Grievance Administrator,
Petitioner/Appellant,
v
Michael G. Sewell, P-28999,
Respondent/Appellee.

ADB 58-88; 113-88

Decided: July 31, 1989

BOARD OPINION

The hearing panel in this case imposed a suspension of 120 days based upon its finding that the respondent failed to answer a Request for Investigation and failed to answer a formal complaint. Neither the respondent nor the Grievance Administrator has sought modification of that discipline. The Petition for Review filed by the Grievance Administrator is limited to the issue of the effect of respondent's default for failure to answer. We rule that the respondent's default in this case relieved the Grievance Administrator of an obligation to establish the factual allegations in the complaint. Therefore, the hearing panel's dismissal of Counts I and II is reversed. The order suspending the respondent's license to practice law for 120 days is otherwise affirmed.

The formal complaint filed by the Grievance Administrator in April 1988 contained two counts based upon the respondent's alleged neglect of workers' compensation matters for which he was retained in 1985. A third count charged that he failed to answer a Request for Investigation filed by one of those clients in December 1987. Since the filing of that complaint, the respondent has not answered or appeared at any stage of these disciplinary proceedings. The respondent's failure to answer that complaint resulted in his default and the filing of a second complaint. The second complaint was unanswered and the respondent failed to appear before the hearing panel, contrary to MCR 9.115(H). The record discloses that all Requests for Investigation, complaints and notices were mailed to the respondent by regular and certified mail at his last known address in Appleton, Wisconsin and an address in Bloomfield Hills, Michigan which was his last address maintained with the State Bar of Michigan in accordance with Rule 2 of the Supreme Court Rules Concerning the State Bar.

At the hearing conducted on June 6, 1988, the hearing panel acknowledged that the respondent's default for failure to answer had been entered and they received the arguments of the Grievance Administrator's counsel that the default constituted an admission of the allegations in that complaint. Counsel for the Grievance Administrator indicated that, in reliance upon prior rulings of the Board, notably Matter of Daune Elston, DP 100/82, December 7, 1982 (Brd. Opn. p. 238), he was not prepared to offer testimony or other evidence in support of the allegations in Counts I and II of the formal complaint and he requested that the panel rule that misconduct was established based solely upon respondent's default.

The Grievance Administrator now seeks a review of the hearing panel's ruling that misconduct could not be found as to those Counts without the entry of a prima facie case by the Grievance Administrator tending to show that the allegations of neglect had been independently investigated and corroborated.

It is the firm conviction of a majority of the Attorney Discipline Board that the respondent's default in these disciplinary proceedings constitutes an admission to the factual allegations in the complaint. Unless that default is properly set aside in accordance with the applicable court rules, the respondent is foreclosed from contesting the issue of professional misconduct and the Grievance Administrator is relieved of the responsibility of producing evidence in support of those allegations. In that case, the only issue remaining before the panel is the appropriate level of discipline which should be imposed. The Board has previously ruled that the respondent has a right to participate in the discipline phase of the proceeding by offering evidence in mitigation. In reaffirming this policy, we specifically reaffirm the Board's opinion in Matter of Daune Elston, supra.

In that case, the Board rules that "default is an admission of the misconduct alleged. Respondent's participation is limited to the assessment of discipline and the question of liability is closed." Matter of Daune Elston, supra, citing American Central Corporation v Stevens Van Lines, 103 Mich App 507; 303 NW2d 234 (1981) which held that an entry of default is equivalent to an admission of the allegations. See also Smak v Gwozdik, 293 Mich 185; 291 NW2d 270 (1940).

More recently, the Board considered the issue presented her: the discipline of the misconduct charges notwithstanding the respondent's default. In Matter of David A. Glenn, DP 91/86, ADB Opinion February 23, 1987, the Board stated, in reaffirming Elston:

> In the absence of an order setting aside the default, the respondent in such cases should be prepared for the consequences clearly spelled our in MCR 9.115(D)(2) that "a default with the same effect as a default in a civil action may enter against a respondent who failed within the time permitted to file an answer."

In Matter of David A. Glenn, supra, the respondent failed to answer the Request for Investigation filed by the client and the formal complaint filed by the Grievance Administrator but appeared at the scheduled hearing where he was afforded an opportunity to give testimony as to mitigating circumstances. The Board ruled that the respondent's default sealed the issue of misconduct and that the panel's dismissal of a count, based upon the respondent's mitigating evidence, was error. In the present case, the respondent neither answered or appeared and the panel was presented with no evidence related to the charges of misconduct. Rather, it

was the panel's position that the Grievance Administrator's well-pleaded allegations would not be accepted and that the Grievance Administrator had an affirmative obligation to establish the essential charges of misconduct whether or not the respondent was in default.

In the Board's ruling in Elston, supra, the Board held that the misconduct phase in these proceedings may be analogized to the liability phase of a civil trial. We believe that the rule which closes the issue of misconduct in the case of a defaulted respondent is consistent with the jurisprudence of this State.

The Michigan Supreme Court ruled at the beginning of this century that a default closes the issue of liability. Grinnell v Bebb, 126 Mich 157 (1901). There, the Court stated: "The defendant has a right to appear and contest the amount of damages, but the default fixes his liability on the cause of action alleged and admits that something is due the plaintiff." Grinnell, supra at page 159. As recently as 1982, Justice Fitzgerald of that Court wrote for the majority, "It is an established principle of Michigan law that a default settles the question of liability as to well-pleaded allegations and preclude the defaulting party from litigating that issue." Wood v Detroit Automobile Inter-Insurance Exchange, 321 NW2d 653, 656 (1982).

Similarly, the Michigan Court of Appeals ruled that the defendant's liability is "cemented by a default", Midwest Mental Health Clinic v Blue Cross-Blue Shield, 326 NW2d 599, 601 (1982), and has stated that a properly defaulted defendant could not contest the issue of liability. Equico Lessors, Inc. v Original Buscemis, 364 NW2d 373 (1985).

The Board has yet to be provided with authority in this or other cases in support of the proposition that the plaintiff has an obligation to submit proof on the issue of liability when a default has been properly entered. We do not find that a hearing panel's acceptance of the allegations of misconduct in a discipline case is any different from a court's acceptance of the claims of liability when the defendant has defaulted in a civil case. If, as the court rules provide, the entry of a default has the same effect in both cases, then acceptance of the Administrator's charges of misconduct, without additional proofs, is entirely consistent with the rulings of the Supreme Court. In Haller v Walczak, 347 Mich 292 (1956), the Court stated that "neither do we find merit in the claim that plaintiff, in support of her motion for default judgment, was bound to offer proof establishing the negligence of the defendants."

Inasmuch as the Board is taking the opportunity to emphasize its prior rulings on the effect of a default, we also emphasize that a default establishes only the well-pleaded allegations in the complaint. The Supreme Court has pointed out "on default, every well-pleaded averment is accorded the quality of truth." Lesisko v Stafford, 293 Mich 479, 481 (1940), but "there can be no question

but that the entry of a default means an admission only of matters well-pleaded." Smak v Gwozdik, supra, at page 189. By defaulting, the respondent does not admit facts extrinsic or unnecessary to the allegations of misconduct nor does the defaulted respondent admit an averment which is a conclusion of law. Bonnici v Kindsvater, 275 Mich 304 (1936). "If the complaint failed to state a cause of action, it will not support a judgment." Saginaw County Prosecuting Attorney v Bobenal Investments, Inc., 314 NW2d 512, 514 (1981).

In the instant case, the hearing panel was bound to accept the well-pleaded allegations in Counts I and II that the respondent was retained by Frederick Artish and Anthony Pickarski to represent them in workers' disability matters, that he failed to institute proceedings to bring the matter on for hearing in the Artish case and failed to communicate with his client, and that he failed to appear for a scheduled hearing on July 13, 1987 on behalf of Mr. Pickarski, resulting in the dismissal of Pickarski's case.

The Grievance Administrator's request that the dismissal of Counts I and II be reversed was not accompanied by a request that the discipline imposed by the panel be increased. The suspension for 120 days is therefore affirmed. We do wish to note, however, that the panel cited the specific mitigating effect of respondent's prior unblemished record and the fact that he did respond to the Request for Investigation filed by his client Frederick Artish. The respondent was required by MCR 9.113(A) to file an answer to that Request for Investigation. Failure to answer a Request for Investigation is deemed to be professional misconduct. MCR 9.104(7) and MCR 9.113(B)(2). It does not follow that the respondent's compliance, on a single occasion, with a duty imposed on all lawyers should be considered as mitigation.

Concurring: Hon. Martin M. Doctoroff, Remona A. Green, Hanley M. Gurwin, Linda S. Hotchkiss, M.D.

## DISSENT

By Patrick J. Keating

I file this dissent to express my strong disagreement with the position take by the majority that discipline can be imposed against an attorney based upon unsubstantiated and uncorroborated allegations of misconduct if the respondent is in default. The majority relies heavily upon the Board's 1987 decision in Matter of David A. Glenn, DP 91/86, February 23, 1987. I did not agree with the majority's position then and I reaffirm my views as expressed in the dissent to that opinion. These views were restated in my dissenting opinion on this issue in Matter of Mary E. Gerisch, ADB 171-87; 197-87, ADB Opinion April 28, 1988.

The majority relies heavily on an analogy between the misconduct phase in a discipline case and the liability phase in a civil trial. The analogy was drawn by the Board in its opinion in

Matter of Daune Elston, DP 100/82, ADB Opinion December 7, 1982 (Brd. Opn. p. 238). That analogy overlooks one critical point. Notwithstanding the entry of default and the establishment of liability, the party proceeding against a defaulted defendant in a civil case must verify his or her damages to the satisfaction of the court before judgment is entered. Generally, damages are proven through a sworn testimony. In other cases, a sworn statement may be sufficient. Nevertheless, whether the case involves liquidated damages or requires sworn testimony, there are safeguards in place to prevent a fraud on the court.

In these disciplinary proceedings, the Grievance Administrator insists that decision should be made regarding an attorney's continued right to practice law based upon the unsworn allegations in a complaint which, in turn, may be based solely upon the unsworn Request for Investigation received from a client.

It is not my intention to excuse or condone an attorney's failure to answer a Request for Investigation or a formal complaint. Failure to answer either a Request for Investigation or a complaint is an act of professional misconduct which reflects adversely on the attorney's understanding of his or her obligations. The Board has held that, in the absence of unusual mitigating circumstances, a suspension may be warranted when an attorney fails to answer a Request for Investigation and I agreed with the majority in that aspect of its ruling in Matter of David A. Glenn, supra. I also agree that an attorney who failure to answer or appear at any stage of the proceedings should generally be required to establish his or her eligibility for reinstatement to the satisfaction of a hearing panel in accordance with the reinstatement proceedings which are triggered by a suspension of 120 days or more. Matter of Peter H. Moray, DP 143/86, ADB Opinion January 28, 1987. I believe that these are appropriate and legitimate standards for imposing discipline as the result of an attorney's failure to answer.

I strongly disagree, however, with the position of the majority that an attorney who has failed to answer a Request for Investigation of formal complaint may be disciplined for neglect, incompetence, forgery, embezzlement or any other unsupported charges which happen to be contained in the formal complaint.

In reviewing the record in this case, I note that the hearing panel did not make undue demands upon counsel for the Grievance Administrator. At one point, counsel was asked merely to make an offer of proof regarding the testimony of the two clients who allegedly retained respondent Sewell in workers' compensation cases. In response to questions as to whether or not it could be established that the respondent was, in fact, retained in those cases, counsel admitted that no attempt had been made to review the Bureau of Workers' Disability Compensation files.

I do not believe that a requirement that the Grievance Administrator establish a prima facie case in default cases would

seriously affect the Grievance Administrator's prosecution of these cases. On the contrary, I believe such a requirement would greatly improve the perception of these disciplinary proceedings.

For the reasons stated in my dissenting opinions in Matter of David A. Glenn, supra and Mary E. Gerisch, supra, I disagree with the majority's ruling on the effect of a default and I dissent from the decision of the hearing panel's dismissal of Counts I and II. I agree with the majority that the 120-day suspension should be affirmed. That is an appropriate discipline in the case of an attorney who has failed to answer the Request for Investigation, failed to answer the formal complaint and failed to appear before the panel. The respondent's license should not be reinstated until he has established his eligibility for reinstatement in accordance with MCR 9.123(B).

DISSENT

By Robert S. Harrison

I wish to join with my colleague Patrick J. Keating in his dissent on the issue of the effect of a default in these disciplinary proceedings. I believe that the hearing panel in this case expressed a legitimate concern that the allegations in Counts I and II of the Complaint were simply unsubstantiated restatements of the grievances submitted by the two clients. The Attorney Discipline Board and the hearing panels have been empowered by the Michigan Supreme Court with the authority to strip an attorney of his or her right to continue in their chosen profession. That power should not be exercised in the absence of safeguards to the rights of the respondent.

This respondent should be disciplined for his demonstrated failure to answer the Request for Investigation and formal complaint aggravated by his failure to appear at the hearing. There has not been the slightest showing that he should be disciplined for his neglect of two workers' compensation cases. As Mr. Keating points out, the hearing panel did not make an unreasonable demand upon the Grievance Administrator, and I am troubled by the Administrator's attitude that the Commission's representatives should not be put to the trouble of making an offer of proof or establishing a prima facie case.

My disagreement with the majority opinion in this case goes further, however. I do not agree that a suspension of 120 days is necessarily appropriate in this case. A 120-day suspension is, in effect, and indefinite suspension since the respondent must now undergo reinstatement proceedings which could add an additional three to six months to the suspension. I do not believe such a suspension is called for under the circumstances.

(Board Member Theodore P. Zegouras joins in this dissent.)