Grievance Administrator,
State of Michigan
Attorney Grievance Commission,

Petitioner/Cross-Appellant,

v

Leonard R. Eston, P 13231,

Respondent/Appellant.

Case No. 92-40-GA

Issued: July 14, 1993

BOARD OPINION

The Attorney Discipline Board has considered the separate petitions for review filed by the Grievance Administrator and the respondent, Leonard R. Eston, seeking review of a hearing panel order suspending the respondent's license to practice law for eighteen months. We affirm the panel's factual findings and its conclusions on the issues of misconduct. We reduce discipline to a reprimand.

The hearing panel found that the respondent was retained in November 1985 to investigate and prosecute an appeal of a criminal conviction. The respondent's failure to visit his client in prison as he promised to do was found to constitute a violation of MCR 9.104(2-4) and Canons 1, 6 and 7 of the then applicable Code of Professional Responsibility, DR 1-102(A)(1,6); DR 6-101(A)(3); and, DR 7-101(A)(1-3).

A second count which charged that the respondent made statements in an answer to a Request for Investigation which were false and known to be false at the time they were made was dismissed by the panel on the grounds that those allegations were not established by a preponderance of the evidence.

The Grievance Administrator argues that the panel erred in dismissing Count II and suggests that the panel improperly imposed a burden of proof of "clear and convincing evidence" upon the Administrator. The Administrator seeks increased discipline. The respondent seeks dismissal of the entire complaint on the grounds that the hearing panel's findings of misconduct were not established by a preponderance of the evidence. The respondent also claims procedural defects in these proceedings and requests a finding that the Grievance Administrator's complaint was barred under the doctrine of laches.

The procedural defects claimed by the respondent have been reviewed and are found to be without merit. In reviewing the hearing panel's factual findings, the Attorney Discipline Board must determine whether those findings have proper evidentiary support in the whole record. Grievance Administrator v Irving August, 438 Mich 296; 475 NW2d 256 (1991). Applying that standard to our review of the record in this case we find that the hearing panel's finding of misconduct as to Count I and its dismissal of Count II are both amply supported by the evidence. As evidenced by its written report, the hearing panel itself was acutely aware of the "serious credibility problems" presented by the testimony of the respondent's client and the client's mother. Nevertheless, evidentiary support for the hearing panel's conclusion that the respondent did not visit his client in prison is found in petitioner's Exhibit #4, the prison visitor records for Ray L. Jackson.

The complaint also charged that the respondent was served with a Request for Investigation filed by Ray L. Jackson and that the respondent's answer filed in June 1990 stated affirmatively that the respondent visited his client in Jackson Prison and met with him personally to discuss his appeal. The complaint charged, in Count II, paragraph (g) that:

> (g) "Respondent's statements were false and were known by respondent to be false at the time they were made for that reason that the respondent never visited Mr. Jackson in prison. Respondent's statements constituted material misrepresentations to the Attorney Grievance Commission in an official investigation with intent to fraudulently induce dismissal of the Request for Investigation".

In dismissing this charge, the hearing panel stated in its report:

> "As to the allegations in Count II, the panel concludes that although respondent's statements to the AGC were false, in response to the Request for Investigation as to whether respondent visited Mr. Jackson in state prison in 1985, the Grievance Administrator did not prove by a preponderance of the evidence that respondent knowingly made false statements to the AGC with intent fraudulently to induce dismissal of the Request for Investigation. . . .
>
> In the present case, there is no evidence respondent made a statement which he knew to be false when he responded to the Request for Investigation by stating that he visited the complainant at a state prison in Jackson, Michigan. Further, there is no evidentiary support in the record that he recklessly made such a statement without any knowledge of its truth. More than seven years has elapsed from the date of respondent's claimed visit to the complainant to the hearing in this matter. Surely memories dim with time. Attorneys rarely keep record of their appointments back seven years. Witnesses die, as one witness did in this case. . . .
>
> It was the Grievance Administrator's burden to prove by a preponderance of the evidence [MCR 9.115(J)(3)] that respondent knowingly made false statement concerning his

> alleged visit to the complainant, that those statements were a material misrepresentation and that the statements were made with intent fraudulently to induce dismissal of the Request for Investigation. Having failed to meet the burden of proof as to the knowing falsity of the statements, the allegations of Count II must be dismissed".

We affirm the hearing panel's conclusion that evidentiary support for the charge of fraudulent intent is absent from this record.

In a footnote, the hearing panel's report notes that Michigan case law in civil cases has established a requirement that claims of fraudulent misrepresentation be established by clear and convincing evidence. (Hearing panel report, page 9, footnote 6). We appreciate the Grievance Administrator's concern that this reference could be interpreted as signaling a change in the burden of proof applicable in a disciplinary proceeding conducted under MCR 9.115. Notwithstanding that footnote reference, the hearing panel's report clearly and consistently refers to the Grievance Administrator's duty to establish the misconduct alleged in the formal complaint "by a preponderance of the evidence, as required by MCR 9.115(J)(3)".

Level of Discipline:

It is clear from its report that the hearing panel carefully weighed the aggravating and mitigating factors which were presented by the parties at the discipline phase of the proceeding required by MCR 9.115(J)(2).

In reaching its decision to impose a suspension of eighteen months, the hearing panel emphasized two factors considered in aggravation.

First, the hearing panel considered the respondent's extensive history of prior discipline which includes a sixty-day suspension effective May 19, 1986 for neglect of a client matter; a reprimand effective June 26, 1987 for verbally abusing another attorney; a fifteen-month suspension effective July 29, 1987 for failing to pursue several criminal appeals, ignoring court orders and making false statements to a federal magistrate; and a three-year suspension effective August 10, 1987 for violation of an order of suspension which resulted in a contempt citation by a Wayne County Circuit Judge. Were it not for respondent's serious disciplinary record, the panel wrote, his failure to visit a client in prison might warrant only a reprimand or short suspension. In this case, the panel concluded, the respondent's established "pattern of indifference" should result in a more substantial discipline in keeping with a concept of "progressive discipline".

Secondly, the panel reported that it was gravely concerned with the findings of another hearing panel and affirmed by the Michigan Supreme Court that the respondent had not established his eligibility for reinstatement to the practice of law for the reason that his conduct since the orders of suspension issued in July and August 1987 had not been exemplary and above reproach and he could not be safely recommended to the public, courts and legal profession as a person fit to practice law.

The Board endorses the concept of progressive discipline under the appropriate circumstances. In our 1988 opinion involving this respondent, Matter of Leonard R. Eston,

DP 24/87, Brd. Opn. (2/8/88), we affirmed the respondent's suspension for a period of three years with the observation that:

> "In previous cases, the respondent has been found to have violated these [professional] standards as they relate to his duties to clients and to the courts. In this case, we are presented with evidence that respondent was unwilling or unable to comply with the terms of an order of suspension issued by the Attorney Discipline Board in its role as the Supreme Court's adjudicative arm. We are thus presented with a continued pattern of indifference to those very standards described in MCR 9.103(A). . .". Matter of Eston, DP 24/87, Brd. Opn. at p.4, 1988.

In earlier opinions, the Board has ruled that "repeated misconduct may evidence the need for more severe discipline". Matter of O. Lee Mollette, 35391-A, Brd. Opn. p. 143 (1981) and that misconduct may be aggravated by a respondent's recidivism and conscious disregard for the discipline system. Matter of Ross John Fazio, DP 36/82, Brd. Opn. p. 294 (9/13/83).

In the instant case, the respondent's failure to visit his client in prison in 1985 was not brought to the attention of the Attorney Grievance Commission until the complainant filed his Request for Investigation in October 1989. The respondent's answer to the Request for Investigation was filed in June 1990 and the formal complaint was filed in February 1992. For purposes of considering the appropriate level of discipline for respondent's neglect of his duties to a client in 1985, we conclude that the respondent's subsequent disciplinary history is of dubious value. In Mollette, supra, we spoke of the aggravating effect of the respondent's prior misconduct. In 1985, respondent Eston had not yet been the subject of public discipline. It cannot be said that his failure to visit a client in 1985 was related to the misconduct for which he was subsequently disciplined nor can it be said that the respondent's conduct in 1985 exhibited a disregard for the discipline system.

Similarly, we do not believe that significant weight should have been given to the findings of the hearing panel which denied the respondent's petition for reinstatement in 1991. That panel decision, based upon the respondent's conduct since the entry of an order of discipline in July 1987, was not relevant to a proper consideration of respondent's discipline for conduct which occurred in 1985.

There is no evidence in the record that the seven-year delay between the respondent's conduct in 1985 and the filing of this formal complaint in 1992 was the result of any bad faith by the complainant or the Grievance Administrator and we reject the respondent's claim that this proceeding should be dismissed under the doctrine of laches. This case does present a somewhat unusual factual situation, however, in which the respondent accumulated an extensive disciplinary history after the misconduct for which discipline is now to be imposed. Under these unique circumstances, discipline is reduced in this case to a reprimand.

Concurring: John F. Burns, C. Beth DunCombe, Linda S. Hotchkiss and Theodore P. Zegouras

Board Member Miles A. Hurwitz would affirm the hearing panel's

order of suspension.

Board Members George E. Bushnell, Jr., and Elaine Fieldman did not participate