Grievance Administrator
State of Michigan
Attorney Grievance Commission,

Petitioner/Cross-Appellant,

v

D Richard Miller, P 33456,

Respondent/Appellant.

ADB 123-89; 92-258-GA;
93-15-GA; 93-77-GA

Decided: April 20, 1995

BOARD OPINION

The respondent filed petitions for review in each of four separate matters. Those cases have been consolidated for review at the respondent's request. The Board has also considered the Grievance Administrator's cross-petition for review in Case 93-15-GA.

The hearing panel orders of discipline which we now consider are: Case No. ADB 123-89--a thirty-seven-month suspension for the respondent's sexual harassment of female employees, making a false statement in his answer to a Request for Investigation and causing a letter containing a false statement of material fact to be sent to the Attorney Grievance Commission; Case No. 92-258-GA--a two-year suspension for multiple counts of neglect, charging of excessive fees and failure to cooperate with an investigation conducted by the Attorney Grievance Commission; Case No. 93-15-GA--a thirty-day suspension for sexual harassment of a court employee; and Case No. 93-77-GA--revocation of the respondent's license for the neglect of criminal appeals as appointed counsel and for failure to obey orders of the Michigan Court of Appeals.

For the reasons stated below, we reverse the hearing panel decision in Case No. 93-77-GA. The findings of misconduct entered by the three panels in Case No(s). ADB 123/89; 92-258-GA; and 93-

15-GA are affirmed. Based upon our finding that the respondent has engaged in a pervasive pattern of personal and professional

misconduct, we conclude that his license to practice law in Michigan should be revoked.

ADB 123-89

Count One of this three-count complaint alleged that respondent engaged in verbal and physical conduct or communication of a sexual nature with three female employees and that at no time was respondent's behavior encouraged, invited or condoned by the employees. Count Two alleged that respondent knowingly made a false statement (denial of one employee's allegations) in his answer to the Request for Investigation, in an attempt to obstruct the investigation of the Attorney Grievance Commission. Count Three alleged that respondent knowingly caused a letter signed by his employees containing a false statement of material fact to be sent to the Commission in an attempt to obstruct the investigation.

Evidentiary hearings were held on September 17, October 30, and December 4, 1990, and January 16 and 22, 1991. The testimony of those hearings is thoroughly summarized in the panel's fifty-one-page report on misconduct filed on March 3, 1993. The panel found that misconduct as alleged in all three counts of the formal complaint had been established by a preponderance of the evidence.

In accordance with MCR 9.115(J)(2), separate hearings on discipline were held on April 19, August 10, October 19 and December 17, 1993. The testimony of those hearings is summarized in the panel's nineteen-page aggravation/mitigation report filed on March 1, 1994 with the order of suspension.

In its report, the panel concluded that respondent:

> [h]as an increasingly serious problem in controlling his own behavior. If the order of discipline . . . entered today is left standing, we would add our thought that the State Bar of Michigan [sic], if it entertains any Petition for Reinstatement, should be extremely careful to obtain a report establishing that Respondent has regained control of his impulses and judgment. Report On Aggravation/Mitigation, p. 18.

The panel further concluded:

> Certainly no mitigation was shown with regard to . . . Counts II and III. The cases are plentiful and the court rule clear on the point that every Respondent owes a duty of full and fair disclosure to a request for investigation . . . It remains clear that Respondent did not do so. As previously found, it is difficult to conclude on Count III that Respondent did anything other than attempt an act of deceit in requesting his then-secretaries to mislead the Attorney Grievance Commission. Report On Aggravation/ Mitigation, p. 18-19.

Case No. 92-258-GA

Counts One and Two of this complainant pertain to respondent's representation of James Beetham, the personal representative of the Estate of Kathleen T. Canning. Count One charged that respondent failed to file a Petition for Commencement of Proceedings for approximately nine months. Count Two charged that respondent failed to comply with Mr. Beetham's request for an itemized statement of services; filed a claim for attorney fees in the clearly excessive amount of $1962.50; filed a petition to reinstate the claim for attorney fees and requested an amendment to increase the claim to the clearly excessive amount of $3965; and sought to collect fees for services performed after his was discharged and for his time in responding to Mr. Beetham's Request for Investigation.

Count Three alleged that respondent was retained by Tania Brumbaugh to obtain an annulment, but that he failed to present an order to the court, resulting in the dismissal of Ms. Brumbaugh's case, and he failed to advise Ms. Brumbaugh of the dismissal or to take any steps to have the case reinstated.

Count Four alleged that respondent was retained by Diana Armstead to petition for custody of her minor child. Count Four charged that respondent failed to comply with Ms. Armstead's requests for an itemized statement of services and sought to charge

Ms. Armstead at an hourly rate greater than the rate set forth in the written retainer agreement. Count Five charged that respondent failed to comply with written requests by the Attorney Grievance Commission for a detailed statement of services rendered on Ms. Armstead's behalf.

Count Six alleged that respondent was retained by Hortense Page to represent her in a domestic relations and/or probate matter. Count Six charged that respondent failed to comply with written requests by the Attorney Grievance Commission for an itemized statement of services rendered on behalf of Ms. Page and failed to comply with a Subpoena Duces Tecum directing him to provide the information sought by the Attorney Grievance Commission.

Count Seven alleged that respondent was appointed to represent Anthony Q. Heath in criminal appellate proceedings. Count Seven charged that respondent failed to visit with Mr. Heath during the initial stages of the representation and failed to file an appellate brief on his client's behalf.

Evidentiary hearings were held on April 20, May 10, May 17, June 10, and June 14, 1993. The panel issued its preliminary report on misconduct on September 14, 1993, finding that misconduct was established by a preponderance of the evidence as to all seven counts in the Formal Complaint.

An aggravation/mitigation hearing was held on October 8, 1993. The panel's report and order of suspension were issued on April 26, 1994. The panel noted respondent's failure to appreciate the consequences of the findings of misconduct; his denial of any wrongdoing; his denial of responsibility for his actions; his clear failure to grasp the standards of conduct for attorneys; and his pompous, self-righteous attitude toward his failure to fully represent his client's constitutional rights. The panel ordered a two-year suspension and ordered respondent to make restitution to Ms. Brumbaugh in the amount of $2,500.00 and to Ms. Armstead in the amount of $2,000.00.

Case No. 93-15-GA

The complaint alleged that on June 25, 1992, respondent appeared at the intake counter of the court clerk's office of the 41-B District Court, and

> [w]hile present in the court clerk's office, he leaned his body across the intake counter and grabbed the button located between the breasts of 41-B District Court Deputy Court Clerk Kara Furtah (Rickert). In response to Ms. Furtah's inquiry regarding why he had touched her, Respondent informed her, "I just wanted to cop a feel," or words to that affect [sic].

The hearing panel concluded that the allegations of professional misconduct were established and that the respondent's claim that his actions and statements to the deputy court clerk constituted mere "bantering" was not credible.

Following a separate hearing on discipline on September 10, 1993, the hearing panel ordered a suspension of thirty days but directed that the respondent's reinstatement in accordance with MCR 9.123(A) would be conditioned upon the submission of a report from a psychologist or psychiatrist that:

> a. Respondent recognizes that his conduct, as determined by the panel to have occurred in its report, is wrong; and
>
> b. Respondent is capable of controlling his conduct, and refraining from conduct (as determined by this panel to have occurred . . .) in the future as a member of the legal profession in dealing with the public, his clients and court employees.

Case No. 93-77-GA

The twenty-five count formal complaint charged that between August 19, 1988 and September 14, 1991, the respondent was appointed in various Michigan courts to represent criminal defendants in twenty-three appellate proceedings and to represent

one party in an appeal from a probate court order; that in each of the twenty-four cases, he failed to meet personally with his client and failed to keep the client informed of the status of the appeal; that in ten of the twenty-four cases he took no action whatsoever; that in the other fourteen cases he failed to respond to no-progress warning letters from the court; that he filed defective pleadings and that in fourteen cases he failed to pay costs assessed against him by the Court of Appeals.

Respondent filed an answer on June 15, 1993. On June 25, 1993, the Grievance Administrator filed a motion to strike and/or motion for more definite answer. The hearing panel granted the motion to strike and ordered the respondent to file an amended answer on or before September 30, 1994.

At a hearing on October 12, 1993, the hearing panel ruled that the respondent's amended answer did not conform to the applicable court rules in that it contained general denials without stating the substance of the matters on which the respondent would rely to support those denials. [See MCR 2.111(D)] The panel entered an order striking the respondent's answer and granting the Grievance Administrator for entry of a finding of misconduct.

Following a separate hearing on discipline, the hearing panel entered an order on January 12, 1994 revoking the respondent's license to practice law.

Issues on Review

The respondent has petitioned for review on the following grounds:

Case No. ADB 123-89: That the panel erred in finding misconduct; the panel erred in allowing certain evidence to be admitted; and, assuming that misconduct was proven, the hearing panel erred in imposing a thirty-seven-month suspension.

Case No. 92-258-GA: That errors of fact and law occurred prior to and during the hearings; the panel failed to subpoena records and witnesses as requested by respondent; the panel failed to take into account mitigating factors; the petitioner was allowed

to introduce improper exhibits; the panel failed to clarify the nature of the suspension; counsel for petitioner should have been removed for overzealousness, and malicious prosecution or abuse of process; and additional testimony should be taken and the appointment of a special master may need to be considered.

Case No. 93-15-GA: That errors of fact and law occurred prior to and during the hearings; and the panel failed to take into account several mitigating factors.

Case No. 93-77-GA: The hearing panel's decision to strike the respondent's second amended answer and to enter findings of misconduct without affording the respondent an opportunity to present evidence was erroneous; the hearing panel failed to consider appropriate mitigating factors; and the Grievance Administrator's counsel brought material to the panel's attention which was prejudicial to the respondent.

Discussion

The Board has considered each of the respondent's claims and, with one significant exception, has concluded that they are without merit.

In Case 93-77-GA, the Grievance Administrator filed a twenty-five count complaint based upon the respondent's alleged failure to take appropriate action or to communicate with his clients as appointed counsel in twenty-four appellate matters as well as his alleged failure to comply with certain orders of the Michigan Court of Appeals. The respondent filed a timely answer to the complaint in which he admitted that he owed certain duties to his clients as the result as his appointment as appellate counsel. The allegations that he violated those duties were denied for the reason that they were untrue.

The Grievance Administrator then filed a motion to strike the respondent's answer on the grounds that it failed to meet the requirements of MCR 9.111(C). That motion was granted by the hearing panel and the respondent was directed to file an amended answer no later than September 30, 1993. The respondent filed an

amended answer on October 5, 1993. In answer to the paragraph in each of the first twenty-four counts of the complaint charging neglect and non-communication, the respondent answered:

> C. Denied for the reason that the same is untrue; in further response, pleadings have been filed and/or efforts were underway to finish and file the brief on appeal; these efforts were obstructed by the Michigan Appellate Assigned Counsel System (MAACA); the Court of Appeals generally will grant extensions of time to file appeal briefs or other appropriate pleadings in criminal matters; even if the Court does not grant an extension, the brief or other appropriate pleading will be accepted late, possibly with costs assessed, presumably in part because the Court itself is years behind in its work; also, the Court of Appeals may have been less immediately concerned about the lateness of particular pleadings than it was about counsel's inability to pay previous costs assessments; clients were typically regularly advised of paper work and other matters progressing in their appeals; it is not necessarily true that a personal interview is required; finally, the client must be kept reasonably informed; see also the answer to Count twenty-five, allegations b and d where applicable.

On the Grievance Administrator's motion, the hearing panel entered an order striking the respondent's amended answer, entering the respondent's default and entering a finding that the charges of misconduct in the complaint were established. Thereafter, the respondent's participation in that matter was limited to an opportunity to present mitigating evidence which might bear upon the level of discipline to be imposed.

In striking the respondent's amended answer, the panel ruled that the respondent "has failed within the time permitted to file an answer in accordance with the applicable court rules and the panel's order filed September 13, 1993, and that respondent is therefore in default." The panel specifically relied upon MCR 2.111 which directs that a responsive pleading must state an

explicit admission or denial as to each allegation on which the adverse party relies and MCR 2.111(D) which states that "each denial must state the substance of the matters on which the pleader will rely to support the denial."

Had the respondent completely ignored the hearing panel's order that he file an amended answer, we would have affirmed the panel's decision to strike the respondent's original answer and to enter the respondent's default. We do not believe, however, that the filing of an amended answer five days late or the form of the denials in the amended answer warranted the draconian measure of precluding the respondent from offering evidence in defense of any of the charges. While general denials are objectionable under the Michigan Court Rules, the respondent's amended answer was not so clearly deficient that it should have been stricken in its entirety. We therefore reverse the decision of the hearing panel to strike the respondent's amended answer in Case No. 93-77-GA and we set aside the panel's order of revocation.

We take this opportunity to affirm the conclusion of the hearing panel in Case No. ADB 123-89 that the respondent's sexual harassment of his employees constituted professional misconduct and is grounds for discipline. This issue was framed by the hearing panel as follows:

> There is certainly not much to be said in favor of the demeanor and judgment of respondent, who snapped the hose and suggestively touched the body of a sixteen year old female secretary entrusted to his employment. Equally repulsive are the touchings of other female secretaries, the crotch pointing and the record replete with respondent's sniggering, lewd remarks. We would have to conclude that the Grievance Administrator has portrayed an environment of sexually exploitive conduct by respondent in his office. Respondent's conduct toward his female employees might well be termed "sexual harassment", and, as such, could be conduct violative of several bodies of law: the criminal law (assault and battery), the Michigan civil rights statues and the federal

> statutes relating to sexual discrimination. The question for us is, however, whether such conduct violates the rules of our profession in such a manner as to warrant professional discipline.

Hearing Panel Report, 3/3/93, p 42.

In resolving that question, the hearing panel found guidance in two Minnesota cases, Matter of Discipline of Peters, 428 NW2d 375 (Minn. 1988) and Re: Complaint Concerning Miera, 426 NW2d 850 (Minn. 1988). In Peters, the Court found that the respondent, the dean of a law school, repeatedly engaged in unwanted physical and verbal communication of a sexual nature with four female employees. Rejecting the respondent's arguments that his conduct was neither sexually motivated nor wrongful and did not occur in his professional capacity, the Minnesota Supreme Court stated:

> Neither can it be said that a lawyer's ethical obligations and professional responsibility are confined to conduct arising out of the attorney/client relationship. The Code of Professional Responsibility has been interpreted as requiring a lawyer to comply with applicable disciplinary rules at all times, regardless of whether he or she is acting in a professional capacity.

Peters, supra, p 380.

The Court reprimanded the respondent in that case "to assure the public and warn the practicing lawyer that it cannot condone such [sexually harassing] conduct by an attorney."

Arguments that the respondent's conduct in this case was not related to his status as a lawyer are unavailing in light of our Supreme Court's decision extending the applicability of the Rules of Professional Responsibility to a lawyer's private conduct. In Grievance Administrator v Nickels, 422 Mich 254 (1985), for example, the Court upheld the findings of professional misconduct based upon the respondent's failure to remit and account for funds withheld from his secretary's wages ruling that "misconduct may include activities that are unrelated to the practice law, if they

otherwise fall within conduct prescribed by the Code or the General Court Rules." Nickels, supra F260. As the Court stated earlier in Matter of Grimes, 414 Mich 483; 326 NW2d 380 (1982):

> The rules of professional conduct adopted by this Court evidence a commitment to high standards and behavior beyond reproach. We cannot stress too strongly the responsibility of the members of the bar to carry out their activities, both public and private with circumspection.

Therefore, even when considered separately from the respondent's submission of a false statement in an answer to a Request for Investigation and his efforts to induce employees to provide misleading information to the Attorney Grievance Commission, we affirm the hearing panel's conclusion that the respondent's conduct in the nature of sexual harassment of his female employees violated MCR 9.104(2) [conduct exposing the legal profession to obloquy, contempt, censure or reproach] and MCR 9.104(3) [being contrary to justice, ethics, honesty or good morals].

Level of Discipline
Case No. ADB 123-89; 92-258-GA; 93-15-GA

At the respondent's request, his petitions for review in these matters before the Board have been consolidated. Therefore, it is not necessary that we review the claims of the parties with regard to the sufficiency, or insufficiency, of the discipline imposed in the three matters which remain before us on a case-by-case basis.

Taken together, the cases before us establish a pattern of misconduct so pervasive that revocation of the respondent's license to practice law in Michigan is the only appropriate remedy.

In Case No. ADB 123-89, we have considered, as did Tri-County Hearing Panel #3, the unrelenting nature of the respondent's demeaning attitude toward his female employees, the continuation of that conduct toward his employees during the course of these proceedings and the respondent's own attempts to trivialize his conduct. While this case involved offensive remarks and touching of

female employees in a work-place setting, Case 93-15-GA (the respondent's inappropriate touching of a female deputy court clerk) involved conduct which was not limited to the relative privacy of his law office but extended to his conduct toward a public employee. The findings of the hearing panels in these two cases were supplemented by the findings of Tri-County Hearing Panel #22 in Case 92-258-GA that the respondent neglected his professional obligation to provide diligent, competent and zealous representation for his clients in certain probate, domestic relations and criminal matters; that he failed to communicate adequately with his clients in those cases; that he charged excessive fees and that he failed to cooperate with an investigation conducted by the Attorney Grievance Commission.

In assessing the appropriate discipline to be imposed, the Standards for Imposing Lawyer Sanctions adopted by the American Bar Association in 1986 (amended February 1992) provide useful guidance. Standard 9.22(A-K) discusses those factors which may be considered in aggravation which would justify an increase in the degree of discipline to be imposed. The following factors apply in this case: Selfish motives [9.22(B)]; a wideranging pattern of misconduct [9.22(C); multiple offenses [9.22(D)]; bad-faith obstruction of the disciplinary process by intentionally failing to comply with the rules of the disciplinary agency [9.22(E)]; submission of a false statement during the disciplinary process [9.22(F)]; the respondent's refusal to acknowledge the wrongful nature of his conduct [9.22(G)]; and, the vulnerability of the victims of the respondent's misconduct [9.22(H)][1]

The ABA Standards for Imposing Lawyer Sanctions referred to above also discuss those mitigating circumstances which may justify

[1] One complainant/former employee who fell victim to respondent's sexual advances as detailed in Case 123-89 was a sixteen year old high school co-op student at the time of the misconduct. We find the respondent's conduct in that regard to have been particularly offensive.

reduction in degree of discipline to be imposed. The absence of a prior disciplinary record [Standard 9.32(A)] was considered in this case.

Conclusion

Bearing in mind our fundamental obligation to protect the public, we have considered the full panoply of the respondent's misconduct as established in separate proceedings before three hearing panels. This case may not be neatly categorized as a sexual harassment case, a neglect case, a misrepresentation case or a case involving a deliberate attempt to obstruct an Attorney Grievance Commission investigation. Because all of those factors are present here, we turn, ultimately, to the general principle that:

> The license to practice law in Michigan is, among other things, a continuing proclamation by the Supreme Court that the holder is fit to be entrusted with professional and judicial matters and to aid in the administration of justice as an attorney and counselor and as an officer of the Court. It is the duty of every attorney to conduct himself or herself at all times in conformity with standards imposed on members of the bar as a condition of the privilege to practice law.

MCR 9.103(A).

Sadly, the respondent has amply demonstrated that he is unable to conduct himself in conformity with the standards imposed on the members of the legal profession. As the Supreme Court's adjudicative arm in these matters, we are unable to extend the proclamation of fitness to the respondent and his license to practice law in Michigan is therefore revoked.

Board Members John F. Burns, George E. Bushnell, Jr., Elaine Fieldman, Barbara B. Gattorn, Albert L. Holtz, Linda S. Hotchkiss, M.D. and Miles A. Hurwitz concur in this opinion.

Board Member C. Beth DunCombe was recused and did not participate in this matter.

Board Member Marie Farrell-Donaldson was absent and did not

participate in this matter.