IN THE MATTER OF PHILLIP E. SMITH
A Member of the State Bar of Michigan,
Respondent.
File Nos. DP-123/82 & DP-65/82

Decided: April 19, 1983

OPINION OF THE BOARD

Respondent was suspended from the practice of law for 120 days by Order of the Michigan Supreme Court affirming an Attorney Discipline Board decision. In re Phillip Smith, File No. 35166-A (1981). Respondent failed to comply with the order of discipline and was charged accordingly in a new formal complaint heard by the Saginaw County 10th Circuit Hearing Panel. The panel revoked Respondent's license to practice law. On review of this matter we reduce Respondent's discipline to a suspension of thirty months and modify the hearing panel finding regarding the extent of Respondent's non-compliance.

Respondent was suspended from practice for 120 days on November 4, 1981. Respondent did not notify his clients of his change in status as required by GCR 1963, 968 (Tr, 60). A sign outside his office continued to advertise him as an attorney (Tr, 53). Testimony established that legal work continued in Respondent's office during his suspension (Tr, 74, 78). Respondent also signed another attorney's name to a pleading during this time without that attorney's authorization (Tr, 101, 185-186).

Before the suspension began, Respondent was contacted by a client about a divorce (Tr, 138). Respondent continued to consult with this client while suspended from practice. Respondent did not inform the client about his suspension until March, 1982 (Tr, 144).

Respondent was contacted by four other individuals who requested legal assistance during this period (Tr, 126-127, 150, 159, 131). Respondent did not inform any of these people of his suspension from practice (Tr, 129, 133, 134-135, 154, 161). Respondent accepted fees in several of these instances (Tr, 130, 132, 160). It is clear Respondent gave legal assistance to these parties while he was suspended.

Respondent filed an affidavit attesting that he had fully complied with the discipline order except that he was unable to pay the assessed costs. This affidavit was false; the facts above clearly indicate Respondent practiced law while suspended. Respondent interviewed clients, accepted fees, continued to hold himself out to the public as an attorney, and prepared documents while under suspension. While Respondent may have substantially reduced the scope of his practice,* by his own admissions he clearly is guilty of repeated, flagrant violations of the suspension order. This blatant disregard for the order is a very serious offense that strikes at the very heart of the Supreme Court's effort to protect the public.

In assessing the appropriate level of discipline the Board must consider all relevant factors and circumstances: the Respondent's past record, the severity of the original misconduct, the

severity of the violations of the disciplinary order of suspension as well as any mitigating factors. The penal effect of a disciplinary suspension is a legitimate aspect of professional discipline, In re Grimes, 414 Mich 483, 326 NW2d 380 (1982); however, the punishment must not be disproportionate to the offense. The most serious forms of misconduct--fraud, conversion and misappropriation of funds, criminal activity or compromising of a client's fundamental rights -- have, depending upon a variety of factors and individual circumstances, resulted in discipline ranging from two years to revocation of license. As stated above, failure to comply with a discipline order and deceit in the requisite affidavit of compliance ranks among the most serious offenses. Such misconduct threatens and undermines the ability of the profession to maintain the trust and confidence of the public and this has broad negative implications for the entire legal system. However, this threat to the system must be realistically evaluated. We justifiably concern ourselves with how to enforce discipline orders given limited resources for monitoring the suspended lawyer. Yet, lawyers obviously cannot practice in a vacuum -- as evidenced by the case at bar. The means of enforcing disciplinary orders, while certainly limited, is not ineffective. The entire bar and all courts and administrative agencies are notified of disciplinary status changes. The Grievance Commission has been a vigilant enforcement agency.

Certainly, the sanction for non-compliance with an order of suspension could be three years or even revocation of license. The Board acknowledges that the Grievance Administrator makes a compelling argument for disbarment in order to preserve the effectiveness of disciplinary enforcement; however, we must resist any rigid classification of these cases and must assess discipline on an ad hoc basis, In re Grimes, 414 Mich 483, 326 NW2d 380 (1982). Other jurisdictions have taken a similar approach:

> "'We believe that it is appropriate in determining the discipline to be imposed to take into consideration circumstances surrounding the incident, including cooperation and restitution.' While judgments must be fair to society and severe enough to deter others prone to like violations, they must also be 'fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation.'" The Florida Bar v Pettie, Supreme Court of Florida No. 61,256, November 4, 1982 at page 7.

Of course, the Board cannot ignore its own findings in similar cases; while keeping within a certain range of discipline, it is appropriate to avoid unexplained differences or inconsistencies between similar cases. In Schwartz v Greenspan, DP-1/81, April, 1982, the Respondent practiced while suspended and filed false affidavits of compliance, as was done in this case. However, the Respondent in Greenspan represented clients in court and at depositions and testified falsely to a hearing panel at his reinstatement hearing. The Respondent in Greenspan received a 36 month suspension for this misconduct. Here, Respondent avoided appearing in Court and admitted his misconduct to the hearing panel.

We distinguish this matter from Schwartz v Zisman, l Mich Dis Rptr 358, DP-25/80, DP-66/80 (1981). The Respondent in Zisman was disbarred for flagrant and total disregard of an order of suspension; he continued to practice openly in the courts of our state, deceived the courts and discipline hearing panel, forged a check and filed a bankruptcy petition using the name of another attorney while under, and to conceal his, suspension. In Zisman it was clear to the Board that the Respondent had no intention of adhering in any degree to the order of suspension.

In the case of In re Jenkins, DP-45/81, April 1, 1982, the Respondent violated his order of suspension by holding himself out as an attorney authorized to practice law and writing letters asserting the position of certain clients. Like Mr. Smith, Respondent Jenkins had very substantially limited his professional activity, complying in part with the discipline order except to draft letters on behalf of two clients; he was penalized for his violations by a suspension of 1 year. In contrast, Respondent Smith's violations of his order of suspension exceeded those of Respondent Jenkins both in number and scope. It is particularly troublesome that Respondent filed the pleadings signing the name of another attorney although purportedly this was done only to protect the interest of a client whose matter had been pending prior to the suspension (Board Tr, p 15, 16).

In light of the factors discussed above, and taking into account that the original suspension of 120 days was the first disciplinary action taken against Respondent in his professional career of over 20 years, and based on the Board's modification of the findings of the hearing panel, the discipline of revocation of license is reduced to a suspension of 30 months.

(Secretary David B. Lewis and Member Frank J. McDevitt did not participate in the review of this matter.)

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*While emphasizing the limited effect of this factor, it is relevant that Respondent Smith largely refrained from professional activity that would result in prejudice or damage to clients, and the administration of justice. Had Respondent attempted, for example to represent a criminal defendant in a preliminary examination or trial, or a party in a civil trial, such costly and arduous proceedings could have been nullified. See In re Harrison, 37351-A (June 5, 1980) where the respondent's license was revoked after he had participated in Wayne County Circuit Court proceedings while under suspension.