

STATE OF MICHIGAN
Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellant,

v

Deborah A. Carson, P 37602 ,

Respondent/Appellee,

Case Nos. 00-175-GA; 00-199-FA

Decided: July 13, 2001

BOARD OPINION

The complaint in this case charged that respondent neglected a domestic relations matter, failed to respond to her client's inquiries, failed to refund an unearned fee and failed to return her clients file. Those charges were deemed to be admitted upon entry of the respondent's default for failure to answer the formal complaint. The respondent did not appear before the hearing panel and has not participated at any stage of the public discipline proceedings which were commenced with the filing of the formal complaint on October 24, 2000. In deciding to suspend the respondent's license to practice law for 90 days, the hearing panel determined that because the respondent answered the request for investigation served by the Grievance Administrator, this case is distinguishable from Grievance Administrator v Peter H. Moray, DP 143/86; 157/86 (ADB 1987) and a line of subsequent Board opinions which stand for the proposition that an attorney's unexplained failure to participate in the discipline process should generally trigger the reinstatement requirement of MCR 9.123(B). The Grievance Administrator has petitioned for review on the grounds that a suspension of less than 180 days is inappropriate in this case. We agree and take this opportunity to clarify the scope of Moray and its progeny. A suspension of 180 days, coupled with reinstatement proceedings under MCR 9.123(B) and MCR 9.124, is the minimum level of discipline which should be imposed by a hearing panel when the respondent attorney has failed to answer, appear or otherwise communicate with the hearing panel in response to a formal complaint which has been properly served in accordance with MCR 9.115(C).

In Moray, the Board considered a hearing panel's decision to impose a reprimand in the case of an attorney who had failed to answer two requests for investigation, failed to answer two formal complaints, and failed to appear before the panel. In announcing its decision to impose a reprimand, the panel focused exclusively on the seriousness of the misconduct charged in the initial formal complaint, but minimized the seriousness of the respondent's failure to participate in the proceedings. The panel chairperson in that case explained,

“We are sensitive to the - and share the concern that Mr. Moray has apparently dropped off the face of the earth and not communicated with the State Bar Grievance Administrator [sic] and that is a legitimate concern. On the other hand, there any number of plausible explanations for that, which do not subject [him to] misconduct . . . certainly, we do not condone or minimize the seriousness of it but, in the grand scheme of things, the underlying misconduct is not that grievous.” [Moray, *supra*, p 2.]

In its opinion issued March 4, 1987, the Board served notice that an attorney’s unexplained failure to participate in the disciplinary process would, in and of itself, be taken seriously.

By reprimanding the attorney who fails to answer or appear, or by suspending for a period which will be automatically terminated by the filing of an affidavit of compliance, the discipline system sends a message to the public and to the profession that we are willing to gamble that an attorney’s repeated failure to comply with the rules is not the result of a physical or mental problem which jeopardizes the rights of the attorney’s clients or the administration of justice.

We are not willing to take that chance. Apart from any consideration of deterrence, we conclude that protection of the public and the legal system demands that, as a general rule, the respondent who has failed to answer a request for investigation, failed to answer the formal complaint and failed to appear before the hearing panel should be suspended for a period of 120 days. [The minimum period required in 1987 to trigger the reinstatement process. That threshold was raised to 180 days effective March 1, 1994.]

* * *

We note that the attorney seeking reinstatement in proceedings under MCR 9.123(B) and 9.124 must, among other things, establish by clear and convincing evidence that he/she “has a proper understanding of and attitude toward the standards that are imposed on members of the bar and will conduct himself/herself in conformity with those standards.” MCR 9.123(B)(6).

We conclude that a respondent who fails to answer requests for investigation, fails to answer formal complaints and fails to appear at the hearing has, by definition, made a prima facie showing that he/she does not have a proper attitude toward the standards imposed on members of the bar and that he/she cannot or will not conform to those standards. [Moray, pp 4, 5 (emphasis in original).]

The rationale expressed in the Moray opinion has not changed since 1987 and Moray has been cited by hearing panels or the Board in subsequent cases including Grievance Administrator v Marvin R. Smith, ADB 151-87; 180-87 (ADB 1988); Grievance Administrator v Donald L. Sugg, 91-200-GA; 91-236-FA (ADB 1992); Grievance Administrator v Alvin McChester, 93-132-GA (ADB 1994) and Grievance Administrator v John S. Synowiec, 97-293-GA; 97-315-GA (ADB 1998).

In each of these cases, the Board was presented with a respondent attorney who had failed to answer or appear at both the investigative and hearing stages of the discipline process by failing to answer one or more requests for investigation, contrary to MCR 9.113(A); failing to answer one or more formal complaints, in violation of MCR 9.115(D)(1); and failing to appear in person before a hearing panel, in violation of MCR 9.115(H). In this case, by contrast, respondent Carson did submit an answer to the request for investigation filed by the complainant, Thomas L. Hutcherson, and served by the Grievance Administrator.

In support of its decision to order a suspension for 90 days and to condition the respondent's reinstatement to active practice only upon the filing of the separate affidavits required under MCR 9.119 and MCR 9.123(A) along with restitution of \$400 to the complainant, the hearing panel stated in its report:

The hearing panel is aware of the Attorney Discipline Board's ruling in Grievance Administrator v Peter Moray, DP 143/86; 157/86 (ADB 1987) which held that an attorney who has failed to answer or appear during the discipline process should generally be suspended for a sufficient period to trigger the reinstatement process described in MCR 9.123(B) and MCR 9.124. That is not the case here. Although respondent's failure to answer the supplemental Formal Complaint 00-199-FA, and her failure to appear before the panel has been considered as an aggravating factor, respondent did, in fact, file an answer to the Request for Investigation filed by the complainant, Thomas L. Hutcherson. By failing to appear, respondent has essentially waived her opportunity to present evidence which could be considered in mitigation. Respondent's conduct is aggravated by prior discipline [ABA Standard 9.22(a)]; a pattern of misconduct [ABA Standard 9.22(c)]; and indifference to making restitution [ABA Standard 9.22(j)]. [Hearing panel report 03/28/01, p 3.]

The Grievance Administrator then filed a Motion for Amendment of Judgment with an accompanying brief. The Administrator argued to the panel that a minimum suspension of 180 days was mandated under the rationale expressed in the Moray opinion and under ABA Standard 2.3 which states that a "suspension" as that term is used in the Standards should generally be for a period of time equal to or greater than six months. The hearing panel entered an order on April 23, 2001 stating that it had considered the Grievance Administrator's motion but was not persuaded that an amendment of its order of discipline was warranted.

The rationale behind Moray and its progeny is not based upon a desire to punish the respondent attorney. Rather, the primary concern in such a case is the protection of the public. In Moray, we stated that we would be shirking our responsibility to the public if we simply assumed that an attorney who has failed to answer or appear is otherwise mentally, physically and ethically capable of engaging in the practice of law. By ordering that the attorney who fails to answer or appear will be suspended indefinitely until he or she comes forward, in person, to establish his or her eligibility to practice law to the satisfaction of a reinstatement hearing panel, we assure that protection.

We should emphasize at this point that the attorney who is ordered by a hearing panel to undergo reinstatement proceedings as a result of his or her failure to answer and appear still has two remaining opportunities to come forward and argue for a lower level of discipline. Under MCR 9.118, that attorney has the right to petition the Attorney Discipline Board for review of a discipline order. The Board has, in some cases, recognized that an attorney who is disciplined under Moray but who subsequently appears before the Board and establishes that the failure to participate was not the result of a willful disregard for these proceedings may persuade the Board that reinstatement proceedings are not required. Grievance Administrator v. Sonja Branham, 93-179-GA (ADB 1994) (120 day suspension reduced to 60 days); see also Grievance Administrator v. James Harris, ADB 147-88 (ADB 1989) (1 year suspension reduced to reprimand). And, of course, an attorney who comes to the belated realization that participation in the discipline process is a prerequisite to the maintenance of one's law license may file an application for leave to appeal with the Supreme Court.

We have carefully considered whether this case presents a markedly different factual situation than was presented in Moray and other cases considered by the Board simply because this respondent answered the request for investigation and then abdicated her responsibility to answer or appear during the public proceedings instituted by the filing of a formal complaint. We conclude that it does not.

First, we note that it is not clear from the record when the request for investigation was served upon Ms. Carson in this case or when she answered it. However, we do know that the respondent failed to answer the formal complaint which was served by regular and certified mail on November 2, 2000, that she failed to appear before the panel at the public hearing conducted on January 30, 2001 and that she failed to appear at the review hearing before the Attorney Discipline Board on June 21, 2001. Assuming the passage of at least several months between respondent's answer to the request for investigation and the filing of this formal complaint on October 24, 2000, this attorney has been A.W.O.L. from the discipline process for at least one year. To the extent that the Moray decision was based upon a fear that an attorney's failure to participate could be the result of physical or mental infirmities effecting the ability to practice law, those concerns are legitimately raised when an attorney has been incommunicado for that length of time.

Secondly, the Moray opinion considered the possibility that an attorney's failure to answer or appear was due not to physical or mental inability but could be the result of a deliberate disregard for the obligations imposed under chapter 9.100 of the court rules. In that regard, the fact that an attorney answered the confidential inquiry from the Grievance Administrator neither excuses nor mitigates that attorney's subsequent failure to participate in the process once the public proceedings have commenced.

CONCLUSION

For the reasons stated in Grievance Administrator v Peter Moray, DP 143/86; 157/86 (ADB 1987), we hold that an attorney who fails to answer or appear at any stage of the public proceedings commenced with the filing of a formal complaint under MCR 9.115(B), a reciprocal discipline petition under MCR 9.104 , or a judgment of conviction under MCR 9.120(B)(3) should, as a general rule, be suspended for a sufficient period to trigger reinstatement proceedings under MCR 9.123(B), regardless of whether the attorney may have answered a request for investigation or otherwise communicated with the Grievance Administrator prior to the filing of the formal complaint.

Board members Wallace D. Riley, Theodore J. St. Antoine, Grant J. Gruel, Ronald L. Steffens, Marsha M. Madigan, M.D., and Marie E. Martell concur in this decision.

Members Diether H. Haenicke, Michael R. Kramer, and Nancy Wonch were absent and did not participate.