DAUNE ELSTON,
A Member of the State Bar of Michigan,
Respondent Appellee.
File No. DP 144/82

Decided: March 7, 1983

BY THE BOARD:

Respondent was charged in a formal complaint with failure to answer a prior formal complaint. The hearing panel found that respondent had violated the court and disciplinary rules which provide that failure to answer constitutes misconduct. However, the panel declined to impose discipline for respondent's failure to answer, stating in its report that the failure to answer had already been considered as a factor in assessing the suspension of 60 days issued in connection with the first complaint. The Grievance Administrator appealed seeking additional discipline for the failure to answer. We affirm the hearing panel decision.

Respondent was served with a formal complaint on May 26, 1982 (File No. DP-100/82). Respondent did not make a timely answer and was placed in default. A hearing on DP-100/82 was held on July 9, 1982, and the panel filed its report and order of suspension of 60 days on July 22, 1982. A new complaint DP-144/82, be fore us at this time, was not filed until July 13, 1982; pursuant to Board policy it was assigned on July 19, 1982 to Wayne County Hearing Panel 05, the same panels which heard the original complaint.

The panel declined to discipline respondent on the basis that respondent's failure to answer was considered when the order of discipline in the first case was formulated (Panel Report at p 2, DP-144/82). The Grievance Administrator contends that the failure to answer was charged separately and should result in separate discipline. The Administrator points out that the first complaint did not allege a failure to answer and argues that the respondent cannot be disciplined for misconduct for which he was not specifically charged.[1]

The Grievance Administrator takes the position that amending the original formal complaint after entry of default, or to conform to proofs, would be detrimental to the prosecutorial effort and encourage delays because it would have the effect of renewing the period in which an answer to the formal complaint could be filed. Although the Board questions this interpretation of the rule, this case is decided upon other, more fundamental grounds. The record here makes it clear that notwithstanding the finding of a violation, an additional order of discipline would be contrary to the basic purpose and intent of the rules and a fair and just resolution of this matter.

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1. The panel record is somewhat contrary to the Grievance Administrator's argument on this point; the Deputy Grievance Administrator, Mr. LaBelle, addressed the panel at length at the hearing on the first complaint regarding Respondent's failure to answer. See Tr, pp 4-10, DP-100/82.

The Grievance Administrator cites GCR 1963, 964.10(2) which requires that " . . . if the panel finds . . . misconduct...it must enter an order of discipline...". The Board has, in prior opinions, interpreted this rule to mean that some form of discipline is required even for technical or minimal violations of the disciplinary rule.[2] In re Harry T. Ward, 1 Mich Dis Rptr 230 (1980), vacated and complaint dismissed by order of the Michigan Supreme Court upon reconsideration July 16, 1982; In re Kennedy, 1 Mich Dis Rptr 342 (1981).

However, in this case the Board fails to see the purpose or necessity of the additional formal complaint before us' The transcript of the hearing on July 9, 1982 on the first complaint, DP-100/82, clearly indicates that respondent's failure to answer was brought to the panel's attention (Tr, p 4-10, DP-100/82) (See Footnote #1 above).

Regarding the issue of discipline as punishment, the Michigan Supreme Court recently ruled:

> "This section (GCR 1963, 964) makes clear that the purpose of discipline cannot be punishment, but does not preclude the effect Of discipline from being punishment . . ." In the Matter of Grimes, Michigan Supreme Court Docket No. 66527, decided per curiam, November 23, 1982 rehearing denied and judgment entered January 3, 1983.

In the present case, however, any additional discipline would be merely superfluous and cumulative. Furthermore, and more importantly, very serious constitutional questions arise given the express and unequivocal hearing panel findings that the panel took into account the failure to answer when imposing the 60 day suspension. Here, it is reasonable to conclude that the hearing panel sanction would have been lighter had the failure to answer not been included as a factor in assessing the 60 day suspension. Indeed, the 60 day suspension, upon review of the entire record, does appear to be adequate. Are we to disregard the hearing panel findings, reduce the original discipline and apply a separate additional sanction so that the official record might more clearly show "no stone unturned?"

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2. We take note of the action of the Supreme Court in Ward, supra, the Court dismissed the Formal Complaint without specifically reversing the Board's findings of a "technical" rule violation and, in its order, simply stated that neither the finding of misconduct nor of discipline was "appropriate." Also complicating the issue of mandatory discipline are the decisions of the Michigan Supreme Court in In re Lewis, 389 Mich 668, 209 NW2d (1973) and In re Sauer, 390 Mich 449, 213 NW2d 102 (1973). In these criminal conviction cases, the Court seems to indicate that discipline need not be imposed should there be sufficient mitigating evidence produced.

We think not. It is appropriate in certain cases to issue simultaneously a reprimand and a suspension - or, perhaps, two separate suspensions for separate counts. This can be an effective way to address the relative severity of separate offenses. The panel did not see the need to construct two separate forms of discipline in this case, nor do we.

Furthermore, considering the limitations of time and resources of the Commission and the Board in our volunteer system, we seriously question the necessity of the routine filing of standard, form, formal complaints charging only failure to answer prior formal complaints. While we acknowledge that refusal or failure to answer a request for investigation or formal complaint is misconduct, GCR 1963, 962.2(b) and 953(7), it is certainly adequate that such misconduct be considered an aggravating factor bearing directly upon the assessment of the appropriate level of discipline when such information is a matter of record (for example when a default has been entered); this is particularly true when counsel for the Grievance Administrator has, for whatever reasons, specifically alleged, albeit orally, that there is a distinct violation for failure to file an answer.

We in no way diminish the import or impact of the aforementioned rules that define failure to answer as misconduct. Full, fair and timely disclosure by disciplinary respondents is required if our system is to function effectively. Indeed, more than efficiency is at issue; public confidence in our system of self-enforced discipline is maintained only if we avoid delays and surely and swiftly sanction any dilatory tactics.

The Board shares with the Grievance Commission a concern for strict enforcement of the rules governing lawyer accountability and we acknowledge that the complaints charging only failure to answer a prior complaint are designed with this end in mind. In the present case, however, such action was not appropriate.