STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellant,

v

Mark L. Brown, P-39562,

Respondent/Appellee,

Case No. 00-74-GA

Decided: February 18, 2002

BOARD OPINION

Appearances: Stephen P. Vella, Esq. for Grievance Administrator, Petitioner/Appellant; Walter C. Pookrum, Esq. For Mark L. Brown, Respondent/Appellee

The parties stipulated to a finding of misconduct as violations of MCR 9.113(A)[1] and MPRC 8.1(b)[2]. The only issue before the hearing panel was the determination of the appropriate level of discipline to be imposed. Tri-County Hearing Panel #5 issued a report imposing a reprimand with conditions, to be effective June 5, 2001. Respondent was further ordered to pay costs in the amount of $277.55.

The Grievance Administrator petitioned the Board for review of the hearing panel's decision on the grounds that respondent's misconduct, aggravated by his prior discipline[3], warrants an increase in the level of discipline from a reprimand to a suspension.

The Attorney Discipline Board has conducted review proceedings in accordance with MCR 9.118, including review of the record and due consideration of the briefs and arguments presented by the parties. For the reasons discussed more fully below, we affirm

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1 MCR 9.113(A) states:

> Within 21 days after being served with a request for investigation under MCR 9.112(C)(1)(b), the respondent shall file with the administrator a signed, written answer in duplicate fully and fairly disclosing all the facts and circumstances pertaining to the alleged misconduct...

2 MRPC 8.1(b) states, in part, that a lawyer shall not, "knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority..."

3 The respondent had previously been suspended for 30 days (with consent), effective 12/16/95 (ADB Case No. 95-98-GA) for failure to answer a Request for Investigation.

the findings and conclusions of the hearing panel with respect to the finding of misconduct. However, after consideration of the ABA Standards for Imposing Lawyer Discipline, and based upon a finding that there are no extraordinary circumstances which merit deviation from established precedent, we conclude that suspension is the appropriate level of discipline in this case. We therefore modify the discipline imposed by the hearing panel by increasing the sanction to suspension with conditions. Respondent's license to practice law in Michigan will be suspended for a period of 30 days.

I. Procedural History

The complaint filed by the Grievance Administrator alleged that Mr. Brown failed to answer three, separate, requests for investigation served upon him during the period between June 7 - June 29, 1999. Mr. Brown admitted to all charges[4] and stated that he would not appeal the finding of misconduct. However, the respondent did retain his right to appeal regarding the discipline imposed by the panel. The panel placed its finding of misconduct on the record, based on the stipulation of the parties and on respondent's testimony.

At the sanction phase of the hearing, counsel for the Grievance Administrator presented a previous order of suspension by consent, in Grievance Administrator v Mark L. Brown, 95-68-GA, as evidence of an aggravating factor. In that case, the respondent failed to communicate with a client regarding his failure to file a final judgment of divorce, and failed to answer three requests for investigation. Respondent Brown stipulated to the imposition of a 30 day suspension in that case, effective December 16, 1995.

In the present case Mr. Brown suggests that suspension was appropriate in 1995 because, "there was something that I did that was substantially wrong in addition to my failure to respond to the grievance." (11/20/00 Panel Hearing Transcript (hereafter cited as "Tr."), pp 26-27.) Mr. Brown further testified that, at the time he received the three requests for investigation in the instant matter[5] he was experiencing difficulty in his personal life, including a separation from his wife of 21 years. Respondent testified that he may have been suffering from depression as a result of the separation, and that he was participating in marital counseling. Mr. Brown stated that, at the time he received the requests for

[4] The Administrator withdrew the charge that Respondent violated MCR 9.103(C), noting that the Board has previously held that the same misconduct falls under the Michigan Rules of Professional Conduct 8.1(b).

[5] Two of the three requests for investigation were served on 6/7/99. The third request for investigation was served on 6/29/99.

investigation (in June 1999) it was, "like I was driven to inaction...each and every time I received the grievance, I couldn't move. I just could not move..." (Tr. p 30.)

The hearing panel considered the evidence, testimony presented at the hearing, and the supplemental briefs of the parties. The panel issued its report on May 14, 2001, concluding that a reprimand was the appropriate sanction in this case.

The hearing panel also imposed two conditions as a part of the order of discipline. First, the respondent was to meet with an attorney, designated by the Attorney Discipline Board, to monitor Mr. Brown's practice for a reasonable period of time. The monitoring attorney was to certify to the Attorney Discipline Board that Mr. Brown was not suffering from any mental or physical condition, including depression, which would make it likely that he would fail to respond to any future requests for investigation.

The second condition was that the respondent would stipulate that, if he failed to fully and timely respond to any future request(s) for investigation, he would be suspended for 45 days. Further, the respondent would have been suspended from the practice of law for 45 days if the monitoring attorney failed to make the certification to the Board regarding Mr. Brown's mental and physical health.

Finally, the panel ordered the respondent to pay costs in the amount of $277.55. Mr. Brown has made timely payment of the costs assessed by the panel.

The Grievance Administrator petitioned for appeal of the panel's decision. Both the Grievance Administrator and the respondent, through counsel, filed briefs on appeal. The issue presented to the Board was whether the discipline in this case, based on respondent's admitted misconduct, and as aggravated and/or mitigated by the factors presented, should be increased from a reprimand to a suspension. The Board's review in this case is limited to the appropriate level of discipline. Neither the respondent nor the Grievance Administrator challenged the underlying facts or the finding of misconduct.

II. Discussion

A. Failure to Answer Request for Investigation

1. ABA Standards

The hearing panel recognized its obligation to utilize the American Bar Association ("ABA") Standards for Imposing Lawyer Sanctions. Grievance Administrator v Lopatin, 462 Mich 235 (2000). The report states that the panel considered the factors enunciated in ABA Standard 3.0, as well Standard 7.2.

a. ABA Standard 3.0

The Board is directed, by ABA Standard 3.0, to consider four factors when imposing discipline:

a. the duty violated;
b. the lawyer's mental state;
c. the potential or actual injury caused by the lawyer's misconduct; and
d. the existence of aggravating factors or mitigating factors.

[ABA Standard for Imposing Lawyer Sanctions 3.0 (1986).]

In this case, Mr. Brown's failure to respond to the requests for investigation violated a duty to the legal profession. Actual injury was not recognized. Potential for injury in failing to answer a request for investigation, however, does exist. Potential injury to the public, to a client, and to the legal profession may be inferred.

Respondent Brown admits that he received the requests for investigation, but claimed he was "driven to inaction" and was simply not able to answer as a result. This is not a case of negligence, where the deadline for answer was accidentally forgotten or the request for investigation was misplaced. Rather, Mr. Brown's mental state constituted a knowing failure to answer. The respondent does not rebut the Grievance Administrator's assertion that "knowingly" is the appropriate mental state to apply with respect to determining the level of discipline in this case.

Both aggravating and mitigating factors are present in the instant case. The dispute between respondent and the Grievance Administrator arises out of the weight to be assigned to those factors. The panel essentially determined that the mitigating factors constituted "exceptional circumstances" which supported a reprimand with conditions, instead of suspension, despite the language of ABA Standard 7.2.

b. Standard 7.2 versus Standard 7.3

ABA Standard 7.2 states that:

> Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed to the profession and causes injury or potential injury to a client, the public, or the legal system.

In contrast, Standard 7.3 states:

> Reprimand is generally appropriate when a lawyer negligently engages in a conduct that is a violation of a duty owed to the profession, and causes injury or potential injury to a client, the public, or the legal system.

The issue before the Board is whether a suspension, rather than a reprimand, is appropriate upon application of the ABA Standards when weighed against the substantial body of Board precedent on this issue.[6]

2. Glenn Standard

The Board, in addition to its consideration of the ABA Standards, reviewed Michigan case precedent applicable to this matter. Both parties cite as authoritative the Attorney Discipline Board's opinion in Grievance Administrator v David A. Glenn, DP 91/86 (ADB 1987). The Board in Glenn held that:

> the lawyer who ignores the duty imposed by Court Rule to answer Requests for Investigation and Formal Complaints does so at his or her own peril and that, absent exceptional circumstances, that attorney may expect a discipline greater than a Reprimand. [Glenn, supra, p 5.]

In reaching its decision in Glenn, the Board looked to its previous opinion in Schwartz v Kennedy, DP 40/30, (ADB 1981). "[A] Respondent failing to answer Requests for Investigation may be considered professionally irresponsible and contemptuous...failure to answer also indicates a conscious disregard for the rules of the Court." Kennedy, supra, p 132.

The underlying facts in Glenn involved a respondent who failed to answer a request for investigation. The Board found liability not only for Mr. Glenn's failure to answer, but also found liability, by default, as to the underlying charge of neglect of a client's legal work. In Mr. Brown's case, however, the Grievance Administrator did not file any charges other than the failure to answer. The Board, in Glenn, noted that, in imposing discipline, it could not ignore the fact that Mr. Glenn failed to answer the formal complaint. Because Mr. Brown did answer the formal complaint, that aggravating factor is not present here. It does not necessarily follow, however, that discipline lower than that imposed in Glenn is appropriate here. The gravamen of the respondent's conduct in this case is his repeated failure to answer the requests for investigation. We reiterate the general holding in Glenn - that an attorney who fails to answer a request for investigation should ordinarily expect that a 30 day suspension, as a minimum level of discipline, will be imposed.

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6 The Michigan Supreme Court, in Grievance Administrator v Lopatin, 462 Mich 235, 248 n 13 stated:

> We caution the ADB and hearing panels that our directive to follow the ABA Standards is not an instruction to abdicate their responsibility to exercise independent judgment. Where, for articulated reasons, the ADB or a hearing panel determines that ABA Standards do not adequately consider the effects of certain misconduct, do not accurately address the aggravating or mitigating circumstances of a particular case, or do not comport with the precedent of this Court or the ADB, it is incumbent upon the ADB or the hearing panel to arrive at, and explain the basis for, a sanction or result that reflects this conclusion.

The language of Glenn, however, does not tie the hands of panelists and board members. Instead, the Glenn opinion allows for some discretion to be exercised at the discipline phase, in the presence of "exceptional circumstances." The Board, in Glenn, intended its opinion to serve as notice to the Bar that:

> the lawyer who ignores the duty imposed by Court Rule to answer Requests for Investigation and Formal Complaints does so at his or her own peril and that, absent exceptional circumstances, that attorney may expect a discipline greater than a Reprimand. [Glenn, supra, p 5.]

The Board later cautioned that:

> the Glenn opinion should not be read so narrowly as to deprive the hearing panel of any discretion to consider the imposition of discipline which takes into account all of the factors which are unique to the case before it. Nor do we believe that the phrase "exceptional circumstances" must be read in the sense of circumstances so compelling as to approach an absolute defense to the charge of failure to answer a request for investigation. [Grievance Administrator v Lawrence A. Baumgartner, ADB 91-91-GA; 91-108-FA (1992) at 1.]

The Board must determine whether exceptional circumstances exist in this case which support the imposition of a sanction less than suspension.

B. "Exceptional Circumstances"

1. Aggravating / Mitigating Factors under ABA Standards 9.22 and 9.32

The Board has reviewed the aggravating and mitigating factors set forth in ABA Standards 9.22 and 9.32, for assistance in determining whether "exceptional circumstances" are present in the instant case.

ABA Standard 9.22 enumerates factors which may be considered aggravating factors:

(a) prior disciplinary offenses;

(b) dishonesty or selfish motive;

(c) a pattern of misconduct;

(d) multiple offenses;

(e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency;

(f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;

(g) refusal to acknowledge wrongful nature of misconduct;

(h) vulnerability of victim;

(i) substantial experience in the practice of law;

(j) indifference to making restitution.

[ABA Standards for Imposing Lawyer Sanctions 9.22(a)-(j).]

Mitigating factors, which may justify imposition of a less severe form of discipline than might ordinarily be imposed, are listed in ABA Standard 9.32:

(a) absence of a prior disciplinary record
(b) absence of a dishonest or selfish motive;
(c) personal or emotional problems;
(d) timely good faith effort to make restitution or to rectify consequences of misconduct;
(e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings;
(f) inexperience in the practice of law;
(g) character or reputation;
(h) physical or mental disability or impairment;
(i) delay in disciplinary proceedings;
(j) interim rehabilitation;
(k) imposition of other penalties or sanctions;
(l) remorse;
(m) remoteness of prior offenses.

[ABA Standards for Imposing Lawyer Sanctions 9.32(a)-(m).]

The mitigating factors present in Mr. Brown's case may include: absence of a dishonest or selfish motive; the possible existence of personal or emotional problems at the time of the misconduct, in the form of marital difficulties; full and free disclosure to the hearing panel, including a cooperative attitude during the hearing; possible mental impairment in the form of depression; and Mr. Brown's expression of remorse during the panel hearing. The aggravating factors, however, include: Mr. Brown's prior disciplinary offense; the existence of multiple offenses (failure to answer three requests for investigation); and substantial experience in the practice of law. Mr. Brown's prior discipline was imposed in 1995, and is sufficiently proximate in time that it cannot be ignored as an aggravating factor. Most troublesome, perhaps, is the fact that the respondent's prior discipline also involved his failure to answer a request for investigation - the sole substance of the misconduct in the present case.

The facts present in Mr. Brown's case tend to endorse a finding that the mitigating factors do not outweigh the aggravating factors. Consequently, despite the presence of some mitigating circumstances, the respondent has not established the existence of "exceptional

circumstances" which would warrant a departure from what ordinarily would be a 30 day suspension for failure to answer a request for investigation.

2. "Exceptional Circumstances" in Michigan, post-Glenn

There are several ADB opinions, issued post-Glenn, which have discussed the application of "exceptional circumstances" with respect to the imposition of discipline for failure to answer a request for investigation. In Grievance Administrator v Arthur C. Kirkland, Jr., 98-236-GA (ADB 1999), the Board increased the discipline for failure to answer a request for investigation from a reprimand to a suspension. Kirkland, like this case, involved a failure to answer a request for investigation as the sole charge of misconduct. Like Mr. Brown, Mr. Kirkland did answer the formal complaint and did admit to the misconduct.

The Grievance Administrator cites the Board's order in Grievance Administrator v T. Patrick Freydl, 96-18-GA; 96-36-GA (ADB 1997). In Freydl, while the respondent also failed to answer the formal complaint, the Board affirmed the hearing panel's imposition of a thirty-day suspension for the respondent's failure to answer the request for investigation. Most recently, the Board imposed a 30 day suspension based on the respondent's failure to answer a request for investigation in Grievance Administrator v Kerry L. Jackson, 00-162-GA; 00-181-FA (ADB 2001). Additional post-Glenn cases which concern a respondent's failure to answer are discussed infra.

a. GA v Whelan, 92-231-GA, 92-250-FA (ADB 1993)

The Grievance Administrator cited, to the panel, the Board's opinion in Grievance Administrator v Arthur W. Whelan, Jr., 92-231-GA; 92-250-FA (ADB 1993). Whelan was relied upon to support the Grievance Administrator's argument that an attorney's repeated failure to answer requests for investigation constitutes an aggravating factor, and supports the imposition of a suspension.

In Whelan, the board increased the discipline from a reprimand to a sixty-day suspension. However, the factual basis for imposing discipline in Whelan is easily distinguished from the facts in Mr. Brown's case. The Board concluded that, with respect to Mr. Whelan:

> the respondent's neglect of his obligations to a client, failure to answer a request for investigation and failure to answer a formal complaint, coupled with the aggravating effect of the respondent's lack of candor toward the hearing panel and disregard for the discipline process warrants his suspension from the practice of law for a period of sixty days. [Whelan, supra, p 1.]

While Mr. Brown did fail to answer his requests for investigation, there is no charge that he neglected a client matter, that he failed to answer the formal complaint, or that he was not candid with the panel. Thus, the greater misconduct in Whelan supports the imposition of a 60 day suspension, rather than a 30 day suspension. However, there are not such aggravating factors present in Mr. Brown's case. In fact, Mr. Brown appeared to be forthright with the panel, and remorseful:

> I do not indicate that it's not important that I did not answer grievances. It is very important and I did not do it. I'm wrong and I was wrong, but I would certainly like to point out the fact that these grievances -- I do criminal defense work. I do primarily appointed casework. I do casework for indigent defendants and there are a lot of times that I believe that there are just grievances filed just as a matter of course by the defendants. That doesn't mean that they did anything wrong, and it also doesn't mean that I did anything wrong with regard to them. I failed in my responsibility to respond to the grievances. I did not do that. [Tr, p 28.]

Mr. Brown's statements indicate that he admitted his failure to respond was wrong. "I did not conduct myself properly as an attorney. I did not do what I was supposed to do..." (Tr, p 48.)

The factual discrepancies between Mr. Brown's situation and Mr. Whelan's actions distinguish the length of suspension imposed in Whelan from the length of suspension to be imposed in the instant case. Mr. Brown's attempt to differentiate his failure to respond in this instance from his failure to respond in 1994 disturbs this Board. Mr. Brown seems to suggest that his misconduct is not as serious now as it was in 1995. Mr. Brown distinguishes this case from his prior discipline on the basis of the presence or absence of "substantive" misconduct:

> Quite frankly, I have not lied to a client. I have not taken any money from a client. I have not done anything that bears on me doing inf[r]audulent or false or seeking any pecuniary gain. I've done nothing like that. I admit that I was wrong and obviously because I admit, obviously there should be some discipline imposed.
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> I would say that I haven't done anything that is in and of itself bad, and by that -- what I have done is bad and wrong because I should have filed answers and I did not do that, but I have not done anything in terms of the client contact that was bad, I think that I am, and I don't mean to pat myself on the back, but I think I'm regarded as a very good lawyer in terms of my practice or in the practice area that I practice in as far as the judges and the prosecutors are concerned, and I apologize. I really apologize. [Tr, pp 56-57.]

The Board suspects that Mr. Brown fails to comprehend the serious nature of failing to answer a request for investigation, despite his own feeling that the allegations may lack

merit. "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 1981). "The Board has consistently emphasized in the past that failure to answer a request for investigation within the time allowed is misconduct *per se*." GA v Walsh, 90-102-GA; 90-112-FA (ADB 1991), *citing* MCR 9.104(7) and MCR 9.113(B)(2); Schwartz v Kennedy, DP 49/80 (ADB 1981); Schwartz v Ruebelman, DP 5/81 (ADB 1981); and GA v Melvin R. Smith, 35229-A (ADB 1979). Mr. Brown does not appear to understand that any failure to answer a request for investigation is misconduct *per se*, regardless of whether or not the underlying grievance would have evidenced other, more "substantive," misconduct.

b. GA v Walsh, 90-102-GA, 90-112-FA (ADB 1991)

The Petitioner cites Grievance Administrator v Michael F. Walsh, 90-102-GA; 90-112-FA (ADB 1991) in support of his argument that, even when the respondent "freezes" upon receipt of the request for investigation, suspension is the appropriate discipline to impose for failure to respond to a request for investigation. In Walsh, the Board noted that, post-Glenn, attorneys who ignore their duty to respond to a request for investigation will receive discipline greater than simply a reprimand, "absent exceptional circumstances." Walsh, supra, p 3, *emphasis in original*.

In Walsh, the Board affirmed the hearing panel's decision to impose a suspension, rather than a reprimand, finding that there was no, "evidence or exceptional or compelling circumstances directly related to the respondent's failure to answer the Request for Investigation." (Id.) The Board, while sympathetic to the lawyer who "freezes" upon receipt of a request for investigation, reiterated that:

> the fact remains that just as every citizen has an unavoidable duty to respond to inquiries to the Internal Revenue Service, no matter how frightening or distasteful the prospect, members of the bar have an unavoidable duty to answer Requests for Investigation. [Walsh, supra, p 3.]

The hearing panel in this case recognized the holding in Walsh when it issued its decision to impose a reprimand, rather than a suspension, upon Mr. Brown. The panel noted that the Walsh opinion, while emphasizing the requirement of exceptional circumstances, also stated:

> **It would not be accurate to describe the Board's decision in Glenn as an iron-clad rule that an attorney who fails to answer a Request for Investigation** or formal complaint **must receive a suspension of thirty days,** no more and no less. [Panel Report, p 4, *emphasis in original*, *quoting* Walsh, supra, p 2.]

The question addressed by the Board in Walsh is the same question faced by the Board in this case: whether the mitigating factors presented by the respondent constitute "exceptional circumstances" such that the appropriate level of discipline is reprimand, rather than suspension.

c. GA v Scholten, 93-134-GA, 93-178-FA (ADB 1994)

The Grievance Administrator cites Grievance Administrator v John R. Scholten, 93-134-GA; 93-178-FA (ADB 1994) for the proposition that a respondent's marital difficulties, as a mitigating factor, do not constitute "exceptional circumstances" sufficient to warrant a reduction in discipline. In Scholten, the respondent presented evidence of difficulties in his marriage, and voluntary participation in substance abuse treatment, as mitigating factors. The Board, in Scholten, did not reduce the discipline, and affirmed the hearing panel's imposition of a 45 day suspension.

The Board noted that its primary responsibility was to protect the public, the legal profession, and the courts. The Board's decision to affirm the suspension in Scholten, was based on the fact that Mr. Scholten testified that the personal problems he experienced were not the cause of his failure to answer:

> Faced with the respondent's own testimony that his personal problems were not the primary cause of his failure to fulfill his obligations to this client or to the discipline system, we are not persuaded that the hearing panel's decision was incorrect or that this matter should be remanded. [Scholten, supra, p 4.]

Unlike Mr. Scholten, however, Mr. Brown does assert that his marital difficulties contributed to his failure to respond to the requests for investigation:

> During 1998 and 1999, the period at issue here, [Mr. Brown] experienced upheaval in [his family life], in that he was separated from his wife due to marital problems. It represented the "biggest failure" he had ever experienced. (Tr 30) It had a "serious effect" on him. (Tr 46) It left him depressed; there was a "gloom" (Tr 32-33) It rendered him unable to respond to the requests for investigation, each of which seemed further to compound his problems. (Tr 33-34) [Respondent's Brief in Opposition to Petition for Review, p 3.]

If Mr. Brown's contentions had been supported by evidence, testimonial or documentary, that he had, in fact, been diagnosed with and/or sought treatment for depression, this case might be distinguishable from Scholten. However, without more than Mr. Brown's own personal appraisal, there is not sufficient support to determine that a causal connection linked the mitigating factors and the failure to respond to the requests for investigation.

d. GA v Dunn, 97-192-GA, 97-219-FA (ADB 1998)

The Grievance Administrator directs the Board to an Order Reducing Discipline entered April 15, 1998, in Grievance Administrator v Dennis James Dunn, 97-192-GA, 97-219-FA (ADB 1998). The hearing panel, in Dunn, entered a ninety-day suspension. The Board reduced the discipline and imposed a sixty-day suspension. In reducing the discipline, the Board noted that the respondent's remorse and his resolve to cooperate with any future disciplinary proceedings were mitigating factors.

The Board was not persuaded, however, that the discipline should be reduced to a reprimand. Mr. Dunn's situation was aggravated by his failure to answer a request for investigation and formal complaints in another disciplinary matter only one year prior. Thus, the Board did reduce the suspension from ninety days to sixty days, but did not feel reduction to reprimand was appropriate.

Mr. Brown also had prior contact with the disciplinary system, based on neglect of a client matter and a failure to answer the request for investigation in that case. Mr. Brown's similar prior conduct occurred five years prior to the conduct charged in the current complaint, and is not so remote in time that it should be disregarded as an aggravating factor in this case.

e. GA v Baumgartner, 91-91-GA, 91-108-FA (ADB 1992)

The respondent cites Grievance Administrator v Lawrence A. Baumgartner, 91-91-GA; 91-108-FA (ADB 1992) as an interpretation of Glenn which affords panelists discretion in considering the discipline to be imposed on a case-by-case basis:

> We hold that the hearing panels should use the Glenn decision as a guide in determining discipline in failure to answer cases. Further, hearing panels should exercise their sound discretion in arriving at levels of discipline. The Board will, in turn, prudently exercise that "measure of discretion with regard to ultimate decision" which has been recognized by the court. [Baumgartner, supra, p 2, *citing* Grievance Administrator v August, 438 Mich 296 (1991).]

The concurring opinion[7] in Baumgartner agreed with the majority that the suspension should be reduced to a reprimand, but for alternate reasons. The concurrence stated that:

> to the extent Glenn requires panels to impose a certain level of discipline absent exceptional circumstances, its holding is contrary to the principles of the discipline system as set forth by the Michigan Supreme Court and should not be followed. [Baumgartner, supra (*concurring opinion*), p 5.]

[7] John F. Burns and Miles A. Hurwitz wrote for the majority in Baumgartner. C. Beth DunCombe and Elaine Fieldman authored the concurring opinion.

What the concurring opinion emphasized was the necessity of deciding "failure to answer" cases on a case-by-case basis. "We would let the panels use their good judgment in imposing discipline in failure to answer request for investigation cases as they do in all other cases -- on an individual basis." (Baumgartner (*concurring opinion*), p 6.)

However, the application of Glenn to failure to answer cases does not prevent a panel, or the Board, from evaluating each respondent on a case-by-case basis. Instead, Glenn warns of the likelihood of suspension, absent "exceptional circumstances." Each case, then, inherently requires an individualized approach to determine whether the mitigating and aggravating factors presented constitute "exceptional circumstances." A case by case evaluation of the facts and circumstances surrounding the respondent's failure to answer is not contrary to the holding in Glenn.

As the Grievance Administrator points out, Baumgartner is factually distinguishable from this case. Mr. Baumgartner failed to answer a single request for investigation. Mr. Brown, on the other hand, failed to answer three separate requests for investigation. Multiple occurrences of failure to respond may make it less likely the panel or Board would find exceptional circumstances in that case. The serious nature of failure to respond is amplified when a respondent fails to answer on more than one occasion.

f. GA v Thompson, 97-68-GA, 97-99-FA (ADB 1998)

The hearing panel cited Grievance Administrator v Gregory S. Thompson, 97-68-GA; 97-99-FA (ADB 1998) as an example of the Board's decision to vacate the order of a hearing panel and reprimand a respondent for failure to answer both the formal complaint and a request for investigation. The Grievance Administrator seeks to distinguish Thompson from the case currently before the Board.

The Grievance Administrator points out that there was simply one request for investigation which went unanswered in the Thompson case. We are reminded that Mr. Brown failed to respond to three, separate, requests for investigation. Likewise, Mr. Thompson's record was unblemished. Mr. Brown's record reveals a previous finding of misconduct with imposition of discipline. On the other hand, Mr. Thompson failed to answer both the request for investigation as well as the formal complaint. While Mr. Brown also failed to respond to the requests for investigation, he did file an answer to the formal complaint.

The opinion in Thompson also reiterates the importance of recognizing that failure to respond to a request for investigation, standing alone, does constitute misconduct:

> 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. [Thompson, supra, p 5.]

The Board, in announcing its decision in Thompson, stated it had taken into account all of the factors the hearing panel had considered and was satisfied that reprimand was an appropriate level of discipline. The Board, in Thompson, cited both Glenn as a guideline for determining mitigating of misconduct, and Baumgartner for the holding that reprimand may be appropriate exercise of the sound discretion of a hearing panel. Thompson, supra, p 5. Thus, the question remains - are there exceptional circumstances present in Mr. Brown's case which support the hearing panel's imposition of a reprimand, rather than suspension, for his failure to respond to requests for investigation?

g. GA v Floyd, 90-129-GA (ADB 1991)

One case not cited by either party, but which may bear on the instant matter, is Grievance Administrator v Seymour Floyd, ADB 90-129 (1991). In Floyd, the hearing panel imposed a reprimand on Respondent Floyd for failure to answer a request for investigation. After appeal by the Grievance Administrator, the Board increased the discipline to a thirty-day suspension.

The pertinent similarities in Floyd were that the hearing panel found Mr. Floyd to be remorseful and candid with the panel, just as the panel found Mr. Brown to be remorseful and candid. Mr. Floyd testified, in mitigation, that he was severely depressed as a result of his breakup with his fiancée. Likewise, Mr. Brown claimed to be depressed as a result of his marital difficulties.[8] However, the Board determined that, in Floyd, "the record in this case is devoid of compelling mitigating circumstances related directly to the failure to file an answer to the Request for Investigation." Floyd, supra, p 2.

3. Are "Exceptional Circumstances" Present Here?

The essential question the Board must answer is whether "exceptional circumstances" are present in this case which support the hearing panel's imposition of reprimand. The holding in Glenn has been recognized, by most panels and the Board, as the general rule to be applied in failure to answer cases.

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8 Unlike Mr. Brown, however, Mr. Floyd presented additional mitigating factors, such as a series of financial setbacks, and an unblemished disciplinary record. The instant case is also distinguished in that Mr. Floyd's circumstances were aggravated by his failure to make restitution to a client and his failure to comply with conditions imposed by the hearing panel.

The hearing panel in this case did not reject the holding of Glenn. Instead, the panel specifically stated they were aware of the guidelines set forth in Glenn regarding an attorney's failure to respond to a request for investigation. (Panel Report, p 4.) The hearing panel cited Baumgartner, Thompson, and Walsh in support of its decision to exercise discretion and to evaluate circumstances on a case-by-case basis.

The hearing panel had the benefit of weighing the credibility and testimony of Mr. Brown for themselves, during the hearing. The panelists were aware of Mr. Brown's prior misconduct and the thirty-day suspension imposed on him in 1995. The hearing panel considered the aggravating and mitigating factors and completed its report, finding, "[t]herefore, under all of the circumstances and evidence presented, we conclude that a reprimand is the appropriate sanction in this case."

In support of his argument that a suspension should be imposed, the Grievance Administrator notes that Mr. Brown had plenty of opportunity to answer the requests for investigation. It was not simply a case of three single sheets of paper being ignored. The Grievance Administrator states, "[t]his misconduct did not occur during a brief interlude or as an isolated occurrence." (Brief in Support of Petition for Review, p 7.)

Counsel for the Grievance Administrator served Mr. Brown with requests for investigation, sent communications by letter, fax, and e-mail, made telephone calls, and even personally visited Mr. Brown's office, to encourage him to answer. The Grievance Administrator attempted contact with Mr. Brown on 6/7/99; 6/29/99; 7/8/99; 7/27/99; 7/29/99; 8/24/99; 10/4/99; 11/11/99; 11/17/99; 11/22/99; 11/29/99; and 12/2/99. The formal complaint, filed 4/25/00, does detail the attempts the Grievance Administrator made to contact Mr. Brown. Presumably, therefore, the hearing panel was cognizant of the fact that Mr. Brown repeatedly failed to respond to the Grievance Administrator's communications, over a six month period of time. (The description of the Grievance Administrator's efforts to contact Mr. Brown may be found at pages 7-8 of Petitioner's Brief in Support of Petition for Review.) Most disturbing, perhaps, is the fact that, on 10/4/99, a letter and subpoena for Mr. Brown to appear on 11/4/99, to give a sworn statement, were hand delivered to Mr. Brown's receptionist. Mr. Brown ignored the subpoena and failed to appear on 11/4/99.

The respondent has expressed remorse, and was candid with the panel. Unlike the respondent in Kirkland, Mr. Brown has not displayed an attitude of indifference. Rather, Mr. Brown did file an answer to the formal complaint, he admitted the misconduct, he obtained counsel to represent him in the disciplinary proceedings, he filed briefs where and when

appropriate, and he appeared for, and testified during, the panel hearing.

As of the date of the Board Hearing, however, the respondent still had not sought evaluation or treatment for depression:

Board Member:	Is Mr. Brown treating for depression?
Respondent's Counsel:	He's not. No, at this point he is not treat –
Board Member:	Is he on any sort of medication?
Respondent's Counsel:	Not. Not that I'm aware of. No.
Board Member:	Has he been evaluated or diagnos[ed] that he's suffering from depression since the hearing and you['re] concerned?
Respondent's Counsel:	He hasn't done that. And I think it may have something to do with that, that he hasn't sought that.

[12/20/01 Board Hearing Transcript, pp 21-22.]

Although the mitigating factors presented by Mr. Brown might seem to outweigh the aggravating factors presented by the Grievance Administrator, the Board is not simply charged with balancing the aggravating factors against the mitigating factors. Instead, under Glenn and its progeny, the question to be addressed is whether there is sufficient evidence to support the panel's finding that this case presents "exceptional circumstances." We conclude that Mr. Brown has not offered sufficient evidence to support such a finding in this case.

III. Conditions

The hearing panel imposed a reprimand with conditions. Those conditions are two fold: (1) that Mr. Brown meet with an attorney who will monitor Mr. Brown's activities for a reasonable period of time, until the monitor is able to certify to the Board that the respondent is not suffering from depression, or any other mental or physical condition, which would increase the likelihood that the respondent would fail to fully and timely respond to any future requests for investigation; and (2) that, if Mr. Brown fails to fully and timely respond to any future request for investigation, he will be suspended from the practice of law for a period of 45 days.

The first condition imposed by the panel - to monitor respondent's practice and to identify depression or other disability which might impact his ability to respond to any future requests for investigation - constitutes an admirable goal. However, the Board has determined that a monitoring attorney is not the best person to determine the presence or

absence of depression or any other mental or physical conditions. It is difficult to imagine that an attorney, unless he or she is also a licensed physician or psychologist, is qualified to "certify" to the board that Mr. Brown is not suffering from depression. Thus, the Board will modify the first condition imposed by the hearing panel.

The Board will require that, as a condition of discipline, Mr. Brown be evaluated by a licensed physician or licensed psychologist to determine whether he suffers from depression and if so, whether it would impact his practice of law, including his ability to respond to future requests for investigation. Mr. Brown must seek evaluation and submit the certification by the physician or psychologist to the Board prior to March 21, 2002. The certification must be signed by the physician or psychologist and must attest that, if present, any mental health condition will not impact Mr. Brown's ability to fulfill his responsibilities to clients, the courts, and the legal system.

The second condition imposed by the panel - that any failure to respond to a request for investigation will result in a 45 day suspension - is no longer applicable. Mr. Brown's license to practice law will be suspended for 30 days. Should Mr. Brown fail to respond to a request for investigation in the future, he will face, instead, the possibility that the Grievance Administrator will file a new and separate formal complaint based on his failure to answer.

IV. Conclusion

Respondent ignored his "unavoidable duty to answer Requests for Investigation," Kennedy, DP 48/90, supra. We reviewed the hearing panel's consideration of the various factors in the record and we cannot conclude that respondent's claimed personal or emotional problems rise to the level of "exceptional circumstances" *in this case* within the meaning of Glenn and its progeny. Indeed, given the multiple instances of failure to answer requests for investigation presented here, and the lengths to which the AGC went in order to give respondent an opportunity to answer, when combined with respondent's previous discipline for failing to answer a request for investigation we would, as a general proposition, be inclined to impose a suspension greater than 30 days. However, we have considered the mitigating effects of respondent's marital and emotional problems in addition to his remorse, candor, and cooperation in these proceedings following the filing of the formal complaint.

The decision of the hearing panel is therefore modified, and the level of discipline imposed is increased from reprimand to suspension. Respondent's license to practice law in the State of Michigan will be suspended for 30 days. Furthermore, the conditions imposed

by the hearing panel are modified as follows: Mr. Brown shall obtain an evaluation by a licensed physician or psychologist, and certification from that physician or psychologist, that any mental health disorder, such as depression, does not impact the respondent's ability to fulfill his duties to clients, the courts, and the legal profession. Evidence of the evaluation and such certification, if clinically appropriate, must be filed with the Board before March 21, 2002. The second condition imposed by the hearing panel, regarding future requests for investigation, will be vacated.

Board Members Wallace D. Riley, Theodore J. St. Antoine, Nancy A. Wonch, Grant Gruel, William P. Hampton, and Rev. Ira Combs, Jr. concurred in this decision.

Board Members Ronald Steffens, Marsha M. Madigan, M.D., and Marie E. Martell did not participate.