Grievance Administrator,

Petitioner/Cross-Appellant,

v

Carrie L. P. Gray, P 37546,

Respondent/Appellant.

Case No. 93-250-GA

Decided: February 20, 1996

BOARD OPINION

This formal complaint alleged nineteen separate counts of neglect on respondent's part while employed as a staff attorney for Chrysler Corporation.[1] The hearing panel concluded that the allegations of Count 1, 2, 4, 6 and 7 were established by the evidence and that the respondent's conduct violated Rules 1.1(c) and 1.3 of the Michigan Rules of Professional Conduct. The remaining counts were dismissed. The hearing panel included this request in its written report:

> This panel also found that the actions and conduct of [the respondent] with reference to those counts that we did find as violative of [Section] 1.1(c) and 1.3 as consisting of ordinary negligence. And, I would state for the record that we had considerable difficulty even after the proofs as to whether or not ordinary negligence should be sanctionable. We did in fact determine that the Court Rules provide for sanction. But, if anyone takes an appeal, we would ask the Appellate Court or the Supreme Court to address that particular issue as to whether or not specifically ordinary negligence is sanctionable under our rules. We believe that the rules state that they are. But, it's not specifically

[1] The formal complaint contained twenty counts of alleged misconduct. At the hearing, the Administrator's counsel acknowledged that Count 18 was duplicative of Count 3 and Count 18 was voluntarily dismissed.

indicated.

The respondent filed a petition for review on the grounds that 1) the panel erred as a matter of law in finding that ordinary negligence, without more, is professional misconduct in violation of MRPC 1.1(c) and/or MRPC 1.3; 2) the Administrator failed to prove any violation of the applicable rules where the evidence established that the respondent was acting in a paralegal capacity as a "case manager" along with other non-lawyer case managers in Chrysler Corporations Legal Department; and, 3) misconduct was not shown where the evidence established that respondent was under the direct control and supervision of superior attorneys in the legal department.

The Grievance Administrator filed a cross-petition for review on grounds that the hearing panel 1) erred in dismissing Counts 3, 5 and 8 through 20; and, 2) the respondent's conduct warrants a suspension of her license to practice law.

The Discipline Board has conducted review proceedings in accordance with MCR 9.118 and has reviewed the record below. We conclude that the record contains proper evidentiary support for the hearing panel's conclusions that the allegations of Counts 3, 5 and 8 through 20 were not established and that the respondent's conduct as alleged in Counts 1, 2, 4, 6 and 7 constitute ordinary negligence rather than "neglect". Based upon our review of the authorities cited by the parties, we conclude that the respondent's simple negligence does not constitute unethical conduct warranting discipline. The hearing panel's order of reprimand is therefore vacated and the complaint is dismissed.

On review, the Attorney Discipline Board must determine whether the hearing panel's findings on the issues of misconduct have evidentiary support in the whole record. In re Daggs, 411 Mich 304, 318-319 (1981); Grievance Administrator v August, 438 Mich 296, 304; 475 NW2d 256 (1991). During two days of hearing, the panel heard the testimony of the respondent and her supervising attorney regarding the nature of respondent's employment in the warranty section of Chrysler's Legal Department and her handling of the specific cases cited in the complaint. Documentary evidence was

also introduced (Chrysler Corporation's complete files in each claim against Chrysler assigned to the respondent were not introduced in light of Chrysler's claim of attorney/client privilege). [2]

In applying the appropriate standard of review of a panel's factual findings, it is not the Board's function to substitute its own judgment for that of the panels' or to offer a de novo analysis of the evidence. When, as in this case, the panel's decision to dismiss certain counts has evidentiary support, that decision should be affirmed.

Similarly, we defer to the hearing panel's unanimous conclusion that the respondent's handling of certain other cases in which Chrysler Corporation was named as a defendant, as alleged in Counts 1, 2, 4, 6 and 7, amounted to "ordinary negligence". Having affirmed that finding, we address the question presented in the panel's report--whether or not respondent's ordinary negligence should be sanctionable.

MRPC 1.1(c) states that a lawyer shall not "neglect a legal matter entrusted to the lawyer". In this case, the issue is not, as framed by the Grievance Administrator, whether "neglect" as set forth in MRPC 1.1(c) is limited to willful or gross neglect or encompasses ordinary neglect as well. Rather the question posed by the panel is whether or not there is a difference in the context of discipline proceedings between "neglect" and "negligence". In addressing this question, both parties have cited ABA Informal Ethics Opinion 1273 which states:

> Neglect involves indifference and a consistent failure to carry out the obligations that the lawyer has assumed before his client or a conscious disregard for the responsibility owed to the client. The concept of ordinary

[2] After termination of her employment in the Legal Department, respondent's handling of these files was reported to the Grievance Administrator by a supervising attorney at Chrysler. Neither Chrysler Corporation nor the reporting attorney was a complainant and the Request for Investigation was served in the name of the Grievance Administrator.

> negligence is different. Neglect usually involves more than a single act or omission. Neglect cannot be found if the acts or omissions complained of were inadvertent or the result of an error of judgment made in good faith. (Inf. Op. 1273, November 20, 1973)

This informal ethics opinion is entirely consistent with our 1990 opinion in Grievance Administrator v Samuel Posner, ADB 126-88, (Br. Opn. 1/8/90). In that case, the hearing panel ordered a reprimand for the respondent's failure to obtain medical records in a timely manner and for his failure to institute timely legal proceedings for alleged medical malpractice or, in the alternative, to timely notify his client of his decision not to file a case on her behalf. Noting that the record did not present evidence of willful disregard for his obligations to his client or a wider pattern of neglect, the Board vacated the respondent's reprimand and affirmed that "in certain narrowly drawn circumstances, an act of simple negligence may not necessarily constitute unethical conduct warranting discipline".

As attested to by the numerous Michigan cases cited by the Grievance Administrator, the Board and the Supreme Court have not hesitated to impose an appropriate sanction based upon an attorney's "neglect" of his or her clients' legal matters. In this case, however, we affirm our prior rulings that conduct which does not cross the threshold dividing "negligence" from "neglect" may not warrant public discipline in some cases. We find evidentiary support for the hearing panel's conclusion that the respondent's conduct, under all of the circumstances of this case, did not cross that threshold.

DISSENTING OPINION

Elaine Fieldman

I agree with the majority that ordinary negligence is not the equivalent of neglect and is not misconduct. However, the Grievance Administrator presented evidence which could support a finding of neglect. The panel did not address the question of whether the

respondent's conduct amounted to neglect. I would remand this matter to the panel for findings on this question.

Board Members George E. Bushnell, Jr., Marie Farrell-Donaldson, Barbara B. Gattorn, Albert L. Holtz and Miles A. Hurwitz.

Board Members John F. Burns, C. Beth DunCombe and Paul D. Newman did not participate.