STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,
Attorney Grievance Commission,

Petitioner/Appellee,

Kenneth D. Poss,

Complainant/Appellant,

v

Barry R. Bess, P 10763,

Respondent/Appellee,

Case No. 14-16-GA

Decided: December 22, 2015

Appearances:

Dina P. Dajani, for the Grievance Administrator, Petitioner/Appellee
Kenneth M. Mogill, for the Respondent/Appellee
Thomas W. Cranmer and David D. O'Brien, for the Complainant/Appellant

BOARD OPINION

In October of 2014, respondent stipulated to the entry of a consent order of discipline based on a plea of no contest to the allegation that he violated MRPC 1.15(b)(3) by failing to provide an accounting of funds held in a private client trust account when requested by his client, Dr. Kenneth D. Poss. Pursuant to the stipulation, Tri-County Hearing Panel #56 ordered that respondent be suspended for 180 days, and that,

> as a condition precedent to filing a petition for reinstatement, respondent shall provide a full accounting of the funds held in his client trust accounts with Comerica Bank in January 2007, including the origin, ownership and disbursement of such funds.

Complainant objected to the entry of the consent order of discipline below and has petitioned for review, arguing that the discipline imposed should have included restitution to complainant for "$3.6

million for which [respondent] has failed to account," and $46,337.15 in fees owed to a forensic accountant employed to assist complainant and the Attorney Grievance Commission trace funds in respondent's possession. We affirm.

The formal complaint alleged that, in 2007, Dr. Poss transferred nearly $22 million to respondent's private client trust account in order to keep his wife from accessing the funds during a period of marital discord. The pertinent portion of the complaint further alleged that Dr. Poss and his wife reconciled and that, after making a series of transfers, respondent failed to provide an accounting to Dr. Poss for the funds in his possession. As noted above, a stipulation for consent discipline admitting certain allegations, including the allegation that respondent's records were incomplete and could not establish "whether all funds respondent held on Dr. Poss' behalf . . . were appropriately returned or applied." The parties consented to a suspension of 180 days and, essentially, until all funds were accounted for. In light of the indeterminate state of respondent's records and the preliminary nature of a forensic accounting investigation report by Rodney L. Crawford, CPA, the stipulation did not provide for restitution.

A copy of the stipulation for consent discipline was served on complainant as required by MCR 9.115(F)(5). Complainant thereafter filed an objection to the stipulation and requested that the panel reject it and that respondent be required to pay restitution as part of any resolution of this matter. The hearing panel denied complainant's objections, in part, on the basis that complainant had no standing to object and the panel lacked jurisdiction to consider the objections. The panel also found that the stipulation was otherwise reasonable, appropriate, and consistent with the purposes of attorney discipline. Specifically, the panel stated:

> On November 6, 2014, complainant Kenneth D. Poss filed objections to the stipulation submitted by the parties. The hearing panel, upon review, denied the objections because the complainant lacked standing to make them and the panel lacked jurisdiction to consider them. Proceedings under MCR 9.100, et seq., are between the Grievance Administrator and the respondent; the complainant is not a party. This conclusion is evident from the process itself as well as the text of MCR 9.115(B) which grants the Grievance Administrator authority to proceed even in the absence of a cooperative complainant. Given that, the only parties with standing are those participating in the presentation of and defense to the complaint. Therefore there is no basis in statute or the rules which authorized the panel to consider the objections.

> The panel also will not second guess two seasoned attorneys who have, over an eight month period, discussed and negotiated a resolution of a complaint covering a myriad of issues. We have based our decision on the fact that the only facts before us are those stipulated to the by the respondent in paragraphs 15-19, 21-23, and 26(c) of the complaint. All of the other allegations in the complaint, and the voluminous allegations in the objections of Dr. Poss, are untested by cross-examination and are at best hearsay. By the admission of Dr. Poss, even he cannot tell us the amount mishandled. In our opinion, the discipline which effectively disbars Barry Bess is reasonable. (HP Report, pp 1-2.)

As a preliminary matter, we must dispel the notion that the complainant lacked standing to object to the discipline order or that the panel lacked jurisdiction to consider a complainant objection. Subchapter 9.100 of the Michigan Court Rules grants complainants the right to receive notice of the stipulation as it is submitted to a hearing panel for consideration, and the right to petition for review of a panel's decision to accept a stipulation for consent discipline. MCR 9.115(F)(5), MCR 9.118(A)(1). Thus, this Board has rejected the argument that the Board lacked jurisdiction to consider a complainant's petition for review of a panel's decision to accept a stipulation for consent discipline in *Grievance Administrator v Craig A. Tank*, 06-116-GA (Bd Order, 9/29/2007). In *Tank*, the complainant participated in proceedings before the panel considering a consent proposal, then participated at the Board level, and was given an opportunity to have further participation on remand.

The panel stated that in its report that it would not "second guess two seasoned attorneys who have, over an eight month period, discussed and negotiated a resolution of a complaint covering a myriad of issues." As we discuss below, a panel may decide that there is no good reason to second guess the resolution proposed by the attorneys in a particular case. However it is in fact the proper role of the panel to review and decide whether to accept the stipulation under MCR 9.115(F)(5). As we held in *Tank*, the panel should "make an informed decision as to whether or not the sanction agreed upon by the parties is indeed appropriate for the misconduct for which an admission or plea of no contest has been tendered."

The critical question in this case is whether the discipline imposed through the consent order and accepted by the panel is appropriate given the nature of the uncontested misconduct. The hearing panel stated that it "considered the stipulation and has concluded that it is reasonable and

is consistent with the goals of these discipline proceedings." Respondent pled no contest to violating Count One of the complaint, which alleged that he "failed to promptly render a full accounting of all funds upon the client's request, in violation of MRPC 1.15(b)(3)." No conversion or misappropriation was established by admission or otherwise.

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), our 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" in light of our "responsibility to ensure a level of uniformity and continuity" in disciplinary matters. *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, we do not consider allegations not admitted, nor do we adjust the level of discipline imposed by the panel based upon a stipulation of the parties. Our function in these cases is to assess whether the discipline agreed to and imposed is appropriate for the misconduct admitted to. If we conclude that it is not appropriate, our options are, again, restricted by the fact that the discipline imposed below was based on the consent of the parties. Thus, it appears that 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. *See, e.g., Tank, supra.*

On review, complainant asks us to mandate restitution as a condition of the consent order. For the reasons set forth above, we may not do this. Moreover, we are not persuaded that the panel erred in approving the stipulation and rejecting complainant's arguments that discipline in this case must, to be appropriate, include restitution. This Board has opined that restitution is chiefly appropriate in disciplinary cases where "[r]espondent admits responsibility for the loss of a sum certain or the link between the misconduct and the readily verifiable degree of loss is demonstrated without the need for lengthy proofs or proceedings." *Grievance Administrator v Sauer,* DP-25/84 (ADB 1985). This holding was clarified in *Tank*, where we said:

> [O]ur previous pronouncements on restitution, such as *Sauer*, were not intended to discourage panels from awarding restitution when the proper amount can be reasonably accurately ascertained without the

> extraordinary commitment of resources, and especially when litigation of the dispute in civil forum would be uneconomical.

In this case, the report furnished by the forensic accountant at complainant's behest did not establish with any degree of certainty which, if any, transfers were improper or precisely how much money, if any, was unaccounted for. Here, the panel was not presented with a sum certain nor was there a readily verifiable degree of loss. Rather, the forensic accountant provided the panel with an estimated range spanning from $900,000 to $3.6 million, in a preliminary report dependent upon certain assumptions. Due to the substantial uncertainty in this case concerning the amount in controversy and complainant's capacity to pursue civil remedies, we agree with the Administrator and respondent that the panel did not err in approving the stipulation over the objections of complainant and imposing discipline by consent which did not include restitution in this instance.

For the aforementioned reasons, we affirm the panel's acceptance of the consent order of discipline.

Board members James M. Cameron, Jr., Lawrence G. Campbell, Sylvia P. Whitmer, Ph. D., Rosalind E. Griffin, M.D., Dulce M. Fuller, Louann Van Der Wiele, Michael Murray, James A. Fink and John W. Inhulsen concur in this decision.