STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellee,

v

Dianne L. Baker, P 38830,

Respondent/Appellant,

Case No. 07-189-JC

Decided: January 27, 2010

Appearances:
Cynthia C. Bullington, for the Grievance Administrator
Dianne L. Baker, In Pro Per

BOARD OPINION

Respondent entered a plea of guilty in June 2007 to the offense of operating a motor vehicle while visibly impaired. The record indicates that this was an isolated incident and that respondent has no other criminal convictions or professional discipline. The hearing panel imposed a reprimand with several conditions. Respondent petitioned for review, arguing that misconduct had not been established or, in the alternative, for an order of "no discipline." We vacate the order of discipline and will enter an order imposing no discipline.

The legal framework for this matter is determined, in part, by the lead opinion in *Grievance Administrator v Deutch*, 455 Mich 149; 565 NW2d 369 (1997). We explained the procedural peculiarities of this type of case in a recent opinion involving another respondent convicted of operating a motor vehicle while impaired:

> [T]his is the very unusual case in which the sole basis for the disciplinary prosecution is a criminal act not shown to reflect adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer, see MRPC 8.4(b), and yet which, technically at least, constitutes professional misconduct. See MCR 9.104(A)(5); *Grievance Administrator v Deutch*, 455 Mich 149; 565 NW2d 369 (1997).

> MRPC 8.4(b) provides that "[i]t is professional misconduct for a lawyer to . . . engage in . . . violation of the criminal law, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer." However, MCR 9.104(A)(5) contains no limitation on the types of criminal violations that are regarded as professional misconduct. Instead, all "conduct that violates a criminal law of a state or of the United States" is defined as misconduct for which a lawyer may be disciplined under subchapter 9.100 of the Michigan Court Rules. In *Deutch, supra*, a plurality of the Court concluded that MRPC 8.4(b) does not limit MCR 9.104(A)(5) (actually, its predecessor, MCR 9.104(5)), and that even if the conviction does not reflect adversely on the lawyer's fitness to practice law, once the Administrator files a judgment of conviction with the Board, the hearing panels (and the Board and the Court) have no ability to dismiss the formal complaint, but may, however, enter an order of discipline imposing no discipline. [*Grievance Administrator v David A. Reams,* 06-180-JC (ADB 2008).]

Thus, not all criminal conduct shall result in discipline.[1] "Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice."[2] As we have stated previously, the role of lawyer regulation is to address a certain class of harms or risks:

> Professional discipline does not exist to enhance or multiply the effects of criminal penalties or other consequences suffered by an attorney. It serves a purpose more narrow and yet more critical to the protection of the bar, the courts, and the members of the public utilizing legal services. Under long standing principles, we are bound to treat discipline proceedings as "fact sensitive inquiries that turn on the unique circumstances of each case." Discipline is imposed when the "specific facts" presented at the hearing demonstrate that discipline is called for. Our role is to fashion orders of discipline designed to protect the public, the courts and the legal profession from the harm caused by errant

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[1] It must, however, be considered to be professional "misconduct." *Deutch*, 455 Mich 160 - 162; MCR 9.104(A)(5). See also n 2, *infra*.

[2] *Grievance Administrator v Fink*, 462 Mich 198; 612 NW2d 397 (2000) (quoting Standard 5.12 of the American Bar Association's Standards for Imposing Lawyer Sanctions). See also MRPC 8.4, comment. This fundamental and widely accepted concept has a slightly different application in Michigan, at least since the Court's 1997 opinion in *Deutch*. In other states, and in Michigan prior to *Deutch*, not all crimes have been considered misconduct. The lead opinion in *Deutch* interpreted MCR 9.104(A)(5)'s predecessor in accordance with its plain meaning (all crimes are misconduct) but held that it did not eviscerate MRPC 8.4 (only some crimes are misconduct). Thus, all members of the *Deutch* Court agreed that a lawyer's conduct need not always result in "discipline." However, the lead opinion concluded that criminal conduct must always be found to be "misconduct." Therefore, the guidelines in MRPC 8.4 and its comment, and in the ABA Standards, remain relevant, at the very least, as factors in deciding which crimes should lead to an order of discipline in our state.

> lawyers. If we are to succeed at that critical mission, it is important to maintain our focus.
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> It does not necessarily follow that an individual whose driving privileges have been curtailed or who has otherwise been subject to criminal sanctions for driving offenses must also have his or her professional privileges curtailed. [*Grievance Administrator v Martin G. Deutch (After Remand)*, *supra*. Footnotes omitted.]

Our Supreme Court comprehensively examined the role and purpose of attorney discipline in *Grievance Administrator v Lopatin*, 462 Mich 235; 612 NW2d 120 (2000). The Court adopted the American Bar Association's Standards for Imposing Lawyer Sanctions (ABA Standards) and explained: "Their use will further the purposes of attorney discipline, help to identify the appropriate factors for consideration in imposing discipline and establish a framework for selecting a sanction in a particular case, and promote consistency in discipline." 462 Mich at 238. ABA Standard 1.1 states: "The purpose of lawyer discipline proceedings is to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely to properly discharge their professional duties to clients, the public, the legal system, and the legal profession." This is consistent with the direction provided in rules also adopted by our Court: "Discipline is not intended as punishment for wrongdoing, but for the protection of the public, the courts, and the legal profession." MCR 9.105. Accordingly, we review this matter in light of these purposes of attorney discipline and the principles articulated in the caselaw of our Court and of this Board, including *Reams, supra*, and *Grievance Administrator v Martin G. Deutch (After Remand)*, 94-44-JC (ADB 1998), lv den 460 Mich 1205 (1999).

As a consequence of her conviction, respondent was ordered to pay fines and costs and complete an alcohol highway safety education class and victim's impact panel by the 64A District Court. She was not required by the district court to undergo further treatment or counseling, or to participate in a group such as Alcoholics Anonymous. Respondent has no prior discipline and no prior convictions of any kind.

The Grievance Administrator acknowledged to the panel that there is no evidence that respondent's competence as a lawyer has been called into question but took the position that respondent should be placed under supervision for a period of two years. The hearing panel agreed and ordered a reprimand with conditions requiring her to: (1) abstain from alcohol for two years; (2) participate in monitoring through the State Bar of Michigan's Lawyers and Judges Assistance Program ("LJAP") or individual therapy for two years; (3) sign irrevocable waivers allowing LJAP or her therapist to provide

reports as to her progress; and, (4) provide quarterly reports including a diagnosis, prognosis and recommendation.

Respondent has petitioned for review on the grounds that there has been no evidence presented casting doubt on her fitness as a lawyer and that the Board should therefore conclude that she has not committed professional misconduct, or, in the alternative, enter an order of "no discipline." After having carefully examined the record in this matter, we agree that an order imposing no discipline is appropriate.

At the heart of this case is the Administrator's argument that, notwithstanding her satisfactory completion of the conditions imposed by the district court, "Respondent has failed to take appropriate action to address her alcohol problems."[3] This argument, and the panel's decision, contains several components: (1) the determination that there is a "problem"; (2) the conclusion that respondent's response to the problem is insufficient; (3) the conclusion that the conditions recommended by the Administrator and ordered by the panel are necessary (or at least appropriate); and, (4) the judgment that the Attorney Grievance Commission, the hearing panel and this Board should bring the resources of the attorney discipline system to bear under the circumstances established here in order to require that the respondent acts in accordance with these conditions for a period of two years. We do not find this argument or its component parts persuasive.

During her testimony at the hearing, respondent answered questions about the incident at issue, as well as her drinking habits in general, and she came forward with a fair amount of personal information. Though prior to this incident, she may have had a drink after a stressful workday, she never drank during a lunch hour. The hearing panel noted respondent's testimony that she "had been in the habit of drinking four or five glasses of wine on Friday evenings and four or five glasses of wine on Saturdays." Respondent also testified that since the incident in question here, she generally did not drink on Sunday or during the week. After consuming four or five glasses of wine, she is "relaxed, but . . . not intoxicated." The panel's report also quotes the Administrator's closing argument, in part:

> Ms. Baker obviously is an intelligent, pleasant individual. I do not believe personally that she is recognizing some of the warning signs that are cropping into her life concerning her alcohol usage. Certainly being able to consume four, five drinks and feel relaxed only as opposed to being intoxicated is a warning sign because of the tolerance built up. Certainly Ms. Baker has indicated that she uses alcohol at times to relieve stress. Again, this is a warning sign. Having a loved one complain of a person's usage of alcohol is an additional warning sign regarding one's alcohol usage. These are all factors indicating that Ms.

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[3] Petitioner's Reply Brief, p 9.

> Baker may have an alcohol problem. If not alcohol dependent, I think she may be at least on the borderline, and, not recognizing that, she may very easily slip over into a dependency. [Hearing Panel Report, p 5, quoting Tr, p 24-25.]

The record in this case includes an LJAP evaluation. The hearing panel relied in part on the LJAP evaluation and in part on its own observation of respondent's demeanor during her testimony in concluding that "respondent has an ongoing alcohol problem." (HP Report, p 5.) Respondent has persuasively pointed out problems with the methodology and reasoning of the evaluation[4] and with the conclusion of the panel. The panel did not specify in what respects her testimony was less than credible, and there was no evidence that respondent's work was affected by her consumption of alcohol. The panel acknowledged that "there is . . . no basis in the record for a finding that respondent's ability to practice law competently is, or has been, materially impaired by her use of alcohol."[5] (*Id.*, p 6.)

The record also contains an assessment by a therapist who concluded that respondent had engaged in alcohol abuse (as opposed to reaching the conclusion that respondent was suffering from dependence). This therapist recommended in writing that respondent attend 10 individual therapy sessions, explore the consequences of continued alcohol use, and "attend AA." Respondent testified that she received this assessment with recommendations via fax just prior to her sentencing on July 16, 2007. Though it incorrectly indicated that she agreed to these recommendations, she would have voluntarily attended the therapy sessions and, in fact, did attend four or five which she found to be very helpful. She cancelled the next scheduled appointment when her husband became ill. Respondent also kept a journal, obtained a book recommended by her therapist, cut back on drinking, and improved her relationship with her husband. At the review hearing, the Administrator drew comparisons and contrasts with *Reams, supra*, arguing that, unlike Mr. Reams," [t]here is no indication that she is willing to submit to any type of therapy, that she's dealing with it in any way. . . . She is not willing to conform her conduct to ensure that she is free from alcohol."

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[4] See, e.g., respondent's memorandum to the hearing panel regarding "Response to Substance Abuse Evaluation," dated June 26, 2008, and filed on July 7, 2008.

[5] Respondent holds a managerial position at a governmental agency. She is not engaged in the practice of law. However, whether or not respondent is currently engaged in activities constituting the practice of law in private practice or an institutional setting, her fitness and capacity to practice are relevant considerations. Accordingly, our decision is not based on the fact that she does not now practice. As is noted elsewhere in this order, there is no evidence that respondent's physical or mental ability to engage in the practice of law is in anyway impaired or that she is otherwise unfit to practice.

It must be understood that the respondent in this case, unlike Mr. Reams, has never been ordered by a court to abstain from alcohol or attend Alcoholics Anonymous meetings, nor does this record warrant such an order. Further, the assertion that she is not examining the role of alcohol in her life, and taking steps to address certain issues, simply is not borne out by the record. Finally, Mr. Reams' dependence on alcohol was such that he conceded he should continue to attend 12-step meetings even after his one-year probation was terminated by the criminal court. The issue was whether the discipline system should impose conditions requiring him to do so. This Board, noting that he had continued to participate in a recovery program and was "managing his alcohol problem," did not find a sound reason for the imposition of professional discipline. *Reams*, *supra*, p 10. Disciplinary conditions are even less appropriate in this case.

While this Board defers to a hearing panel's assessments regarding credibility and demeanor, a finding is not insulated from review simply because it is cast in these terms. Our duty is to review the whole record for proper evidentiary support, and when we do so in this case we do not find adequate support for the finding that respondent has "an ongoing alcohol problem." Rather, we find clear evidence that respondent drove while impaired by alcohol on one occasion. This criminal conduct was appropriately dealt with by the district court. The other evidence marshaled fails to demonstrate the existence of a problem for the attorney discipline system to address.

An additional and independent ground for our decision is our conclusion that the level of discipline imposed by the panel, i.e., the reprimand and conditions imposed, is excessive and inappropriate under the circumstances of this case. *In Re Daggs*, 411 Mich 304, 319-320 (1981) (Board has duty to adjust disparities in discipline and provide for continuity and consistency).

In discharging the attorney discipline system's paramount goal of protecting the public, this Board and the hearing panels have imposed stringent conditions, such as those imposed by the panel in this case.[6] However, when bringing the resources and sanctions of the discipline system to bear on an attorney, we must keep in mind factors such as the impact of the misconduct and the degree to which the misconduct is related to the practice of law or the respondent's fitness (physical, mental or otherwise) to practice law. While Michigan, under the plurality opinion in *Grievance Administrator v Deutch*, 455 Mich 149 (1997), classifies all criminal conduct as professional misconduct *per se*, numerous authorities, including *Deutch*, suggest that we should be most circumspect and restrained in the use of our authority when the criminal conduct is far removed from harm to the public, the courts, or the legal profession.

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[6] Failure to abide by such conditions can lead to further discipline. MCR 9.104(A)(9).

We reiterated this point only last year in a case in which we also found an order imposing no discipline to be appropriate. *Grievance Administrator v David A. Reams, supra.* In some cases, the record evidence will clearly establish that a respondent has been unable or unwilling to address an alcohol problem that affects his or her ability to practice. In those situations, discipline and appropriate conditions are called for. This case, however, in no way resembles such situations. Even if the record indicates what could be deemed excessive alcohol consumption at certain points in respondent's life, we must also consider the evidence of respondent's voluntary cessation or reduction of alcohol use during most periods of her life, which include consistent employment in responsible positions, childbirth and child-rearing years, and graduation cum laude from law school while working. We cannot conclude that the discipline imposed below is necessary or appropriate in this case.

Proportional sanctions or conditions designed to deter or avert future misconduct are appropriate. But these must be distinguished from conditions aimed at the prevention of all potential future misconduct no matter how remote or speculative. We understand the motivation of the panel and the petitioner to protect the public, and perhaps the respondent, from the consequences of potential future alcohol consumption. However, after a careful review of the record in this matter, we are firmly convinced that the panel's order exceeds the appropriate disciplinary response in this particular case.

Finally, we feel compelled to comment upon the panel's decision to "confer alone with" counsel for the Attorney Grievance Commission. (See 5/12/2008 Tr, p 27.) Although this colloquy with counsel was done with the consent of respondent and did not result in prejudice or substantive impropriety, it was unnecessary to proceed without respondent and we discourage such a practice in the future.

For all of the foregoing reasons, we vacate the order of the hearing panel and will enter an order imposing no discipline.

Board members William J. Danhof, Thomas G. Kienbaum, Andrea L. Solak, Carl E. Ver Beek, Craig H. Lubben, and James M. Cameron, Jr., concur in this decision.

Board members Sylvia P. Whitmer, Ph.D., William L. Matthews, C.P.A., and Rosalind E. Griffin, M.D., did not participate.

Order

Michigan Supreme Court
Lansing, Michigan

June 25, 2010

140619

Marilyn Kelly,
Chief Justice

Michael F. Cavanagh
Elizabeth A. Weaver
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman
Diane M. Hathaway,
Justices

GRIEVANCE ADMINISTRATOR,
Petitioner-Appellant,

v

SC: 140619
ADB: 07-000189-JC

DIANNE L. BAKER,
Respondent-Appellee.

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On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

CORRIGAN and YOUNG, JJ., would grant leave to appeal.

WEAVER, J., not participating. I abstain from voting on any items dealing with the Judicial Tenure Commission (JTC) and/or the Attorney Grievance Commission (AGC) to avoid any appearance that I could be trying to affect the outcome of the referrals of me to the JTC and AGC by Justices Corrigan, Young and Markman.

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

June 25, 2010

Corbin R. Davis
Clerk

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