

GRIEVANCE ADMINISTRATOR,
Petitioner/Appellant,

v

O. LEE MOLETTE, P 17877
Respondent/Appellee.

File No. DP 20/85

Decided: March 4, 1987

OPINION OF THE BOARD

Based upon the evidence presented, including the testimony of the Respondent, the Hearing Panel concluded that: 1) although the evidence was insufficient to establish that Respondent misappropriated client funds, Respondent committed professional misconduct by his failure to place those funds in a client trust account; 2) Respondent did not advise his client that his license to practice law was suspended on two separate occasions subsequent to his retention; 3) Respondent negligently, but not intentionally, submitted false Affidavits of Compliance to the clerk of the Supreme Court with respect to his notification to that client that he had been suspended; and 4) Respondent did not competently represent the interests of his client.

The Hearing Panel, acting on the mistaken assumption that the two suspensions referred to in the pleadings constituted Respondent's entire disciplinary history, imposed a suspension of thirty days. We affirm the Panel's factual findings but increase the discipline to a suspension of 120 days.

The Petition for Review filed by the Grievance Administrator urges that a thirty day suspension is clearly insufficient in this case on either of two grounds: First, that the misconduct found by the Panel would warrant a greater suspension and, secondly, Respondent's seven prior disciplines for professional misconduct are sufficiently aggravating to require a substantial increase.

The record below discloses that Respondent was retained by Edward Anderson in March 1981 for assistance in a matter involving the revocation of Anderson's driving privileges for his failure to satisfy a claim against him by the State Uninsured Motorist Fund. Respondent accepted a retainer of \$150.00 and agreed to attempt a settlement with the Secretary of State. In August 1981, the Secretary of State's Office agreed to settle the matter for \$422.00 and Anderson delivered the sum of \$500.00 to Respondent to be forwarded by him to Lansing.

At the hearing, Respondent acknowledged that he did not place the \$500.00 in a client trust account as required by Canon 9 of the Code of Professional Responsibility but simply placed the funds in Anderson's file. While there was conflicting testimony at the hearing between Respondent and an Assistant Attorney General as to what further directions, if any, were to be received by Respondent before forwarding the money, it was admitted that the case was not closed and that some time in the middle of 1982 Mr. Anderson's file, still containing the \$500.00, was placed in Respondent's closed files. After that, Respondent took no further action on his client's behalf and, apparently, put the matter out of his mind.

On February 7, 1983, Respondent was suspended for a period of thirty days and in April 1985 he was suspended for 120 days. Although he claimed in his Affidavits of Compliance that he had "notified his clients in all pending matters" of those suspensions, Respondent acknowledges that he did not notify Mr. Anderson. The Hearing Panel found that his failure to notify his clients constituted a violation of the applicable court rule but that since Anderson's file was not in his "open" files, the failure to include that client's name in connection with his Affidavit of Compliance was negligent rather than intentional. The Panel further found that Respondent improperly placed client funds in his file rather than in a client trust account but ruled that there was not sufficient evidence to establish that any client funds were misappropriated. Finally, the Panel determined that the Respondent "wholly failed to competently and expeditiously represent the interests of his client."

Review of the Panel decision will be on the basis of whether, upon the whole record, there is proper evidentiary support, In Re Del Rio, 407 Mich 336; 285 NW2d 277 (1979) and whether those findings are supported by competent, material and substantial evidence. In The Matter of Philip E. Smith, File No. 35166-A (1981) (Brd. Opn. p. 115). While the Grievance Administrator emphasizes the seriousness of Respondent's misconduct, noting for example that MCR 9.123(A) provides that a false statement contained in an Affidavit of Compliance is ground for disbarment, the Hearing Panel made specific findings of fact which emphasized the un rebutted testimony of the Respondent that he accidentally placed Mr. Anderson's file in his closed files and that his failure to notify his client of his suspension was unintentional. In the Panel's view, Respondent's conduct in this entire matter was characterized by his neglect rather than fundamental dishonesty. Our review of the record leads us to the conclusion that there is evidentiary support for such a finding.

Taking into consideration the mitigating effect of the Respondent's return of the client funds prior to the commencement of the formal disciplinary proceedings, Respondent's unintentional, neglectful conduct would not necessarily require increased discipline if the record were devoid of aggravating factors.

In our review of the discipline imposed we must, however, consider the extremely aggravating effect of this Respondent's dismal disciplinary history of seven public disciplines including Reprimands in 1971, 1976 and 1978, a thirty day suspension in 1983, a 120 day suspension and a sixty day suspension in 1984, and a 120 day suspension in 1986. In weighing the effect of that disciplinary record, it should be noted that it has been more than fifteen years since Respondent was first reprimanded and that he practiced law without incident from 1971 to 1976 and again from 1978 to 1983. Nevertheless, even if the three Reprimands from 1971 to 1978 are discounted somewhat, Respondent's disciplinary history since 1983 clearly reflects a pattern of misconduct which should be a cause of concern.

It cannot be said that this Respondent has not been warned. Mr. Molette appeared before the Board in 1981 Matter of O. Lee Molette, File No. 35391-A (May 1981) (Brd. Opn. p. 143). In that case, the Board increased a Hearing Panel Order of Reprimand to a suspension of thirty days for Respondent's neglect of a client's personal injury case and his failure to answer two Requests for Investigation. The majority opinion stated:

We think the discipline ordered by the Hearing Panel is insufficient "to insulate our judicial system and the consumer of legal services" in view of Respondent's pattern of misconduct. He cannot claim inexperience or ignorance of disciplinary procedures. If one respondent's unblemished past record may act as mitigation . . . then evidence of another respondent's repeated misconduct may evidence the need for more severe discipline. Matter of O. Lee Molette, (Brd. Opn. p. 144).

Since the Board expressed its concern in that case in 1981, Respondent Molette has been the subject of three more discipline orders. The goals of these disciplinary proceedings, the protection of the public, the courts and the legal profession, would not be served by the imposition of a suspension which may be terminated automatically by the Respondent by the filing of an Affidavit of Compliance. We modify the Hearing Panel Order of Suspension by increasing to a suspension of 120 days and until Respondent has established his eligibility for reinstatement to the satisfaction of a hearing panel in accordance with MCR 9.123(B) and MCR 9.124.

Concurring: Martin M. Doctoroff, Hanley M. Gurwin, Odessa Komer and Charles C. Vincent, M.D.

Abstaining: Remona A. Green and Robert S. Harrison.