Grievance Administrator,

Petitioner/Appellant,

v

Arnold M. Fink, P 13426,

Respondent/Appellee.

Case No. 96-181-JC

Decided: November 6, 1998

BOARD OPINION

Respondent was convicted of assault and battery, MCL 750.81, following a bench trial.[1] The Grievance Administrator commenced discipline proceedings by filing a judgment of conviction pursuant to MCR 9.120(B)(3). The hearing panel initially dismissed this matter. We reversed the panel's dismissal based on Grievance Administrator v Deutch, 455 Mich 149 (1997), and remanded for proceedings consistent with Deutch. On remand, the panel entered an order finding that respondent committed misconduct but imposing no discipline. The Administrator has filed a petition for review seeking reversal of the panel's order and imposition of discipline. We reverse the panel's order and reprimand respondent.

The assault in this case occurred at a deposition conducted by respondent in the Wayne County Circuit Court case of Sheldon L. Miller v Arnold M. Fink on August 8, 1995. The witness was the plaintiff, Mr. Miller. Present were Mr. Miller, his counsel Michael A. Schwartz, the court reporter, and respondent, who represented himself and examined Mr. Miller.

The record reflects that the civil action was filed in 1990. The lawsuit gave rise to another discipline proceeding prior to

[1] The Judgment of Sentence filed by the Grievance Administrator indicates that the conviction was by guilty plea. However, the Administrator asserts that a bench trial was had, and the Register of Actions/Judgment (exhibit #2) indicates that a bench trial was held and that the judge issued an opinion. Also, respondent testified that there was a bench trial (Tr 12/2/97, pp 49-50). Exhibit 2, and the Administrator's remarks, also indicate that the District Judge prepared an opinion. However, that opinion was not introduced.

this one -- Grievance Administrator v Sheldon L. Miller, 92-117-GA. In that discipline matter, Mr. Miller was accused of assaulting respondent. According to the hearing panel report in that case,[2] respondent was employed by Miller's law firm ("Lopatin, Miller"). He recommended an investment to Miller based on his relationship with one of the principals in the company. The company fell on hard times and Miller's investment performed poorly. After Miller learned that respondent was paid a substantial "commission" for obtaining Miller's capital, Miller sued respondent.

Following a contentious motion hearing on September 12, 1991, Miller and respondent "had words resulting in [Miller's] face-to-face notification to [respondent] that he was fired and that he was not to return to the firm's offices." Grievance Administrator v Miller, HP Report, p 4. Notwithstanding this, respondent went back to the Lopatin, Miller offices and continued preparing for an out of state deposition he was to conduct the next day. When Miller got back to the office, he went into respondent's office and, the Administrator alleged, choked respondent and threatened to kill him. The Miller panel found that "the entire incident took less than a couple of minutes before resolving itself." Thereafter, Miller rescinded the termination and respondent conducted the deposition. In fact, the panel found that the two discussed the deposition in a "civilized" manner the next day. Respondent worked at the firm until January, 1992.

As noted, this matter arises out of a deposition conducted by respondent on August 8, 1995. At the hearing below only one witness, respondent, testified. A transcript of the deposition was

---

[2] We take judicial notice of the report of the hearing panel filed with this Board. Cf. In re Contempt of Calcutt, 184 Mich App 749; 458 NW2d 919 (1990) (appellate court took notice of pleading, court records, and testimony); In re Stowe, 162 Mich App 27; 412 NW2d 655 (1987) (a court may take judicial notice of a judgment in a case filed in the same jurisdiction). The hearing panel in this matter found that Mr. Miller was also the subject of criminal charges in the 46th District Court following the 1995 deposition incident (HP Report, p 3). There is no evidence in the record to support this finding, and counsel for the parties agree that it was after the 1991 altercation that Miller entered into a plea which was taken under advisement in the Detroit Recorder's Court. Also, respondent's counsel represented that the earlier altercation between respondent and Mr. Miller occurred at a deposition (Tr 12/2/97, p 6, 16), but no evidence of this was introduced. We retrace this history in an attempt to clarify the record as to the history between respondent and Miller. However, this background is not as relevant as respondent suggests, and the variations we have noted do not affect our decision.

also introduced. The transcript of the deposition shows that at a relatively early point in the deposition Miller took some verbal shots at respondent (i.e., calling respondent "stupid," and saying "that's typical of your stinking lies").

Later in the deposition, the following exchange occurred:

> Q. [Respondent, Arnold Fink, representing himself in the lawsuit by Sheldon Miller against Fink] So if Arnold Fink told you that Share Data would be bought at two dollars a share, and now you go ahead and enter into an entirely different purchase, how is it that you're blaming Mr. Fink?
>
> A. [Deponent, Sheldon Miller] Read my complaint, Mr. Fink.
>
> Q. Sir, how is it you're blaming Mr. Fink. Answer the question.
>
> A. Because the lying stinking son-of-a-bitch took a kickback of three hundred and seventy-five thousand dollars, that's how.
>
> Q. Sit the f--- down. Don't you raise your voice at me.
>
> A. You asked a question; you got the answer.
>
> Q. Sit down.
>
> A. Tell me to.
>
> Q. Sit down.
>
> MR. SCHWARTZ: [Counsel for Sheldon Miller] Gentlemen, gentlemen -- come on.
>
> Q. I'll tear your f---ing head off. Sit down.
>
> A. Oh, come on, come on, threaten me.
>
> MR. SCHWARTZ: Stop.
>
> A. Oh, come on, threaten me.
>
> Q. You're -- all right, that's it.

MR. SCHWARTZ: Call the police.

Q. You [expletive deleted].

MR. SCHWARTZ: Call the police. Get out of here. Stop it. Both of you stop it.

(Off the record.)

MR. SCHWARTZ:This deposition is over. That's it. I want a record. The deposition is over. Mr. Fink came around the table to where Mr. Miller was. Mr. Fink attacked Mr. Miller. Mr. Fink choked Mr. Miller and shoved him to the ground, knocking over the chair that Mr. Miller was on --

MR. FINK: Yeah right.

MR. SCHWARTZ: -- and he tried to strangle Mr. Miller. I tried to separate --

MR. FINK: In your dreams.

MR. SCHWARTZ: -- them and he refused to get off.

MR. FINK: In your dreams.

MR. SCHWARTZ: This deposition is over. This is the worst harassment that I can imagine. As soon as we're done -- you might as well sit here, Mr. Fink. We've called the police, so you might as well stay here, because otherwise, I'll have to have them come after you at your home. I'm going to report this assault to the Judge and to the Attorney Grievance Commission. Mr. Fink, you've engaged in gross misconduct.

THE WITNESS: Calm down, Michael.

(Deposition concluded at about 4:40 p.m.)

[Exhibit 1-A, pp 69-71.]

At the hearing before the panel, respondent gave the following testimony:

Q. [R's counsel] Can you now describe for the panel your reaction to being called a lying, stinking son of a bitch I believe?

> A. Nothing. I believe I ignored everything that went on. And let me tell you I have never had a problem with any lawyer in any deposition in 33 years of practice; never. I ignored everything that he was saying and we had a break. We went to the bathroom. We crossed paths walking in the same room down to the bathroom and came back up. Then you come to the part shortly after that in that transcript. He stood up and leaned over the table -- and I had a very bad time. It was a very bad moment. [Tr, p 47; emphasis added.]

Respondent further testified that he "just lost it," and "came around the table and shoved [Miller]" (Tr 12/2/97, p 48). Respondent further testified candidly that he had to make his way around the court reporter and that "[t]here was nothing preventing me from going the opposite way around the table to the door." (Id., pp 51-53.) Apparently, Miller sustained no injuries.

The transcript's recitation of the incident is challenged in only one respect, and in this respect it was challenged as it was being transcribed. Mr. Miller's counsel describes the assault as including not only a shove, but also states that respondent "choked Mr. Miller and shoved him to the ground," that "he tried to strangle Mr. Miller, and that when counsel tried to separate them, "he [respondent] refused to get off." At the deposition, as can be seen from the above-quoted portion of the transcript, respondent registered his disagreement with this description of the events. Before the panel, respondent testified that "Mr. Miller was shoved and went over the chair. Nothing else. I did not hit him. I didn't strangle him. I didn't choke him." (Tr 12/2/97, p 58.)

The panel, noting that respondent's version was not contradicted by testimony from any other witness to the deposition incident, evidently decided to credit respondent's version of the assault. Because the hearing panel had the opportunity to observe respondent during his testimony, we defer to the panel's assessment of his demeanor and credibility. Grievance Administrator v Neil C. Szabo, 96-228-GA (ADB 1998); Grievance Administrator v Deborah C. Lynch, No 96-96-GA (ADB 1997). See also In re McWhorter, 449 Mich 130, 136 n 7 (1995).

As noted, the panel imposed no discipline for the misconduct established by respondent's assault conviction. The panel found based on review of the deposition transcript that Miller provoked respondent and that "the conduct of the two lawyers (Messrs. Miller and Fink) had been substantially equivalent." Because we can review the transcript as well as the panel, we will afford less deference to this finding. In fact, in this case, we disagree with it. Based on our review of the transcript, both attorneys behaved in a childish, pugnacious, and unprofessional manner. However, respondent escalated the dispute from verbal sparring to physical contact, a "scuffle," as the panel described it.

Further, "provocation" will not excuse, and will rarely mitigate, gross incivility such as that which occurred here. In a recent opinion we spoke to this question:

> In addition to our concerns as to whether provocation has been established as a factual matter, we have even greater reservations, which we have previously expressed, about the very notion that provocation excuses this kind of conduct. Grievance Administrator v Donald H. Stolberg, No 95-72-GA; 95-107-FA (ADB 1996) (disapproving of provocation as a "justification," but dismissing case on other grounds); Grievance Administrator v Neil C. Szabo, No 96-228-GA (ADB 1998) ("The answer to uncivil conduct is not escalation."). [Grievance Administrator v Leonard B. Segel, 95-210-GA (ADB 1998).]

Respondent argues that the panel properly imposed no discipline upon respondent for several reasons.

Analogizing to criminal law, respondent referred at various times before the panel and the Board to the concept of self-defense, "imperfect self-defense," and "quasi-self-defense." Respondent's brief also argues that the history between he and Miller, including the prior incident in 1991, should be viewed as a substantial mitigating factor, or at least "provides important background against which to judge respondent's reaction when Miller, enjoying a clear size advantage, cursed him, stood up, and leaned over the table during the deposition" (respondent's brief, p 6, footnote omitted). Finally, referring to the fact that

Miller's discipline case arising out of the 1991 incident was dismissed, it is suggested that the panel's order imposing no discipline in this case "avoided an unfair 'double standard.'" We reject all of these potential reasons for imposing no discipline.

First, we note that "a certified copy of the judgment of conviction is conclusive proof of the commission of the criminal offense." MCR 9.120(B)(2). This rule is obviously designed to preclude relitigation of the question of whether a criminal act was committed by the attorney. However, the Supreme Court has also recognized that "attorney misconduct cases are fact sensitive inquiries that turn on the unique circumstances of each case." Deutch, 455 Mich at 166, citing In re Grimes, 414 Mich 483, 490; 326 NW2d 380 (1982). And, the Court has made it clear that

> [t]he hearing panels are not absolved of their critical responsibility to carefully inquire into the specific facts of each case merely because the administrator initiates disciplinary proceedings by filing a judgment of conviction, under MCR 9.120(B)(3), rather than by formal complaint under MCR 9.115(A). [Deutch, 455 Mich at 169.]

Although the record in this case is rather sparse[3], there is sufficient evidence to convince us that discipline is warranted. Respondent admittedly "lost it." Also, respondent's testimony establishes that he could have retreated from the room had he truly felt threatened. Finally, the argument that no discipline in this case is necessary to balance the ledger also fails. Respondent and Miller may despise each other, but they are attorneys and they have an obligation to refrain from interfering with the administration of justice. See Grievance Administrator v Leonard B. Segel, supra. We are not persuaded that Fink can shove Miller at a deposition because Miller may have escaped discipline for allegedly similar conduct four years prior.[4]

---

[3] The District Judge's opinion and findings might have been of assistance to the factfinders in several respects. Although it was referred to and read from, it was not introduced at the hearing.

[4] The panel hearing Miller's discipline case dismissed the formal complaint, finding it "to be without credible factual basis." Grievance Administrator v Miller, Hearing Panel Report, p 4. No petition for review was filed with this Board.

We have concluded that the imposition of discipline is clearly required in this case. However, we also conclude that a reprimand is appropriate under all of the circumstances. Respondent has engaged in a lengthy career with no record of this type of behavior. This singular, short-lived incident occurred in a case in which respondent was the defendant. His status as a party does not excuse his behavior; an attorney must abide by his or her obligations as an officer of the court even if he or she is also the client. However, respondent may not have fully appreciated how difficult it would be to represent himself in the litigation with Miller. Apparently, respondent did learn this lesson as no other incidents were reported.

In an appropriate case, we will not hesitate to impose a suspension for an attorney's assaultive conduct, particularly that which arises out of the performance of lawyering functions. However, assessing all of the facts here, we conclude that a reprimand fully achieves the objectives of the discipline system. There is no evidence of injury to Mr. Miller or of a pattern of similar incidents. Respondent presents no discernable risk to the public, the courts, or the legal profession in light of the unique circumstances giving rise to this incident.

Finally, we note from the records of the criminal proceedings before the 46th District Court which were introduced at the hearing, respondent has been required to pay fines, costs and other charges, to serve six months probation, to submit to counseling as directed by the probation department, and to perform 3 days of community service. Of course, respondent will also have a criminal record. MCL 769.16a. The imposition of other penalties or sanctions is an appropriate factor to consider in determining the appropriate level of professional discipline. Standards for Imposing Lawyer Sanctions (ABA 1991), §9.32(k).

For all of the foregoing reasons, we vacate the panel's order imposing no discipline and reprimand respondent.

Board Members Elizabeth N. Baker, Grant J. Gruel, Albert L. Holtz, Michael R. Kramer, Kenneth L. Lewis, and Nancy A. Wonch concur in this decision.

Board Member Roger E. Winkelman was recused and did not participate.

Board Member C. H. Dudley was absent and did not participate.

Board Member Barbara B. Gattorn dissents:

I would impose a suspension of 30 days for this physical assault by an attorney at a deposition. Respondent's poor judgment led him to represent himself and then to fail to take the steps necessary to ensure that he acted in a professional manner. Although he had a right to represent himself, having elected to do so, he should have been prepared for the almost inevitable clash with Mr. Miller given their shared history.