STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellee,

v

R. Duncan MacDonald, P- 16917,

Respondent/Appellant,

Case No. 00-4-GA

Decided: January 25, 2001

BOARD OPINION

The Grievance Administrator filed a formal complaint on January 13, 2000 which charged that in a telephone conversation on February 27, 1997 with opposing counsel in a workers' compensation matter, the respondent called opposing counsel a "lying son of a bitch" and a "shyster." The Administrator charged that these words directed at another attorney on the telephone violate MCR 9.104(1)-(4) and that portion of Michigan Rule of Professional Conduct 6.5 which states, "A lawyer shall treat with courtesy and respect all persons involved in the legal process." A second count of the complaint charged that on the same day the respondent attempted to communicate by telephone with the Chief of the Saginaw Township Police about the employment status of a police department employee who was then represented by respondent in a workers' compensation matter. The complaint charged that the attempted communication was made without the consent of the attorney for the Township Police Department and was therefore a violation of MRPC 4.2.

The respondent filed a timely answer in which he denied that his conduct in connection with either telephone call constituted professional misconduct. The matter was assigned to Genesee County Hearing Panel #3 which conducted a public hearing and entered an order of dismissal on September 1, 2000. A copy of the hearing panel's report is attached as an appendix. The complainant, Gary D. Patterson, petitioned the Attorney Discipline Board for review of the hearing panel's decision. For the reasons stated below, we affirm the hearing panel's decision to dismiss this formal complaint.

The Panel's Dismissal of Count One

In this case, the time and resources of the Attorney Grievance Commission's legal staff, respondent and his counsel, the complainant and his counsel, the three volunteer members of the hearing panel, seven volunteer members of the Attorney Discipline Board and the Board's legal staff have been marshaled, in

part, to consider the following question: What is the appropriate response of Michigan's disciplinary machinery and the legal profession when one lawyer calls another lawyer a "shyster" and a "lying son of a bitch" on the telephone?

The hearing panel below prefaced its answer to this question by noting, "We are called upon to visit the issue of lawyers behaving like people." This observation echoes sentiments expressed in an earlier case in which another Genesee County Hearing panel considered allegations that an attorney had used profane language toward opposing counsel following a contentious court hearing. In Grievance Administrator v Szabo, 96-228-GA (ADB 1998), lv den 459 Mich 1231; 589 NW2d 283 (1998), that hearing panel concluded that one isolated incident of profane language did not constitute professional misconduct.[1]

> It may be bad manners or poor judgment, but not professional misconduct. Litigation is by its nature adversarial. Oftentimes attorneys involve themselves in heated, confrontational and hostile exchanges. Words are often exchanged in the heat of the battle, but when the emotions calm down, all is forgotten and it is back to business. Not so in this case. [Complainant] chose to exploit this confrontation by filing a grievance and later using it against respondent on at least two occasions to gain a tactical advantage. This panel believes that for the complainant attorney to utilize the grievance process due to profanity is inappropriate.
>
> This panel will not become language referees . . . . [Grievance Administrator v Szabo, 96-228-GA (HP Report, dated 5/14/97), pp 6-7.[2]]

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[1] In Szabo, the panel found that respondent called opposing counsel a "f------g asshole" at least twice during a face-to-face confrontation in the hallway outside the courtroom. Szabo, supra, p 3.

[2] The panel's approach in Szabo may be compared to the decision of Tri-County Hearing Panel #27 to impose a reprimand with conditions for an attorney's repeated use of profanity toward opposing counsel coupled with a slur directed toward a sitting judge. Grievance Administrator v Matthew J. Beer, Case No. 93-234-GA (HP Report, dated 6/29/94). The panel majority in that case stated:

> In determining whether Beer's conduct as found by the panel constitutes professional misconduct, we emphasize that we are examining Beer's conduct in toto as opposed to making a determination whether each statement by Beer constitutes professional misconduct. We note that counsel for the Grievance Administrator stated that this would be the correct approach for the panel to follow after examining the statements which Beer concedes he made, we conclude that under the circumstances his repeated use of vulgar and profane language, combined with his statement suggesting that a sitting judge issued an order based on campaign contributions, constitutes professional misconduct. . . .we share the concerns expressed by our concurring colleague about the First Amendment interests involved in this case, and the danger that hearing panel's will become language referees. We realize and understand that, given the combative nature of litigation, it is inevitable that some terse (or even coarse) language will, on occasion be exchanged by counsel. Mr. Beer's conduct, however, was more than just an isolated example of an attorney using profane language. Beer repeatedly used profane language toward Serlin and exhibited inappropriate conduct as a member of the legal profession. [Beer, supra (HP Report, dated 6/29/94), p 9.]

We affirmed the dismissal of that complaint based upon bad language for many of the same reasons that we now affirm the dismissal of the bad language count in this case. In Szabo, the Board concluded:

> The Administrator does not argue that the use of certain words by an attorney must automatically result in a finding of misconduct regardless of the circumstances. Indeed, such a rule would be at odds with long established general principles in discipline matters. The panel found that respondent's remarks were made in a private exchange not heard by third parties. Nonetheless, we agree with respondent that his outburst was inappropriate. He should have maintained better self-control in the face of what he perceived to be less than professional tactics by his opponent. The answer to uncivil conduct is not escalation . . . . Thus while we do not condone respondent's choice of words in characterizing his opposing counsel, we agree with the panel that under all of the circumstances presented here, respondent's ill-chosen remarks do not rise to the level of misconduct. [Grievance Administrator v Szabo, supra, p 4.]

While the Administrator did not argue in Szabo that the use of certain words must automatically result in a finding of misconduct regardless of the circumstances, the Administrator seemed to make just such an argument in this case. In objecting to a question to the complaining attorney as to whether or not he was offended by respondent's name-calling, the Administrator's counsel asserted to the panel that the panel's job was to determine whether, under an objective standard, the language employed by respondent was offensive.

> Panel Chairperson: Well, that's your statement. The question is are they offensive, which is the question we have to answer.
>
> AGC Counsel: The argument before you is that they are offensive on their face.
>
> Panel Chairperson: No, it's the GA's position that they are offensive on their face, that's why you brought the matter. And it's our decision to decide -
>
> AGC Counsel: You have to - correct. And you have to determine that in an objective, not a subjective manner. (T 102-103).

Neither party nor the complainant has cited authority from Michigan or any other jurisdiction which purports to identify those words or phrases which, when uttered by one lawyer to another on the telephone, would be "offensive on their face" and grounds for professional discipline. We must emphasize that we do not condone respondent's choice of words. His conduct could justifiably be characterized as boorish or childish. Perhaps an admonition or cautionary letter would have been appropriate for this aspect of respondent's behavior. However, we agree with the hearing panel, composed of three attorneys from the local legal community, that respondent's words were not offensive on their face within the scope of the rules cited in the complaint.

The Panel's Exclusion of the Tape Recording

The complainant presents two additional arguments on appeal. During the panel proceedings, the Grievance Administrator moved for the admission of a tape recording of the February 27, 1997 telephone conversation between the complainant and the respondent. This recording was made by the complainant without respondent's knowledge and was submitted to the Attorney Grievance Commission when the complainant filed his request for investigation in April 1999. The complainant argues that the panel erred in refusing to admit the tape recording into evidence.

The complainant argues that the hearing panel ignored Michigan Rule of Evidence 1002 which states:

> **Rule 1002. Requirement of Original**
>
> To prove the content of a writing, recording or photograph, the original writing, recording or photograph is required, except as otherwise provided by these rules or statute.

The Administrator's counsel first moved for the admission of the tape recording in support of the name-calling charges in Count One. Respondent's counsel objected on the grounds that the specific language cited in the complaint was not in dispute and that the rest of the conversation recorded on the tape was irrelevant and/or extraneous. In fact, respondent had submitted his written stipulation at the commencement of the hearing that he had called the complainant a "lying son of a bitch" and a "shyster" in his telephone conversation with the complainant. In light of that objection, the Administrator's counsel acknowledged that the tape would be cumulative and he withdrew his request for the admission of that exhibit, reserving the right to offer it later if respondent raised a defense that he was kidding or joking or that his statement was taken out of context (Tr, pp 7-8). It was not until the conclusion of the hearing, after respondent and complainant had both testified, that counsel re-offered the tape as evidence, but in support of Count Two, not Count One. Respondent's counsel again objected, stating that he had no objection to the admission of any portion of the tape which was relevant but that he objected to the admission of the entire conversation in light of his specific admission that he had made the statements charged in both Counts One and Two.

The hearing panel's ruling that the tape need not be admitted because it was "surplusage" is supported by Michigan case law. See, for example, People v Alexander, 112 Mich App 74; 314 NW2d 801 (1981). The best evidence rule embodied in MRE 1002 applies only when the contents of the writing or recording are at issue. In this case, respondent had explicitly admitted the statements attributed to him in the complaint. Furthermore, the Administrator's counsel had already advised the panel that the context in which the statements were made was essentially irrelevant and that he was seeking a determination that the respondent's language was "offensive on its face."

In addition, MRE 403 directs that evidence which is otherwise relevant may be excluded if its probative value is substantially outweighed by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Again, respondent had admitted the statements charged in both counts of the complaint and a tape recording covering matters not charged in the complaint was not necessary to prove those statements.

The complainant has not established grounds for the reversal of the hearing panel's evidentiary ruling on the admissibility of the tape recording offered by the Grievance Administrator in support of Count Two.

The Panel's Dismissal of Count Two

Finally, the complainant urges that the panel erred in its conclusion that respondent's February 27, 1997 telephone call to the Saginaw Township Police Department did not violate MRPC 4.2.

The record reflects that the complainant's firm regularly represents the Saginaw Township Police Department in both workers' compensation and other employment matters. In February 1997, the respondent and the complainant were opposing counsel in a workers' compensation claim against the police department by respondent's client, Kathleen Moynihan. Ms. Moynihan, whose benefits had been terminated at the beginning of the month, was scheduled to return to work on February 28, 1997. On or about February 27, 1997, she called respondent because she had been told that as soon as she reported to work the following day she would be sent home on a disciplinary leave. Respondent testified that he was seriously concerned about the potential emotional impact this would have on his client. Respondent attempted, without success, to speak with the complainant or a senior partner in complainant's firm. He then placed a call to the police department and spoke only to the receptionist, Deborah Kirby. It is undisputed that respondent did not speak to the police chief or any other administrative official but spoke only with the receptionist. It is also undisputed that he asked the receptionist to tell the chief not to let the police department's law firm "leave him hanging out to dry." (Tr, p 23).

Michigan Rule of Professional Conduct 4.2 states:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a party whom the lawyer knows to be represented in the matter by another lawyer, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

On this count, the panel ruled:

> Once again, this panel is of a single mind on this issue. It is clear from the testimony of Mr. MacDonald that the purpose of his telephone conversation had nothing to do with the subject matter of his representation of his client on the workers' compensation suit. This

> attempt to contact Chief Renico had to do with what appears to be an unrelated matter with respect to his client's return to work and then a potential discharge. Further testimony indicated this phone call was prompted by a 'frantic call' from Mr. MacDonald's client and MacDonald believed his client to be so 'stressed out' that she may be potentially suicidal. Our reasoning as recited above leads us to the conclusion that there is no misconduct. [HP Report, dated 9/1/00, p 3.]

The complainant argues that the hearing panel could have concluded that the disciplinary issue involving respondent's client was potentially related to the workers' compensation issue, thus bringing respondent's telephone call to the township police department within the scope of MRPC 4.2. However, the standard of review to be employed by the Board is not what the hearing panel could have concluded, but whether or not the hearing panel's findings have proper evidentiary support in the whole record. Grievance Administrator v Donald H. Stolberg, 95-72-GA; 95-107-FA (ADB 1996) (affirming panel dismissal); Grievance Administrator v Irving August, 438 Mich 296; 475 NW2d 256 (1991). We conclude that there is evidentiary support in this record for the hearing panel's finding that respondent's attempted communication with the township police chief was not, strictly speaking, on the "matter" then in dispute. Additionally, Formal Ethics Opinion RI-39 (1989) issued by the State Bar of Michigan's Committee on Judicial and Professional Ethics provides support for the panel's conclusion. That committee was asked whether a lawyer seeking to resolve a possible claim prior to litigation could direct communication to a government agency or its employees even if the lawyer knows that the employee has decision making authority and that the agency is generally represented by counsel. The committee reasoned that until there is an actual controversy, "There would be no lawyer who was representing the [agency] 'in the matter' at that particular time since the existence of a controversy has not been confirmed." In the instant case, respondent testified that he was attempting to head off a potential problem when his client returned to work the following day. We also note that there was no actual dialogue between respondent and any township employee with decision making authority, only respondent's somewhat cryptic warning that the chief or the township was being "hung out to dry."

Conclusion

Based upon its consideration of the briefs and arguments submitted on behalf of the complainant and the respondent and its review of the whole record, the Attorney Discipline Board has concluded that the hearing panel order of dismissal entered in this matter on September 1, 2000 should be affirmed.

Board members Wallace D. Riley, Theodore J. St. Antoine, Michael R. Kramer, Grant J. Gruel, Diether H. Haenicke, Ronald L. Steffens and Marsha M. Madigan, M.D., concur in this decision.

Board member Marie E. Martell concurring in part and dissenting in part:

I concur in the decision to affirm the hearing panel's dismissal of Count One of the formal complaint. I also agree that the hearing panel's ruling on the admissibility of the tape recording made by the complainant on February 27, 1997 did not constitute reversible error. However, I respectfully dissent with regard to the hearing panel's dismissal of Count Two. I believe that respondent's communication with the Saginaw Township Police Department on February 27, 1997 was an improper communication under MRPC 4.2. I would therefore reverse the dismissal of Count Two and remand this matter to the hearing panel for the imposition of appropriate discipline.

Board member Nancy A. Wonch did not participate.

APPENDIX

STATE OF MICHIGAN
Attorney Discipline Board

GRIEVANCE ADMINISTRATOR,
Attorney Grievance Commission,

Petitioner,

v Case No. 00-004-GA

R. DUNCAN MacDONALD, P-16917,

Respondent.

_____/

REPORT OF GENESEE COUNTY HEARING PANEL #3

PRESENT: Michael W. Krellwitz, Chairperson
Leonard B. Shulman, Member
Kendall B. Williams, Member

APPEARANCES: Donald D. Campbell,
for the Petitioner
James J. Wascha,
for the Respondent

I. PLEADINGS

Date Filed	Description
01/13/00	Formal Complaint/ Discovery Demand
01/14/00	Notice of Hearing - Initial/ Instruction Sheet
01/18/00	Proof of Service
01/24/00	Notice of Substitution of Panelist
01/24/00	Notice of Administrative Adjournment
02/07/00	Answer to Formal Complaint/Reply to Discovery Demand/Respondent's Discovery Demand/and Proof of Service
02/14/00	Notice of Hearing
02/17/00	Petitioner's Motion to Strike and/or Motion for More Definite Statement/Petitioner's Response to Respondent's Discovery Demand/Proof of Service
03/13/00	Order Denying Petitioner's Motion to Strike
04/06/00	Notice of Adjournment without Date
04/10/00	Respondent's Request for Adjournment/Proof of Service
04/14/00	Appearance
04/17/00	Notice of Hearing
04/19/00	Proof of Service

Date Filed	Description
07/20/00	Itemized Statement of Expenses/Proof of Service

II. EXHIBITS

Number	Description
1	Respondent's Stipulation to the Admission of Fact
2	NOT RECEIVED
3	Respondent's letter dated February 23, 1994
4	Letter to mediator Susan Woodrow, dated January 29, 1997

III. WITNESSES

1. R. Duncan MacDonald
2. Gary Patterson

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IV. PANEL PROCEEDINGS

A public hearing was conducted on Monday, June 26, 2000. In support of the charges in the formal complaint, the Grievance Administrator presented the testimony of respondent, R. Duncan MacDonald, and attorney Gary Patterson, the complainant. The Grievance Administrator offered Exhibit 1, Respondent's written admission that he made the statements attributed to him but denying that those statements violated any duty, rule or standard of conduct. That exhibit was received. Exhibit 2 was identified as a tape recording made by Mr. Patterson of his telephone conversation with Mr. MacDonald. Exhibit 2 was not received. Exhibit 3, respondent's letter of February 23, 1994, was offered by respondent and was received into evidence. Exhibit 4, respondent's letter of January 29, 1997 to mediator Susan Woodrow was offered by the Grievance Administrator and was received.

At the conclusion of the proofs, the counsel for the respective parties presented their closing arguments. Counsel for the Grievance Administrator provided the panel with three Attorney Discipline Board opinions described as the three leading cases by the Board concerning attorney incivility: GA v Leonard Segel, GA v Robert Golden, and GA v Neil Szabo.

V. HEARING PANEL REPORT ON MISCONDUCT

We are called upon to visit the issue of lawyers behaving like people. The respondent, R. Duncan MacDonald, is accused of and admits to calling the aggrieved, attorney Gary Patterson, a "lying son of a bitch" and a "shyster." This occurred some two and one half (2 1/2) years ago during a private telephone conversation which was taped by attorney Patterson and constitutes the allegation contained in Count One. Count Two alleges that respondent made or attempted to make an unauthorized contact about the subject matter of certain representation with another party when he knew that the other party was represented by a lawyer. These matters arise from what we perceive to be a single transaction; however, they will be discussed and decided separately.

On February 27, 1997, respondent, during a telephone conference with attorney Gary Patterson, referred to attorney Patterson as a "lying son of a bitch" and a "shyster." Attorney Patterson taped this conversation. Prior to the hearing, respondent admitted, in writing, to having

made these references to the aggrieved, attorney Patterson. It is clear from the testimony that Patterson and MacDonald did not like one another. It is also clear from the testimony that both attorneys are arrogant. Respondent MacDonald represented Kathleen Moynihan in a worker's compensation lawsuit against Saginaw Township Police. Attorney Patterson represented the Saginaw Township Police Department. Respondent attempted to contact attorney Patterson to ask him to intercede with the Saginaw Township Police Department and not discharge Mr. MacDonald's client when she returned to work the next day. Mr. MacDonald had been contacted by his client who was apparently extremely stressed over the impending discharge, and MacDonald believed her to be suicidal. In any event, Mr. MacDonald was put on hold by Patterson's office for some extended period of time. At that point, he hung up and attempted to contact the Chief of Police directly. He was unsuccessful, although he did leave a message. Shortly thereafter (approximately 10 minutes) attorney Patterson called respondent and the unfortunate conversation took place. We are asked to decide whether or not this conversation between two lawyers on the telephone and in private constitutes misconduct. We believe it does not.

Counsel for the Grievance Administrator presented his case very well. He presented this panel with three cases involving lawyers behaving badly including the matter of Leonard B. Segel, Case Number 95-210-Ga; the matter of Robert H. Golden, Case Number 96-269-GA; and the case of Neil C. Szabo, Case Number 96-228-GA for our consideration and for the proposition that language of this type is a violation of MCR 9.104(1)-(4) and the Rules of Professional Conduct including 6.5(a) and 8.4(a) and (c). We distinguish the case presented before this panel from the above referenced matters of Szabo, Golden, and Segel in that the conduct involved in this case was in a private telephone conversation between two lawyers. In the Szabo, Golden, and Segel cases the conduct involved name calling and physical altercations in public either at deposition with members of the public present or outside of a courtroom with clients and others present. We do not believe that this conduct violates the Rules of Professional Conduct. We do believe, however, that this is certainly not the type of conduct that we wish to promote, but we do recognize the private rather than public nature of this incident. Our profession has become increasingly competitive with clients that are increasingly demanding and require lawyers to practice in an aggressive manner and often go to the bounds of propriety whereby our actions could be construed to be misconduct. On the other hand, we have watching over us the Grievance Administrator, our malpractice carriers, and others (many of whom hold our profession in contempt). In today's society, and at all levels of society, language of the type used by Mr. MacDonald is no longer considered "coarse." Finally, we do not believe that the conduct as alleged in a private telephone conversation rises to the level to be violative of the Court Rules or Rules of Misconduct.

Count Two presents us with the issue as to whether or not Mr. MacDonald inappropriately contacted or attempted to contact the client of another lawyer over the subject matter of certain litigation. As earlier noted, MacDonald represented a client in a worker's comp matter with Saginaw Township and their attorney Gary Patterson. Mr. MacDonald's attempt to contact the Township Chief of Police was on an unrelated matter (and on a perceived emergency basis). Mr. MacDonald was unsuccessful in reaching the Chief. He did leave a message indicating that Mr. Patterson or Mr. Patterson's law firm was leaving the Chief out to dry or words to that effect.

Once again, this panel is of a single mind on this issue. It is clear from the testimony of Mr. MacDonald that the purpose of his telephone conversation had nothing to do with the subject matter of his representation of his client on the worker's compensation suit. This attempt to contact Chief Renico had to do with what appears to be an unrelated matter with respect to his client's return to work and then a potential discharge. Further testimony indicated this phone call was prompted by a "frantic call" from Mr. MacDonald's client and MacDonald believed his client to be so "stressed out" that she may be potentially suicidal. Our reasoning as recited above leads us to the conclusion that there is no misconduct.

VI. CONCLUSION

Based upon the foregoing, we conclude that the formal complaint in this matter should be dismissed.

VII. SUMMARY OF PRIOR MISCONDUCT

None.

VIII. ITEMIZATION OF COSTS

Attorney Grievance Commission:	$ 52.34	
Attorney Discipline Board:	$ 498.75	
TOTAL:	$ 551.09	[Not Assessed]

ATTORNEY DISCIPLINE BOARD
Genesee County Hearing Panel #3

By:_____
Michael W. Krellwitz, Chairperson