Grievance Administrator,
State of Michigan
Attorney Grievance Commission,

Petitioner/Appellee,

v

Frederick L McDonald, P 17366,

Respondent/Appellant.

Case No. 91-256-GA; 92-1-FA

Issued: November 16, 1993

BOARD OPINION

This matter was remanded to the hearing panel for a further hearing to determine the appropriate level of discipline for the respondent's failure to answer a Request for Investigation and his failure to file a timely answer to a formal complaint. The respondent petitions for review of the hearing panel's decision to impose a suspension of thirty days. We are persuaded that, in this case, a reprimand is a sufficient penalty to achieve the goals of these disciplinary proceedings.

The three-count formal complaint, Matter of Frederick L McDonald, Case No. 91-256-GA, was filed in December 1991. The respondent's default was filed on January 2, 1992 along with a supplemental complaint, Case No. 92-1-FA which charged that failure to file a timely answer to the original complaint constituted a separate act of misconduct. The respondent's answer to formal complaint 91-256-GA was filed on January 10, 1992. However, the respondent did not file a separate answer to the supplemental complaint and a default was filed in that case on January 31, 1992.

Following the public hearing in June 1992, the hearing panel concluded that charges of misconduct based upon the respondent's alleged neglect of a legal matter and failure to refund unearned fees had not been established by a preponderance of the evidence and those counts were dismissed. However, notwithstanding the respondent's claim that he prepared an answer to the client's Request for Investigation in May 1991 and directed that it be filed, the panel concluded that an answer to the Request for Investigation was not filed with the Grievance Administrator and that a timely answer to the formal complaint had not been filed. The hearing panel imposed separate, concurrent suspensions of forty days for those violations.

Respondent alleged in his petition for review that he was prejudiced during the separate hearing on discipline when counsel for the Grievance Administrator improperly referred to three confidential admonitions issued by the Attorney Grievance Commission in 1971, 1974 and 1981. The respondent also argued that a forty-day suspension was out of proportion to the level of misconduct.

In response, the Grievance Administrator conceded that public disclosure of admonitions by the Attorney Grievance Commission prior to June 1, 1987 was improper [1] and that attorneys who gave their consent to an admonition before June 1, 1987 did so with the understanding that the admonition could not be made public under any circumstance. The Grievance Administrator agrees that those amendements to MCR 9.106 and MCR 9.115(J)(3) should not be applied retroactively.

The Board remanded this case to the hearing panel with specific instructions that the prior admonishments issued were improperly admitted into evidence and that both parties should have a new opportunity to present evidence in aggravation or mitigation.

At the hearing, respondent's counsel argued to the panel:

> "A man comes before you with a clear slate. He has no admonishments or reprimands or discipline of any kind in the last ten years." (Tr. p. 41)

Counsel for the Grievance Administrator then made pointed reference to the three admonitions previously ruled inadmissible by the Board. The re-introduction of those matters was defended by counsel:

> "In Michigan Court Rule 9.106, admonishments are discipline. And I am only pointing that out because Mr. Davis asked his client, have you ever been disciplined in the last ten years. And he has been admonished. It was prior that, prior to June 1st of 1987, admonishments that took place prior to that time were not admissible when you decided the case. But I think that, there again, we can rely upon those admonishments for whatever value you want to give them because he has opened the door and said that in the last ten years, he has never been disciplined." (Tr.
> p. 46)

We agree with the respondent that counsel's re-introduction of the respondent's prior admonitions into the record before the panel was clearly erroneous for two reasons. First, MCR 9.106 states:

> "An admonition does not constitute discipline and shall be confidential under MCR 9.106 except as provided by MCR 9.115(J)(3)".

Secondly, we fail to see how respondent's counsel can be said to have opened the door. Respondent's counsel argued to the panel that his client had not been disciplined or admonished during the past ten years, i.e. since 1983. That statement was true. Had counsel represented that the respondent had never been admonished, we would agree that evidence relating to the respondent's three admonitions, all prior to 1982, would have been proper. However, the representation that the respondent's record was unblemished

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[1] Effective June 1, 1987, MCR 9.106 and MCR 9.115 were amended to allow the disclosure of an attorney's prior confidential admonitions as aggravating evidence to be considered by a hearing panel at a separate hearing on discipline. [MCR 9.106(6); MCR 9.115(J)(3)]

since 1983 was, according to the record below, entirely accurate and the door to the area of respondent's confidential admonitions prior to 1982 should have remained firmly barred.

Having agreed that the re-introduction of those matters was erroneous, we are nevertheless unable to conclude that those references resulted in a material prejudice to the respondent and it does not appear that the hearing panel was improperly influenced. Our decision to reduce discipline in this case to a reprimand is based solely upon the respondent's persuasive showing that his failure to comply with the requirements of MCR 9.113(A) and 9.115(D)(1) was not the result of a conscious disregard for his obligations under these rules. While office disorganization can never exonerate an attorney's failure to comply with the duty to file timely answers to Requests for Investigation or formal complaints, it is a factor which may be considered in determining whether the goals of these proceedings may best be achieved by imposing a suspension of an attorney's right to practice law. We are unable to conclude that a suspension is required in this case.

Board Members John F Burns, George E Bushnell, Jr, C Beth DunCombe, Elaine Fieldman, Linda S Hotchkiss, MD, Miles A Hurwitz and Theodore P Zegouras concurring.