

Attorney Discipline Board

GRIEVANCE ADMINISTRATOR,
Attorney Grievance Commission,

Petitioner/Appellee,

DAVID W. P. MICHAEL,
Complainant/Appellant,

v

Case No. 06-116-GA

CRAIG A. TANK, P 58360,

Respondent/Appellee.

07 SEP 28 PM 12:40
MICHIGAN ATTORNEY DISCIPLINE BOARD

ORDER REMANDING FOR RECONSIDERATION

Issued by the Attorney Discipline Board
211 W. Fort St., Ste. 1410, Detroit, MI

Complainant David Michael filed a petition pursuant to MCR 9.118(A)(1) seeking review of the consent order of discipline entered in this matter.

The formal complaint charges that respondent failed to seek Mr. Michael's lawful objectives, to act with reasonable diligence and promptness, to keep him reasonably informed and to comply promptly with reasonable requests for information. At the time of filing, the complaint was accompanied by an executed stipulation for consent order of discipline under MCR 9.115(F)(5), in which respondent and the Grievance Administrator agreed that respondent would plead no contest to the charges in the complaint in exchange for the entry of an order of reprimand. The stipulation was approved by the Attorney Grievance Commission and was eventually accepted by the hearing panel.

In the stipulation, respondent pled no contest to the following allegations pertaining to his handling of Mr. Michael's matters:

14. In approximately July of 2003, David Michael retained Respondent for representation in a charge of driving under the influence of liquor in Chicago, Illinois.

15. Mr. Michael provided a copy of a notice of hearing scheduled for July 29, 2003, in Chicago to Respondent.

16. Respondent did not help Mr. Michael locate or retain Illinois counsel, nor did Respondent appear at the July 29, 2003 hearing.

17. In July of 2004, Mr. Michael retained Respondent to represent him in a domestic violence charge in the 43rd District Court.

18. A July 9, 2004 notice of pretrial hearing was mailed for a scheduled hearing in the domestic violence matter on July 27, 2004.

19. Respondent filed his appearance by facsimile on July 27, 2004, but did not appear for the hearing on behalf of Mr. Michael with regard to the domestic violence matter.

Pursuant to the stipulation for consent discipline, the panel found that respondent violated the following Michigan Rules of Professional Conduct: 1.2(a); 1.3; 1.4(a); and 8.4(a).

Complainant argues on review that the panel was not fully advised of the nature of respondent's misconduct, and thus was unable to give appropriate consideration to the stipulation. He alleged in argument to the Board:

- A. That respondent accepted money from Mr. Michael for representation in a driving matter in Illinois - a state in which respondent was not licensed to practice law.
- B. That for a period of 16 months, respondent deceived Mr. Michael by telling him that his case was being handled properly.
- C. That respondent failed to represent Mr. Michael in another legal matter.
- D. That in July 2004, respondent personally informed Mr. Michael that he had obtained a dismissal of the charges against him in Illinois but that Mr. Michael discovered in November 2004 that the charges had not been dismissed. That after Mr. Michael discharged respondent with regard to the matter in Illinois, respondent failed to return the unearned fees.

Complainant Michael seeks restitution of the \$3,500 he allegedly paid to respondent and restitution for additional out-of-pocket expenses incurred as a result of respondent's misconduct (including expenses incurred to pursue this appeal). In addition, the complainant argues that the hearing panel erred in accepting a stipulation for a reprimand and that respondent's misconduct warrants greater discipline.

Respondent argues that the Board lacks jurisdiction to consider a complainant's petition for review of a hearing panel's decision to accept a stipulation for consent discipline under MCR 9.115(F)(5). We disagree. 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). This is consistent with the Court's decision to give a complainant the right to notice of a consent proposal submitted to a panel (see MCR 9.115(F)(5)) and the right to seek review of the Attorney Grievance Commission's dismissal of a request for investigation (MCR 9.122(A)(2)).

This Board has previously held that the Attorney Grievance Commission possesses the prosecutorial discretion to allege, or not allege, particular rule violations in a complaint filed with the Board as well as the inherent authority to withdraw a complaint, or specific charges, which may become unworthy of prosecution. (See *Grievance Administrator v Kurt A. O'Keefe*, 90-13-GA (ADB 1992). It does not necessarily follow, however, that once the Grievance Administrator has investigated the matters brought to his attention in a complainant's request for investigation and the Attorney Grievance Commission has authorized the filing of a formal complaint for adjudication before a panel, that the complainant should be relegated to the role of a mute bystander as the Grievance Administrator and respondent negotiate the terms of a stipulation for consent discipline under MCR 9.115(F)(5).

Under MCR 9.115(F)(5), a hearing panel may accept or reject a stipulation for consent discipline presented by the Grievance Administrator and a respondent. If the stipulation is not accepted, "the matter must then be referred for hearing to a hearing panel other than the one that passed on the proposed discipline." *Id.* Implicit in a panel's authority to accept or reject a stipulation is the opportunity for the members of the panel to 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 a plea of no contest has been tendered. In this case, the hearing panel requested, in correspondence to the parties, further information, including "what impact, if any, did Mr. Tank's actions, as described in the complaint, have on his clients or third parties." A joint response was submitted to the panel by the parties. In addition, separate written responses were submitted to the panel by Complainant Michael and another complainant. However, Complainant Michael has argued persuasively that, at least as to his grievances against respondent, the panel may not necessarily have had access to all of the available information relevant to the nature and scope of respondent's misconduct.

In light of the principle expressed in both MCR 9.102(A) and MCR 9.105 that the primary goal of these discipline proceedings must be the protection of the public, we conclude that this matter should be remanded to the hearing panel for reconsideration of its decision to accept the stipulation for consent discipline in this case, particularly with regard to the charges of misconduct involving complainant David Michael. On remand, the panel should consider the record in the review proceedings before the Board and may conduct such further proceedings as it deems appropriate, which may include a hearing.¹ Complainant Michael should be allowed to participate in a manner determined by the panel. See *Grievance Administrator v Stephen J. Borowski*, 95-115-GA (Bd Order 06/19/96).

On remand, the panel should inquire into the following areas:

1. Whether respondent rendered services having any value to complainant Michael;
2. The nature of services, if any, rendered in Illinois;

¹ In answer to questions posed by the Board's Chairperson as to what evidence, if any, the respondent would be prepared to produce showing the fees paid by Mr. Michael and the services performed, respondent's counsel pointed out under MCR 9.126(A), "[A]ny interested person may inspect the request for investigation and the respondent's answer thereto if a formal complaint has been filed." Respondent's counsel represented that those documents would constitute, at least in part, the proofs to be offered in answer to those questions. Presumably, these will be available for the panel's consideration.

3. The impact of respondent's actions upon complainant;
4. Whether respondent misrepresented the status of the Illinois matter; and,
5. Any other matters pertinent to the appropriate level of discipline for the admitted misconduct or otherwise relevant to whether the stipulation for consent discipline should be accepted.

Also, in light of the argument on review that restitution would be inappropriate under the Board's decision in *Grievance Administrator v Frederick A. Sauer, Jr.*, DP-25-84 (ADB 1985), we take this opportunity to point out that our 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.

Thus, we have ordered restitution in numerous instances notwithstanding the broad guidelines in *Sauer*. For example, in *Grievance Administrator v Donald L. Sugg*, No. 92-181-GA (ADB 1993), the Administrator and the complainant both petitioned for review. We granted the complainant's request to modify the order of discipline to include restitution of attorney fees paid to respondent for an appeal the respondent neglected to file. Restitution was ordered even though not requested by the Administrator and even though the formal complaint did not allege failure to return an unearned fee.

A review of our cases demonstrates that restitution is frequently ordered in cases involving neglect when the attorney has failed to return an unearned fee taken in advance. See, e.g., *Grievance Administrator v John S. Synowiec*; *Grievance Administrator v Richard G. Parchoc*, 94-39-GA; 94-68-FA (ADB 1994); *Grievance Administrator v G. Michael Doroshewitz*, ADB 138-89; 154-89; 156-89; 163-89 (ADB 1990); *Grievance Administrator v Clifford R. Williams*, ADB 43-87; 69-87 (ADB 1988). While the primary purpose of discipline is to protect the public from unfit lawyers and not to adjust all complaints between client and lawyer, restitution can have an important rehabilitative and deterrent effect. Therefore, in deciding whether to accept a proposal for consent discipline, the panel may consider the presence or absence of a provision regarding restitution.

NOW THEREFORE,

IT IS ORDERED that this matter is remanded to Tri-County Hearing Panel #13 for proceedings consistent with this order. We do not retain jurisdiction.

ATTORNEY DISCIPLINE BOARD

By: 
William P. Hampton, Chairperson

DATED: September 28, 2007

Board Members William P. Hampton, Lori McAllister, George H. Lennon, Billy Ben Baumann, M.D., William J. Danhof, William L. Matthews, C.P.A., and Andrea L. Solak concur in this decision.

Board Members Rev. Ira Combs, Jr. and Hon. Richard F. Suhrheinrich did not participate.