IN THE MATTER OF DAUNE ELSTON,
A Member of the State Bar of Michigan,
Respondent.
File No. DP-100/82

Decided: December 7, 1982

OPINION OF THE BOARD

Respondent was negligent in his handing of a criminal appeal. He failed to answer the Request for Investigation and Formal Complaint resulting in a default. The hearing panel denied Respondent's oral motion to set aside the default. The Grievance Administrator proceeded to present evidence to the panel. Respondent was not allowed to participate by cross-examination or by presentation of his own evidence, Respondent filed a Petition for Review by the Board, claiming the panel erred in refusing to set aside the default and that the discipline imposed is excessive, This matter shall be referred to a master so that both parties will be able to present evidence relevant to the level of discipline that should be imposed. Evidence presented to the master is to be limited to aggravating and mitigating factors bearing upon discipline.

Complainant paid Respondent $800 in May, 1980 to take a criminal appeal to the Michigan Supreme Court (Tr, 18). Respondent did not answer Complainant's letters (Tr, 25, 29). Complainant received only one letter from Respondent during the entire period of representation (Tr, 37; Exhibit 112). Nineteen months passed and no appeal brief was filed. Complainant asked for the return of her money and documents (Tr, 31). The retainer was returned (Tr, 31). However, the documents were not returned until the day of the hearing - July 9, 1982 (Tr 57-58). No post-conviction appeal was ever filed by Respondent with the Michigan Supreme Court on Complainant's behalf.

The pivotal issue in this case is whether Respondent should be allowed to participate in a hearing after a default has been entered against him. GCR 1963, 520.2(2) states in pertinent part:

> "If in order to enable the court to enter judgment or to carry it into full effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper." (Emphasis added)

We decide that Respondent should be allowed to participate in the hearing on "damages" which we find analogous to the question of the level of discipline in discipline proceedings. We do not condone Respondent's failure to answer but must observe the requirements of the applicable court rule.

In the recent case of American Central Corporation v Steven's Van Lines, 103 Mich App 507, 303 NW2d 234 (1981) the Michigan Court of Appeals held that an entry of default is equivalent to an admission of the allegations. See also, Smak v Cwozdik, 293 Mich 185, 291 NW 270 (1940) and Shashan v Brisson, 43 Mich App 666, 204 NW2d 692 (1972). The admission is limited only

to liability and does not extend to damages. See, Bonnici v Kindsvater, 275 Mich 304, 266 MW 360 (1936) and Haller v Walczak, 347 Mich 297, 79 NW2d 622 (1956). In the disciplinary context a default is thus limited to an admission of misconduct. The level of discipline to be imposed remains to be determined.

A party in default may participate in a hearing on damages (equivalent in disciplinary context to the level of discipline).

> "[I]t seems apparent that the defaulted party should be permitted to participate in any proceeding whereby damages are assessed." American Central v Stevens Van Lines, supra, at 236.

A similar conclusion was reached simultaneously by a different panel of the Michigan Court of Appeals in Meyer v Walker Land Reclamation, Inc., 103 Mich App 526, 302 NW2d 906 (1981). The Meyer court noted that the best way to assess damages is by permitting the defaulted party to participate in the hearing on damages. The Court noted that GCR 1963, 520.2(2) provided for notice, implying that the defaulted party's participation is to be sought and secured. The Court noted:

> "If notice was only intended to insure an observer's presence, rather than that of a participant, each damages hearing would result in an appeal because that would be the only means by which a defaulted party could voice his objections to the proceedings. As we are not sufficiently persuaded that the administration of justice requires such a procedure, we will not endorse it now." 302 NW2d 906 at 913.

We conclude that the defaulted party should be able to participate in the hearing in order to assist the panel in determining the level of discipline to be imposed. 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.

A master will be appointed to hear evidence on the level of discipline to be imposed. The hearing before the master is to be limited to the level of discipline. The stay of discipline will remain in effect until further order of the Board.

All concur.