Grievance Administrator,

Petitioner/Appellee,

v

William R. McFadden, P 17393,

Respondent/Appellant

No 95-200-GA

Decided: March 16, 1998

BOARD OPINION

Respondent moves for reconsideration of the Board's order affirming Tri-County Hearing Panel #85's order of reprimand. For the reasons set forth below, the motion is denied.

The hearing panel found that respondent engaged in the dual representation of certain clients with regard to a parcel of real estate and the transfer of a liquor license. The panel also found that respondent represented his own interests with regard to the transaction. Respondent contended that he represented the parties as an "accommodation." The panel found that respondent violated MRPC 1.7 and MRPC 1.8, but that in light of respondent's unblemished record and "the nature and extent of said misconduct," a suspension was not warranted. Respondent filed a petition for review. The Grievance Administrator did not.

This Board affirmed the panel's order of reprimand. Respondent has moved for reconsideration on the ground that, following its findings of misconduct, the panel indicated an interest in dismissal or taking some action less onerous than a reprimand. Respondent argues that the panel should have had the option of entering an order imposing "no discipline" pursuant to the Supreme Court's recent opinion in Grievance Administrator v Deutch, 455 Mich 149 (1997).

We ordered supplemental briefs on the question whether Deutch is applicable to a proceeding commenced by a formal complaint under

MCR 9.115, or if Deutch is applicable only to matters commenced with the filing of a judgment of conviction in accordance with MCR 9.120. We have concluded that Deutch is not limited to matters commenced under MCR 9.120. However, we conclude that an order imposing no discipline is not appropriate in this instance, and we therefore deny the motion for reconsideration. The panel's order of reprimand is affirmed.

I.

In Grievance Administrator v Deutch, supra, the Court declared that "MCR 9.115(J)(3) does not require discipline where misconduct is established." Deutch, 455 Mich at 162. That rule provides, in part: "If the hearing panel finds that the charge of misconduct is established by a preponderance of the evidence, it must enter an order of discipline." MCR 9.115(J)(3). Historically, the Board, and the Commission, had read MCR 9.115(J) and MCR 9.106 to require that a panel must impose at least a reprimand following the hearing on discipline if the panel determined, during the initial ("misconduct") phase of the proceedings, that the respondent committed misconduct. However, in Deutch, the Court clarified that "the order of discipline [required by MCR 9.115(J)(3)] may, in fact, order no discipline at all." Deutch, 455 Mich at 163.

The Administrator argues that although nothing in the express language of the Court's opinion limits its application to judgment of conviction cases filed under MCR 9.120, the context of the Court's statements should be taken to so restrict them. Specifically, it is argued that only when misconduct under MCR 9.104(5) (proscribing criminal conduct) is established by a judgment of conviction pursuant to MCR 9.120, may an order imposing no discipline be entered. After a careful reading of Deutch we must disagree.

A.

First, we note the plain language of Deutch, repeated throughout the opinion, which clearly indicates that the "no discipline" option is a procedural and logical component of the

hearing on discipline.[1] This second-stage hearing, at which the level of discipline is set after aggravating and mitigating factors have been considered, takes place in every case in which misconduct has been established.

The Administrator argues that

> the Court . . . recognized that the power to impose discipline should not lie with the Grievance Administrator, and thus there was a need to place some check on the prosecutorial authority. Without such a check, the decision to file a judgment of conviction would necessarily always result in the imposition of some sanction. It was this need to check the prosecutorial power that led to the announcement of a new procedure in judgment of conviction cases. [Administrator's brief, p 4.]

We agree that the Court wished to avoid reposing the power to discipline in the Commission. But, we cannot agree that the Court created the no-discipline option in Deutch to bolster or justify a "new procedure."

The Court did not write new rules, it interpreted existing ones. And in the process of doing so it repeatedly explained that "at the second hearing referred to in MCR 9.115(J)(2), hearing panels have the discretion to issue orders of discipline under MCR 9.115(J)(3) that effectively impose no discipline on respondents." Deutch, 455 Mich at 169. Neither the language nor the logic of the opinion qualified these statements or limited them to MCR 9.120 proceedings, and MCR 9.115(J) applies to all subchapter 9.100 proceedings whether commenced by judgment of conviction (MCR 9.120) or by formal complaint (MCR 9.115(B)).

Moreover, the basis for the Court's conclusion that MCR 9.115(J)(3) does not require the imposition of discipline after every finding of misconduct is found in rules and principles applicable to all discipline cases:

> Again, it should be noted that the order of discipline may, in fact, order no discipline at all. MCR 9.106 echoes the language in MCR 9.104, which states that a finding of "misconduct" is only

[1] The hearing on discipline follows, sometimes immediately, a hearing at which misconduct has been established. See MCR 9.115(J)(2).

> "*grounds* for discipline," not that a finding of misconduct requires the imposition of discipline in every case. Where notions of justice and fairness require, we hold that the order of discipline, required under MCR 9.115(J)(1) and (3), could include an order that effectively imposes no discipline on an attorney. [Deutch, 455 Mich at 163. Emphasis in original.]

The reference to MCR 9.104 is particularly worth examining. That rule lists nine acts or omissions by an attorney which are deemed to be "misconduct" and "'only *grounds* for discipline,'" Deutch, 455 Mich at 163 (emphasis in original). One of those grounds is "conduct that violates a criminal law of a state or of the United States." Logically, if a panel can impose no discipline for a criminal conviction because MCR 9.104 states that such conduct is only "grounds for discipline," then a panel must have the authority to impose no discipline under the other eight "grounds" enumerated in that rule.

In sum, the Court's holding that MCR 9.115(J)(3) does not require the imposition of discipline in every case of misconduct is based on: (1) the bifurcated system which affords such discretion to the panels, the Board, and the Court; (2) the language of the court rules, including MCR 9.104 and 9.106; and (3), "notions of justice and fairness."

B.

Also, the Administrator's reading is inconsistent with the rationale of Deutch and would defeat, at least in part, the purpose of bifurcating the prosecutorial and adjudicative functions in discipline proceedings.

In Deutch, the Court described Michigan's bifurcated system: the Attorney Grievance Commission investigates and prosecutes allegations of attorney misconduct while the Board serves as the Court's adjudicative arm, assigning formal complaints to panels for hearing and reviewing panel proceedings upon petition. Deutch, 455 Mich at 158-159; MCR 9.108; MCR 9.110. Such bifurcation serves "as an important check and balance on the activity of each branch" or agency of the Court's discipline system. Deutch, 455 Mich at 159.

"For similar reasons, Michigan's attorney discipline process has been divided so that each disciplinary proceeding involves two stages, or two separate hearings." Id.

The Court explained that "[t]he Board and the hearing panels independently review each case to insure discipline is required to protect the public, the courts, and the legal profession." Id. If the no-discipline option is not available in cases initiated by formal complaint, then the "institutional 'check' on the prosecutorial branch,"[2] could easily be defeated by that branch through the use of the formal complaint procedure.[3] Thus the careful system of checks and balances established by the rules and described in Deutch would be reduced to an exercise in futility.

C.

Also, an interpretation which would leave unfettered discretion in the prosecutor to determine, by his procedural election, whether discipline may or must be imposed is objectionable solely on the ground that it elevates form over substance.

The Court in Deutch disagreed about rule interpretations in some aspects, but all of the Justices wanted to avoid shallow formalism, although they expressed it in different contexts. The majority disapproved of a rule (or interpretation thereof) which would force a panel to disregard relevant conduct or factors not precisely established by the judgment of conviction. The dissenters found that the panel was applying the rules as written. However, there did not seem to be any disagreement with the philosophy behind the majority's injunction that:

> The hearing panels are not absolved of their critical responsibility to carefully inquire into

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[2] 455 Mich at 158.

[3] MCR 9.104(5) defines as misconduct "conduct that violates a criminal law of a state or of the United States." It does not require that MCR 9.120 be used whenever an attorney's criminal conduct is at issue. See Deutch, 455 Mich at 160. The Commission could allege in a formal complaint that the attorney was convicted, or that he or she committed the elements of a crime. The attorney may be likely to stipulate that criminal conduct was committed and wish to litigate only the level of discipline, if any, to be imposed.

> the specific facts of each case merely because the administrator initiates disciplinary proceedings by filing a judgment of conviction, under MCR 9.120(B)(3), rather than by formal complaint under MCR 9.115(A). [Deutch, 455 Mich at 169.]

Thus, the Court concluded that it would make little sense to allow matters of form to impede the process of adjudication by preventing panels from considering pertinent matters or reaching an appropriate disposition.

Were we to accept the Administrator's reading of Deutch we would be establishing a scheme whereby one respondent charged with criminal conduct via MCR 9.120 show cause proceedings has the possibility of receiving no discipline while another attorney, who happens to be charged with identical conduct by means of a formal complaint under MCR 9.115(B), has that possibility foreclosed. This seems to us formalistic at best, arbitrary at worst, and contrary to the spirit of Deutch in any event. The outcome of a proceeding should not depend upon how it was shown that an attorney engaged in "conduct that violates a criminal law of a state or of the United States." MCR 9.104(5).

D.

Finally, we must reject the following argument:

> When the Grievance Administrator determines that the facts of a case justify disciplinary proceedings, and he/she files a Formal Complaint, the hearing panel will exercise its critical responsibility to carefully inquire into the specific facts of the case when it decides whether a finding of misconduct should be made. But when the Grievance Administrator files a valid judgment of conviction, the finding of misconduct is already made before the hearing panel makes its inquiry into the facts. It was this need to have some procedure by which the hearing panel could still fulfill its duty to inquire into the facts after a finding of misconduct in a judgment of conviction case which led to the procedure established in Deutch.
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> Because the hearing panel considering a case initiated by Formal Complaint can decide whether

> the facts of the case justify some form of discipline when it determines if it should make a finding of misconduct, there is no need in such situations to impose the check on the Grievance Administrator's authority that was recognized in Deutch. A finding of misconduct based upon fully developed facts necessarily includes the determination that some form of discipline is appropriate. Therefore, when misconduct is found following the presentation of evidence on a Formal Complaint . . . there is simply no justification for permitting a hearing panel to enter an order of discipline that imposes no sanction. [Administrator's brief on review, pp 6-7.]

We reiterate our conclusion that the no-discipline option was not "established in Deutch." And the Court's analysis does not depend on the manner in which proceedings are commenced. Most important, however, we cannot entertain the notion that a hearing on misconduct and a hearing on discipline are fungible. Panels, the Board, and the Court perform entirely different functions in these distinct hearings: "The initial hearing establishes the existence of professional misconduct and the second hearing determines the level of discipline appropriate in light of any mitigating or aggravating factors in the particular case. MCR 9.115(J)(3)." Deutch, 455 Mich at 159.

If a panel finds that the allegations in a formal complaint have been sustained by a preponderance of the evidence, then it must determine whether the facts established constitute a violation of one or more of the Rules of Professional Conduct or Court Rules specified in the complaint. This is the familiar process of making findings of fact followed by conclusions of law. It is dictated by the rules of practice and procedure applicable in bench trials and, therefore, in these proceedings. See MCR 9.115(A). We do not wish to institutionalize a process whereby panels manipulate either their findings of fact or their legal conclusions in order to achieve the same effect as an order of no-discipline in cases where it is unavailable. However, were we to adopt the Administrator's reading of Deutch, such actions might prove difficult to restrain.

II.

The fact that a "no-discipline" option exists does not mean that it should be employed often.

In an effort to increase uniformity and predictability as much as possible in an area of the law marked by case specific analysis, most discipline bodies have properly been reluctant to let proven rule violations go without at least a reprimand. At least since its inception in 1978, our system has operated on the presumption that an attorney found to have committed professional misconduct will be disciplined. This is a logical, if not intuitive, presumption, and it is not unique to Michigan.

It is the general rule that "the court or disciplinary agency should impose a sanction" following a finding that misconduct has been committed. ABA Standards for Imposing Lawyer Sanctions, §1.3, Commentary.[4] In fact, this Board had interpreted the rules to require the imposition of some discipline once misconduct had been proven. See, e.g., In Re Harry T. Ward, No 34204-A (ADB 1980)[5], and Grievance Administrator v Sandra S. Schultz, ADB 96-89 (ADB

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[4] Unlike our rules, the ABA Model Rules for Lawyer Disciplinary Enforcement (MRLDE), define an admonition as a form of discipline. Compare MCR 9.106(6) with MRLDE, 10A(5). As in Michigan, only discipline counsel may admonish a respondent, and counsel may not do so after formal charges have been issued. However, a panel chair must approve an admonition under MRLDE, 10A(5). Since the adjudicative part of the discipline system is involved under the Model Rule, characterizing an admonition as discipline would not seem to present due process problems or confuse the prosecutorial and adjudicative functions.

[5] In Ward this Board "regretfully impose[d] a reprimand" where an attorney settled a personal injury action for $325,000 in 1980, and charged a fee of 50% (which had been approved by the trial judge and which the Board and panels impliedly found reasonable by virtue of the difficulty of the case). During the course of the representation, the Court adopted GCR 928 setting forth a schedule of maximum contingent fees in such cases, which respondent's fee exceeded. GCR 928 provided that it "[did] not apply to agreements reduced to writing before May 3, 1975." Respondent commenced representing the client in 1969, and settled the case in "late 1975." Although respondent's interview sheet contained his own notation as to the fee, there was no writing within the meaning of the rule. Neither a hearing panel or the State Bar Grievance Board found misconduct. On complainant's request, however, the Court remanded to this Board (which succeeded the Grievance Board in 1978). A hearing panel was assigned and found that the fee had not been reduced to writing; the panel concluded that there had been "a technical violation," but that "under the facts and circumstances in this case [there is no justification for] the imposition of discipline." Ward, Board Opinion. Citing MCR 9.115(J)(3)'s predecessor, the Board reversed the panel. The Board reasoned that the rules required discipline upon a finding that a rule was violated, even if such violation was technical. The Board also pointed out that respondent was charged with the knowledge of the rule amendment, but noted: "we impose this reprimand with regret. Respondent is a competent and respected attorney and recovered a large sum in a difficult case." On reconsideration of its order denying leave, the Court vacated the Board's order reprimanding respondent. 413 Mich 1106 (1982).

1990).

For these reasons, the Board has only rarely dismissed a case on the grounds that the misconduct did not warrant discipline even though the evidence established a rule violation. See, e.g., Grievance Administrator v John F. Gilhool, ADB 81-88 (ADB 1989) (violation of Code provisions "were, at best, de minimis"). In the wake of Deutch's clarification that an order of "no discipline" may be entered following a finding that misconduct has been committed, we conclude that this option should continue to be exercised quite sparingly by panels and the Board.

Parties, counsel, and members of panels and the Board should continue to strongly presume that some form of discipline will follow a finding of misconduct. Generally, a reprimand is imposed whenever a suspension or disbarment is not necessary to serve the ends of the discipline system. On the low end of the spectrum of misconduct warranting a reprimand are "relatively innocuous, technical, or isolated violations that suggest an unusual or minor lapse of judgment rather than a more derelict state of mind." Wolfram, Modern Legal Ethics (1986), §3.5.3, p 127. See also, Grievance Administrator v Steven J. Lupiloff, DP 34/85 (ADB 1988), p 5 ("lack of actual harm to complainant coupled with respondent's lack of intent to defraud may mitigate the gravity of respondent's technical misconduct to a degree that discipline should be reduced to a reprimand"). Such minor misconduct should ordinarily receive a reprimand and not an order imposing no discipline.

III.

In this case, we are unable to conclude that the panel's order of reprimand was inappropriate.

Even a competent and ethical attorney may suffer an uncharacteristic lapse and find himself or herself in violation of the Rules of Professional Conduct. When such an attorney is reprimanded, it does not necessarily brand him or her as "unethical," nor does it necessarily connote an intentional violation of the rules in that instance. But a reprimand does serve the important function of marking the boundaries of ethical

conduct for that attorney as well as others. And, by its public nature, it can amount to significant discipline for some attorneys, particularly those with no record of prior discipline.

After reviewing the record, we concluded that the panel's findings of fact are supported by the evidence, and that its conclusions of law were not erroneous. We also rejected respondent's due process arguments.

The panel issued its report and order of reprimand on March 28, 1997. In July, the Supreme Court released Deutch, supra. Respondent seeks reconsideration of our order affirming the panel's reprimand on the basis that the panel was erroneously informed by counsel for the Administrator that it could impose no less than a reprimand. Whether or not the panel would choose to impose no discipline, we have concluded that a reprimand is appropriate. Accordingly, the motion for reconsideration is denied.

Board Members Elizabeth N. Baker, C.H. Dudley, M.D., Barbara B. Gattorn, Grant J. Gruel, Albert L. Holtz, Michael R. Kramer, Kenneth L. Lewis, Roger E. Winkelman, and Nancy A. Wonch concur in this decision.