Grievance Administrator,
Petitioner/Appellant,
v
Terry McCarthy, P-28550,
Respondent/Appellee.

ADB 135-88

Decided: January 13, 1989

BOARD OPINION

The Grievance Administrator has filed a Petition for Review seeking modification of an order of discipline on the grounds that the respondent's failure to answer a Request for Investigation aggravated by failure to answer a Formal Complaint warrants discipline greater than the reprimand imposed by the hearing panel. Based upon our review of the record and the arguments presented by the parties at a review hearing conducted in accordance with MCR 9.118, the order of discipline in this case is modified by increasing discipline to a suspension of thirty days.

The factual issues considered by the hearing panel are not in dispute. A Request for Investigation filed by the Grievance Administrator by a client of Mr. McCarthy was mailed to the respondent on February 3, 1988 in accordance with MCR 9.112(C)(1)(b). The correspondence to Mr. McCarthy on that date included a warning that his failure to submit a full and fair disclosure of the facts and circumstances pertaining to the allegations in the Request for Investigation would be considered misconduct under MCR 9.113(B) and MCR 9.104(7). The respondent's failure to file an answer within twenty-one days resulted in further correspondence from the Grievance Administrator dated March 2, 1988. This letter, entitled "Final Notice", again referred to applicable court rules and was intended to place the respondent on notice that his continued failure to provide the required answer would result in the institution of disciplinary proceedings before the Attorney Discipline Board.

A Formal Complaint based upon the failure to answer the Request for Investigation was filed with the Board on May 26, 1988 and served on the respondent by regular and certified mail on June 6, 1988. His default failure to answer was filed June 28, 1988. The respondent took no action to set aside that default and filed no pleadings prior to the commencement of a hearing on July 18, 1988. The respondent testified that he received the original Request for Investigation but "didn't bother to look at it" because he assumed it pertained to another matter. He requested that the panel gave him an opportunity to answer the initial Request for Investigation.

In arguments to the hearing panel and the Board, counsel for the Grievance Administrator has consistently maintained that the minimum level of discipline which would be appropriate in this case

is controlled by the Board's ruling in Matter of David A. Glenn, (DP 91/86, Brd. Opn. February 23, 1987). In that case, the Board increased discipline in a case involving failure to answer a Request for Investigation from a reprimand to a suspension of thirty days. We noted with dismay in that opinion that seventy-four orders of discipline were issued by the Board in 1986 in cases where the respondent was under a duty to answer a Request for Investigation. In calendar year 1986, sixty-one percent of those disciplined attorneys ignored the duty imposed under MCR 9.113(A) to file a written answer to a Request for Investigation within twenty-one days. We included in that opinion a specific warning to the Bar 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, supra, p. 6.

The report on discipline filed by the panel in this matter reveals that the panel was cognizant of our decision in Glenn but found that a minimum suspension of thirty days was too harsh a remedy under the circumstances of this case. The panel specifically recited the mitigating effect of respondent's prior unblemished record during ten years of legal practice and the apparent lack of substance to the allegations in the underlying Request for Investigation served on the respondent in February 1988.

The respondent's prior unblemished record was a mitigating factor and was properly considered by the panel. See ABA Standards for Imposing Lawyer Sanctions, 1986, Factor 9.32(a); Matter of Ross John Fazio, DP 105/80; DP 143/80, July 10, 1981 (Brd. Opn. p. 146).

We are much less inclined to assign any substantial mitigating weight to the fact that the Request for Investigation ignored by the respondent did not result in additional charges of professional misconduct. In a case cited in our opinion in Matter of David Glenn, we reviewed the unavoidable duty to answer Requests for Investigation. In Matter of James H. Kennedy, DP 48/80, March 10, 1981 (Brd. Opn. p. 132), we stated:

> "Beyond the self interest which should impel conscientious lawyers 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."

We dispel any notion that the duty to answer a Request for Investigation rises or falls depending upon the "seriousness of the charges contained in the Request for Investigation. Presumably,

every grievance filed by a client is "serious" to that client. As the Board has stated, a respondent failing to answer Requests for Investigation may be considered "professionally irresponsible and contemptuous." Matter of James Moore, #35620-A, April 4, 1979 (Brd. Opn. p. 8).

During his oral arguments presented to the Board in connection with the Administrator's petition for review, the respondent stated, "I am as ignorant of these proceedings as anybody off the street would be." The ordinary person off the street has no obligation to demonstrate a minimal understanding of the court rules which govern the disciplinary process. Licensed attorneys do. Unfortunately, the respondent's attitude, as evidenced by that remark, is consistent with an apparent indifference to the importance of these proceedings and that attitude is amply demonstrated in the record below by his failure to file pleadings with the Board at any stage of these proceedings. Under the circumstances, the thirty-day suspension in accordance with our ruling in Matter of David Glenn is warranted.

Martin M. Doctoroff, Remona A. Green, Hanley M. Gurwin, Linda S. Hotchkiss, M.D., Patrick J. Keating and Theodore P. Zegouras.

Correction of Board Opinion

The respondent brings to the Board's attention our factual misstatement regarding the relationship between the respondent and the complainant who filed the Request for Investigation. The Request for Investigation was not, as stated in our opinion, filed by a client of Mr. McCarthy's but by an individual who complained that she was contacted by Mr. McCarthy and that he used rude and abusive language toward her. The error does not, however, have a bearing upon the respondent's duty to answer a Request for Investigation which has been filed with the Attorney Grievance Commission and served by the Grievance Administrator in accordance with MCR 9.112(C)(1)(b).

The respondent also brings to our attention the statement in the opinion that the Grievance Administrator's "final notice" was sent to the respondent and was returned to the Grievance Administrator by the postal service. The mailing of a final notice is not required by the Court Rules. Further language in the opinion regarding respondent's receipt or non-receipt of that notice is not necessary.