STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,
State of Michigan
Attorney Grievance Commission,

Petitioner/Appellee,

v

Lawrence A. Baumgartner, P25163,

Respondent/Appellant.

Case Nos. 91-91-GA; 91-108-FA

BOARD OPINION

John F. Burns and Miles A. Hurwitz

The Attorney Discipline Board has considered the petition filed by the respondent seeking review of a hearing panel order suspending his license to practice law in Michigan for thirty days. For the reasons stated in their separate concurring opinion, we agree with Board members DunCombe and Fieldman that the findings of misconduct alleged in Count I of the formal complaint should be dismissed.

We also agree that a reprimand is an appropriate discipline, in this case, for the respondent's failure to answer a request for investigation, aggravated by his failure to file a timely answer to the formal complaint. However, our rationale for that conclusion differs from that of our colleagues.

The findings of misconduct under Count I of the complaint played virtually no part in the panel's decision to impose a suspension of thirty days. The panel's report makes it quite clear that a reprimand would have been imposed had it not been for the constraints of the Board's Opinion in Matter of David A. Glenn, DP 91/86, Brd. Opn. 3/23/87. The Glenn opinion should not be read so narrowly as to deprive the hearing panel of any discretion to consider the imposition of discipline which takes into account all of the factors which are unique to the case before it. Nor do we believe that the phrase "exceptional circumstances" must be read in the sense of circumstances so compelling as to approach an absolute defense to the charge of failure to answer a request for investigation.

Nevertheless, the failure of an attorney to discharge his or her fundamental duty to answer a request for investigation sends an unmistakable signal that the respondent/attorney may be unwilling or unable to aid the discipline system in the prompt resolution of these investigations. More than eleven years ago, the Board emphasized that this duty has two faces: responsibility to the Bar and to the public:

> [T]he duty to the Bar is to help clarify complaints made about its members, so that grievances with merit may proceed, and those without substance may be disposed of quickly . . . . The duty to the public relates to fairness to lay people who may have a legitimate grievance . . . .
>
> Failure to fulfill this dual duty of responding is in itself substantive misconduct, and should never be ignored by a hearing panel, or excused as a peccadillo unworthy of drawing discipline.
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> Matter of James H. Kennedy, DP 48/80, Brd. Opn. p. 132 (3/10/81).

To the extent that the Board's 1987 opinion in Glenn constituted a further warning to the legal profession and an assurance to the public that these investigations are taken seriously, we believe that the Board's position in Glenn has continued vitality.

We hold that the hearing panels should use the Glenn decision as a guide in determining discipline in failure to answer cases. Further, hearing panels should exercise their sound discretion in arriving at levels of discipline. The Board will, in turn, prudently exercise that "[m]easure of discretion with regard to ultimate decision" which has been recognized by the Court. Grievance Administrator v August, 438 Mich 296; 475 NW2d 256 (1991).

We are persuaded, based on the record in this case, that a deviation from the level of discipline suggested in Glenn is an appropriate exercise of that discretion.

CONCURRING OPINION

C. Beth DunCombe and Elaine Fieldman

Respondent appeals findings of misconduct and the 30 day suspension imposed. The panel held that respondent committed misconduct in connection with his representation of a client. This holding was based on the panel's findings that an amended complaint which respondent filed on behalf of a client did not comply with a court order and respondent failed to pay costs of $500 which the Court imposed following dismisal of the amended complaint. In addition, the panel held that respondent committed misconduct in failing to answer a request for investigation and failing to file a timely answer to the formal complaint.

We hold that the findings of misconduct with respect to the filing of the amended complaint and non-payment of costs are not supported by the evidence. Respondent admits that he failed to answer the request for investigation, but asserts that the suspension should be reduced to a reprimand. We would reduce the suspension to a reprimand.

I.

Respondent was retained in May 1988 to file a civil suit for recovery of damages to a client's sailboat. The complaint alleged:

> VI. That on or about February 27, 1988, defendant Carol L. Patton, was the operator of a motor vehicle that left the roadway on North River Road and struck plaintiff's sailboat which was drydocked at the Sun and Sail Marina, in Harrison Township.

The complaint further alleged that the plaintiff suffered "damages as a result of defendant['s] failure to maintain control of her automobile . . . . "

The defendant filed a motion for summary disposition. The Circuit Court ordered respondent to file an amended complaint with a more detailed description of the defendant's alleged liability for tortious conduct. Respondent filed an amended complaint, but the Court found that the amended complaint was deficient and granted defendant's motion for summary disposition. In a subsequent order, the Court awarded $500 in costs to the defendant.

Respondent maintained that the complaint and amended complaint were sufficient, but acknowledged that the amended complaint did not allege further specific facts regarding the cause of the accident or the duty of the defendant driver. Respondent admitted that he did not pay the costs, explaining that the defendant did not pursue collection. These facts are the basis for the panel's findings of misconduct on count I of complaint 91-91-GA.

We conclude, based on a review of the whole record, that respondent's conduct (omissions) did not constitute professional misconduct. The Grievance Administrator argued:

> That the amended complaint as drafted was incompetent. Judge Schwartz had given an opportunity to cure it by filing a competent pleading. Mr. Baumgartner neglected to file a competent pleading and that was what formed the basis of Count I of the Complaint. (Rev. Hrg. T-25).

Specifically, the hearing panel held that respondent violated MCR 9.104(1-4), Michigan Rules of Professional Conduct (MRPC) Rule 1.1(c), 1.2(a), 1.3 and 8.4(a,c) as well as Canons 1, 6 and 7 of the Code of Professional Responsibility (Code), DR 1-102(A)(1,5,6), DR 6-101(A)(3) and DR 7-101(A)(1-3). While respondent's representation of the client predated the MRPC, all of the misconduct alleged occurred after the effective date of the MRPC (October 1, 1988). Accordingly, the MRPC applies and all findings of violations of the Code should be dismissed.

The panel did not rule that a complaint dismissed by a judge is prima facie, an incompetent pleading. Nor do the rules prohibit "incompetent pleadings," whatever that means.

None of the rules relied on by the panel (or charged in the complaint) apply here. Rule 1.1(c) states that "[a] lawyer shall not neglect a legal matter entrusted to the lawyer." There is not evidence that respondent neglected a matter. He filed a complaint and, in response to a court order, an amended complaint. While the Court was not satisfied with the complaint or amended complaint and granted summary disposition, this does not establish that respondent neglected his client's matter.[1]

Rule 1.2 pertains to the "scope of representation" and provides that "[a] lawyer shall seek the lawful objectives of a client through reasonably available means . . . . " The rule aims at striking a balance between actions which the lawyer may take without obtaining the client's consent and those to which the client must consent. By its terms,[2] the rule does not pertain to the circumstances of this case.

Rule 1.3 requires a lawyer to act with "reasonable diligence and promptness." There is no evidence on this record that respondent was not diligent or prompt.

Similarly, we conclude that there is insufficient evidence to establish that the failure to pay costs, under the facts and circumstances, constitutes professional misconduct. Given the paucity of evidence on this issue, such a finding of misconduct must necessarily depend on a ruling that an attorney's failure to pay costs must be, by definition, professional misconduct. We do not believe that such a rule would be consistent with the reality of the day-to-day practice of law. Therefore, the findings of misconduct as alleged in count I, subparagraph D-i,iii are dismissed.

II.

The hearing panel indicated that but for Matter of David A. Glenn, DP 91/86 (2/23/87), it would have imposed a reprimand and stated that because of Glenn, it had "no alternative other than to suspend respondent form the practice of law for thirty (30) days."

Our colleagues would hold that Glenn "has continued vitality" and that under Glenn, a reduction in the "suggested minimum" is warranted in this case.

We agree that the suspension should be reduced to a reprimand, but for different reasons. We agree with the hearing panel that under Glenn a 30 day suspension is required and absent Glenn a reprimand should be

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[1] During argument, the attorney for the Grievance Administrator asserted that respondent's conduct violated Rules 1.1(a) and (b). However, the complaint did not allege a violation of these rules so we need not address this argument.

[2] The panel opinion erroneously refers to Rule 1.2(9). There is no such rule.

imposed. We would hold that to the extent Glenn requires panels to impose a certain level of discipline absent exceptional circumstances, its holding is contrary to the principles of the discipline system as set forth by the Michigan Supreme Court and should not be followed.

It is well established in the jurisprudence of our state that discipline cases are fact specific and the discipline imposed must be determined on an individual basis. State Bar Grievance Administrator v DelRio, 407 Mich 336; 285 NW2d 277 (1979); Matter of Grimes, 414 Mich 483; 326 NW2d 380 (1982). Any minimum level of discipline runs contrary to this principle. This case demonstrates the inappropriateness of Glenn. If the panel had considered this case on an individual basis, as required under DelRio and Grimes, it would have imposed a reprimand. Instead the panel (at the direction of this Board) ignored this obligation and imposed a "standard discipline."

There is no question that the failure to answer a request for investigation is misconduct warranting discipline. MCR 9.104(7); 9.113. Glenn was a reaction to the frustration the Board apparently felt in reviewing many cases where the respondents had ignored requests for investigation. Indeed, the Glenn opinion discusses the number of cases where disciplined attorneys failed to answer requests for investigation and expressly stated it was "dismay[ed]" by these numbers. The Board's dismay and its desire to correct a perceived problem does not justify departing from the requirement that each discipline case be examined on an individual basis.

Our colleagues in effect maintain that under Glenn each case is analyzed on an individual basis because where "exceptional circumstances" exist, the panel may impose discipline less than a suspension. They state that Glenn does not "deprive a hearing panel of any discretion to consider the imposition of discipline which takes into account all of the factors which are unique to the case before it." In addition, our colleagues do not "believe the phrase 'exceptional circumstances' must be read in the sense of circumstances so compelling as to approach an absolute defense . . . . " However, the "exceptional circumstances" exception remains undefined under our colleagues' opinion. Panels are given no clue of how to predict what this Board will find to be an exceptional circumstance. This case is a perfect example. Without articulating the "exceptional circumstance," our colleagues would find that there is one. This approach is unfair to hearing panels who are given absolutely no direction to aid them in figuring out the amorphous "exception." Even more important, as respondent here argued, respondents are given no direction as to what may constitute an "exceptional circumstance" so they may adequately prepare and present their cases.

In addition, as respondent pointed out so well, the exception has indeed swallowed the rule. Since Glenn, this Board has reduced suspensions to reprimands and affirmed reprimands in failure to answer cases. In many of these cases there is no rhyme or reason to the finding of exceptional circumstances. Moreover, the attorney for the Grievance Administrator essentially conceded that Glenn is not a sound decision. During oral argument, she said that it would be a mistake to set forth guidelines because "[e]ach case should be decided on its own facts." (Transcript at 33).

Our decisions since Glenn and the Grievance Administrator's argument confirm that failure to answer cases should be decided on a case by case basis.[3] While our colleagues maintain that under Glenn panels should consider the factors which are "unique," this case certainly presents nothing exceptional or unusual. This respondent (as many respondents) had an unblemished record and a busy practice. To suggest that these factors are exceptional under Glenn is to overrule Glenn subsilentio--virtually every case would present "exceptional circumstances."

There is no basis for imposing a different rule in failure to answer cases than in cases involving other types of misconduct. To be sure, we may be irritated by the indifference to the discipline system displayed by lawyers who ignore requests for investigation and formal complaints. However, such indifference is certainly no more an affront to the legal system and no more an embarrassment to the public than misconduct in the handling of client matters, which is not subject to standard discipline that must be imposed absent "exceptional circumstances." Glenn's imposition of, in effect, mandatory discipline in cases involving indifference to the discipline system where no such mandatory discipline is imposed in cases involving indifference to clients, is to elevate our complaints over the public's--a message we do not want to send.

We would let the panels use their good judgment in imposing discipline in failure to answer request for investigation cases as they do in all other cases--on an individual basis. This is consistent with established law.

Accordingly, we would reverse the hearing panel and dismiss Count I of the complaint and would reduce respondent's discipline to a reprimand on Count III.

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[3] We do not mean to suggest that a suspension is inappropriate in failure to answer cases. Panels may look to the Glenn opinion as a guide, but Glenn should not be applied to impose a minimum or standard discipline.