

GRIEVANCE ADMINISTRATOR

v

DAVID N. WALSH,

Respondent

File No. DP-16/83

Review Hearing: May 11, 1984

Decided: August 16, 1984

OPINION OF THE BOARD

Respondent was charged in a two-count formal complaint with neglect in failing to file a lawsuit within the applicable statute of limitations, failing to communicate with his client and making false statements in his answers to the Grievance Administrator's Request for Investigation. The hearing panel made detailed findings and concluded that the evidence supported the charges of misconduct by a preponderance of the evidence and ordered Respondent suspended for a period of 121 days. Respondent petitions for review claiming: (a) that the panel failed to acknowledge and consider certain mitigating evidence; (b) the findings of misrepresentation are not supported by the evidence; and, (c) that the suspension of 121 days is excessive.

Respondent was retained to represent a client in a personal injury claim arising in October, 1977. The client moved to New Jersey in late 1977 and kept Respondent advised of her address and telephone; an attorney from New Jersey contacted Respondent several times at the behest and on behalf of the client to inquire into the status of her claims.

The insurer of the defendant in the civil litigation made a settlement offer and delivered to Respondent a draft in the amount of the settlement. Testimony regarding the client's initial acceptance or rejection of this offer is conflicting, but Respondent openly admitted that he did neglect the matter at least at that point in his representation of the Complainant-client.

For a period of almost one year, December 1978 to November 1979, Complainant had difficulty contacting the Respondent; this was the reason that the Complainant sought the assistance of the New Jersey attorney. Despite this attorney's efforts, Respondent did not contact Complainant until May, 1980, which was approximately five (5) months before expiration of the statute of limitations.

The time for filing a lawsuit eventually lapsed and Respondent explained that he had misplaced the file; he indicated that he was not certain of the accident date for purposes of computing the period of limitations. Respondent did attempt to file a lawsuit based upon an alternate theory which provided a more liberal statute of limitations, but this action was ultimately dismissed by the Court of Appeals.

In his answer to the Grievance Administrator's request for investigation Respondent stated that the Complainant requested that Respondent not start the lawsuit immediately. Respondent further stated that he had lost contact with Complainant from 1979 to 1981. Upon review of the

testimony, the Panel found these statements were false.

The hearing panel receives evidence in the first instance and has the opportunity to judge the Respondent's credibility. The hearing panel's findings of fact should be given deference whenever possible. See, In re McGinnis, 1 MDR 1 (1975); the panel's findings should stand when they are supported by the whole record, Schwartz v Smith, MDR 304 (1981). However, the Board is given broad authority under GCR 1963, 967.4 to assess the appropriate parameters of discipline and must exercise its "overview function" in reviewing the conclusions and findings of panels particularly with respect to the level of discipline, In re Daggs, 411 Mich 304, 307 NW2d 66 (1981).

After reviewing the testimony and pleadings in this matter, it is clear that the hearing panel's findings of fact are based upon adequate support in the record. However, it is the Board's opinion that the discipline rendered by the hearing panel should be modified based on the mitigating circumstances present here.

One of the primary purposes for disciplinary action is to protect the public from future acts of misconduct by the Respondent and to deter similar acts or omissions by others. Respondent has made adequate restitution to the Complainant and the Board is persuaded that Respondent is remorseful for his negligence and has taken steps to improve office administration in order to prevent such neglect and oversight from occurring in the future.

A 121-day suspension would require a prolonged reinvestigation and reinstatement hearing procedure. Considering all circumstances, the public would be adequately protected by a 120-day suspension; the Board feels that any further suspension would be merely punitive, In re Dunn, File # 35169-A (1978). However, Respondent's prior discipline is duly noted and any future misconduct would serve to establish a pattern calling for substantial sanctions.

The Board concurs with the hearing panel's findings, but reduces the order of discipline to a 120 day suspension with costs to be assessed.