GRIEVANCE ADMINISTRATOR,
Petitioner/Appellant,
v
MARVIN R. SMITH, P-31393,
Respondent/Appellee

ADB 151-87; 180-87

Decided: May 11, 1988

OPINION OF THE BOARD

Remona A. Green, Hanley M. Gurwin and Theodore P. Zegouras

The Attorney Discipline Board has considered the Petition for Review filed by the Grievance Administrator which requests that the ninety-day suspension imposed by the hearing panel be increased. The misconduct which has been established in this case is aggravated by Respondent's failure to answer or appear at any stage of these proceedings and Respondent has previously been reprimanded for misconduct which included his failure to answer a Request for Investigation and a Formal Complaint. Discipline in this case is increased and Respondent is suspended for a period of one year.

A three count Formal Complaint, ADB 151-87, was filed by the Grievance Administrator on September 9, 1987 and served on Respondent Marvin R. Smith on September 21, 1987. The complaint charged that Respondent was retained in April 1984 by a client to institute an age discrimination suit against an employer but failed to take action on his client's behalf, failed to answer her inquiries regarding the status of the case and failed to refund the unused portion of the fees which had been paid. The complaint further charged that Respondent actively misrepresented the status of the case by telling his client In October 1984 and again in December 1985 that suit had been filed on her behalf in Federal Court. Finally, the complaint charged that Respondent Smith failed to answer a Request for Investigation filed by the client in October 1986, in violation of MCR 9.113(A). Upon the entry of Respondent's default for failure to answer this Formal Complaint, a second Complaint, ADB 180-87 was filed and served.

The hearing panel to which this case was assigned convened on November 9, 1987. The Respondent did not appear or otherwise communicate with the panel despite the mandatory language of MCR 9.115(H) that he appear in person. The panel ruled that the default had been properly entered and Constituted Respondent's admissions to the allegations in the Complaint. The panel concluded that Respondent's conduct violated the provisions of MCR 9.104(1-4,7); MCR 9.103(C); MCR 9.113(B)(2) and Canons 1, 2, 6 & 7 of the Code of Professional Responsibility, DR 1-102(A)(1,4-6); DR 2-110(A)(3); DR 6-101(A)(3) and DR 7-101(A)(1-3). The panel noted Respondent's prior reprimand and imposed a suspension of ninety days with the further condition that Respondent make restitution to his client in the amount of $750.00.

The Petition for Review filed by the Grievance Administrator resulted in the issuance by this Board of an Order to Show Cause directing the Respondent and the Grievance Administrator to appear before the Board on February 24, 1988 to show cause why the hearing panel's order should not be amended. Respondent Smith again failed to appear or communicate with the Board, despite the requirement that he appear personally [(MCR 9.118(C)(1)].

An attorney suspended for a period of 119 days or less may resume the active practice of law by filing an affidavit with the clerk of the Supreme Court attesting that he or she has complied with the terms of the discipline order. [(MCR 9.123(A)]. No personal appearance is required and no further inquiry is made with regard to the attorney's understanding of or attitude toward the obligations which are imposed on all members of the Bar. Restoration of Respondent's license under such a procedure would not be appropriate in this case.

Based upon a Request for Investigation filed by Respondent's client, Shirley Stanley, Respondent was charged, among other things, with lying to Ms. Stanley about her case. The Complaint filed by the Administrator specifically charged that Respondent told his client-in October 1984 and December 1985 that he had instituted an age discrimination suit on her behalf in Federal court although he knew or should have known that no such case had been filed. Respondent Smith has chosen not to answer those charges and therefore his default was properly deemed to be an admission of the misconduct alleged, see Matter of Daune Elston DP 110/82, December 1982 (Brd. Opn. p. 238); In the Matter of David A. Glenn, DP 91/86, ADB Opn. February 23, 1987.

The findings of the hearing panel in this case establish that the Respondent has violated those principles of trust and confidence which form the very cornerstone of our legal system. As this Board noted in a recent opinion, our legal system depends, in large part, upon the assumption that attorneys, as officers of the court, are telling the truth when they make statements about the cases they are handling, see Matter of Mary E. Gerisch, ADB 171-87; 197-87, ADB Opn. April 28, 1988. An attorney who has lied to his client to hide his neglect should not, in fairness to the courts, the public and the legal profession, be returned to the practice of law without assuming the responsibility of demonstrating that deficiencies in that area have been recognized and overcome.

We are also troubled by Respondent's continuing disregard for his obligation to comply with the rules governing the handling of complaints against lawyers. Respondent Smith was reprimanded in a previous case for his failure to answer a Request for Investigation filed by a client in June 1985. In that case, DP 133/85; DP 157/85, the Formal Complaint served on him by the Administrator in November 1985 was unanswered by the Respondent and that hearing panel denied his motion to set aside the default. In the instant case, we are presented with Respondent's failure to answer a Request for Investigation served in October 1986, his failure to respond to a warning letter from the Attorney Grievance Commission in November 1986, his failure to appear before the hearing panel in November 1987 and his failure to appear at show cause proceedings before the Board in February 1988. We are therefore faced with a pattern stretching over a two and one half year period of an inability or unwillingness to comply with the court rules pertaining to our discipline system.

An attorney whose license has been suspended for more than 119 days must establish by clear and convincing evidence that he or she has a proper understanding of and attitude toward the

standards that are imposed on members of the Bar and will conduct himself or herself in conformity with those standards, MCR 9.123(B)(6). Unfortunately, the record before us contains a prima facia showing that this Respondent clearly lacks an understanding of those standards. We are therefore unable to affirm an order of discipline which would allow him to resume the practice of law without the necessity of the reinstatement proceedings described in MCR 9.123(B).

Respondent's failure to answer or to appear in these proceedings would justify an increase in discipline and would be in accordance with our prior ruling in Matter of Peter Moray, DP 143/86; DP 157/86, ADB Opinion March 4, 1987. In that case, we stated:

> Apart from any considerations of deterrence, we conclude that protection of the public and the legal system demands that, as a general rule, the Respondent who has failed to answer a Request for Investigation, failed to answer the Formal Complaint and failed to appear before the hearing panel should be suspended for a period of 120 days.

In that case, we referred to the minimum suspension period of 120 days which triggers the reinstatement procedure described in MCR 9.123(B). Discipline in that case was increased to 150 days, however, in light of the additional further aggravating effect of respondent's failure to appear before the Board in response to an Order to Show Cause.

In this case, we consider not only Respondent's previous indifference to his responsibility to answer and his failure to appear before the Board but also the serious nature of the underlying misconduct reported by the panel. We conclude that a suspension of one year is warranted.

CONCURRING OPINION

Robert S. Harrison and Patrick J. Heating

We agree with the result reached by the majority and believe that a suspension of one year is appropriate in light of this Respondent's continuing history of apparent indifference to his responsibility to answer or appear during these proceedings. This Board's decision in Matter of Peter Moray, DP 143/86; DP 157/86, ADB Opinion March 4, 1987 does not represent a change in philosophy on the Board's part and we have long recognized that failure to answer or appear during these proceedings constitutes much more than a mere technical violation of the rules. In a 1979 opinion, we ruled that a respondent failing to answer Requests for Investigation may be considered "professionally irresponsible and contemptuous" In Re: Moore, 1/35620-A, State Bar Grievance Board (1979) and we noted the following year that failure to answer may indicate "a conscious disregard for the rules of the court", In the Matter of Ruebelman, 1/36527-A, Attorney Discipline Board (1980).

The reasons for this concern were more fully explained by the Board In Matter of James H. Kennedy, DP 48/80, March 10, 1981, (Brd. Opn. p. 132) in which a hearing panel order of dismissal

was reversed and a 121 day suspension imposed. Speaking to Respondent's admitted failure to answer a Request for Investigation the Board stated:

> Members of the Bar have an unavoidable duty to answer Requests for Investigation. These requests are complaints, generally made by members of the public, against attorneys. Beyond the self-interest which should impel conscientious lawyers to answer, it is an affirmative to do so. This duty has two faces: responsibility to the Bar and to the public.

We do not agree, however, that the neglect of a client matter or the misrepresentation to a client alleged in the Formal Complaint have been "established" and we do not believe that such misconduct should be cited as grounds for an increase in discipline. No testimony or documentary evidence of any kind was introduced at the hearing to support those allegations of misconduct. Notwithstanding the Board's opinion in the Matter of Daune Elston, DP 100/82, December 1982 (Brd. Opn., p. 238), we are unwilling to ascribe to the proposition that discipline may be imposed for alleged misconduct in a default case without the proper verification.