GRIEVANCE ADMINISTRATOR,
Petitioner/Appellee,
v
GERALD K. EVELYN, P-29182,
Respondent/Appellant.

ADB 187-87

Decided: September 2, 1988

BOARD OPINION

Majority Opinion, Martin M. Doctoroff, Hanley M. Gurwin, Patrick J. Keating and Theodore P. Zegouras.

The hearing panel in this case suspended the respondent's license to practice law for thirty days for his failure to answer a Request for Investigation. The Attorney Discipline Board has considered the Petition for Review filed by the respondent urging that the misconduct alleged in the formal complaint had not been established by a preponderance of the evidence and that the discipline imposed was excessive. The Board has determined that the hearing panel's findings are supported by the record and that the thirty-day suspension should be affirmed.

On July 15, 1987, a Request for Investigation filed with the Attorney Grievance Commission by a former client, was served on the respondent in accordance with MCR 9.112(C)(1)(b). The court rules require that an attorney served with such a request for investigation must, within twenty-one days, file a signed, written answer with the Grievance Administrator. Respondent Evelyn has never claimed that he filed a signed, written answer within twenty-one days. He testified to the panel that he did not file an answer at that time "because I was too busy, because I believed I had additional time". (Hrg. Tr. 1/28/88 p. 30) In his defense, respondent stated that he received a "final notice" from the Grievance Administrator approximately August 10, 1987. Because he was engaged in a lengthy trial, he prepared a handwritten answer to the Request for Investigation which he gave to his secretary with instructions that it be typed, signed for him by the secretary, and delivered to the Attorney Grievance Commission. He testified that he believed that these instructions had been carried out and was surprised when a formal complaint was served in November charging him with failure to answer. Mr. Evelyn's statements regarding his instructions to his secretary were corroborated by another attorney in his office who added that the secretary in question had been discharged and could not be located.

Notwithstanding respondent's speculation as to what might have happened to the answer which he claims to have handwritten, the proofs established that an answer was never delivered to the Attorney Grievance Commission before the filing of a formal complaint. Even if the answer described by the respondent had been delivered according to the respondent's version of events, it would not have not met the requirements of MCR 9.113(A) with regard to timeliness or signature.

The failure to answer the Request for Investigation is the only act of misconduct alleged in the formal complaint filed by the Grievance Administrator. Independent review of the client's claim, without the benefit of Mr. Evelyn's answer, apparently persuaded the Commission that Mr. Evelyn's representation of that criminal client would not support further charges of misconduct. The Board has ruled that the failure to answer a Request for Investigation, however, is misconduct which may warrant a suspension. In Matter of David A. Glenn, DP 91/86, (Brd. Opn. 2/23/87), we reemphasized the unavoidable duty of an attorney to answer such requests and our imposition of a thirty-day suspension in that case was accompanied by notice to the respondent and 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."

The hearing panel in this case was clearly troubled, as we are, by an additional factor which is present in this case. During the separate discipline hearing required by MCR 9.115(J)(2), it was disclosed to the panel that Mr. Evelyn was privately admonished by the Grievance Commission for failure to answer a Request for Investigation in a previous matter. In file No. 52/83, the respondent was defaulted for failure to answer a formal complaint in a timely manner, although the charges of misconduct were eventually dismissed in that case. More recently, however, the respondent was reprimanded by a hearing panel in file No. DP 96/83 for his failure to answer a Request for Investigation. Respondent has admitted that his explanation given to the hearing panel in that case was that he had given a handwritten copy of an answer to his secretary to type and file but that the secretary had not followed his instructions. As the hearing panel members in this case pointed out in their comments at the hearing, Mr. Evelyn's prior experience as the subject of disciplinary inquiries should have created an especially strong desire to see that an appropriate, timely answer was filed. In the prior Order of Reprimand in File No. DP 96/83, filed February 7, 1984, Mr. Evelyn was notified by a hearing panel of its conclusion that he alone was responsible for the acts of his secretary if she failed to transmit an answer to a Request for Investigation and that he, not his secretary, is responsible for assisting the Grievance Administrator in making our grievance process work.

This Board has no desire to punish Respondent Evelyn and that is not the primary goal of these proceedings. Respondent's competence with regard to his handling of his clients' cases is not questioned in this case. On the other hand, we share the panel's concern with respondent's somewhat cavalier attitude toward the responsibility to comply with the court rules and their frustration that a prior admonishment and reprimand have apparently not sufficed to impress upon the respondent the seriousness of these investigations. We are unable to conclude that the panel erred in its decision to impose a suspension of thirty days, the minimum suspension period allowed under MCR 9.106(2).

Dissenting Opinion

By Remona A. Green and Robert S. Harrison

We are unable to discern any way in which the interests of the public, the courts or the legal profession are served by suspending the respondent's license in this case. This is not a case in which an attorney has simply ignored the duty to answer a Request for Investigation. Both the respondent

and his associate stressed to the panel their concern that an answer to the Request for Investigation be filed and their efforts to see that the client's concerns expressed in the Request for Investigation were successfully answered. The respondent, who was engaged as defense counsel in a criminal matter, made a good faith effort to see that the answer was delivered. According to the testimony of Mr. Evelyn and Mr. Sowell, they were satisfied that Mr. Evelyn's secretary had, in fact, hand-delivered the answer to the office of the Attorney Grievance Commission. Had Mr. Evelyn made further efforts to contact the Grievance Commission himself to determine that his instructions had been carried out, he would have discovered that the answer had not been delivered and he could have taken further action to correct the situation. Respondent testified, however, that he was extensively involved in several criminal cases involving capital offenses charged against his clients during that period. We question whether respondent's pre-occupation with those important trials should have been given greater weight as a mitigating factor. We also believe that the discipline imposed should be substantially mitigated by the fact that the client's substantive charges in the Request for Investigation were not deemed worthy of prosecution.

We do not suggest that respondent's failure to take all appropriate steps to see that his answer was properly prepared and filed should be excused. We do think, however, that the circumstances do not require the imposition of a thirty-day suspension. We are confident that a reprimand would have the desired deterrent effect and that a suspension would be unnecessarily punitive.