

STATE OF MICHIGAN

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ATTORNEY DISCIPLINE BOARD

Attorney Discipline Board

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Grievance Administrator,

Petitioner/Appellee,

v

William G. Shanaberger, P 41912,

Respondent/Appellant,

Case No. 18-33-MZ
(Ref. 16-6-JC; 16-7-GA)

Decided: November 20, 2018

Appearances:

Cynthia C. Bullington (misconduct and sanction hearing and brief on review) and
Dina P. Dajani (review hearing only), for the Grievance Administrator, Petitioner/Appellee
William G. Shanaberger, In Pro Per, Respondent/Appellant

BOARD OPINION

On July 17, 2018, Tri-County Hearing Panel #74 issued an order disbaring respondent from the practice of law, effective August 8, 2018. Respondent timely filed a petition for review. The Attorney Discipline Board has conducted review proceedings in accordance with MCR 9.118, which included a review of the whole record before the hearing panel and consideration of the briefs and arguments presented to the Board at a review hearing held on October 16, 2018. For the reasons discussed below, we vacate the order of disbarment and dismiss the petition seeking additional discipline for respondent's alleged failure to comply with a previous order.

I. Panel Proceedings

On April 16, 2018, the Attorney Discipline Board issued an order to show cause on the Grievance Administrator's petition, and scheduled a hearing for June 4, 2018. The matter was assigned to Tri-County Hearing Panel #74, and the hearing was held as scheduled. Although respondent failed to appear, he asserts this was because he did not know about the hearing. At the

hearing, counsel for the Grievance Administrator requested an increase in discipline to a 180-day suspension of respondent's license, and specifically stated she was not advocating for disbarment.

On June 5, 2018, once respondent found out that the hearing had been conducted in his absence, he immediately filed a motion for rehearing, explaining that he had not received notice of the hearing date, had been in constant contact with counsel for the Grievance Administrator, and had already completed, or was in the process of completing, the conditions imposed on him in the panel's prior order of suspension entered May 4, 2017. The hearing panel entered an order denying respondent's motion for rehearing on July 17, 2018. That same day, the hearing panel issued its report, finding that respondent committed professional misconduct by violating the hearing panel's May 4, 2017 Order of Suspension with Conditions (By Consent) in violation of MCR 9.104(9), and disbarring respondent effective August 8, 2018.

On August 7, 2018, respondent filed a timely petition for review, arguing that the panel erred in denying his request for rehearing on the order to show cause because he did not have notice of the hearing, and erred in determining that disbarment was the appropriate sanction. Respondent filed a petition for stay of the order of discipline during the pendency of his appeal. An interim stay of the order of disbarment was entered, pending receipt of a response to the petition for stay from the Grievance Administrator and further consideration by the Board. The Grievance Administrator did not respond to the petition for stay, so the interim stay has remained in place during the pendency of these review proceedings.

A. Background: Underlying Proceedings and Compliance Issues

This appeal involves a petition for order to show cause filed by the Grievance Administrator, seeking to increase respondent's 90-day suspension for failing to comply with his original discipline conditions. In the underlying matter, the parties submitted a stipulation for consent order of discipline on March 29, 2017. The stipulation contained respondent's admissions to a misdemeanor conviction for allowing an unlicensed driver to operate a motor vehicle, as well as to the factual statements and misconduct allegations set forth in the amended formal complaint. The parties agreed respondent's license to practice law would be suspended for 90 days and that he would be subject to various conditions.

On March 20, 2018, counsel for the Grievance Administrator filed a petition for entry of an order to show cause, seeking an increase in discipline for respondent's failure to timely comply with the conditions set forth in the order of suspension with conditions by consent. In support, petitioner attached an affidavit from Yulanda Burgess of the Attorney Grievance Commission, who was responsible for monitoring respondent's compliance with the consent order of discipline. Ms. Burgess indicated that she had sent three letters to respondent regarding his non-compliance, but she did not receive a response from respondent to any of the letters.

In respondent's answer to the petition for order to show cause, respondent explained his personal problems and absence from the state that prevented him from receiving his mail, including the letters sent by Ms. Burgess. Respondent stated that shortly after he executed the stipulation for consent order of discipline, he was evicted from his rental home. He stayed with various friends, at inexpensive hotels, or in his van, but did not have a permanent mailing address. He had no job and no income, and asserted he was too embarrassed and humiliated to share the details of his situation with his family and friends. To make matters worse, his personal belongings that were being stored at a friend's rental space were sold because the rental fee on the storage unit was not being paid. In August of 2017, respondent's van broke down and he was unable to pay for the repairs, so he ultimately began living on the streets the majority of the time from August 18, 2017 until September 24, 2017.

On September 23, 2017, respondent learned that his father, who lived in Pennsylvania, had died of a heart attack earlier that day. Respondent traveled to Pennsylvania and remained there for the next seven months, in order to take care of himself, help his family, and take care of his father's home. His siblings gave him an advance on his estate distribution percentage so he could return to Michigan. In April of 2018, when respondent returned to Michigan, he received the petition for order to show cause and quickly responded. Respondent explained his absence, indicated he was extremely remorseful and laid out his plan for complying with the imposed conditions. Respondent also asked for additional time in which to comply. Meanwhile, respondent was in nearly constant contact with counsel for the Grievance Administrator, in order to provide updates on his progress. In fact, between April 23, 2018 and June 5, 2018, respondent had contacted counsel for the Grievance Administrator, Cynthia Bullington, by email to provide updates at least eight times:

April 23, 2018: Upon returning to Michigan and re-establishing internet access, respondent received the petition for order to show cause and the stipulation for electronic service that was sent to his gmail account. That same day, respondent contacted Ms. Bullington by email, explained the reason for his absence and lack of communication for the previous ten months, and asked to meet with her the next day or the day after to discuss his case. Respondent also provided Ms. Bullington with a new cell phone number. Ms Bullington responded: "I really do not see the point in doing so at this time. You have done nothing to fulfill your conditions. My suggestion - file your response. After you file a response, if there is any reason to do so, we can meet."

April 25, 2018: Respondent sent an email to Ms. Bullington to let her know he had nearly completed his responsive pleadings and compiled exhibits, and he would have a copy of his response hand-delivered to her office the next day. Ms. Bullington did not respond.

April 26, 2018: Respondent sent Ms. Bullington an email, indicating he was trying to file his response but no one was at her office; he quickly followed up with another email when someone answered the door and accepted his filing. Ms. Bullington did not respond.

April 30, 2018: Respondent sent an email to Ms. Bullington, confirming that he received her executed stipulation to e-service. Ms. Bullington did not respond.

May 25, 2018: Respondent sent an email to update Ms. Bullington as to his progress. The email detailed respondent's financial situation involving his father's estate, as well as his progress regarding counseling and his completion of the required law practice management courses he was required to complete as a condition of his discipline. Ms. Bullington did not respond.

May 29, 2018: Respondent sent another update email to Ms. Bullington, to inform her that he completed the seminars required under the consent order. Respondent also updated her on the status of his counseling and the distribution of the estate, which he explained would allow him to pay the costs that were due under the consent order. Ms. Bullington did not respond.

June 1, 2018: Respondent sent yet another update email to Ms. Bullington. Respondent explained the status of the estate distribution, asked if he could make a partial payment, and asked for

Ms. Bullington to clarify to whom he should make the payment. Respondent also explained the status of his counseling, and offered to come see Ms. Bullington “next week” to discuss further, if necessary. He also asked if he should be updating the ADB, and appeared to be unaware of the pending hearing date, stating: “Any direction you may give would be appreciated.” Ms. Bullington did not respond.

June 4, 2018: Hearing held.

June 5, 2018: The day after the hearing, respondent sent another update to Ms. Bullington, providing the name of his counselor and indicating he would be making a partial payment the next day, with the intent to make the check payable to the AGC. Ms. Bullington responded only with: “The hearing was yesterday.” Respondent immediately replied and explained he had not received notice of the hearing, even though he “signed the e-service stip” and “checked [his] email every day” and “tried to keep [the AGC] informed twice per week since [his] return.”

II. Discussion

Respondent first argues that the hearing panel abused its discretion in denying respondent’s motion for rehearing because the evidence supports respondent’s claim that he did not have actual notice of the show cause hearing. We agree.

Under MCR 2.119(F), a trial court has discretion to grant rehearing or reconsideration of a decision on a motion. *Al-Maliki v LaGrant*, 286 Mich App 483, 486 (2009). “The rule allows the court considerable discretion in granting reconsideration to correct mistakes, to preserve judicial economy, and to minimize costs to the parties.” *Kokx v Bylenga*, 241 Mich App 655, 659 (2000). The trial court may even give a party a second chance on a previously decided motion. *Id.* The denial of a motion for rehearing is reviewed for an abuse of discretion. *Churchman v Rickerson*, 240 Mich App 223, 225 (2000).

Michigan Court Rule 9.115 requires that service of a formal complaint must be made by personal service or by registered or certified mail to the respondent’s last known address. Under this rule, “last known address” is the address on file with the State Bar as required by Rule 2 of the Supreme Court Rules Concerning the State Bar of Michigan. Rule 2 also requires any member to “notify the State Bar promptly in writing of any change of name or address.” In addition, notice of the hearing must be served by the Board. MCR 9.115(G).

Although respondent was served with the Petition for Order to Show Cause and the Order for Show Cause at his Rule 2 address (a P.O. Box), there is no dispute respondent failed to update the State Bar with a new physical address either when he moved to Pennsylvania or when he returned to Michigan in April of 2018. As a result, the Rule 2 address was invalid. However, in his motion for rehearing, respondent explained that he had not received the petition or the notice of hearing at the P.O. Box address (or any other physical address), he did not have access to the P.O. Box, and he did not sign the green card attached. Furthermore, respondent provided additional evidence that he did not have access to the P.O. Box at the time of service, and that some of his certified mail was mistakenly accepted and signed for by The UPS Store employees and then discarded.

In *Grievance Administrator v Rhonda R. Russell*, 91-202-GA; 91-235-FA (ADB 1992), counsel for the Grievance Administrator argued that once he established a request for investigation had been served, “the fact that she doesn’t get it is not material or relevant, because the rule says service is effective at the time of mailing and non-delivery doesn’t affect the validity.” *Russell, supra* at 2. Responding to that argument, this Board concluded:

Adoption of the [Administrator’s] argument presented in this case would result in the imposition of professional discipline in every case involving a failure to file a timely answer to a request for investigation even if the respondent could establish conclusively that there was non-delivery. To cite extreme examples, discipline would be imposed even if it were established that the respondent’s mailbox had been destroyed by vandals, that the post office had burned to the ground or that the mail carrier had thrown his deliveries in a land fill. [*Id.* at 2.]

Therefore, where claims of non-delivery are supported by evidence, we must be able to allow for logic and fairness. See *Grievance Administrator v Pamela C. Hartwig*, 97-266-GA (ADB 1999).

Here, the hearing panel abused its discretion by completely disregarding the fact that respondent had been in constant contact with counsel for the Grievance Administrator, appeared to be completely unaware of the hearing date, and had been actively attempting to comply with the conditions of the consent order. This evidence, coupled with logic and fairness under the circumstances, should have resulted in respondent being granted a new hearing. Such a conclusion is bolstered by the fact that the hearing panel appears to have been misled about respondent’s constant contact with counsel for the Grievance Administrator.

On review, the Grievance Administrator asserts that the panel was not misled because it was told about one of respondent's emails - an email sent June 1, 2018, the Friday before the hearing. Thus, the Administrator argues, the panel was aware of respondent's contact with the Attorney Grievance Commission. The hearing transcript, however, reveals that there was absolutely no attempt to inform the panel that counsel for the Grievance Administrator had been receiving constant updates from respondent. To the contrary, counsel went so far as to say she had "no idea" what prompted respondent's email, and that she "was very surprised" to have received it. (Tr 6/4/18, pp 5-7.)

When questioned further by the panel, counsel for the Grievance Administrator admitted respondent had contacted her earlier and had asked to meet:

CHAIRPERSON STERLING: This is the first correspondence you had from him to you?

MS. BULLINGTON: He had earlier contacted me wanting to meet with me and I replied saying I did not want - did not feel a meeting would be productive between he and myself because of his extended noncompliance. Basically said we're going to go to hearing. [Tr 6/4/18, p 16.]

Unfortunately, that is not what respondent was told. Respondent's April 23, 2018 email explained that he had been living in Pennsylvania since July of 2017 because his father fell ill and passed away. He then asked if he could come see Ms. Bullington the next day in order to discuss the case. Ms. Bullington responded: "I really do not see the point in doing so at this time. You have done nothing to fulfill your conditions. My suggestion - file your response. After you file a response, if there is any reason to do so, we can meet." There was never any mention of a hearing, and despite additional requests by respondent, there was never a meeting with the Grievance Administrator's counsel.

On review, we are concerned that counsel for the Grievance Administrator appears to completely gloss over the fact that respondent maintained incessant contact with her office, and instead she simply argues "[a]t no time, did [r]espondent state that he was unaware of a scheduled date for the show cause hearing." In his June 1, 2018 email, however, respondent implies that he is unsure about the next step, and asks Ms. Bullington for direction:

Hello Cynthia:

I wanted to get you an update.

On the estate distribution to provide funds to payoff the balance owed and any further monies due for your time in filing the Motion For Show Cause, my sister advised this morning that she is “waiting on letter from stock company. I have to get a medallion signature once they send it. I will give [the estate attorney] a call next week to follow up.”

In the interim, Cynthia, I should be able to make a partial payment towards what is owed early next week. Can you kindly confirm that the check should be made payable to “Attorney Grievance Commission”; or indicate to whom it should be made payable?

On the counseling end I have requested consults with 4 therapists and expect to complete those consults early next week; choose a therapist and have him/her complete the forms provided with my written authorization to disclose the counseling information to you/the AGC panel.

I am more than willing to come see you next week to discuss further if necessary.

Not sure if I should be updating the ADB as well since the show cause is still pending or if they simply check with you on the status. Any direction you may give would be appreciated.

I am eager to fulfill my obligations under the Consent Order with all deliberate speed. Until then, of course, I will continue my current routine and continue to make as many steps towards fulfilling the balance of the terms of the consent order in full, or piece meal with top priority.

Thank you Cynthia. Have a good weekend.

Best,
William Shanaberger

From the tone and content of respondent’s message, as well as evidence presented of his reaction to finding out a hearing had been conducted, it is clear respondent was unaware a hearing on the petition for order to show cause had been scheduled. What is also evident is that the panel

had the impression that respondent's communications with Ms. Bullington were very limited. Had the panel been aware of respondent's repeated contact and continuous updates regarding his compliance with the conditions imposed in the prior order, perhaps there would have been a different outcome. All of this was eventually laid out by respondent in his motion for rehearing, but it does not appear to have been considered by the panel. For these reasons, we find that the hearing panel abused its discretion in denying respondent's request for a rehearing.

Respondent further argues that, even if he had failed to comply with the prior consent order of discipline, the sanction of disbarment is excessive and disproportionate. Again, we agree.

In exercising its overview function to determine the appropriate sanction, the Board reviews a hearing panel's decision as to the level of discipline to ensure that it reflects a level of uniformity and continuity in discipline imposed for similar offenses under similar circumstances. *Grievance Administrator v Brent S. Hunt*, 12-10-GA (ADB 2012); *Grievance Administrator v Lopatin*, 462 Mich 235; 612 NW2d 120 (2000).

The Board frequently refers to a four-step process when applying the American Bar Association Standards for Imposing Lawyer Sanctions (ABA Standards):

First, the following questions must be addressed: (1) What ethical duty did the lawyer violate? (A duty to a client, the public, the legal system or the profession?); (2) What was the lawyer's mental state? (Did the lawyer act intentionally, knowingly, or negligently?); and, (3) What was the extent of the actual or potential injury caused by the lawyer's conduct? (Was there a serious or potentially serious injury?).

The second step of the process involves identification of the applicable standard(s) and examination of the recommended sanctions. Third, aggravating and mitigating factors are considered. Finally, "panels and the Board must consider whether the ABA Standards have, in their judgment, led to an appropriate recommended level of discipline in light of factors such as Michigan precedent, and whether the Standards adequately address the effects of the misconduct or the aggravating and/or mitigating circumstances." [*Grievance Administrator v Arnold M. Fink* (After Remand), 96-181-JC (ADB 2001), pp 1-2, lv den 465 Mich 1209 (2001), citing *Grievance Administrator v Lopatin*, 462 Mich 235; 612 NW2d 120 (2000).]

Respondent readily admits he did not timely comply with all of the conditions of the prior consent order of discipline. He has taken responsibility for his actions, and there is no evidence he intentionally disregarded his duty to fulfill his obligations under the consent order; rather, some very unfortunate circumstances prevented him from doing so. Importantly, there is absolutely no evidence of any injury caused by respondent's failure to comply with his conditions.

ABA Standard 8.0 provides the appropriate sanctions to impose in cases involving violations or failure to comply with prior orders of discipline. The panel relied on ABA Standard 8.1, which provides:

- 8.1 Disbarment is generally appropriate when a lawyer:
- (a) intentionally or knowingly violates the terms of a prior disciplinary order and such violation causes injury or potential injury to a client, the public, the legal system, or the profession; or
 - (b) has been suspended for the same or similar misconduct, and intentionally or knowingly engages in further similar acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession.

However, Standard 8.0 further provides:

- 8.2 Suspension is generally appropriate when a lawyer has been reprimanded for the same or similar misconduct and engages in further similar acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession.
- 8.3 Reprimand is generally appropriate when a lawyer:
- (a) negligently violates the terms of a prior disciplinary order and such violation causes injury or potential injury to a client, the public, the legal system, or the profession; or
 - (b) has received an admonition for the same or similar misconduct and engages in further similar acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession.

We find that this case does not fall under any of the above-referenced standards. There has been no evidence presented of injury or potential injury to the discipline system, the profession, or anyone in particular. Given that respondent was actively attempting to comply with the conditions previously imposed and advising counsel for the Grievance Administrator of his progress in this regard, we cannot help but wonder why this matter could not have been resolved by simply adjourning the hearing and giving respondent additional time in which to comply - a request he specifically made in his answer to the petition for order to show cause. Perhaps the Administrator would have even been willing to voluntarily dismiss the show cause once respondent fully complied.

It is likewise unclear what the panel was trying to accomplish by disbaring respondent. There is no evidence or even an allegation that respondent was practicing law or that he in any way attempted to practice law since his 90-day suspension went into effect. Moreover, the panel admitted at the hearing that respondent's competence as an attorney was not being questioned. (Tr 6/4/18, p 30.) Albeit untimely, respondent has now fulfilled all of the conditions of the original discipline order. No actual, discernible harm was caused to a client, the public, the legal system, or the profession, and respondent obtained no personal benefit.

III. Conclusion

The hearing panel clearly abused its discretion in this case by denying respondent's motion for rehearing. Regrettably, however, the fault does not lie solely with the panel; had the panel been provided with all the information at the hearing regarding respondent's circumstances and attempts at compliance, this abuse of discretion may not have occurred. Regardless, the particular facts and circumstances of this case certainly do not warrant disbarment. Respondent is in no way a danger to the public or the profession. He made a serious effort to comply with the terms of his prior order of discipline as soon as was practicable given his circumstances, and he has now fully complied. While respondent should update his Rule 2 address immediately with the State Bar when necessary, we conclude further discipline is not warranted for his failure to do so under the circumstances.

For all of the foregoing reasons, we will vacate the order of disbarment and dismiss the petition for order to show cause. In addition, the Board deems respondent to be in full compliance

with the conditions imposed in the previous order of discipline.¹ Finally, in light of the fact that we are vacating the order of disbarment, respondent's pending request for a stay of discipline is moot.

Board members Jonathan E. Lauderbach, Barbara Williams Forney, James A. Fink, John W. Inhulsen, Karen O'Donoghue, Michael B. Rizik, Jr., and Anna Frushour concur in this decision.

Board members Rev. Michael Murray and Linda S. Hotchkiss, M.D. were absent and did not participate.

¹ At the review hearing, petitioner argued that once someone fails to meet the exact terms of a disciplinary order - in this case, a specific time limit in which to complete the conditions - they are incapable of ever being readmitted to practice. (Tr 10/16/18, pp 21-22.) Petitioner reasoned that, in such a case, any affidavit filed under MCR 9.123(A) asserting respondent is in full compliance would contain a false statement, and thus disbarment would be appropriate. We flatly reject this argument. Not only would this be an absurd result, but this is not indicative of the purpose of MCR 9.123(A). Moreover, a respondent's untimely compliance with conditions imposed in an order of discipline is often accepted by the Attorney Grievance Commission, as well as the Attorney Discipline Board, when consistent with the protection of the public, the courts and the profession.