STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellee,

v

Bernard Feldman, P-27628,

Respondent/Appellant,

Case Nos. 01-43-GA; 01-80-GA

Decided: April 30, 2002

BOARD OPINION

The respondent's license to practice law in Michigan was revoked by Tri-County Hearing Panel # 72 in an order entered December 20, 2001. Respondent Feldman petitioned for review of the hearing panel's decision. The Attorney Discipline Board has conducted review proceedings in accordance with MCR 9.118 and has reviewed the record before the panel. For the reasons discussed below, we affirm the hearing panel order of revocation and restitution.

Proceedings Before the Panel

The formal complaint in Case No. 01-43-GA was filed in March 2001. It alleged that the respondent committed misconduct, specifically, that he violated MCR 9.104(1)-(4) and MRPC 1.1(a)-(c); 1.2(a); 1.3; 1.4; 1.15(a)-(b); 3.2; and 8.4(a)-(c). The formal complaint in Case No. 01-80-GA, filed June 2001, alleged that respondent violated MCR 9.104(1)-(4); MCR 9.119(D) and (E); MCLA 600.916 (MSA 27A.916); and MRPC 3.4(c); 5.5(a); and 8.4(a)-(c).

In May 2001, ten days prior to the scheduled hearing in Case No. 01-43-GA, the respondent filed a motion for an adjournment. The request for adjournment was granted, and the hearing was rescheduled for July 24, 2001. The Grievance Administrator's motion to consolidate the two cases was granted, and a hearing on both Case Nos. 01-43-GA and 01-80-GA was set for October 22, 2001.

Two days prior to the October hearing date, the respondent faxed his request for an adjournment. The panel denied the motion and proceeded with the hearing. Exhibits were offered into evidence, and testimony from two complainants was admitted. As to Case No. 01-43-GA, the

hearing panel found that the respondent had neglected legal matters; made misrepresentations to his clients regarding the status and progress of cases; endorsed a client's name on the back of a check without the client's knowledge or consent; failed to deposit the funds in a client trust account and instead deposited the check into his own account; and failed to promptly pay the client the settlement proceeds to which the client was entitled. As to Case No. 01-80-GA, the hearing panel concluded that, in filing a claim of appeal with the Michigan Court of Appeals and by appearing as counsel of record for a defendant in a matter before the 48th District Court, the respondent engaged in the practice of law and held himself out as an attorney during a time when his license was suspended. The hearing panel ordered that the respondent's license to practice law in Michigan be revoked, and that he pay restitution in the aggregate amount of $8,700.00.

Proceedings Before the Board

The respondent petitioned for review of the hearing panel's decision and order. The respondent asserted in his two-page brief in support of his petition that the hearing panel's decision to deny the second request for adjournment constituted a denial of his right to due process of law. Respondent also claimed that he was denied due process because the hearing panel, proceeding in his absence, revoked his license to practice law.

Approximately 25 minutes prior to the scheduled start of the April 18, 2002 Board hearing[1] on the respondent's petition for review, the respondent sent a facsimile to the ADB offices stating that he would not be able to appear for the hearing because of medical and financial reasons. The respondent requested that the hearing be adjourned, or in the alternative, that the hearing proceed in his absence. The respondent offered no support whatsoever for his motion to adjourn and it was denied.

MCR 9.118(C) requires a respondent to appear in person at a review hearing, unless his or her absence is excused by the Board. "Failure to appear may result in denial of any relief sought by the respondent, or any other action allowable under MCR 9.118(D)." MCR 9.118(C). Thus, the Board could simply have dismissed outright the petition for review based on the respondent's failure to appear. Nevertheless, the Board proceeded with the review hearing in respondent's absence, both to address the due process argument raised by the respondent, and for the purpose of clarifying the application of MCR 9.115(H) and MCR 9.115(F)(1). We emphasize, however, that the respondent's

[1] Notice of the April 18, 2002 hearing was mailed to all parties on February 20, 2002.

absence was not excused and would ordinarily have resulted in the dismissal of his petition for review.

Discussion

The respondent's first request for adjournment, in May 2001, was based on his statement that he was unavailable on the date of hearing, and that he was in the process of retaining counsel to represent him in the disciplinary proceedings. The Grievance Administrator, in reliance upon respondent's assertion that he intended to retain counsel, stipulated to the motion for adjournment. The motion was granted.

The second motion for adjournment was faxed to the hearing panel chair two days prior to the October hearing date. The respondent's request for adjournment was based on his assertion that he was currently living in Florida and that he was unable to attend the hearing due to illness. The Grievance Administrator opposed that request. The hearing panel did consider the respondent's request, but denied the second motion for adjournment.

Michigan Court Rules do allow the hearing panel chair to grant one adjournment per party. However, additional adjournments are also permitted, at the request of a party, "if good cause is shown." MCR 9.115(F)(1). The respondent based his request for adjournment on his assertion that his own illness prevented him from traveling to Detroit to appear at the hearing. The respondent failed, however, to provide any evidence, such as an affidavit from his treating physician, to support his assertion. A hearing panel is not obliged to adjourn a hearing, even if the motion is timely filed, merely because a respondent claims that his or her illness precludes personal appearance.

The respondent was provided with reasonable notice of his hearing. The notice of hearing was issued ten weeks prior to the hearing date. Mr. Feldman's request for adjournment, faxed just two days prior to the October hearing, was not timely filed. Generally, unless a Court directs otherwise, "a written motion (other than the one that may be heard *ex parte*), notice of the hearing on the motion, and any supporting briefs or affidavits must be served...at least 9 days before the time set for the hearing, if served by mail..." MCR 2.119(C)(1)(a). It is the current practice of the Attorney Discipline Board to provide a procedural instruction sheet to accompany each formal complaint served upon a respondent attorney. These procedural instructions were served upon respondent Feldman twice - first when formal complaint 01-43-GA was served on respondent by the Grievance Administrator on April 4, 2001 and again on July 25, 2001 when formal complaint 01-80-GA was served on respondent. The Board's instruction sheet includes specific instructions

pertaining to the filing of a motion for adjournment. Special instructions are included for a request for adjournment filed less than five days before the scheduled hearing:

EMERGENCY MOTIONS FOR ADJOURNMENT

1. A request for adjournment filed less than five days before the scheduled hearing date shall be considered an emergency motion.

2. An emergency motion shall be in writing and shall be filed with the Attorney Discipline Board.

3. In addition to the statements required in a regular motion for adjournment, an emergency motion shall include an affirmative statement explaining why the motion was not or could not have been filed at least five days prior to the scheduled hearing.

None of respondent's adjournment requests, either to the hearing panel or to the Board, offered an explanation as to why the motions could not have been filed at least five days prior to the scheduled hearing.

There has been no denial of respondent's opportunity to be heard in this case. If the respondent had attended the panel hearing, he would have been able to argue on his own behalf, cross-examine any witnesses, challenge the admission of exhibits, and present his own witnesses and/or evidence. However, the respondent did not appear, he did not move for permission to appear telephonically, nor did he retain counsel to represent him at the hearing. Instead, the respondent relied on his own interpretation of MCR 9.115(H), which states, in part, that if the respondent claims he is unable to appear due to mental or physical incapacity, "the panel or board on its own initiative may suspend the respondent from the practice of law until further order of the panel or board." Respondent argued that because he requested an adjournment due to illness, the panel should not have proceeded with the evidentiary portion of the case, but should merely have recommended or ordered suspension of his license to practice law.

Contrary to the respondent's assertions, the language of the relevant section of MCR 9.115(H) is permissive, and simply allows the panel to suspend a respondent's license, if the panel so chooses, until a final order is issued. The court rule does not mandate that the hearing panel take such action, nor does the court rule prohibit the panel from conducting a hearing in the absence of a respondent. MCR 9.115(H) does not bar the panel from proceeding with the evidentiary portion of a hearing, including the admission and consideration of testimonial and documentary evidence

offered by the Grievance Administrator. Similarly, MCR 9.115(H) does not prohibit the panel from proceeding, despite the absence of the respondent, with the discipline portion of a hearing, including the presentation and consideration of aggravating and mitigating factors.

Conclusion

The hearing panel did not absolve the Grievance Administrator of the responsibility of establishing misconduct by a preponderance of the evidence in these consolidated cases. The hearing panel did not enter a default judgment against the respondent, but weighed the evidence and reached a reasoned conclusion. Because the respondent was provided both with sufficient notice of the hearing, and an opportunity and forum to be heard, the Board finds that the respondent was not denied due process of law.

Respondent's petition for review states in conclusory fashion that the hearing panel's decision was not supported by competent and material evidence in the record and that the panel's ultimate decision to order the revocation of his license to practice law is harsh and inappropriate. We have conducted a sufficient review of the record below to persuade us that those arguments are without merit. The hearing panel's findings have support in the record. Its decision to order revocation comports with both ABA Standards for Imposing Lawyer Sanctions and discipline case law in Michigan. The hearing panel's report and order are affirmed in all respects.

Board members Theodore J. St. Antoine, Ronald Steffens, William P. Hampton, and George Lennon concur.

Board members Nancy A. Wonch, Marie E. Martell, and Rev. Ira Combs, Jr. concur in the result but would have dismissed the petition for review without hearing pursuant to MCR 9.118(C)(1).

Board Members Wallace D. Riley and Marsha M. Madigan, M.D. did not participate in the hearing or decision.