

GRIEVANCE ADMINISTRATOR,
Petitioner/Appellee,

v

SAMUEL POSNER, P-19025,
Respondent/Appellant.

ADB 126-88

Decided: January 8, 1990

BOARD OPINION

The respondent was reprimanded by a hearing panel which concluded that his failure to institute a medical malpractice case on behalf of a client or, in the alternative, to communicate with his client in a timely fashion regarding his decision not to go forward on her behalf, constituted neglect of a legal matter and a failure to carry out a contract of employment. The Attorney Discipline Board has considered the Petition for Review filed by the respondent and has concluded that the facts in this case do not establish professional misconduct of a type or degree warranting the imposition of discipline.

The complaint filed by the Grievance Administrator charged, in Count I, that the respondent was retained in May 1985 by Adele Lockard to institute legal proceedings as the result of the alleged medical malpractice of a doctor whose last date of treatment was in November 1984. The complaint charged that the respondent failed to institute timely legal proceedings to toll the applicable statute of limitations or, in the alternative, that he failed to timely notify his client of his intention not to file a case on her behalf. A second count charged that the respondent's failure to obtain medical records in a timely manner constituted separate grounds for discipline. Count III charged that the client obtained substitute counsel in October 1986 but that the respondent failed to release the contents of his client's file until December 12, 1986.

Based on the testimony and exhibits submitted during two days of hearings, the hearing panel dismissed Count III but found that the respondent had failed to act in a timely manner as alleged in Counts I and II. Following a separate hearing on the issue of discipline, the panel issued its order reprimanding the respondent. The accompanying report on discipline specifically cited the respondent's prior unblemished record during fifty years of practice.

The hearing panel's report on misconduct contains a five-page summary of the evidence and reflects a fair consideration of the evidence brought before them. In considering the respondent's defense that he was led to believe by his client's statements that her last date of treatment was in March 1985 and that the two-year statute of limitations would not expire until March 1987, the panel concluded that the testimony of the client was more believable than the testimony of the respondent. The panel also rejected the claim that a handwritten letter from the

client to the respondent supported that defense.

In reviewing the factual findings of the panel, the Board adheres to the rule that the panel's findings will be supported where "upon the whole record, there is proper evidentiary support", In re Del Rio, 407 Mich 336 (1976). The Board has noted that deference should be given to the findings made by a panel which has the best opportunity to judge credibility. We decline to disturb the panel's factual findings in this case.

We are unable to conclude, however, that the respondent's inaction in this case warrants public disciplinary sanctions. The Board has previously ruled that, in certain narrowly drawn circumstances, an act of simple negligence may not necessarily constitute unethical conduct warranting discipline. In Matter of John F. Gilhool, ADB 81-88 (Brd. Opn. August 15, 1989), the Board ruled that an attorney's failure to turn over certain records to a client after he had lost them in his office was the result of negligence and inattention which was, at best, de minimus. The reprimand imposed by the panel in that case was reversed and we issued an opinion citing In re: Gelzer, 158 AT2d 331 (Sct. NJ, 1960) in which an attorney's failure to properly record a title insurance policy, while negligent and careless, was "not willful or of such a character to warrant a conclusion of unethical conduct." In this case, there does not appear to have been any willful disregard of the respondent's obligations to his client nor is there evidence suggesting a pattern of neglect.

In light of all the facts and circumstances presented in this case, we believe that an order vacating the reprimand and dismissing the complaint in this case is consistent with the goals of these disciplinary proceedings.

All concur