IN THE MATTER OF JAMES H. KENNEDY,
A Member of the State Bar of Michigan,
Respondent.
No. DP-48/80

Decided: March 18, 1981

OPINION OF THE BOARD

Respondent, a sole practitioner admitted to the Bar in 1961, was charged with the dilatory handling of an estate, and failure to answer a Request for Investigation. He admitted the allegations before Wayne Circuit Hearing Panel "R", and provided the panel with an explanation in mitigation. The hearing panel was satisfied with Respondent's account, and dismissed the Formal Complaint. The Grievance Administrator appealed, pointing out that even a technical violation of the Code of Responsibility requires the entry of discipline. We agree, reverse the decision of the hearing panel, and suspend Respondent for one hundred twenty-one (121) days.

I. FACTS

There is no question but that the allegations in the Formal Complaint were established by Respondent's admissions. Respondent filed an Answer to the Formal Complaint the day before the panel hearing. Panel tr. at 5. The Answer was characterized by counsel for the Grievance Administrator as a general denial, id., but Respondent changed his Answer before the panel and admitted all allegations in the Complaint, panel tr. at 6, with an accompanying explanation. After orally tracing his conduct in the estate matter, he apologized for his failure to answer the Request for Investigation. Panel tr. at 32.

Complainant retained Respondent to help probate the estate of a man with whom Respondent had been acquainted. Respondent performed some preliminary work on the estate, but delays followed. Complainant, who had been special administratrix, was suspended as a result of these delays. A failure to pay the inheritance tax produced penalties of $705.62 against the estate. Respondent received no fees in the matter. Panel tr. at 11.

Respondent admitted receiving the Request for Investigation. Panel tr. at 32. He told the panel that he meant to answer the Request, but put it aside and "just never seemed to get to it, even knowing that I should have." Id.

Respondent has had prior disciplinary experience. He was suspended for one hundred twenty-one days by this Board in 1980. Schwartz v Kennedy, No. 36454-A (Mich. Att'y Discip. Bd. 1980). He was reprimanded in 1979, and suspended for one year in 1970. By this point, he should be accustomed to answering Requests for Investigation. The hearing panel in the present case was mistakenly supplied with erroneous information concerning Respondent's previous discipline and, in determining that this Complaint should be dismissed, considered only his 1970 suspension. See Report and Order of the Hearing Panel at 3.

II. MITIGATION

Where even a technical violation of the discipline rules is established, discipline must follow, regardless of the mitigation exhibited. See GCR 1963, 964.10(2), "If the hearing panel finds that the charge of misconduct is established by a preponderance of the evidence, it must enter an order of discipline . . ." [emphasis added]. See also Schwartz v Ward, No. 34204-A (Mich. Att'y Discip. Bd. 1980). Once the present Respondent admitted the allegations before the panel, the panel's discretion was confined to settling on the proper degree of discipline. Respondent's explanation "in mitigation" could not wholly exculpate him, but could only tend to limit the severity

of the discipline imposed. See In re Ziegler, No. 33442-A (Mich. St. B. Grievance Bd. 1976) (per curiam).

The single context in which mitigation may obviate the necessity for discipline is a proceeding following a criminal conviction. In such a proceeding, a hearing panel which "finds that disciplinary action should not be taken based upon respondent's showing in mitigation . . . may so enter its order." In re Lewis, 389 Mich 668, 209 NW2d 203, 208 (1973). See also In re Sauer, 390 Mich 449, 231 NW2d 102 (1973). This privilege, in which mitigation may extinguish misconduct, has never been extended, either by Supreme Court or Board opinion, to misconduct arising in a non-criminal context.

The present Respondent presented no adequate excuse for his failure to answer the Request for Investigation. He has had previous experience with disciplinary procedures, and cannot plead ignorance of them. See In re Harrington, No. 35542-A (Mich. Att'y Discip. Bd. 1979); Ziegler, supra. We noted in the former case involving Respondent that he "failed, and has failed in the past, to answer the Request[s] for Investigation." Kennedy. Subsequent failures to answer can only jaundice the Board's view of proposed mitigation.

Both Respondent's failure to answer and his mishandling of the estate are the latest incidents in a certain pattern of misconduct. In his last appearance before the Board, Respondent presented what we thought "[appeared] to be a pattern of misconduct manifesting the need for . . serious discipline." Kennedy. Respondent's present apology and explanations are insufficient. Although apology may be considered in mitigation, In re Shirley, No. 35976-A (Mich. Att'y Discip. Bd. 1979) (per curiam), here it is engulfed in a wave of aggravating circumstances.

III. MISCONDUCT IN HANDLING AN ESTATE

The slow handling of an estate causes a client harm, especially when consequences of the gravity described here are incurred. The special administratrix was suspended from her position due to Respondent's neglect, and the estate was assessed $705.62 in penalties because inheritance taxes were not paid. This Board and its predecessor Board have held Michigan lawyers to a high professional standard in probate matters.

The Respondent in Schwartz v Smith, No. 35166-A (Mich. Att'y Discip. Bd. 1981) was suspended for one hundred twenty days and until the estate he had delayed was closed. He would have drawn harsher suspension had it not been for the mitigation of restitution, a circumstance absent in the present case.

The Board in In re O'Brien, No,. 33975-A (Mich. Att'y Discip. Bd. 1978) (per curiam) reduced Respondent's discipline to a reprimand from a ninety day suspension in light of overwhelming mitigation. Respondent had paid substantial penalties assessed against the estate from his own pocket; retained experienced counsel to assist him in closing the estate; and had twenty years of unblemished law practice. The present case stands in stark contrast in its lack of mitigation.

In In re Ruebelman, No. 33692-A (Mich. St. B. Grievance Bd. 1977), aff'd, 402 Mich 501, 265 NW2d 161 (1978), a Respondent who had neglected an estate, failed to protect its assets or pay taxes on it was suspended for sixty days and until the estate was closed. He had no previous misconduct.

IV. REQUESTS FOR INVESTIGATION

Members of the Bar have an unavoidable duty to answer Requests for Investigation. These Requests are 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 faces: responsibility to the Bar, and to the public. The duty to the Bar is to help clarify complaints made about its members, so that grievances with merit may proceed, and those without substance may be disposed of quickly. The Bar should not suffer the effects of uncertainty resulting from dangling complaints. The duty to the public relates to fairness to lay-people who may have a legitimate grievance.

> Many complainants approach the filing of a complaint with reservations. A complainant is aware that he has little knowledge of the standards of the profession and that the lawyer's conduct he questions may not in fact violate the code of professional responsibility. He often feels that he cannot state his complaint adequately because his lawyer has not kept him properly informed. Moreover, the complainant often finds that his inability to use language effectively combined with his ignorance of the underlying facts and applicable law, make it difficult to be precise.

Standards for Lawyer Discipline and Disability Proceedings, American Bar Association, at 46. 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 (Mich. St. B. Grievance Bd. 1979) (per curiam) This Board has recognized that failure to answer also indicates "a conscious disregard for the Rules of the Court," Schwartz v Ruebelman, No. 36527-A (Mich. Att'y Discip. Bd. 1980), a disregard which the present Respondent has shown in the past. Kennedy.

An attorney with professional or constitutional objections to answering a Request for Investigation may make these reservations known under GCR 1963, 962.2(a), Some contact with or response to disciplinary authorities, however, is necessary. Members of the Bar have no absolute privilege of silence in the face of accusations of misconduct. Despite the holding of the United States Supreme Court in Spevack v. Klein, 385 US 511 (1967) that no attorney may be subjected to a penalty or sanction for the assertion of a Fifth Amendment privilege of silence, this is logically confined to situations in which a response may expose a member of the Bar to criminal incrimination. As the Michigan Supreme Court has interpreted this privilege in disciplinary proceedings,

> [t]he choice of whether to appear and to offer proofs lies with the one charged, but the obligation to meet charges never entails an obligation of self incrimination. Any other rule would render the [Attorney Discipline] Board impotent. 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 NW2d 428, 420 (1973).

V. DISCIPLINE

A suspension of one hundred twenty-one days in the present case is appropriate, in light of the facts, Respondent's past record, and the absence of genuine mitigation. Respondent will be required to establish his fitness to re-enter practice before a hearing panel before he may be reinstated to the Bar. GCR 1963, 972.2; 973.

The dismissal of the Formal Complaint is reversed and, the charges of misconduct having been admitted, Respondent is suspended for one hundred twenty-one days.

REVERSED.

LEWIS, Secretary, dissents, for the reasons set forth in his dissent in Schwartz v Grimes, No. 35939-A (Mich. Att'y Discip. Bd. 1981).