Grievance Administrator,

Petitioner/Appellant,

v

Gregory S. Thompson, P 39258,

Respondent/Appellee.

97-68-GA; 97-99-FA

Decided: March 11, 1998

BOARD OPINION

Respondent admittedly failed to answer a request for investigation and a formal complaint. The panel found that these failures to answer constituted professional misconduct as charged in the consolidated complaints but concluded that public discipline was not warranted. The Grievance Administrator petitioned for review of the hearing panel's "Order Regarding Discipline" which imposed no discipline but admonished respondent for his failure to answer. We agree with the Grievance Administrator that the power to admonish an attorney rests solely with the Attorney Grievance Commission under the procedure outlined in MCR 9.106(6). We also agree that the panel's decision to impose no discipline was inappropriate under the facts of this case. We vacate the hearing panel's order and reprimand respondent for his failure to answer the request for investigation and a formal complaint.

BACKGROUND

On October 9, 1996, Harrisville attorney J. Thomas Carroll, Jr. wrote to the Attorney Grievance Commission to complain that respondent, Gregory S. Thompson, had failed to pay the sum of $60.00 for legal services rendered by Carroll to a client of respondent's in August 1995. Mr. Carroll sent a copy of his letter to respondent. On October 11, 1996, respondent sent a personal money order to Mr. Carroll in the amount of $68.00. On October 21, 1996, Mr. Carroll sent written acknowledgment that he had received the check to respondent and the Attorney Grievance Commission. On the same day, October 21, 1996, the Deputy Administrator of the

Attorney Grievance Commission sent a letter to respondent which 1) attached the correspondence previously submitted by Mr. Carroll; 2) described Mr. Carroll's correspondence as a request for investigation; 3) directed respondent to submit a written answer within twenty-one days in accordance with MCR 9.113(A); and, 4) warned respondent that his failure to submit such a statement could be considered misconduct under MCR 9.104(7) and MCR 9.113(B).

Respondent wrote or called the Grievance Commission and was granted an extension to file his answer until November 25, 1996. No answer was received and on December 5, 1996, the Deputy Administrator sent another copy of the request for investigation to respondent, by regular and certified mail, with a "final notice" warning that failure to file an answer within ten days would subject him to disciplinary proceedings before the Attorney Discipline Board.

The Grievance Administrator made good on that warning by filing a formal complaint on April 9, 1997 which charged that respondent's failure to file an answer to the request for investigation constituted professional misconduct in violation of MCR 9.103(C) and MCR 9.104(1), (2), (3), (4) and (7), MCR 9.113(A), MCR 9.113(B)(2) and the Michigan Rules of Professional Conduct, 8.1(b) and 8.4(a) and (c). The matter was assigned to a hearing panel and a hearing date was set. On May 5, 1997, the Administrator filed a default for respondent's failure to file an answer to formal complaint 97-68-GA. The Administrator also filed a supplemental complaint, 97-99-FA which charged that respondent's failure to answer the original complaint constituted separate misconduct.

Respondent retained counsel and appeared before the panel on the scheduled hearing date. Respondent admitted that his default had been properly entered. He did not contest the panel's finding that misconduct had been established.

In mitigation, respondent testified that he received the request for investigation from the Attorney Grievance Commission after he sent payment to the complaining attorney. He testified

that he never answered the request for investigation because he "simply forgot about it." (Tr. p. 35). He also admitted that he received both formal complaints but did not answer them again, because he forgot due to a heavy trial schedule. "It just wasn't a priority." (Tr. p. 43). Respondent told the panel:

> This will not happen again. I have learned by lesson. It has cost me dearly. I have lost sleep over this. I have never been through this type of thing before.

In closing, respondent's counsel recommended that no discipline be imposed, citing Grievance Administrator v Deutch, 455 Mich 135; 565 NW2d 369 (1997), or in the alternative, that no more than a reprimand be imposed, citing Grievance Administrator v Baumgartner, 91-91-GA; 91-108-FA (ADB 1992). Petitioner's counsel recommended a thirty-day suspension, citing Grievance Administrator v Glenn, DP 91/86 (ADB 1987).

In its report issued October 10, 1997, the panel held:

> Under the facts and circumstances in this case, Hearing panel No. 73 concludes that the original request for investigation should not have issued without an informal hearing having been conducted under 9.114(A)(1). Indeed, it appears clear that the original matter wa a fee dispute between attorneys. The discipline process was never intended as a collection agency. The matter would have been most efficiently and judiciously handled in an informal manner.
>
> Further, the panel finds that the Respondent stood ready, willing and able to accept his responsibility for failure to respond to the formal request for investigation and complaint, in spite of the fact that the request for investigation and Complaint should not have issued. The panel further finds that the underlying complaint is *de minimis*, in addition to involving matters which are not disciplinary in nature.
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> Therefore, adhering to Deutsch [sic] . . . Hearing Panel No. 73 enters an admonishment of Respondent, consistent with MCR 9.106. In this regard the panel is mindful that Deutsch [sic] conflicts to some degree with 9.106 in that under the body of 9.106 admonishment is to be entered by the Commission without filing a complaint. While the entry of an admonishment is cited as appropriate

> discipline under Deutsch [sic], that decision also requires that the Board conclude a finding of misconduct in order to enter discipline of whatever kind it fashions. Without a complaint, there can be no finding of misconduct. In the case at bar, the misconduct relates to a failure to reply to an investigation which should have never issued. Thus, the panel, adhering to the dictates of Deutsch [sic] and applying the language and purpose of the rules as cited above, has fashioned the discipline stated in this paragraph in order to achieve a just and efficient conclusion to this matter. Lastly, it is noted that under the Rule, an admonishment does not constitute discipline *per se*, but is, as stated in the Rule, an appropriate response to misconduct, and shall be confidential under MR 9.126. [Opinion of Tri-County Panel No. 73, pp.5-6.]

DISCUSSION

This case is not about respondent's alleged debt of $60.00 to another attorney. Nor is the Board in a position to question the wisdom of issuing the request for investigation or respondent's claim that the discipline process was improperly utilized for the collection of a relatively inconsequential debt.

This case is about respondent's failure to answer a request for investigation and a formal complaint despite repeated warnings of the disciplinary consequences.

The duty to answer a request for investigation is set forth in MCR 9.113(A). The importance of that duty was reaffirmed by the Board in Grievance Administrator v Lawrence A. Baumgartner, 91-91-GA; 91-108-FA (ADB 1992). There, the Board reduced a thirty-day suspension to a reprimand and stated,

> Nevertheless, the failure of an attorney to discharge his or her fundamental duty to answer a request for investigation sends an unmistakable signal that the respondent/attorney may be unwilling or unable to aid the discipline system in the prompt resolution of these investigations. More than eleven years ago, the Board emphasized that this duty has two faces: responsibility to the bar and to the public:
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> > [T]he duty to the bar is to help clarify complaints made about its members, so that grievances with merit may proceed, and those without

> substance may be disposed of quickly . . .. The duty to the public relates to fairness to lay people who may have a legitimate grievance . . ..
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> Failure to fulfill this dual duty of responding is in itself substantive misconduct, and should never be ignored by a hearing panel, or excused as a peccadillo unworthy of drawing discipline. Matter of James H. Kennedy, DP 48/80, (ADB 1991)

An attorney may refuse to answer a request for investigation on expressed constitutional and professional grounds. MCR 9.113(B)(1). In that situation, the refusal must be submitted to a hearing panel for adjudication. Until the attorney's constitutional or professional objections are resolved by a panel, the attorney may not be found guilty of failing to answer. Grievance Administrator v Philip A. Gillis, 96-248-GA, (ADB 1997).

Even in that relatively uncommon situation, however, the burden remains squarely on the attorney to file a timely response which identifies the grounds for the refusal. There are no circumstances under which the attorney may decide to ignore a request for investigation or formal complaint on the grounds that the matter is frivolous.

A. THE HEARING PANEL LACKED AUTHORITY TO ADMONISH

In common usage, an admonition suggests advice, a warning or an expression of strong disapproval. In that sense, a panel may dismiss a complaint, impose discipline, or, in certain cases, find misconduct but impose no discipline with a warning or admonition to an attorney that certain conduct is to be avoided in the future. A panel's use of the words admonishment or admonition in that context will not invalidate an otherwise appropriate order of dismissal or order of discipline.

As used in chapter 9.100, however, an "admonition" or "admonishment" (the terms are used interchangeably in the rules) describes a particular type of resolution to a request for investigation under specifically described circumstances.

MCR 9.106 states in pertinent part:

> Misconduct is grounds for:
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> . . .
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> (6) With the respondent's consent, **admonition by the commission** without filing a complaint. An admonition does not constitute discipline and shall be confidential under MCR 9.126 except as provided by MCR 9.115(J)(3). The administrator shall notify the respondent of the provisions of this rule and the respondent may, within twenty-one days of service of the admonition, notify the commission in writing that respondent objects to the admonition. Upon timely receipt of the written objection, the commission shall vacate the admonition and either dismiss the request for investigation or authorize the filing of the complaint. [Emphasis added]

We are unable to construe that rule in such a way as to allow admonishment by a hearing panel after the filing of a complaint. Instead, the hearing panel relied on a literal . . . reading of a footnote to the lead opinion in Grievance Administrator v Deutch, 455 MICH 135 (1997). Footnote 12 in that Opinion reads:

> "MCR 9.106 describes the "types of discipline; minimum discipline; admonishment" and in descending order from most to least severe, sets forth the types of discipline the hearing panel's are authorized to impose. Such discipline, in descending order of severity, includes: revocation of the attorneys license to practice law in Michigan, suspension of the Michigan license to practice for various terms and with various conditions, reprimand, probation, restitution, admonishment without the filing of a complaint [Deutch, 455 MICH at 163 N12].

First, and most obviously, the paraphrase of MCR 9.106 in footnote 12 which suggests that an admonishment is a type of discipline is directly contradicted by the actual language of MCR 9.106 (6) which plainly states "an admonition does not constitute discipline . . .". We note also that the catch line of MCR 9.106 distinguishes between discipline and an admonishment.

Footnote 12 refers to a key concept behind an admonishment, describing it as "admonishment without the filing of a complaint". To the extent the footnote in Deutch suggests that a panel has the

power to admonish, this reading must be rejected as logically inconsistent. A panel cannot admonish "without the filing of a formal complaint" if a panel's first involvement in the discipline process is after a formal complaint has, in fact, been filed.

Admittedly, admonishments are similar to discipline in that they can be considered at the discipline phase of a subsequent proceeding. But even the rule which allows such disclosure and consideration maintains the distinction between admonishment and discipline:

> In determining the discipline to be imposed, any and all evidence of aggravation or mitigation shall be admissible, including previous admonitions **and** orders of discipline, and the previous placement of the respondent on contractual probation. [MCR 9.115(J)(3); emphasis added].

Finally, the impracticality of the panel's interpretation is referenced in the final sentence of its report: "Lastly, it is noted that under the rule, an admonishment does not constitute discipline *per se*, but is, as stated in the rule, an appropriate response to misconduct, and shall be confidential under MCR 9.126." Admonishments are indeed confidential under MCR 9.106(6) and MCR 9.126. However, while dispositions of investigations by the Attorney Grievance Commission, including admonishments, are confidential, discipline proceedings subsequent to a formal complaint are open to the public. MCR 9.126 specifically directs that "formal pleadings, reports, findings, recommendations, discipline, reprimands, transcripts and orders resulting from hearings must be open to the public." The panel's report seemingly suggests that the result in this case should be categorized as either a public admonishment or a confidential disposition by the panel. Neither result is available under the rules.

The Board may yet be required to deal with other consequences of the Court's opinion in Deutch; however, a newly recognized authority under which hearing panels have the power to admonish is not one of them.

B. LEVEL OF DISCIPLINE

The panel's report relies upon the lead opinion in Grievance Administrator v Deutch, supra, primarily as grounds for a panel's authority to issue an admonition. For the reasons stated above, we do not find such authority in Deutch. Nevertheless, the panel's reliance on Deutch also raises the possibility, at least by implication, that the panel could have entered an order of discipline which, in fact, imposes no discipline at all, Deutch, 455 Mich at 163. Although this issue was not briefed by the parties in this appeal to the Board, the Administrator's counsel, in apparent anticipation that such an order might be considered in this case, argued to the Board at the review hearing that the "no discipline" option in Deutch was limited to criminal conviction cases instituted under MCR 9.120(B)(3).

We do not need to resolve that question in this case, not only because it was not briefed or presented as an acceptable alternative to the panel's attempted admonition, but because discipline is clearly warranted in this case.

Participants in the discipline system should avoid the trap of distinguishing between "substantive" misconduct and "mere" failure to answer a request for investigation or failure to answer a formal complaint. The attorney who has actual notice of a request for investigation or formal complaint and nevertheless ignores the duty to answer which is explicitly set forth in the court rules has committed professional misconduct. Depending on the circumstances, that misconduct may be mitigated to a degree warranting reprimand. Although the Board has provided a guideline in that regard (see Matter of David A. Glenn, DP 91/86 (ADB 1987), the Board has recognized that a reprimand may, in some cases, represent an appropriate exercise of the panel's sound discretion. Grievance Administrator v Lawrence A. Baumgartner, 91-91-GA; 91-108-FA (ADB 1992).

By way of emphasis, we repeat language from Matter of James H. Kennedy which appears earlier in this opinion.

> Failure to fulfill the dual duty [to the bar and to the public] of responding is in itself substantive misconduct, and should never be

> ignored by a hearing panel, or excused as a peccadillo unworthy of drawing discipline. Matter of James H. Kennedy, DP 48/80, (ADB 1991).

We have not previously recognized an exception to that holding nor do we here.[1]

Respondent Thompson has a prior unblemished record. In his appearances before the panel and the Board he has generally accepted responsibility for his conduct and provided assurance that there will be no reoccurrence. Taking into account all of the factors considered by the hearing panel, we are satisfied that a reprimand is an appropriate result in this case.

Board Members Elizabeth N. Baker, C. H. Dudley, Barbara B. Gattorn, Grant J. Gruel, Albert L. Holtz, Kenneth L. Lewis, Roger E. Winkelman and Nancy A. Wonch concur in this decision.

Board Member Michael R. Kramer did not participate in this decision.

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[1] We should, however, clarify a footnote which appeared in a recent Board opinion in Grievance Administrator v Leonard C. Jaques, 97-157-JC, (ADB 1997). In footnote 1 in that opinion, speaking of the holding in Deutch that an order of discipline may effectively impose "no discipline", we stated:

> To that extent, Deutch does implicitly overrule prior Board opinions which held that "where even a technical violation of the discipline rules is established, discipline must follow, regardless of the mitigation exhibited." Matter of James H. Kennedy, DP 48/80, (ADB 1981).

While the Deutch concept of an order of discipline which imposes no discipline conflicts with the quoted portion of the Board opinion in Kennedy that discipline must always follow a finding of misconduct, nothing in Deutch conflicts with the holding in Kennedy that the substantive misconduct of failure to answer should result in discipline.