STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellee,

v

Joan Marsh Simmons, P 41442,

Respondent/Appellant,

Case Nos. 00-113-GA; 00-127-FA

Decided: May 10, 2001

BOARD OPINION

Based upon her default for failure to answer two formal complaints, the hearing panel found that the misconduct charged against respondent, Joan Marsh Simmons, was established. That conduct included respondent's failure to take timely action on behalf of a client for whom she had been retained to file a motion for relief from judgment in a criminal case; her failure to keep her client reasonably informed as to the status of the matter; and her failure to return unearned fees in the amount of $8,400.00. The hearing panel also found that respondent's failure to file an answer to formal complaint 00-113-GA constituted separate misconduct warranting discipline. Following a separate hearing on discipline, the hearing panel ordered a suspension of respondent's license to practice law for a period of 45 days and ordered restitution of unearned fees in the amount of $8,400.00. The respondent petitioned for review on the grounds that (1) the level of discipline is not justified by the evidence; (2) respondent was not treated fairly during the panel proceedings; and (3) the panel failed to give respondent's mitigating circumstances proper consideration. The Attorney Discipline Board has conducted review proceedings in accordance with MCR 9.118 and has reviewed the record below. We reduce the amount of unearned fees to be returned to the complainant to $8,150.00 in light of the undisputed evidence that a check for $250.00 from the complainant to respondent was never cashed. However, for the reasons discussed below, we are not persuaded that the respondent was treated unfairly during the panel proceedings or that the hearing panel's decision to impose a suspension of 45 days should be modified.

PANEL PROCEEDINGS

A two-count formal complaint was filed by the Grievance Administrator in this matter on June 26, 2000 under file no. 00-113-GA. The complaint charged that respondent, Joan Marsh Simmons, was retained in 1996 by Lizzie Bailey to pursue a motion for relief from judgment (referred to as a Rule 6.500 motion) on behalf of her son, Robert Lee Carter, Jr., who had been sentenced to 25 to 80 years imprisonment in 1986 for second-degree murder and armed robbery. The

complaint charged in count one that respondent failed to file the motion, failed to communicate with Ms. Bailey and abandoned the matter. Count two charged that respondent failed to return unearned fees to Ms. Bailey totaling $8,400.00.

The record discloses that the complaint was served on the respondent by the Grievance Administrator by regular and certified mail at three addresses, including a law firm on West Seven Mile Rd. in Detroit which was Respondent's business address registered in accordance with Rule 2 of the Supreme Court's Rules Concerning the State Bar of Michigan. Copies of the complaint, instruction sheet, and notice of hearing were mailed to respondent at these addresses on June 28, 2000 and, under MCR 9.115(c), service was effective at the time of mailing. Respondent's default for failure to answer was filed July 20, 2000 along with a supplemental complaint bearing case no. 00-127-FA. The hearing originally scheduled for August 21, 2000 was adjourned at the hearing panel's request. On July 25, 2000, the Board notified the parties in writing that the public hearing in the consolidated cases would be conducted at the Board's office in Detroit on October 16, 2000.

The Board's files disclose that the respondent first communicated with the Board in this matter on August 24, 2000 when she made a telephone request for copies of the pleadings filed to date. Respondent confirmed that conversation in a letter hand delivered to the Board on August 25, 2000. The first pleading on respondent's behalf was a motion for adjournment filed by her attorney on September 21, 2000. That motion was opposed by the Grievance Administrator. The hearing panel entered an order denying the motion for adjournment on September 29, 2000. On October 5, 2000, respondent's counsel filed a motion for reconsideration of the denial of his motion for adjournment. That motion was accompanied by respondent's motion to set aside the default which had been entered July 20, 2000. That motion and accompanying affidavit dealt with the reasons for respondent's failure to file a timely answer to the complaint but did not assert any facts showing a meritorious defense to the allegations in the formal complaint as required by MCR 2.603(D)(1). This deficiency was noted in the Grievance Administrator's response filed October 6, 2000.

Neither respondent nor her counsel appeared at the scheduled hearing on October 16, 2000. Shortly before the hearing began, respondent's counsel telephoned the Board and spoke with the panel's chairperson. He advised that he was in Las Vegas, New Mexico en route to Los Angeles, California. On the record, the chairperson noted the conversations and respondent's absence. The panel chairperson observed:

> That being said, I would just like to indicate that I was on the phone several times with Mr. Whitfield. I indicated to him on the phone early. I did indicate to him about 9:00. I gave him a phone number which was in the file for his client and asked if his client was available to get her here. He said he had been trying to reach her. I believe that the applicable rules require that respondent be present for these proceedings, and respondent, Joan Marsh Simmons, is not present this morning. (Transcript 10/16/00 p. 9)

The hearing panel announced that respondent's motion to set aside default was denied and that the misconduct charged in the formal complaint was therefore established. Although the complainant and other members of her family were present and available to testify, the panel announced that it would conduct a separate hearing on discipline at a later date. The misconduct hearing on October 16, 2000 was concluded at approximately 10:30 am. At 11:50 am, further pleadings were filed on respondent's behalf including a supplemental affidavit in support of motion to set aside default, supplemental affidavit for adjournment and answer to complaint.

At the hearing on discipline conducted December 11, 2000, the panel received the testimony of the complainant, Lizzie Bailey. She testified that the total amount to be paid to respondent was $10,000 - $1,600 for review of the transcripts of her son's trial and a visit with her son in prison and an additional $8,400 for the preparation and filing of a motion for relief from judgment. She testified that the agreed upon fee of $8,400 for the filing of that motion was paid in installments in 1996 and 1997. Ms. Bailey testified that she had little or no success in contacting respondent by telephone during 1997 and 1998 except when she threatened to "call Channel 2 and try to put you in the Hall of Shame." (Transcript 12/11/00 at p. 34) Asked whether she had attempted to request a refund, Ms. Bailey testified:

> Probably in 1997, asking her, because I knew she wasn't going to give the money back. And I am pretty sure in 1998, I was calling and asking her to please return the money if she didn't have the time that she had said that she had to work on the case. I called Ms. Simmons every week, sometimes everyday. She changed her - she had the phone number changed or disconnected and I had no way of reaching her then.
>
> I had a minister write her a letter. She did talk to the minister. She said, well, maybe I will have you write something to help her with the case, and the minister never heard from Ms. Simmons anymore. (Transcript 12/11/00 at p. 36)

The Grievance Administrator offered into evidence a copy of a letter of admonition issued to respondent by the Attorney Grievance Commission in June 2000 as the result of respondent's failure to file a timely answer to a request for investigation in an unrelated matter in the fall of 1999.

In mitigation, respondent testified on her own behalf and submitted a copy of a brief in support of a motion for relief from judgment filed in the Oakland County Circuit Court on December 7, 2000 in the matter of People v. Robert Lee Carter, Jr.. (Respondent's exhibit 9.) Respondent's exhibits also included an uncashed check dated December 14, 1997 from Lizzie Bailey to Joan Simmons in the amount of $250.00. (Respondent's exhibit 7.)

Respondent testified that she visited with Robert Carter in Marquette and then on four subsequent occasions at a prison in Standish. Her testimony that her last visits with Mr. Carter were

in August and September 1997 was later corrected by her counsel to March or April 1998. She testified that she started preparing a motion and brief for relief from judgment on Mr. Carter's behalf in March 1997, but the work on the brief was delayed, in part, because of periodic states of depression. (Transcript 12/11/00 at p. 97.) She testified regarding her diagnosis and treatment for this condition, stating that there were times when "I have been unable to physically move; and there have been times when moving has been difficult . . . but as I indicated, nothing has ever interfered with my mental ability to think or to stratagize or to make a good judgment call in terms of analyzing or that type of thing." (Transcript 12/11/00 at pp. 99-100.) Although her time records were no longer available, Respondent estimated that she expended more than 1500 hours on Mr. Carter's behalf, including 23 hours in travel time to Marquette and Standish and approximately 500 hours for the actual drafting of the motion.

In closing arguments to the panel, counsel for the administrator suggested a suspension in the range of 60 to 90 days, citing the applicability of ABA Standards 4.12 [dealing improperly with client property] and Standard 4.42 [knowing failure to perform services for a client]. In response, counsel for the respondent pointed out that there was no charge in the formal complaint dealing with the misuse of client funds. He stressed that there is no time limit on the filing of a Rule 6.500 motion and that his client did, in fact, file such a motion in this case, albeit four days before the discipline hearing and approximately four years after she was retained. Following its deliberations, the panel announced from the bench its decision to impose a suspension of 45 days and to order restitution of $8,400.

DISCUSSION

Although respondent's brief presents three arguments, two of them are essentially variations on the theme that a 45 day suspension with restitution is too severe for the misconduct in this case when considered in light of the mitigating circumstances. The separate argument that respondent was treated "unfairly" during the discipline process will be addressed first.

Under MCR 9.115(F)(1), a hearing panel may grant one adjournment per party, provided there has been a showing of good cause. The Board has traditionally deferred to a panel chairperson's exercise of sound discretion in granting or denying such requests. In this case, we note that although formal complaint 00-113-GA was effectively served on June 28, 2000 by regular and certified mail to the registered address provided by respondent, the request for adjournment filed by her attorney was not filed until September 21, 2000. At that point, the case had been pending for almost three months and there remained more than three and one-half weeks until the scheduled hearing on October 16, 2000. We would be more sympathetic towards respondent on this issue had she fulfilled her obligation under MCR 9.115(H) to personally appear at the hearing on October 16, with or without her attorney, to address the panel on the issues of her requested adjournment and her pending motion to set aside the default. Instead, there is nothing in the record below to indicate that

respondent or her attorney attempted to obtain substitute counsel or that respondent made any attempt to communicate with the hearing panel regarding her personal non-appearance.

We also note that although respondent's default for failure to answer complaint 00-113-GA was filed July 20, 2000, respondent had not met the requirements for setting aside a default prior to the commencement of the hearing on October 16, 2000. MCR 2.603(D)(1) directs that a motion to set aside a default, except when grounded on lack of jurisdiction, shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed. The respondent's motion to set aside default filed October 5, 2000 was accompanied by respondent's affidavit, but that affidavit is limited to respondent's explanations for her failure to file a timely answer. It contains no "facts" or other information related to the charges of misconduct in the complaint. This deficiency was asserted in the Grievance Administrator's response to the motion filed October 6, 2000.

Approximately one hour after the conclusion of the panel hearing on October 16, 2000, additional pleadings on respondent's behalf were filed with the Board. These included an answer to the complaint, a supplemental affidavit for adjournment and respondent's affidavit in support of motion to set aside default. The contents of this affidavit are restricted to the circumstances surrounding respondent's reasons for not filing a timely answer to the complaint. At no time during the proceedings before the panel did respondent file an affidavit of facts showing a meritorious defense as required by the rules. In Grievance Administrator v. Clyde Ritchie, ADB 52-87 (ADB 1988), the Board held that a hearing panel has substantial discretion in determining whether good cause for setting aside a default has been shown, but that a panel is unable to exercise that discretion if the respondent has not met the minimum requirements of MCR 2.603(B)(1) by demonstrating good cause and by filing an affidavit of facts showing a meritorious defense.

In short, we cannot find that the hearing panel abused its discretion in denying the request for adjournment. Furthermore, the panel was precluded from granting respondent's motion to set aside default by respondent's own failure to meet the minimum requirement of the applicable rule.

Having properly ruled at the hearing on October 16, 2000 that the misconduct charged in the complaint was established by respondent's default, the panel could have proceeded immediately with the separate hearing to determine the appropriate discipline. See MCR 9.115(J)(2). Indeed, the complainant, Lizzie Bailey, was present and was available to testify on that date and neither respondent nor her counsel were present to object had the panel been inclined to proceed. Instead, the hearing panel adjourned the discipline phase of the proceeding until December 11, 2000, at which time respondent and her counsel were both in attendance. We find that respondent's claims that she and her counsel were treated "unfairly" by the hearing panel are without merit.

LEVEL OF DISCIPLINE

Although the Grievance Administrator's counsel argued to the panel that it could consider discipline under either ABA Standard 4.12 or Standard 4.42, the hearing panel properly confined its analysis to Standard 4.42.

ABA Standard 4.12 suggests that "suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client." In suggesting application of this Standard by the hearing panel, the administrator's counsel asserted that respondent had "commingled funds with her own funds and did not remit the funds to her client upon a request." (Transcript 12/11/00 at p. 127.) The complaints in this case include charges of neglect of a legal matter, failure to communicate, failure to return unearned fees and failure to answer a formal complaint. The complaints do not charge any violation of MRPC 1.15 nor are there allegations that respondent commingled client funds with her own. The hearing panel wisely declined the invitation to consider discipline under ABA Standard 4.12 where the misconduct described in that Standard was not charged in the complaint.

ABA Standard 4.42, on the other hand, is applicable in this case. That Standard directs:

> Suspension is generally appropriate when: (a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client; or (b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client.

Although the Standard is not cited in respondent's brief in support of petition for review, her request that discipline be reduced to a reprimand in this case is presumably offered in reliance on ABA Standard 4.43 which provides:

> 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 a client.

Taken in the light most favorable to her, respondent's own testimony suggests that she had a "sample brief" ready in September 1998. (Transcript 12/11/00 at p. 122.) Nevertheless, the actual brief for which respondent was retained in 1996 was not filed until December 2000 - four days before the discipline hearing. There is evidentiary support in the record, including the testimony of the complainant and the respondent, of the hearing panel's conclusion that respondent's inactivity in this matter went beyond mere negligence and rose to a knowing failure to perform a service for a client within the meaning of ABA Standard 4.42.

Nor are we persuaded that the hearing panel failed to properly consider, or assign the appropriate weight to, respondent's eventual filing of the Rule 6.500 motion after the commencement of the discipline proceeding or her medical condition during the period of the

representation.

Under MCR 9.106(2), a hearing panel may order a suspension of an attorney's license to practice law in Michigan for a specified term not less than 30 days. Having determined that a suspension was appropriate in this case, the hearing panel chose to order a suspension at the lower end of the available range of suspensions authorized by the Court Rules. We conclude that the hearing panel properly applied the ABA Standards in reaching a decision that suspension, rather than a reprimand, is appropriate in this case. We decline to modify the discipline imposed.

With regard to the hearing panel's order that respondent return unearned fees of $8,400 to the complainant, Lizzie Bailey, we have determined that that figure includes a payment of $250 from Lizzie Bailey to respondent by check dated December 14, 1997. That check, respondent's exhibit 7, was not cashed. Accordingly, the hearing panel's order is modified by reducing the restitution provision to the amount of $8,150.00.

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

Members Diether H. Haenicke and Nancy Wonch were absent and did not participate.