Grievance Administrator,

Petitioner/Appellant,

v

Mary L. Banks, P 44700

Respondent/Appellee.

95-234-GA; 95-264-FA

Decided: January 10, 1997

BOARD OPINION

The Grievance Administrator filed a formal complaint on November 7, 1995 (95-234-GA) which charged the respondent with neglect and incompetence in her handling of a criminal matter, and with failing to answer a Request for Investigation. On December 4, 1995, the Grievance Administrator defaulted respondent for her failure to answer the complaint within twenty-one days of mailing as required by MCR 9.115(D). On the same day, the Grievance Administrator filed a second complaint (95-264-FA) which charged that respondent's failure to answer the first complaint constituted a separate act of professional misconduct. The respondent filed a motion to set aside default which was granted by the hearing panel. At the conclusion of the hearing on the merits of the consolidated complaints, the panel entered an order dismissing both complaints.

The Grievance Administrator has filed a petition for review and the Attorney Discipline Board has conducted review proceedings in accordance with MCR 9.118. We conclude that the hearing panel's decision to set aside the respondent's default did not constitute an abuse of discretion. The panel's dismissal of Count 1 is affirmed. However, we reverse the panel's dismissal of the charges that respondent failed to answer a Request for Investigation and failed to answer a formal complaint and we remand this matter to the hearing panel for a hearing on discipline in accordance with MCR 9.115(J)(2).

Respondent was charged with three separate and distinct types

of misconduct: 1) failure to provide reasonable representation and communication to a client in a criminal case; 2) failure to answer that client's Request for Investigation; and, 3) failure to answer a formal complaint. We have considered each of these charges, and the Administrator's grounds for appeal, separately. First, however, we address the Administrator's argument that the hearing panel erred in setting aside the respondent's default.

Setting Aside The Default

Formal complaint 95-234-GA was properly served and actually delivered to the respondent and she does not claim otherwise. Respondent's default in accordance with MCR 9.115(D)(2) was filed December 5, 1995. On December 28, 1995, respondent filed a motion to set aside default, memorandum in support of motion, affidavit of meritorious defense, answer to complaint and affirmative defenses. (These pleadings were delivered to the panel on December 15, 1995 and were served on the Grievance Administrator on December 19, 1995.)

The Board has recognized that a motion to set aside a default in a discipline proceeding must meet the requirements of MCR 2.603(B)(1), i.e, respondent must demonstrate good cause and must file an affidavit of facts showing a meritorious defense. In Grievance Administrator v Clyde Ritchie, ADB 52-98 (ADB 1989), the Board recognized that a hearing panel has substantial discretion in determining whether good cause has been shown but that a panel is unable to exercise that discretion if the respondent has not met the minimum requirements of the applicable rule. Unlike Ritchie, in which the respondent filed no affidavit, respondent Banks did meet the filing requirements of Rule 2.603(B)(1).

In general, the Board has given substantial deference to a hearing panel's decision to set aside a default. This is appropriate where the motion is filed within a relatively short time after the entry of default, where the respondent is able to articulate a cognizable defense to all or part of the complaint, and where there is no significant delay in the proceedings or

manifest prejudice to the Grievance Administrator. We decline to disturb this panel's decision to set aside the default and to hear this case on its merits.

Count 1

Count 1 of complaint 95-234-GA charged the respondent with failure to provide diligent representation, failure to further her client's objectives and failure to keep her client reasonably informed in the course of her representation of a client charged with first degree murder. It is undisputed that the client was arrested in March 1994 on a charge of first degree murder and that there was substantial evidence of the defendant's guilt, including a confession and eye witnesses. Respondent was the third attorney to represent this client. Prior counsel had attempted to have the defendant undergo an independent evaluation to explore a diminished capacity defense but defendant had failed to cooperate with the examiner. Respondent did not meet the defendant until January 1995 when she was asked to take over his case. Her next direct contact with her client occurred at a pretrial conference in March 1995. Respondent interviewed her client in jail a few days prior to the scheduled trial date of May 1, 1995. At trial, the defendant waived a jury. Defendant was convicted of first degree murder and felony firearm after a bench trial in which the people called eight witnesses and introduced the defendant's statement to police. The defense called no witnesses.

The Grievance Administrator's conclusory argument that the hearing panel demonstrated an unwillingness to hold respondent accountable for her lack of communication and failure to prepare adequately under the circumstances and that this unwillingness has resulted in an appearance of apathy and unconcern on the part of the bar is not supported by the record. The record includes the police records, court file, the transcript of the criminal trial and the testimony of respondent, her client and the client's mother.

In its report, the panel reviewed the evidence, including the

complainant's letter to respondent in February 1995 indicating his unwillingness to go to trial in light of the evidence against him and expressing his desire to begin serving his sentence. The panel further noted that respondent negotiated a plea bargain to second degree murder with a sentence of forty years instead of life without parole plus two years on a felony firearm charge. The complainant rejected the proposed plea bargain. The panel's report also cites two letters written by the complainant to respondent a month after his conviction which support respondent's claim that the complainant's requests for visits in jail was motivated largely out of a desire for a social relationship with respondent rather than a desire to prepare for the impending trial.

The standard of review to be followed by the Board is whether the hearing panel's findings have proper evidentiary support in the record. Matter of Daggs, 411 Mich 304, 318-319 (1981). Applying that standard here, we find ample evidentiary support for the panel's conclusion that the charges in Count 1 were not established by a preponderance of the evidence.

Failure to Answer Request for Investigation

The record establishes that at least one copy of the Request for Investigation was delivered to respondent's office and that she did not file an answer to it. The panel's dismissal of the count charging failure to answer a Request for Investigation is based on its conclusion that the Grievance Administrator did not effectuate valid service of the Request for Investigation under the rules. We disagree.

Rule 9.112(C)(1)(b) provides that, after making a preliminary investigation, the Administrator may:

> b) serve a copy of the Request for Investigation on the respondent by ordinary mail at the respondent's address on file with the State Bar as required by Rule 2 of the Supreme Court rules concerning the State Bar of Michigan. Service is effective at the time of mailing, and non-delivery does not affect the validity of service. If a respondent has not filed an answer, no formal complaint shall

> be filed with the Board unless the Administrator has served the Request for Investigation by registered or certified mail, return receipt requested.

Respondent testified that she had no recollection of receiving the original Request for Investigation which, the Grievance Administrator alleges, was mailed to her on May 2, 1995 by ordinary mail. The hearing panel properly ruled that the Administrator's production of the original Request for Investigation was not sufficient to establish that the Request for Investigation was actually mailed on that date. There was no offer of testimony by an employee, proof of mailing or other evidence on that issue.

However, it is undisputed that the Grievance Administrator's "final notice" dated June 8, 1995 was delivered to respondent's office by certified mail on June 9, 1995 and that a return receipt was signed by respondent's employee. The panel reported:

> Respondent testified in November 1995, after receiving the formal complaint in case number 95-234-GA, she searched her files and found an unopened envelope containing the June 8, 1995 final notice in an unrelated file. She does not know how the envelope got in the file, although she acknowledged that she did her own filing. (HP Report p. 11)

The final notice which was unquestionably delivered to respondent's office on June 9, 1995 refers specifically to an attached Request for Investigation mailed on May 2, 1995. The notice warns that failure to answer the attached Request for Investigation could result in disciplinary proceedings.

The above-cited provision of MCR 9.112(C)(1)(b) wisely provides for a fail-safe procedure in the event that the original Request for Investigation is not answered. That rule requires delivery of a second copy by registered or certified mail, return receipt requested as a prerequisite to the filing of a formal complaint. The Grievance Administrator followed that procedure in this case. Respondent's claim that the final notice was inadvertently misfiled may certainly be taken into consideration as a mitigating factor. Nevertheless, dismissal of Count 2 was not appropriate in light of the facts of this case.

Case 95-264-FA--Failure to Answer Formal Complaint

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 plain 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.

Board Members C. H. Dudley, M.D., Barbara B. Gattorn and Miles A. Hurwitz concur in this decision.

Board Member Elaine Fieldman, joined by George E. Bushnell, dissents.

DISSENT

MCR 9.112(C) requires that the Grievance Administrator serve a copy of the Request for Investigation on the respondent by ordinary mail.[1] There is no evidence in this case that the Grievance Administrator served the Request for Investigation by first class mail. Having not complied with the first step, service was not perfected. Accordingly, I would affirm the decision of the hearing panel. While it may appear that this result is elevating form over substance, I submit that otherwise the Grievance Administrator could routinely ignore the first class service requirement and claim that service was perfected by other means. The rule does not permit the Grievance Administrator to make that choice.

Board Members Albert L. Holtz, Michael R. Kramer and Kenneth L. Lewis were absent and did not participate.

[1] The majority opinion states that the Administrator "may" serve a Request for Investigation by ordinary mail, suggesting that the Administrator may choose a different method of service. MCR 9.112(C) gives the Administrator a choice of notifying the complainant and respondent that the Request for Investigation is inadequate or serving it by first class mail. There is no authority for alternate service.