Grievance Administrator,
State of Michigan
Attorney Grievance Commission,

Petitioner/Appellee,

v

John R Scholten, P 35817,

Respondent/Appellant.

Case No. 93-134-GA; 93-178-FA

Decided: February 18, 1994

BOARD OPINION

The two-count complaint in this matter charged that the respondent failed to take appropriate action on his client's behalf in a divorce matter and failed to answer that client's Request for Investigation. The respondent's failure to answer the formal complaint resulted in the entry of a default. Although he had not previously filed a pleading or otherwise communicated with the hearing panel, respondent appeared before the panel on the scheduled hearing date. The hearing panel denied respondent's request for an adjournment to allow him time to retain counsel.

Based upon its consideration of the aggravating and mitigating factors presented, the hearing panel ordered that the respondent be suspended from the practice of law for forty-five days and that he make restitution to his former client in the amount $400. The respondent has petitioned the Board for review of the hearing panel's order arguing that the hearing panel's refusal to grant an adjournment constituted error. The respondent also seeks a reduction in the level of discipline or, in the alternative, a remand to the hearing panel for an opportunity to present further mitigating evidence in support of a request for an order of probation under MCR 9.121(C).

Based upon our review of the whole record, we do not believe that the hearing panel acted improperly and we decline to modify the hearing panel's order.

Although the respondent contends that he became aware of these proceedings on the day of the hearing, the respondent does not claim that he was not properly served with notice. There is ample

evidentiary support for the hearing panel's conclusion that the respondent either had actual notice of

the hearing or that his lack of notice was the result of his own negligence.

At the hearing on September 14, 1993, the respondent represented that he had moved his office earlier that month. The record discloses that the complaint and notice of hearing were sent to the respondent's former address [his address registered with the State Bar of Michigan and the address to which service was required by MCR 9.115(C)] by regular and certified mail on July 28, 1993. A notice of substitution of panelist was sent by regular and certified mail on August 9, 1993, a default was sent by regular and certified mail on August 25, 1993 and a supplemental complaint and an additional notice of hearing were sent by regular and certified mail on August 17, 1993. At least one of those envelopes was in the respondent's possession when he appeared at the hearing and he acknowledged to the panel that it contained a notice of hearing. Although his testimony on this point was somewhat inconsistent, the respondent acknowledged at least twice that he had been served with a copy of the complaint. (Tr. p. 43, 47)

Respondent does not challenge the hearing panel's conclusion that the misconduct charged in the formal complaint was established, both by the default and by the testimony of the complainant, his former client.

The respondent contends that he was entitled to be represented by an attorney and that the hearing panel's refusal to grant his request for an adjournment on the morning of the hearing denied him the opportunity to obtain legal counsel. The respondent had a right, guaranteed by MCR 9.115(E), to be represented by an attorney. That right, however, required a minimal level of diligence on the respondent's part to obtain such representation in a timely manner or, at the very least, to make a timely request for an adjournment. Having failed to respond to a Request for Investigation served on him on January 11, 1993, a final notice served February 18, 1993, a formal complaint filed July 28, 1993, a default filed August 25, 1993 and a second formal complaint filed August 30, 1993, the respondent's verbal request for an adjournment, made more than an hour and a half after the commencement of the hearing, was not timely. The hearing panel acted within its discretion by concluding that the respondent had failed to establish good cause for a delay in the proceedings.

We have also considered the respondent's argument that had he been represented by counsel, he would have been able to establish his eligibility for an order of probation as described by MCR 9.121(C).

At the hearing, the respondent took advantage of the opportunity to present evidence in mitigation. He spoke to the

panel about the personal difficulties which he was experiencing during 1992 and 1993, including a difficult marital situation and his self-referral to the Lawyers and Judges Assistance Committee in the spring of 1993. He stated to the panel, however, that these factors were not the cause of his client's difficulties nor were they responsible for his failure to answer the Request for Investigation. (Tr. p. 114) Based upon the existing record, it is clear that the respondent failed to establish his eligibility for an order of probation by failing to establish that his ability to practice law competently was materially impaired during the period relevant to this complaint; that the impairment was the cause of or substantially contributed to that conduct; that the cause of the impairment is susceptible to treatment; or that he has submitted a detailed plan for treatment.

We are placed in a difficult position. The respondent has apparently recognized a problem with alcohol and has taken steps to confront and conquer that problem. The respondent is to be commended in that regard.

At the same time, our overriding duty is to focus on the primary goal of these disciplinary proceedings--the protection of the public, the courts and the legal profession. 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 the discipline system, we are not persuaded that the hearing panel's decision was incorrect or that this matter should be remanded. The hearing panel Order of Suspension and Restitution is therefore affirmed.

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

DISSENTING OPINION

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

We agree with the characterization in the majority opinion of the proceedings below and the dilemma in which the Board now finds itself. We disagree as to the appropriate course of action. While there is no question that the testimony offered by the respondent to the hearing panel in mitigation was insufficient to satisfy the criteria of MCR 9.121(C)(1)(a-d), it is possible that with the assistance of counsel, the respondent might well be able to meet his burden of establishing eligibility for probation if given an opportunity.

This is not a question of whether the respondent is entitled to a remand to the hearing panel; it is a question of whether or not the discipline system can afford to forego the undeniably

punitive effect of a forty-five day suspension, at least temporarily, in order to allow this attorney an opportunity to establish his eligibility for probation. We cannot overlook the possibility that an order of probation, with appropriate conditions, would in the long run best achieve the goals of these proceedings by dealing with the causes of the respondent's inappropriate conduct. We suggest that the Board should seize that opportunity in this case.

Board Member Barbara B Gattorn did not participate.