

STATE OF MICHIGAN

Attorney Discipline Board

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ATTORNEY DISCIPLINE BOARD

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Grievance Administrator,

Petitioner/Appellee,

v

Jeffrey B. Hollander, P 49306,

Respondent/Appellant,

Case No. 14-10-GA

Decided: April 14, 2015

Appearances:

Kimberly L. Uhuru, for the Grievance Administrator, Petitioner/Appellee
Jeffrey B. Hollander, In Pro Per, Respondent/Appellant

BOARD OPINION

Tri-County Hearing Panel #60 of the Attorney Discipline Board issued an order of disbarment in this matter on October 28, 2014. On November 19, 2014, respondent filed a petition for review of the panel's order pursuant to MCR 9.118. Respondent was notified in writing on November 20, 2014, that his petition for review was untimely within the meaning of MCR 9.118(A)(1). Shortly thereafter, respondent filed a delayed petition for review which was granted in an order issued December 10, 2014.

The Attorney Discipline Board has conducted review proceedings in accordance with MCR 9.118, including review of the record before the hearing panel and consideration of the briefs and arguments presented to the Board at a review hearing conducted on March 18, 2015. For the reasons discussed below, the hearing panel's order entered October 28, 2014, is affirmed.

Central to respondent's delayed petition for review, and to the eventual outcome of the proceeding before the panel, are (1) the undisputed fact that respondent failed to file an answer to the Grievance Administrator's formal complaint within the 21 day period provided in MCR 9.115(D)(1); (2) the question of whether the hearing panel erred in its decisions to deny respondent's motions to dismiss the formal complaint for lack of subject matter jurisdiction; and, (3) the question

of whether the hearing panel erred in its decisions to deny respondent's motions to set aside the default entered against him for his failure to answer the formal complaint.

On February 11, 2014, the Grievance Administrator filed a four-count formal complaint charging respondent with misconduct. The common factor in all four charges of the complaint was the fact that during the time frames referenced in the complaint, respondent was forbidden from holding himself out as an attorney by any means or practicing law in any form as a result of the revocation of his license, by consent, effective April 15, 2009.¹ The formal complaint specifically charged that on four separate occasions, respondent practiced law and/or held himself out as an attorney while he was disbarred from the practice of law, in violation of MCR 9.119(E)(1) and (4), and in violation of an order of discipline, in violation of MCR 9.104(9). In three of the counts, respondent was also charged with engaging in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer, in violation of MRPC 8.4(b).

The formal complaint was served by regular and certified mail on February 13, 2014 to respondent's Rule 2 address on file with the State Bar. Although not required to do so, on March 17, 2014, the Grievance Administrator re-served the formal complaint on respondent at three additional addresses. The Grievance Administrator also filed a motion to adjourn the upcoming hearing to allow respondent sufficient time to receive the complaint, file an answer, and for the Grievance Administrator's counsel to prepare for hearing with respondent's answer. The hearing was adjourned and ultimately rescheduled to August 26, 2014.

Respondent failed to file an answer to the formal complaint and his default was entered on May 1, 2014. On May 21, 2014, respondent filed his first motion to dismiss the formal complaint and motion to set aside the default. Respondent argued that his default should be set aside because the formal complaint was filed in violation of procedural and ethical rules (delay in filing the formal complaint) and violated respondent's constitutional rights to due process. The Grievance Administrator's response denied that there was any intentional delay or bad faith in filing the formal complaint and argued that respondent failed to establish good cause for his failure to answer the formal complaint and had failed to show that he had a meritorious defense to the charges. On June

¹ Respondent's license to practice law was revoked, by consent, effective April 15, 2009 in a matter titled *Grievance Administrator v Jeffrey B. Hollander*, Case No. 08-102-GA.

13, 2014, the hearing panel issued an order denying respondent's motion to set aside the default as it did not comply with the requirements to set aside a default as set forth in MCR 2.603(D)(1). The order further indicated that because respondent was in default, his remaining motions would not proceed.

On July 16, 2014, respondent filed a second motion to set aside default, this time referencing the requirements of MCR 2.603(D)(1), and attaching an affidavit. As for good cause, respondent argued that there was a procedural defect in that the Grievance Administrator "failed to comply with the 21-day rule in which notice of hearing must be served on the respondent," and that when he actually received the complaint, it was less than 21 days before the hearing. The Grievance Administrator filed a response to the motion on August 1, 2014, noting that respondent's second motion still did not address the fundamental issue of respondent's lack of good cause.

On the day of the August 26, 2014 hearing, respondent presented the hearing panel and the Grievance Administrator's counsel with a third motion to dismiss that argued that the Grievance Administrator had failed to comply with MCR 9.112 and 9.114 and that such a failure denied the panel jurisdiction over the proceedings and required that the formal complaint be dismissed. After argument, both motions were denied and the hearing proceeded.

On October 28, 2014, the hearing panel's report on misconduct and discipline was issued in which the panel ordered that respondent be disbarred. The panel's report specifically indicated that the delay in filing the formal complaint constituted good cause for the order to take effect retroactively on May 1, 2010.

With regard to respondent's motions to dismiss for lack of subject matter jurisdiction, a review of the record reveals that the Grievance Administrator complied with the relevant court rules. Respondent was given notice of the Grievance Administrator's Request for Investigation and an opportunity to respond. An investigation ensued and, at its conclusion, the matter was submitted to the Attorney Grievance Commission which reviewed the matter and directed that a complaint be filed, all in conformity with MCR 9.109(B)(5), 9.112(C)(1)(b), and 9.114(A)(2). The formal complaint, therefore, was properly before the panel and the hearing panel committed no error in denying respondent's motions to dismiss the formal complaint.

A hearing panel's decision to grant or deny a motion to set aside a default is reviewed by the Board under an abuse of discretion standard. *Grievance Administrator v Gerald C. Simon, et al*, 02-

83-GA; 03-40-GA; 03-38-GA (ADB 2003); *Grievance Administrator v R. Reid Krinock*, 12-26-GA (ADB 2013). In its memorandum opinion in *Simon*, the Board discussed the high threshold set by an abuse of discretion standard, citing *Alken-Ziegler, Inc. v Waterbury Headers Corp*, 461 Mich 219; 600 NW2d 638 (1999):

An abuse of discretion involves far more than a difference in judicial opinion. *Williams v Hofley Manufacturing Co.*, 430 Mich 603,619; 424 NW2d 278 (1988). It has been said that such abuse occurs only when the result is "so palpably and grossly violative of fact and logic that it evidences not the exercise of will, but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." *Marrs v Board of Medicine*, 422 Mich 688,694; 375 NW2d 321 (1985), quoting *Spalding v Spalding*, 355 Mich 382,384-385; 94 NW2d 810 (1959), and noting that, although the *Spalding* standard has been often discussed and frequently paraphrased, it has remained essentially intact. *Alken-Ziegler*, supra, 461 Mich at 227.

The Court's decision in *Alken-Ziegler* also stands for the proposition that a decision to set aside a default must be based upon a sufficient showing of both good cause and a meritorious defense. While a hearing panel's decision to grant or deny a motion to set aside a default is in the panel's discretion, the Board has also consistently held that there must be a sufficient showing as to both good cause and meritorious defense, otherwise the panel's decision to set aside a default will be reversed. *Grievance Administrator v Clyde Ritchie*, ADB 52-87 (ADB 1988).

Respondent was unable to establish the first prong of the test; he did not have good cause for his failure to answer the formal complaint. Respondent was served at his last known address, as required by MCR 9.115(C). Pursuant to MCR 9.115(C), "service is effective at the time of mailing and nondelivery does not affect the validity of the service." Once the Grievance Administrator mailed the complaint to the Rule 2 address, service was effectuated. Although not required to, the Grievance Administrator's counsel located additional addresses for respondent and not only reserved the formal complaint at those addresses, but requested that the upcoming hearing be adjourned to ensure that respondent had sufficient time to answer the complaint and prepare for the hearing. In addition, respondent acknowledged that he received the formal complaint and therefore had actual knowledge of the complaint and the upcoming proceedings. (Tr 8/26/14, p 21.)

Finally, the formal complaint and notice of hearing respondent acknowledged he received, was accompanied by a procedural instruction sheet which included the following notices (emphasis in original):

3. An **answer** to the formal complaint must be filed within 21 days after the date of service of the complaint on respondent. Service of the complaint is effective at the time of mailing or personal service.
4. **WARNING: FAILURE TO FILE A TIMELY ANSWER WILL RESULT IN DEFAULT AND CONSTITUTES SEPARATE, ACTIONABLE MISCONDUCT.** See MCR 9.113 and 9.115(D)(2).

Respondent clearly did not have good cause for his failure to answer the formal complaint. Having failed to establish good cause, the first prong of the two prong test, it was not then an abuse of discretion for the hearing panel to deny respondent's motions to set aside the default.

Because respondent has offered no meritorious arguments to establish error below, we will enter an order affirming the hearing panel's order of disbarment.

Board members James M. Cameron, Jr., Lawrence G. Campbell, Dulce M. Fuller, Rosalind E. Griffin, M.D., Sylvia P. Whitmer, Ph.D., Louann Van Der Wiele, Michael Murray, and John W. Inhulsen, concur in this decision.

Board member James A. Fink was absent and did not participate.