IN THE MATTER OF WOODROW FLOYD,
A Member of the State Bar of Michigan,
Respondent,
Nos. DP-44/80, 49/80, 56/80, 163/80

Decided: August 19, 1981

OPINION OF THE BOARD

This opinion resolved the several consolidated Formal Complaints against Respondent heard by the Board at its April and May, 1981, meetings. The first group of Complaints, DP-44/80; 49/80; and 56/80 [Review Case I], contained allegations of six (6) counts of misconduct. Three of the Counts principally alleged neglect, and three (3) charged failure to answer Requests for Investigation. Respondent admitted failure to answer two (2) of the Requests for Investigation, but did not address the third such allegation. The Wayne Circuit Hearing Panel "B" dismissed all Counts.

The second review matter, DP-163/80, heard by Oakland Circuit Hearing Panel "J", alleged both failure to answer a fourth Request for Investigation, and neglect. The neglect Count was dismissed by Oakland Circuit Hearing Panel "J" at the motion of the Grievance Administrator. The Count relating to failure to answer was also dismissed following an explanation in mitigation by Respondent. The Grievance Administrator appeals these dismissals. We reverse and impose reprimands in both Cases I and II.

I. REVIEW CASE I

The Panel in Case I dismissed the Complaint in its entirety, apparently because of it having found no merit to the substantive charges. There was no question of fact that Respondent failed to answer the Requests for Investigation. No mitigation relating to this failure to answer was presented.

II. REVIEW CASE II

In his Answer to the Formal Complaint in Review Case II, Respondent admitted his failure to answer the Request for Investigation arising from the neglect Count. After the neglect Count was dismissed, Respondent told the Panel that he had intended to file an answer to the Request, but failed because of "tremendous * * * personal pressures." Tr. at 12-13.

In its Conclusions and Findings of Fact, the Case II Panel stated that (1) Respondent answered the Formal Complaint and, simultaneously, answered the Request; (2) the Request arose from the neglect Count which was dismissed; (3) Respondent supplied the Panel with an explanation of his tardiness in answering; and (4) "for the reasons of fundamental fairness and justice," the failure-to-answer Count was also dismissed. Tr. at 31-32.

III. FAILURE TO ANSWER

Failure to answer a Request for Investigation within the time allowed is misconduct per se. GCR 1963, 953(7); 962.2(b); Schwartz v Kennedy, No. DP-48/80 (Mich. Att'y Discip. Bd. 1981); Schwartz v Ruebelman, No. 36527-A (Mich. Att'y Discip. Bd. 1980); In re Smith, No. 35229-A (Mich. Att'y Discip. Bd. 1979); In re Moore, No. 35620-A (Mich. Att'y Discip. Bd. 1979).

As we explained in Kennedy, supra:

> "Members of the Bar have an unavoidable duty to answer Requests for Investigation * * * Failure to fulfill this 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. * * * This Board has recognized that failure to answer also indicates `a conscious disregard for the Rules of the Court.'"

[Emphasis added.] We re-emphasize this analysis. Simply because the principal Counts which gave rise to Requests for Investigation were dismissed does not mean that procedural omissions are nullified. This apparently was the sole rationale behind the dismissal in Case I, and partly the reason for the dismissal in Case II; such reasoning is unsupportable. Yet, even failure to answer a Request containing charges which may prove meritless constitutes misconduct.

Between mid-1979 and mid-1980, Respondent was served with five (5) Requests for Investigation in connection with these two cases and a previous disciplinary incident. None of the Requests was answered on time. Such a pattern of misconduct militates toward heavier discipline than would be imposed for a lesser number of similar violations. Schwartz v Molette, No. 35391-A (Mich. Att'y Discip. Bd. 1981); Ruebelman, supra; In re Harrington, No. 35542-A (Mich. Att'y Discip. Bd. 1979). Nevertheless, due to the presence of factors in mitigation, we impose a reprimand in both review matters. But, '[h]aving afforded this notice to the Michigan bar, should a similar case arise in the future, serious discipline may well be imposed upon a finding of misconduct." In re Buk, No. 35947-A (Mich. Att'y Discip. Bd. 1979).

IV. MITIGATION

The Board limits discipline here to reprimand, taking into account several factors in mitigation. Respondent suffered from personal problems, including illness serious enough to require his hospitalization, in and around the time of misconduct. The several failures to answer were somewhat contemporaneous, occurring during a year in which Respondent apparently experIenced unusual personal difficulty. Also, the Board was Impressed with his genuIne remorse at the review hearing.[1] Finally, It is considered mitigation that the substantive charges generating the Complainants were dismissed.

V. CONCLUSION

We reiterate that culpable failure to answer a Request for Investigation, once proven or admitted, requires that ImposItion of discipline, even upon dismissal of accompanying charges of substantive misconduct. Factors in mitigation may be presented relating to failure to answer a Request. It is worth noting that a Respondent's intent in failing to answer is not an element of the offense.[2] In re Smith, No. 35229-A (Mich. Att'y Discip. Bd. 1979). Excuses such as the one advanced by Respondent in the instant case, that he intended to answer but did not due to personal difficulties, can therefore be considered only In mitigation.

The dismissals of the Counts relating to failure to answer Requests for Investigation are reversed, and Respondent is reprimanded.

REVERSED.

FOOTNOTES

1. Although remorse cannot be made a requirement for reinstatement after a suspension, In re Baun, No. 32207-A (Mich. Att'y Discip. Bd. 1979), it may be considered in mitigation of discipline. Cf. In re Shirley, No. 35976-A (Mich. Att'y Discip. Bd. 1979) (Respondent's convincing display of genuine sense of responsibility and apology, taken in light of all surrounding circumstances, is considered by Board in mitigation).

2. Actionable "failure to answer," of course, requires some degree of culpability which may be based on simple neglect as illustrated, for example, by procrastination or by office disorganization resulting in misplaced mail or documents.

3. Respondent himself acknowledged this at the panel hearing in Case II:

> "I should have filed an Answer to the Request for Investigation. I intended to file a response. And the only reason I did `not was I believed because of the tremendous pressures and personal pressures that I was under at the time.
>
> Of course, this is no defense -- it is just -- may go toward it; there may be some mitigating circumstances." Tr. at 12-13 [emphasis added].