Grievance Administrator,
State of Michigan
Attorney Grievance Commission,

Petitioner/Appellant,

Marvin Hancock,
Complainant/Appellant,

v

Donald L. Sugg, P 38874,

Respondent/Appellee.

Case No. 92-181-GA; 92-202-FA

Issued: May 13, 1993

BOARD OPINION

The hearing panel order issued November 5, 1992 directed that the respondent be suspended from the practice of law for a period of sixteen months. That suspension was imposed retroactively to commence February 12, 1992, to run concurrently with a fifteen-month suspension imposed in an unrelated matter.

The Attorney Discipline Board has considered the petitions for review filed by the Grievance Administrator and the complainant, Marvin Hancock. The Grievance Administrator argues that the respondent's default precluded dismissal of Counts IV and V of the complaint and the Administrator seeks increased discipline. The complainant has requested that the hearing panel's order be modified to include restitution of atorney fees paid to Mr. Sugg.

The Board has conducted review proceedings in accordance with MCR 9.118 and has concluded that the hearing panel's report should be clarified to reflect that the misconduct alleged in each count of the complaint was established by virtue of the respondent's default. The Order of Suspension is modified as to the effective date. The respondent's license to practice law shall be suspended for a period of sixteen months effective the date of the hearing panel's order. The order is further modified by the inclusion of a provision for restitution to the complainant.

A formal complaint in the matter of Grievance Administrator v Donald L. Sugg, Case No. 92-181-GA was filed July 22, 1992. The respondent's default for failure to answer was filed August 18,

1992 and a second complaint based upon the failure to answer was filed. Matter of Donald L. Sugg, Case No. 92-202-FA.

The initial complaint charged as follows: Count I--that the respondent was retained in June 1990 to represent Brenda Sikora in a domestic relations matter, a criminal matter and a personal injury action but the respondent failed to take appropriate action on his client's behalf in those matters; Count II--that following his discharge by Ms. Sikora in January 1991, the respondent failed to return her files to her or to provide an accounting of the fees which had been paid; Count III--that respondent failed to answer the Request for Investigation filed by Ms. Sikora; Count IV--that the respondent was retained by Marvin Hancock in 1990 for the trial and, if necessary, the appeal of a criminal matter but that the respondent failed to file a timely appeal of the criminal conviction; Count V--that the respondent failed to answer the Request for Investigation filed by Marvin Hancock.

The respondent did not appear at the hearing conducted in Midland on September 16, 1992. The Grievance Administrator's counsel presented documentary evidence which established that the formal complaint, notice of hearing and all subsequent pleadings were served in accordance with MCR 9.115(C) which requires that service be made by registered or certified mail at the respondent's address on file with the state bar as required by Rule 2 of the Supreme Court Rules concerning the State Bar of Michigan.

The Grievance Administrator also presented the testimony of Marvin Hancock and his sister. That testimony was offered for the purpose of establishing aggravating circumstances with regard to the misconduct alleged in Count IV of the complaint.

The hearing panel's report concluded that the allegations in Counts I, II and III were taken as true by the panel in light of the entry of the respondent's default. However, with regard to Counts IV and V, the respondent's alleged failure to file an appeal on behalf of Marvin Hancock and his failure to answer Mr. Hancock's Request for Investigation, the panel reported that the testimony presented in aggravation was not persuasive or believable. The panel reported it reached no conclusion with respect to the merits of Counts IV and V.

The hearing panel's order refers generally to the panel's finding and conclusion "that misconduct has been established by virtue of the default". By way of clarification, we expressly rule that all five counts in formal complaint 92-181-GA were established upon entry of the respondent's default.

In December 1982, the Board ruled that "default is an admission of the misconduct alleged. Respondent's participation is limited to the assessment of discipline and the question of liability is closed". Matter of Daune Elston, DP 100/82, Brd. Opn. p. 238, (1982) citing American Central Corporation v Steven Van Lines, 103 Mich App 507; 303 NW2d 234 (1981) holding that an entry of default is equivalent to an admission of the allegations. The Board further ruled in that case that the hearing on damages in a civil case was analogous to a hearing panel's consideration of the level of discipline to be imposed and that while the default constituted an admission of misconduct, the defaulted respondent would have an opportunity to participate in the discipline phase.

In 1987, the Board reaffirmed that ruling in Matter of David A. Glenn, DP 91/86 (1987):

"We reaffirm the Board's ruling in Elston that a default for failure to answer

> a formal complaint in these discipline proceedings constitutes an admission of misconduct and further proceedings on that complaint are limited to a determination of the level of discipline which should be imposed."

The testimony of Marvin Hancock and his sister, offered for the limited purpose of establishing aggravating circumstances, was found by the panel to be not persuasive or believable. The Board has repeatedly expressed its reluctance to disturb those conclusions of a hearing panel which are based upon its first-hand opportunity to assess credibility. Schwartz v Walsh, DP 16/83 Brd. Opn. p 333 (1984).

However, even if full deference is given to the panel's decision to give no substantial weight to the testimony offered in aggravation on Count IV, the established misconduct in this case is extensive and egregious. The respondent's failure to appear at the hearing in violation of MCR 9.115(H) must be considered as an aggravating factor along with the respondent's record of prior public discipline.

The hearing panel's decision to impose a sixteen-month suspension retroactively, to run concurrently with a fifteen-month suspension issued in an unrelated matter was intended by the panel to have the effect of an additional suspension of thirty days. Respondent's misconduct warrants a suspension of sixteen-months. The hearing panel's order will therefore be modified to a suspension of sixteen months effective November 5, 1992, the date the hearing panel's order was issued.

Finally, we have considered the request by complainant Marvin Hancock for return of attorney fees paid to the respondent. The record contains unrebutted testimony that the respondent was paid an initial fee of $800 for his representation of Marvin Hancock and that an additional fee of $2000 was paid for the express purpose of retaining the respondent's services for the appeal of Mr. Hancock's conviction. The allegation in Count IV that the respondent failed to file a claim of appeal on Hancock's behalf having been established, restitution to Mr. Hancock in the amount of $2000 is appropriate.

Opinion of: C Beth DunCombe, Linda S. Hotchkiss, M.D., Miles A. Hurwitz and Theodore P. Zegouras.

DISSENTING OPINION

John F. Burns

I agree with the majority decision to clarify the findings as to Counts IV and V and I agree with the length and commencement date of the suspension imposed in this decision. However, I am not prepared to grant restitution in this case. Count IV of the complaint alleges that the respondent violated his duties and responsibilities in that he failed to timely appeal Mr. Hancock's criminal conviction. However, the complaint makes no mention of the fees allegedly paid to the respondent for his representation in that matter. The respondent's default therefore does not constitute an admission to any allegation regarding the amount of fees or the specific nature of the retainer agreement. An order of restitution in this case is entirely inappropriate when it is based solely upon testimony which the hearing panel characterized as not believable. Furthermore, I believe that great care should be exercised generally in ordering the restitution of attorney fees.

As the Board noted in Matter of Frederick Sauer, DP 25/84, Brd Opn. p 359 (1985):

> "The Michigan Supreme Court, in its wisdom, allowed restitution as a discretionary adjunct to discipline. However, not every case, perhaps not most, involve circumstances and proofs which would make restitution appropriate. In the disciplinary forum, the calculation of reimbursable losses is frought with difficulty. Formal complaints filed by the Grievance Administrator usually do not aver a specific sum lost, nor are such complaints generally designed to show that certain acts or omissions are the sole cause of specific losses in verifiable amounts".

> "The discipline forum is not intended or equipped to resolve monetary disputes. It is the overriding purpose of our discipline system, in the adjudication of complaints against attorneys, to take proofs, to rule upon the ethical issues and fashion appropriate disciplinary sanctions to deter similar misconduct and otherwise protect the public, the courts and the legal profession".

The discipline process was not intended be and should not be used as a collection agency.

George E. Bushnell, Jr. and Elaine Fieldman did not participate in this decision.