Grievance Administrator,

Petitioner/Appellant,

v

Leonard B. Segel, P 32122,

Respondent/Appellee,

Case No. 95-210-GA.

Decided: May 11, 1998

BOARD OPINION

This matter is before us a second time. In the first review proceedings we reversed Tri-County Hearing Panel #72's order of dismissal and found that respondent had violated MRPC 8.4(c), and MCR 9.104(1), (2) and (4). We remanded the case to the panel for a hearing on discipline pursuant to MCR 9.115(J)(2). Following the hearing on remand, the panel entered an order imposing no discipline for respondent's misconduct. The Administrator filed a petition for review and seeks a suspension of 30 days. We vacate the panel's order imposing no discipline and reprimand respondent.

I.

The formal complaint alleges that respondent improperly conducted himself at a deposition by using abusive language toward opposing counsel and by refusing to surrender documents presented to the deponent by opposing counsel. The record establishes that these events took place during the deposition of a neuropsychologist in a worker's compensation case. A transcript of the deposition is in evidence. It discloses that respondent was upset because he believed his opposing counsel was acting unprofessionally and unethically. Specifically, respondent objected to questions regarding the psychologist's review of the testimony by respondent's client, Randolph Bailey, in another action.

Mr. Bailey was plaintiff in the worker's compensation proceedings. He and the defendant were also party to other litigation in which opposing counsel represented defendant. When opposing counsel began to question the psychologist about Mr. Bailey's testimony in the other case, respondent objected strenuously on the basis that the worker's compensation record was closed (as to lay testimony) and the magistrate judge had already denied opposing counsel's request to adjourn the trial in order to permit him to depose Mr. Bailey in the other action first. After trying various strategies to deter opposing counsel from questioning the psychologist on these matters, respondent asked that a separate record of the controverted questions and answers be made. When opposing counsel did not agree to do so, respondent said and did the following, as alleged in the complaint:

> Concerning the issue of whether a separate record should be made regarding some of the doctor's testimony, he told opposing counsel, "Fuck you. Put that on the record."; with respect to certain transcripts opposing counsel sought to use in the deposition which had been provided to Respondent for his review, he stated, "You're not getting either one of these stupid things back. Now, tell me what you're going to do."'; he stated to opposing counsel, "For you to pull bull crap like this is beyond belief. You have to be the most unethical lawyer I have seen in my life."; he stated to opposing counsel, "You are the most unethical asshole I've seen in your [sic] life."; He also stated to opposing counsel, "If we were in a boxing ring right now, I would flatten your ass. You can put that on the record."; and, he refused to return the deposition transcripts to opposing counsel. [February 21, 1996 Panel Report, p 2, reciting allegations from the formal complaint.]

At the hearing on misconduct, respondent admitted the foregoing and argued that he was provoked by his opposing counsel. Perhaps persuaded by this argument, the panel dismissed this case based on its finding "that there has been no showing of misconduct within the context of these Rules from the evidence presented in this case." Id., p 3.

In the initial review proceedings we vacated the panel's order of dismissal, holding that:

> 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 further conclude that the respondent's conduct exposed the legal profession to obloquy, contempt, censure or reproach and therefore violated MCR 9.104(2). [August 7, 1996 order of the Board.]

Pursuant to this order, the matter was remanded and the panel conducted a hearing on discipline on October 21, 1996. In its October 16, 1997 report on discipline, the panel found that

> the offensive language used by [respondent] on the record at the time of the deposition of Dr. Louis Dvorkin, Ph.D. to have been the result of deliberate provocation by Mr. [Stephen] Coticchio [opposing counsel]. [Panel Report (After Remand), p 5.]

Relying on <u>Grievance Administrator v Deutch</u>, 455 Mich 149 (1997), the panel entered an order imposing no discipline.

II.

On review, the Administrator argues that

> The Supreme Court's Opinion in <u>Grievance Administrator v Deutch</u>, 455 Mich 149 (1997), is applicable only to matters commenced with the filing of a Judgment of Conviction in accordance with MCR 9.120. When misconduct is found following the presentation of evidence concerning a Formal Complaint, discipline must be ordered pursuant to MCR

> 9.115(J)(2) and (3). The minimum discipline for misconduct found pursuant to a Formal Complaint is a reprimand pursuant to MCR 9.106. As a matter of law, the hearing panel did not have the option of issuing no discipline against Respondent in this matter. [Petitioner's Brief, p 5.]

For all of the reasons discussed at length in Grievance Administrator v William R. McFadden, No 95-200-GA (ADB 1998), we disagree and hold that the panel had the authority under the rules to enter an order imposing no discipline. Of particular relevance to the argument presented here is the Court's unqualified and unambiguous holding that "MCR 9.115(J)(3) does not require discipline where misconduct is established." Deutch, 455 Mich at 162.

III.

The Administrator also argues, in the alternative, that even if the panel had the authority to enter a no-discipline order, it should not have done so in this case. We agree.

The Board exercises an overview function with regard to the ultimate disposition in these matters to ensure consistency and continuity in discipline imposed, and to provide guidance to the hearing panels. In exercising this function, we have concluded that this is not one of the very rare cases in which an order imposing no discipline would be appropriate.

We have carefully reviewed the record in this matter. In its report following the hearing on discipline held after remand, the panel expressly found that Stephen Coticchio, respondent's opposing counsel, was "not credible." Although the panel's report did not identify what testimony it rejected, we presume that one such strand of testimony related to whether or not Mr. Coticchio was in fear of imminent bodily injury. This "issue" arose during the misconduct phase of the hearing. Although not charged in the complaint, the panel questioned Mr. Coticchio on this matter, perhaps in light of his statement to respondent during the Dvorkin deposition ("Sit down, you are threatening me").

Whether or not respondent's opposing counsel actually feared

a battery is not dispositive of this case. We defer to the panel's apparent finding that Mr. Coticchio did not in fact experience such fear, notwithstanding his protestations to the contrary. Nevertheless, the transcript of the deposition and the testimony of respondent reveal an undisputed and unacceptable chain of events that originated from respondent's loss of control.

The panel found that "the offensive language used by [respondent] . . . [was] the result of deliberate provocation by Mr. Coticchio." Even if we discerned adequate evidentiary support for this finding, we could not agree that the provocation shown here would justify an order imposing no discipline.

First, the finding appears to have been based on the argument that respondent was entitled to have any questions he objected to put on a "separate record." Respondent contended that Coticchio's conduct in attempting to question Dvorkin on matters in the Bailey deposition was improper because a mere objection on the record by respondent would not keep the Worker's Compensation Magistrate from reading the arguably inadmissible testimony. We are not persuaded that a "separate record" was the only way to attain respondent's objectives. In any event, the claim that Coticchio's refusal to accede to a separate record provoked respondent's conduct is not supported by the deposition transcript (petitioner's exhibit 1).

The transcript reflects that when Coticchio began to question Dvorkin about the Bailey deposition testimony, respondent objected to it as ethically improper (exhibit 1, p 55). While Mr. Coticchio was placing his basis for pursuing the testimony on the record, respondent interrupted: "Bull crap, Counsel" (id.). We understand that respondent strongly objected to his opposing counsel's conduct, and we further understand the panel's view that it would have been the collegial and professional thing for opposing counsel to accede to the request that a separate record be made. Perhaps had it actually been a request, Mr. Coticchio might have granted it. But, the transcript reflects more rudeness and ad hominem attacks by respondent until, finally, the following takes place:

> MR. SEGEL: Hold on a second, Let's put this on a separate record. If he is going to talk about

crap like this, this is not admissible. If you want to talk and ask this doctor questions you put this on a separate record now.

MR. COTICCHIO: You have your objection.

MR. SEGEL: No, you put it on a separate record. Do you understand me, right now.

MR. COTICCHIO: No sense putting it on the separate record.

MR. SEGEL: Fuck you. Put that on the record. You're not getting either one of these stupid things back. Now, tell me what you're going to do.

MR. COTICCHIO: Sit down, you are threatening me.

MR. SEGEL: You are the most unethical ass-hole I've seen in your [sic] life.

THE WITNESS: Excuse me, I will call security.

MR. SEGEL: Call them right now.

MR. COTICCHIO: Call security. That's inappropriate.

MR. SEGEL: If we were in a boxing ring right now, I would flatten your ass. You can put that on the record.

MR. COTICCHIO: May I have the deposition transcripts back?

MR. SEGEL: No, take it away from me. Come on wimp take a shot at me. Come on, take a shot at me.

MR. COTICCHIO: That's inappropriate.

MR. SEGEL: Everything you have done so far is inappropriate in this case.

MR. COTICCHIO: Can I have my transcripts back please?

MR. SEGEL: No, you can't have it back. I asked you to go on a separate record and you won't do it. [Exhibit 1, pp 59-61.]

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.")

We agree with the administrator that the claim of provocation is particularly weak in this case. Respondent was "provoked" not by conduct similar to his own, but by what he considered to be a questionable legal tactic. When in depositions and other such settings lawyers must be able to handle an opposing counsel's stratagems without resorting to disruptive conduct such as bullying, swearing, name-calling, and playing keep-away with exhibits.

Of course a panel must consider all of the circumstances, including the conduct of others involved in the situation at issue. However, a claim of provocation cannot automatically serve as a defense to, or excuse for, conduct such as this. Were we to hold otherwise we would be encouraging a downward spiral in the conduct of members of the bar. We have considered the actions of opposing counsel, and we nonetheless conclude that respondent's reaction constitutes misconduct warranting discipline.

IV.

Although respondent's tirade was not excusable, when we consider all of the circumstances, the absence of aggravating evidence, and the undisputed evidence that this incident was entirely out of character for respondent, we conclude that no useful purpose would be served by a suspension in this case.

The hearing panel appropriately noted the testimony of three attorneys who are personally familiar with the manner in which respondent conducts his practice and/or personal life. Each of these attorneys testified that they held respondent in high regard, professionally and personally. According to the unrebutted evidence, respondent is a competent, thorough, dedicated advocate

for his clients. Two of these attorneys testified that he has a reputation for honesty and integrity. There was agreement in the testimony that while respondent may be "passionate" as an advocate or "intense and competitive" on the basketball court, he is consistently "courteous" and "respectful" of others.

We are convinced that respondent understands that this type of conduct is subject to discipline, and that he is extremely unlikely to repeat it. Under the facts of this case, we consider it unnecessary to impose a suspension for one isolated incident of this nature in an 18-year career otherwise unblemished, and, in fact, characterized by civil and cordial, albeit zealous representation. Accordingly, the hearing panel's order imposing no discipline is vacated, and respondent is reprimanded.

Board Members Elizabeth N. Baker, C.H. Dudley, M.D., Grant J. Gruel, Michael R. Kramer, Roger E. Winkelman, and Nancy A. Wonch concur in this decision.

Board Members Albert L. Holtz and Kenneth L. Lewis dissent and would affirm the order of the hearing panel.

Board Member Barbara B. Gattorn, dissenting.

A reprimand is not sufficient for the degree of misconduct displayed here. Officers of the court should be able to conduct discovery or de bene esse depositions without sinking to this level. Respondent repeatedly demanded a separate record. Opposing counsel denied these requests, as he was entitled to do. Respondent's reaction was disproportionate. Even if opposing counsel had wrongly withheld his consent to the separate record procedure, that is not sufficient provocation to justify respondent's prolonged fit of anger. It is inexcusable for a member of the bar to resolve an issue with this kind of action. Lawyers -- who earn their living by resolving disputes -- must be in control of their emotions. I would impose a suspension of 30 days.