State of Michigan
Attorney Grievance Commission
Grievance Administrator,

Petitioner/Appellant,

v

Martin G Deutch, P 12711
94-44-JC

Vicky O Howell, P 44329
94-50-JC; 94-93-JC

Respondents/Appellees.

Decided: April 20, 1995
Corrected: April 27, 1995

CORRECTED
BOARD OPINION

The Grievance Administrator seeks review of the orders of three separate hearing panels declining to impose discipline based upon an attorney's conviction of the offense of impaired driving. In each case, the Grievance Administrator commenced the proceedings under MCR 9.120(B)(3) by filing a judgment of conviction showing that the respondent had been convicted of the criminal offense of operating a motor vehicle while visibly impaired.[1] In accordance with that subrule, the Board assigned each matter to a separate hearing panel and ordered the attorney to show cause why a final order of discipline should not be entered. Each hearing panel dismissed the case before it.

By stipulation of the parties, the petitions for review have been briefed and argued together in accordance with MCR 9.118.

It is the Grievance Administrator's position that when proceedings are instituted under MCR 9.120(B)(3), the filing of a

[1] In this opinion, the term "drunk driving" is used generically to refer to crimes such as operating a motor vehicle under the influence of liquor, or with an unlawful blood alcohol level, or while impaired. In these cases, respondents were convicted under local ordinances or state statutes in which visible impairment is presumed if the driver is found to have a blood alcohol content of .07 percent or greater.

judgment of conviction showing that the attorney has been convicted of any crime of a state or the United States mandates the hearing panel to impose some level of discipline and it has no discretion to dismiss.[2] The Grievance Administrator relies solely on MCR 9.120.

While certain provisions of subchapter 9.100 of the Michigan Court Rules lend support to the Grievance Administrator's position, such an interpretation would conflict with the Michigan Rules of Professional Conduct and would otherwise be inconsistent with established law pertaining to Michigan disciplinary procedure.

We conclude that a hearing panel may dismiss an order to show cause issued under MCR 9.120(B)(3) upon a finding that a respondent's conviction of violating a state or federal criminal law does not amount to conduct reflecting adversely on that respondent's honesty, trustworthiness, or fitness as a lawyer. MRPC 8.4(b). Accordingly, we affirm the orders of dismissal entered by the respective hearing panels in these matters.

I.

The Grievance Administrator relies upon MCR 9.120(B)(2), which states:

> In a disciplinary proceeding instituted against an attorney based on the attorney's conviction of a criminal offense, a certified copy of the judgment of conviction is conclusive proof of the commission of the criminal offense.
> (Emphasis added)

---

[2] The Grievance Administrator also argued that while he may exercise prosecutorial discretion in deciding whether to seek discipline for certain types of criminal conduct, the exercise of that prosecutorial discretion is reviewable only by the Michigan Supreme Court under the mandamus proceedings in MCR 9.304. These cases involve no such challenge to the exercise of prosecutorial discretion. Rather, they present the question whether a panel may dismiss an order to show cause upon a finding that misconduct has not been proved. Accordingly, we do not address this argument.

He argues that:

> MCR 9.120 requires discipline solely upon proof of a conviction of a criminal offense. . . .In disciplinary proceedings under MCR 9.120, hearing panels are limited to imposing discipline upon proof of a conviction of a crime. Hearing panels do not have discretion or authority to dismiss an order to show cause.

Grievance Administrator's Brief in Support of Petition for Review, p 7.

MCR 9.120 is intended to prevent respondents from relitigating "the issues that have been or will be litigated in the criminal trial court or the appellate courts." MCR 9.120, comment to 1987 amendments. The conviction is sufficient to prove the facts upon which it was based, i.e., the illegal conduct of the attorney. The question remains, however: must all convictions filed under MCR 9.120(B) result in discipline as a matter of law?

MCR 9.120(B)(1) states that "a certified copy of a judgment of conviction is conclusive proof of the commission of the criminal offense." The rule does not say that a judgment of conviction is conclusive proof of misconduct. Further, MCR 9.120(B)(3) provides that after a hearing "the panel shall issue an order under MCR 9.115(J)," which subrule includes the options of an order of discipline based upon a finding of misconduct [MCR 9.115(J)(3)] or an order of dismissal based upon the opposite finding [MCR 9.115(J)(4)].

If the Court had intended all proceedings brought under MCR 9.120 to result in an order of discipline, the rule could easily have directed the panel to issue an order of discipline under MCR 9.115(J)(3). As written, MCR 9.120(B)(3) contains no such direction and plainly allows the panel to enter an order of dismissal under MCR 9.115(J)(4).

We conclude that MCR 9.120 does not provide, directly or by necessary implication, that hearing panels "do not have discretion or authority to dismiss an order to show cause."

II.

The Grievance Administrator further argues that "'conduct that violates a criminal law of a state or of the United States' is grounds for discipline." This is an apparent reference to MCR 9.104(5), which states:

> The following acts or omissions by an attorney, individually or in concert with another person, are misconduct and grounds for discipline, whether or not occurring in the course of an attorney/client relationship:
>
> * * *
>
> (5) conduct that violates criminal law of a state or of the United States;

MCR 9.106 provides that misconduct is grounds for revocation, suspension, reprimand, or probation. And, MCR 9.115(J)(3) states that a hearing panel "must" enter an order of discipline upon a finding of misconduct.

When read alone MCR 9.104(5) appears to provide that any violation of state or federal law constitutes misconduct. However, MCR 9.104(5) does not stand alone. The Michigan Rules of Professional Conduct provide that:

> It is professional misconduct for a lawyer to:
>
> * * *
>
> (b) engage in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer;
>
> * * *

MRPC 8.4(b).[3]

---

[3] The Michigan Rules of Professional Conduct were adopted by an order of the Supreme Court which became effective October

The comment to MRPC 8.4 states in pertinent part:

> Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

MRPC 8.4 constitutes an expression by the Supreme Court of the meaning of "professional misconduct." Faced with the question of whether the Court intended to declare that every criminal conviction rises to the level of professional misconduct, we cannot disregard a provision so directly pertinent to this inquiry.

The principles of statutory construction apply to the interpretation of court rules. Lockhart v Thirty-Sixth Dist Judge, 204 Mich App 684, 688; 516 NW2d 76 (1994). Several rules of construction are applicable in this case.

> Statutes that relate to the same subject or share a common purpose, such as the statutes in the instant case, are in pari materia and must be read together as one law. . .. If the statutes lend themselves to a construction that avoids conflict, that construction should

---

1, 1988. MRPC 8.4(b) replaced DR 1-102(A)(3)'s proscription of "illegal conduct involving moral turpitude."

> control. . .. When two statutes conflict, and one is specific to the subject matter while the other is only generally applicable, the specific statute prevails. . ..

Brown v Manistee Co Rd Comm'n, 294 Mich App 574, 577; 516 NW2d 232 (1994) (citations omitted).

We must read subchapter 9.100 (including MCR 9.104(5) and MCR 9.120) together with the MRPC harmonizing them and avoiding conflict where possible, not only because of the rules of construction but because subchapter 9.100 includes among its definitions of misconduct: "conduct that violates the standards or rules of professional responsibility adopted by the Supreme Court."

In reading 9.104(5) together with MRPC 8.4(b), we must avoid an interpretation which would render a rule surplusage or nugatory. Booth v University of Michigan Bd of Regents, 444 Mich 211, 228; 507 NW2d 422 (1993). We will not assume that the Court adopted a rule that would serve no useful purpose. Manville v WSU Bd of Governors, 85 Mich App 628, 635; 272 NW2d 162 (178), lv den 406 Mich 959 (1979). The Grievance Administrator urges us to read MCR 9.104(5) to require discipline whenever a conviction is filed under MCR 9.120(B)(3), irrespective of whether the conduct evidenced by the conviction reflects adversely on the respondent's honesty, trustworthiness or fitness as a lawyer. We could only adopt this reading if we disregard MRPC 8.4(b).

Finally, MCR 9.104 is part of subchapter 9.100 which governs the procedure for disciplining attorneys. MCR 9.107. Although MCR 9.104 does enumerate various acts or omissions which constitute "misconduct and grounds for discipline," it is apparent that the MRPC are the principal source of the standards of conduct imposed upon Michigan attorneys by the Supreme Court. MCR 9.103(A). The MRPC contain a detailed statement of the obligations and prohibitions providing "a basis for invoking the disciplinary process." MRPC 1.0(b). We conclude that the MRPC are more

comprehensive and specific than the definitions of misconduct contained in subchapter 9.100, and therefore must prevail in the event of a conflict between them.

Our application of the rules of statutory construction leads us to conclude that the Court did not intend that discipline must be imposed upon every incident of an attorney who has been convicted of a violation of state or federal law regardless of the nature of the crime or the circumstances surrounding its commission. This conclusion is bolstered by the Court's opinions, including those prior to the adoption of MRPC 8.4(b).

III.

In In Re Lewis, 389 Mich 668; 209 NW2d 203 (1973), the Court analyzed the procedure under a predecessor to MCR 9.120. Despite the existence of a rule that expressly defined misconduct as "[c]onduct that violates the criminal laws of this or any other state or of the United States,"[4] it is clear from the opinion that disciplining an attorney convicted of a crime was not then a simple matter of tendering a certified conviction to a hearing panel and then presenting evidence bearing solely on the level of discipline.

At the time Lewis was decided there were three, arguably conflicting, rules pertaining to criminal acts and professional misconduct.[5] The precursor to MCR 9.120 provided that an attorney convicted of a felony, a crime punishable for a term of one year or more, or a crime involving moral turpitude could have his or her license suspended. In Lewis, the Court rejected the argument that this section allowed summary suspension of an attorney

---

[4] State Bar Rule 14, § 2(5), supra, renumbered effective January 12, 1972 as Rule, § 2(5). 386 Mich liii, lxxiii.

[5] They were: State Bar Rule 15, § 2(5) (predecessor of MCR 9.104(5); State Bar Rule 16.17 (predecessor of MCR 9.120; and DR 1-102(A)(3) [now supplanted by MRPC 8.4(b)].

[6] State Bar Rule 16.17.

convicted of a serious crime, holding that such an attorney is entitled to a full hearing:

> The function of 16.17 is to relieve the Administrator of the burden of establishing actionable misconduct under Rule 15, § 2(5) [MCR 9.104(5)'s predecessor], against an attorney convicted of a serious crime. Rule 16.17 allows the Administrator to satisfy the burden of proof, a "preponderance of the evidence," required under 16.13 by placing before the hearing panel proper evidence of a "final" conviction. When such a conviction is properly placed in evidence, the hearing panel will consider it, along with all other relevant evidence offered by the parties to the hearing, in reaching the decision. If it finds discipline warranted, it shall enter its order accordingly relying on the proof of the conviction, undiminished by convincing rebuttal evidence with respect to mitigation, as sufficient basis for action. If, however, it finds that disciplinary action should not be taken based upon respondent's showing in mitigation, it may so enter its order.

Lewis, 389 Mich at 677-678 (emphasis added).

Although a Supreme Court rule then provided that conduct violating a state or federal criminal law constituted attorney misconduct, the Lewis Court unequivocally held that a hearing panel could determine that disciplinary action was not warranted. The Court so held even though it stated that "[t]he function of [State Bar Rule] 16.17 [was] to relieve the Grievance Administrator of the burden of establishing actionable misconduct under [MCR 9.104(5)'s predecessor] against an attorney convicted of a serious crime," and even though a rule provided that a hearing panel "shall enter an order of discipline" upon a finding of misconduct.[7]

The Court's holding in In Re Grimes, 414 Mich 483; 326 NW2d 380 (1982), is consistent with Lewis. Grimes had been convicted

[7] See State Bar Rule 15.13, 383 Mich lv, and compare MCR 9.115(J)(3).

of willful income tax evasion. The hearing panel, relying in part upon both the predecessor to MCR 9.104(5)[8] and a precursor of MRPC 8.4(b),[9] found misconduct and ordered a suspension of 60 days. The Supreme Court reversed the Board's order to increase discipline to a 120-day suspension and further increased discipline to revocation. The Court's opinion in Grimes demonstrates the narrow construction given to what is now MCR 9.104(5):

> When an attorney is found guilty of certain crimes, the fact of the conviction itself, without more, may serve as grounds for suspension of his license.
>
> * * *
>
> The felonious nature of Grimes' convictions and the potential penalties they carried would have been sufficient grounds for suspension of his license.
> Grimes, 414 Mich at 491, 492 (emphasis added).

The Court emphasized the hearing panel's conclusion that Grimes was guilty of illegal conduct involving moral turpitude and its observation that "the evidence which the attorney had presented in mitigation was not sufficient to avoid discipline." Grimes, 414 Mich at 495 (emphasis added).

None of these statements would have been necessary or appropriate if the Court had read MCR 9.104(5)'s predecessor to require the imposition of discipline whenever an attorney is convicted of a state or federal offense.

IV.

Other jurisdictions do not impose automatic discipline for every conviction. None of the decisions from other jurisdictions cited by the Administrator hold that a conviction must ipso facto yield discipline. To the contrary, those cases, and others we have reviewed, all analyze whether an attorney's conviction for

---

[8] GCR 1963, 953(5).

[9] DR 1-102(A)(3) (a lawyer shall not "[e]ngage in illegal conduct involving moral turpitude").

drunk driving adversely reflects upon his or her fitness as a lawyer.

For example, in In Re Seat, 588 NE2d 1262 (Ind, 1992), the court held that:

> Having concluded that the Respondent engaged in a criminal act we must next determine . . . if this act reflects adversely on his honesty, trustworthiness or fitness as a lawyer in violation of Prof. Cond. R. 8.4(b) . . .
>
> The record before us indicates that the Respondent was arrested one time for driving intoxicated. The Hearing Officer specifically found that the Respondent is not and has never been alcohol dependent nor does he have a history of alcohol related offenses. He voluntarily resigned from his position as deputy prosecutor. The record contains little else which can enlighten us as to whether and how Respondent's criminal act affected his fitness as a lawyer. In light of this, we conclude that misconduct under Prof. Cond. R. 8.4(b) has not been established.

In Re Seat, 588 NE2d at 1263-1264.

The Grievance Administrator also relies on In Re Oliver, 493 NE2d 1237 (Ind, 1986), where the respondent crashed his car and was found to have a blood alcohol content of .23 percent one hour after the accident. At that time, the disciplinary law of Indiana was based on the Model Code of Professional Responsibility and the pertinent inquiries included whether the conduct constituted "illegal behavior involving moral turpitude." In concluding that it did not, the Indiana court examined the nature of this charge and interpreted the term "moral turpitude" in light of a California decision equating such term with unsuitability to practice law. The court expressly found this definition "consonant with the ABA Model Rules of Professional Conduct." 483 NE2d at 1239.

The Court concluded:

> Standing alone, Oliver's act of driving while intoxicated, without a prior history of alcohol offenses and without damage done to anyone other than himself, does not constitute a violation of Rule 1-102(A)(3).

493 NE2d at 1241.

The court also addressed the question of whether the respondent's conduct reflected adversely on his fitness to practice law under what was then Indiana's Rule 1-102(A)(6). The court concluded that the event was an isolated one that did not "lead to any reasonable question about [the respondent's] suitability as a practitioner." 493 NE2d at 1243.[10]

In State ex rel Oklahoma Bar Ass'n v Armstrong, 791 P2d 815 (Okla, 1990), the respondent was convicted of a felony drunk driving offense and disciplinary counsel transmitted a certified copy of the conviction to the Oklahoma Supreme Court for a summary discipline proceeding. The Oklahoma court rules provided for summary discipline upon conviction of a crime "'which demonstrates [a] lawyer's unfitness to practice law.'" 791 P2d at 817. This standard corresponds to Rule 8.4 of the Oklahoma Rules of Professional Conduct.

The Oklahoma court noted that a lawyer's conviction of some crimes will, by itself, demonstrate the lawyer's unfitness to practice law. However, conviction of some types of illegal conduct will not "facially demonstrate the lawyer's unfitness to practice law." Accordingly, the court referred the matter to a trial panel of the state's Professional Responsibility Tribunal for findings on the respondent's fitness.

---

[10] Seat and Oliver were prosecutors and were, for that reason alone, disciplined by the Indiana court because it found their conduct prejudicial to the administration of justice. However, the Grievance Administrator has not cited a case where a single conviction for drunk driving has resulted in discipline on the grounds that the lawyer's conduct reflected adversely on his or her fitness to practice law.

The trial panel found that the respondent had previously been convicted of two drunk driving offenses; respondent, an alcoholic, had not had a drink since the third incident (six years prior) which gave rise to the subject conviction; no complaints or allegations of professional misconduct had been made against respondent; there was no evidence that respondent's ability to efficiently or properly represent clients had been affected or that his crime had adversely affected his fitness to practice law. State ex rel Oklahoma Bar Ass'n v Armstrong, 848 P2d 538 (Okla, 1992). Notwithstanding the foregoing, the bar association requested discipline. The court, finding "no evidence of respondent's unfitness to practice law," denied the request.

Discipline was imposed in In re Kelley, 52 Cal 3d; 801 P2d 1126; 276 Cal Rptr 375 (1990), where the respondent had been convicted of a second drunk driving violation while on probation for the first. The court found a nexus between the respondent's conduct and her fitness to practice law 1) because the second conviction "was in violation of a court order directed specifically at [her]"; and 2) because her "repeated criminal conduct, and the circumstances surrounding it[11] are indications of alcohol abuse that is adversely affecting [her] private life," which "if not checked, may spill over into [her] professional practice and adversely affect her representation of clients and her practice of law." 52 Cal 3d at 495-496.

V.

We cannot find on the records before us that the three subject convictions embrace conduct which reflects adversely on the respondents' honesty, trustworthiness, or fitness as a lawyer.

---

[11] The circumstances surrounding the second conviction in Kelley included the respondent's decision not to join friends who had been seated for a dinner party at a restaurant but to remain in the bar portion of the restaurant where she had five drinks over a "short period of time." She was stopped on her way home by a police officer who noticed that her movements were "labored." She refused to perform field sobriety tests but sat on the curb and claimed she was a friend of the officer's family. A breath test indicated that her blood alcohol level was between .16 and .17 percent.

In 94-44-JC, the Grievance Administrator filed a copy of respondent Martin G Deutch's July 28, 1993 judgment of conviction for "operating while impaired." Respondent was originally charged with violating a Bloomfield Township ordinance; it is unclear whether he plead guilty to an ordinance violation known as "operating while impaired," but we assume this is the case. In 94-50-JC, the Grievance Administrator filed a certified copy of respondent Vicky O Howell's June 22, 1992 plea-based conviction for "operating while impaired."[12] In 94-93-JC, the Grievance Administrator filed a certified copy of respondent Howell's conviction and judgment of sentence for operating a vehicle while impaired contrary to "MCL 257.6253-A" [MCL 257.625(3); MSA 9.2325(3)].

In cases 94-44-JC (Deutch) and 94-50-JC (Howell), the respondents moved for summary disposition on the ground, among others, that their respective violations of the criminal law did not reflect adversely on their honesty, trustworthiness or fitness as a lawyer.

In response, the Grievance Administrator cited MCR 9.104(5) and Lewis, supra for the proposition that "once a judgment of conviction is entered, there is sufficient evidence in the record to sustain a finding of misconduct," and offered no evidence and little if any argument that the single impaired driving convictions reflected adversely on their fitness as lawyers. The panels granted summary disposition.

We agree with the courts in Oliver and Armstrong, supra, that a single drunk driving conviction does not per se establish conduct reflecting adversely on a respondent's fitness as a lawyer. Accordingly, in light of the absence of evidence of the

---

[12] We do not decide whether an ordinance violation constitutes a violation of "a criminal law of a state" within the meaning of MCR 9.120(B)(3).

respondent's unfitness, the panel properly granted summary disposition in these matters. MCR 2.116(C)(10).

We also find that dismissal as to Howell's second conviction was proper. That matter went to hearing after respondent's motion for summary disposition was denied. Respondent testified regarding the circumstances surrounding the conviction. The hearing panel summarized her testimony:

> The evidence adduced at the hearing established that the Respondent walked from her office to an adjacent restaurant at about 5:30 p.m. on April 22, 1993. She had two scotches, perhaps doubles. She ate some of the appetizers served during the "happy hour". She spent the next several hours with her friends engaged in ballroom dancing. By 8:30 p.m., she left the restaurant, walked to her car, and began to drive home.
>
> A deputy sheriff stopped the Respondent for allegedly cutting him off as the respondent completed a left turn from the median of a divided highway. The [deputy] did not ask the respondent if she had been drinking and, according to the Respondent, assured her that he would just issue her a warning. When he look her license to run it on the LEIN system,

he inquired whether he would "find anything". The respondent then told the deputy that she was just two weeks shy of completing her year's probation for the first OWI offense. At that point the deputy's demeanor toward her changed. Ultimately she was arrested, taken into custody, and held until 3 a.m. the following morning. She took a Breathalyzer and registered a .11 and a .12.

Hearing Panel Report (94-93-JC), pp 10-11.

The record further disclosed that the respondent was sentenced to probation for her second offense and completed the same successfully; as of the date of the hearing (September 1, 1994), respondent had not had a drink since April 22, 1993.

The hearing panel, in concluding that the order to show cause should be dismissed, stated:

> Other than the obvious fact that it is regretful, to say the least, that an attorney has violated the law, there is nothing <u>per se</u> offensive to the administration of justice or to the Respondent's fitness as a lawyer in her

> conviction of OWI. This is especially so in the case at bar where the Respondent was at an after hours social event, with friends, unrelated to her status as an attorney, not on "company business", and not acting in an official capacity in any way. She should not be excused for her criminal conduct, and she has not been. She has paid the price as imposed by the judicial system. However, inasmuch as there is nothing in this record to indicate that Respondent has engaged in dishonesty, fraud, deceit, or misrepresentation, or that her fitness as an attorney is in doubt, the Administrator ought not be allowed to exact a professional price as well.

Hearing Panel Report (94-93-JC), p 11.

On review, the Grievance Administrator argues, citing Kelley supra, that respondent has "displayed a complete disregard for the conditions of her probation, the law and the safety of the public." As to this argument, we agree with the hearing panel that:

> The Grievance Administrator did not charge the Respondent with failure to abide by the terms of her probation order or with flagrantly disregarding a directive of the court. In fact, the Administrator chose not to charge the Respondent with anything. Rather, he availed himself of the provisions of MCR 9.120(B)(3), which require the Respondent to show cause why a final order of discipline should not be entered. This rule affords the Administrator with a relatively simple means of bringing an attorney within the purview of the discipline process. . . .If the Administrator had chosen to do so, he could have brought a formal complaint against the Respondent and charged with both drunk driving offenses as well as with having violated the court's probation order.
>
> * * *
>
> The only issue is whether an order of discipline should be entered against this Respondent based on her having been convicted of Operating a Motor Vehicle While Visibly Impaired, in violation of MCL 257.625b [MCL 257.625(3)], on June 9, 1993. However much the other matters are of concern to this

> panel, they are simply not at issue in the case as framed by the Administrator.

Hearing Panel Report (94-93-JC), pp 9-10

For the reasons discussed, the hearing panels' orders of dismissal in these three cases are affirmed.

Board Members John F Burns, C Beth DunCombe, Elaine Fieldman, Barbara B Gattorn and Miles A Hurwitz concur in this decision.

Board Member Albert L Holtz was recused and did not participate.

Board Members George E Bushnell, Jr, Marie Farrell-Donaldson and Paul D Newman were absent and did not participate.