GRIEVANCE ADMINISTRATOR,
Petitioner/Appellant,
v
SANFORD KESTON, P-15923,
Respondent/Appellee.

Case Nos. ADB 62-87; 95-87

Decided: December 5, 1988

BOARD OPINION

The Respondent was reprimanded by a hearing panel for his failure to file appeals as appointed counsel in two criminal cases, his contempt citation for failure to perfect an appeal and his failure to answer two Requests for Investigation. The Board has considered the Petition for Review filed by the Grievance Administrator seeking modification for the discipline imposed. The Respondent is suspended for thirty days with an additional condition that he continue regular active participation in Alcoholics Anonymous.

The formal complaint filed by the Grievance Administrator April 21, 1987 alleges that respondent Keston was appointed by the Genesee County Circuit Court as appellate counsel on behalf of Joseph Wendt in October 1983. Except for meeting with his client in March 1984, Mr. Keston filed no pleadings and took no action on his client's behalf despite five written inquiries from Mr. Wendt over a two-year period. Count II charges the respondent with failure to answer the Request for Investigation filed by Wendt in June 1986.

Count III charged that respondent was appointed to represent Daniel L. Williams in July 1983. He visited his client once and spoke with him by telephone in December 1984 but otherwise failed to take any action. As the result of his neglect of that case, respondent was found in contempt by the Genesee County Circuit Court. (Count IV)

The respondent's default for failure to answer the complaint was filed in May 1987. He subsequently filed a motion to set aside the default in which he represented to the panel that he intended to admit most of the allegations. He submitted a proposed answer which did in fact contain admissions to the essential factual allegations. At the hearing before the panel, respondent's counsel stated that his client was admitting the allegations in the complaint and the panel ruled that misconduct had been established.

In mitigation, the respondent testified to the panel that he had very poor office procedures and that these two assigned counsel cases were apparently misplaced in his office, although he does not deny receiving them. As further mitigation, respondent introduced testimony from his wife (who also served as his legal secretary) and a psychiatrist for the purpose of establishing that he had been

an active alcoholic since his college days until March 1987. In that month, respondent was ordered to submit to treatment for alcoholism following a conviction for impaired driving in Oakland County. Mr. Keston testified that it was his third drunk driving arrest in three years and that he had been arrested for drunk driving as many as five times before that.

The hearing panel did not accept the respondent's request for probation under the guidelines of MCR 9.121(C). While the record below adequately supports respondent's contention that he suffered from alcohol addiction, we agree with the panel's conclusion that such alcoholism was not the primary cause of respondent's inability to fulfill his obligations to these two clients or to the Grievance Administrator. The panel did conclude, however, that the respondent had been plagued with the consequences of very poor work habits and office procedures which could be corrected without ordering that he be suspended from the practice of law.

The appeal filed by the Grievance Administrator is based on two arguments. First, it is emphasized that the two criminal defendants that respondent was appointed to represent were "callously ignored" for more that three years. Notwithstanding testimony from the respondent and his secretary as to a disorganized office and some initial difficulty in locating those appellate assignments, the record does show that he was obviously aware of his appointment in both cases when he went to interview his clients in 1984. The respondent has offered no satisfactory explanation for his subsequent failure to file any pleadings or his failure to acknowledge the correspondence from his clients.

In answer to questions posed by the Administrator's counsel, the respondent did not seem to appreciate the damage to those clients. He acknowledged that if either conviction was reversed, then his neglect would have resulted in an extra three to four years of needless incarceration. He seemed to assume, however, that if the convictions were affirmed then the clients had suffered no injury. (Tr. p. 134-135) We must agree with the Grievance Administrator's position that, guilty or innocent, a person who has requested assigned counsel has the right to some communication from counsel and has the right to a timely hearing on the appeal.

It is also argued by the Administrator that the failure to answer the Request for Investigation, aggravated by failure to file a timely answer to the complaint, warrants discipline greater than a reprimand in the absence of some exceptional circumstances. Matter of David A. Glenn, DP 91/86 (Brd. Opn. February 23, 1987). In Glenn, the Board noted its concern that approximately sixty percent of the disciplined attorneys in the previous year had failed to answer a Request for Investigation. The opinion in that case was intended to serve notice to the Bar that failure to ignore the affirmative duty to answer complaints would result in discipline greater than a reprimand.

A suspension of an individual's license to practice law, even for the minimum suspension period of thirty days, obviously entails certain hardships for the attorney and has a deleterious effect on his or her practice. While the hearing panel in this case correctly pointed out that discipline for misconduct is not intended as punishment for wrongdoing [MCR 9.105], we are persuaded in this case that a reprimand would not adequately achieve the goal of the protection of the public, the courts and the legal profession. In arriving at this conclusion, we have considered out stated goal of assuring, to the extent possible, reasonable uniformity among the disciplinary orders issued by the numerous volunteer hearing panels. See Matter of Robert Grimes, #35939-A, (Brd. Opn. p. 118, January 9, 1981).

We do not disagree with the panel's conclusion that respondent's alcoholism does not justify the imposition of an order of probation. However, with the amendment to MCR 9.106(2), effective June 1, 1987, the Board has the authority to attach to a suspension order additional conditions relevant to the established misconduct. But for the respondent's good-faith efforts to recognize and treat his alcoholism, the discipline imposed in this case might have been more severe. We recognize the efforts that respondent has made in that area and, to the extent that his alcoholism was relevant to his admitted neglect of these legal matters, we believe that it would be appropriate to include a requirement that the respondent continue regular and active participation with Alcoholics Anonymous for a period of one year.

Robert S. Harrison, Patrick J. Keating, Charles C. Vincent, M.D., Theodore P. Zegouras.

Dissenting Opinion

Hanley M. Gurwin, Martin M. Doctoroff

We agree the discipline should be increased in this case. However, we would increase discipline to a suspension of ninety days. The Respondent's failure to communicate with the two criminal defendants he was appointed to represent continued long after the files were allegedly misplaced. His failure to extend the simple courtesy of a reply to their requests for information demonstrates an unfortunate lack of understanding of his role as an attorney and counsellor. We are also troubled by Respondent's failure to answer a Request for Investigation and his failure to file a timely response to the Formal Complaint. That misconduct alone would normally warrant the sanction imposed by the Board in this case. In an affidavit in support of his motion to set aside default, Respondent states, "[T]hat at that time Affiant did not appreciate nor did he understand the functions and distinction between the Attorney Grievance Commission and the Attorney Discipline Board--nor does he yet." Given the seriousness of these proceedings and the potential consequences for the Respondent involved, we would expect that an attorney named as a Respondent

would make every effort to acquaint himself with the Court Rules which govern these proceedings.