GRIEVANCE ADMINISTRATOR,
Petitioner/Appellant,
v
RICHARD W. BOHAN, P-10950,
Respondent/Appellee.

File No. DP 108/86

Decided: February 8, 1988

BOARD OPINION

The Grievance Administrator seeks review of an Order of Reprimand issued by the hearing panel for Respondent's admitted failure to answer a Request for Investigation. The Attorney Discipline Board agrees that an increase in discipline is warranted in light of this Respondent's prior disciplinary history. The order of discipline is modified to a suspension of thirty days.

The Grievance Administrator filed a two-count complaint which charged that the Respondent neglected a personal injury case which he was retained to handle in 1978. The second count of the Complaint alleged that the client's Request for Investigation was served by the Grievance Administrator on February 28, 1986 but was not answered by the Respondent despite a further written notice sent by certified mail April 1, 1986 advising Mr. Bohan that failure to answer a Request for Investigation would result in the institution of disciplinary proceedings.

The record below discloses that the Formal Complaint was served by mail on October 7, 1986 and that Respondent's default for failure to file a timely answer to the Complaint was filed November 12, 1986. A Motion to Set Aside Default was filed on Respondent's behalf on November 25, 1986 acknowledging his failure to file timely answers to the Request for Investigation or the Formal Complaint. The Motion was accompanied by Respondent's Affidavit which stated that he has a record of prior suspensions arising from Requests for Investigation and Formal Complaints and that he "froze" when he received the pleadings in this case. The Motion to Set Aside Default was granted and the case proceeded to a hearing on the merits.

Based upon the testimony of the Respondent and the Complainant and the documents offered as exhibits, the hearing panel concluded that the charges of neglect contained in Count I of the Complaint had not been established by a preponderance of the evidence and that Count was dismissed. The panel ruled, however, that Respondent's admitted failure to answer the Request for Investigation constituted professional misconduct in violation of MCR 9.104(1,4,7), MCR 9.113(B)(2) and Canon 1 of the Code of Professional Responsibility, DR 1-102(A)(1,5,6). In a separate report on discipline filed in accordance with MCR 9.115(J)(2), the panel included a summary of Respondent's admonishments by the Grievance Administrator in February 1971, February 1972 and March 1987 along with a summary of his prior misconduct resulting in a thirty-day suspension effective December 18, 1972, a ninety-day suspension effective February 2, 1979 and a ninety-day suspension effective June 26, 1981. The panel noted in mitigation that Respondent Bohan had expressed his remorse for his failure to file an answer to the Request for

Investigation and had stated to the panel that he had not taken this proceeding lightly. The Grievance Administrator appeals the panel's conclusion and argues that a suspension is warranted in this case.

It cannot be said that the Board has failed to emphasize in the past that failure to answer a Request for Investigation within the time allowed is misconduct per se, in violation of MCR 9.104(7) and MCR 9.113(B)(2). In an opinion issued in March 1981, for example, we noted that:

> "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 duty to do so. This duty has two faces: responsibility to the bar and to the public . . . a respondent failing to answer Requests for Investigation may be considered "professionally irresponsible and contemptuous"." In Re Moore, 35620-A, State Bar Grievance Board (1979). This Board has recognized that failure to answer also indicates "a conscious disregard for the rules of the Court." Schwartz v Ruebelman, 36527-A, Attorney Discipline Board 1980" In the Matter of James H. Kennedy, DP 48/80, March 10, 1981 (Brd. Opn. p. 132)

More recently, we cited those concerns in our opinion in Schwartz v Glenn, DP 91/86, February 23, 1987, in which the Board increased an Order of Reprimand to a suspension of thirty days for an attorney's failure to answer a Request for Investigation. In that opinion, we stated that the increased discipline was "intended to serve notice upon 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 "warning" in February 1987 had not, of course, been issued at the time Respondent Bohan was served with the Request for Investigation. Our decision to increase discipline in this case is not mandated by the warning contained in the Glenn case but is based upon our concern that this Respondent, whose prior contacts with the discipline system have resulted in three admonishments and three suspensions, was not able to conduct himself in conformity with the standards imposed on members of the bar as a condition of the privilege to practice law.

The Board has long recognized the mitigating effect of a Respondent's prior unblemished record. See In the Matter of James Moore, File No. 35620-A, April 1979, (Brd. Opn. p. 8); Schwartz v Conley, DP 169/83, May 9, 1985 (Brd. Opn. p. 366). By the same token, however, we must, at some point, consider the aggravating effect of a Respondent's prior history of misconduct and this view is supported by the American Bar Associations' Committee on Professional Sanctions which has defined the presence of prior disciplinary offenses as an aggravating circumstance that may justify an increase in the discipline to be imposed. Standards for Imposing Lawyer Sanctions, 1986, Standard 9.22(a). Mr. Bohan has been suspended from the practice of law on three occasions and has been admonished by the Grievance Administrator in three other matters, as recently as March

1987. He is not unfamiliar with the operation of the discipline system. Under the circumstances, a "warning" in the form of a Reprimand would not seem to be appropriate.

Finally, we note as a further aggravating factor Respondent's failure to appear before the Board in response to the Board's Order to Show Cause setting the date and time for a review hearing in this case. We have ruled in the past that a respondent's failure to appear for hearing before the Board may be considered as evidence of his or her attitude toward these discipline proceedings, In the Matter of Donald C. Huber, DP 40/82, July 29, 1983 (Brd. Opn., p. 290).

The order of discipline imposing a reprimand in this case is modified by increasing to a suspension of thirty days.

All concur.