

GRIEVANCE ADMINISTRATOR,  
Petitioner/Appellant,  
v  
PETER H. MORAY, P-17953  
Respondent/Appellee.

File Nos. DP 143/86; DP 157/86

Argued: January 28, 1987  
Decided: March 4, 1987

OPINION OF THE BOARD

The Petitioner in this matter, the Grievance Administrator, seeks review of a Hearing Panel Order of Reprimand in light of the Respondent's failure to answer two Formal Complaints, his failure to appear before the Hearing Panel, and the Panel's finding that Respondent failed to provide legal services in a divorce case, failed to honor a commitment to pay for publication of a legal notice and failed to answer two Requests for Investigation. It is the Board's unanimous determination that the imposition of a reprimand in such a case is inconsistent with the goals of our system of professional discipline. The Hearing Panel Order is modified by increasing discipline to a suspension of 150 days.

A Formal Complaint was filed with the Attorney Discipline Board and served upon Respondent Moray in accordance with the Rules on September 16, 1986. No Answer was filed. A Default was entered and served upon the Respondent along with a second Formal Complaint. No Answer was filed and the Respondent did not appear at the scheduled hearing before the panel on October 22, 1986. There is no indication in the record that Mr. Moray attempted to communicate in any way with the Discipline Board, the Hearing Panel Members or the Grievance Commission following service of the first Complaint.

The Hearing Panel Report recites its finding that the allegations in the Formal Complaints were established. In brief summary, the Panel found that Mr. Moray was retained to represent a client in a divorce matter in November 1984, that he failed to institute proceedings on his client's behalf and failed to communicate with his client. Respondent failed to pay for the publication of an Order to Answer published at his request in the Oakland County Legal News in October 1985. Respondent failed to answer Requests for Investigation served by the Grievance Administrator in May 1986 and June 1986. Finally, Respondent's failure to answer the first Formal Complaint was deemed to constitute a further violation.

At the conclusion of the hearing on October 22, 1986, the Hearing Panel returned from its deliberations and announced its decision that a suspension would not be in order. The Panel Chairman explained:

We are sensitive to the -- and share the concern that Mr. Moray has apparently dropped off the face of the earth and not communicated with the State Bar Grievance Administrator [sic] and that is a legitimate concern. On the other hand, there are any number of plausible explanations for that, which do not subject [him to] misconduct ... Certainly, we do not condone or minimize the seriousness of it but, in the grand scheme of things, the underlying misconduct is not that grievous. (Tr. 10/22/86, pp. 11 & 12)

Although not entirely clear, it appears that the Panel's reference to the "underlying misconduct" concerns the finding that Respondent neglected to perform legal services on behalf of a client and failed to pay for the publication of an Order in a legal journal. Upon a finding that misconduct had been established as to either of those two counts, the Panel was required by MCR 9.115(J) (2) to enter an Order of Discipline. No matter how "grievous", a reprimand was the most lenient form of discipline which the panel could imposed for that misconduct.

It would appear then that Respondent's failure to answer the Request for Investigation served in May 1986, his failure to answer the Request for Investigation served in June 1986 and his failure to answer the Formal Complaint served in August 1986 were not considered by the Panel to be of sufficient gravity to warrant the imposition of additional discipline. Furthermore, the Panel was not, apparently, greatly concerned by Respondent's failure to attend the hearing although his appearance was specifically required by the provisions of MCR 9.115(H).

In 1981, the Attorney Discipline Board issued an Opinion in the Matter of James H. Kennedy, DP 48/80, March 10, 1987, (Brd. Opn. p. 132), reversing a hearing panel order of dismissal and imposing a suspension of 121 days. In that case, the Board specifically noted Respondent's admitted failure to answer a Request for Investigation and the Board's Opinion rejected the notion that the failure to answer a Request for Investigation is merely a "technical violation":

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. The duty to the Bar is to help clarify complaints made about its members, so that grievances with merit may proceed, and those without substance may be disposed of quickly. The Bar should not suffer the

effects of uncertainty resulting from dangling complaints. The duty to the public relates to fairness to lay people who may have a legitimate grievance . . .

Failure to fulfill the dual duty of responsibility is in itself substantive misconduct, and should never be ignored by a hearing panel or excused as a peccadillo unworthy of drawing discipline. A Respondent failing to answer Requests for Investigation may be considered "professionally irresponsible and contemptuous." In re Moore, No. 35620-A (State Bar Grievance Board 1979) (per curiam). This Board has recognized that failure to answer also indicates "a conscious disregard for the rules of the Court." Schwartz v Ruebelman, No. 36527-A (Attorney Discipline Board, 1980).

In Kennedy cited above, Respondents failed to answer a Request for Investigation and/or a Formal Complaint but did eventually appear personally before the hearing panel to explain the surrounding circumstances. Respondent Moray, however, has neither answered the legitimate inquiries of the Grievance Administrator nor has he appeared in person at the hearing before the Panel or the review proceedings conducted before this Board.

In his remarks at the conclusion of the hearing, the Panel Chairman in this case acknowledged the "concern" that Mr. Moray "apparently dropped off the face of the earth" but noted that "there are any number of plausible explanations for that." (Tr. p. 11)

We do not believe that our duty to protect the Court, the public, and the legal profession allows us to make such an assumption. At the time of the hearing, Respondent Moray had, for whatever reasons, failed to answer two Requests for Investigation, failed to answer two Formal Complaints and failed to appear at the hearing. The record before the panel clearly established that he was unwilling or unable to discharge certain obligations required of licensed attorneys. The burden was clearly upon Respondent to come forth and offer any explanation concerning his failure to respond to the discipline process. It would be error for the Hearing Panel to speculate as to the plausibility of the reasons for an attorney's failure to appear.

In prior opinions, we have referred to such failures as evidence of a "contemptuous" attitude. In re Moore, 35620-A (State Bar Grievance Board 1979). The Board realized that there may be other circumstances which may explain an attorney's failure to communicate with discipline agencies in matters directly involving his or her livelihood. It is "plausible", for example, that such an attorney may be physically or mentally incapacitated by illness or substance abuse, may have left the State of Michigan or may have

abandoned the practice of law. In such cases, the continued licensure of the attorney may constitute a danger to the rights of the attorneys' clients. By reprimanding the attorney who fails to answer or appear, or by suspending for a period which will be automatically terminated by the filing of an Affidavit of Compliance, the discipline system sends a message to the public and to the profession that we are willing to gamble that an attorney's repeated failure to comply with the rules is not the result of a physical or mental problem which jeopardizes the rights of the attorney's clients or to the administration of justice.

We are not willing to take that chance. 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.

Under the Court Rules governing these disciplinary proceedings, the only mechanism by which a panel or the board can insure contact with disciplinary authorities is by ordering a suspension of sufficient duration as to require reinstatement proceedings under the provisions of MCR 9.123(B) and MCR 9.124. Under the provisions of MCR 9.123(B), an attorney who is suspended for 120 days or more is not eligible for reinstatement until he/she has petitioned for reinstatement and has appeared personally for cross-examination before a hearing panel to "answer fully and fairly under oath all questions on his/her eligibility for reinstatement."

We note that the attorney seeking reinstatement in proceedings under MCR 9.123(B) and 9.124 must, among other things, establish by clear and convincing evidence that he/she "has a proper understanding of and attitude toward the standards that are imposed on members of the Bar and will conduct himself/herself in conformity with those standards." MCR 9.123(B)(6). We conclude that a Respondent who fails to answer Requests for Investigation, fails to answer Formal Complaints and fails to appear at the hearing has, by definition, made a prima facie showing that he/she does not have a proper attitude toward the standards imposed on members of the Bar and that he/she cannot or will not conform to those standards.

In the present case, we do not find it at all unreasonable that Respondent be suspended for more than 120 days and until he has, at long last, come forward to explain his apparent indifference to his responsibilities under the Court Rules.

In this case, the complete absence of any evidence which might be considered in mitigation is coupled with the aggravating effect of Respondent's failure to appear before the Board in response to an Order to Show Cause. The Hearing Panel Order of Discipline is modified by increasing the Reprimand to a suspension of 150 days.

All concur.