STATE OF MICHIGAN

Attorney Discipline Board

GRIEVANCE ADMINISTRATOR,
Attorney Grievance Commission,

Petitioner/Appellee,

v Case No. 24-18-GA

MICHELLE L. ELOWSKI, P 74608,

Respondent/Appellant.
_____/

ORDER GRANTING REQUEST FOR INTERLOCUTORY REVIEW AND AFFIRMING HEARING PANEL ORDER DENYING MOTION TO SET ASIDE DEFAULT

Issued by the Attorney Discipline Board
333 W. Fort St., Ste. 1700, Detroit, MI

The Grievance Administrator filed a formal complaint against respondent on February 26, 2024. The formal complaint alleges several instances of misappropriation of client funds. Respondent did not file an answer to the formal complaint. On April 2, 2024, the Grievance Administrator filed a default against respondent. On April 16, 2024, a pre-hearing conference was held. Respondent appeared and advised the panel that it was her intention to file a motion to set aside the default previously filed by the Grievance Administrator.

On May 2, 2024, respondent filed her motion and brief to set aside default. Counsel for the Grievance Administrator filed her response on May 14, 2024. A virtual hearing on respondent's motion was held on September 5, 2024. Both parties attended. Both parties then supplemented their briefs on the default issue on September 12, 2024. On October 28, 2024, the panel issued an order denying respondent's motion to set aside default. Respondent then filed this instant petition on November 18, 2024, seeking interlocutory review of the panel's order denying respondent's motion to set aside the default. The Grievance Administrator filed his response to respondent's petition on December 13, 2024, arguing that the panel's order denying respondent's motion to set aside the default should be affirmed.

The Attorney Discipline Board has the authority under MCR 9.110(E)(5) and 9.118(A)(1) to grant leave to review a non-final order of a hearing panel and to decide such interlocutory matters without a hearing. "[The] Board has traditionally required a demonstration that the appellant would suffer substantial harm by awaiting final judgment before taking an appeal." *Grievance Administrator v Timothy A. Stoepker*, 13-32-GA (ADB 2014) citing *Grievance Administrator v Sue E. Radulovich*, 06-50-GA (ADB Order, 9/29/2006) (citing MCR 7.205(B)(1)).

In this matter, we first need to decide whether review of the panel's order is appropriate at this stage of the proceedings. In order to determine whether to grant interlocutory review, the Board typically considers two factors; the degree to which the petitioner [in this case respondent] will be harmed if review is not granted at this point in the proceedings, and the deference given to a hearing panel's decision to grant or deny a motion to set aside a default.

As for the first factor, based on the particular facts and circumstances of this proceeding, if the panel's decision to deny respondent's motion to set aside the default is not heard now, respondent will arguably be substantially harmed because she may be precluded from presenting a defense to the allegations of professional misconduct, possibly resulting in discipline being imposed before she could seek review by the Board. As for the second factor, deference should only be given if the default was appropriately upheld. Thus, in this case, these factors favor the Board interceding now as opposed to awaiting a final order.

However, while we recognize that the review of the panel's order is proper at this time, we further find that respondent has not presented grounds in her petition to disturb the panel's order denying her motion to set aside the default. Respondent's primary argument in her petition is that, since the default was not entered with a clerk, but instead filed by the Grievance Administrator, that the default is invalid. This specific argument has been raised, and rejected, by the Board in the past. In *Grievance Administrator v Frederick Toca*, 08-22-AI; 08-85-JC; 08-140-GA (ADB 2010), a default was entered in the same manner it was against respondent herein. On appeal, the respondent challenged the validity of the entry of the default on the basis that it was not entered by a clerk. The Board rejected the argument and upheld the entry of default, finding:

> We find no error requiring reversal. Except as otherwise provided in subchapter 9.100 of the Michigan Court Rules, the rules governing practice and procedure in a nonjury civil action apply to a proceeding before a hearing panel. MCR 9.115(A). Subchapter 9.100 provides that: "A default, with the same effect as a default in a civil action, may enter against a respondent who fails within the time permitted to file an answer admitting, denying, or explaining the complaint or asserting grounds for failing to do so." MCR 9.115(D)(2). We are not persuaded that the proceedings are invalid unless either a court clerk (or, analogizing, ADB personnel) actually perform an action denominated "entry of default." Nor are we convinced that respondent has been prejudiced by any action in these proceedings. Respondent's failure to answer or otherwise defend is not contested. Whether AGC counsel purports to enter the default by the filing of a document so captioned, or counsel submits a notice to the ADB and entry immediately follows receipt, is of no practical significance. *Id* at 3.

Respondent has not presented any facts or argument that distinguishes this matter from *Toca*. Regardless of whether a default is entered by a clerk, or filed with the Board by the Grievance Administrator, it cannot be filed or entered without the same condition precedent, the failure of a respondent to answer or defend within the time prescribed. Further, once entered by a clerk, or filed by the Grievance Administrator, a defendant or respondent cannot then answer or defend the substance of a complaint until another condition precedent, the setting aside of the default by a panel or the court. The method proscribed for the entry of a default in a disciplinary proceeding is not identical to the process in a civil matter, but it does not need to be. It is a distinction without a difference, and respondent has not identified any prejudice she suffered as a result.

Further, we find that respondent's additional arguments for setting aside the default unpersuasive. A motion to set aside a default or a default judgment, except when grounded on lack of jurisdiction over the defendant, shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed. Good cause is defined as a substantial defect or irregularity in the proceedings or a reasonable excuse for a failure to comply with the requirements which created the default. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 224 (1999). Furthermore an affidavit asserting a meritorious defense is a necessary condition for a

default to be set aside. MCR 2.603(D)(1). 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. *Id.* at 227; *Grievance Administrator v Gerald C. Simon,* et al, 02-83-GA, 03-40-GA, 03-38-GA (ADB 2003).

The only argument respondent raises as to the "good cause" requirement is that she had discussions with counsel for the Grievance Administrator prior to the filing of the formal complaint and the default and had, to some degree, participated in the proceedings to that point. The Grievance Administrator does not dispute that respondent had engaged in discussions regarding a possible consent, but argues that such discussions did not absolve respondent from her duty to answer the formal complaint. The panel found that respondent had not satisfied the "good cause" requirement to set aside the default, and that any discussions respondent may have had with the Grievance Administrator regarding a possible settlement simply were not relevant. In their order denying respondent's motion to set aside default, the panel found that:

> While substantive defects relative to the service of a Formal Complaint could possibly satisfy the "good cause" requirement of the Court Rule, Respondent never asserted improper service. Respondent was obviously aware of the pendency of the Complaint in light of her ongoing communications with counsel for Petitioner. [Order 10/28/24, p 4.]

Service of the complaint in this matter was proper. The Grievance Administrator filed a proof of service on February 29, 2024, indicating service on respondent by regular and certified mail. Respondent has never alleged that she did not receive the formal complaint. Further, by her own admission, respondent was aware that a formal complaint had been filed, as she was in discussions regarding a possible consent. There is no evidence that the parties ever agreed that respondent's time to file an answer to the formal complaint would be extended. Nor is respondent alleging any deficiency in service or notice that would establish good cause for her failure to answer. The panel did not abuse its discretion in this determination, particularly in light of the established policy of Michigan courts against setting aside of defaults which are regularly entered. See *Glasner v Griffin*, 102 Mich App 445 (1980).

As for the meritorious defense requirement, respondent's motion falls even shorter. Respondent is charged with very serious misconduct including the serial misappropriation of thousands of dollars from multiple clients and she has also been charged with felony embezzlement for the same conduct. The allegations against respondent, deemed proven by the default, establish that she is a serious threat to the public and that unnecessary protracted litigation in this matter would be harmful to the public, particularly when respondent did not raise any legitimate meritorious defenses in her affidavit.

Respondent's statement of meritorious defense in her motion and corresponding affidavit details emotional and personal difficulties that she states she was experiencing during the time of the alleged conduct, and she also challenges the amount that was allegedly misappropriated in certain counts. These are simply not defenses to the charged misconduct. As found by the panel:

> Respondent's Motion and supporting affidavit utterly fail. Respondent's "Verified Statement of Meritorious Defense" for the most part describes personal difficulties, which may be relevant at the sanction stage but do not in any fashion address the allegations in the Complaint. Respondent's reference to "responses" to other "complaints with the AGC" is simply inadequate to provide a basis to set aside the default in the instant matter. Respondent's blanket assertion in the affidavit that she disputes the amount in controversy is not a statement of facts. [Order 10/28/24, pp. 4-5.]

The panel correctly notes that respondent's personal difficulties, if established, may be relevant to determining the appropriate level of sanction to impose, but are not defenses to the actual charges of misconduct. Further, the calculation of a precise dollar amount that respondent may owe in restitution is also a question ordinarily addressed at a sanction hearing, not a defense to the charges contained in the formal complaint. As such, respondent has failed to set forth any meritorious defenses, and the panel did not abuse its discretion in denying her motion to set aside the default.

The Attorney Discipline Board has considered respondent's petition for interlocutory review and the Grievance Administrator's response, and being otherwise fully advised;

NOW THEREFORE,

IT IS ORDERED that respondent's request for interlocutory review of the hearing panel's October 28, 2024 order denying motion to set aside default is **GRANTED**.

IT IS FURTHER ORDERED that the hearing panel's October 28, 2024, order denying motion to set aside default is **AFFIRMED**.

IT IS FURTHER ORDERED that this matter is **REMANDED** to Tri-Valley Hearing Panel #2 to conduct further proceedings in accordance with MCR 9.115(J)(2).

ATTORNEY DISCIPLINE BOARD

By: /s/ Alan Gershel
Chairperson

Dated: January 20, 2025

Board members Alan Gershel, Peter Smit, Rev. Dr. Louis J. Prues, Andreas Sidiropoulos, MD, Katie Stanley, Tish Vincent and Kamilia Landrum concur in this decision.

Board members Jason Turkish and Linda Orlans concur with the majority decision to grant interlocutory review, but dissent from the majority decision to affirm the hearing panel's denial of respondent's motion to set aside the default.

We agree with the majority's decision to grant interlocutory appeal in this matter, and we also agree with the majority position that respondent has not raised any compelling arguments that the manner of entry of defaults in the disciplinary system is problematic or caused undue prejudice. Panels must be able to enforce timely responses to actions brought by the Grievance Administrator to preserve the orderly conduct of the discipline system and ultimately the appropriate conduct of attorneys in our State. However, because we would grant respondent's motion to set aside the default, we must respectfully dissent from the majority decision.

There is a strong public policy interest in favor of resolving cases on their merits. This ensures fairness, consistency, and the integrity of our process, which we have strived to uphold with our liberal application of setting aside defaults. This application has included cases which, in our opinion, had far less substantive engagement by the respondent than the one before the Board. We strongly disagree that the upholding of a default where the respondent is actively engaging in

the disciplinary process, albeit without first filing a formal response, is what the default rule intended. Respondent herein did not answer the formal complaint in the prescribed time for her answer, but she has not been absent or disengaged from this matter. Rather, respondent was engaging with the Administrator's counsel in an attempt to possibly resolve this matter when the default was entered. Thereafter, she promptly filed a motion to set aside the default once she learned of its entry. While there may be a set of facts egregious enough to warrant the extreme consequence of the Board not setting aside a default and imposing a disciplinary sanction without a full hearing on the merits, they are not present here.

The integrity of the process is best served by addressing the misconduct allegations on their merits. This allows the panel, the board, the court, and the public to be assured that the appropriate sanction is ultimately selected to protect the public and the profession. To proceed with the sanction phase without the benefit of a full accounting of respondent's conduct when she is now fully engaged, having previously been in communication and actively negotiating with the Administrator's Counsel, and willing to formally answer the complaint, would be at variance to the Board's mandate of protecting the public's confidence in the profession, which can only happen when the discipline process is open, complete, and fair. Justice demands that we reverse and set aside the panel's decision preventing the adjudication of this matter on the merits prior to imposing a sanction potentially as severe as disbarment.

Lawyers play a pivot role in our civil society and work to preserve the rule of law. As such, when sanctions like disbarment are considered, whether ultimately appropriate or not, the public is owed the protection of a system of discipline that provides a full and fair hearing on the merits, whenever possible—and it is certainly possible here.

For these reasons, we must respectfully dissent.