Grievance Administrator,

Petitioner/Appellant,

v

Neil C. Szabo, P 33792

Respondent/Appellee.

96-228-GA

Decided: February 11, 1998

BOARD OPINION

The respondent, Neil C. Szabo, was charged with professional misconduct for allegedly challenging opposing counsel to a fight and for saying to him, "you are a fucking asshole." The hearing panel concluded that respondent was not guilty of professional misconduct as alleged and dismissed the complaint. The Grievance Administrator petitioned for review. For the reasons set forth below, we affirm the hearing panel's decision.

The charges of professional misconduct arise out of respondent's representation of the husband/defendant in a divorce case in Genesse County Circuit Court. Complainant represented the wife/plaintiff. Respondent and complainant appeared on behalf of their respective clients at a motion hearing in Genesse County Circuit Court on April 15, 1996. The formal complaint charges that after the conclusion of the motion hearing and upon exiting the courtroom, respondent blocked complainant's way and shouted at him, "do you fight?" According to the complaint, respondent continued to stand a few feet away from the complainant while shouting,

i) "Do you box?";

ii) That he, (Respondent) wanted to "physically fight him?";

iii) "You're a fucking asshole"; and,

iv) "I want to kick your ass because you are a fucking asshole. You can sue me for libel but I will say it

again. You are a fucking asshole."

The complaint alleges that this conduct violates MCR 9.104(1), (2), (3) and (4) and MRPC 6.5(a), and 8.4(a) and (c).

At the hearing, complainant testified that respondent was inches away and essentially had complainant pinned against the courtroom door. Complainant testified that respondent railed "for several minutes"; that complainant attempted to quiet him down but respondent kept getting louder; that he "thought [respondent] was going to hit me right then and there"; and that respondent called him a "fucking asshole" repeatedly, "at least half a dozen times."

Complainant's client corroborated some of complainant's testimony, while contradicting other portions.

Respondent testified differently as to the events that day. Complainant was one and one half hours late to the hearing on the motion, which he opposed strenuously although respondent had recently more or less acceded to a similar request to obtain funds from an account "frozen" by court order. Complainant "aggressively" opposed the motion and unjustly accused respondent's client of having gambling debts. Just prior to leaving for court, respondent received complainant's deposition notice for the following Monday (motion day where respondent practices).

According to respondent, he suggested to complainant that they put on boxing gloves and settle their differences at the YMCA, at which point complainant said, "what kind of lawyer are you to threaten me?" Respondent testified that he repeatedly explained to no avail that he was not threatening complainant but rather was using a figure of speech to suggest that complainant drop his hardball litigation tactics. But complainant would not accept respondent's meaning. Instead, according to respondent, complainant called his client over and "performed" for her.

Respondent described what happened next:

> A. Well, he had his client over. I already explained to him three or four times before that there is no threat involved here. And he is still -- he is still doing this. And ["]what kind of a lawyer are you["], I took it personal. He is insulting me personally.

> Q. And then is that when you used the remarks, ["]I know what kind of a lawyer you are, you're a fucking asshole["]?
>
> A. Exactly.

When complainant continued to insist he was being threatened, respondent uttered the unflattering eptithet again and then, realizing he had lost his temper, turned and walked away. Complainant then called out "how can you threaten me and just walk away[?]" But respondent kept walking.

Because a hearing panel has the opportunity to observe the witnesses during their testimony and so to judge their demeanor, this Board generally defers to the panel's resolution of credibility questions. Grievance Administrator v Deborah C. Lynch, No 96-96-GA (ADB 1997). See also In Re McWhorter, 449 Mich 130, 136 n 7 (1995). The panel here made it clear that it believed respondent's version of the events, and placed little credence in the testimony of complainant and his client on critical points.

In addition to the foregoing witnesses, two Genesee Circuit Judges testified and described respondent as courteous, professional, and respectful. Further, complainant's predecessor testified that while she was respondent's opposing counsel in the very same divorce proceedings which gave rise to this matter, respondent "was always a gentleman, poised, quiet." She testified that she had opposed him in other cases and that he was never unprofessional.

After hearing all of the evidence, the panel characterized respondent's outburst as an "isolated incident," and found that he "did not repeatedly use profane language toward [complainant] and did not continually exhibit inappropriate conduct as a member of the legal profession." The panel expressly rejected complainant's testimony regarding the duration of the incident, and noted that complainant used his grievance against respondent in the divorce proceedings "on at least two occasions to gain a tactical advantage." Appropriately, neither the panel nor the respondent suggest that complainant's actions excuse respondent's conduct.

Viewing the panel's report in its entirety, we can only construe it as accepting respondent's testimony that his fleeting reference to boxing was made in exasperation and/or jest, and that the statements could not have been seriously understood by complainant as an invitation to fight. After respondent had his say, he walked away from a potentially inflammatory situation. Thus we are left to consider the profanity used by respondent.

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

Board Members Elizabeth N. Baker, Barbara B. Gattorn, Albert L. Holtz, Miles A. Hurwitz, Michael R. Kramer and Roger E. Winkelman concur in this opinion.