

Grievance Administrator,
Petitioner/Appellant,

v

David H. Fried, P-13709

Case No 94-223-GA

Decided: February 20, 1997

BOARD OPINION

The formal complaint charged respondent with several counts of misconduct pertaining to his handling of two medical malpractice matters and a decedent's estate. After hearing the evidence on the allegations of misconduct, the hearing panel dismissed the complaint. We affirm in part and reverse in part.

I. Counts I-III (Complainant Whitehead)

We affirm the panel's dismissal of Counts I-III. In these counts the formal complaint essentially alleges that respondent failed to pursue Ms. Whitehead's medical malpractice case with reasonable diligence, failed to maintain reasonable communication with his client, and made misrepresentations to the client and to the Grievance Administrator in response to the Request for Investigation. The panel carefully weighed and discussed the conflicting evidence, and specifically found certain witnesses to be lacking in credibility.

This Board reviews a hearing panel's findings of fact for adequate evidentiary support. Grievance Administrator v August, 438 Mich 296, 304; 475 NW2d 256 (1991). "Because of the panel's unique opportunity to observe the witnesses, we accord great deference to the panel's assessment of credibility and demeanor." Grievance Administrator v Dennis M. Hurst, 95-32-GA (1996). There is adequate evidentiary support for the panel's findings as to Counts I-III.

II. Counts IV & V (Complainant Banek)

We reach a similar result as to the panel's disposition of Counts IV and V. These counts also presented allegations that respondent mishandled a medical malpractice claim and made misrepresentations to the client. Again, the panel weighed the conflicting evidence, and in part on the basis of credibility, found that respondent did not commit misconduct and dismissed these counts. After a review of the record, we conclude that there is adequate evidentiary support for the panel's action.

III. Asserted Bias of Panel

This panel report is in many ways a model. It is clear, uses a minimum of conclusory jargon, and is concise yet detailed where appropriate. It is supported by citations to the record and to applicable law. Some panel reports state but do not explain the basis for their findings. This report clearly indicates that the panel took seriously its responsibility to resolve the questions of fact presented here. Unfortunately, this otherwise fine report is marred by a comment which is subject to an interpretation we are certain the authors did not intend.

The Administrator argues that the panel's description of a witness as "a somewhat coarse and also very angry woman," evinces gender or other bias. We find no basis for reversal based upon this claimed error. When viewed in context, we are convinced that this remark was related to the finding that this witness was hostile to respondent and not credible. Nonetheless, the panel could have expressed itself better. One does not have to be thin-skinned to take offense at the term "coarse." Panels should endeavor to describe a witness's demeanor without using language which might be considered demeaning or which could be construed as gratuitous personal remarks.

IV. Sanders Estate

Respondent was contacted by relatives of the recently deceased Blanche Sanders in February 1992. He timely commenced probate proceedings on March 3, 1992. There was one heir, and the assets consisted primarily of a house in Detroit, two bank accounts, and a small amount of personalty. However, respondent obviously put the matter on the proverbial "back burner" and steadfastly refused

to assign it higher priority.

Respondent failed to pay the inheritance tax on time, causing penalties and interest to accrue. He similarly failed to pay property taxes when due, again causing the estate to incur penalties. He failed to maintain insurance on the house, despite the urging of an insurance broker. He delayed in consummating the sale of the (uninsured) house until December 27, 1993, despite having been made aware of the ultimate purchaser more than a year earlier, near the beginning of his representation. Respondent failed to file an amended inventory after discovery of a previously omitted bank account.

Respondent, who also served as the personal representative, failed to timely file the annual account of fiduciary. It is undisputed that a successor fiduciary was ultimately appointed in approximately March of 1994. The probate file contains a July 15, 1993 order captioned: "Report/Order Fiduciary Suspended." There is some dispute as to whether he continued to act as fiduciary thereafter pursuant to an order reinstating him or otherwise. But, that point is inconsequential. Respondent's failure to timely file an account, or thereafter take appropriate action in the estate proceedings, caused the heir to retain attorney John Murphy, who ultimately filed a petition to remove respondent as fiduciary. This resulted in the appointment of a Guardian Ad Litem (and a \$600 charge to the estate for her fees).

The panel, noting that "everything that was supposed to get done, eventually got done," found that respondent did not neglect the Sanders estate or otherwise commit misconduct. We do not agree. Respondent did not get "everything done" in this probate case; a successor was required to close the estate. And, even though respondent's various omissions and delays may have had a minimal financial impact upon the estate -- an impact perhaps covered by the reduction in fees ultimately allowed respondent by the probate court -- we nonetheless conclude based upon the undisputed facts that misconduct occurred.

Even if respondent was at the outset guilty of no more than misjudging the realities of his caseload, respondent's handling of

this particular estate demonstrates a failure to act with reasonable diligence and promptness. MRPC 1.3. Moreover, under the facts and circumstances presented, which include the repeated reasonable requests for action by the heir's family, and prodding by the successor counsel and fiduciary, the probate court, and the Guardian Ad Litem, we conclude that respondent neglected this matter. MRPC 1.1(c); Grievance Administrator v Carrie L.P. Gray, 93-250-GA (ADB 1996); Grievance Administrator v Bruce J. Sage, 96-35-GA (ADB 1997).

This opinion does not require a finding of misconduct upon every failure to strictly adhere to a specific timetable in probate matters. Nor does it stand for the proposition that the late filing of an account of fiduciary, or the receipt of a notice of delinquency, or even the suspension of the fiduciary, must result in discipline. The omissions catalogued above, singly or in combination, will not always constitute misconduct. The question is whether, under all of the circumstances, the respondent proceeded with reasonable diligence and promptness (MRPC 1.3), and/or whether, respondent's failure to act amounts to neglect (MRPC 1.1(c)).

V. Conclusion

We affirm the panel's order of dismissal as to Counts I-V of the formal complaint. We reverse the order of dismissal as to Count VI,¹ and remand the matter to a new hearing panel for a hearing and determination on discipline pursuant to MCR 9.115(J)(2).

Board Members Elizabeth N. Baker, Barbara B. Gattorn, Albert L. Holtz, Miles A. Hurwitz, Michael R. Kramer, Nancy A. Wonch, and Roger E. Winkelman concur in this decision.

Board Member C. H. Dudley, M.D., dissents from the decision to assign the matter to a new panel on remand, but otherwise concurs with the opinion of the Board.

Board Member Kenneth L. Lewis was absent and did not participate.

¹ Count VII was voluntarily dismissed by the Grievance Administrator.