Grievance Administrator,

Petitioner/Appellee,

v

Harvey J. Zameck, P-22054,

Respondent/Appellant,

98-114-GA; 93-133-FA

Decided: December 15, 1999

BOARD OPINION

Respondent, Harvey J. Zameck, petitioned for review of a hearing panel order entered May 6, 1999, suspending his license to practice law in Michigan for a period of 90 days. The suspension was automatically stayed in accordance with MCR 9.115(K). The Attorney Discipline Board has conducted review proceedings in accordance with MCR 9.118, including consideration of the briefs and arguments presented by the parties and review of the whole record before the panel. For the reasons discussed below, we affirm the hearing panel's decision.

PANEL PROCEEDINGS

The formal complaint in this matter charged, in four separate counts, that respondent engaged in professional misconduct in that he: (1) neglected a client matter and allowed the statute of limitations period to expire in a medical malpractice matter; (2) failed to communicate with his client and failed to respond truthfully to her requests for information; (3) failed to fully and fairly address the allegations made by that client in a request for investigation served upon him by the Grievance Administrator; and (4) failed to comply with the Grievance Administrator's lawful request for the client's file and failed to comply with a properly issued subpoena duces tecum calling for the production of that file.

Respondent failed to file a timely answer to that complaint (designated as Case No. 98-114-GA). His default was entered and a second complaint (Case No. 98-133-FA) was filed and consolidated. The parties subsequently submitted a stipulation to set aside the default and the Grievance Administrator moved to dismiss the supplemental complaint.

In his answer to the formal complaint, respondent admitted all the factual allegations in Count One of complaint 98-114-GA but denied many of the factual allegations in Counts Two through Four. At the commencement of the hearing before the panel on February 23, 1999, respondent's counsel amended his answer to the complaint to admit the allegations of misconduct in all four counts. The effect of these admissions was confirmed by respondent on the record.

The panel moved immediately to the separate hearing on discipline required by MCR 9.115(J)(2) and took the testimony of the complaining witness. The hearing was concluded on March 23, 1999. In mitigation, respondent presented the testimony of several character witnesses and the testimony of psychologist Lewis W. Smith, Ph.D. In closing, respondent's counsel argued for contractual probation under MCR 9.114 (a disposition in lieu of discipline which may be approved only by the Attorney Grievance Commission) or an order of reprimand. At no point during the proceedings before the hearing panel, either in the pleadings or at the two hearings, did respondent request consideration of an order of probation under MCR 9.121.

In its report, the hearing panel discussed the testimony of Dr. Smith in some detail. The panel noted Dr. Smith's opinion that respondent:

> had developed an 'unconscious aversion' to cancer issues and therefore was placed in a position with respect to Ms. Kulin-Perry's case where he unconsciously avoided the task of working on her case. Dr. Smith further testified that he felt that Mr. Zameck's prognosis was very good for recovery but that he should not be involved in any cancer cases or medical malpractice cases in the future. [Hearing Panel Report, p 5.]

However, the hearing panel was not entirely persuaded by this testimony, saying:

> The Respondent's primary defense in mitigation with respect to his conduct relates to testimony given by his psychologist, Dr. Lewis Smith. Unfortunately, the respondent did not seek out or retain the services o[f] Dr. Smith until three days after the first hearing was held in this matter. The Panel is not convinced by Dr. Smith's assertion that the problems experienced by the Respondent rose to the level of incapacitation with respect to handling the medical malpractice claim of Ms. Kulin-Perry. The testimony of Dr. Smith directly contradicts the admissions of the respondent that he lied and deceived Ms. Kulin-Perry regarding the status of her claim for a period of several years. While Dr. Smith refers to a subconscious avoidance of Ms. Kulin-Perry's matter that was entrusted to the respondent, the respondent has admitted intentional and willful deception of a client during a

> period of several years. This conduct is unacceptable from a practicing attorney with the experience of the respondent. In addition, the record is replete with evidence of the respondent's intentional and willful refusal to cooperate in the Grievance Commission's investigation, by virtue of his failure to properly respond to the request for investigation, failure to turn over his file and ignoring a subpoena served on him by the Attorney Grievance Commission. All of this conduct is shown on this record and makes it clear to the panel that respondent has attempted to stonewall his client as well as the Grievance Commission and demonstrates a distinct lack of respect for the disciplinary system and the privilege of practicing law in Michigan. [Hearing Panel Report, p 8.]

DISCUSSION

Respondent has petitioned for review of the hearing panel's decision to impose a 90 day suspension. The Grievance Administrator has not sought review. The petition for review filed May 27, 1999 asserted that the panel's decision did not comport with the evidence presented at the aggravation or mitigation hearing. It was not until the filing of respondent's brief on September 7, 1999 that respondent first made a request for probation under MCR 9.121(C). Respondent argues that the evidence presented in mitigation to the panel met the criteria in MCR 9.121(C)(1). Respondent further argues that "the panel was presented with a set of facts which practically mandated application of the probationary period set forth by MCR 9.121; however, the panel failed to impose such an appropriate sanction." (Respondent's Brief in Support of Petition for Review, p 13.)

MCR 9.121(C) clearly places the burden on a respondent to assert the criteria in MCR 9.121(C)(1)(a)-(d) in response to a formal complaint and to then demonstrate those criteria to the hearing panel by a preponderance of the evidence. The hearing panel was not mandated to grant probation in the absence of a request for that relief.

However, we reject the Grievance Administrator's assertion that "probation under MCR 9.121(C) is an option only when a respondent asserts impairment defensively in his or her answer to a formal complaint" (Grievance Administrator's brief p 8). MCR 9.121(C) requires that the assertion of an impairment warranting probation be made "in <u>response</u> to a formal complaint" (emphasis added). Clearly, the Supreme Court could have required that the assertion of grounds for

probation be made in the "answer" which must be filed within 21 days after the complaint is served as required by MCR 9.115(D)(1). That is not what the plain language of the rule requires.

We further note that MCR 9.115(J) requires a bifurcated hearing with a strict separation between the "misconduct" phase and the "discipline" phase. Under that rule, aggravating and mitigating factors are not to be presented to or considered by the hearing panel unless and until there has been a finding of misconduct. MCR 9.121(C) requires that an impairment warranting probation be asserted "in mitigation." Logic is strained by a reading of subchapter 9.100 which requires that evidence in mitigation should be withheld from a panel until after a finding of misconduct except that an impairment asserted "in mitigation" under MCR 9.121(C) must be asserted in the answer to a formal complaint, prior to a ruling on misconduct and prior to the panel's consideration of any evidence on the charges of misconduct.

With that clarification, we are in agreement with the Administrator that the grounds for probation enumerated in MCR 9.121(C)(1)(a)-(d) were not properly asserted in this case and the panel was never provided with a proper basis for consideration of an order of probation.

Moreover, even if the grounds for probation had been properly asserted below, the panel did not err in its decision to impose a suspension. As the Grievance Administrator correctly points out, a panel is not required to grant probation even if all the criteria in MCR 9.121(C)(1) are properly asserted and established. On the contrary, a hearing panel may not impose probation unless it also specifically finds that "an order of probation is not contrary to the public interest." MCR 9.121(C)(1). A hearing panel's decision not to grant probation will generally not be disturbed by the Board. See GA v Peter Shek, ADB 227/87 (ADB 1989).

Respondent's admitted misconduct included misrepresentations to his client regarding the status of her case and conduct described by the panel as intentional and willful refusal to cooperate in the Attorney Grievance Commission's investigation. We are not persuaded that the panel erred in its decision to impose a suspension rather than a reprimand.

While they do not provide rigid guidelines for a level of discipline to be imposed in every conceivable factual situation, the American Bar Association's Standards for Imposing Lawyer Sanctions provide a useful framework within which to catagorize misconduct and to identify the appropriate sanction. We note that ABA Standard 4.62 suggests that, absent aggravating or mitigating circumstances, "suspension is generally appropriate when a lawyer knowingly deceives

a client, and causes injury or potential injury to the client." Standard 4.63 suggests that a reprimand is appropriate when a lawyer "negligently fails to provide a client with accurate or complete information," causing injury (emphasis added). As noted above, respondent "admitted intentional and willful deception of a client for a period of several years." (Hearing Panel Report, p 8.)

The 90-day suspension ordered by the panel in this case is in accord with the ABA Standards and could be described as lenient in light of prior opinions of the Board in which misconduct including deliberate misrepresentations to a client resulted in suspensions requiring reinstatement under MCR 9.123(B). See Grievance Administrator v Ann Beisch, DP 122/85 (ADB 1988). We are persuaded that the hearing panel arrived at its decision by carefully considering the nature of the misconduct in light of all the aggravating and mitigating circumstances and that decision is affirmed.

C.H. Dudley, Diether H. Haenicke, Michael R. Kramer, Kenneth L. Lewis, Wallace D. Riley, Theodore J. St. Antoine and Ronald L. Steffens concur in this decision.

Board member Nancy A. Wonch dissents.

While I agree that the issue of probation under MCR 9.121(C) was not properly before the hearing panel and that the panel did not err in granting probation, this Board may nevertheless "affirm, amend, reverse or nullify the order of the hearing panel in whole or in part or order other discipline." MCR 9.118(D). "Other discipline" in this case could include a reprimand with conditions relevant to the established misconduct as provided in MCR 9.106(3). Under the circumstances presented in this case, I would vacate the hearing panel's order of suspension and order a reprimand with stringent conditions effective for at least two years and to include continued counseling and the appointment of a monitor. I believe that such conditions would, in the long run, provide better protection to the public and the legal profession than a 90 day vacation from the practice of law culminating in a completely unsupervised return to the practice with no evidence of remediation whatsoever.