STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,
State of Michigan
Attorney Grievance Commission,

Petitioner/Appellee,

v

Jeffrey W. VanTreese, P 31858,

Respondent/Appellant.

Case No. 90-137-GA

Decided: February 7, 1992

MAJORITY OPINION

The respondent's license to practice law in Michigan was revoked by a hearing panel based upon the panel's conclusion that the respondent obtained cocaine from two separate clients in exchange for legal services, encouraged one of those clients not to give truthful testimony to a grand jury, and was convicted, in May 1989, by guilty plea, of the crime of use of cocaine and to possession of cocaine less than twenty-five grams, by a plea which was taken under advisement.

The respondent's petition for review seeks a reduction in the discipline imposed. In the alternative, it is requested that this case be remanded to a hearing panel to allow the respondent an opportunity to present evidence in mitigation. The respondent's petition for review was accompanied by a petition for a stay of discipline. The request for a stay was denied by the Board in an order entered June 4, 1991. Upon review of the whole record and consideration of the arguments and briefs presented by the respective parties, the Board has concluded that the respondent's default was improperly entered. No evidence was entered in support of the charges contained in Count III of the complaint. Count III must therefore be dismissed. The Board further concludes, however, that the nature of the misconduct established by the evidence warrants the discipline imposed by the panel and the Order of Revocation is affirmed.

A four-count complaint was filed by the Grievance Administrator in this matter on August 10, 1990. Count I charged that the respondent accepted cocaine from a client, Mary Thuss, in partial exchange for legal services rendered in defending her against criminal charges of the delivery of cocaine. Count II charged that the respondent encouraged Ms. Thuss not to give truthful testimony to a grand jury. In Count III, it was alleged that the respondent accepted cocaine from another client, Kurt Stoner,

while representing Stoner on drug-related charges. The fourth count was based upon the respondent's 1989 conviction by guilty plea of the offense of use of cocaine and possession of cocaine less than twenty-five grams, which plea was taken under advisement.

A stipulation to adjourn the hearing scheduled for October 2, 1990 was filed by the parties. On September 10, 1990, the respondent filed his answer to the complaint. In that answer, the respondent admitted purchasing cocaine from Ms. Thuss and admitted entering the pleas to use and possession of cocaine described in Count IV but he denied counseling his client Thuss to give false testimony (Count II) or accepting cocaine from client Stoner (Count III). No further pleadings or communications were received from the respondent prior to the hearing conducted before a panel in Detroit on March 20, 1991. The respondent did not appear at that hearing.

Upon the motion of the counsel for the Grievance Administrator, the panel declared that the respondent was in default for failure to appear at the hearing. Notwithstanding the declaration of a default, Mary Thuss was sworn as a witness and gave testimony regarding the allegations of Counts I and II. Court records were submitted in support of Count IV. No testimony or exhibits were offered in support of the charges relating to Curt Stoner in Count III.

The hearing panel's report recites that:

> "Based upon the default entered on the record, the hearing panel has concluded that the allegations of misconduct of formal complaint 90-137-GA are deemed to be admitted".

We do not believe that the respondent's default was entered properly. MCR 9.115(D) directs that a signed answer to a complaint be filed within twenty-one days and that rule provides:

> (2)"A default, with the same effect as a default in a civil action, may enter against a respondent who fails within the time permitted to file an answer admitting, denying or explaining the complaint or asserting the grounds for failing to do so".

The filing of the respondent's answer to the complaint on September 10, 1990 precluded the entry of a default under 9.115(D)(2). This is the only rule under Sub-chapter 9.100 of the Michigan Rules of Court authorizing the entry of a default in a disciplinary proceeding.

A respondent/attorney is under an affirmative duty to appear personally at a hearing. (MCR 9.115(H)]. An attorney who fails to appear is in violation of that rule and, if he or she has claimed physical or mental incapacity as a reason for the non-appearance, may be subject to an immediate, indefinite suspension. [MCR 9.115(H)l However, the rules do

not appear to contemplate the entry of a default against a respondent who fails to appear at the **hearing but who filed** an answer. In that instance, the Grievance Administrator is not relieved of the obligation to establish the charges of misconduct by a preponderance of the evidence.

Notwithstanding the panel's ruling on the issue of default, the record discloses that the Grievance Administrator's counsel did submit sufficient evidence to establish the charges of misconduct in three of the four counts. The sworn testimony of Mary Thuss clearly supports the charges in Counts I and II that the respondent obtained cocaine from her and that, in his capacity as her attorney, he suggested to her that she withhold from a grand jury testimony which might incriminate him. As to Count IV, sufficient evidentiary support was introduced in the form of copies of the circuit court records relating to the respondent's criminal matter.

No evidence was submitted to the panel which would support the allegations of misconduct contained in Count III. Those allegations were denied in the answer filed by the respondent. In the absence of supporting evidence, the charges in that Count must be dismissed.

The testimony of the respondent's client, Mary Thuss depicts the respondent's abuse of the lawyer/client relationship in stark terms. Mr. VanTreese was retained by Ms. Thuss in 1986 for the specific purpose of representing her following her arrest for the sale of cocaine. According to her testimony, a second relationship developed in which she became a regular supplier of cocaine to her attorney. These deliveries were made to the respondent at his office, at the client's house and, on at least one occasion, at the respondent's house (Tr. p. 7,8) Deliveries of cocaine were made to the respondent at his office both during and after regular office hours. (Tr. p. 8) The amounts varied from one ounce for which respondent was charged $100 to three and one-half ounces at a charge of $300. (Tr. p. 8,9) Sometimes, Mr. VanTreese would pay cash. At others, the amount would be deducted from Ms. Thuss' bill for legal services (Tr. p. 8)

In Matter of Grimes, 414 Mich 483; 326 NW2d 380 (1982), the Supreme Court ruled that revocation of an attorney's license to practice law was appropriate where the respondent was found guilty of "illegal conduct involving moral turpitude" compounded by a finding that the respondent was guilty of counseling or assisting his client in conduct that he knew to be illegal or fraudulent. We believe that Grimes is a useful guide in considering the appropriateness of the discipline entered by the panel.

As in Grimes, the respondent willfully violated the law. "Any lawyer knowingly engaging in criminally proscribed conduct can properly be charged with an awareness of the possible jeopardy in which such activity which may place his professional status". In the Matter of Rabideau, 102 W12d 16, 25; 306 NW2d 1 (1981).

As in Grimes, the respondent counseled a client to be less than candid in testimony to the proper authorities, with no regard for the interests of the client or society, but in a callous attempt to conceal his own wrongdoing.

> "The legal system is virtually defenseless against the united forces of a corrupt attorney and a perjured witness, thus, 'for an attorney at law to actively procure or knowingly countenance the commission of perjury is utterly reprehensible'. In re Allan, 52 Cal2nd 762, 768; 344 P2d 609 (1959)". In the Matter of Stroh, 97 W2d 289; 644 P2d 1161, 1165 (1982)

There is ample evidentiary support in the record for the panel's conclusion that respondent VanTreese suggested to his client that she not mention his involvement in the drug transactions in her sworn testimony to a grand jury in the hope and expectation that she would give evidence which was not fully forthcoming.

If anything, however, the respondent's willingness to Involve his client in his procurement of cocaine was more reprehensible than the advice given to her prior to her grand jury testimony.

Ms. Thuss testified that she delivered cocaine to the respondent on many occasions and at different locations. In view of the charges against her for delivery of cocaine, each transaction with the respondent placed her at greater risk of further arrest and decreased the likelihood of a favorable result in the criminal matter for which the respondent had been retained.

Regardless of any sympathy which might be invoked for an attorney who is willing to violate the law to satisfy his or her own addiction, neither the public nor the legal profession should be expected to tolerate an attorney's willful involvement of a client in a series of illegal transactions.

Finally, we have considered the respondent's argument that his failure to appear before the panel was the result of his failure to enter the hearing date properly on his calendar and thus constituted "excusable error". The argument is not persuasive. Furthermore, none of the potentially mitigating factors referred to by the respondent in the proceedings before the Board would have sufficient weight to warrant a reduction of discipline had those factors been presented to the panel.

DISSENTING OPINION OF: Elaine Fieldman and Theodore P. Zegouras

We would reduce discipline to a suspension of two and one-half years. Like the majority, we are particularly troubled by the respondent's willingness to jeopardize the rights of his client in order to facilitate

his own procurement of cocaine. Nevertheless, we are persuaded that a reduction is warranted in light of both the circumstances of this case and the discipline imposed in other cases involving illegal drugs.

The misconduct in this case occurred during the years 1986 to 1988. The record discloses that respondent practiced law without discipline following his admission to the bar in 1980. The record further suggests that he is now gainfully employed in the State of Florida. There is no evidence before us suggesting that the respondent trafficked in illegal drugs for monetary gain. These factors suggest strong similarities to other cases considered by the Board involving the use or possession of cocaine resulting in discipline less than revocation, including Matter of James Bearinger, ADB 36-88, 1989 (Order of Revocation reduced to suspension of two and one-half years); and Matter of Wendell N. Davis, ADB 8-88; 39-88, 1989 (Brd. Opn. affm. three-year suspension for attorney convicted of the felony of possession of less than fifty grams of cocaine)

We adopt that portion of the majority opinion dealing with the effect of the respondent's failure to appear at the hearing. Although the attorney who answers the complaint but fails to appear at the hearing assumes the risk of certain consequences, sub-chapter 9.100 appears to limit the entry of a default to those cases where the attorney fails to answer the complaint.

DISSENTING OPINION OF: George E. Bushnell, Jr.

For the reasons stated by the majority, I agree that a default was not entered in accordance with the rules but that there is sufficient evidentiary support for the panel's conclusions with regard to Counts 1, 11 and IV.

I do not in any way wish to minimize the gravity of the respondent's misconduct nor can I condone his reprehensible behavior which demonstrates a profound disrespect for the rights of his client and for his obligations to the criminal justice system.

Nevertheless, I would impose a suspension of the respondent's license rather than revocation. While MCR 9.123(B)(2) allows an attorney whose license has been revoked to petition for reinstatement after a minimum period of time has elapsed (five years under the current rules), the Supreme Court's recent opinion in Matter of Irving August, _____Mich _____ (1991), coupled with the position taken by the Grievance Administrator in opposition to the reinstatement of disbarred attorneys, suggests that an attorney seeking reinstatement following revocation will not know with certainty whether his or her reinstatement petition will be opposed on the grounds that the misconduct was so egregious that the "mere" passage of five years is not sufficient. By warning in its opinion in August that there may be types of misconduct warranting permanent disbarment, but declining to identify such misconduct, the Court has, I am afraid, deprived all parties of adequate guidelines which may be applied in future reinstatement cases following revocation. I am not prepared to subject this respondent to that uncertainty.

John F. Burns, C. Beth Duncombe, Linda S. Hotchkiss, M.D. and Miles A. Hurtwitz