Grievance Administrator,
State of Michigan
Attorney Grievance Commission,

Petitioner/Appellant,

v

Seymour Floyd, P 28796,

Respondent/Cross-Appellant.

Case No. 91-198-GA; 91-227-FA

Decided: July 15, 1993

BOARD OPINION

The complaint in this case charged that the respondent failed to comply with applicable provisions of MCR 9.119(a-c, e,f,g) in that he failed to file an affidavit of compliance that he had notified his clients, tribunals and opposing parties of a non-disciplinary suspension for failure to pay costs. Further, the complaint alleged, the respondent's affidavit filed with the Supreme Court pursuant to MCR 9.123(A) was false because the respondent had not complied with the provisions of MCR 9.119.

The respondent's default for failure to answer formal complaint 91-198-GA was filed on November 20, 1991. On that date, a second complaint, 91-227-FA was filed alleging that failure to file a timely answer to a formal complaint constituted a separate act of professional misconduct. The respondent's answer to the first formal complaint, 91-198-GA was filed with the Board on November 22, 1991. A separate default on the failure to answer complaint was filed on December 18, 1991.

After three adjournments, the hearing panel conducted a hearing on September 25, 1992. At the hearing, the respondent moved to set aside the defaults, the motions were denied, and the hearing proceeded to the discipline phase of the proceeding. The panel ordered that the respondent's license to practice law in Michigan be suspended for eighteen months.

Separate petitions for review have been filed by the Grievance Administrator and the respondent. The Grievance Administrator seeks an increase in discipline. The respondent argues, among other things, that notification to clients, tribunals and opposing

parties under MCR 9.119 is not required following an attorney's automatic suspension for non-payment of costs under MCR 9.128. We

must agree with the respondent's reading of those rules. Formal complaint 91-198-GA is therefore dismissed.

The finding of misconduct based upon the respondent's failure to file a timely answer to complaint 91-198-GA is affirmed. The failure to file a timely answer, aggravated by the respondent's failure to file an answer to complaint 91-227-FA and further aggravated by the respondent's prior disciplinary history, warrants a suspension of thirty days.

An Order of Reprimand and Restitution issued by Tri-County Hearing Panel #84 in case no. 90-129-GA on December 17, 1990 directed that the respondent pay costs of $495.76 within thirty days of the effective date of the order. Under MCR 9.115(J)(3), an order of discipline takes effect twenty-one days after it is mailed to the respondent. The order was therefore effective January 8, 1991 and the costs were due on or about February 8, 1991. Both the order and the enclosure letter to the respondent made specific reference to the automatic suspension provision of MCR 9.128 which states in part:

> "If the respondent fails to reimburse the State Bar for the expense within the time perscribed, a certified report of the non payment must be filed with the Supreme Court, and the respondent shall be suspended automatically until the respondent pays the costs, or until a hearing panel or the board approves a suitable plan for payment, and until fulfillment of the requirements of Rule 9.123".

On February 12, 1991, the Attorney Discipline Board issued a "Notice of Automatic Suspension Pursuant to MCR 9.128" which recited the respondent's non payment of costs and stated:

> "IT IS ORDERED that in accordance with MCR 9.128 as amended, effective June 1, 1987, respondent Seymour Floyd is suspended automatically from the practice of law, effective February 8, 1991, until respondent pays the costs described in the attached Certification of Non-Payment or until a hearing panel or the Board approves a suitable plan for payment, and until fulfillment of the requirements of MCR 9.123(A)."

On March 15, 1991, the respondent filed the affidavit which is required by MCR 9.123(A) stating that:

> "After just [sic] been duly sworn, the undersigned, Seymour Floyd, deposes and says

> that he has complied fully with the terms and conditions of the Order of Automatic Suspension issued by one Attorney Discipline Board February 12, 1991.
>
> _____
> Seymour Floyd

The instant proceeding was commenced with the filing of formal complaint 91-198-GA on October 25, 1991. It charges that the respondent failed to comply with MCR 9.119(a-c, e, f and g) in that he failed to notify his clients or the courts of his suspension and he failed to file an affidavit that he had provided that notice. Further, the compliant charged that the respondent's affidavit filed with the Supreme Court on March 15, 1991 was false "for the reason that respondent had not, in fact, complied with the provisions of MCR 9.119." The respondent's conduct was alleged to be in violation of MCR 9.104(1-4,9) and the Michigan Rules of Professional Conduct, Rules 3.3(a)(1,4); 8.1(a) and 8.4(a-c).

The Board has previously ruled that "Default is an admission of the misconduct alleged. Respondent's participation is limited to the assessement of discipline and the question of liability is closed." Matter of Duane Elston, DP 100/82, Brd. Opn. p. 238 (1982), citing American Central Corporation v Stevens Van Lines, 103 Mich App 507; 303 NW2d 234 (1981). See also Matter of David A. Glenn, DP 91/86, (1987); Matter of Donald L. Sugg, 91-181-GA; 92-202-FA (1993). It must be noted, however, that the cases cited by the Board in its prior opinions explicitly limit the effect of a default "to an admission by the defaulting party as to all well-pleaded allegations." (emphasis added) American Central Corp v Stevens Van Lines, Inc. supra 303 NW2d at 236; Smak v Gwozdik, 293 Mich 185; 291 NW2d 270 (1940).

In this case, we agree with the respondent that his default could not constitute an admission that he had violated a duty imposed by court rule unless such a duty actually appears in the rules cited in the complaint.

The "Notice of Automatic Suspension Pursuant to MCR 9.128" issued by the Board and mailed to the respondent on February 12, 1991 contains no reference to the notification requirements of MCR 9.119. That Court Rule directs that:

> "An attorney whose license is revoked or suspended, or who is transferred to inactive status pursuant to MCR 9.121, or who is suspended for non disciplinary reasons pursuant to Rule 4 of the Supreme Court Rules concerning the State Bar of Michigan, shall, within seven days of the effective date of the order of discipline, be transferred to

> inactive status or the non-disciplinary suspension, notify all of his or her active clients in writing, by registered or certified mail, return receipt requested of the following:. . ."

MCR 9.119 does not explicitly require notification to clients, courts or parties following a non-disciplinary suspension for non payment of costs pursuant to MCR 9.128. The Rule refers only to non-disciplinary suspensions pursuant to Rule 4 of the Supreme Court Rules concerning the State Bar of Michigan. (Failure to pay annual bar dues). The Rule imposes a duty to notify within seven days of the effective date of an order of discipline, a transfer to inactive status or a non-disciplinary suspension (limited, as noted above, to non-disciplinary suspensions for failure to pay bar dues).

In this case, the respondent was not subject to the only type of non-disciplinary suspension identified in the Rule, he was not placed on inactive status, and he did not receive an "order" of discipline. The Board's "notice" of automatic suspension issued February 12, 1991 was simply that--a notice. The respondent's automatic suspension for non-payment of costs was the result of the automatic operation of MCR 9.128 and not the result of any action or notice issued by the Board.

It could be argued that a non-disciplinary suspension for failure to pay costs is analogous to a non-discipinary suspension for failure to pay bar dues and thus falls within the spirit of MCR 9.119. However, we are not prepared to impose discipline based upon an alleged duty which is not clearly set forth in the Court Rules. If it is the Supreme Court's intent to extend the duty of notification in MCR 9.119 to attorneys suspended for non-disciplinary reasons pursuant to MCR 9.128, that language can easily be added to this rule.

Dismissal of complaint 91-198-GA does not, however, alter the fact that the respondent failed to answer that complaint in a timely fashion. The failure to answer a complaint in conformity with MCR 9.115(D) is itself a separate act of misconduct warranting discipline. See MCR 9.104(7). The failure to answer a complaint or a Request for Investigatin is 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, Brd. Opn. p. 132 (1981).

> "If suspension could not result from a decision not to answer substantive charges, professional misconduct could never be censured. An attorney could ignore charges brought against him, knowing that no action could be taken, and thus frustrate the whole

grievance procedure. In re Moes, 389 Mich 258; 205 NW2d 428 (1973).

In this case, the respondent's answer to complaint 91-198-GA was due no later than November 19, 1991 in accordance with MCR 9,115(D). Respondent's default was filed by the Grievance Administrator on November 20, 1991. On November 22, 1991, the respondent filed an answer to formal complaint consisting entirely of the single words "admit" or "deny" to the individual paragraphs in the complaint. The Grievance Administrator subsequently filed a Motion for More Specific Answer. On March 24, 1992, the hearing panel entered an order recognizing the entry of the respondent's default and the respondent's subsequent failure to take action to set aside that default. The panel's order clearly provided that any further pleadings with regard to the respondent's default must be filed within ten days of that order. No action to set aside his default was taken by the respondent until an oral motion was presented at the hearing conducted on September 25, 1992.

At the time the complaint in this matter was served upon the respondent in October 1991, the respondent had been the subject of six formal complaints filed by the Grievance Administrator in previous matters. Two of those complaints were based solely upon the failure to answer formal complaints. The respondent cannot claim an unfamilarity with the discipline system or its procedures. His failure to file a timely answer to the complaint in this case, compounded by his failure to take timely action to set aside the default and his failure to answer the supplemental complaint was unexcusable and warrants a suspension of thirty days.

Concurring: John F. Burns, George E. Bushnell, Jr., Elaine Fieldman,Linda S. Hotchkiss, M.D., Miles A. Hurwitz and Theodore P. Zegouras

C. Beth DunCombe did not participate