

GRIEVANCE ADMINISTRATOR

v

O. LEE MOLETTE,

File No. DP 128/84

Argued: November 8, 1985

Decided: January 31, 1986

OPINION OF THE BOARD

Respondent has a record of three suspensions and three reprimands since 1971. In this case, he neglected a worker's compensation claim over a period of several years, and failed to answer the Formal Complaint. The panel suspended him for thirty days. Respondent presents a pattern of misconduct and should undergo reinstatement proceedings; we affirm the findings of fact of the panel and increase the suspension to 120 days.

I.

Respondent was hired in 1977 to file a worker's compensation claim. The client's doctor delayed until 1982 before issuing a medical report for the case. The client could not afford medical depositions or other reports. Respondent would not advance costs. On the day before trial, Respondent finally paid for a medical examination of the client. The case was dismissed, despite the eleventh-hour medical report. The client secured other counsel and later received \$1,400 for his claim.

The core of misconduct found by the panel was Respondent's failure to prepare the medical evidence. Respondent admitted to the client soon after being hired that medical evidence was needed. Some efforts were made to build medical evidence, but they were thwarted because the client could not afford the costs or because the one potential source of an available medical report--the client's physician--delayed for several years before issuing an opinion. Thereafter, Respondent took no further action to assemble any evidence, and only on the eve of trial did he secure a medical report.

When asked at the panel hearing why he did not refer the case earlier to a firm which would advance costs, Respondent said he knew it was a weak case and did not want to send it to another attorney who would then have to pay for evidence. The panel concurred with the remarks of grievance counsel:

If [Respondent] did not want to advance costs but realized that medical evidence was necessary, then he had a duty to tell this to the client and say 'Go to another that will advance costs,' that 'I can't handle this case properly.' That was his duty and he never got to that point. Up until the day before the trial . . . April tr. 49

Respondent's own testimony proves neglect, inadequate preparation, and failure to carry out a contract of employment. It is misconduct to (1) suspend the preparation of a case for years because a client cannot afford to develop the evidence, and (2) refuse either to advance costs to the client or advise the client to seek other counsel able to do so.

II.

If Respondent had never been disciplined before, the thirty day suspension awarded by the panel might be within reasonable range. See Grievance Administrator v Walsh, No. 36462-A (1980) (Board imposed 120 day suspension for neglect of litigation; Respondent had no previous misconduct). The Grievance Administrator urges a lengthy suspension because of Respondent's record of discipline (three reprimands from 1971-78, and suspensions of thirty, sixty, and 120 days in 1983 and 1984).

"The Board is entitled to consider past violations and sanctions in determining discipline." Grievance Administrator v Nickels, Mich. Sup. Ct., No. 73240 (Slip. op. Aug. 20, 1985), at 6. In Grievance Administrator v Kennedy, No. 36454 (1980), the Board was "concerned with what appears to be a pattern of misconduct manifesting the need for more serious discipline." Kennedy, who had neglected a worker's compensation case, had past discipline of a reprimand and a suspension for similar misconduct. The Board suspended him for 121 days so that he would have to undergo reinstatement hearings. See also Grievance Administrator v Hoffman, No. DP 93/80 (1981) (neglect of criminal appeal; past discipline of reprimand and thirty days; Board imposed 120 days noting prior misconduct).

We note that our concern regarding the building pattern of offenses was made clear to Mr. Molette in the Board's opinion in a prior case--Grievance Administrator v Molette, No. 35391-A (1981). The Board ordered a thirty day suspension after neglect of litigation and other offenses: "If [an] unblemished past record may act as mitigation...then repeated misconduct may evidence the need for more severe discipline."

As further aggravation, we note that Respondent Molette, did not answer the Formal Complaint. He also failed to appear at the Board review hearing either personally or through counsel, and sent no excuse for his absence. See Grievance Administrator v Zisman, Nos. DP 66/80; 25/80 (1981).

Respondent is suspended for 120 days and will be required to undergo reinstatement investigation and hearing prior to possible return to practice.