Grievance Administrator,

Petitioner/Appellant,

v

Martin G. Deutch, P 12711

Respondent/Appellee.

94-44-JC

Decided: October 13, 1998

BOARD OPINION
(On Remand)
(Issued October 13, 1998)
(Corrected version issued October 15, 1998)

Respondent, Martin G. Deutch was convicted in July 1993 of the misdemeanor offense of operation of a motor vehicle while visibly impaired, a violation of West Bloomfield Township Ordinance 5.15-22 and MCL 257.625; MSA 9.2325. On remand from the Supreme Court, the hearing panel found that professional misconduct was conclusively established by the filing of the judgment of conviction. Upon consideration of the nature of the offense and the relevant aggravating and mitigating factors, the panel concluded that an appropriate order would be an order which ordered no discipline at all. We affirm the panel's decision.

In May 1994, the Grievance Administrator commenced a disciplinary action against respondent pursuant to MCR 9.120(B)(3) by filing a judgment of conviction showing that respondent pled guilty to the offense of "Operating While Impaired" on July 28, 1993 in the 48th Judicial District Court. In accordance with that rule, the Board issued an order directing respondent to show cause to a hearing panel why a final order of discipline should not be entered. On June 14, 1994, Tri-County Hearing Panel #58 unanimously granted respondent's motion to dismiss with prejudice, concluding that his conviction did not constitute professional

misconduct because it did not reflect adversely on his honesty, trustworthiness or fitness as a lawyer.

The Board considered the Grievance Administrator's petition for review and entered an order in April 1995 affirming the hearing panel's dismissal. In its opinion, the Board attempted to read MCR 9.104(5), which declares that it is professional misconduct and grounds for discipline for a lawyer to engage conduct which violates a criminal law, in conjunction with the more restrictive declaration of MRPC 8.4(b) that it is professional misconduct for a lawyer to engage in conduct involving a violation of the criminal law "where such conduct reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer." The Board concluded that MCR 9.104(5) could not be read so as to declare that every criminal conviction constitutes professional misconduct per se. The Board ruled that hearing panels could dismiss an order to show cause based upon a misdemeanor conviction which involved no adverse reflection on the individual's fitness to practice law.

The Supreme Court granted the Grievance Administrator's application for leave to appeal. In an opinion by Justice Weaver, joined by Justices Brickley and Riley,[1] the Court reversed the decisions of the hearing panel and the Board, ruling that (1) MCR 9.104(5) is not limited by MRPC 8.4(b) because the two rules identify distinct forms of misconduct and need not be read in conjunction with each other; (2) the filing of any judgment of conviction against an attorney constitutes evidence of "misconduct" subjecting the attorney to an order of discipline, regardless of whether the conviction, on its face, reflects adversely on the attorney's honesty, trustworthiness or fitness as a lawyer; and, (3) a hearing panel does not have authority to dismiss the proceedings at an initial misconduct hearing where the Grievance Administrator has proffered a valid judgment of conviction. Grievance Administrator v Deutch, 455 Mich 149; 565 NW2d 369 (1997).

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[1] Justice Boyle authored a concurring opinion encouraging the Court to address what, in her view, are serious shortcomings in the form and application of the current rule. Chief Justice Mallett, joined by Justice Cavanagh, filed a dissenting opinion. Justice Kelly did not participate.

The Court went on to explain that while proof of a violation of MCR 9.104(5) in the form of a judgment of conviction must result in a finding of professional misconduct and the entry of an order of discipline in every case, a hearing panel is not absolved of its "critical responsibility to carefully inquire into the specific facts of each case." Grievance Administrator v Deutch, supra, p 169. The court ruled that after both parties have had an opportunity to present any and all relevant evidence of aggravation or mitigation, "panels have the discretion to issue orders of discipline under MCR 9.115(J)(3) that effectively impose no discipline on respondents." Deutch, supra, p 169.

The Supreme Court remanded this case to the Board for appointment of a panel to enter an order of discipline pursuant to MCR 9.115(J)(3). The Board, in turn, assigned this matter to Tri-County Hearing Panel #58 for further proceedings in accordance with the Supreme Court's opinion. The panel conducted a public hearing on September 10, 1997, and issued its report and order imposing "no discipline" on October 10, 1997.

This matter is before the Board a second time for consideration of the Grievance Administrator's petition for review. The Grievance Administrator seeks the entry of an order imposing discipline.

The essential facts surrounding respondent's arrest and conviction for the offense of impaired driving in 1993 are set forth in respondent's October 1, 1993 answer to the Grievance Administrator's request for investigation. The answer, offered into evidence by the Administrator, states:

> On June 20, 1993 while driving on southbound Middlebelt near Pine Lake Road, in my 1993 Acura Legend, I was stopped by a West Bloomfield Police Officer, given sobriety tests and subsequently given two breathalyzer examinations with a result each time of .15 alcohol content. As such I was arrested for drunk driving and subsequently pled guilty to a lesser charge of operating a motor vehicle while visibly impaired. I was fined, put on reporting probation and my motor vehicle license was taken away for 3 months. I was issued a restricted license to drive to, from

> and during the course of employment. On the evening in question, which was a Saturday evening, I had been to a wedding and had consumed at least 3 vodkas during the course of the evening. After leaving the wedding my date and I stopped with others at a restaurant in Keego Harbor where I had one additional drink with my food. On the way home I was stopped by the West Bloomfield Police. This incident is one in which I demonstrated extremely bad judgment. I am aware that it is improper to drink excessively and drive. In fact, I have decided as a result of this experience, which I believe is an isolated incident, that one should not drink at all when one is planning to drive a motor vehicle. This experience has been troubling to me as well as having been an embarrassment to me both personally and professionally. It was not easy pleading guilty even to a misdemeanor in front of my colleagues. I regret the incident and vow it will never happen again. [Petitioner's Exhibit #3, paragraph "c".]

In its report, the hearing panel concluded that since there was no dispute that respondent was convicted in 1993 of an alcohol related driving offense, respondent's statements regarding his two breathalyzer examinations at the time of his arrest added nothing. The panel also ruled that respondent's admitted conviction of the civil infraction of careless driving in April 1992 did not result in a criminal conviction and therefore did not establish that respondent should be disciplined as a recidivist. The panel found:

> The respondent has not been the subject of any prior disciplinary proceedings. His competency and conduct as an attorney have been attested to by a highly credible witness who has almost daily business contacts with the respondent, as well as frequent social contacts. She testified that, in their day-to-day and social activities, she never saw him under the influence of alcohol. More than four (4) years [have] elapsed since the 1993 conviction with no further evidence of any alcohol-related incidents.
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> * * *

> Your panel is satisfied that the respondent is not an alcoholic, does not have an alcohol problem, and he is a competent attorney.

In our review of a hearing panel's decision to enter a particular type of discipline order, it is appropriate that we give some measure of deference to the hearing panel's collective judgment. It was the panel after all, which had the opportunity to assess respondent's character and demeanor during his testimony. At the same time, the Supreme Court has recognized that the Board possesses "a measure of discretion with regard to its ultimate decision" Grievance Administrator v August, 438 Mich 296, 304; 475 NW2d 256 (1991). Our review of the panel's decision in this case is also guided by the principle that "review of these proceedings, is best handled on a case by case basis," Grievance Administrator v Nickels, 422 Mich 254 (1985), and that attorney misconduct cases generally stand on their own facts. In re Grimes, 414 Mich 483, 490; 326 NW2d 380 (1982). We are mindful of the principle that an attorney may be disciplined for activity unrelated to the practice of law, Nickels, 422 Mich at 260, and that it is the responsibility of every member of the Bar to carry out their activities, both public and private, with circumspection. Grimes, 414 Mich at 494.

The Grievance Administrator argues on appeal that the hearing panel's decision to impose "no discipline" fails to recognize the aggravating effect of (1) respondent's blood alcohol level at the time of his arrest; and, (2) evidence of respondent's plea of guilty to a civil infraction of "careless driving" in April 1992.

I

In his answer to the Grievance Administrator's request for investigation, respondent made a candid, forthright disclosure that his blood alcohol level at the time of arrest registered .15 percent.[2] In the context of assessing the potential danger to others on the highways, we agree with the Administrator's

[2] Respondent was convicted of impaired driving. Under MCL 257.625(A), breathalyzer test results showing a blood alcohol level greater than .10 percent establish a presumption of "driving under the influence," while a blood alcohol level greater than .07 percent, but less than .10 percent, establishes a presumption of "impaired driving."

observation that "common sense and experience indicates that the danger and the potential for harm presented by a 'drunk driver' increases as that person's level of intoxication increases" (Administrator's Brief in Support of Petition for Review, p. 6).

We also must emphasize that we are cognizant of the serious societal problem of drunk driving. We cannot escape the constant reminders that innocent motorists and pedestrians are daily placed at risk by drunken drivers. We believe, however, that the Administrator's arguments regarding the danger and potential for harm presented by drunk drivers raise issues to be addressed in the first instance by law enforcement officials and the criminal justice system.

Professional discipline does not exist to enhance or multiply the effects of criminal penalties or other consequences suffered by an attorney. It serves a purpose more narrow and yet more critical to the protection of the bar, the courts, and the members of the public utilizing legal services. Under long standing principles, we are bound to treat discipline proceedings as "fact sensitive inquiries that turn on the unique circumstances of each case."[3] Discipline is imposed when the "specific facts" presented at the hearing demonstrate that discipline is called for.[4] Our role is to fashion orders of discipline designed to protect the public, the courts and the legal profession from the harm caused by errant lawyers. If we are to succeed at that critical mission, it is important to maintain our focus.

It does not necessarily follow that an individual whose driving privileges have been curtailed or who has otherwise been subject to criminal sanctions for driving offenses must also have his or her professional privileges curtailed. The Grievance Administrator conceded that point during oral arguments before the Court in this case in his statement that, in the first ten months

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[3] Deutch, 455 Mich at 166, citing In re Grimes, 414 Mich 483, 490; 326 NW2d 380 (1982).

[4] As noted above, panels have, in all discipline proceedings, a "critical responsibility to carefully inquire into the specific facts of each case." Deutch, 455 Mich at 169.

of 1996, only two out of twelve drunk driving cases were approved by the Attorney Grievance Commission for formal disciplinary proceedings. Grievance Administrator v Deutch supra, p 167. The Administrator does not claim that all potentially dangerous drivers are, in fact, dangerous lawyers. There may be some factors which are extremely relevant in determining an individual's potential to do harm while behind the wheel but which are less relevant in assessing that individual's fitness as a lawyer.[5]

Respondent's statement as to his blood alcohol level at the time of his arrest in 1993 is in the record before the panel. We have considered its aggravating effect in this case. There is no evidence in the record which establishes a relationship between respondent's blood alcohol level while driving on that occasion and the existence of an ongoing pattern of alcohol abuse, a pattern of disregard for state driving laws, or his fitness to engage in the practice of law.

II

We have also considered the Administrator's argument that the hearing panel failed to assign appropriate weight to the aggravating effect of respondent's guilty plea, in April 1992, to the civil infraction of "careless driving." While the panel ruled that the judgment of conviction in that matter (Administrator's Exhibit #1) would be admitted without reference to the original charge, the Administrator's counsel was able to elicit testimony from respondent, without objection, regarding the circumstances of his prior arrest in February 1992:

> Q. Describe for me, Sir, the circumstances under which you were initially charged with that offense [driving while under the influence of alcohol]. What was the underlying incident that led to that charge?

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[5] We recognize that under Deutch a lawyer's criminal conduct will be considered "misconduct" irrespective of whether it "reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer." MRPC 8.4(b). However, there can be no question that these are relevant considerations in determining the level of discipline, if any, to be imposed. Indeed, the 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.

> A. I went out. I had a few drinks with some friends. It was icy. The car skidded off the road. Police came and they arrested me. [Tr 9/10/97, p 27.]

Respondent's testimony constitutes the full extent of the evidence in the record that respondent was previously found responsible for an "alcohol related civil infraction."

The existence of respondent's prior arrest in February 1992 was actually inserted into the record of this case prior to the remand proceedings, not during the original proceedings before the panel or at the first review proceedings before the Board, but during oral arguments before the Supreme Court. There, the Grievance Administrator, in discussing the discretion exercised by the Attorney Grievance Commission in filing judgments of conviction for drunk driving, advised the Court that the Grievance Commission was aware of this respondent's prior careless driving conviction, reduced from a drunk driving charge, when it authorized the institution of this proceeding. That disclosure during oral argument is referenced in the Court's opinion in this case at footnote 18. In the same footnote, the majority commented on the Administrator's statement that the cases in which formal discipline is pursued typically involve recidivism or other facts that evidence a potential substance abuse problem:

> We would agree that recidivism is an indicium, not only of a potential substance abuse problem, but also that the attorney is unwilling to reform on the basis of criminal sanctions. [Grievance Administrator v Deutch, 455 Mich at 167, n 18.]

Assuming, arguendo, that there is sufficient evidence in the record to establish that respondent's careless driving conviction in 1992 was a "prior alcohol related offense," we are not persuaded that the panel erred in its decision to give that careless driving infraction relatively little weight as an aggravating factor in its assessment of discipline. There is no evidence in the record relating to respondent's blood alcohol level at the time of his arrest in February 1992. There is no evidence from a court record or police officer which sheds any further light on the circumstances which led to that arrest. There is no evidence in

the record, and the Grievance Administrator does not claim, that respondent has a substance abuse problem or that he had such a problem in 1992 or 1993. The hearing panel found that there was insufficient evidence in the record to brand respondent as a "recidivist." That finding was not clearly erroneous.

More important than the "recidivist" label, however, is whether the specific facts in this case demonstrate an underlying problem that must be addressed by the discipline system. The problem could be substance abuse, or it could be a disregard for law inconsistent with the obligations of an officer of the court. It could be, but it is not in this case. The Administrator, as noted, has specifically not claimed that respondent has a substance abuse problem, much less one that endangers his clients and colleagues on the bench and at the bar. Significantly, also, the Administrator concedes respondent's fitness. And, the record contains unrebutted testimony that respondent is an ethical and competent practitioner, which means that at least in the professional arena he does abide by rules having the force of law.

Is respondent a scofflaw with regard to "drunk driving" laws? We consider the whole record, including the conviction which gave rise to these proceedings (the June 1993 impaired driving conviction) and the civil infraction (the April 1992 careless driving), as well as the lack of evidence as to any other criminal convictions, civil infractions, or violations of the law. The only evidence that respondent is a scofflaw is the fact that he has had two contacts with the authorities after having consumed alcohol.[6] On the other hand, all of the other evidence tends to prove that respondent is a law abiding citizen who exhibited poor judgment rather than deliberate disregard of the law. Respondent's statement that he has imposed limitations upon himself with regard to drinking and driving that exceed the limits imposed by law suggests that he regrets his poor judgment and sincerely desires to avoid any repetition of that conduct. There is insufficient

[6] There is no evidence in the record from which to conclude that respondent violated laws prohibiting driving while impaired or intoxicated in connection with the incident that gave rise to his April 1992 careless driving infraction, or even that the incident was caused by excessive alcohol consumption.

evidence to conclude that respondent lacks or lacked the proper attitude with respect to the laws of this state.

CONCLUSION

In this case, the Administrator disclaims an intent to argue that all driving under the influence cases require discipline. And, the Administrator specifically concedes that neither the nature of the offense nor the specific facts and circumstances in this case reflect adversely on this respondent's fitness as a lawyer (Review hearing 1/15/98, Tr p 7).[7]

We can easily envision many cases in which the circumstances leading up to or surrounding an alcohol related driving conviction may establish that professional discipline is necessary or even useful to the protection of the public, the courts, or the profession. However, those circumstances have not been shown to exist in this case.

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[7] At the hearing on review, counsel for the AGC was asked whether and how the criminal violation here related to respondent's fitness to practice law. He responded:

> What we're saying is, and what the Court said very clearly in the Deutch case, is that any criminal violation is misconduct, whether it reflects on their fitness to practice law or not. I would say that in this particular case, there is no reflection on his honesty, integrity or fitness to practice law. But it is the violation of criminal law under which he's charged. Why do we feel that's important? We feel that's important because you're a lawyer 24 hours a day, and the misconduct doesn't have to arise out of the fact that you're representing a client. We're saying that we recognize that lawyers have a special responsibility to follow the law. [Review hearing 1/15/98, Tr p 7 (emphasis added).]

We do not quarrel at all with any of the individual statements of law in the foregoing passage. However, mere recitation of the well-accepted principles that lawyers are lawyers 24 hours a day and that they may have a special responsibility to follow the law cannot alone establish the propriety of discipline. Were that the case, there would be nothing left of the Deutch majority's clear holding that although all criminal conduct is misconduct, it does not in every case warrant discipline. We understand the Deutch majority's holding that in Michigan, for purposes of determining whether criminal conduct is misconduct, it is indeed "irrelevant" (as AGC counsel stated at the review hearing) that the criminal violation demonstrates no adverse reflection on the lawyer's fitness to practice. However, to argue that a lawyer should be disciplined for criminal conduct irrespective of these factors is, in essence, to argue with the Deutch majority's premise that the adjudicative discipline arm (the Board and its panels) provide a "check" on the prosecution arm (the AGC) -- albeit at the discipline stage rather than, as in other jurisdictions, at the misconduct stage. That there be a check at some stage was, of course, viewed by the Court as critical.

Finally, in considering whether an order of "no discipline" could be viewed as a meaningless result, the comments in footnote 13 to the majority opinion in Deutch, supra, are instructive:

> In such a case [where a panel has decided to forego the imposition of discipline], resources have not been wasted despite the fact that professional discipline was not, in the end, imposed. The attorney has had to acknowledge that he committed "misconduct" and both the administrator and the respondent-attorney have had a full opportunity to inform the panel of mitigating and aggravating factors that often, particularly in cases of recidivism, reveal the true nature and degree of the problem. Moreover, the Attorney Grievance Commission has created a record of misconduct that will be helpful and relevant under MCR 9.115(J)(1) should that attorney commit further, future acts of misconduct. [Grievance Administrator v Deutch, supra, p 163, n 13.]

For all of the reasons stated above, we conclude that the hearing panel's decision to forego the imposition of professional discipline in this case was appropriate and should be affirmed.

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

Board Chairperson Albert L. Holtz recused and did not participate.