

GRIEVANCE ADMINISTRATOR

v

WENDELL C. FLYNN,
A Member of the State Bar of Michigan,
Respondent-Appellant.

File Nos. DP-65/84 & 94/84

Decided: April 16, 1985

OPINION OF THE BOARD

The Respondent, Wendell C. Flynn, was charged with issuance of a check which was subsequently returned dishonored due to insufficient funds in the account "NSF" and with failure to answer a Request for Investigation, and Formal Complaint. The hearing panel found that Respondent violated Canon 1, DR 1-102(A)(4-6), GCR 953(2-4)(7) and GCR 62.2(b) for his failure to answer the Request for Investigation and Formal Complaints, and ordered a 30 day suspension. The panel also imposed a reprimand for issuance of the "NSF" check. Both the Grievance Administrator and the Respondent appealed, seeking a review of the discipline. We vacate the finding of misconduct relative to the NSF check and dismiss the reprimand; regarding the failures to answer, we reduce the suspension of 30 days to a reprimand.

Facts

Respondent, who has been an attorney for 40 years, purchased hardware from the Complainant in November, 1981. Respondent had originally been a cash customer of Complainant, but was allowed a charge account due to the volume of his business. Respondent subsequently made payments on this account. [However, the last check in the amount of \$2,874.74 and written on November 27, 1981, was returned because of insufficient funds. This check was issued on the account of Airlines Rent-a-Car Corporation and signed by the Respondent as an officer of that company (Tr, pp 8-9, 11-12).

In September, 1982, the Complainant, president of the hardware company, instituted a civil suit in the 34th District Court and prevailed by default in the amount of \$3,379.06.

In addition to the civil action, the Complainant filed a Request for Investigation with the Attorney Grievance Commission. The Complaint filed by the Grievance Commission charged misconduct with regard to the check and cited Respondent's refusal to answer the Request for Investigation. The Respondent also failed to timely answer the Formal Complaint, and a second Formal Complaint which merely charged failure to answer the first Formal Complaint.

At the hearing conducted by the hearing panel, the Respondent admitted that he purchased hardware with a check which was returned "NSF," resulting in a default judgment against him. However, the judgment was paid by Respondent in full prior to the panel hearing (Tr, pp 8-9, 11-12). Respondent admitted that he failed to answer the Request for Investigation and the Formal

Complaint. Respondent, however, claimed that his failure to respond was based upon his objection to the use of the grievance mechanism as a collection device.

Despite his default for failure to answer the Formal Complaint, the Respondent was permitted to cross examine one of the witnesses; we find that this constituted a non-prejudicial irregularity not resulting in a miscarriage of justice, MCR 1985, 9.107(A).

Upon review of the findings of the hearing panel we find that the circumstances surrounding the writing and dishonor of the check do not amount to actionable misconduct. We are persuaded by Respondent's arguments as set forth in counsel's review brief on this issue. The allegations in the Complaint are undisputed, however, there is nothing to indicate that the Respondent intended to perpetrate a fraud at the time the check was tendered. At the time of this transaction the Respondent was not acting in an individual or professional capacity; he was involved in a purely commercial transaction. It is worthy of emphasis that he did pay in full the default judgment rendered against him. Indeed, counsel for the Grievance Administrator acknowledged that if the Respondent had properly and timely answered the Request for Investigation, this matter would not have resulted in the filing of a formal Complaint. Because Respondent's conduct did not include an element of fraud or misrepresentation, we vacate the reprimand imposed by the Panel regarding this allegation.

In assessing the appropriate level of discipline with regard to Respondent's failure to answer the Request for Investigation and the Formal Complaint, several factors are considered by the board. The Respondent's refusal to answer the Request for Investigation and the Formal Complaint constituted misconduct *per se*, GCR 1963, 953(7); 962.2(b). Dismissal of substantive allegations does not justify Respondent's refusal to respond, even if such substantive charges are deemed wholly without merit. As we have emphasized in past decisions, timely, full and fair responses to investigatory inquiry by the Grievance Commission are an essential element of accountability by the legal profession.

Respondent argues in mitigation that he resented the Complainant's improper use of the grievance process as a means of asserting a civil claim, and viewed this matter with a sense of patent injustice and outrage. Respondent himself describes his failure to answer as a function of this reaction and his rather feisty personality. While we find no fraudulent intent on Respondent's part and understand, to some degree, his attitude of indignation, we view his repeated failures to respond to the Grievance Administrator as a reflection of intemperance which simply cannot be condoned. Respondent admits that his failure to answer warrants some sanction.

In light of all the circumstances we feel the suspension of 30 days ordered by the hearing panel is unnecessary and in consideration of Respondent's admission and experience in these proceedings, we find that an adequate corrective effect can be achieved without suspension. We dismiss the count alleging misconduct based on issuance of the NSF check and vacate the reprimand imposed for this conduct by the hearing panel. A reprimand will be issued for the failures to answer the Request for Investigation and Formal Complaint, with a warning that any future failure to comply with the rules may result in more severe discipline.

All concur.