

STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellee

v

Frederick L. McDonald, P 17366

Respondent/Appellee,

Case No. 06-3-GA

Decided: May 1, 2007

Appearances:

Patrick K. McGlinn, for Grievance Administrator, Petitioner/Appellee
Stephanie Carter, for Respondent/Appellee
Dyann Salmi, Complainant, In Pro Per

BOARD OPINION

In this case, the Attorney Discipline Board has considered a petition for review filed by the complainant, Dyann Salmi, on the grounds that the stipulation for consent order of reprimand approved by the Attorney Grievance Commission and accepted by the hearing panel resulted in insufficient discipline. The Attorney Discipline Board has conducted review proceedings in accordance with MCR 9.118. For the reasons discussed below, the consent order of reprimand issued by Tri-County Hearing Panel #8 on October 12, 2006 is affirmed.

I. Procedural Background

The formal complaint was filed by the Grievance Administrator in this matter on January 5, 2006. That complaint charged that respondent, Frederick L. McDonald, neglected a legal matter entrusted to him by Dyann Salmi; failed to keep her informed of the status of her claim and made misrepresentations to his client. Among other things, the complaint charged that respondent filed a complaint on behalf of Ms. Salmi in a matter titled Dyann Salmi v Aurora Casket Co. in Wayne County Circuit Court in March 2003. At the defendant's request, the matter was subsequently removed to the U.S. District Court for the Eastern District of Michigan and then transferred to the

U.S. District Court for the Southern District of Indiana. The complaint charges that in that representation, respondent failed to respond to the defendant's motion to dismiss; that the suit was dismissed with prejudice in February 2004; that respondent failed to advise his client that the matter had been dismissed; and that in April 2005, respondent wrote a letter to Ms. Salmi advising her, among other things, that he would "continue to pursue your litigation in the Indiana court . . ."

Respondent filed a timely answer to the complaint. The first hearing scheduled for March 2, 2006 was adjourned at respondent's request and the Grievance Administrator and respondent then stipulated to a further adjournment for the announced reason that the parties were attempting to resolve the matter by consent discipline.

On September 28, 2006, the Grievance Administrator and respondent filed a stipulation for consent order of discipline under the procedure described in MCR 9.115(F)(5). Respondent offered his plea of no contest to the allegations that he neglected a legal matter entrusted to him, in violation of MRPC 1.1(c), and that he failed to act with reasonable diligence and promptness in his representation of Ms. Salmi, in violation of MRPC 1.3 and 3.2. The parties stipulated that the remaining charges of misconduct, including failure to seek the lawful objectives of a client [MRPC 1.2(a)]; failing to keep a client reasonably informed about the status of the matter [MRPC 1.4(a)]; and making a misrepresentation to a client [MRPC 8.4(b)], would be dismissed. The parties further stipulated to the entry of an order of reprimand. In support of that request, the Grievance Administrator and respondent agreed that a reprimand for neglect and lack of diligence in a single matter is consistent with Standard 4.43 of the American Bar Association's Standards for Imposing Lawyer Sanctions. Finally, the parties acknowledged the presence of mitigating factors under ABA Standard 9.32 including the absence of a dishonest or selfish motive; a timely good faith effort to rectify the consequences of the misconduct; a cooperative attitude toward the proceedings and remoteness of prior offenses. Aggravating factors under Standard 9.22 were identified as: prior disciplinary offenses and substantial experience in the practice of law.

Under MCR 9.115(F)(5), such a stipulation between the Grievance Administrator and a respondent attorney must first be approved by the Attorney Grievance Commission. Once approved, the stipulation is to be filed with the hearing panel and a copy of the proposed stipulation must be served upon the complainant. In this case, the stipulation was filed with the hearing panel and mailed to complainant Dyann Salmi on September 26, 2006. On October 12, 2006, the hearing panel entered an order of reprimand. In its accompanying report, the panel stated affirmatively that

it had considered the stipulation submitted by the parties and had concluded that it was reasonable and consistent with the goals of these discipline proceedings. The cover letter which accompanied the hearing panel's order advised the Grievance Administrator, the respondent and the complainant of their right, pursuant to MCR 9.118(A), to seek review by the Attorney Discipline Board. The complainant's petition for review was filed with the Board on November 22, 2006.

In addition to the opportunity to present written briefs in support of their respective positions, the complainant, respondent and the Grievance Administrator addressed the Board at a public hearing conducted in Detroit on February 19, 2007.

II. Discussion

The issue before Tri-County Hearing Panel #6, when it considered whether or not to accept the stipulation submitted by the Grievance Administrator and respondent, was whether or not a reprimand is the appropriate level of discipline in light of respondent's plea of no contest to the allegations in subparagraphs 22(a) and (c) of the formal complaint, i.e., that he neglected a legal matter entrusted to him and that he failed to act with reasonable diligence and promptness.

Under MCR 9.115(F)(5), a hearing panel may approve or reject a stipulation for consent order of discipline. If not approved, the matter must then be referred for hearing to a new hearing panel and the statements or stipulations made in connection with the stipulation are not admissible in future proceedings. While the fact that the Grievance Administrator and the Attorney Grievance Commission have endorsed the proposed resolution is a factor to be considered by the panel, approval of such a stipulation involves more than simply "rubber stamping" the proposal.

Under the procedures utilized by the Attorney Discipline Board in such cases, a hearing panel which has received a stipulation for consent discipline is reminded in a written memorandum from the Board that it has an obligation to make an informed decision and that the panel may wish to consider such factors as the respondent's prior misconduct; the applicable standard pursuant to the ABA Standards and Grievance Administrator v Lopatin, 462 Mich 235 (2000); prior precedent of the Attorney Discipline Board and the Supreme Court; the nature or degree of the harm caused by respondent's misconduct; and, if necessary, further information regarding the nature of the misconduct in greater detail than may be spelled out in the complaint. Once the panel has undertaken this review, the hearing panel's chairperson must sign and return a notice to the Board, affirmatively stating that the panel has either accepted or rejected the proposal or that further

information is required.

In this case, the panel chairperson's written notice that the stipulation was accepted was submitted to the Board on October 4, 2006. The hearing panel's order of reprimand and the accompanying report, both signed by the panel's chairperson, further reflect the panel's specific finding that a reprimand for the established misconduct in this case is appropriate under ABA Standard 4.43 and the aggravating and mitigating factors identified by the parties. The Board is completely satisfied that the hearing panel acted appropriately by making an informed decision to accept the stipulation for consent order of reprimand submitted in this case.

The thrust of the complainant's request for review by the Board is that respondent committed, in her opinion, acts of misconduct which were either not included in the formal complaint or which were encompassed in those paragraphs in the complaint dismissed by stipulation of the parties.

The Attorney Discipline Board has previously been presented with situations in which a complainant has objected to the Grievance Administrator's decision to dismiss a complaint, in whole or in part. In those cases, the Board has uniformly held that it will not question the authority of the Attorney Grievance Commission or the Grievance Administrator to seek dismissals of actions which may be unworthy of prosecution for the reason that "such authority is inherent in the Commission as the prosecution arm of the Supreme Court." *Matter of Bufalino*, ADB Case No. 36580-A (1981). See also *Grievance Administrator v Richard Durant*, ADB Case No. 208-88 (1990); *Grievance Administrator v Kurt A. O'Keefe*, ADB Case No. 90-13-GA (1992); and *Grievance Administrator v Mark L. Brown*, ADB Case No. 95-68-GA (1996).

In our opinion in *Kurt O'Keefe, supra*, we noted that when the Grievance Administrator has filed a formal complaint and the complainant objects to the Administrator's subsequent decision to dismiss the complaint (or specific allegations in it), that complainant may be "caught in a procedural web not entirely of her own making":

Had the complainant's request for investigation been rejected by the Grievance Administrator as insufficient under the provisions of MCR 9.112(C)(1)(a) or had it been dismissed by the Grievance Commission under MCR 9.114(A), the complainant would have had the right to file a complaint for mandamus [now complaint for superintending control] in the Supreme Court. See MCR 9.122(A)(2) and MCR 7.304. In light of the fact that the Attorney Grievance

Commission is under the court's direct supervisory control as its investigation and prosecution arm (MCR 9.108(A)) and the Grievance Administrator is the Court's direct appointee (MCR 9.109(A)), it is appropriate that the Court, not the Board, should review discretionary acts of the Commission or the Administrator with regard to the dismissal of an investigation or prosecution. *O'Keefe, supra* at 3.

It is unquestioned that a complainant has the right to petition the Board for review of a hearing panel order. MCR 9.118(A)(1). A complainant may seek review of, among other things, a hearing panel's findings and conclusions of misconduct based upon the evidence presented; the panel's determination of the appropriate level of discipline; and a panel's decision regarding restitution. However, as the Board has consistently held in the cases cited above, the Board will not review the inherently prosecutorial decisions of the Attorney Grievance Commission or the Grievance Administrator to voluntarily dismiss a particular charge of misconduct, whether by stipulation or by voluntarily withdrawing the charge. Such prosecutorial decisions are beyond the scope of the Board's review.

For all of these reasons, the complainant's petition for review is dismissed and the hearing panel order of reprimand (by consent) is affirmed.

Board members William P. Hampton, Lori A. McAllister, Hon. Richard F. Suhrheinrich, William J. Danhof, and Andrea L. Solak, concur in this decision.

Board members Rev. Ira Combs, Jr., George H. Lennon, Billy Ben Baumann, M.D., and William L. Matthews, C.P.A., did not participate.