Grievance Administrator,
State of Michigan
Attorney Grievance Commission,

Petitioner/Appellee,

v

R Earl Selby, P 30058,

Respondent/Appellant

93-7-GA

Decided: March 17, 1994

BOARD OPINION

Based upon the respondent's default for failure to file an answer to the formal complaint, the hearing panel below found that the charges of professional misconduct were established. Specifically, the panel concluded that the respondent's failure to provide diligent and expeditious representation to his client in a divorce matter and his failure to file an answer to that client's Request for Investigation constituted violations of MCR 9.104(1-4,7), MCR 9.113(A), MCR 9.113(B)(2) and the Michigan Rules of Professional Conduct, Rules 1.1(c), 1.3, 3.2, 8.1(b) and 8.4(a,c). Following a hearing on discipline, the panel declined to enter an order of probation as requested by the respondent and ordered that the respondent's license to practice law in Michigan be suspended for thirty days. The respondent has petitioned the Attorney Discipline Board for review of the hearing panel's decision.

The respondent has not established the existence of prejudicial irregularities during the course of the hearing panel proceedings below. See MCR 9.107(A). The order of discipline issued by the hearing panel is affirmed.

The respondent appeared personally at the panel hearings of February 16, 1993 and August 31, 1993. At the first hearing, respondent stated affirmatively that he was not seeking to set aside the default. The respondent requested and was granted a continuance to present a consent discipline proposal to the Attorney Grievance Commission. A hearing was rescheduled upon notice from the parties that they were unable to reach agreement on an appropriate disposition.

At the continued hearing, counsel for the Grievance Administrator submitted a copy of the Order of Reprimand, With

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Conditions, issued December 1, 1992 in a prior unrelated matter. Matter of R Earl Selby, 92-72-GA, 92-100-FA. In that case, the

respondent was found to have neglected a legal matter, failed to communicate adequately with his clients and failed to answer a Request for Investigation. The Attorney Grievance Commission and a hearing panel consented to a reprimand with conditions including monitoring by an attorney and treatment by a physician and psychologist for a period of eighteen months commencing December 23, 1992.

At the hearing on discipline in this case, the respondent submitted a letter from a pastor in his community, letters from the physician and psychologist with whom he was treating and a proposed plan of probation which was essentially identical to the conditions then in effect under the earlier consent order of reprimand.

In closing arguments, counsel for the Grievance Administrator requested that the panel impose a suspension of sufficient duration to require separate reinstatement proceedings. The respondent urged the adoption of the plan for probation in lieu of suspension.

The respondent argues that the hearing panel erred in failing to order an independent physical or mental examination by a physician. He cites MCR 9.121(C)(2) which states:

> "If the respondent alleges physical or psychiatric disability pursuant to sub-rule (C)(1), the hearing panel shall order the respondent to submit a physical or mental examination by a physician selected by the hearing panel. . .". (emphasis added)

The hearing panel proceedings were subject to the former language of MCR 9.121(C)(2).[1] We reject the respondent's argument on this issue for two reasons. First, a precondition to the appointment of a physician by a hearing panel in the former sub-rule was an allegation by the respondent of physical or psychiatric disability pursuant to MCR 9.121(C)(1). That sub-rule, in turn, directs that in response to a formal complaint, the respondent must

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[1] Effective March 1, 1994, this portion of MCR 9.121(C)(2) was amended by substitution the word "may" for "shall". The wisdom of that amendment is amply illustrated by the position taken by the respondent in this appeal. Having failed to file any pleadings in the proceeding before the panel, and having failed to make any request to the panel for an independent physical or mental examination, the respondent now claims for the first time on appeal that the panel's failure to order such an examination should invalidate the panel's decision. The amendment to the rule which became effective March 1, 1994 makes it clear that the hearing panel now has discretion to order such an examination but that the burden of establishing eligibility for probation rests squarely upon the respondent.

assert in mitigation that a) his or her ability to practice law competently was materially impaired by physical or mental disability or by drug or alcohol addiction during the period when the conduct which is the subject of the complaint occurred; b) the impairment was the cause of or substantially contributed to that conduct; c) the cause of the impairment is susceptible to treatment; and, d) that he or she in good faith intends to undergo treatment and submits a detailed plan for such treatment. The assertion of an impairment first raised by the respondent at the hearing on August 31, 1993 did not meet the requirements of MCR 9.121(C)(1).

Secondly, the claimed error must be considered in light of MCR 9.107(A) which directs that "an investigation or proceeding may not be held invalid because of a non-prejudicial irregularity or an error not resulting in a miscarriage of justice". Not only did the respondent fail to raise this issue during the panel proceedings but he has failed to establish prejudice. Two letters from the respondent's physician and psychologist were admitted into evidence over the objection of the Grievance Administrator. At best, an independent evaluation would have confirmed the information which the respondent believed was sufficient. At worst, a further report might have refuted or undermined the respondent's claim. We do not believe that the former language of MCR 9.121(C)(2) was intended to shift the burden of establishing eligibility for probation from the respondent.

The respondent also suggests that because he submitted some medical evidence (the letters from Dr Harrelson and Dr Way) and the Grievance Administrator submitted no evidence to the contrary that he is perforce entitled to probation under MCR 9.121(C). However, regardless of the weight of the evidence submitted by a respondent, the decision to grant probation under that rule is discretionary and requires a finding that probation would not be contrary to the public interest.

The second objection is the hearing panel's alleged failure to file a report in accordance with MCR 9.115(J)(1). He argues that the reports on misconduct and discipline mailed to the respondent did not include a certified transcript, pleadings, exhibits and a summary of all previous misconduct for which the respondent was disciplined, as required by that rule.

The hearing panel's "report of decision" filed September 28, 1993 identified the respondent's prior reprimand with conditions in 92-72-GA; 92-100-FA under the heading, "Prior Discipline". The files and records of the Board include certified copies of all original exhibits and all pleadings and documents filed under MCR 9.115(A). Respondent's novel argument that the copy of the report and order served on the respondent under MCR 9.115(J)(5) must be accompanied by copies of all pleadings, transcripts and exhibits is unwarranted and impractical. All of the material described by the

respondent was and is available to him on request. The respondent has not shown that he was prejudiced in any way by the Board's failure to attach the full record of the case to the respondent's copy of the panel's report.

The third objection is respondent's claim that a panel member should have been disqualified because the panelist and the respondent represented parties in a post-judgment divorce matter at the time of the discipline proceedings. The record below is devoid of any evidence or suggestion that the affected panel member was biased or prejudiced for or against either party. MCR 9.115(F)(2)(a) states that the respondent may move to disqualify a member of the hearing panel within the time permitted to file an answer. The respondent raised no objection to the make-up of the hearing panel during the panel proceedings.

We find that the panel proceedings were conducted without prejudicial irregularity and that the panel's decision should be affirmed.

Board Members George E Bushnell, Jr., C Beth DunCombe, Marie Farrell-Donaldson, Elaine Fieldman and Miles A Hurwitz concur.

DISSENTING OPINION

Board Members John F Burns, Albert L Holtz and Linda S Hotchkiss, M.D.

We agree with the majority that the procedural objections raised by the respondent are without merit. We do not believe, however, that our colleagues have devoted sufficient attention to the issue of the appropriate discipline in this case. This matter bears some procedural and factual resemblance to Matter of John R Scholten, 93-134-GA; 93-178-FA. As in that case, respondent Selby failed to answer the Request for Investigation or the formal complaint but appeared before the panel, without counsel, to assert his eligibility for probation under MCR 9.121(C)(1).

In an opinion issued February 18, 1994 in Matter of Scholten, the Board affirmed the hearing panel's decision to impose a suspension of forty-five days. We dissented from that decision and we believe that the concerns raised in that dissent are applicable here. While the testimony and exhibits offered by the respondent to the hearing panel may have been insufficient to satisfy the criteria of MCR 9.121(C)(1)(a-d), it is possible that with the assistance of counsel, this respondent might meet his burden of establishing eligibility for probation if given an opportunity. As we said in Scholten, this case raises the question of whether or not the discipline system can afford to forego the punitive effect of a short suspension where a strong possibility exists that an

order of probation with appropriate conditions could best achieve the goals of these discipline proceedings in the long run by dealing with the causes of the respondent's inappropriate conduct.

Board Member Barbara B Gattorn did not participate.