STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellant,

v

Carolyn J. Jackson, P 53018,

Respondent/Appellee,

Case No. 18-58-GA

Decided: May 7, 2019

Appearances

Kimberly L. Uhuru, for Grievance Administrator, Petitioner/Appellant
Carolyn J. Jackson, In Pro Per

BOARD OPINION

Tri-County Hearing Panel #51 of the Attorney Discipline Board issued an order on September 14, 2018, suspending respondent's license to practice law in Michigan for a period of 180 days, and requiring her to pay restitution in the amount of $1,500.00. The Grievance Administrator filed a petition for review, seeking an increase in discipline. On December 12, 2018, the Attorney Discipline Board conducted review proceedings in accordance with MCR 9.118, which included a review of the whole record before the hearing panel and consideration of the brief and arguments presented to the Board at a review hearing. For the reasons discussed below, we increase discipline from a 180-day suspension to a two-year suspension.

I. Background and Proceedings Before the Hearing Panel

Count One of the formal complaint alleged that respondent committed misconduct during her representation of a client who sought legal assistance in modifying the terms of her judgment of divorce regarding child support and parenting time. Specifically, respondent was charged with neglecting a legal matter in violation of MRPC 1.1(c); failing to seek the lawful objectives of a client

in violation of MRPC 1.2(a); failing to act with reasonable diligence and promptness in violation of MRPC 1.3; failing to keep a client reasonably informed in violation of MRPC 1.4(a); and failing to refund an unearned fee, in violation of MRPC 1.16(d). Count Two of the complaint charged respondent with failing to respond to a request for investigation, in violation of MCR 9.104(1)-(3), and (7); 9.113(A); and MRPC 8.1(a)(2) and 8.4(a) and (c). The complaint also charged violations of MCR 9.104(1), (2), (3) and (4).

Although respondent was served with the formal complaint by regular and certified mail at two different addresses, including her Rule 2 address on file with the State Bar, respondent failed to answer the formal complaint. On July 9, 2018, petitioner served respondent with a default at both addresses. Respondent did not move to set aside the default.

The matter was assigned to Tri-County Hearing Panel #51 and a hearing was held on July 26, 2018. Respondent appeared for the hearing. Counsel for the Grievance Administrator admitted twelve exhibits, and then moved for the panel to make a finding of misconduct based upon the default. Respondent did not oppose the motion, but rather admitted that she "screwed up" by not doing what she needed to do with her client. Based upon the arguments made by counsel for the Grievance Administrator and respondent's own admissions, the hearing panel found misconduct was established in both Counts One and Two. The panel then proceeded to the sanction phase of the proceedings.

Counsel for the Grievance Administrator offered six more exhibits, which were all evidence of respondent's prior disciplinary history. Specifically, respondent's disciplinary history consists of: an admonishment in 2001 for neglect and failure to communicate; a reprimand in 2008 for neglect and failure to communicate; an admonition in 2009 for practicing law while suspended due to nonpayment of bar dues; a 60-day suspension in 2016 for neglect, failure to seek the lawful objectives of her client, failure to act with reasonable diligence, failure to keep her client informed, failure to explain a matter to her client, and failure to return an unearned fee; a 60-day suspension in 2017 for neglect, failure to seek the lawful objectives of her client, failure to act with reasonable diligence, failure to keep her client informed, and failure to respond to a request for investigation; and a 180-suspension in 2018, for neglect, failure to seek the lawful objectives of her client, failure to act with reasonable diligence, failure to keep her client informed, failure to hold client property separate from her own, failure to deposit fees into her trust account, failure to refund unearned fees,

failure to notify clients of her suspension, and holding herself out as an attorney during her suspension from the practice of law.

Based upon respondent's prior discipline for the same or similar conduct, counsel for the Administrator argued that disbarment is appropriate under ABA Standard 8.1(b). It was also pointed out that previous panels have already tried every type of diversion program available to respondent, to no avail. These conditions included attending the Tips and Tools seminar put on by the State Bar, taking a professional responsibility course, having a mentor monitor her practice, and going to the State Bar's Practice Management Resource Center for help with her law office management. Counsel asserted that none of these conditions were effective since respondent continues to engage in the same misconduct.

Respondent testified on her own behalf, explaining that although the record does not look good, it is just a small snapshot of her 23 years of practice. Respondent also explained that she has had some challenges the last few years, because she takes on a lot of clients that most other attorneys would not take on; clients that are difficult to manage and with whom there are always payment issues.

After a brief deliberation, the panel announced that it would be imposing a 180-day suspension starting immediately, but that the suspension would be extended until the client has been fully repaid $1,500, and the costs associated with the hearing have been paid. The hearing panel issued its report on September 14, 2018, reflecting its findings.

On September 25, 2018, the Grievance Administrator filed a timely petition for review, arguing that the hearing panel's imposed discipline of 180 days is insufficient because of respondent's disciplinary history. Although not required to do so, respondent did not file a responsive brief to the Grievance Administrator's brief in support of the petition for review, but did appear for oral argument before the Board. The suspension of respondent's license to practice law became effective July 26, 2018.

II. Discussion

The only issue before us is whether the hearing panel imposed insufficient discipline for the misconduct found and in consideration of the aggravating factors present. In deciding the appropriate discipline to be imposed, the Board employs the American Bar Association (ABA) Standards for Imposing Lawyer Sanctions. *Grievance Administrator v Lopatin*, 462 Mich 235; 612

NW2d 120 (2000). Pursuant to the ABA Standards, hearing panels and the Board examine the duty respondent violated, respondent's mental state, and the actual or potential injury caused by respondent's conduct. Next, the Standards' recommended sanctions are considered based upon the answers to these questions. *Id.* at 240. Then aggravating and mitigating factors are to be considered. *Id.* Finally, "the Board or a hearing panel may consider whether there are any other factors which may make the results of the foregoing analytical process inappropriate for some articulated reason." *Grievance Administrator v Frederick A. Petz*, 99-102-GA (ADB 2001) (citing *Lopatin*, 462 Mich at 248 n 13).

On review, the Administrator argues that Standards 4.42 (Lack of Diligence) and 7.2 (Violations of Duties Owed As A Professional) are applicable.[1] Both of these Standards provide that suspension is appropriate. The Administrator argues, however, that after considering aggravating factors, discipline should be increased to disbarment.

There is no doubt, based upon the default and respondent's own admissions, that a suspension is warranted. ABA Standard 4.42(a) calls for a suspension for knowingly failing to perform services for a client and causing injury or potential injury to a client. ABA Standard 7.2 typically applies to a failing to answer a request for investigation, and an attorney who fails to answer a request for investigation should ordinarily expect that a 30-day suspension, as a minimum level of discipline, will be imposed. *Grievance Administrator v Mark L. Brown*, 00-74-GA (ADB 2002). Therefore, suspension is appropriate under both of these Standards.

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[1] At the hearing on discipline, the Administrator argued that ABA Standard 8.1(b) is applicable, which provides:

> 8.1 Disbarment is generally appropriate when a lawyer:
>
> (a) intentionally or knowingly violates the terms of a prior disciplinary order and such violation causes injury or potential injury to a client, the public, the legal system, or the profession; or
>
> (b) has been suspended for the same or similar misconduct, and intentionally or knowingly engages in further similar acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession.

To the extent the Administrator argued at the sanction hearing that disbarment is appropriate under ABA Standard 8.1(b), this Board recognizes that the rigid application of this Standard has not been the practice in Michigan. See *Grievance Administrator v Robert E. Jones*, 05-09-GA (ADB 2007). Rather, prior discipline is assessed as an aggravating factor under Standard 9.22, and the appropriate weight can be given to the prior misconduct through this Standard, not Standard 8.1.

Respondent's misconduct in this case includes neglect, failure to communicate, failure to return an unearned fee, and the failure to respond to a request for investigation. The appropriate discipline in neglect cases and cases involving a failure to communicate are dependent upon the facts and circumstances, but discipline can range from a reprimand up to disbarment. See *Grievance Administrator v Frederick L. McDonald*, 06-3-GA (ADB 2007) (determining reprimand is appropriate level of discipline where respondent neglected a legal matter entrusted to him and failed to act with reasonable diligence and promptness); *Grievance Administrator v Paul S. Schaefer*, 01-140-GA (ADB 2004) (revocation of license in case involving neglect, failure to return unearned fee and failure to notify client of suspension).

Sanctions imposed in Michigan for failure to return an unearned fee have also included reprimands and suspensions of varying lengths up to disbarment, depending upon numerous factors such as the length of time during which the lawyer withheld the unearned fee, whether the misconduct is accompanied by other violations, and whether the case has been characterized mainly as a neglect case or a more serious misappropriation case. See e.g., *Grievance Administrator v Richard G. Parchoc*, 94-39-GA; 94-68-FA (ADB 1994) (three-year suspension increased to revocation for neglect and failure to return unearned fees aggravated by misrepresentation to client, failure to notify her of his suspension in a prior disciplinary action, failure to answer request for investigation and formal complaint, and prior discipline); *Grievance Administrator v Seymour Floyd*, 90-129-GA (ADB 1991) (30-day suspension for failure to return unearned fee was aggravated by failure to answer request for investigation and mitigated by undocumented depression; increased in subsequent show cause proceedings to eight-month suspension after failure to make ordered restitution); and *Grievance Administrator v Michael Doroshewitz*, ADB 138-89; 154-89; 156-89; 163-89 (ADB 1990) (180-day suspension coupled with various conditions for "persistent pattern of neglect and inattention including . . . failure to provide legal services [and return unearned fees] to six separate clients" mitigated by ongoing recovery from alcoholism).

Finally, although an attorney who fails to answer a request for investigation should ordinarily expect that at least a 30-day suspension will be imposed, multiple instances of failing to answer requests for investigation has resulted in more lengthy suspensions. See *Grievance Administrator v Ronald Thomas Bruce, Jr.*, 15-122-GA (ADB 2017) (60-day suspension for failure to respond to seven requests for investigation); *Grievance Administrator v Ronald Thomas Bruce, Jr.*, 16-101-GA (ADB 2018) (270-day suspension for failure to respond to ten requests for investigation).

The Administrator asserts that disbarment is appropriate, however, because of the applicable aggravating factors. ABA Standard 9.22 lists the following factors which may be considered in aggravation:

(a) prior disciplinary offenses;
(b) dishonest or selfish motive;
(c) a pattern of misconduct;
(d) multiple offenses;
(e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency;
(f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
(g) refusal to acknowledge wrongful nature of conduct;
(h) vulnerability of victim;
(i) substantial experience in the practice of law;
(j) indifference to making restitution;
(k) illegal conduct, including that involving the use of controlled substances.

Were it not for respondent's serious discipline record, a 180-day suspension might be sufficient. In this case, however, respondent appears to have developed a pattern of indifference. This pattern is continuing, and the misconduct is substantially similar in every case, beginning in 2001. Therefore, the aggravating factors applicable here include respondent's prior disciplinary offenses, a pattern of misconduct, multiple offenses, and bad faith obstruction of the disciplinary proceeding by failing to respond to requests for investigation. In addition, respondent has been licensed since 1995, so she has the knowledge and experience to know better. Finally, although respondent claims she is not indifferent to paying restitution to make the claimant whole as soon as possible, respondent's history of paying restitution on time or even at all is questionable at best.

Although we do not agree with the Administrator that the circumstances of this case warrant disbarment, we do agree that this is an appropriate case to employ the concept of progressive discipline. This Board has endorsed the concept of progressive discipline under the appropriate circumstances. *Matter of Leonard R. Eston*, DP 24/87 (ADB 1988). Furthermore, in earlier decisions, the Board has ruled that "repeated misconduct may evidence the need for more severe discipline." *Matter of O. Lee Molette*, 35391-A (ADB 1981). Likewise, misconduct may be aggravated by a respondent's recidivism and conscious disregard for the discipline system. *Matter of Ross John Fazio*, DP 36/82 (ADB 1983).

The circumstances of this case make it appropriate for progressive discipline in the form of an increase in the length of suspension. Respondent has been repeatedly warned that her conduct does not conform to the Michigan Rules of Professional Conduct; nevertheless, her behavior has remained unchanged. Respondent continues to neglect cases, repeatedly fails to communicate with her clients, and repeatedly fails to refund unearned fees. Respondent has been given every type of help available, from being ordered to attend several seminars and classes put on by the State Bar, to the assignment of a mentor to monitor her practice. Despite this, respondent has failed to correct her behavior, and there is no evidence she is making any effort to prevent the misconduct from occurring again. Also concerning is the fact that respondent has defaulted at least twice in prior discipline cases, and has failed to answer at least four requests for investigation. Respondent certainly cannot claim inexperience or ignorance of disciplinary procedures. See *In re Ziegler*, 33442-A at 19 (Mich St Grievance Bd 1976). While former misconduct is never a basis for an exact formulation of discipline, respondent's past pattern of neglect and failure to answer communications from the Attorney Grievance Commission indicates a conscious disregard for the Court Rules. For the protection of the public, therefore, respondent should not be practicing law until she can prove she has a proper understanding of the standards that are imposed on members of the bar, and that she will conduct herself in conformity with those standards.

III. Conclusion

Based upon the misconduct established, prior Board precedent, and consideration of the aggravating and mitigating factors, respondent's misconduct is sufficiently severe to warrant an increase in discipline. Furthermore, respondent's apparent indifference to her obligations and her lack of understanding of the standards that are imposed on members of the bar warrants a substantial suspension, certainly greater than 180 days. As such, we modify the discipline order and increase the suspension to two years.

Board members Rev. Michael Murray, Jonathan E. Lauderbach, Barbara Williams Forney, James A. Fink, John W. Inhulsen, Karen O'Donoghue, Linda Hotchkiss, MD, and Anna Frushour concur in this decision.

Board member Michael B. Rizik, Jr. was absent and did not participate.