GRIEVANCE ADMINISTRATOR,
Petitioner/Appellant,
v
MARY E. GERISCH, P-30951,
Respondent/Appellee.

ADB 171-87; 197-87

Decided: April 28, 1988

BOARD OPINION

MAJORITY OPINION

By Remona A. Green, Hanley M. Gurwin, Charles C. Vincent, M.D., Theodore P. Zegouras

The hearing panel entered an order suspending the license of Respondent, Mary E. Gerisch, for a period of three years upon its finding that the Respondent failed to inform a client that his cause of action had been dismissed and that she manufactured a false settlement check and settlement statement in support of a claim to the client and the Attorney Grievance Commission that the case had been settled. The Grievance Administrator brings this appeal seeking an increase in the discipline imposed. By a majority, the hearing panel Order of Suspension is vacated and Respondent's license to practice law is revoked.

The Grievance Administrator filed a four-count complaint against this Respondent on October 1, 1987 and her default for failure to answer was filed October 30, 1987 along with a second complaint. The Respondent did not appear at the hearing in Detroit on November 16, 1987.

Based upon the default and the documentary exhibits offered by the Grievance Administrator, the hearing panel found that Respondent, who was then practicing law in Midland, Michigan, prepared and filed a complaint on behalf of Glen Fitzgerald against Lincoln Technical Services for an alleged breach of an employment agreement. The defendant notified Ms. Gerisch that the monetary dispute had in fact been settled and that the complaint should be dismissed. In January 1985, an Order of Dismissal was entered by the court in accordance with a stipulation signed by Respondent's associate. Mr. Fitzgerald, the client, had not been consulted and had not consented to the dismissal.

Instead, Respondent advised her client that the litigation had been settled for $3226.00. To aid this deception, Respondent sent the client a copy of a check purportedly sent to her by the employer for that amount. The document was a fabrication and the panel received into evidence a photo-copy of the actual check, which, in its original form, had been written some two years earlier in a different amount and to a different payee. She also sent the client a copy of a "settlement agreement" purportedly executed by defendant's counsel. This document was also fabricated and the signature forged. Finally, Respondent sent her client her own check for the fictitious settlement amount less fees and costs. This check was dishonored upon presentment for insufficient funds. The

final count of the Administrator's Complaint charged Respondent with answering the Request for Investigation falsely.

The Attorney Discipline Board has had occasion to consider cases involving attorneys who have attempted to cover up their neglect or mishandling of a client's case and who have resorted to the use of fabricated or forged documents to assist in the deception practiced upon the unsuspecting client. In the past, discipline in such cases has ranged from a suspension of 120 days to disbarment, depending on the mitigating factors presented. See, for example, Matter of Michael L. Oesterle, DP 139/83, February 8, 1985 (Brd. Opn. p. 337 [reducing suspension from two years to 121 days]); Matter of John D. Hagy, DP 153/82, DP 66/82, DP 99/82, DP 122/82, DP 128/82, May 13, 1983 (Brd. Opn. p. 226 [increasing suspension from 100 days to two years]); Matter of Anthony B. Meisner, DP 75/83, June 21, 1985 (Brd. Opn. p. 369 [increasing two year suspension to disbarment]).

In the instant case, Respondent Gerisch has failed to answer or appear at any stage of these proceedings thereby waiving her right to present mitigating evidence. Although we take notice that Ms. Gerisch has not previously been disciplined for professional conduct since her admission to the Bar in 1980, the record is otherwise silent as to any factors which could be considered in mitigation.

Our decision to increase the discipline in this case from a three-year suspension to the revocation of Respondent's license is based not only upon the absence of mitigating factors but upon our belief that any lesser form of discipline would depreciate the seriousness of the offense and would not act as a deterrent.

Our legal system depends, in large part, upon the assumption that lawyers, as officers of the court, are telling the truth when they make statements about the cases they are handling. An attorney who creates forged pleadings or documents not only destroys the trust of the client but does incalculable harm to the legal system. Clients, court officers and other lawyers who receive pleadings or documents from a lawyer should never have to question the document's authenticity.

In a recent opinion ordering the disbarment of an attorney found to have fabricated a client-consent form, the Supreme Court of Pennsylvania stated simply "Truth is the cornerstone of the judicial system, and the practice of law requires an allegiance and a fidelity to truth", Office of Disciplinary Counsel v Wittmaack, #J-245-1986, PA Sup.Ct. (3-11-87). In this case, Respondent has been untruthful to her client and untruthful in her response to the legitimate inquiry of our Supreme Court's investigative arm. Inasmuch as the license to practice law in Michigan is considered to be a proclamation to the public and the legal profession that the holder is fit to act in matters of trust and confidence, we believe that revocation of that license is an appropriate sanction when an attorney violates the fundamental obligation to be truthful. This would seem to be especially true when a deliberate, calculated intent to deceive is evidenced by the preparation of a forged document.

DISSENTING OPINION

By Patrick J. Keating

I believe that the three-year suspension imposed by the hearing panel should be affirmed. I believe that such a suspension is warranted by Respondent's failure to discharge her obligation under the Court Rules to answer the serious allegations of misconduct in the Formal Complaint and her failure to appear before the hearing panel for examination. I differ with the majority, however, on the question of whether the factual allegations in the Complaint have been established. Mere entry of a default for failure to answer a formal complaint does not, in and of itself, establish the truth of the misconduct alleged in the complaint and discipline should not be imposed for misconduct which has not been established by testimony at the hearing.

In a decision issued in 1982, the Attorney Discipline Board considered the issue of whether or not a respondent should be allowed to participate in a hearing after a default had been entered against him. See Matter of Daune Elston, DP 100/82, December 7, 1982 (Brd. Opn. p. 238). Looking to the civil jurisprudence of Michigan for direction, the Board reasoned that the question of the level of discipline to be imposed in these proceedings is analogous to the hearing on "damages" in a civil case and that the defaulted disciplinary respondent was therefore entitled to limited participation on the issue of discipline. In the course of that ruling, the Board flatly asserted that "in the disciplinary context, a default is thus limited to an admission of misconduct . . . the default is an admission of the misconduct alleged. Respondent's participation is limited to the assessment of discipline and the question of liability or (guilt) is closed". Matter of Daune Elston, supra (Brd. Opn. p. 239).

While that Board opinion cites several opinions of the Michigan Court of Appeals, most notably American Central Corporation v Steven Van Lines, 103 Mich App 507; 303 NW2d 234 (1981), I do not accept the argument that there is established legal authority in this state for the proposition that the entry of a default relieves the Grievance Administrator of any obligation to support his claims of professional misconduct against an attorney through sworn testimony. In a civil case, the moving party proceeding against a defaulted defendant must verify his or her damages to the satisfaction of the court before judgment is entered. In these proceedings, which affect the professional reputation and livelihood of the respondent, the Administrator's unsworn allegations of misconduct should not be accepted as "established" unless the Administrator or his counsel is able to present a prima facia case supported by sworn testimony.

In this case, the allegations of misrepresentation are highlighted by a claim that documents were "forged". It is the seriousness of those charges and the importance of these proceedings which make it all the more important that the charges have some support in the record before we invoke the penalty of disbarment.

DISSENTING OPINION

By Robert S. Harrison

I would affirm the suspension of three years. The three-member hearing panel which heard this case filed a report containing their unanimous conclusion that a three-year suspension was an appropriate sanction. This Board is not in possession of any additional facts which would put us in a better position to impose discipline. A suspension of three years or more requires that a suspended

attorney seeking reinstatement be recertified by the Board of Law Examiners. It appears from the record that this Respondent is no longer in the State of Michigan and there is no evidence concerning her intent to return or to seek reinstatement. The hearing panel in this case determined that a three-year suspension would constitute sufficient protection of the public, the courts and the legal profession and I am not persuaded that their decision was erroneous.