STATE OF MICHIGAN

Attorney Discipline Board

GRIEVANCE ADMINISTRATOR,
Attorney Grievance Commission,

Petitioner,

v Case No. 02-83-GA

GERALD C. SIMON, P 20501,

Respondent.
_____/

GRIEVANCE ADMINISTRATOR,
Attorney Grievance Commission,

Petitioner,

v Case No. 03-40-GA

GERARD TRUDEL, P 39342,

Respondent.
_____/

GRIEVANCE ADMINISTRATOR,
Attorney Grievance Commission,

Petitioner,

v Case No. 03-38-GA

THOMAS C. MCGINNIS, P 33419,

Respondent.
_____/

MEMORANDUM OPINION

In these otherwise unrelated matters now pending before separate hearing panels, the Grievance Administrator has filed interlocutory petitions for review. In each case, the Grievance Administrator seeks an order from the Board reversing a hearing panel's decision to set aside a respondent's default based upon the respondent's failure to file a timely answer to a formal complaint. In light of the common issues of law presented, the Board has considered these petitions and issues this joint opinion. For the reasons set forth below, the interlocutory petitions for review in the above matters are denied.

BACKGROUND

In the matter of Grievance Administrator v Gerald C. Simon, Case No. 02-83-GA, Tri-County Hearing Panel #72 conducted a separate hearing on the respondent's motion to set aside default and, on March 25, 2003, issued its opinion and order granting the motion. Citing Alken-Ziegler, Inc. v Waterbury Headers Corp, 461 Mich 219; 600 NW2d 638 (1999), the panel ruled that the showing of "good cause" may be lessened if a party states a meritorious defense that would be absolute if proven. The panel also noted its belief that the law favors determinations of claims on the merits. The panel stated, by a majority,

> Given that the respondent appeared as scheduled at the initial hearing, has had a 50 year career with no prior discipline, and in light of the seriousness of the allegations made by the petitioner, the panel is of the belief that the most prudent course of action is to decide this matter on the merits and to set aside the default.

The Grievance Administrator filed a petition for interlocutory review by the Attorney Discipline Board on April 15, 2003.

In the matter of Grievance Administrator v Gerard Trudel, Case No. 03-40-GA, the formal complaint was served on the respondent under the accelerated schedule required by MCR 9.116 which is designed to expedite proceedings against a judge when the Judicial Tenure Commission has made a recommendation to the Supreme Court. On March 26, 2003, the Grievance Administrator served a copy of the complaint and notice of hearing on the respondent by regular and certified mail addressed to respondent at the address for the 24th District Court. On April 10, 2003, the Grievance Administrator re-served the complaint and notice of hearing by regular and certified mail to the respondent at his residential address in Allen Park, Michigan. On the same day, April 10, 2003, the Administrator filed a default against the respondent for failing to answer the complaint mailed to his court address. On the date of the hearing, April 14, 2003, Respondent Trudell appeared in person before the panel. He advised the panel that he had retired from the 24th District Court on March 1, 2003. He acknowledged that he had not changed his business address registered with the State Bar of Michigan but he stated that his residential address had been used for all mailings in the Judicial Tenure Commission action. The respondent tendered his answer, discovery demand and affirmative defenses to the panel at the hearing on April 14, 2003. His verbal motion to set aside default was granted. The Grievance Administrator's petition for interlocutory review was filed May 2, 2003.

The formal complaint in Grievance Administrator v Thomas M. McGinnis, Case No. 03-38-GA was served March 28, 2003 by regular and certified mail. His default was filed April 22, 2003. The respondent appeared in person at the scheduled hearing on May 13, 2003. Based upon his testimony that he had been under psychiatric care since December 2002, and that he had been treating with a psychiatrist since February 21, 2003, the panel announced, over the Grievance Administrator's objection, that it would set aside the default. The panel subsequently entered a written order granting the respondent's motion to set aside default conditioned upon respondent's filing of an answer and the respondent's payment of costs in the amount of $350. The respondent complied with both conditions. The Grievance Administrator's petition for interlocutory review was filed on June 5, 2003.

DISCUSSION

The threshold question to be answered by the Board in each of these cases is not whether the hearing panel erred in granting the respondent's request to set aside a default but whether the Attorney Discipline Board should intercede at this stage of the hearing panel proceeding. In considering a challenge to its authority to entertain a petition for review on an interlocutory basis, the Board has stated:

> This Board has consistently entertained petitions for interlocutory review, and has granted such review when it appears that a decision by the Board prior to entry of a final order by the panel would likely be useful and consistent with MCR 1.05 and MCR 9.102(A). We see no reason to hold that we may not consider interlocutory review, but must, in all cases, require the parties to press on through hearing to a final order - - even where pre-trial review of a panel determination could save the resources of the panel and the parties. Interlocutory review is often denied, but it occasionally makes sense, and we hold that the rules do not preclude the Board from granting it. [Grievance Administrator v Fieger, 97-83-GA (ADB 1999).]

In Fieger, supra, we granted the Grievance Administrator's interlocutory petition for review of a hearing panel's ruling on a pre-trial motion in limine and, at the Administrator's urging, we ruled that MCL 600.2106 applies in Attorney Discipline proceedings.

In considering whether or not to review the panels' decisions at this stage of the proceedings, we have focused primarily on two factors: 1) the degree to which the petitioner will be harmed if review is not granted at this time, and 2) the high degree of deference which must be afforded to a decision at the trial level to grant or deny a motion to set aside a default. See Alken-Zeigler, supra.

In the instant matters, the Grievance Administrator argues in each case that "substantial harm" will result if the Board's review of the hearing panel's decision to set aside a default is deferred until the conclusion of the panel proceedings. Specifically, the Administrator argues that unless the Board intervenes to reinstate the default in each case, these cases will proceed as contested matters requiring the Grievance Administrator to establish misconduct by a preponderance of the evidence. At that point, the Administrator argues, the issue of respondent's default will be moot and the Administrator will be deprived of meaningful review on that issue.

While we understand this aspect of the Administrator's request for interlocutory review, we must consider whether "substantial harm" will necessarily result if the Board refrains from interfering in these proceedings at this time. In arguing for interlocutory review in the Trudel matter, the Administrator argues:

> The deprivation of petitioner's opportunity for review of the Order is substantial harm justifying interlocutory review pursuant to MCR 7.205(B). Interlocutory review and reversal of the Order will be a final disposition of the misconduct phase of this proceeding,

obviating the need for a hearing. [Administrator's Brief in Support of Petition for Interlocutory Review, p 3.]

Unlike a traditional civil proceeding in which a plaintiff seeks money damages or the enforcement of certain rights from one or more defendants, attorney discipline proceedings are conducted, first and foremost, to ensure the protection of the public, the courts and the legal profession. See MCR 9.105. Moreover, the procedural rules governing these proceedings are to be "liberally construed" toward that end. MCR 9.102(A).

As a general proposition, the Board is skeptical that the Grievance Administrator "wins" when he is relieved of the obligation of introducing evidentiary support for the charges of misconduct in a complaint or that the Grievance Administrator is necessarily "harmed" if a panel's ruling on a default is allowed to stand. In fact, it can be argued that the public, the courts and the legal profession are all best served when public discipline is based upon a full and fair public record.[1] Unlike civil proceedings, discipline proceedings are not zero-sum contests in which a gain for one party is achieved solely at the expense of the opposing party. In the three matters before the Board on petitions for interlocutory review, the hearing panels each expressed a desire to proceed with a hearing on the merits; the respondent attorney, despite a failure to file a timely answer, has nevertheless appeared in person at the first scheduled hearing date prepared to go forward; and the Grievance Administrator makes no claim in any of the cases that the Attorney Grievance Commission will be prejudiced in any significant way if the cases are tried on the merits. While the Board fully agrees that a respondent who fails to comply with the rule requiring an answer to a formal complaint within 21 days should not be rewarded for his or her delinquency, it does not necessarily follow that a policy which precludes the development of a full record achieves the best result in these cases. We also note that when a default is set aside, the respondent attorney may yet suffer economic or disciplinary consequences as the result of the failure to file a timely answer.[2]

The briefs filed by the Grievance Administrator in support of these petitions for interlocutory review uniformly cite our Supreme Court's decision in Alken-Ziegler, supra, primarily to emphasize the Court's holding in that case that the decision to set aside a default must be grounded upon findings of both good cause and a meritorious defense. However, it is the Court's emphasis on the

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[1] In its opinion which held that the filing of any judgment of conviction against an attorney constitutes evidence of misconduct subjecting that attorney to an order of discipline, the Supreme Court noted that in such a case, a hearing panel is not absolved of its "critical responsibility to carefully inquire into the specific facts of each case." Grievance Administrator v Deutch, 455 Mich 149, 169 (1997). The panel's inquiry into the specific facts of a case will not only assist that panel in arriving at a proper and informed application of the ABA Standards for Imposing Lawyer Sanctions but may, in cases involving suspensions of 180 days or more, allow the Grievance Administrator and a reinstatement hearing panel to have a better understanding of the nature of the misconduct in assessing that attorney's subsequent eligibility for reinstatement.

[2] In one of the cases before us, Grievance Administrator v Thomas M. McGinnis, the hearing panel conditioned the setting aside of the default on the respondent's payment of costs in the amount of $350. We note also that if misconduct is established, a respondent's failure to file a timely answer to the complaint may be considered by a panel as an aggravating factor in assessing the appropriate level of discipline.

deference due to a trial court's decision on a motion to set aside default which is immediately relevant to the threshold question of whether or not to grant interlocutory review.

We note that in Alken-Ziegler, the trial court denied the defendant's motion to set aside a default. The Court of Appeals did not find that the defendant had a satisfactory explanation for its failure to answer the complaint and summons but reversed the trial court's ruling for the reason that the defendant had demonstrated that a manifest justice would result if the default was not set aside. Before discussing what it viewed as the Court of Appeals incorrect blurring of the separate requirements of "good cause" and "meritorious defense" under MCR 2.603(D)(1), the Supreme Court underscored the high degree of deference which should have been given to the trial court's ruling. Specifically, the court noted that the trial court's ruling on a motion to set aside a default or a default judgment will not be set aside unless there has been a clear abuse of discretion. Alken-Ziegler, supra, 461 Mich at 227. The Supreme Court continued

> An abuse of discretion involves far more than a difference in judicial opinion. Williams v Hofley Mfg Co, 430 Mich 603, 619; 424 NW2d 278 (1988). It has been said that such abuse occurs only when the result is "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." Marrs v Bd of Medicine, 422 Mich 688, 694; 375 NW2d 321 (1985), quoting Spalding v Spalding, 355 Mich 382, 384-385; 94 NW2d 810 (1959), and noting that, although the Spalding standard has been often discussed and frequently paraphrased, it has remained essentially intact.
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> This Court historically has cautioned appellate courts not to substitute their judgment in matters falling within the discretion of the trial court, and has insisted upon deference to the trial court in such matters. For example, the Court stated in Scripps v Reilly, 35 Mich 371, 387 (1877):
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> > It can never be intended that a trial judge has purposely gone astray in dealing with matters within the category of discretionary proceedings, and unless it turns out that he has not merely misstepped, but has departed widely and injuriously, an appellate court will not re-examine. It will not do it when there is no better reason than its own opinion that the course actually taken was not as wise or sensible or orderly as another would have been.
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> And in Detroit Tug & Wrecking Co v Gartner, 75 Mich 360, 361; 42 NW 968 (1889), the Court said:
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> > To warrant this Court in interfering in matters so entirely in the sound discretion of the circuit court as the granting or refusing of a new trial, the abuse of discretion ought to be so plain that, upon

> consideration of the facts upon which the court acted, an unprejudiced person can say that there was no justification or excuse for the ruling made. [Alken-Ziegler, supra, 461 Mich at 227-229; footnote omitted.]

Again, we wish to underscore the difference between these disciplinary proceedings and civil disputes which typically involve private parties. Though private disputes may pertain to matters of great importance to the parties involved, the consequences of a default in such cases are, by and large, limited to the parties. In lawyer discipline cases, the fitness of a lawyer is at issue and protection of the public may be best served by a full airing of the evidence regarding the nature of the alleged misconduct. While the court rules governing defaults play an important role in these discipline proceedings, we believe that, except in the clearest cases of a panel's abuse of discretion, public policy concerns and a liberal construction of the rules governing these proceedings suggest that interlocutory review of a hearing panel's decision on a motion to set aside default should rarely be granted on an interlocutory basis.

CONCLUSION

Taking into account the nature of the harm which will allegedly be suffered by the Grievance Administrator if these cases are tried on the merits, the high degree of deference to be given to a panel's decision on a motion to set aside default and the panels' not unreasonable desire to develop a full record on the facts and circumstances bearing upon these respondents' culpability, we are not persuaded that interlocutory review is warranted in these cases.

ATTORNEY DISCIPLINE BOARD

By: Theodore J. St. Antoine

Theodore J. St. Antoine, Chairperson

DATED: NOV 2 1 2003

Board member Ronald L. Steffens, concurring in part and dissenting in part, states:

As a general rule, I agree that hearing panel proceedings should be allowed to continue without the procedural delays caused by interlocutory appeals, by either party, asking the Attorney Discipline Board to overturn a hearing panel's procedural ruling. I also concur with my fellow Board members on their decision to deny the Administrator's request for interlocutory review of the panels' decisions of the matters of Gerard Trudell and Thomas McGinnis. However, although I am prepared to give a great deal of deference to a panel's decision when it considers a motion to set aside a default, I believe that the respondent's failure to file a timely answer in the matter of GA v Gerald Simon was inexcusable and that the panel's decision to set aside the default in that case warrants review sooner rather than later.

Board Secretary Marie Martell, dissenting, states:

I would grant the petitions for interlocutory review in these three matters for the reason that I am not satisfied that the hearing panel in each case properly articulated appropriate grounds which would justify setting aside a default. I believe this issue warrants further examination and discussion by the Board.