Grievance Administrator,
State of Michigan
Attorney Grievance Commission,

Petitioner/Appellant,

v

Julian M. Levant, P 16592,

Respondent/Appellee.

91-222-GA

Issued: June 10, 1993

BOARD OPINION

This matter is before the Attorney Discipline Board for consideration of the Grievance Administrator's Petition for Review of a hearing panel Order of Reprimand. Based upon the evidence presented, the panel concluded that the respondent was responsible for the late filing of an appeal to the United States Court of Appeals for the Sixth Circuit, thereby neglecting a legal matter entrusted to him in violation of Canon 6 of the Code of Professional Responsibility, DR 6-101(A)(3). The panel further found that the respondent was ultimately responsible for the contents of a letter from his office to the client regarding the status of the appeal. Without finding specifically that the respondent saw the letter or signed it, the panel ruled that the respondent was responsible for the truth of any statements contained in the letter. The finding of a false statement in that letter supporting a ruling that the respondent was in violation of MCR 9.104(3,4). Finally, the panel concluded that a specific charge that the respondent failed to advise his client that the appeal to the Sixth Circuit had been dismissed was not established by a preponderance of the evidence.

The Grievance Administrator argues that all of the charges of misconduct in the complaint were supported by the evidence and that a reprimand in this case does not adequately protect the public, the courts or the legal profession. The Grievance Administrator seeks a suspension of sixty days. Based upon a review of the whole record, we find proper evidentiary support for the hearing panel's decision to dismiss Count II, paragraph (c)(i). In the absence of a finding that the respondent participated personally in the making of false or misleading statements to his client, we conclude that

the imposition of a reprimand was well-within the hearing panel's discretion under the circumstances of this case and the reprimand is therefore affirmed.

Count II of the complaint, paragraph (c)(i), charged that the respondent failed to advise his client that a second appeal had been dismissed by the Sixth Circuit Court of Appeals. We do not disagree with the Grievance Administrator's argument that there is evidence in the record which supports that charge. Specifically, the complainant testified that he was not notified of the dismissal by his attorney. However, the standard on review is not whether there was evidence in the record in support of the allegations in the complaint but whether or not the hearing panel's findings and conclusions have proper support in the whole record. Grievance Administrator v Irving August, 438 Mich 296; 304 NW2d (1991); In re Del Rio, 407 Mich 336; 285 NW2d 277 (1977). In this case, there was also the testimony of the respondent and his secretary that notice of the dismissal was sent from his office. Presented with conflicting evidence, it was the panel's duty to determine whether the weight of the evidence, by a preponderance, supported the allegations in the formal complaint. If a panel finds that conflicting evidence favors the respondent or the conflicting evidence has equal weight, the allegation must be dismissed. On the issue of the respondent's alleged failure to notify his client of the dismissal, the panel concluded:

> "Due to conflicting testimony as to the charge contained in paragraph (c)(i) of Count II, the panel is unable to make a finding that the Administrator has borne the burden of proof by a preponderance of the evidence. The charge in paragraph (c)(i) is, therefore, dismissed."

As the Board has previously ruled, a hearing panel's findings of fact should be given deference whenever possible and the panel's findings should stand when they are supported by the whole record. Grievance Administrator v David N. Walsh, DP 16/83, Brd. Opn. p. 233 (1984).

The Grievance Administrator's request for an increase in discipline emphasizes the respondent's "deliberate misrepresentations to his client concerning a scheduled court appearance on the appeal". (Grievance Administrator's Brief, p. 7, 5/12/93). Arguing that the respondent's conduct involved "an intentional act of deception (Grievance Administrator's Brief, p. 7), this case is analogized by the Administrator to cases involving deliberate misrepresentations found by the Board to warrant suspensions ranging from 120 days, (Matter of Ann Beish, DP 122/85, Brd. Opn. [2/8/89] to a suspension of four years, (Matter of Leo Gilhool,) ADB 155-88, [1989].

The hearing panel below pointedly avoided a finding that the respondent engaged in any intentional act of deception in connection with a letter from his office to the client dated January 6, 1989 containing false information. (The letter was admitted into evidence as Grievance Administrator's Exhibit #1). Instead, the panel found:

> "Respondent admits that exhibit 1 came from his office, both in the answer to complaint and in his testimony before the panel. Respondent denied, during the testimony, that he had seen the letter or that it was his signature on the letter.
>
> Whether or not the respondent saw the letter or signed it or accepting his explanations as to what the letter really meant, having admitted that the letter came from his office addressed to Wolvin, he is responsible for the truth of any statements made therein." (Hrg. Pnl. Rept. p. 4)

We decline to substitute our judgment for that of the panel on the issue of the respondent's personal knowledge or intent with regard to that letter. Based upon the panel's findings and conclusions, the respondent's conduct is not fairly characterized as conduct involving deliberate misrepresentations or intentional acts of deception.

The hearing panel's report on discipline refers to the pendency of a malpractice action against the respondent by the complainant to determine the financial damages, if any, suffered by the complainant as the result of the respondent's conduct. The panel noted that "respondent was candid in accepting responsibility and did not attempt to deny responsibility for actions of his office staff". This factor was properly considered by the panel in mitigation and is consistent with the ABA Standards for Imposing Lawyer Sanctions which states that a cooperative attitude toward disciplinary proceedings may be considered as an appropriate mitigating factor. [Standard 9.32(e)].

By way of aggravation, the Grievance Administrator introduced evidence of the respondent's admonition in 1988 for alleged neglect of a client matter and failure to communicate with a client. The panel acted within its discretion in declining to consider that admonition as an adverse factor after receiving the respondent's explanation of the circumstances involved.

Based upon the panel's conclusion that the respondent, through his own negligence or the negligence of his staff, failed to file a timely appeal and allowed an untruthful letter to issue from his

office, we do not believe that the hearing panel's considered opinion to impose a reprimand was inappropriate.

Concurring--John F. Burns, C. Beth DunCombe, Elaine Fieldman, Linda S. Hotchkiss, M.D. and Miles A. Hurwitz

George E. Bushnell and Theodore P. Zegouras did not participate.