GRIEVANCE ADMINISTRATOR,
Petitioner/Appellee,

v

EUGENE OSTROWE, P-24307,
Respondent/Appellant.

ADB 110-89; 137-89

Decided: June 29, 1990

BOARD OPINION

The hearing panel in this matter issued an order suspending the respondent's license to practice law for 120 days based upon its finding that the respondent appeared in court on behalf of a client at a time when his license to practice law was suspended, that he failed to notify another client of that suspension and that he failed to return the unearned portion of a retainer fee which he accepted prior to the suspension. The respondent has filed a petition for review seeking a reduction of the discipline imposed. The Attorney Discipline Board is not persuaded that the discipline imposed by the panel is inappropriate in light of the nature of the respondent's misconduct and the aggravating factors presented.

The respondent was reprimanded in a prior disciplinary matter in September 1988 for his failure to answer a Request for Investigation, aggravated by his failure to answer the formal complaint [ADB 151-88, hearing panel order effective September 15, 1988. That order of reprimand contained a provision in accordance with MCR 9.128 directing that the respondent reimburse the State Bar of Michigan for the costs of that proceeding, in the sum of $173.41. Mr. Ostrowe's failure to comply with the cost provision of that order, or to seek an extension of time within which to discharge that obligation, triggered the automatic suspension provisions of MCR 9.128 and a notice of automatic suspension was issued by the Board effective October 24, 1988.

The complaint filed by the Grievance Administrator in this case charged that the respondent's automatic suspension pursuant to MCR 9.128 was in effect on January 13, 1989 when he appeared on behalf of the defendant in a criminal matter in the Forty-sixth District Court. A second count of the complaint charged that the respondent agreed to represent another client in property dispute in June 1988 and accepted the sum of $1000 toward the agreed upon retainer of $2500. The complaint charged that after his automatic suspension in October 1988 the respondent failed to notify his client of his suspension and failed to return the unused portion of the partial retainer. The respondent's conduct in both matters was alleged to be in violation of MCR 9.104(1-4), Canons 1 and 2 of the Code of Professional Responsibility, DR 1-102(A)(4,5) and DR 2-110(A)(3); and Rules 1.6(d) and Rule 5.5 of the Michigan Rules of Professional Conduct.

The respondent's failure to answer the complaint resulted in the filing of a default on

September 7, 1989. The hearing before the panel proceeded as scheduled on October 3, 1989. Upon his late arrival, the respondent was advised that the hearing had been commenced and that the misconduct alleged in the complaint was established by virtue of the default. The panel chairman advised Mr. Ostrowe that:

> "You are now present and, if you wish to make some motion or make some statement with respect to the matter at this time, we will entertain that. Otherwise you are certainly free to participate in the next phase of the hearing which deals with what discipline is appropriate." (Tr. p. 16)

Although the respondent addressed the panel at some length, he made no motion to set aside the default. In fact, the respondent did not attempt to set aside the default until he filed a motion with the Board on February 8, 1990, approximately three months after the filing of his petition for review. The respondent's motion to set aside default was denied by the Board in an order issued March 28, 1990.

The only issue before the Board in this case, therefore, is whether or not the hearing panel imposed an appropriate level of discipline. The respondent's default stands as an admission of the misconduct charged in the complaint. Matter of David A. Glenn, DP 91/86, Brd. Opn. 12/17/86, Matter of Daune Elston, DP 100/82, 1982 (Brd. Opn. p. 238).

In addition to the legal effect of respondent's default, it is noted that the respondent does not seriously dispute the allegations that he actually received the formal complaint but that he did not answer it. (Tr. p. 25) He admits that he appeared before Judge Levy in the Forty-sixth District Court in January 1989 as alleged in Count I. He was asked specifically if he knew that he wasn't licensed to practice law at that time and answered "Ya, I hadn't paid my Bar dues". (Tr. p. 26) In his pleadings filed with the Board, the respondent now describes that representation as a "gratuitous appearance at the request and insistence of an acquaintance" and he characterizes his appearance while suspended as a foolish error".

The respondent's argument that the hearing panel acted arbitrarily and capriciously in its decision to impose a suspension of 120 days is not persuasive. On the contrary, the record in this case clearly supports the conclusion that the respondent's reinstatement to the practice of law should not be automatic. The respondent's failure to recognize the gravity of his deliberate appearance on behalf of a client while suspended from the practice of law is directly relevant to the issue of whether he has a proper understanding of and attitude toward the standards that are imposed on members of the Bar. By suspending the respondent for 120 days, the hearing panel determined that the respondent’s eligibility for reinstatement should be considered by a hearing panel during the reinstatement process outlined in MCR 9.123(B) and MCR 9.124. This respondent's understanding of the standards imposed on members of the Bar will be an issue in those reinstatement proceedings. We conclude that such consideration is appropriate and that the respondent should be required to establish by clear and convincing evidence that he will conduct himself in conformity with those standards in the future. The suspension of 120 days imposed by the panel is affirmed.

John F. Burns, Hon. Martin M. Doctoroff, Remona A. Green, Hanley M. Gurwin, Robert S. Harrison and Theodore P. Zegouras

CONCURRING OPINION

By Dr. Linda S. Hotchkiss, M.D.

I concur in both the reasoning and the result of the opinion in this case. I believe that it should be emphasized that the respondent is not disciplined for his failure to pay the costs assessed in a prior case nor is the discipline imposed simply because he failed to answer the formal complaint. I agree that the respondent does not seem to appreciate the seriousness of the charge that he attempted to practice law while he was suspended. His failure to answer a Request for Investigation in the prior case and his failure to answer the formal complaints were properly considered as aggravating factors.

I am especially concerned by the respondent's reliance upon his experience with the State Bar Grievance Board in 1977 as a reason for his inability to confront the charges filed in this case in 1989.

Mr. Ostrowe has argued that he was "intentionally terrorized and traumatized" by the State Bar Grievance Board over a fee dispute in 1977. He has explained to the Board:

> "I, of course, was outraged at their behavior but severely frightened by this traumatic experience, with those same feelings and fear being resurrected each time I received notices from the Grievance Commission and Discipline Board, including Requests for Investigation. This trauma, fear and paralysis arises instantly upon receipt of materials from these oversight organizations." (Respondent's Brief in Support of Petition for Review, p. 6).

Notwithstanding my professional training, I am obviously (and emphatically) not in a position to make a professional observation or diagnosis based simply upon a review of the respondent's pleadings and his personal appearance before the Board. However, I believe that I speak for the other members of the Board by stating that I am troubled by the respondent's reliance on his alleged "trauma" suffered during a disciplinary inquiry in 1977 as an explanation for his inability to respond to correspondence from the Grievance Commission or Discipline Board more than twelve years later. I would hope that Mr. Ostrowe would take appropriate steps to put the events of 1977 in perspective and to prepare to convince the hearing panel assigned to his reinstatement that he will be able to deal with such inquiries if they should arise in the future.