

IN THE MATTER OF BOOKER T. GAULDEN  
A Member of the State Bar of Michigan  
Respondent.  
35588-A

Decided: May 14, 1979

OPINION

FACTS

The Formal Complaint in this matter was filed July 11, 1978. Although Respondent submitted a written Motion for Severance on August 6, 1978, he failed to answer the Formal Complaint and a Default was entered by the Grievance Administrator on September 28, 1978. The matter had been originally scheduled for a hearing August 30, 1978, and later was adjourned to October 13, 1978, upon written Motion of the Respondent. Another conflict arose for the Respondent and the record discloses that Respondent sought a continuance of the October 13, 1978 hearing by phone correspondence and mail-a-gram message forwarded to the Panel Chairman. Respondent was informed by the Panel Chairman that he would have to obtain the second adjournment from the Chairman of the former Grievance Board, but this was not done. A written Motion for Adjournment of the second hearing date was presented at the hearing on October 13, 1978 by a lay Representative of the Respondent along with other papers including a belated Answer to the Formal Complaint.

Respondent seeks an opportunity to explain his failure to timely answer the complaint and to assert defenses to the substantive charges. Respondent now pleads that his attendance at the continued hearing before the Panel was precluded by the necessity of his presence at a district court criminal trial some distance from the location of the hearing panel. At the Review Hearing Respondent continually asserted that he felt the criminal proceeding took precedence over the discipline proceeding which he characterized as an "administrative" proceeding. (Middle, page 9, transcript of Review Hearing, March 8, 1979). It was disputed whether Respondent should be able to plead an insoluble conflict in schedule when, according to the Grievance Administrator, (Review Hearing Transcript, page 28), Respondent knew or should have known of a potential conflict several weeks in advance of the discipline hearing. Respondent insists that he had no reason to anticipate the length of the criminal trial in question and that he sought only to protect the interests of his clients, the criminal defendant, by remaining available for questions intermittently posed by the jury during their deliberations.

Respondent was not totally "in absentia" by virtue of his contacts with the hearing panel chairman prior to the date of the discipline hearing. However, it is duly noted that a Default against Respondent was properly entered and that the hearing panel was correct in its interpretation of GCR 964.6 (a) which requires that a party may receive more than one adjournment only upon request made to the Board. When questioned why he failed to receive approval for the second adjournment from the Grievance Board Chairman, Respondent urged that such procedure was not his understanding (Review Hearing transcript, page 40).

## DECISION BY THE BOARD

In consideration of fundamental due process safeguards, and to provide the accused attorney the benefit of any doubts, substantial though they are, relative to his understanding of the court rules, the Board will remand this matter for further proceedings to afford Respondent an opportunity to cross-examine the witnesses of the Grievance Administrator and to produce any evidence he may have on his own behalf. Of course, as a procedural matter, Respondent cannot be afforded an opportunity to rebut the charges in the Complaint and cross-examine witnesses against him without the setting aside of the Default in this matter. Pursuant to GCR 520.4 the Default shall be set aside. The pertinent court rule, GCR 967.3 (b), does not provide for a rehearing per se, rather, only for the taking of additional testimony and the issuance of a supplemental report by the Panel. Therefore, the Grievance Administrator need not resubmit his proofs but need only make witnesses available to Respondent for cross-examination. The Stay of Discipline issued earlier in this matter shall remain in effect until such time as the Board considers the additional testimony which will be taken pursuant to GCR 967.3(b).

It should be noted for the record that the Review Hearing in this matter was conducted by a Sub-Board of the Attorney Discipline Board pursuant to GCR 967.3(a); the Sub-Board's recommendation, adopted herein, was considered by the whole Board along with the transcript of the Review Hearing proceedings and relevant pleading and exhibits as well as the transcript of the proceedings before the Hearing Panel. Because unavoidable delay in the Board's decision was anticipated, the Board's Order for further proceedings was issued in advance of this Opinion to afford the parties the earliest possible notice of their status in this matter.