of the personal and professional pressures recited to the panel and the Board, the Board cannot entirely accept the explanation offered by his counsel at the review proceeding that "he just kind of shut down." (Review hearing tr 5/17/07, p 13.) By his testimony to the panel, respondent established that, subsequent to the filing of Ms. Beaubien's request for investigation in September 2005, he was able to obtain a settlement of her claim with the driver's insurance company (albeit without Ms. Beaubien's knowledge or consent) and he was then able to negotiate a settlement with Ms. Beaubien for his own potential liability to her for professional malpractice. In short, this was a highly selective "shut-down" which affected only respondent's ability to communicate with the Attorney Grievance Commission while he attempted to salvage the situation with Ms. Beaubien and carried on his representation of other clients.

As our Supreme Court has stated:

> The process of investigating complaints depends to a great extent upon an individual attorney's cooperation. Without that cooperation, the Bar Association is deprived of information necessary to determine whether the lawyer should continue to be certified to the public as fit. Obviously, unless attorneys cooperate in the process, the system fails and public confidence in the legal profession is undermined. If the members of our profession do not take the process of internal discipline seriously, we cannot expect the public to do so and the very basis of our professionalism erodes. [*Anonymous v Attorney Grievance Commission*, 430 Mich 217, 249, 422 NW2d 648 (1988); citing *In Re Del H. Clark*, 99 Wash2d 702, 707-708, 663 P2d 1339 (1983).]

We therefore vacate the hearing panel's order of reprimand and enter an order suspending respondent's license to practice law in Michigan for 30 days, consistent with our prior opinions in *GA v Glenn* and *GA v Brown*, *supra*, and the cases cited therein.

Board members William P. Hampton, George H. Lennon, Hon. Richard F. Suhrheinrich, William J. Danhof, and William L. Matthews, C.P.A., concur in this decision.

Board members Lori A. McAllister, Rev. Ira Combs, Jr., Billy Ben Baumann, M.D., and Andrea L. Solak did not participate.