GRIEVANCE ADMINISTRATOR,
Petitioner/Appellant,
v
SIDNEY R. BORDERS, P-11006,
Respondent/Appellee.

ADB 2-87

Decided: April 12, 1988

BOARD OPINION

A Petition for Review was filed in this case by the Grievance Administrator seeking an increase in the discipline imposed by the hearing panel. The Attorney Discipline Board adopts the recommendation of the sub-board which was convened in accordance with MCR 9.118(C)(1). The hearing panel Order of Reprimand is affirmed. In addition, Respondent is assessed additional costs in the amount of $750.00 as reimbursement to the State Bar of Michigan for the needless expenditure of time by the hearing panel members, the Attorney Discipline Board, the Attorney Grievance Commission and the members of their respective staffs caused by Respondent's failure to answer the Requests for Investigation and his failure to file a timely answer to the Formal Complaint.

On May 6, 1986, Respondent was served with a Request for investigation which directed that he file an answer fully and fairly disclosing all the facts and circumstances pertaining to allegations of professional misconduct submitted by a former client. A second Request for investigation submitted to the Grievance Administrator by the client's wife alleged further misconduct in connection with a separate legal matter and that Request for investigation was served on Respondent on or about May 19, 1986. MCR 9.113 requires that an attorney file an answer to a Request for investigation within twenty-one days after service and the rule grants the Grievance Administrator authority to allow further time to answer. The record in this case discloses that Respondent Borders neither answered the Requests for investigation nor complied with extensions of time granted by the Grievance Administrator despite a "final notice" in July 1986 advising that his refusal to answer would result in the institution of discipline proceedings.

On November 24, 1986, the Grievance Administrator filed a four-count complaint against Mr. Borders. Counts I and III were based on the allegations of misconduct submitted by Toma Juncaj and his wife Drane Juncaj in their respective Requests for investigation. Counts II and IV recited Respondent's failure to answer the Requests for Investigation served in May 1986. This complaint was served on Respondent by certified mail and was accompanied by the Board's instruction Sheet which contained the following warning:

> "Failure to file a timely answer will result in default and constitutes separate, actionable misconduct. See MCR 9.113 and MCR 9.115(D)(2)." (original emphasis)

Respondent's default for failure to answer was filed December 30, 1986. On January 16, 1987, Respondent finally filed a written response to the allegations first made in May 1986, in the form of a Motion to Set Aside Default accompanied by a proposed Answer.

At the hearing before the panel, Respondent's motion to set aside the default was taken under advisement and was ultimately denied by the panel for the reason that Respondent had failed to establish good cause as required by MCR 2.603(D). Nevertheless, the panel ruled that the evidence presented by the parties prior to the ruling on that motion did not establish misconduct by a preponderance of the evidence as to counts I and III. The hearing panel determined that Respondent's failure to answer the two Requests for investigation did constitute misconduct warranting a reprimand.

Although the Petition for Review filed by the Grievance Administrator sought reversal of the panel's dismissal of those counts, counsel for the Grievance Administrator withdrew that claim during the review proceedings. The sub-board which considered the arguments of the parties was asked to rule only on the issue of whether or not the reprimand imposed by the panel constitutes an appropriate discipline in light of Respondent's failure to answer the Requests for investigation.

The Board is unable to accept the argument of the Grievance Administrator that this case is directly controlled by our ruling in Matter of David A. Glenn, File No. DP 91/86, Attorney Discipline Board Opinion February 23, 1987. In that case, we imposed a suspension of thirty days in the case of an attorney who had offered no explanation for his failure to answer a Request for investigation. We emphasized that the court rules promulgated by the Supreme court are explicit in their requirement that an attorney shall answer such requests and that "the failure of a Respondent to answer within the time permitted is misconduct". MCR 9.113(B)(2), MCR 9.104(7). In our opinion in that case, we expressed our dismay that approximately sixty per-cent of the attorneys disciplined for misconduct in Michigan in 1986 failed to answer at least one Request for investigation and we characterized our opinion as a 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 peril and that, absent exceptional circumstances, that attorney may expect a discipline greater than a reprimand." Matter of David A. Glenn, supra.

The respondent in this case notes that the Requests for investigation served upon him were received approximately ten months prior to the Board's "warning" to the Bar in the David A. Glenn case. The Board's February 1987 opinion in Matter of David A. Glenn, was certainly not the first opinion by this Board to emphasize the importance of an attorney's duty to answer a Request for investigation. in a 1981 opinion, the Board ruled that:

> Members of the Bar have an unavoidable duty to answer Requests for investigation . . . a respondent failing to answer Requests for Investigation may be considered 'professionally irresponsible and contemptuous' . . . this Board has recognized that failure to answer also indicates a conscious disregard for the rules of the court. in the Matter of James H. Kennedy, File No. DP 48/80, (Brd. Opn. p. 132, 1981).

Nevertheless, our opinion in Glenn contained a prospective policy regarding the minimum discipline to be imposed in all but the most exceptional cases involving failure to answer Requests for investigation. In this case involving failures to answer in 1986, we choose to defer to the conclusion drawn by the hearing panel that a suspension is not required.

We must, however, make it clear that we reject Respondent's claim that his busy schedule attending to his clients' affairs excused his failure to answer these Requests for investigation. There is no suggestion that the Grievance Administrator acted unreasonably and Mr. Borders acknowledges that his requests for extensions of time to answer were granted by the Administrator's staff. While we do not in any way minimize the importance of Respondent's duty to his clients, his duty to the Supreme Court and the legal profession clients demanded that he find time, between May 1986 and December 1986, to answer the Requests for investigation. Had he done so, the record before us strongly suggests that the Attorney Grievance Commission's inquiry would have been closed without the necessity of the filing of a Formal Complaint, the assignment of the case to a hearing panel of three volunteer attorneys, the consideration of this matter by the volunteer lawyers and lay people who constitute the Attorney Discipline Board and the Attorney Grievance commission, and the attendant expenditure of time by the staffs of those two agencies.