GRIEVANCE ADMINISTRATOR,
Petitioner/Appellee,

v

ERIC P. vonWIEGEN, P-23724,
Respondent/Appellant.

ADB 27-89

Decided: October 4, 1990

BOARD OPINION

In this reciprocal discipline case considered by a hearing panel in accordance with MCR 9.104, the Grievance Administrator established that the Appellate Division of the Supreme Court of New York issued a decision and order sustaining a charge that the respondent violated certain provisions of New York's Code of Professional Responsibility by hiring a person to recommend the use of his services. The respondent's license to practice law in that state was suspended for a period of five years. In the absence of any objection by the respondent, who did not appear, the panel found that the respondent failed to overcome the "conclusive presumption" that the finding of misconduct in New York should be binding in Michigan and that the respondent should be the subject of identical discipline.

The hearing panel imposed a suspension of five years. The respondent has filed a petition for review which has been considered by the Board in accordance with the provisions of MCR 9.118. The Board has concluded that the New York adjudication of misconduct is conclusive proof of misconduct warranting the imposition of discipline in Michigan. The Board is persuaded, however, that the imposition of identical discipline would be clearly inappropriate. The discipline imposed by the panel is reduced and the respondent's license to practice law in Michigan suspended for a period of three years.

These proceedings were instituted with the filing of a Petition for Order to Show Cause filed by the Grievance Administrator with an attached copy of an order entered on January 18, 1989 by the Appellate Division of the Supreme Court for the Third Judicial Department in the State of New York. In that order, the Court granted the motion of the Committee on Professional Standards, Third Judicial Department, to confirm a referee's report with respect to Charge I and to grant the respondent's motion to disaffirm the referee's report as to Charge II.

The Grievance Administrator's Petition to Show Cause was granted by the Board which directed that the respondent appear before a hearing panel on April 18, 1989. The matter was adjourned to June 6, 1989 as the result of the respondent's telephone request for an adjournment. However, the panel received no further communication from the respondent and he did not appear at the adjourned hearing.

Neither the Grievance Administrator's Petition for Order to Show Cause nor the attached Court order specified the nature of the charges against respondent VonWiegen in the New York disciplinary proceedings. At the hearing conducted in Detroit on June 6, 1989, counsel for the Grievance Administrator acknowledged the lack of information in the pleadings and introduced into evidence a certified copy of the charges filed in New York that Mr. Vonwiegen hired one Jeffrey Arnow to solicit cases on his behalf and directed Mr. Arnow to make false and misleading statements to prospective clients to induce them to engage his legal services. The panel also received from the Administrator a certified copy of the per curiam opinion which accompanied the January 18, 1989 order of the Appellate Division.

A timely petition for review was filed on behalf of the respondent on the grounds that discipline identical to the five-year suspension imposed in New York would be clearly inappropriate. A supporting brief was filed which relied heavily upon an attached copy of the report of referee Norman B. Fitzer. Although this document was the basis for the opinion and order offered as exhibits by the Grievance Administrator, it was not entered into evidence below and was not a part of the record considered by the panel. The opposing brief filed on behalf of the Grievance Administrator refers to the respondent's "totally irrelevant dissection of the referee's report" but stops short of objecting to the introduction of the report into the record.

The imposition of reciprocal discipline based upon an order from another jurisdiction is based entirely upon that section of MCR 9.104 which provides:

> Proof of an adjudication of misconduct in a disciplinary proceeding by another state or a United States court is conclusive proof of misconduct in a disciplinary proceeding in Michigan. The only issues to be addressed in the Michigan proceeding are whether the respondent was afforded due process of law in the course of the original proceeding and whether imposition of identical discipline in Michigan would be clearly inappropriate.

This rule provides no guidance as to the procedure which should be employed in order to place these issues before a hearing panel. Since the adoption of this rule in its present form in June 1987, reciprocal discipline cases have been instituted by the Grievance Administrator's filing of a petition for order to show cause. Where, as in the instant case, the respondent raises no objection to this procedure, the Board has granted the Administrator's petition and has directed the parties to appear before a panel and to show cause why an order of reciprocal discipline should not be entered.

While such a procedure is an efficient way of bringing the matter before a panel where there is little or no dispute that the respondent was the subject of an order of discipline in another jurisdiction, this procedure does not relieve the Grievance Administrator of the obligation to file an initial pleading which specifies the acts or omissions for which the respondent was disciplined and which describes, with reference to the applicable code or rules of conduct, the professional misconduct for which reciprocal discipline is sought.

In this case, there is nothing in the Administrator's Petition for Order to Show Cause or the supporting order from which the Board, the panel or a member of the public could be reasonably informed as to the nature of the alleged misconduct. We agree with the respondent's contention that the referee's report provides the factual context for the findings of the Appellate Division and it is therefore an integral part of the Court's order of discipline. Although not offered into evidence in the proceedings below, the referee's report is relied upon by both parties in their arguments to the Board and has been considered.

As noted above, the rule governing reciprocal discipline proceedings directs that the only issues to be addressed in the Michigan proceeding are 1) Whether the respondent was afforded due process of law in the original proceedings and 2) Whether imposition of identical discipline here would be clearly inappropriate. In his pleadings before the Board, the respondent specifically waives any claim that the New York proceedings lacked due process. He argues, however, that a panel's consideration of the appropriate level of discipline must include a determination that the factual findings in New York support a finding of professional misconduct under the applicable rules in Michigan. In this case, he argues the solicitation of potential clients through a third party which occurred in New York would not constitute professional misconduct in Michigan and therefore, the imposition of <u>any</u> discipline is clearly inappropriate.

While we agree that material differences in the substantive rules of conduct between two jurisdictions may be important factors in determining the <u>level</u> of discipline which should be imposed in reciprocal discipline cases, we are not persuaded that the issue of misconduct, having been established in a jurisdiction where the acts occurred, may be retried in the Michigan proceedings. The Board has been presented with no authority in support of respondent's position that "in order for discipline to be imposed in Michigan, it must be based upon Michigan law". Indeed, the most recent treatise on Michigan disciplinary proceedings states that "an adjudication of discipline in a foreign jurisdiction constitutes conclusive proof of misconduct and is not rebuttable," <u>Michigan Rules of Professional Conduct and Disciplinary Procedure</u>, Dubin and Schwartz, ICLE, 1989, at Page 15-9.

In considering whether the five-year suspension imposed in New York would be "clearly inappropriate" as a reciprocal discipline in Michigan, we have considered differences between the disciplinary standards including sanction levels, in the two states involved. We have considered such differences in prior cases, see, for example, <u>Matter of Mark L. Davis</u>, ADB 47-89, Brd. Opn. March 22, 1990, citing <u>In re Witte</u>, 99 IL2d 301; 458 NE2d 484 (1983).

We are somewhat hampered in this regard by the dearth of discipline cases in Michigan involving the improper solicitation of clients. As noted by the respondent, our Supreme Court has suggested that a two-year suspension would be appropriate in a case involving the improper personal solicitation of clients in a personal injury case. <u>State Bar Grievance Administrator v Jaques</u>, 401 Mich 516 (1977) (Discipline was never actually imposed in that case as the result of the Court's subsequent determination that the state's anti-solicitation statute was unconstitutional, see <u>State Bar Grievance Administrator v Jaques</u> (on remand) 407 Mich 26 (1979). In the only other case considered by the Board involving solicitation of any kind, the Board affirmed a hearing panel decision that respondent's letters to widows of heart-attack victims constituted

improper direct mail solicitation but reduced discipline from a forty-five day suspension to a reprimand. Grievance Administrator v Robert J. Buk, 35947-A (Brd. Opn. p. 37, 1979).

We conclude that a five-year suspension is inappropriate. We have considered the factual findings affirmed by the Appellate Division in New York and the weight which that Court placed upon Mr. Vonwiegen's prior serious misconduct in the making of deceptive and misleading statements in direct mail solicitation to accident victims. (Matter of VonWiegen, 108 AT2d 1012) We conclude that the respondent's license to practice law in Michigan should be suspended for three years.

All concur