GRIEVANCE ADMINISTRATOR,
v
RICHARD NELSON, P-18237
Respondent.

File No. DP 26/85

Decided January 24, 1986
Issued: February 20, 1986

Chairman Patrick J. Keating; Secretary Charles S. Vincent, M.D.; and Board Members Robert S. Harrison and Odessa Komer concurred in the Opinion of the Board.

Vice-Chairman Martin M. Doctoroff and Member Remona A. Green, dissented.

Member Hanley M. Gurwin did not participate in the decision of this case.

OPINION OF THE BOARD

Respondent was charged with neglecting the criminal appeal of an imprisoned client after Respondent was appointed in November 1982 to represent him.[1] Respondent admitted the charges by default and presented a statement in mitigation before the panel. He was suspended for sixty days. We reduce discipline to a reprimand, with emphatic warning to Respondent that further misconduct of this type may well result in a substantial suspension.

Respondent had not requested the court appointment at issue here; in fact, he has not sought appellate appointments since 1979. At the time of this appointment, Respondent practiced with another attorney who did take such cases. Upon receiving notice of the appointment, Respondent turned the file over to the other attorney and assumed that the matter would be handled properly. The other attorney died some months later, without having worked on the' case. Respondent then took no steps to perfect the appeal or to withdraw from the appointment.

This is Respondent's first offense in sixteen years of practice. Most of his work over the past sixteen years has been in Detroit Recorder's Court and this is the first disciplinary action against him; this a significant mitigating factor because criminal defense practitioners are particularly vulnerable to grievances.

[1] We note that Respondent answered neither the request for investigation nor the formal complaint and defaulted. Normally, these would be aggravating elements calling for additional discipline, Grievance Administrator v Kennedy, No. DP 48/80 (1981), but Respondent presented evidence in mitigation that he did attempt to answer the request for investigation and dictated an answer to the formal complaint, which was not served due to clerical error.

Of course, "[i]t was Respondent's obligation to promptly seek effective removal from the case [but] ... we do recognize ... that, in Detroit Recorder's Court, procedural matters, such as withdrawal of counsel, are frequently handled informally. Whether such practices are justified remains

questionable; Respondent seems to have had some basis for concluding that the [informal] withdrawal was acceptable." Grievance Administrator v Daggs, No. 35447-A (1979).

We confirm our view, expressed in Grievance Administrator v Harrington, No. 35542-A (1979), "that practitioners responsible for the appeal of criminal matters carry a particularly serious responsibility in preserving the constitutional safeguards of their clients, and in the case of an imprisoned client, maintaining communications which are obviously of such importance to the prisoner." Even if it is true, as Respondent argued, that the Complainant would have remained imprisoned for other offenses if Respondent had successfully pursued the appeal, the client nevertheless should never be left uninformed. "[M]aterial damage to a client's interests is not a prerequisite to discipline for neglect", Grievance Administrator v Sallen, No. DP 52/82 (1982).

Finally, Respondent is not eligible for probation, contrary to suggestions in his petition for review, as he neither requested it below nor presented evidence in fulfillment of the criteria at MCR 9.121(C).

We reduce discipline to a reprimand and order Respondent to take immediate steps to perfect Complainant's appeal or to withdraw from the case and substitute competent counsel.

Vice-Chairman Martin M. Doctoroff and Member Remona A. Green dissenting.

DISSENTING OPINION

We would affirm the suspension of sixty days assessed by the panel. First, we do not find any mitigation of Respondent's double failure to answer the request for investigation and formal complaint. Despite his mitigatory excuses, the panel was not persuaded to set aside his default, and we should now view Respondent's absence of cooperation as an aggravating factor.

The Board has held that carelessness is "unacceptable as the basis for a defense" to charges of failure to answer a request for investigation, Grievance Administrator v Smith, No. 35229-A (1979), and that such failure to answer "is in itself substantive misconduct, and should never be ignored by a hearing panel or excused as a peccadillo unworthy of drawing discipline," Grievance Administrator v Kennedy, No. DP 48/80 (1981). Yet, today, the Board treats Respondent's failure to answer as a peccadillo, Similarly, failure to respond to the formal complaint indicates "a conscious disregard for the Rules of the Court." Grievance Administrator v Ruebelman, No. 36527-A (1980). Taken in conjunction with the serious misconduct of neglect, a suspension is warranted.

We are particularly disturbed that Respondent, even to the day of the Board review hearing, had taken no steps to perfect the Complainant's appeal.A suspension of sixty days is consonant with Board precedent in cases of aggravated neglect of a criminal appeal. See, e.g., Grievance Administrator v Conley, No. DP 169/83 (1985); Grievance Administrator v Lovett, No. DP 119/83 (1984); Grievance Administrator v Hoffman, No. DP 93/80 (1981), and Harrington, supra.