Grievance Administrator,

Petitioner/Appellant,

v

Leonard C. Jaques, P 15450,

Respondent/Cross-Appellant,

97-157-JC

Decided: December 23, 1997

BOARD OPINION

This discipline proceeding was commenced with the filing of a judgment of conviction entered in the United States District for the Eastern District of Michigan on June 20, 1997 by U. S. Magistrate Thomas A. Carlson. That judgment recited that respondent, Leonard Jaques, was found guilty of one count of simple assault in violation 18 U.S.C. Sec. 113(A)(5). Respondent's assaultive conduct occurred May 7, 1996. Respondent was ordered to pay a fine of $5000 and a special assessment of $10 and was ordered to engage in a program of community service to be completed within nine months. In accordance with MCR 9.120(B)(3), the Attorney Discipline Board ordered respondent to show cause why a final order of discipline should not be entered and the matter was referred to a hearing panel. The respondent and the Grievance Administrator have each petitioned for review of the hearing panel's order of reprimand issued September 10, 1997. We remand to the hearing panel for an inquiry into the specific facts of the underlying case as mandated by Grievance Administrator v Deutch, 455 Mich 149; 565 NW2d 369 (1997).

The Grievance Administrator seeks review only on the level of discipline and argues that respondent's conduct warrants a suspension of at least 180 days. The respondent filed a cross-petition for review. He argues that the hearing panel erred in its refusal to entertain argument regarding the meaning and construction of applicable Michigan court rules; its refusal to

entertain argument regarding the constitutionality of the applicable court rules; its refusal to entertain testimony and argument regarding the conduct which led to the assault conviction; and in its decision to impose a reprimand rather than no discipline at all. We conclude that the panel's refusal to admit the testimony regarding respondent's conduct on May 7, 1996 was inconsistent with the panel's responsibilities as explicated in Grievance Administrator v Deutch, supra. We remand to the panel on that issue only and do not address the other arguments raised on appeal.

At the panel hearing on August 11, 1997, the Grievance Administrator's counsel stated he was prepared to offer the testimony of as many as three witnesses. They were identified as Thomas Emery, the attorney who was the victim of the assault; Fred Pratt, the court reporter who was present in the room when the assault took place; and respondent. Counsel explained that the proposed testimony would establish certain aggravating factors including the victim's status as an attorney, that the assault occurred in a federal courtroom and that respondent had not expressed remorse. Having taken the offer of proof, the panel ruled that it would exclude the testimony for the reason that, with one exception, those matters were encompassed in the judgment of conviction itself. As to that exception, that the assaultive behavior occurred in a courtroom outside the presence of a judge or jury, the parties placed a stipulation on the record.

The respondent, in turn, made an offer of proof as to witnesses who would testify to the events which led to the assault conviction, including what was described as "considerable history" between Mr. Jaques and Mr. Emery, the physical condition of a witness on whose behalf respondent would claim to have intervened and respondent's own state of mind as to the need for such intervention. Respondent conceded that the proffered testimony had been presented to Magistrate Carlson in the federal assault proceeding. That testimony was also excluded by the panel on the grounds that it was inadmissible in light of the conclusive nature of the judgment of conviction.

We do not necessarily fault the panel for its view that allowing the testimony concerning the conduct which resulted in the assault conviction would impermissibly open the door to a relitigation of the criminal proceeding. It is well settled that MCR 9.120(B)(3) provides a procedural shortcut which allows the Grievance Administrator to file a certified copy of a judgment of conviction thereby relieving the Administrator of the obligation of retrying the criminal case. In many cases, hearing panels have accepted the argument of the Grievance Administrator and his predecessors that testimony regarding the facts of the underlying case should be discouraged as an attempt to "go behind the conviction," especially if respondent or his witnesses offered testimony which would tend to minimize or cast doubt upon a necessary element of the criminal offense.

At the Board review hearing, the Grievance Administrator's counsel was asked whether respondent should have the right to present mitigating evidence in the form of an account by respondent or any other eye witnesses to the assault. The Deputy Administrator replied that such testimony should not be allowed because, under 9.120 "you can't, in effect, attack the validity of a conviction, which is what he is doing" (Brd. Hrg. 11/20/97, Tr. p. 27). The colloquy between the Board's Vice-Chairperson and the Deputy Grievance Administrator continued:

> VICE-CHAIRMAN LEWIS: Example comes to mind. Assault. Lawyer is convicted of assault. You've got the conviction. Now we go to the mitigating phase of the process. And the question that pops up is well, why did you assault this person. Well, he said something real ugly about my mother. Why wouldn't that kind of thing be allowed at the mitigating phase of this process?
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> MR. EDICK: Because you are attacking collaterally the underlying conviction. If, in fact, the assault --
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> VICE-CHAIRMAN LEWIS: You've got the misconduct already in place. I guess now the question is what penalty should be imposed. You've got a misconduct. That's already established

> because you've met your burden and they don't have a right to go around that. But they do have a right, it seems to me, to be able to say well, there's some mitigating circumstances here, and if you hear them, maybe you won't punish me at all or you won't punish me as much.
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> MR. EDICK: I still think what is really happening in disguise is they're attacking the validity of the conviction. For example, if the Judge in Mr. Jacques' criminal case had even a reasonable doubt as to whether he was acting in self-defense or not, he would have bound to acquit him. And he didn't acquit him, he convicted him.
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> And this whole issue of what Mr. Jacques was allegedly -- how he was allegedly acting was all litigated in front of Magistrate Carlson. So to do and re-litigate that all again, it really defeats the purpose of 9.120. I think the Court has made a --
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> VICE-CHAIRMAN LEWIS: Mr. Edick, I got your answer.

First, we do not agree that respondent's attempt to show his or her motivation or state of mind at the time of the offense necessarily constitutes an improper attack upon the conviction itself. The example raised by the Board's vice-chairperson is apt. In the eyes of the criminal law, claims of provocation, for example, may be irrelevant to the question of whether or not the necessary elements of the crime of assault have been established. Nevertheless, the question of whether or not the assault was provoked or unprovoked may have a direct bearing on the appropriate penalty imposed by the sentencing judge. Similarly, those circumstances could have a direct bearing on the appropriate discipline which should be imposed when the defendant happens to be a licensed attorney. In short, a shove administered to a drunken bully hurling epithets at one's child and an unprovoked attack on opposing counsel during oral argument could both, hypothetically, result in a conviction of simple assault. Nevertheless, the differing circumstances in those two situations could warrant widely differing sanctions. Without testimony as to those

circumstances, there is simply no way to differentiate between the two otherwise seemingly identical assault convictions.

The record in the instant case establishes that respondent engaged in conduct on May 7, 1996 which led to his conviction of the crime of simple assault on June 20, 1997. The parties stipulated that the event in question occurred in a U. S. District Courtroom at a time when court was not in session. There is no dispute between the parties that respondent is sixty-nine years old, has been practicing law for thirty-five years and has no prior discipline in Michigan. Other than the offers of proof submitted at the hearing, there is no other information in the record which would assist the panel or the Board in conducting a meaningful analysis of the nature of respondent's conduct or the appropriate sanction.

We need not comment on the arguments of the parties as to whether or not the Supreme Court's recent opinion in Grievance Administrator v Deutch, supra, represented a significant change in the nature of proceedings conducted under MCR 9.120(B). For purposes of this matter, it is enough to recognize that Deutch clarifies, if not establishes, a hard and fast rule that professional misconduct under MCR 9.104(5) is conclusively established by the Administrator's filing of a judgment of conviction for any criminal offense regardless of whether the conviction, on its face, reflects adversely on the attorney's honesty, trustworthiness or fitness as a lawyer under MRPC 8.4(b). Deutch, 455 Mich at 153. In such a proceeding, the hearing panel and the Board clearly have no substantive adjudicative function with regard to the issue of professional misconduct. Under MCR 9.120(B)(3), the Administrator has the sole discretion to decide which judgments of conviction will be filed and which will not be filed and, thus, which attorneys who have violated a criminal law will be subject to an order of discipline and which will not.

Recognizing, however, that the hearing panels and the Board should have some adjudicative role, described as the "requisite check on the Administrator's prosecutorial authority," Deutch, 455 Mich at 162, the Court emphasized the necessarily broad scope of

the hearing on discipline under MCR 9.115(J)(3). The notion that the parties are restricted from presenting evidence regarding the facts of the underlying case is dispelled in Deutch:

> The hearing panels are not absolved of their critical responsibility to carefully inquire into the specific acts 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.

The importance of such an inquiry into the specific facts of the case is underscored in Deutch by the Court's ruling that while an order of discipline must follow in every case where the Administrator has filed a valid judgment of conviction, the order may effectively impose no discipline on the attorney.[1]
A panel decision to forego the imposition of discipline at all would, the Court noted, occur in the rare case "where the mitigating circumstances so clearly outweigh any aggravating factors and the nature and harm of the crime." Deutch, 455 Mich at 163 n 13 (emphasis added).

Deutch not only mandates an inquiry into the specific facts of each case, but makes clear that any fear that such an inquiry would constitute an attack on the conviction is unfounded. Except for a few narrowly drawn circumstances[2], the finding of misconduct which

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[1] While we need not consider the extent to which Deutch otherwise modifies prior interpretations of the rules governing discipline proceedings, we know of no prior rule or decision which contemplates the entry of an order of discipline which "effectively imposes no discipline." To that extent, Deutch does implicitly overrule prior Board opinions which held that "where even a technical violation of the discipline rules is established, discipline must follow, regardless of the mitigation exhibited." Matter of James H. Kennedy, DP 48/80 Brd. Opn. p. 132 (1981). See also Schwartz v Ward, #34204-A, Brd. Opn. p. 80 (1980).

[2] The Court discussed some of these exceptions:

> Arguably, the respondent could challenge a finding of misconduct by claiming that the crime is not a violation of state or federal law; the crime does not carry the requisite penalty of punishment by imprisonment, fine, or other discipline; or the conviction was set aside or otherwise eliminated from the respondent's record. Dismissal would only be appropriate if the hearing panel found such arguments to be persuasive. Otherwise, the Administrator has proven, with the valid judgment of conviction, that respondent committed "misconduct." Deutch, 455 Mich at 161.

automatically results from the filing of a judgment of conviction under MCR 9.120(B)(3) is, under Deutch, unassailable.

CONCLUSION

We remand this proceeding to the hearing panel for a careful inquiry into the specific facts of the case, including the nature and harm of the crime. The hearing panel shall then file its report on discipline and enter an appropriate order in accordance with MCR 9.115(J)(1) and (3).

Board Members Elizabeth N. Baker, C. H. Dudley, Barbara B. Gattorn, Grant J. Gruel, Albert L. Holtz and Nancy A. Wonch.

Board Members Michael R. Kramer and Roger E. Winkelman did not participate in this decision.