STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,
State of Michigan
Attorney Grievance Commission,

Petitioner/Appellant,

v

Michael F. Walsh, P 21947,

Respondent/Appellee.

90-102-GA; 90-112-FA

Decided: May 7, 1991

BOARD OPINION

Based upon his default for failure to answer the two-count formal complaint the hearing panel determined that the misconduct alleged in the complaint was established. Specifically, the panel concluded that the respondent was appointed to represent a defendant in a criminal appeal but failed to perfect a claim of appeal on his client's behalf, failed to respond to his client's inquiries and failed to answer the Request for Investigation filed by the client. Following a separate hearing to determine the level of discipline, the hearing panel ordered that respondent Walsh be reprimanded. The Attorney Discipline Board has considered the Petition for Review filed by the Grievance Administrator and has concluded that modification of the hearing panel's order is warranted. In accordance with the Board's prior rulings, a suspension of thirty days is ordered in light of the respondent's failure to answer the Request for Investigation, his neglect of a criminal appeal and his failure to answer the formal complaint.

The respondent appeared before the panel on July 20, 1990. Although given an opportunity, he did not move to set aside the default and candidly admitted that the allegations in the complaint were true. He was appointed in June 1987 to appeal a criminal conviction. He failed to take any action on his client's behalf and failed to respond to the client's inquiry. The respondent explained to the panel that his law office was in turmoil and he simply lost track of the file. He acknowledged receiving both the Request for Investigation and the formal complaint but admitted that the longer he put off answering, the harder and harder it became until he became incapable of acting.

In announcing their decision to impose a reprimand, the panel's chairman emphasized that they understood the seriousness of the misconduct but that they believed a reprimand was sufficient to achieve the goals of professional discipline. The panel referred specifically to the prior

unblemished record, his volunteer work in the community and to the legal profession (including service as a volunteer investigator for the Attorney Grievance Commission) and his sincere remorse. The panel's report on discipline closes with the statement that a reprimand was imposed "in the firm belief that the respondent's lapses of judgment in this case will not be repeated in the future".

In closing arguments to the panel, the Grievance Administrator's counsel called the panel's attention to the prior ruling of the Attorney Discipline Board in Matter of David A. Glenn, DP 91-86 (1987). Specifically cited was that portion of the Glenn opinion which contains the following warning:

> "Our decision to increase the discipline imposed by the hearing panel from a reprimand to a suspension of thirty days is intended to serve notice upon the respondent and the bar that the lawyer who ignores the duty imposed by the Court Rules to answer a Request 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".

The Board's consideration of this Petition for Review involves a balancing of two important but competing issues: 1) The Board's warning to members of the bar in 1987 in Matter of David A. Glenn that failure to answer Requests for Investigation is likely to result in a suspension of at least thirty days "absent exceptional circumstances"; and 2) A hearing panel's discretion to make decisions on the appropriate level of discipline based upon their first-hand opportunity to observe the respondent.

The Board's decision in Matter of David A. Glenn was certainly not a departure from the Board's prior decisions in cases involving failure to answer a Request for Investigation. The Board has consistently emphasized in the past that failure to answer a Request for Investigation within the time allowed is misconduct per se, MCR 9.104(7) and MCR 9.113(B)(2); Schwartz v Kennedy, DP 48/80 Brd. Opn. p. 132 (1981); Schwartz v Ruebelman, DP 5/81, Brd. Opn. p. 150 (1981); and In re Smith, 35229-A, Brd. Opn. p. 21 (1979). The Board clearly hoped, however, that emphasis in Glenn on the likely consequences of failure to answer would have a greater deterrent effect.

It would not be accurate to describe the Board's decision in Glenn as an iron-clad rule that an attorney who fails to answer a Request for Investigation or formal complaint must receive a suspension of thirty days, no more and no less. A suspension of thirty days is the least suspension which may be imposed in any case under the current provisions of MCR 9.106(2). A longer suspension may be warranted in some cases depending on

the presence of aggravating factors, including a prior disciplinary history for similar acts of misconduct or introduction of evidence showing a wide-spread pattern of misconduct.

On the other hand, the Board clearly envisioned cases in which .exceptional circumstances" could justify imposition of the lowest form of discipline under our rules--a reprimand. Such circumstances should, of course, be considered on a case-by-case basis and it would be impossible to issue a check list or scoring system under which the dividing line between cases warranting reprimand and those warranting suspension could be predicted with any degree of accuracy.

If the Board's opinion in Matter of David A. Glenn is to have continuing vitality, however, careful consideration should be afforded to the words chosen by the Board in its announcement that lawyers who ignore the duty to answer Requests for Investigation will face a disciplinary sanction greater than a reprimand "absent exceptional circumstances" (emphasis added)

In the instant case, the hearing panel's report cites the mitigating effect of the respondent's prior unblemished record during twenty years as a member of the bar along with the candor and remorse which were evident in his testimony to the panel.

In the final analysis, we are simply not persuaded that these mitigating factors alone are exceptional or compelling. Respondent is to be commended for his candid testimony to the hearing panel. No less should be expected from an attorney appearing before a panel or any other tribunal. A lack of a prior disciplinary history should not be overlooked but should al so be considered in light of the fact that the vast majority of Michigan attorneys practice their entire legal careers without disciplinary sanction.

Absent from the record below is evidence of exceptional or compelling circumstances directly related to the respondent's failure to answer the Request for Investigation. He acknowledged receipt of the Request for Investigation but explained that he set it aside "because I had something that I had to do immediately when that came in and it just kept getting to where it got set aside and set aside and then it got to where psychologically I would get the thing and it just--I couldn't--. Partly I couldn't bring myself to respond because I knew I screwed up and had done something wrong". (Tr. p. 13) While the members of the Board are not unsympathetic to the plight of the lawyer who "freezes" upon receipt of an inquiry from the Attorney Grievance Commission, the fact remains that 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. See Schwartz v Kennedy, DP 48/80, Brd. Opn. p. 132 (1981).

The record in this case discloses that the respondent did not answer the Request for Investigation served by mail December 28, 1989, he did not answer the final notice sent by certified mail sent January 24, 1990, he

did not answer the formal complaint served June 8, 1990 and he did not answer a supplemental complaint served July 10, 1990.

Finally, our decision to order increased discipline in this case is based partly upon our consideration of the misconduct alleged in the Request for Investigation, i.e., the respondent's neglect of a criminal appeal on behalf of his client. By taking the opportunity in this opinion to again emphasize the importance of an attorney's duty to answer Requests for Investigation, we do not mean to overlook the fact that these proceedings were prompted by the respondent's failure to perfect a claim of appeal and his apparent failure to respond to the client's inquiries. The Board has previously expressed its concern when a lawyer fails to protect the rights of a jailed client:

> "Practitioners responsible for appeal of criminal matters carry a particularly serious responsibility in preserving the constitutional safeguards of their clients and, in the case of an imprisoned client, maintaining communications which are obviously of such importance to the prisoner. In re: Harrington, #35542-A Brd. Opn. p. 5 (1979)

It is therefore the Board's conclusion that a suspension of the respondent's license to practice law for a period of thirty days is warranted under the circumstances of this case.

John F. Burns, Hanley M. Gurwin, and Theodore P. Zegouras Remona A. Green, not present Linda S. Hotchkiss, M.D. did not participate in this matter

DISSENTING OPINION

George E. Bushnell, Jr., and Elaine Fieldman

We respectfully dissent from the majority opinion to vacate the Order of Reprimand imposed by the hearing panel and the Board's decision to impose a suspension of thirty days.

In disagreeing with our colleagues on the majority, we do not intend to undermine the Board's legitimate emphasis on the duty of every attorney to answer Requests for Investigation. Nor do we, by any means, condone the acts of professional misconduct in this case.

Nevertheless, it is clear that similar concerns were carefully considered and weighed by the members of the hearing panel. In particular, the panel's consideration of the Board's rulings in Matter of David A. Glenn, DP 91/86, (February 1987) and other cases is reflected in the panel's report:

> "Although the panel is aware of the prior decisions of the Board regarding attorneys who fail to answer, we are also aware of our duty to impose a discipline which is intended primarily intended to protect the public and the legal profession. The panel has carefully weighed these factors and has concluded that a suspension in this case may not be the most appropriate form of discipline".

We believe that deference should have been afforded to the hearing panel's decision. Absent a clear of abuse of judgment and discretion, the Board, as an appellate body, should not substitute its judgment for that of the panel which has heard and considered all of the evidence submitted by the parties. The record in this matter is devoid of any such abuse.

The Order of Reprimand should be affirmed.