GRIEVANCE ADMINISTRATOR,
Petitioner/Appellant,
v
DAVID A. GLENN, P-14049
Respondent/Appellee

File No. DP 91/86

Argued: December 17, 1986
Decided: February 23, 1987

OPINION OF THE BOARD

The Respondent in this case failed to answer the Formal Complaint filed by the Grievance Administrator and his Default was properly filed. Following a hearing, during which the Default was allowed to stand, the Panel dismissed Count I which alleged neglect of a bankruptcy matter but found that misconduct had been established as to Count II which alleged Respondent's failure to answer a Request for Investigation.

The Grievance Administrator seeks review of that decision and argues that, in accordance with prior rulings of the Board, Respondent's Default constituted an admission to those charges and the Panel erred as a matter of law in dismissing Count I of the Complaint. It is further argued that the discipline imposed was insufficient in light of Respondent's failure to answer the Request for Investigation and the aggravating effect of his failure to answer the Complaint.

In accordance with prior opinions of this Board, Respondent's Default for failure to answer the Complaint was sufficient to establish the allegations in Count I of the Formal Complaint and we reverse the Hearing Panel dismissal and impose a reprimand as to that Count. Further, we affirm the Panel's findings that Respondent failed to answer a Request for Investigation as alleged in Count II, but we conclude that such misconduct warrants modification of the discipline imposed and we increase to a suspension of 30 days.

On June 12, 1986, the Administrator filed a two Count Formal Complaint charging that Respondent was retained in a bankruptcy matter in September 1985 (amended at the hearing to reflect the correct year, 1984) but that he neglected to file the necessary papers or to obtain a stay of the proceedings with regard to pending garnishments. Count II charged that the Respondent failed to answer the Request for Investigation filed by the client and served by the Administrator in January 1986.

Mr. Glenn failed to answer the Formal Complaint and a Default was filed with the Board July 11, 1986 as provided by MCR 9.115(D) (2).

At the commencement of the proceedings on July 21, 1986, the panel chairman announced that "since Mr. Glenn has failed to file an Answer, he has been defaulted. He is entitled to address the Panel with respect to the discipline only . . . and not with respect to the factual matters that are

to be elicited in connection with the Complaint." (Tr. p. 4) This was the position taken by the Panel throughout the proceedings:

> Mr. Glenn: You are saying that I can't participate in the hearing other than to address myself to the question of the severity of this one.
>
> Mr. Kiefer: That's right. (Tr. p. 6)
>
> Mr. Kiefer: We are not going into the facts of the matter (Tr. p. 19).
>
> Ms. DunCombe: I think that is your defense Mr. Glenn which you waived in not responding to the Formal Complaint (Tr. p. 20)
>
> Mr. Kiefer: I don't believe that you can to into a defense of the facts of the case. (Tr. p. 20)
>
> Mr. Kiefer: You had an opportunity when you were supposed to file an answer, and once having been defaulted you had an opportunity to motion to set aside default so we could hear that testimony . . . it is the same as a civil case. If you are in default you are defaulted you can't go before the judge and tell the judge the defenses in the matter. (Tr. p. 21)

In support of the allegations in Count I, counsel for the Administrator presented the testimony of the Complainant, Mr. Atkari who testified that he spoke with the Respondent in 1984, that he paid the quoted fee of $350.00 by March of 1985, that in the summer of 1985 he was subpoenaed to go to Court, but that Mr. Glenn did not, as he promised, "take care" of that matter. Complainant testified that the Bankruptcy Petition was eventually filed and a discharge obtained in July 1986.

The Grievance Administrator submitted three exhibits all related to Respondent's Default for failure to answer the Formal Complaint and his failure to answer the Request for Investigation.

The Report filed by the Hearing Panel recites that, based upon the testimony of the Complainant, Respondent did perform the legal service requested of him in the bankruptcy matter, although late, and that the Complainant "ratified the acts of Respondent by continuing to employ his services and by agreeing to pay Respondent additional money for his services." Count I was therefore dismissed. The Panel concluded, however, that Respondent's failure to answer the Request for Investigation was established and imposed a reprimand.

Notwithstanding the Panel's repeated statements during the hearing to both parties that the Respondent had waived his right to present a defense and that the effect of the Default was "the same as a civil case" (Tr. p. 21), the Panel concluded that the Administrator had not established the allegations in Count I that Respondent failed to represent his client competently and expeditiously.

In December 1982, the Board ruled 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." (emphasis added) Matter of Daune Elston, DP 100/82 1982 (Brd. Opn. p. 238) citing American Central Corporation v Stevens Van Lines, 103 Mich App 507; 303 NW2d 234 (1981) holding that an entry of Default is equivalent to an admission of the allegations. See also Smak v Gwozdik, 293 Mich 1985; 291 NW 270 (1940) and Bonnici v Kindsvater, 275 Mich 304; 266 NW 360 (1936). The Board further ruled that the hearing on damages in a civil case was analogous to a hearing panel's consideration of the level of discipline to be imposed and that while the Default constituted an admission of misconduct, the defaulted Respondent should have an opportunity to participate in the discipline phase by offering evidence in mitigation.

In this case, Respondent was afforded an opportunity to address the Panel on the issue of mitigation. Applying the rule in Elston to this case, Respondent cannot reasonably argue that he was unfairly prejudiced by a finding that he neglected a case as alleged in the Complaint since, as the Panel Chairman pointed out to him, he waived his right to present a defense by failing to answer the Request for Investigation or the Complaint. The Board's decision in Elston has not been overruled or modified by the Board or the Supreme Court and there is nothing novel in the law of this jurisdiction about the assessment of liability against a party who does not take advantage of the opportunity to present a defense.

The attorney who fails or refuses to answer a Formal Complaint as specifically directed by MCR 9.115(D)(1), may seek to have that Default set aside in pleadings properly filed in accordance with MCR 2.603(D). In the absence of an order setting aside the default, the Respondent in such cases should be prepared for the consequences clearly spelled out 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 fails within the time permitted to file an answer."

We reaffirm the Board's ruling in Elston that a Default for failure answer a Formal Complaint in these discipline proceedings constitutes an admission of misconduct and further proceedings on that Complaint are limited to a determination of the level of discipline which should be imposed. The Panel's decision to dismiss the allegations in Count I despite Respondent's Default for his failure to answer was error. The Panel's decision as to that Count is reversed.

We must emphasize that the allegations in Count I are not, in any event, without support in the record. The fact that the Respondent eventually obtained a discharge in bankruptcy for his client does not necessarily refute the allegations in the complaint that Respondent's delay in completing the legal work constituted neglect within the meaning of Canon 6 of the Code of Professional Responsibility for example. While we cannot conclude that the testimony of the Respondent and the Complainant defeats the allegations contained in that Count, we find significant mitigating effect and find that Respondent's neglect of the legal matter entrusted to him warrants the imposition of a Reprimand.

Turning to Count II of the Formal Complaint, we cannot agree with the Hearing Panel that Respondent's unexcused failure to answer the Request for Investigation should result in discipline limited to a Reprimand.

In his personal appearances before the Hearing Panel and the Discipline Board, this Respondent offered no explanation as to his failure to answer the Request for Investigation. The Court Rules promulgated by the Supreme Court are explicit in their requirement that an attorney shall fully and fairly disclose all the facts and circumstances pertaining to the misconduct alleged in a Request for Investigation and the warning that "the failure of a Respondent to answer within the time permitted is misconduct." MCR 9.113(B)(2), MCR 9.104(7).

This Board notes with dismay that a majority of the attorneys in the State disciplined for misconduct during the year 1986 failed to answer at least one Request for Investigation served by the Grievance Administrator despite the warning that such a failure would be construed as a separate act of misconduct. Our preliminary review of all final Orders of Discipline entered during the year 1986 discloses that eighty-two orders became effective. Eight of those cases involved proceedings in accordance with MCR 9.120 as a result of the Respondent's conviction of a crime and those cases did not involve the filing of Requests for Investigation. Of the remaining seventy-four Orders of Discipline in which the Respondent was under a duty to answer a Request for Investigation, the Respondent was found to have ignored that duty in forty-five cases or sixty-one percent.

We hasten to add that this figure does not reflect in any way upon the 99.6% of the attorneys licensed to practice in Michigan who were not disciplined last year, and we note that the disciplined attorneys who failed to answer Requests for Investigation represented a small fraction of the Requests for Investigation dismissed by the Grievance Administrator without the institution of formal proceedings. The fact remains, however, that only thirty-nine percent of the disciplined attorneys in 1986 who were served with Requests for Investigation bothered to answer.

Looking further at the disciplines imposed in Michigan in 1986, we note that of the forty-five disciplined attorneys who did not answer Requests for Investigation, seven did answer the Formal Complaint which was subsequently filed with the Attorney Discipline Board, eleven entered into a Stipulation with the Grievance Administrator for a Consent Discipline in accordance with MCR 9.115 (F)(5), and twenty-seven attorneys, or sixty percent, continued to be unresponsive and failed to answer the Formal Complaint. Unfortunately, Respondent Glenn falls in the latter category. We cannot ignore the aggravating effect of Respondent's failure to answer the Formal Complaint.

It cannot be said that the Board has failed to emphasize in the past that failure to answer a Request for Investigation within the time allowed is misconduct per se. MCR 9.104(7) and MCR 9.113 (B)(2); Schwartz v Kennedy, DP 40/30, 1981 (Brd. Opn. p. 132); Schwartz v Ruebelman, DP 5/81, 1981 (Brd. Opn. p. 150); In Re: Smith, 35229-A, 1979 (Brd Opn. p. 21). As we explained in Kennedy:

> Members of the Bar have an unavoidable duty to answer Requests for Investigation . . . a Respondent failing to answer Requests for Investigation may be considered professionally irresponsible and contemptuous . . . this Board has recognized that failure to answer also indicates a conscious disregard for the rules of the Court. Schwartz v Kennedy, DP 40/00, 1981 (Brd. Opn. p. 132).

Our decision to increase the discipline imposed by the Hearing Panel from a Reprimand to a suspension of 30 days is intended to serve notice upon the Respondent and the Bar that the lawyer who ignores the duty imposed by Court Rule to answer Requests for Investigation and Formal Complaints does so at his or her peril and that, absent exceptional circumstances, that attorney may expect a discipline greater than a Reprimand.

Martin M. Doctoroff, Remona A. Green, Hanley M. Gurwin, Odessa Komer concurring.

DISSENTING OPINION

Patrick J. Keating

I respectfully dissent from the decision of the majority as to Count I and would affirm the dismissal of Count I of the Formal Complaint. I do however join in the increase in discipline on Count II.

The sole ground for Appeal, other than seeking an increase of discipline, is a claim by the Grievance Administrator that the Hearing Panel must, as a matter of law, impose discipline, without any requirement that supporting evidence be introduced where a Respondent has been defaulted for failure to answer the well pleaded allegations of a Formal Complaint. The majority has affirmed this claim. I do not think this is the law; even if it were, it is not applicable to the instant factual circumstance.

Both the Grievance Administrator and the Board cite Grievance Administrator v Daune Elston; DP 100/82 as support for the defaulted Respondent to participate in the hearing. The Board on appeal reversed the Hearing Panel in Elston and pointed out: First, entry of the well pleaded allegations in the Complaint, but is limited only to liability and does not extend to damages, Haller v Walczak, 347 Mich 297 and American Central Corp v Stevens Van Lines, 103 Mich App 507; Second, the hearing required by GCR 1963 520.2(2) [now MCR 2.603(B)(3)(b)] to determine the amount of damages before a Default Judgment is entered in a civil case where the damages are unliquidated is "analogous to the question of the level of discipline in discipline proceedings."

The statement by the majority here that "the defaulted Respondent should have an opportunity to participate in the discipline phase by offering evidence in mitigation" is not correct and too narrowly restricts the holding of Elston. Elston clearly holds there must be a hearing on the level of discipline, that such a hearing is similar to that required by MCR 2.603(B)(3)(b) [formerly GCR 1963, 520.2(2)], that a defaulted Respondent is entitled to fully participate in such a hearing and that either party may offer any evidence relevant to the issue of the level of discipline. It is not possible in this state to obtain a Default Judgment without some proof, under oath, in support of the claim. If the damages are liquidated an Affidavit will suffice, MCR 2.603(B)(2); if unliquidated, proofs must be taken as pointed out above. Obviously, the very integrity of the process demands that every judgment be based upon proof given under oath; we should require no less before the imposition of discipline upon a respondent attorney.

Further, this case differs factually from Elston. Here, testimony was taken at the hearing before the panel; this testimony was apparently to determine the level of discipline. The Hearing Panel concluded, on the basis of such testimony, that no discipline should be imposed. Such conclusion finds support in the record. Further, this factual finding is not challenged by the Grievance Administrator or disturbed by this Board. To me, it is manifestly unjust to impose discipline upon a Respondent, defaulted or not, for alleged misconduct which is demonstrably refuted by the clear, uncontradicted and unchallenged testimony. While I know of no case law on point, it is inconceivable that a Court in this state would award a Default Judgment for money damages where the required hearing on damages conclusively demonstrated that the Plaintiff was not entitled to any damages whatsoever.

I would, for the above reasons, affirm the Hearing Panel's dismissal of Count I. Further our Hearing Panels should be advised that no discipline should be imposed in the absence of sworn testimony in support of the finding and that either the Grievance Administrator or the Respondent, whether defaulted or not, may offer evidence relevant to the level of discipline where that is an issue in the hearing. This rule should cause no concern to the Grievance Administrator. A defaulted Respondent may always, as here, be successfully charged with misconduct for failure to answer the Request for Investigation or failure to answer the Formal Complaint.

I agree that, absent unusual circumstances, failure to answer a Request for Investigation, or failure to answer a Formal Complaint constitutes misconduct which warrants more than a reprimand and I therefore would join the majority in increasing the discipline in Count II from a Reprimand to a thirty day suspension.