STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,
State of Michigan
Attorney Grievance Commission,

Petitioner/Appellant,

v

Bruce J. Thorburn, P 28912,

Respondent/Appellee.

Case No. 91-27-GA

Decided: February 7, 1992

The formal complaint filed by the Grievance Administrator on February 7, 1991 charged, in a single count, that the respondent was served with a Request for Investigation on April 27, 1990 but, to the date of the filing of the complaint, had failed to file an answer in violation of MCR 9.104(1-4,7); MCR 9.113(A); MCR 9.113(B)(2) and the Michigan Rules of Professional Conduct, 8.1 and 8.4(a,c). The respondent has never denied that an answer to the Request for Investigation was not filed but has asserted in his answer to the complaint and in his testimony to the panel that he prepared an answer and believed that his employees had delivered it to the Attorney Grievance Commission. The Attorney Discipline Board has considered the Petition for Review filed by the Grievance Administrator seeking reversal of the hearing panel's decision to dismiss this complaint. The Board concludes that the respondent's failure to file an answer to the Request for Investigation constituted professional misconduct warranting discipline. The hearing panel Order of Dismissal is therefore vacated. The respondent is reprimanded.

The respondent has, at all times, acknowledged that he received a Request for Investigation pertaining to one Carole L. Fontaine which was mailed to him by the Attorney Grievance Commission on April 27, 1990. It was accompanied by instructions that it be answered within twenty-one days. The Grievance Commission attorney responsible for the investigation testified that the respondent requested an extension of time to file his answer on May 22, 1990 and an extension was granted until May 29, 1990. On the following day, May 30, 1990, a letter was sent to the respondent by certified mail, entitled Final Notice, advising that no answer had been received and that he could be the subject of disciplinary proceedings if no answer to the Request for Investigation was received by June 9, 1990. (Tr. P. 10)

The Administrator's counsel testified that an additional letter was mailed to the respondent on June 20, 1990 regarding his failure to respond.

Finally, the Administrator's counsel testified regarding her two contacts with the respondent by telephone on August 10, 1990 and August 21, 1990. On each occasion, the respondent was advised that no answer had been received. (Tr. p. 12)

In his direct testimony to the panel, the respondent acknowledged receiving the Request for Investigation and acknowledged receiving an extension of time to file an answer. He testified that he recalled dictating a response and recalled having signed it but that he did not personally mail it. The respondent recalled speaking with the Grievance Commission's attorney by telephone in August. He testified that she advised him that there was no substantive basis to the complainant's request for investigation. The respondent told the Commission's attorney that he believed that an answer had been submitted but that he would submit his answer to the Commission "forthwith". (Tr. p. 18) "1 then requested of my office and my staff that it be sent out again. That did not occur, and I acknowledge that". (Tr. p. 18-19)

At the hearing on May 14, 1991, the respondent offered into evidence a photo copy of a letter to the Attorney Grievance Commission dated June 8, 1990 in answer to the Request for Investigation from Carole Fontaine. Under cross-examination, the respondent stated that he had not been able to locate a copy of the June 8, 1990 letter until three days before the hearing.

Having had the opportunity to observe the respondent and to weigh his testimony, the panel acknowledged in its report that it faced a difficult decision.

> "The panel is torn. On the one hand, we take very seriously the responsibility of attorneys to respond to charges of professional misconduct, however devoid of merit the individual attorney may regard the charge . . . When there is reason for the respondent to be alert to the fact that there has been some problem in the transmission of his response, we would impose an affirmative duty on an attorney to personally assure that the response was delivered. We believe that there is an exceptional circumstance in this case, however. It is acknowledged that in the last contact between respondent and the Board [sic] that occurred before the formal complaint was filed, a Grievance Commission attorney told respondent that there was no basis for the grievance." We believe that the combination of this fact, along with respondent's actual preparation of a response and his belief that the response was filed makes it unreasonable to require that this respondent and these circumstances affirmatively assume a personal responsibility for the actual delivery of his response". (Hrg. Pnl. Rept. p. 2); (Emphasis in the original)

During her testimony, the investigating attorney for the Grievance Commission attorney acknowledged that she told the respondent that there

appeared to be little or no merit to the charges in the client's Request for Investigation. We believe that the panel's reliance on this factor was misplaced. We wish to dispel any notion that the duty to answer a Request for Investigation is dependent upon the seriousness of the allegations. As the Board stated in Matter of James H. Kennedy, DP 48/80 (Brd. Opn. p. 132, 1981),

> "Beyond the self-interest which should impel the conscientious lawyer to answer, it is an affirmative duty to do so. This duty has two faces: Responsibility to the Bar and to the public. The duty to the Bar is to help clarify complaints made about its members, so that grievances with merit may proceed, and those without substance may be disposed of quickly. The Bar should not suffer the effects of uncertainty resulting from dangling complaints. The duty to the public relates to fairness to lay people who may have a legitimate grievance . . . Failure to fulfill this dual duty of responding is in itself substantive misconduct and should never be ignored by a panel, or excused as piccadillo unworthy of drawing discipline'.

As the Board stated more recently, in Matter of Michael F. Walsh, 90-102-GA; 90-112-FA, Brd. Opn- 5/7/91.

> "Just as every citizen has an unavoidable duty to respond to inquiries from the Internal Revenue Service, no matter how frightening or distasteful the prospect, members of the Bar have an unavoidable duty to answer Requests for Investigation."

Extending that analogy further, the average citizen may be required to file a tax return even if advised by a government employee that no taxes are actually due. The candor of the Commission's employee regarding the merits of the grievance did not relieve the respondent of the responsibility to file an answer. The Grievance Commission's staff should not be faulted for its continued attempts to emphasize this duty to the respondent by mail and by telephone for a period of almost three months after the expiration of the extension which was granted at his request.

The hearing panel's report also cites the respondent's assertion that he prepared an answer to the Request for Investigation and that he should not be held personally liable for the failure of his employees to see that the document was actually delivered. We are troubled by certain aspects of this defense. For example, the respondent was specifically advised by the Commission's staff that his answer had not been received and he promised that a copy would be hand-delivered on August 23, 1990 yet he took no steps to verify that it had been delivered. Although the copy introduced into evidence is dated June 8, 1990, respondent did not provide a copy to the Grievance Administrator when the formal complaint was filed

in February 1991 and did not actually produce the answer until the hearing on May 14, 1991. Nevertheless, the respondent's testimony was not directly rebutted. As in other cases, the Board defers to the panel in matters of credibility. Schwartz v Walsh, DP 16/83 (Brd. Opn- p. 333, 1984). We do not, however, find that the respondent's version of the events constitutes a valid defense in this case.

This is not the first case in which the Board has encountered the defense that the attorney's good-faith effort to file an answer was thwarted by the negligence of his or her staff. In Matter of Seymour Floyd, 90-129-GA, Brd. Opn- 5/2/91, the respondent offered into evidence his original signed answer to a Request for Investigation with the explanation that it was "inadvertently" not mailed. However, he acknowledged receipt of the Grievance Commission's subsequent notice that an answer had not been received. In that case, the Board increased discipline from a reprimand to a suspension of thirty days for the reason that the record was "devoid of compelling mitigating circumstances related directly to the failure to file an answer."

The "it's my secretary's fault" defense has been employed by another attorney not once, but twice. In Matter of Gerald K. Evelyn, DP 96/83 (Hrg. Pnl. Order of Reprimand, 2/7/84), the respondent was reprimanded by a panel for his failure to answer a Request for Investigation. He explained to the panel that he had given a hand-written copy of his answer to his secretary but that she failed to follow his instructions to type it or deliver it. Four years later, in Matter of Gerald K. Evelyn, ADB 187-87, Brd. Opn-9/2/88, that attorney was again reprimanded by a panel for failure to answer a Request for Investigation. He again offered the defense that he prepared a hand-written answer which he gave to his secretary for typing but that she failed to carry out his instructions. In that case, the Board increased discipline to a suspension of thirty days.

We are not prepared to rule in this case that the failure to file an answer to a Request for Investigation is a per se offense which can never be excused by unforeseen circumstances beyond an attorney's control. However, we do not believe the circumstances in this case warrant an exception to the general rule recited in Matter of Michael Walsh, supra, Matter of James H. Kennedy, supra and other opinions of the Board regarding an attorney's duty to file an answer. Under the circumstances, we believe that the issuance of a reprimand is an appropriate resolution of this case.

John F. Burns, George E. Bushnell, Jr., C. Beth DunCombe and Miles A. Hurwitz

DISSENTING OPINION

We do not believe that the hearing panel's decision to dismiss the complaint was erroneous. We would affirm that decision.

Elaine Fieldman, Linda S. Hotchkiss, M.D. and Theodore P. Zegouras