Grievance Administrator,
State of Michigan
Attorney Grievance Commission,

Petitioner/Appellant,

v

Arthur W. Whelan, Jr., P 22234

Respondent/Appellee.

92-231-GA; 92-250-FA

Issued: September 13, 1993

BOARD OPINION

The respondent failed to file a timely answer to the formal complaint and a default was entered in accordance with the rules. In proceedings before the panel, the respondent failed to establish good cause for his failure to file a timely answer. Based upon the default, the allegations of misconduct were deemed to be admitted and the panel concluded that the respondent failed to take appropriate action on behalf of a client to tax costs against the opposing party, failed to take action to enforce the judgment in favor of his client, failed to communicate with his clients regarding the status of the matter and failed to answer a request for investigation. The formal complaint charged that the respondents conduct violated MCR 9.104 (1-4 and 7); MCR 9.103(C); MCR 9.113(A); MCR 9.113(B-2) and the Michigan Rules of Professional Conduct 1.1 (c); 1.3; 1.4 (a); 3.2; 8.1 (b) and 8.4 (a and c). The hearing panel ordered that the respondent be reprimanded.

The Attorney Discipline Board has considered the Petition for Review filed by the Grievance Administrator seeking increased discipline. We conclude that the respondent's neglect of his obligations to a client, failure to answer a request for investigation and failure to answer a formal complaint, coupled with the aggravating effect of the respondent's lack of candor toward the hearing panel and disregard for the discipline process warrants his suspension from the practice of law for a period of sixty days.

The Attorney Discipline Board has consistently expressed a concern for the attorney who, without any justification or explanation, refuses to answer requests for investigation for formal complaints. In a 1981 Opinion, Matter of James H. Kennedy, DP 48/80, (Opn. of Brd. p. 132, 1981). The Board discussed the duty to answer Request for Investigations:

> "Members of the Bar have an unavoidable duty to answer requests for investigation. These requests or 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 phases: responsibility to the Bar and to the public ...
>
> Failure to fulfill this dual duty of responding 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). This Board has recognized that failure to answer also indicates "a conscious disregard for the rules of the court" Schwartz v Rubelman No. 36527-A (Attorney Discipline Board 1980)."

The possibility that an unexplained failure to answer a request for investigation could result in the suspension of a respondents license was re-emphasized by the Board in Matter of David A. Glenn, DP 91/86, (Brd. Opn. 2/23/87). The Board specifically warned the respondent and the bar "that the lawyer who ignores the duty imposed by court rule to answer requests for investigation and formal complaints does so at his or her peril and that, absent exceptional circumstances, that attorney may expect a discipline greater than a reprimand".

That opinion was revisited by the Board in 1992 in Matter of Lawrence A. Baumgartner, Case No. 91-91-GA, 91-108-FA, (Brd. Opn. 7/21/92). The four members of the Board who participated in that decision were unanimous in their conclusion that Glenn supra need not be read so narrowly as to create a mandatory minimum level of discipline in every case involving a failure to answer a request for investigation. Noting that the panel had imposed a suspension of thirty days solely on the basis of a perceived "rule" announced in Glenn, the Board implemented the hearing panel's expressed desire to impose a reprimand under the particular facts and circumstances of that case.

In the Board's divided opinion in Baumgartner, two board members confirmed that, to the extent that Glenn constituted a warning to the legal profession and an assurance to the public that these disciplinary investigations are to be taken seriously, the Board's position in Glenn has continued vitality, subject to the admonition that hearing panels and the board must be able to exercise sound discretion by limiting discipline to a reprimand under appropriate circumstances.

In a separate opinion in Baumgartner, two board members concluded that the use of the Glenn decision as a binding rule or standard is contrary to the principle stated by our Supreme Court that discipline cases are fact specific and that discipline must be imposed in each case on an individual basis, State Bar Grievance Administrator v Del Rio, 407 Mich 336; 285 NW2d 277 (1979). That separate opinion, however, noted that "we do not mean to suggest that a suspension is inappropriate in failure to answer cases. Panels may look to the Glenn opinion as a guide, but Glenn should not be applied to impose a minimum or standard discipline", Baumgartner supra separate opinion of Board Members DunCombe and Fieldman.

While the Board's prior opinions, including Glenn and Baumgartner, make it clear that failure to answer a request for investigation may result in the imposition of a reprimand, the possibility of a suspension should also be considered in such cases. As our Supreme Court noted twenty years ago:

> "If suspension could not result from a decision not to answer substantive charges, professional misconduct could never be

> censured. An attorney could ignore charges brought against him, knowing that no action could be taken, and thus frustrate the whole grievance procedure in re Moes 389 Mich 258 205 NW 2d 428, 430 (1973)."

The respondent explained that he failed to answer the request for investigation because he was angry. Respondent testified: that when the grievance was filed against him, "... I got so ticked off, I refused to file an answer, and it was my fault, and I didn't do it, and I admitted that", (Tr.p.61) . . . .. "Boy I get ticked off when my attorney dues go to pay for a system that doesn't know what they're doing. They don't investigate anything further. They just send out the complaint and say answer it, a....., and that is what they do, I am sorry I object to that. I don't feel that is fair at all and I don't think that the Attorney Grievance Commission should be paid with my dues to put me under the rug". (Tr.p.84). When asked by panel member why he had failed to answer the formal complaint, respondent replied "because I thought it was a bunch of baloney". (Tr. 1/5/93 p.11)

For the reasons cited by the Supreme Court in Moes, supra, our discipline system simply cannot function if an attorney is excused from answering a request for a investigation simply because he or she is "ticked off" with the complainant or the Attorney Grievance Commission. Had he filed a timely answer, it is likely that this matter would have been brought to an earlier resolution - possibly without the need for public discipline proceedings. Similarly, the court rules make it clear that an attorney must answer a formal complaint, or assert a constitutional privilege, regardless of the attorney's opinion of the merits of the complaint.

Our decision to increase discipline in this case to a suspension of sixty days is based not simply upon a complete absence of mitigating evidence but on the presence of aggravating factors too serious to ignore. Specifically, we are troubled by the respondents cavalier attitude toward his responsibility to appear before the panel and to file appropriate pleadings.

At the initial hearing on November 17, 1992, the respondent, having been defaulted for failing to answer the complaint, was given ten days by the panel to file an appropriate motion to set aside the default. The hearing was adjourned to December 11, 1992. On that date, the panel members and counsel for the Grievance Administrator appeared at the appropriate time and place. The respondent called the panel chairman that morning to explain that he was bleeding and was on his way to the hospital. In his phone call to the panel chairman, the respondent represented that he had mailed the requested Motion to Set Aside Default to all parties. In the absence of the respondent, the hearing was again adjourned to January 5, 1993.

On January 4, 1993, the panel members and the Grievance Administrator's counsel received the brief from the respondent which he alleged had been mailed the previous November. At the hearing, the respondent conceded that he had not, in fact, gone to the hospital on December 11, 1992, although he maintained that he had suffered from bleeding on that date and had talked with his doctor.

Finally, with regard to the alleged signature of a notary on the respondents Motion to Set Aside Default, the respondent acknowledged that the document had not, in fact, been notarized by his secretary but that her purported signature was signed by the respondent or his wife "with authority".

Throughout these proceedings, from the respondent's failure to answer, to his misleading statements to the panel regarding his failure to appear on December 11, 1992, to his casual submission of a pleading bearing a false notarization, the respondent has exhibited an attitude toward these proceedings characterized by disdain. These aggravating factors warrant increased discipline.