STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellant,

v

Arnold M. Fink, P-13426,

Respondent/Appellee,

Case No. 96-181-JC

Decided: April 25, 2001

BOARD OPINION (AFTER REMAND)

In our previous opinion in this matter we reprimanded respondent for conduct culminating in the shoving of attorney Sheldon Miller at a deposition. Grievance Administrator v Arnold M. Fink, 96-181-JC (ADB 1998). The hearing panel had initially dismissed this case, and we remanded for consideration under Grievance Administrator v Deutch, 455 Mich 149 (1997), which held that cases initiated by the filing of a valid conviction may not be dismissed. The panel then issued an order finding misconduct but imposing no discipline, an option set forth in Deutch. On review, we vacated that order and imposed a reprimand. The Grievance Administrator appealed from our decision, arguing that discipline should be increased. The Court heard this case in conjunction with other disciplinary appeals, including Grievance Administrator v Lopatin, 462 Mich 235; 612 NW2d 120 (2000). In Lopatin, the Court adopted the American Bar Association's Standards for Imposing Lawyer Sanctions (ABA Standards) on an interim basis. The Court has remanded this matter to us for application of the ABA Standards. Grievance Administrator v Fink, 462 Mich 198; 612 NW2d 397 (2000).

We directed the parties to file supplemental briefs and thereafter scheduled the matter for oral argument. Having considered the parties' arguments in their briefs and at oral argument, and having reconsidered the appropriate level of discipline in this matter after application of the ABA Standards as directed by the Court, we conclude that our previous opinion and order reprimanding respondent should not be modified.

In Grievance Administrator v Ralph E. Musilli, 98-216-GA (ADB 2000), we recently applied the ABA Standards in accordance with Lopatin, and did so in four parts. First, the following questions must be addressed: (1) What ethical duty did the lawyer violate? (A duty to a client, the public, the legal system or the profession?); (2) What was the lawyer's mental state? (Did the lawyer act intentionally, knowingly, or negligently?); and, (3) What was the extent of the actual or potential injury caused by the lawyer's conduct? (Was there a serious or potentially serious injury?).

The second step of the process involves identification of the applicable standard(s) and examination of the recommended sanctions. Third, aggravating and mitigating factors are considered. Finally, "panels and the Board must consider whether the ABA Standards have, in their judgment, led to an appropriate recommended level of discipline in light of factors such as Michigan precedent, and whether the Standards adequately address the effects of the misconduct or the aggravating and/or mitigating circumstances." Musilli, supra, p 5, citing Lopatin, 462 Mich at 248 n 13.

I.

Duties Violated, Lawyer's Mental State & Injury or Potential Injury

A. Duty (or Duties) Violated.

Some forms of misconduct may be said to violate more than one of the duties set forth in the Standards. In this case, the Administrator asserts that respondent's conduct "during a court related proceeding clearly violated his duties owed to the legal system, and the profession." This is consistent with our view of the disruptive conduct at a deposition we described in Grievance Administrator v Leonard B.Segel, 95-210-GA (ADB 1998):

> The respondent's abusive language toward opposing counsel and the respondent's refusal to surrender documents presented to the deponent by opposing counsel constituted conduct prejudicial to the proper administration of justice in violation of MRPC 8.4(c) and MCR 9.104(1). In reaching this conclusion, the Board notes that the respondent's conduct did not occur during a private exchange between attorneys but was recorded during the course of a deposition conducted in accordance with the Michigan Court Rules. Those rules contemplate a proceeding outside of the presence of a judge or hearing officer during which the parties and their attorneys are nevertheless able to obtain evidence and to make and preserve objections in accordance with the rules of evidence. In addition to his obligations to his client, the respondent had an obligation, as an attorney and officer of the court, to promote the proper administration of justice by conforming his conduct to the well-established norms of practice at a deposition conducted without direct judicial supervision.

We also note the introduction to Standard 6.0, which deals with duties owed to the legal system and states that lawyers must refrain from "interfering with a legal process." In the commentary to Standard 6.22[1], reference is made to In Re Vincenti, 92 NJ 591; 458 A2d 1268 (1983), involving a lawyer whose antics "substantially interfered with the orderly trial process."

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[1] Standard 6.22 provides: "Suspension is appropriate when a lawyer knowingly violates a court order or rule, and there is injury or potential injury to a client or a party, or interference or potential interference with a legal proceeding."

Finally, by drawing our attention to Standard 5.12 the Court has suggested that the ethical duty violated is one to the public. Fink, 462 Mich at 204. The purpose of identifying the duty violated is to aid the adjudicator in selecting an appropriate Standard. This is discussed further below.

B. Respondent's Mental State.

The Standards contain the following definitions:

> "Intent" is the conscious objective or purpose to accomplish a particular result.
> "Knowledge" is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result.
> "Negligence" is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.

Although the parties and the panel did not employ the terminology of the foregoing definitions in the Standards, each has addressed the respondent's mental state. The Administrator asserts that Michigan Criminal Jury Instruction, CJI2d 17.2(3) "requires proof of the specific intent to commit a battery or to make someone reasonably fear an immediate battery." The Administrator further points to the evidence in the record indicating that respondent, during "a verbal exchange," went around a conference table and "attacked" Mr. Miller. Respondent, on the other hand, asserts that his mental state "was not one of premeditated wrongdoing or anything of the like," but that he "was understandably distressed as a result of Mr. Miller's threatening conduct and the taunting which precipitated the shove." The panel characterized respondent's mental state in finding that "this case was in the nature of a personal lapse of control by two lawyers (Messrs. Miller and Fink) who should have known better, but not deserving of professional discipline."

C. Extent of Actual or Potential Injury.

The Administrator concedes that there is no evidence of actual injury to Mr. Miller in the record, but points out that the potential for injury to a person "is always considerable when intentional acts of violence are perpetrated" and that "the introduction of intentional crimes of violence into court proceedings is harmful to the administration of justice and injurious to the profession." Again, although the panel did not use the terminology of the Standards, it distinguished this case from one in which "the misconduct occurred in open court or before non-lawyer clients, or resulted in physical injury, or led to a conviction for felonious assault."

II.

Applicable ABA Standard.

As noted above, the Administrator argues that duties to the profession (Standards, section 7.0) and the legal system (section 6.0) were violated in this case. Although we might agree as an abstract proposition that disrupting a deposition might be viewed as a breach of a duty to the profession, nothing in the text or commentary of section 7.0 of the Standards suggests that conduct of the type involved here is to be analyzed under the Standards in that section. However, as noted above, certain Standards in section 6.0 might be considered applicable. For example, Standard 6.22 provides that "[s]uspension is appropriate when a lawyer knowingly violates a court order or rule, and there is injury or potential injury to a client or party, or interference or potential interference with a legal proceeding." As we have mentioned, the commentary to that Standard cites In Re Vincenti, supra. The commentary states that in Vincenti, "The court noted that it was not confronted with 'an isolated example of loss of composure brought on by the emotion of the moment; rather, the numerous instances of impropriety pervaded the proceedings over a period of three months.'"

In Vincenti, the New Jersey Supreme Court referred to another one of its decisions,

> In re McAlevy, 69 N.J. 349 (1976), where the respondent, in court, threatened physical violence and the next morning in chambers flew into a rage and attacked opposing counsel, ultimately involving the judge and his clerk in the melee. In only severely reprimanding respondent for the two related incidents that occurred within a 24 hour period, the Court noted the respondent's contrition and apology. [Vincenti, 458 A 2d at 1274.]

Standard 6.23 indicates that reprimand is generally appropriate for negligent noncompliance with court orders or rules causing interference or potential interference with a legal proceeding. The commentary to that Standard cites a Florida case involving "harassing delay tactics at trial" for which the lawyer received a reprimand.

The Administrator also asserts that Standard 5.12 (involving violations of duties to the public) is applicable. Respondent focuses on Standard 5.12 as well, arguing that it supports the earlier decision of this Board. Section 5.0 of the Standards is captioned "violations of duties owed to the public." Standard 5.1 bears the heading "failure to maintain personal integrity." The Administrator's brief refers to the Court's opinion, which reads in part:

> Because this is among the first cases requiring application of the ABA standards, we draw the ADB's attention to Standard 5.12 which states:
>
> Suspension is generally appropriate when a lawyer

> knowingly engages in criminal conduct which does not contain the elements listed in Standard 5.11 [which focuses on dishonesty] and that seriously adversely reflects on the lawyer's fitness to practice.

The commentary to this section states in pertinent part:

> Although a lawyer is personally answerable to the entire criminal law, a lawyer shall be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving *violence*, dishonesty or breach of trust, or serious interference with the administration of justice are in that category.

This appears to be the standard applicable to the type of conduct at issue. [Fink, 462 Mich at 204. Emphasis and bracketed material in original.]

The dispositive factor in Standard 5.12 would appear to be whether the conduct here "seriously adversely reflects on [respondent's] fitness to practice." In approaching this question respondent's brief argues:

> One anticipates that the Administrator will attempt to equate the reference to "violence" in the Commentary with the notion that anything which constitutes a technical "assault and battery" results in a presumptive suspension. That suggestion cannot withstand careful scrutiny.
>
> That approach stretches the meaning of the word "violence" considerably. It is more fair and accurate to say that an innocuous shove, like that which occurred here, is not "violence," even though it is a technical "assault." Thus, the "assault" characterization does not change the fact that a reprimand is appropriate under Standard 5.12, since the shove does not "seriously adversely reflec[t] on [Mr. Fink's fitness to practice.
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> * * *
>
> Fairly viewed, the Commentary suggests that acts which truly constitute "violence" often, or ordinarily, reflect on fitness to practice law. That is not to say that "violence" always reflects on fitness to practice. Nor is it to replace the Standard's "fitness" criterion with the facile equation of "violence" with "adversely effects fitness." Thus, the assumption that most "violence" is suspension material does not displace the Standard itself or the fact that, in this case, the event, even if fairly characterized as "violence," does not "seriously adversely [reflect] on [Mr. Fink's] fitness to practice." [Respondent's brief on remand, pp 8-9; emphasis and bracketed material in original.]

Counsel for the Administrator does not address the question whether the conduct in this case seriously adversely reflects on respondent's fitness to practice.[2] Rather, assuming that a suspension is appropriate, the Administrator argues that a suspension of 180 days, or at least one imposing the reinstatement conditions set forth in MCR 9.123(B)(1)-(7), is required. The Administrator's brief argues:

> An attorney who resorts to even a single act of intentional violence directed at another person during a court proceeding should be required to show by clear and convincing evidence the . . . requirements of MCR 9.123(B)[(1)-(7)]. Nothing less than the conditions and procedures set forth in MCR 9.123 can give adequate assurance to the bench, the bar and the public that the attorney who intentionally inflicted physical violence upon a participant in the judicial phase of our justice system is once again worthy of the privilege to practice law and act as an attorney, counsel or an officer of the court. [Petitioner's brief on remand, p 12.]

We note briefly that the word "violence" has a several definitions. See, e.g., *Webster's New World Dictionary* (New York: Simon & Schuster, 1980, 2nd ed) ("physical force used so as to injure, damage, or destroy"), Black's Law Dictionary (7th ed) ("unjust or unwarranted use of force, usu. accompanied by fury, vehemence, or outrage; physical force unlawfully exercised with the intent to harm"), People v Terry, 217 Mich App 660, 662 (1996) (following Criminal Jury Instruction definition: "any wrongful application of physical force against another person so as to harm or embarrass him"). See also Black's, supra ("violent offense": "a crime characterized by extreme physical force, such as murder, forcible rape, and assault and battery with a dangerous weapon").

We are persuaded by respondent's contention that the pertinent inquiry is not whether this crime or that fits within a definition of "violent" that may or may not have been intended by the drafters of Standard 5.12's commentary. Instead, the commentary and the Standard itself focuses, appropriately, on whether the conduct at issue reflects adversely on the respondent's fitness to practice. Indeed, for suspension to be appropriate under the text of Standard 5.12, the conduct must "seriously adversely reflect" on fitness. Plainly then, the Standards embody the view that not all criminal conduct committed by a lawyer should result in a suspension, and that some such conduct

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[2] Petitioner's brief states, at p 10:

> The ABA Standards state that suspension is generally appropriate, when a respondent violates Rule 8.4(b), absent aggravating or mitigating factors. There are no substantial or compelling factors, either aggravating or mitigating, present in this case. Accordingly, a suspension should be imposed.

The table in Appendix 1 to the Standards does in fact cross-reference violations of Model Rule 8.4(b) with Standard 5.1, essentially a rubric under which Standards 5.11, 5.12, 5.13, and 5.14 are found. Model Rule 8.4(b) provides that: "It is professional misconduct for a lawyer to . . . commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."

may not even need to be the subject of professional discipline at all.[3] The Standards do not require a fitness inquiry that refers only to categories, classes, or labels attached to crimes, e.g., "violent crimes."

Further, the Court has explained 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). [Grievance Administrator v Deutch, 455 Mich 149, 169 (1997).]

Deutch and countless other decisions by the Court and this Board require a panel to consider evidence introduced by the Administrator and respondent bearing on particular facts of the misconduct at issue with the object of assessing not only whether rules have been violated but also what disciplinary response is necessary and proportionate to protect the public, the courts, and the legal system. The Standards, while intended to promote consistency, were never intended to frustrate this inquiry. Thus, even if the battery here is categorized as "violence" for some purposes, we believe the plain text of Standard 5.12 and Michigan caselaw require us to assess the particular conduct at issue.

Our previous opinion in this matter describes respondent's conduct and the circumstances surrounding it. Implicit in the panel's essential findings in this case is the factual determination that this incident does not reflect a lack of fitness to practice law because it was provoked, abbreviated, did not involve clients, did not produce injuries, and was the product of a momentary loss of control in an unusual case. The record also indicates that this was an unprecedented event in respondent's career. The Administrator proffered no evidence to rebut the more than adequate evidence to sustain such findings. Although counsel for the Administrator read from the District Judge's opinion finding respondent guilty of misdemeanor assault during closing arguments, the opinion was not introduced. Also, the Administrator introduced no witness – not Mr. Miller, not his counsel, not even the court reporter – to offer a different version of the events. Given the uncontroverted evidence, and the critical obligation of panels and this Board to fashion an appropriate disciplinary response to misconduct based on evidence in the record, we cannot accept the Administrator's invitation to presume respondent is unfit to practice.

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[3] Although our Supreme Court arrives at the same conclusion in Deutch, it takes a somewhat different path. As we discuss in section IV of this opinion, the Standards and Model Rules do not consider all criminal conduct to be professional misconduct. In Deutch, although our rules, including MCR 9.104(5), were interpreted such that all criminal conduct constitutes professional misconduct, the Court explained that some misconduct might be the subject of an order imposing no discipline.

Our initial review of this case led us to the conclusion, in our previous opinion, that "respondent represents no discernable risk to the public, the courts or the legal profession." We have reviewed the record again, with particular reference to ABA Standard 5.12, and we can only conclude from the facts in this record that this particular shoving incident does not "seriously adversely reflect" on this particular respondent's fitness to practice. Accordingly, we conclude that Standard 5.12 suggests that suspension is not appropriate in this case. This conclusion is bolstered by other parts of Standard 5.1.

As we survey the remainder of Standard 5.1, which deals with criminal and other conduct reflecting adversely on a lawyer's fitness to practice law, we must observe that it is somewhat confusing because not all of the elements of the conduct at issue are held constant in each of the standards found in this section. In other words, although standards 5.11 – 5.14 appear designed to reflect a scale of misconduct beginning with disbarment material and descending to admonition cases, an effort to place a particular case in the appropriate spot along the continuum is somewhat hampered by the fact that the text of the standards do not consistently describe the conduct to which they are applicable. For example, under 5.11(b), disbarment is deemed appropriate for intentional dishonest conduct seriously reflecting adversely on fitness to practice, whether or not the conduct is criminal. However, Standard 5.12 appears on its face to be applicable only to criminal conduct (with additional elements involving fitness), whereas the text of Standard 5.13 (dishonesty and similar conduct that adversely reflects on fitness) does not specifically reference criminal conduct. It is unlikely that the Standards were meant to suggest that criminal conduct not meeting all of the elements of Standards 5.11(a) and 5.12 must always escape discipline altogether or that dishonest non-criminal conduct should only be the subject of a disbarment order or a reprimand, and not a suspension.

Despite the lack of an express reference in the text, the commentary indicates that Standard 5.13 is intended to apply to criminal conduct in some instances: "a pattern of repeated offenses, even ones of minor significance when considered separately, can indicate such indifference to legal obligation as to justify a reprimand." This language in the commentary to Standard 5.13 is drawn almost verbatim from the comment to Rule 8.4. That rule, and all of the subparts of Standard 5.1, including Standard 5.13 (reprimand) and Standard 5.14 (admonition), require an adverse reflection on the lawyer's fitness to practice law. The commentary suggests what type of conduct does not reflect adversely on a lawyer's fitness to practice:

> There are few situations not involving fraud or dishonesty which are sufficiently related to the practice of law to subject a lawyer to discipline. The Arizona Supreme Court applied this standard in In re Johnson, 106 Ariz. 73, 471 P.2d 269 (1970), a case where a lawyer was charged with assault, stating that "isolated, trivial incidents of

> this kind not involving a fixed pattern of misbehavior find ample redress in the criminal and civil laws. They have none of the elements of moral turpitude, arising more out of the infirmities of human nature. They are not the appropriate subject matter of a solemn reprimand by this court." 471 P.2d at 271. [Commentary, Standard 5.13.]

Respondent Johnson, a 24-year member of the Arizona Bar assaulted an opposing party at a deposition held at the office of a lawyer "not on friendly terms with respondent because his association with respondent had been dissolved under strained circumstances." The plaintiff in the litigation had been discharged from his position by respondent on behalf of respondent's corporate client, the defendant. Differing versions of what happened when respondent Johnson went to shake the plaintiff's hand were not reconciled in the opinion. However, there is agreement that respondent Johnson struck the plaintiff two or three times and that the plaintiff suffered a bruise under the left eye.

Standard 5.1 would appear to recommend dismissal. Under Deutch, that is not an option available to us, and, for reasons discussed below, it is not one we would exercise if it were available.

III.

Aggravating and Mitigating Factors

The aggravating factors in this case include two prior orders of discipline. Standard 9.22(a). Respondent was admitted to the bar in 1968. He was suspended for 60 days in 1972 for improper solicitation. The Administrator concedes that the remoteness of this offense is a mitigating factor. Standard 9.32(m). In 1995, respondent was reprimanded by Tri-County Hearing Panel #72 for failing to maintain settlement proceeds in a separate account pending resolution of a dispute with the Lopatin, Miller firm. This dispute also grew out of respondent's 1991 termination from Mr. Miller's firm (referenced in our earlier opinion). No client funds were improperly handled. Noting that "the misconduct in this matter concerned a situation and conflict unique to these particular parties, and is not likely to reoccur," and that the parties (respondent and Mr. Miller or his firm) had resolved their monetary disputes by settling a civil action, the panel declined to order restitution or other conditions.

We are not persuaded that Standards 9.32(b) (absence of a dishonest or selfish motive) or (c) (personal or emotional problems), cited by respondent, are applicable or, if so, significantly mitigating here.

The Administrator also cites Standard 9.22(i) which treats "substantial experience in the practice of law" as an aggravating factor. This factor is somewhat relevant. Certainly, one could say that a seasoned attorney should know how to control his or her temper when he or she is being baited. But, we would be misapplying this Standard without returning to the context and isolated

nature of this incident. The fact that respondent has practiced for over 30 years without engaging in assaultive behavior, except for shoving Mr. Miller, strongly indicates that respondent does know how to comport himself and thus significantly reduces the aggravating effect of Standard 9.22(i).

In our original opinion, we referred to Standard 9.32(k) (imposition of other penalties or sanctions):

> 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).

In this particular case, we consider the criminal penalties imposed upon respondent to be a mitigating factor, for reasons we shall explain.

The Standards do not dictate precisely what weight should be given to aggravating or mitigating factors. Rather, consistent with their intent to permit "creativity and flexibility in assigning sanctions in particular cases," they call for "consideration of the appropriate weight of [all relevant] factors in light of the stated goals of lawyer discipline." Standard 1.3 The purpose of lawyer discipline proceedings is enunciated in Standard 1.1:

> 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.

In our view, penalties associated with conviction do not always mitigate the sanction we would otherwise consider appropriate. For example, crimes such as embezzlement or fraud may carry heavy penal sanctions designed to serve the ends of the criminal justice system and yet virtually always also result in lengthy suspensions or disbarment in order to protect the public, the courts and the legal profession. However, where, as here, the conduct warrants condemnation by the profession, but there is no evidence of a character flaw or continuing or underlying problem placing the public at risk, the nature of criminal or other sanctions imposed may be entitled to greater weight. In this case, the Administrator's brief argues for a suspension of 180 days or more, or, in the alternative, a shorter suspension with reinstatement conditioned upon compliance with MCR 9.123(B)(1)-(7) (requiring respondent to prove by clear and convincing evidence that he is fit to practice, etc.). Such an order of discipline is wholly unwarranted in light of the record before us. We have already

mentioned the utter lack of evidence that the shove respondent gave Mr. Miller – an incident which has apparently never occurred during an ordinary case handled by respondent in a career spanning three decades – is symptomatic of some larger problem that needs to be addressed. Moreover, the order of probation entered by the District Court required respondent to participate in counseling as ordered by the probation department. The Administrator has introduced no evidence suggesting that the probation department's evaluation and referrals (if any) did not adequately address any potential issues which might pose a risk to the public, the courts or the profession.

In summary, we attach relatively little aggravating weight to respondent's 1995 reprimand or his substantial experience in the practice of law. Indeed, both of these factors seem to point to the conclusion that conduct and complaints stemming from the dissolution of respondent's professional relationship with Mr. Miller are at odds with respondent's generally good record. We consider the criminal penalties suffered by respondent to be somewhat mitigating.

IV.

Appropriate Level of Discipline

We now conduct the fourth part of analysis outlined in Lopatin:

> In the final step of the process of determining the appropriate discipline, panels and the Board must consider whether the ABA Standards have, in their judgment, led to an appropriate recommended level of discipline in light of factors such as Michigan precedent, and whether the Standards adequately address the effects of the misconduct or the aggravating and/or mitigating circumstances. Lopatin, 462 Mich at 248 n 13. [Musilli, supra, p 5.]

Thus, our final task on remand is to determine whether the Standards' recommendation should be followed in this case. The Standards would not impose discipline in the circumstances described in In re Johnson, supra, cited in the above-quoted commentary to Standard 5.13. In this case, although respondent Fink's conduct at Mr. Miller's deposition was an isolated incident and the criminal justice system had in fact been resorted to (as in Johnson), we previously determined that discipline is appropriate.

Our cases taken as a whole would probably suggest at least the following two differences with Standard 5.1. First, "conduct involving dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law" (Standard 5.13), frequently draws discipline greater than a reprimand. Second, panels and the Board may be more likely to impose a reprimand where the Administrator has filed a case involving criminal conduct that does not reflect adversely on a lawyer's fitness to practice law. This is so because the Court, in Deutch, held that dismissal was not an option, at least where a judgment of conviction had been filed with the ADB

because, under Michigan's rules, criminal conduct always constitutes professional misconduct whether or not the conduct reflects adversely on the respondent's fitness to practice. This is a departure from the way criminal conduct is viewed by the Model Rules and the Standards. Although the Court explained that the panels, Board and Court could enter an "order of discipline [imposing] no discipline at all," 455 Mich at 163, we have been reluctant to do so, for obvious reasons, except in the most compelling cases. See Musilli, supra.

Even after analyzing the Standards more closely with reference to this case, we remain convinced that an order imposing no discipline is inconsistent with the aims of the discipline system. The purpose of discipline articulated in Standard 1.1 (quoted above) is quite similar to our Court's own statement in MCR 9.105 that:

> Discipline for misconduct is not intended as punishment for wrongdoing, but for the protection of the public, the courts, and the legal profession.

In In re Reinstatement of Arthur R. Porter, Jr., 97-302-RP (ADB 1999), we explained that: "The Michigan Supreme Court's interpretation of MCR 9.105's predecessor rule recognizes that deterrence is important and penal sanctions may be required to achieve it." In support of this proposition we cited In Re Grimes, 414 Mich 483, 491; 326 NW2d 380 (1982) ("the purpose of discipline--protection of the public, the courts and the legal profession--may at times best be achieved through the deterrent effect of punishment").

Our previous decision to vacate the panel's order imposing no discipline and reprimand respondent was not made because we felt that Mr. Fink needed discipline to ensure that he would not again engage in similar misconduct. Rather, it was intended to send the message to the bar that even where a loss of control is entirely understandable, it is not acceptable in a deposition setting and there will generally be a disciplinary sanction even in "minor" cases involving assault or inappropriate physical contact in the course of practicing law.

Counsel for the Administrator asks us to send what he must perceive to be a stronger message. Specifically, we are asked to suspend respondent for 180 days, or, in the alternative, for 90 days but without automatic reinstatement. At oral argument after remand, counsel contended that this Board could eradicate assaults by suspending the respondent until compliance with MRPC 9.123(B)(1)-(7) "in any case involving an act of intentional violence in the course of a court-related proceeding." We are not persuaded by counsel's assertion that we can stop violence at depositions, but not misappropriation or conflicts of interest, with such an unwavering rule. We fail to see how the prospect of a particular sanction will deter fisticuffs, which are likely to arise out of the heat of the moment, but not misappropriation, which will almost always be accompanied by opportunities for reflection. However, we understand the Administrator's point that sanctions in this area should

put the bar on notice that attorneys have a basic duty to manage their anger in appropriate ways, and that the discipline system will respond, where appropriate, if that duty is breached.

If, as counsel for the Administrator suggests, attorneys engage in a calculus whereby they examine this Board's opinions to determine the likely sanctions and then decide whether or not to attack their opponents, our opinions will give them little solace. Even this one tells the story of a respondent who has paid for his momentary loss of control with a criminal conviction, two hearings at the panel level, three review proceedings before this Board, appeal to the Supreme Court, and very public discipline. The public and the bar can thus be assured that the Attorney Grievance Commission will pursue discipline for even an isolated and relatively minor battery. No attorney with enough sense to heed the message in a discipline decision would be emboldened by this or any other decision we have issued.

In another case, decided prior to the adoption of the Standards in Lopatin, we have declared that although we "will continue to review and decide these matters on a case-by-case basis, as is the rule in attorney discipline proceedings . . . lawyers can expect that conduct rising to the level of a physical assault while performing their legal duties will generally result in a suspension." Grievance Administrator v Robert H. Golden, 96-269-GA (ADB 1999), remanded for reconsideration 463 Mich 1211 (2000).

Of course, "attorney misconduct cases are fact-sensitive inquiries that turn on the unique circumstances of each case." Deutch, 455 Mich at 166. And, as we have noted, hearing panels bear a "critical responsibility to carefully inquire into the specific facts of each case." Deutch, 455 Mich at 169. Therefore, it is incumbent on the parties to introduce evidence illuminating the true nature of the misconduct. Any rule which would simplistically characterize conduct by labels (e.g. "assault"), and then allow that characterization to dictate the level of discipline to be imposed irrespective of factual distinctions, will promote barren records and decisions on discipline without all of the relevant facts. This is ultimately harmful to the public, the courts, and the bar. For only when a panel, this Board, and/or the Court have a full and true picture of the nature of the misconduct can the appropriate level of discipline be assigned. Such a record is also important in the event a respondent is suspended for 180 days or more and seeks reinstatement under MCR 9.123 and MCR 9.124. If the record does not fully reveal the nature of the misconduct, in context, then there is not only a risk that inappropriate discipline will be imposed, there is also the risk that it will be difficult to assess whether the lawyer has met his or her burden to establish fitness for reinstatement.[4]

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[4] MCR 9.123(B)(7) requires examination of the attorney's past conduct, including that which led to revocation or suspension. Also, we have explained that rehabilitation is ordinarily a component of fitness to be demonstrated in reinstatement proceedings. Grievance Administrator v Porter, supra. Cursory descriptions of the misconduct can often make it difficult for reinstatement panels as well as those imposing discipline to get to the

We can elevate uniformity to a high plane by simply declaring that all misconduct within certain classes will be treated the same, but this will inevitably lead to its own kind of imprecision. Specifically, some misconduct, examined closely, will actually be worse than it sounds when glibly described in a phrase or two. Some misconduct will carry a label which sounds worse than the actual events in the case at issue. Thus, we are not persuaded that we *must* impose a suspension in this case because it involves an "assault," and is described in the Administrator's brief as an "intentional act of violence." After reviewing the record, we conclude that such characterizations simply do not accurately reflect what transpired here, and we are not persuaded that a suspension is necessary to advance the aims of the discipline system, including protection of the public, courts and the legal profession through deterrence of similar conduct.

However, we are also not persuaded to follow the Standards' recommendation in this case. We conclude that Michigan precedent lends justification to our previous decisions not to dismiss this case or impose no discipline as the Standards suggest.

Grievance Administrator v Sanford N. Lakin, 96-166-GA (HP Report, 10/22/97) involved allegations that respondent "had battered another attorney during the course of a deposition." HP Report, p 2. The panel made the following findings:

> The various witnesses differ on the precise details as to what occurred next, but they all agree that during the encounter (a) respondent grabbed or struck Mr. Casey [opposing counsel], (b) Mr. Casey's glasses came off or were knocked off his face in the process, (c) Mr. Casey told respondent not to touch him again, and (d) after Mr. Casey told respondent not to touch him again, then the respondent took on finger and "flicked" or "struck" Mr. Casey's forehead. The witnesses' descriptions varied in such minor details as exact positioning of respondent's hands, whether the glasses were "knocked off" or "flew off," and the like. All the witnesses agreed that there were two touchings. . . . Mr Casey neither sought nor required medical treatment as a result of either contact, although he was humiliated by the incident. [Lakin, supra, Report, p 4.]

The panel was unequivocal in its repeated condemnation of the respondent. However, it explained that: "although the blame falls squarely on respondent's shoulders, the situation would not have reached such a feverish pitch in the absence of Mr. Casey's overly aggressive and uncivil goading." This background, and the panel's conclusion that the "juvenile and adolescent outburst . . . reflects the old adage that it takes two to tango," were not discussed in relation to mitigation. Rather, they were considered just prior to the panel's conclusion that MRPC 6.5(a) and 8.4(c) had been violated. The panel imposed a reprimand with conditions related to stress counseling and/or

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bottom of things, i.e., to isolate "the problem" so that the panel can reach a decision that will protect the public, the courts, and the profession.

anger management.

In Grievance Administrator v George T. Krupp, 94-178-GA (HP Report on Misconduct 7/24/95), the hearing panel found that respondent not only hurled profanities at the opposing counsel and party in a divorce case, but also that he threw a pen at opposing counsel while swearing at him and threatening to "kick [his] ass." Opposing counsel testified that respondent was "completely out of control," and "took his fist and did sort of a jabbing kind of thing in my face," and "picked up a pen, threw it and just missed my left ear, hit the back wall." Finding misconduct, the panel sorted out the duties of an advocate in a tense situation:

> [E]ven the most dedicated commitment of a zealous advocate to his client's cause does not justify boorishness, harassment, verbal abuse or intentional humiliation of an adverse party.
>
> As noted . . . , this case is the aftermath of what can best be described as a domestic relations imbroglio, which does little credit to either involved party. The bitterness and contentious nature of that dispute does not, however, relieve respondent, as an "officer of the court" and member of the bar, from the duty of exercising reason, restraint, self-control and professional objectivity in his dealings with the adverse party, opposing counsel and the court. [Krupp, supra, Report on Misconduct, pp 35-36.]

In its report on discipline, the Krupp panel noted evidence that respondent and his opposing counsel were "like oil and water" and that respondent was generally aggressive, but not abusive or abrasive. The panel wrote:

> In imposing discipline on this respondent, the most significant question to be addressed is whether his displays of discourtesy, ill manners, even boorishness, directed against the opposing party, and her counsel, were characteristic of the manner in which respondent ordinarily conducts his practice . . . . [Krupp, supra, Report on Discipline, 2/11/96, p 7.]

After concluding that respondent Krupp's actions were atypical, the panel imposed a reprimand.

The respondent in Grievance Administrator v Daniel Noveck, 91-153-GA (HP Order of Reprimand by Consent, 1/30/92), admitted the allegations in the formal complaint that, during a deposition, he was "rude, condescending and discourteous to opposing counsel . . . and the deponents" and that during a recess he "followed [opposing counsel] into another room and caused an altercation during which he impermissibly touched her person." See also, Vestrand, *The Ethical Boundaries of Civility*, 74 Michigan Bar Journal, No 2, p 170 (March, 1995) (describing the Noveck case as follows: "the respondent was reprimanded for rude and intimidating questioning of a deponent and pushing the opposing attorney during a break in the examination").

A hearing panel also reprimanded the respondent after he pled guilty to misdemeanor, or "simple," assault in violation of MCL 750.81; MSA 28.276. Grievance Administrator v George E. Thick, II, DP-147/83 (HP Report, 4/18/84). During an argument between a divorcing couple that took place in respondent's office, respondent, who represented the wife, "became somewhat concerned for his own safety and the safety of his client and removed from a desk drawer an old revolver and placed it on the desk in an effort to calm the Defendant/husband." HP Report, p 2. Not surprisingly, brandishing the pistol failed to calm the husband. It also did not deter him from attempting to leave with certain documents gathered from respondent's desk. Respondent stood in a doorway to prevent the husband from leaving with the documents. When the husband remained belligerant and pushed respondent aside, respondent grabbed the husband by the belt, shouted to his secretary to call the police, and was dragged from his office out into a hallway, whereupon respondent and the husband rolled down a flight of stairs. Respondent kept hold of the husband as he started back up the stairs and the "struggle continued up the stairs, through the hallway, out the door and into the parking lot." The husband left with all the documents. Finding respondent's actions unjustified, and noting that such conduct could "lead to violence,"[5] the panel found misconduct and imposed a reprimand.

Based in part on the foregoing precedent, we reaffirm our earlier determinations that orders of dismissal or no discipline are inappropriate in this case, notwithstanding the Standards' apparent suggestion to the contrary.

The parties also cite cases involving Leonard Jaques. The Administrator cites a Texas federal district court's decision to suspend that respondent for three years. In re Leonard C. Jaques, 972 F Supp 1070 (ED Tex, 1997). The District Judge's opinion considered six separate counts of alleged misconduct. Although three of the counts were dismissed on statute of limitations or because it was considered impractical to proceed, the misconduct found on the remaining three counts alone demonstrated significant cause for the court's concern. Respondent Jaques was found to have: (1) committed an assault upon opposing counsel during a break in court proceedings, causing a mistrial to be declared and giving rise to sanctions and an assault conviction; (2) disrupted a deposition in a different case; and, (3) "committed fraud on a client." The court found that:

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[5] This does not appear to be the panel's attempt at irony. Rather, the panel appears to have taken the matter quite seriously and its findings indicate that neither respondent Thick or the husband struck a blow or did anything that might be construed as an attack. Understandably, the panel did not view the altercation as "violence." Nonetheless, an assault conviction was obtained. This illustrates an important point emphasized in Deutch. A wide range of disparate conduct may be lumped together under a category such as "assault and battery." For example, there is surely a difference between poking another with one's finger and winding up and striking another with a closed fist. Yet, both might give rise to an assault and battery conviction. That is why the Court has wisely directed the panels to look through such labels and not to abdicate their critical responsibility to inquire into the particular facts of each case.

> Respondent's misconduct indicates that he does not have at this time the requisite professional character to discharge his duties to his clients and the United States District Court for the Eastern District of Texas. A lesser discipline than suspension is not appropriate under these unique circumstances. Respondent's misconduct has adversely affected most of the participants in the legal system – clients, fellow lawyers, and courts.
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> * * *
>
> Therefore, in accordance with Local Rule 3(d)(1), Respondent Leonard C. Jaques is hereby SUSPENDED from the Eastern District of Texas for a period of three years (one year for each Count). [972 F Supp at 1084.]

The Administrator argues this decision establishes that: "At least on Michigan attorney has been the subject of a disciplinary order suspending him for a period of more than 180 days for conduct arising out of his conviction for assault while in the courtroom." Respondent points out that the assault by Jaques was the subject of a proceeding before a Michigan hearing panel under MCR 9.120 (the rule on criminal convictions involved in this case). Jaques was convicted for "simple assault" in violation of 18 USC 113(a)(5). See Judgment in ADB file 97-157-JC. See also our opinion in that case, Grievance Admnistrator v Leonard C. Jaques, 97-157-JC (ADB 1997), wherein we remanded the case to the panel "for a careful inquiry into the facts of the case" under Deutch, in part to enable the Administrator to introduce the testimony of respondent's opposing counsel (the victim of the assault) and the court reporter.

After remand, the panel conducted a further evidentiary hearing at which Mr. Jaques was the only witness called. In its report and order of reprimand, the panel summarized the testimony of the sole witness as to the specific facts leading up to the assault conviction. He testified, among other things that unbeknownst to his opposing counsel, respondent's expert witness had recently had "multiple bypass surgery" and was scheduled for more; that opposing counsel rushed the witness in a rage and began yelling at the witness and trying to physically remove the rope from his hands; and that he, respondent, tried to quell the disturbance and in the course of doing so "stiff armed" opposing counsel (respondent later testified that he mis-spoke and meant to say "pulled"); and that counsel's fall appeared feigned. The panel noted: "Respondent Jaques testified that his actions were provoked by the actions of Mr. Emery [opposing counsel], and the Grievance Administrator offered no evidence to refute that claim."

The Jaques panel also declined to give aggravating effect to the Texas federal court's order, noting that reciprocal discipline proceedings had been initiated by the Administrator. No petition for review was filed by the Administrator; Mr. Jaques died approximately 12 days after entry of the panel's order. We do not find the Jaques decisions to afford much guidance. Even if we credit the somewhat brief recitation of facts by the Texas court over the evidence presented to the Michigan panel, we find the case plainly distinguishable. The Texas court adopted a finding that this

courtroom assault was without any justification. It was also presented with evidence of other serious misconduct that caused it to conclude that respondent did not have "the requisite professional character" to discharge his duties as an officer of the court. Despite a cursory statement assigning one year of the total suspension to each count, it is impossible to say exactly how the aggravating effect of Jaques' pattern of misconduct entered into this assessment.

Respondent also cites In re Claude R. Thomas, 441 Mich 1206; 494 NW2d 458 (1992). That case involved a district court judge who, over the course of two days made harassing and obscene phone calls to a Mr. Johnson regarding his relationship with respondent's ex-wife. A few days later, respondent "became involved in a verbal and physical altercation" with Mr. Johnson. Respondent was convicted of malicious use of the telephone, MCL 750.540e(1)(a) and (d), and of assault and battery, MCL 750.81. He was censured for violating MCR 9.104(2) and Canons 1, 2A, and 2B of the Code of Judicial Conduct. Comparison of Judge Thomas' case to the instant one provides *some* assistance in roughly gauging the proportionality of discipline for the misconduct here, but there are several distinctions. First, although a judge has a duty to conduct himself or herself with integrity and in a manner that preserves public confidence in the judiciary at all times, the conduct in Thomas did not take place in connection with the judge's official duties, which would be more analogous to a lawyer disrupting a deposition. On the other hand, the conduct in Thomas was worse, and it was sustained, not fleeting. Judge Thomas raised alcoholism in mitigation. Respondent raises the uniqueness of the situation involving Mr. Miller.

V.

Conclusion

Respondent represented himself at a deposition in a case involving a suit against him by a former colleague (Mr. Miller) with whom he had clashed in the past. Emotions ran high. Miller baited respondent, who retained composure for a time. But, when Miller stood menacingly and called respondent a son-of-a-bitch, respondent took the bait, one or two upped him in the insult department and ultimately shoved Miller when Miller somewhat belligerently refused to sit down and resume the deposition.

As we noted in our prior opinion, "Respondent has engaged in a lengthy career with no record of this type of behavior" prior to this "singular, short-lived incident." And, we further explained that:

> 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.

Our conclusion that "respondent represents no discernable risk to the public, the courts or the legal profession" has not been shown to be erroneous. Rather, it strongly supports our present conclusion that respondent's reaction to Mr. Miller's antagonistic and bullying posture, standing alone in a 30-year career, demonstrates an uncharacteristic loss of judgment and control but simply does not adversely reflect on his fitness to practice law. However, we are still not inclined to view this as a matter unworthy of a reprimand.

We again conclude that a reprimand is appropriate in this case to send the clear signal that physical contact has no place in the arsenal of legitimate advocacy tools, and that even a transitory loss of control with no lasting effects is not acceptable. In so doing, we may be drawing a line, but the establishment of such a guidepost does not mean that we must abandon common sense principles like progressive discipline, proportionality, and careful inquiry into the facts. So, while we would consider a suspension requiring reinstatement proceedings under MCR 9.123(B) to be drastically disproportionate in this case, we reaffirm our pre-Lopatin warning that lawyers may generally expect a suspension if they engage in assaultive conduct in the course of their duties. In the wake of Lopatin, however, we now couch that warning in the language of the Standards (see, e.g., Standard 5.12) which focus on a respondent's fitness to practice law. This is not a new focus. As we said in our opinion after remand in Grievance Administrator v Martin G. Deutch, 94-44-JC (ADB 1998) (affirming order imposing no discipline), p 7 n 5, lv den 460 Mich 1205 (1999):

> [T]he concept of "fitness" is central to the function of regulating the bar. It is a prerequisite to acquiring (State Bar Rule 15, §1), maintaining (MCR 9.103(A)), and regaining (MCR 9.123(B)(7)) the license to practice law. "Fitness" is arguably the touchstone or key variable to be addressed whenever the level of discipline is assessed. See, e.g., Standards for Imposing Lawyer Sanctions (ABA, 1991), §9.1.

Board Members Wallace D. Riley, Theodore J. St. Antoine, Michael R. Kramer, Nancy A. Wonch, and Marsha M. Madigan, M.D., concurred in this decision.

Board Member Marie E. Martell dissented and would impose at least a 30-day suspension.

Board Members Grant J. Gruel, Diether H. Haenicke, and Ronald L. Steffens were absent and did not participate.