

Grievance Administrator,
Petitioner/Appellant,
v
Michael J. Kavanaugh, P-23977,
Respondent/Appellee.

ADB 66-88; 91-88; 108-88

Decided: August 15, 1989

BOARD OPINION

The Grievance Administrator filed a Petition for Review in this case seeking an increase in discipline. Based upon its review of the record below, the briefs and arguments presented by counsel and consideration of the respondent's prior disciplinary history, it is the conclusion of the Board that the two-year eleven month suspension imposed by the panel should be increased to a suspension of three years and six months.

The respondent failed to answer the three formal complaints consolidated for hearing in this case. The respondent did appear personally before the panel at hearings June 9, 1988 and November 15, 1988. The hearing panel determined that the allegations in the formal complaints were established by the defaults. The respondent testified on his own behalf during the separate hearing on discipline mandated by MCR 9.115(J)(2). The only issue before the Board is the sufficiency of the discipline imposed by the panel.

This case represents the respondent's third suspension for professional misconduct. In November 1985, the respondent was suspended for sixty days (Matter of Michael J. Kavanaugh, DP 7/84). In that case, the Attorney Discipline Board increased a hearing panel reprimand to a sixty-day suspension. The Board concluded that although the respondent did not commit an intentional misappropriation of client funds when his employee mistakenly deposited those funds in a business account rather than the client trust account, the respondent did not take appropriate steps to rectify the error and that he improperly retained those funds for his own use in anticipation of unspecified future legal services.

The respondent was suspended for 119 days as the result of a consent order of discipline which became effective in August 1986 (Matter of Michael J. Kavanaugh, DP 74/85). In that case, the respondent admitted allegations that he was retained in a medical malpractice case but failed to institute suit before the expiration of the statute of limitations, belatedly attempted to file a complaint in the wrong forum, failed to advise his client of the dismissal of the suit, and failed to communicate with his client regarding the merits of her claim or the status of her case.

The complaints filed in this case charge that Mr. Kavanaugh failed to notify his clients of his August 1986 suspension, that he continued to practice law and to provide legal services to those

and new clients during that suspension, that he failed to withdraw as attorney of record from cases pending on court dockets following his suspension, that he filed a false affidavit of compliance, that he failed to answer Requests for Investigation, and that he failed to answer two formal complaints. The respondent's conduct was found to be in violation of MCR 9.104(1)-(4)and(8); MCR 9.119; MCL 600.916; and Canons 1, 3, 6 and 7 of the Code of Professional Responsibility, DR 1-102(A)(1),(5)and(6); DR 3-101(B); DR 6-101(A)(3) and DR 7-101(A)(1)-(3).

The respondent offered testimony to the panel regarding his physical and emotional problems during the period the misconduct occurred. The mitigating effect of that testimony was properly considered by the panel. We believe, however, that the evidence of mitigation in this case is heavily outweighed by a number of aggravating factors. These include a pattern of misconduct evidenced by the forty separate counts in the three complaints consolidated in this matter, the respondent's prior history of professional discipline and respondent's continued indifference or inability to fulfill his obligations to cooperate in these disciplinary proceedings. In the current proceedings, the respondent has failed to answer Requests for Investigation, failed to answer three formal complaints and failed to appear at the review hearing before the Board.

The record before us casts grave doubts upon Mr. Kavanaugh's continued fitness to represent members of the public as a lawyer and as an officer of the court. The three and one-half year suspension which we imposed requires not only that respondent petition for reinstatement and establish his eligibility to the satisfaction of a hearing panel or the Board but also conditions his reinstatement upon his recertification by the Board of Law Examiners.

All concur.