

Grievance Administrator,
Petitioner/Cross-Appellant,

v

Jonathan E. Holt, P 28948

Respondent/Appellant

94-158-GA; 94-174-FA

Decided: January 16, 1998

BOARD OPINION

This matter was commenced with the filing of a three-count formal complaint, Case 94-158-GA, which charged that respondent committed acts of professional misconduct warranting discipline. Respondent failed to timely answer that complaint and a default was entered. A supplemental complaint for failure to answer, Case 94-174-FA, was filed and consolidated for hearing. A default was entered for respondent's failure to timely answer that complaint. Both defaults were subsequently set aside by the panel. On August 28, 1997, the hearing panel filed its report and order dismissing Counts 2 and 3 of formal complaint 94-158-GA for the reason that the allegations had not been established by a preponderance of the evidence. The panel dismissed formal complaint 94-174-FA based upon its prior ruling setting aside the default in the original complaint. The panel unanimously concluded that respondent's failure to promptly prepare and process a proposed judgment of divorce and eligible domestic relations orders on behalf of complainant warranted a suspension of respondent's license to practice law for a period of thirty days.

The respondent filed a petition for review arguing that the panel's findings of misconduct are without proper evidentiary support; that the panel precluded respondent's effective examination of certain witnesses as the result of the witnesses' assertion of an attorney/client privilege or doctor/patient privilege; and that the discipline imposed by the panel is unduly harsh. The Grievance Administrator filed a cross-petition for review which seeks a determination that respondent's failure to

file a timely answer to the original formal complaint constituted professional misconduct. The Administrator seeks an additional thirty-day suspension for the failure to file a timely answer.

COMPLAINT 94-158-GA

The Attorney Discipline Board has conducted review proceedings in accordance with MCR 9.118 and has reviewed the record below. With regard to the panel's findings of misconduct as alleged in Count 1 of formal complaint 94-158-GA, we conclude that those findings have proper evidentiary support in the whole record and they should be affirmed. We are not persuaded that the panel erred in its rulings on the assertion of a physician/patient privilege with regard to the testimony of Dr. Sommerschild or the assertion of an attorney/client privilege with regard to the testimony of complainant's former husband and his attorney.

COMPLAINT 94-174-FA

The hearing panel's decision to set aside the default for failure to file a timely answer to complaint 94-158-GA was a proper exercise of its discretion. Nevertheless, MCR 9.104(7) establishes failure to answer a complaint in conformity with MCR 9.115(D) as misconduct and grounds for discipline regardless of the entry or setting aside of a default under the procedural rules which appear in MCR 9.115(D)(2) and MCR 2.603(D). We addressed this issue in Grievance Administrator v Mary L Banks, 95-234-GA (ADB 1997):

The hearing panel erred in dismissing the formal complaint which charged that respondent's failure to file a timely answer to the initial complaint, Case 95-234-GA, constituted professional misconduct in violation of MCR 9.104(7). Respondent does not claim that the complaint was improperly served. She acknowledges receiving the complaint and she admits that she did not file a timely answer. Her sole explanation to the panel was that she received a notice from the Board adjourning the initial hearing date and she thought that this relieved her of the responsibility to file an answer within twenty-one days. There is nothing in the adjournment notice or the rules which create such an inference. The Board has ruled that the withdrawal of a default for failure to

answer does not preclude a finding that the failure to file a timely answer nevertheless constitutes a violation of MCR 9.104(7) and the plan language of MCR 9.115(D)(1). Grievance Administrator v Rhonda R Russell, 91-202-GA; 91-235-GA (ADB 1992). As with the failure to answer the Request for Investigation, the circumstances surrounding respondent's failure to file a timely answer may well constitute a mitigating factor to be considered by the panel in determining the appropriate discipline. Those circumstances did not, however, relieve respondent of the unavoidable duty to provide a timely answer to the complaint. [Grievance Administrator v Banks, p 6.]

The circumstances in this case are similar. Respondent concedes that the formal complaint was properly served and he explained to the panel that he and his staff mistakenly assumed that an answer was required within twenty-eight days after service rather than within twenty-one days as required by MCR 9.115(D). We do not necessarily disagree with the panel's conclusion that respondent's failure to file a timely answer to the complaint need not result in suspension of respondent's license under all of the circumstances. However, in accordance with the Board's prior rulings, these circumstances mitigated but did not exonerate respondent's failure to file a timely answer. We therefore reverse the hearing panel's dismissal of formal complaint 94-174-FA.

LEVEL OF DISCIPLINE

Taking into account all the factors in this case, including respondent's prior unblemished record, the absence of dishonesty or selfish motives and the absence of evidence in the record suggesting that respondent's conduct was part of a pervasive pattern of neglect on behalf of other clients, we are not persuaded that suspension of the respondent's license is necessary to achieve the proper goals of these discipline proceedings. Discipline is therefore reduced to a reprimand.

Board Members Barbara B. Gattorn, Grant J. Gruel, Albert L. Holtz, Kenneth L. Lewis and Nancy A. Wonch concur in this decision.

Board Members Elizabeth N. Baker, C. H. Dudley, Michael R. Kramer and Roger E. Winkelman did not participate.