STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,
Attorney Grievance Commission,

Petitioner/Appellee,

Steven Gursten,

Complainant/Appellant,

v

David E. Christensen, P 45374,

Respondent/Appellee,

Case No. 18-71-GA

Decided: September 27, 2019

Appearances

Stephen P. Vella and Sarah C. Lindsey, for the Grievance Administrator, Petitioner/Appellee
Kenneth M. Mogill, for the Respondent/Appellee
Donald D. Campbell and Trent B. Collier, for the Complainant/Appellant

BOARD OPINION

The Grievance Administrator filed a formal complaint against respondent on June 29, 2018. The complaint alleged that respondent committed misconduct after Michigan Auto Law, (complainant's firm), and respondent's professional corporation entered into an Independent Contractor Agreement (ICA) effective March 1, 2007. The complaint charged violations of MRPC 1.4(b); 1.5(c); 8.4(a); and, MCR 9.104(2). The parties filed a stipulation for consent order of discipline pursuant to MCR 9.115(F)(5), contemporaneously with the filing of the formal complaint. The stipulation indicated that respondent admitted the factual statements and allegations of professional misconduct contained in the formal complaint, in its entirety. For this, the parties stipulated that respondent be reprimanded. The panel ultimately accepted the parties' stipulation for consent order of discipline and, in accordance with the stipulation of the parties, ordered that respondent be reprimanded.

Complainant, Steven Gursten, filed a petition for review arguing that the hearing panel abused its discretion in accepting the parties' stipulation for consent order of discipline and requesting that the Board reject the stipulation, and exercise its authority under MCR 9.118(D) to "order other discipline" and increase the discipline imposed from a reprimand to a suspension. For the reasons discussed below, the hearing panel's order of reprimand (by consent) is affirmed.

I. Panel Proceedings/Background

The matter was assigned to Tri-County Hearing Panel #4 to consider whether to accept the stipulation for consent order of discipline submitted by the parties. In addition to respondent's admissions, the parties further stipulated that respondent violated duties owed to his clients and the profession; his mental state was negligent in regard to the duties owed; and, that his conduct caused potential injury to his client; that ABA Standards 4.63 and 7.3 were the most appropriate standards to apply to the misconduct committed; that one aggravating factor listed under ABA Standard 9.22 applied: Standard 9.22(i) (substantial experience in the practice of law); and that five mitigating factors listed under ABA Standard 9.32 applied: Standard 9.32(a) (absence of a prior disciplinary record); Standard 9.32(b) (absence of a dishonest or selfish motive); Standard 9.32(d) (timely good faith effort to make restitution or to rectify consequences of misconduct); Standard 9.32(e) (full and free disclosure and cooperative attitude toward proceedings); and Standard 9.32(g) (character and reputation). The stipulation contained the following further information for the panel to consider:

> The parties agree that respondent believed he had the right to represent the clients through his own professional corporation, but he was negligent when he failed to recognize that he should notify his clients of the change and enter into a new contingent fee agreement which identified his professional corporation as the firm handling the case with his clients. No clients complained about this conduct or reported injury as a result of the conduct, but the potential for injury existed.
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> * * *
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> Respondent's actions were not intended to deceive or mislead his clients; rather, he failed to recognize his professional obligations to his clients under the unique contractual relationship he had with Michigan Auto Law.
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> * * *

> To resolve the matter quickly and amicably, respondent filed a declaratory judgment action against Michigan Auto Law, and the parties entered into a settlement early in the litigation. Respondent has satisfied all of his obligations under the settlement agreement.[1]
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> * * *
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> Respondent has cooperated with the investigation, including meeting with the Attorney Grievance Commission attorneys and providing all documents and information requested.

A copy of the stipulation was served on complainant pursuant to the Grievance Administrator's requirement to do so under MCR 9.115(F)(5)(a)(ii). On July 23, 2018, complainant filed a lengthy objection to the stipulation for consent order of discipline and a request to stay the proceedings pending before the hearing panel. Complainant indicated that he objected to the stipulation for consent order of discipline because the formal complaint addressed only "a small fraction of [respondent's] misconduct . . . and, a reprimand is far too lenient for the misconduct cited in the formal complaint after proper application of the ABA Standards for Imposing Lawyer Sanctions and the Michigan Attorney Discipline Board's decisions in comparable cases." (Objection 7/23/18, pp 1-2.)

Complainant's objection further noted his immediate intention to file a complaint for superintending control with the Michigan Supreme Court, noting that although the hearing panel could not modify the formal complaint, the Supreme Court could. On July 27, 2018, the panel issued an order that granted complainant's request for a stay of the proceedings pending the Court's decision as to his complaint for superintending control.

On December 21, 2018, the Court issued an order denying complainant's complaint for superintending control because "the Court is not persuaded that it should grant the requested relief." On January 16, 2019, the panel issued a scheduling order allowing the Grievance Administrator and respondent an opportunity to respond to complainant's objections and scheduling a hearing on March 12, 2019. The Administrator and respondent both filed responses in support of the stipulation for consent order of discipline. The hearing was subsequently administratively adjourned without date.

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[1] Respondent's responsive brief mentions the declaratory action, which was facilitated by retired Wayne County Circuit Court Judge James Rashid, in a footnote and specifically notes that Judge Rashid was interviewed and indicated he saw no ethical misconduct and would have reported it to the Commission if identified. (Respondent's brief, 5/22/19, p 14.)

On April 4, 2019, the hearing panel's report was issued in which the panel indicated its acceptance of the parties' stipulation for consent order of discipline and, in accordance with the stipulation of the parties, ordered that respondent be reprimanded, effective April 26, 2019. On April 25, 2019, complainant filed a timely petition for review.

II. Discussion

MCR 9.118(A)(1) gives a complainant the right to file a petition with this Board seeking review of an "order of a hearing panel filed under MCR 9.115." No exception is made for consent orders filed under MCR 9.115(F)(5). On review, complainant relies on our decision in *Grievance Administrator v Mark C. Matheny*, 04-155-GA (ADB 2005), in which we vacated a hearing panel order of suspension and ordered the revocation of the respondent's license, in support of his request that the Board exercise its authority under MCR 9.118(D) to "order other discipline" and increase the discipline imposed to a suspension. However, and as noted by the Administrator, complainant's reliance on *Matheny* is misplaced as that matter involved review of a hearing panel order resulting from a contested hearing, not a stipulation for consent order of discipline.

In a review proceeding initiated by a complainant's petition following the entry of an order of discipline by consent pursuant to MCR 9.115(F)(5), the Board's role is quite limited. Ordinarily, the Board has fairly broad authority to "review and, if necessary, modify a hearing panel's decision as to the level of discipline." *Grievance Administrator v Brent S. Hunt*, 12-10-GA (ADB 2012), p 7, citing *Grievance Administrator v August*, 438 Mich 296,304; 475 NW2d 256 (1991); MCR 9.110(E)(4). But, when a complainant seeks review of an order of discipline agreed to by the Attorney Grievance Commission and a respondent that has been approved by a hearing panel, the Board does not consider allegations not admitted, nor does the Board adjust the level of discipline imposed by the panel based upon a stipulation of the parties.

The Board's function in these cases is to assess whether the discipline agreed to and imposed is appropriate for the misconduct admitted to. If the Board concludes that it is not appropriate, the options are, again, restricted by the fact that the discipline imposed below was based on the consent of the parties. Thus, the Board may either refer the matter to another hearing panel for hearing, or, if appropriate, remand the matter to the panel that approved the stipulation for consent discipline for further consideration. *Grievance Administrator v Barry Bess*, 14-16-GA (ADB 2015).

On review, complainant maintained that he was not asking the Board to conclude that the formal complaint was insufficient and he acknowledged that the Board could not consider allegations that are not charged in the formal complaint. Instead, he argued that the prosecutorial discretion afforded to the Commission to determine what allegations to charge, "does not allow the Commission to stipulate to discipline that is insufficient for the allegations it actually pleaded . . . nor can they stipulate that a respondent was negligent when the allegations in a formal complaint establish intentional, dishonest conduct." (Complainant's Brief in Support, p 1.) Complainant argued that the Commission already determined that respondent acted dishonestly when it admonished respondent in writing back in September 2015.[2] However, allegations do not constitute proof of conduct and acceptance of an admonishment does not constitute proof of a particular state of mind.

In order to determine the appropriateness of the parties' stipulation, complainant argues that his RI and attachments can, and should be, considered by the Board pursuant to the provisions of MCR 9.126(A), and because of an order of remand we previously issued in *Grievance Administrator v Craig Tank*, 06-116-GA (ADB 2007). In *Tank*, we did remand the matter to the panel to consider additional information related to the charged misconduct contained in the formal complaint and admitted to by respondent Tank in the parties' subsequent stipulation for consent order of discipline, but review of the RI and answer thereto, pursuant to MCR 9.126(A), was suggested by respondent

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[2] This matter originated with the filing of a Request for Investigation (RI) against respondent by Complainant Gursten back in April 2014; AGC File No. 0935-14. The RI was initially closed after a preliminary review pursuant to MCR 9.112(C)(1)(a), but then re-opened, investigated, and submitted to the Attorney Grievance Commission for its review and decision. On September 18, 2015, respondent's counsel was advised in writing that the Commission had determined to admonish respondent. The letter specifically indicated that:

> . . . the Commission determined that [respondent] deposited monies into an IOLTA and business account where it is disputed that he had specific authorization to do so, thereby exposing the legal profession to obloquy, contempt, censure, or reproach in violation of MCR 9.104(2). A lawyer should avoid conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in accordance with MRPC 8.4(b). [Complainant's Brief, Exhibit 7.]

Respondent did not object to the admonishment, which constituted an acceptance under MCR 9.114(B)(2), so complainant was notified in writing of the admonishment and respondent's acceptance of that outcome. Aggrieved by that outcome, complainant filed a complaint for superintending control with the Michigan Supreme Court, pursuant to MCR 9.122(A)(2) and MCR 7.306(A)(2). Ultimately, the complaint for superintending control was dismissed without prejudice and without costs based on the Grievance Administrator's representation to the Court that AGC File No. 0935-14 would be re-opened for further investigation. Respondent's motion to vacate the admonishment and appoint independent counsel was denied.

Tank as evidence he could produce to show certain fees paid and services provided. Importantly, our order of remand did not indicate that the Board could either consider additional allegations of misconduct not charged or order the Attorney Grievance Commission to investigate and/or prosecute allegations of misconduct raised by a complainant but not charged in a formal complaint.

Furthermore, it is not apparent that more information was necessary. Complainant's 26 page objection to the stipulation for consent order of discipline, which made specific references to the allegations raised in his RI, was reviewed by the panel, and they ultimately determined that "the objections did not warrant rejecting the stipulation for consent order of discipline." (Report, 4/4/19, p 2.) More importantly, complainant's objections to the stipulation for consent order of discipline, which we presume were similar, if not the same as the ones expressed to the panel, were set forth in his second complaint for superintending control, (filed to ask the Court to modify the formal complaint), which the Court ultimately denied because it was "not persuaded that it should grant the requested relief." (Order 12/21/18.)

III. Conclusion

There is no indication from our review of the record that the panel did not make an informed decision as to whether the agreed upon discipline was appropriate for the admitted misconduct. In addition, the Board is satisfied that the discipline imposed is within the acceptable range of the ABA Standards and prior Board precedent.

Board members Rev. Michael Murray, Jonathan E. Lauderbach, Barbara Williams Forney, James A. Fink, Karen O'Donoghue, Michael B. Rizik, Jr., Linda Hotchkiss, MD, and Anna Froshour concur in this decision.

Board member John W. Inhulsen was absent and did not participate.