IN THE MATTER OF O. LEE MOLETTE,
A Member of the State Bar of Michigan,
Respondent.
No. 35391-A

Decided: May 28, 1981

OPINION OF THE BOARD

Respondent was consulted by Complainant in 1974 after Complainant had been in a car accident in Alabama. Neither Complainant nor his wife were injured, but their car was destroyed. Respondent was retained to collect damages, and Respondent's fee was to be one-third of the net recovery. Tr. at 15

Complainant made many calls to Respondent about the status of his case, but had difficulty reaching him. Respondent eventually told Complainant that suit would be filed. In October, 1976, Respondent wrote to his client, stating that the matter would be settled within six months. Petitioner's Exhibit 13. Suit was filed one day before the statute of limitations was to expire, in August, 1977. Apparently, Respondent had reached an understanding that the insurer was to tender some settlement monies. Respondent therefore agreed to a discontinuance with prejudice and without costs. This discontinuance as filed in 1979 without Complainant having received any payment. Tr. at 54.

Several days before the panel hearings were to begin, Respondent paid Complainant $1,000 in certified check, and $440 in cash in place of a settlement. Tr. at 33-34. Complainant is also to receive $500 from the insurance company.

Respondent did not answer the Request for Investigation. He also failed to answer a Request for Investigation in an unrelated matter, the substance of which the Grievance Administrator did not pursue.

The Panel found Respondent had neglected Complainant's case and failed to answer the two Requests for Investigation. All other allegations were dismissed. Respondent had also been charged with making false statements to the Grievance Administrator while his case was under investigation, but the panel found that this was not supported by a preponderance of the evidence.

The Panel reprimanded Respondent. He has received at least four (4) reprimands in the past, between 1971-79. In mitigation, the panel found that Respondent paid Complainant $1,400 in restitution, and that Complainant was to receive the additional $500 from an insurance company, and that Complainant did not receive personal injuries, but only suffered the loss of his car, plus car rental and lodging expenses. Tr. at 35-36.

The Grievance Administrator appeals, arguing that the reprimand was not severe enough discipline in light of Respondent's previous record of misconduct, and that the "mitigation" of Respondent's settlement with Complainant just before the panel proceedings should not have been

considered at all. The Grievance Administrator requests a "severe disciplinary sanction." We agree that a reprimand is insufficient, and suspend Respondent for thirty days.

It is professional misconduct for an attorney to accept the benefits of a contingent fee contract and not properly discharge his obligation to thoroughly investigate the case and to fulfill a commitment to prosecute it unless relieved by his client or by the court. In re Crane and Roth, No. 33077-A (Mich. St. B. Grievance Bd. 1976), aff'd in part and rev'd in part, 400 Mich 484, 255 NW2d 624 (1977). Although restitution made after discipline proceedings are begun may be considered in mitigation, it will not excuse the misconduct itself. In re Ziegler, No. 33442-A (Mich. St. B. Grievance Bd. 1976).

We think the discipline ordered by the Hearing Panel is insufficient "to insulate our judicial system and the consumer of legal services" in view of Respondent's pattern of misconduct. In re Clark, 38, 47, No. 34141-A (Mich. St. B. Grievance Bd. 1976). Respondent has been reprimanded several times before, and has failed on many occasions to answer Requests for Investigation. In 1971, he failed to answer such a Request. Wayne County Hearing Panel No. 10, in its Report, noted "Respondent offered no explanation as to why he failed to answer the Request for Investigation by the State Bar Grievance Board." File No. 28852. In 1974, Respondent failed to answer both a Request for Investigation and the Formal Complaint against him, although his Defaults were set aside. File No. 31471. In 1976, he twice failed to answer Requests, and was reprimanded. Files No. 33353, 34040. In the present case, Respondent again failed to answer two Requests. He cannot claim inexperience or ignorance of disciplinary procedures. See Ziegler at 19. If one Respondent's unblemished past record may act as mitigation, In re Geralds, 402 Mich 387, 263 NW2d 241 (1978), then evidence of another Respondent's repeated misconduct may evidence the need for more severe discipline. While former misconduct is never a basis for an exact formulation of discipline in the context of a subsequent and completely separate factual situation, Schwartz v Hovey, No. 36409-A (Mich. Att'y Discip. Bd. 1980), Respondent's past pattern of failure to answer these communications "indicates a conscious disregard for the Rules of the Court." Schwartz v Ruebelman, No. 36527-A (Mich. Att'y Discip. Bd. 1980).

We do take into account the restitution made by Respondent just before the panel proceedings. As decided in Schwartz v Smith, No. 35166-A (Mich. Att'y Discip. Bd. 1980), delayed repayment will not undo the initial misconduct, but every effort should always be made to make full restitution, and such efforts go properly toward consideration of mitigation. See also In re Daggs, No. 35447-A (Mich. Att'y Discip. Bd. 1979).

The findings of fact of the hearing panel are affirmed and the discipline is increased to a suspension of thirty days.

DISSENTING OPINION OF VICE-CHAIRPERSON LYNN SHECTER AND MEMBER WILLIAM REAMON:

We concur that the findings of fact should be affirmed, but dissent in the assessment of

discipline. We think Respondent should be suspended for 120 days.

Respondent's representation of Complainant White was a sequence of neglect and procrastination. Suit was not filed until just before the statute of limitations was to run, three years after the accident. Respondent failed to answer interrogatories from the defendant, which resulted in dismissal of his client's case. It was reinstated apparently only by acquiescence of defense counsel. Respondent did not respond to an offer of judgment made in 1978. In 1979, five (5) years after the accident, the case was finally dismissed with prejudice and without costs. Respondent has not recovered anything for his client.

When served with a Request for Investigation, Respondent followed a familiar pattern and ignored the document. Respondent has made it clear in the past that he intends to flout the Court Rules of this State by refusing to answer these Requests. This Board in the past has recognized the seriousness of a failure to make such answers. In In re Harrington, No. 35542-A (Mich. Att'y Discip. Bd. 1979), the Board increased discipline, in part due to "recognition of Respondent's particularly culpable failure to answer the Request for Investigation and the Formal Complaint, which are dual violations of the Standards of Conduct," In another instance of a repeat offender, the Board commented:

> Respondent has been disciplined in the past, the present misconduct is serious and, especially in the counts involving failure to answer the Requests for Investigation, indicates a conscious disregard for the Rules of the Court. The Rules require accused attorneys to make some response to charges against them.

Schwartz v Ruebelman, No. 36527-A (Mich. Att'y Discip. Bd. 1980).

While Respondent's restitution is properly considered in mitigation, he has been reprimanded at least four (4) times in the past. This aggravated pattern of misconduct requires more serious action by the Board. We would impose a suspension of 120 days.