IN MATTER OP ALAN GOLDBERG,
A Member of the State Bar of Michigan,
Respondent.
No. DP-2/80

Decided: March 18, 1981

OPINION OF THE BOARD

Respondent was charged with six counts of misconduct. Counts III and VI related to failure to answer Requests for Investigation. Count I charged that Respondent abused his position as counsel to the guardian of an incompetent's estate by suggesting investment of funds from the estate in an enterprise in which both he and the guardian were co-partners. Respondent also allegedly failed to account to Complainant and the probate court for the funds of the estate. Count II charged that Respondent failed to account to a client for a settlement check received on the client's behalf. Count IV charged that Respondent converted and commingled funds to his own use from a settlement check in another case. Count V charged that he failed to honor the bill of a process-serving firm.

The Grievance Administrator moved before the panel to dismiss Counts II and III because of the Complainant's absence, and lack of proofs. Tr. of April 25, at 11-12. The motion was taken under advisement but never ruled upon by the panel. The panel did not make findings or conclusions on these counts.

The factual allegations of Count IV were undenied, Tr. of April 25 at 16-18, but Respondent planned to offer psychiatric testimony in mitigation. A psychiatrist was subpoenaed to testify for Respondent but did not appear. Respondent eventually chose not to present evidence in mitigation, Tr. of August 13 at 6-7, but simply asked not to be disbarred.

The Grievance Administrator also asked that Count V be dismissed, which motion was taken under advisement by the panel but not ruled upon. This count concerned failure to pay the process-serving company, and Respondent made restitution to the company on the morning of the first panel hearing. Tr. of April 25 at 12-13. In summary, the Grievance Administrator moved to dismiss Counts II, III, and V, but these motions were never ruled on by the panel. Count IV was undisputed, and no mitigation was offered. Count VI was not dismissed, and remained undenied by Respondent. Testimony was taken on Count I, Tr. of April 25, but it was eventually admitted by Respondent. Tr. of May 30 at 2-4.

The panel made findings on Count I alone, and concluded that further findings were unnecessary. It suspended Respondent for two years and eleven months. The Grievance Administrator pointed out in his claim of appeal that Respondent admitted the allegations in Counts I and IV, both of which involve mishandling of the funds of clients. We are urged to correct the oversight of the panel and to enter the logical findings and conclusion in its Report, in effect, nunc pro tunc. We are also asked to increase the imposition of discipline, and to disbar Respondent. We agree that discipline should be increased, and suspend Respondent for three years and one day.

Respondent clearly admitted the charges in Counts I and IV, and did not offer evidence in mitigation. It is unlikely that the hearing panel overlooked a making of findings of fact and conclusions of law on Count IV. In its Report, the panel said "Following the plea of guilty to the allegations of Count I, it was unnecessary to take further testimony on the other Counts." Panel Report at 19, Finding, emphasis added. The panel apparently thought that it did not need to look beyond the first admitted allegation in considering discipline. Apparently it had already concluded that it would have imposed the same discipline regardless of the number of counts proven or admitted.

The Michigan Supreme Court thrice directed our predecessor Board to set out its reasons for modifying or increasing the discipline imposed by a hearing panel. In re Williams, 394 Mich 5; 228 NW2d 222 (1975); In re Gillette, 394 Mich 1; 228 NW2d 220 (1975); State Bar Grievance Administrator v Gillette, 393 Mich 26, 222 NW2d 513 (1974). In Williams, the court explained that a liberal interpretation of Rules 16.15 [now GCR 967.4] and 16.13 [now GCR 964.10] required the Board to state the findings of fact, or reasons, for its new disciplinary action. 228 NW2d at 226. The court found three grounds for such a requirement. First, basic fairness; second, to provide a written statement to guide hearing panels and the Board itself in analogous situations; and third, to assist the Supreme Court when it is called upon to review decisions of the Board. "Unless the Board provides the Court with its his rationale, we are left to guess why the Board found it necessary to modify the panel's result." 228 NW2d at 227. Similar reasoning requires that hearing panels set forth findings and conclusions on each count of the Formal Complaint.

GCR 1963, 964.10 concerns the decisions of hearing panels. The provision corresponding to this section in the old rules was examined by the Supreme Court in Williams as part of its decision to require the Board to set out its reasons for modifying discipline. 228 NW2d at 226.

> A reasonable (and liberal...) construction of [967.4] leads us to the conclusion that under [967.4] the Board is required to comply with those procedures set forth in [964.10] to the extent that they are consistent with the Board's review function. In the context of the present appeal a reasonable construction of [964.10] as incorporated by [967.4] requires the Board to state its findings of fact -- or reasons for its disciplinary action. The combination of these two rules, in effect, requires the Board to back up its order with a statement of the reasons that caused it to reach is conclusion.

228 NW2d at 226 [Emphasis added]. The court, therefore, based its holdings requiring the Board to set out its reasons on the rule concerning the decisions of the hearing panels. The requirements relating to panels were incorporated through GCR 1963, 967.4 and held applicable to the Board. Recognizing that panels exercise original, not appellate, jurisdiction, it is nevertheless implied by Williams that panels should bear the same burden of explanation as does the Board, within their jurisdictional sphere. We think it reasonable, then, to require panels in their reports to touch upon each count alleged in the Formal Complaint, and set out findings of fact, conclusions of law, or indicate that the count was not proven, or dismissed on motion. This comports with "basic fairness," leaves a written record on file for future reference and, most importantly, assists the Board in reviewing the particular case.

In the present case, the panel made findings on one count alone. It did not rule upon motions to dismiss several other counts, and did not discuss other counts either admitted or undenied by Respondent. The Grievance Administrator is requesting increased discipline based upon what would be, in effect, nunc pro tunc entries by the Board. An entry nunc pro tunc is clerical in nature; it is not intended to supply action omitted by a court or other agency, but to supply omission in the record of action really accomplished, but let out through neglect or mistake. Mallory v Ward Baking Co., 270 Mich 91, 258 NW2d 414 (1935). An entry nunc pro tunc would therefore be appropriate here only if we were convinced that the panel committed an oversight in leaving a gap in its report as to Counts II through VI. We are not, however, convinced that the panel's omission of complete findings was inadvertent. Such an entry, in any case, is unnecessary. GCR 1963, 967.3(a) directs the Board to "make a final decision on consideration of the whole record." [Emphasis added.] We reach our conclusion after studying the whole record in this case, including the transcripts, and need not correct clerical omissions in the panel's report. Consequently, we base our decision on the findings concerning Count I, Respondent's admission of Count IV, and his failure to deny Count VI. Counts II, III and V, which the Grievance Administrator move to dismiss, are not considered.

We affirm those findings of fact in the report, and increase Respondent's suspension to three years and one day. The effective date of discipline shall remain unchanged, October 14, 1980, since Respondent was denied a stay pending this review. We are impressed by the severity of the offenses described in Counts I and IV. Respondent miscounseled the first Complainant to use funds from the estate over which she was guardian. He did not advise his client that such an investment was prohibited by the Michigan Probate Code, nor suggested that she obtain independent advice. Respondent also failed to account to his client and to the court for the funds of the estate. In Count IV, Respondent was charged with converting and commingling the proceeds of a settlement check received on behalf of a client. We think Respondent should be recertified by the Board of Law Examiners before reinstatement. In addition, we accept Respondent's self-imposed condition to reinstatement that he be required to repay both Complainants in full, with interest. See Panel Tr, of August 13, 1980 at 10-11; Bd. Tr. at 5. If the State Bar's Client Security Fund has reimbursed one or both of the clients, then Respondent is to repay the Fund.

The findings of fact of the panel are affirmed, and discipline is increased to a suspension of three years and one day.

AFFIRMED AS MODIFIED.

LEWIS, Secretary, Dissenting:

I dissent in the modification of discipline for the reasons set forth in my dissent in Schwartz v Grimes, No. 35939-A (Mich. Att'y Discip. Bd. 1981).