

STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,
State of Michigan
Attorney Grievance Commission,

Petitioner/Appellant,

v

Benjamin W. Dajos, Jr., P 12448,

Respondent/Appellee.

Case No. 90-103-GA; 90-113-FA

Decided: May 17, 1991

BOARD OPINION

Formal Complaint No. 90-103-GA charged that the respondent neglected two legal matters entrusted to him, failed to apply or return client funds and failed to answer four separate Requests for Investigation. The respondent's failure to answer that complaint prompted a supplemental complaint charging that failure to answer the complaint constituted separate grounds for discipline in accordance with MCR 9.104(7). The respondent's default for failure to answer complaint 90-103-GA was entered by the hearing panel and the proceedings before the panel were confined to the introduction of aggravating or mitigating evidence bearing upon the level of discipline to be imposed. This petition for review has been filed by the Grievance Administrator on the grounds that the Order of Reprimand issued by the panel imposes an insufficient level of discipline in light of the professional misconduct which was established. We agree and increase discipline in this case to a suspension of sixty days.

The complaint charged that the respondent was retained to represent a client in a land contract forfeiture action and that he failed to deliver certain funds to the treasurer's office in payment of outstanding taxes, interest and penalties. In a separate matter, the respondent failed to file and interlocutory appeal in a criminal matter after promising to do so.

In an unrelated divorce case, respondent Dajos failed to have the marital assets appraised and failed to notice the taking of the wife's deposition. The complaint charged that the respondent failed to answer the Request of Investigation in each of those matters and failed to answer a fourth, unrelated, Request for Investigation.

At the hearing on July 19, 1990, the hearing panel denied the request to set aside the default. At that hearing and at a further hearing on October 3, 1990 the respondent was given an opportunity to testify with regard to the allegations of misconduct. Notwithstanding an objection by counsel for the Grievance Administrator that the respondent was improperly attacking the merits of the allegations which had been established by virtue of the default, the panel allowed such testimony, indicating that they took a "liberal" view of the situation (Tr. p. 20). However, the panel announced that it intended to receive the respondent's testimony only for the purpose of gauging its mitigating effect (Tr. p. 18).

As evidence of aggravation, the Administrator's counsel advised the panel that the respondent's license had been suspended for 119 days in 1980 and that he had since been the subject of two non-disciplinary admonishments issued by the Attorney Grievance Commission.

In its report, the hearing panel concluded that the respondent had offered "reasonable explanations for his actions involved with the grievance complaints" but had given no "reasonable explanations for failure to respond to the Request for Investigation [sic] or the formal complaint". The panel determined that a reprimand was the appropriate sanction.

The hearing panel's apparent decision to impose discipline only for the failure to answer Requests for Investigation and formal complaints is not consistent with the finding in the panel's report that the respondent's failure to answer the formal complaint constituted admissions to the allegations.

A similar situation was presented to the Board in Matter of Barry Boyer, ADB 67-88; Brd. Opn. August 11, 1989. There, a panel denied the respondent's motion to set aside a default and announced that the only matter before the panel was the level of discipline. Nevertheless, based upon the respondent's testimony, the panel then ruled that the Administrator had failed to establish misconduct by a preponderance of the evidence and dismissed five of the seven counts in the complaint. In its opinion in Matter of Barry Boyer, the Board stated:

"We again reaffirm our prior rulings that a default for failure to answer a formal complaint in these discipline proceedings constitutes an admission of misconduct and further proceedings on that complaint are limited to a determination of the level of discipline which should be imposed. The panel's decision to dismiss the allegations was erroneous in light of the panel's refusal to set aside the respondent's default."

Similarly, in Matter of David A. Glenn, Case No. DP 91/86, Brd. Opn. February 23, 1987, the hearing panel ruled that the respondent was in default and was entitled to put in evidence only as to mitigation, not as a defense

defense to the charges. Nevertheless, that panel dismissed the count charging neglect of a legal matter. In that case, the Board also determined that the dismissal of that count was in error.

In this case, as in the matters of David A. Glenn and Barry Boyer, supra, the initial finding that misconduct had been established by virtue of the default mandated imposition of discipline as to all counts. See MCR 9.115(J)(3): "If the hearing panel finds that the charge of misconduct is established by a preponderance of the evidence, it must enter an order of discipline. . .". (Emphasis added)

The Board has previously ruled:

"Where even a technical violation of the discipline rules is established, discipline must follow, regardless of the mitigation exhibited . . . respondent's explanation 'in mitigation' could not wholly exculpate him, but could only tend to limit the severity of the discipline imposed" Matter of James H. Kennedy, DP 48/80 Brd. Opn. p. 132 (1981)

In both Glenn and Boyer, cited above, the Board deferred to the panel's consideration of evidence submitted in mitigation and ruled that the acts or omissions directly involving the respondents' clients warranted only a reprimand. In both cases, however, the Board imposed suspensions of thirty days based upon each respondent's failure to answer a Request for Investigation.

The facts in the instant case suggest that greater discipline is warranted. Unlike Glenn and Boyer which each involved a single count of neglect, this case involves the respondent's apparent neglect of matters entrusted to him by three separate clients. Taken together, these matters seem to present a pattern which extends back to 1987 and 1988 when the respondent was admonished for his neglect in two separate divorce proceedings.

Of equal importance is the respondent's failure to answer four separate Requests for Investigation. This apparent indifference is aggravated by his failure to answer the two formal complaints consolidated for hearing in this case. The respondent has simply failed to offer an adequate explanation for his failure to respond to these inquiries. The record is therefore devoid of mitigating circumstances of the type contemplated by the Board in Matter of David A. Glenn, supra where we warned "Lawyers who fail to answer Requests for Investigation and formal complaints do so at their peril and, absent exceptional circumstances, may expect discipline greater than a reprimand".

All concur