

IN THE MATTER OF JOEL SIMMER,
Member of the State Bar of Michigan,
Respondent
File Nos. DP 109/83; DP 124/83

Argued: January 19, 1984
Decided: February 1, 1984

OPINION OF THE BOARD

The hearing panel found that Respondent neglected a certain personal injury case resulting in the client's loss of her right to sue because of the applicable statute of limitations. The panel found that Respondent submitted false answers in his response to the Grievance Administrator's request for investigation and that Respondent failed to answer a second request for investigation. The Respondent filed a petition for review claiming that the panel finding of misrepresentation in the answer to the first request for investigation, is unsupported by the evidence; Respondent therefore seeks a reduction of the suspension of 119 days imposed by the panel. Given the scope and nature of the alleged misrepresentation and the proofs in regard thereto and in light of certain mitigating factors, the Board reduces the suspension to a period of 60 days.

The client-complainant in this matter was involved in an auto accident in June of 1979 and retained Respondent on a contingent fee basis. Throughout the following year, the complainant encountered difficulty in attempting to communicate with the Respondent and in March of 1980 she filed a request for investigation citing Respondent's failure to communicate and failure to advise her of the status of her case. Respondent answered this request for investigation and admitted the allegations. Apparently he settled the matter with the complainant who dismissed the grievance and he accepted an admonishment from the Grievance Commission under GCR 1963, 955.

As part of the settlement of the grievance, Respondent was to send certain pleadings to complainant's attorney in the State of Utah. In March of 1983, however, the complainant filed a second request for investigation, again alleging that Respondent failed to communicate with her and failed to respond to her request for the pleadings. By the time the complainant had filed this second request for investigation, the statute of limitations on complainant's case had taken effect and complainant lost her right to sue. The Grievance Administrator also alleges that Respondent made false statements in his answer to the first request for investigation. Respondent states that he had communicated with substitute counsel and offered to forward the pleadings in question, to-wit: a complaint for personal injury to substitute counsel in Utah; Respondent claims that he was informed by substitute counsel that it was not necessary to forward said documents - it is this defensive claim that the Grievance Administrator characterizes as a misrepresentation. The Grievance Administrator charges that Respondent enlarged upon his misrepresentation in the answer to the request for investigation by stating that the matters leading up to the original request for investigation were resolved, when, in fact, they were not resolved until after the request for investigation.

A default was entered after Respondent failed to answer the second request for investigation and the formal complaint. His motion to set aside the default was denied, and based upon the

default, which is tantamount to an admission to the charges in the formal complaint, Schwartz v Elston, File No. DP-100/82 (December, 7, 1982), the hearing panel made findings of neglect, failure to carry out a contract of professional employment, failure to answer a request for investigation and misrepresentation in the original request for investigation. Respondent was allowed to make a statement in mitigation, but the only mitigating factor acknowledged by the panel was Respondent's previously unblemished record.

The Board has reviewed the record in this matter carefully and has had an opportunity to observe and question the Respondent in the review hearing. Respondent has clearly acknowledged his mishandling of the personal injury matter and his errors in failing to deal with the request for investigation and formal complaint in a proper and timely manner. The Board is persuaded that Respondent is genuinely remorseful and at this time has a constructive and positive attitude regarding this matter.

The Board finds no error or abuse of discretion by the panel in denying the motion to set aside default and will leave the default status of this matter undisturbed and the Board will not accept new evidence offered by Respondent. However, the record of proofs submitted by the Grievance Administrator in the default proceedings, presents a very close factual question regarding Respondent's culpability and intent to mislead or deceive by his statements made in response to the original request for investigation. Had the hearing panel been given the advantage of a further development of the facts surrounding the alleged misrepresentation, it is entirely possible that they may have concluded that no material misrepresentation had been made. Because a valid default stands, the Board will not amend the hearing panel findings. However, based upon the record as a whole, and in light of the mitigating factors which the Board considered the suspension will be reduced from 119 days to 60 days.

While Respondent issued a notice of change of status to his clients, he failed to do so by registered or certified mail as required by GCR 1963, 968. Respondent shall be afforded an opportunity to re-issue said notices in accordance with said court rule and file proof of the same with the Grievance Commission within 5 days of the Board's order issued herewith.

ALL CONCUR.