Grievance Administrator,
State of Michigan
Attorney Grievance Commission

Petitioner/Appellant,

v

Ben D. Tubergen, P 31396,

Respondent/Appellee.

Case No. 92-235-GA; 92-255-FA

Issued: March 31, 1993

BOARD OPINION

The Grievance Administrator has petitioned the Attorney Discipline Board for review of a hearing panel Order of Reprimand on the grounds that the respondent's admitted neglect of an adoption matter and his failure to answer a formal complaint warrants an increase in the level of discipline. We agree. Discipline is increased in this case to a suspension of 120 days.

The respondent was retained in June 1989 to institute adoption proceedings on behalf of a client. The record discloses that the affected family members were a husband and wife and the wife's two natural children by a former marriage. Both children had reached the age of majority and it was the family's desire that the two daughters be adopted by their stepfather and assume his surname. Although the complainants testified that they made repeated attempts to get information from the respondent about the status of the adoption proceedings and were actually led to believe by the respondent that a petition had been filed on their behalf, no adoption petition was ever filed.

In January 1992, the complainants notified the respondent by letter that they intended to file a grievance against him. When no response had been received after ten days, a Request for Investigation was filed with the Grievance Administrator and it was subsequently served upon the respondent. The respondent's failure to answer that Request for Investigation constitutes the basis for Count II of the formal complaint.

Although the respondent failed to file an answer to formal complaint 92-235-GA served September 18, 1992 or formal complaint 92-255-FA served October 19, 1992, the respondent did appear at the hearing conducted in Allegan on November 2, 1992. At that hearing, it was disclosed to the panel that the respondent had contacted the complainants approximately one week prior to the hearing and had offered to pay them the sum of $500--a sum which included the
return of the $200 retainer paid to the respondent in 1989. The respondent admitted to the panel that the charges in the complaint were true.

The hearing panel's report refers without elaboration to the mitigating and aggravating factors presented in the testimony to the panel. Although these factors were

not specifically identified, the Board has considered the mitigating effect of the respondent's twelve years of practice unblemished by prior discipline, the absence of a pattern of neglect and the absence of a dishonest motive. However, the record also contains evidence of aggravating factors including the respondent's repeated failure to answer his clients' inquiries over a course of three years and his wholly inadequate explanation for his failure to respond to the Request for Investigation and two formal complaints.

On balance, we are persuaded that the nature and length of the respondent's disregard for the rights of these particular clients and his failure to answer the legitimate inquiries of the discipline process requires an increase in discipline.

The Standards for Imposing Lawyer Discipline approved as a guideline by the American Bar Association in 1986 has been cited by the Board in prior cases as a useful tool when considering appropriate levels of discipline. In cases involving a lack of diligence in representation of a client, the ABA standards suggest that a reprimand may be generally appropriate when a lawyer does not act with reasonable diligence when representing a client, but that a suspension is generally appropriate when "a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client", (emphasis added) Standard 4.42(a) ABA Standards for Imposing Lawyer Discipline, American Bar Association, 1986.

In this case, the respondent's knowing failure to perform the adoption services for which he was retained must be inferred from his failure to respond to the repeated inquiries of his clients over a period of three years.

The respondent's failure to fulfill his obligations to the discipline system is also of concern. The Board has previously ruled:

> "Members of the bar have an unavoidable duty to answer Requests for Investigation. . .a respondent failing to answer Requests for Investigation may be considered 'professionally irresponsible and contemptuous'. . .this Board has also recognized that failure to answer also indicates a conscience disregard for the rules of the court". Schwartz v Kennedy, DP 40/80, 1981 (Brd. Opn. p. 132).

In a 1987 opinion, the Board went so far as to serve notice upon a respondent and the bar generally that "the lawyer who ignores the duty imposed by court rule to answer Requests for Investigation and formal complaints does so at his or her peril and that, absent exceptional circumstances, that attorney may expect a discipline greater than a reprimand". Matter of David A. Glenn, DP 91/86, Brd. Opn. 2/23/87.

The Board has subsequently explained that Glenn did not go so far as to impose an invariable "rule" requiring hearing panels to impose a suspension in every case involving the failure to answer a Request for Investigation. See for example the separate opinions in Matter of Lawrence A. Baumgartner, 91-91-GA; 91-108-FA, Brd. Opn. 7/21/92. Nevertheless, the concern which prompted the Board's opinion in Glenn, that is, an unexcused, unexplained failure to answer a Request for Investigation, is present in this case and that concern is magnified when the respondent's failure to answer the Request for Investigation constitutes only one example of the respondent's failure to discharge the obligations imposed under these rules.

Although placed on notice that his failure to answer the formal complaint would result in the entry of a default and further charges of misconduct, the separate formal complaints served upon the respondent in this action were ignored.

Upon the filing of the Grievance Administrator's petition for review, this Board issued an Order to Show Cause in accordance with MCR 9.118(A) and the respondent was directed to appear personally at a review hearing before the Board on March 11, 1993. Contrary to the terms of that order and the express provisions of MCR 9.118(C)(1), the respondent failed to appear or to offer any explanation for his absence.

In its Order of Reprimand issued December 18, 1992, the hearing panel directed that the respondent pay costs in the amount of $249.08 within a specified period. MCR 9.128 mandates an automatic suspension from the practice of law if a respondent fails to reimburse the State Bar for expenses incurred in these proceedings within the time prescribed. Respondent Tubergen's automatic suspension pursuant to that rule became effective March 10, 1993.

In light of this respondent's continued disregard for the obligations imposed under these rules, a suspension of sufficient length to require a petition for reinstatement is warranted. The respondent's license shall be suspended for a period of 120 days, commencing March 10, 1993 and until reinstatement in accordance with MCR 9.123(B) and MCR 9.124.