

STATE OF MICHIGAN
Attorney Discipline Board

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ATTORNEY DISCIPLINE BOARD
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Grievance Administrator,

Petitioner/Appellee,

v

James R. Phillips, P 18874,

Respondent/Appellant,

Case Nos. 11-62-JC

Decided: February 22, 2012

Appearances:

Robert E. Edick, for the Grievance Administrator, Petitioner/Appellee [before the Board]
Cynthia C. Bullington, for the Grievance Administrator, Petitioner/Appellee [before the Panel]
James R. Phillips, In Pro Per, Respondent/Appellant [absence excused]

BOARD OPINION

Respondent, James R. Phillips, petitioned the Attorney Discipline Board for review of an order of disbarment issued by Ingham County Hearing Panel #1 on September 23, 2011. Proceedings before the panel were conducted under MCR 9.120(B) based upon respondent's conviction for possession of child pornography, a felony, in violation of USC 2252A(a)(5)(B). A review proceeding under MCR 9.118 was conducted by the Board on January 11, 2012. Respondent's written request that he be excused from attending in person because of his incarceration in the state of California was granted, without objection. For the reasons discussed below, the hearing panel's order is affirmed.

It is undisputed that respondent's license to practice law in Michigan was administratively suspended by the State Bar of Michigan, effective March 1, 2005, for his non-payment of dues. Respondent was not actively licensed in Michigan at the time of his felony conviction in the United States District Court for the Central District of California on December 20, 2010. The Board has first considered respondent's argument that because of his status as a suspended attorney, he was not

subject to the jurisdiction of the Attorney Grievance Commission or the Attorney Discipline Board at the time of his conviction on September 20, 2010.¹ This claim is without merit.

A similar argument was considered and rejected by the Board in *Grievance Administrator v Owen Patrick O'Neill*, 94-63-JC (ADB 1995). Respondent O'Neill's license had been suspended in an unrelated matter since September 1989 when he was subsequently convicted of the crime of armed robbery in March 1994. He argued that he was therefore not an "attorney" subject to further discipline based on his criminal conduct. Citing various legal treatises as well as the Supreme Court's opinion in *Grievance Administrator v Attorney Discipline Board*, 441 Mich 411; 522 NW2d 868 (1994), the Board explained why such an argument cannot be sustained. In that opinion, the Board specifically addressed the question of whether an attorney who has been suspended, including for failure to pay annual bar dues, may nevertheless be disciplined for a subsequent criminal conviction:

Adoption of the position urged by the respondent would essentially immunize a suspended attorney from disciplinary prosecution for criminal conduct during the period of suspension and the respondent alone could extend that immunity by deciding when to seek reinstatement.

The hearing panel acted appropriately in ruling that a lawyer whose license has been suspended may nevertheless be disciplined for acts of misconduct committed during the period of suspension.

The hearing panel order of revocation is affirmed. [*Grievance Administrator v O'Neill*, supra, p 6.]

The Board has also considered respondent's argument that the hearing panel's denial of his motion for an adjournment constituted error. Discipline proceedings in this matter were commenced on May 23, 2011, when the Grievance Administrator filed a certified copy of the sentencing and judgment document from the United States District Court for the Central District of California. In accordance with MCR 9.120(B)(3), the Board then ordered the respondent to show cause why a final order of discipline should not be entered and the matter was referred to Ingham County Hearing

¹ Notwithstanding his reference to his intent to "resign" as a member of the Bar when he stopped paying his dues and left the state, respondent has pointed to no tangible evidence that his resignation was tendered or accepted by the State Bar of Michigan. His status during this discipline proceeding is properly characterized as that of a suspended attorney.

Panel #1 for a hearing. The hearing originally scheduled for July 18, 2011, was administratively adjourned by the panel to August 25, 2011. At that hearing, the panel announced that it had considered respondent's motion to dismiss and/or to adjourn the matter until after his anticipated release from federal custody in September 2012. Without elaboration, the panel chairperson announced that respondent's motion to adjourn was denied and the hearing proceeded with arguments from the Grievance Administrator's counsel as to the appropriate sanction.

In general, the decision of a hearing panel chairperson to grant or deny a request for an adjournment² is considered under an abuse of discretion standard. Such a standard is consistent with the standard applied to a trial court's decision on whether to grant an adjournment. See, for example, *People v Akins*, 259 Mich App 545, 556; 675 NW2d 863 (2003); *In Re Withdrawal of Attorney*, 234 Mich App 421, 431; 594 NW2d 514 (1999). The Board is not persuaded that the hearing panel's denial of respondent's request to adjourn this discipline proceeding until his release from prison - an adjournment of more than one year - constituted an abuse of discretion under the circumstances presented.

Finally, the Board has considered the underlying question presented in respondent's petition for review. That is, should the Board exercise its authority to reverse or modify the hearing panel's decision to order respondent's disbarment? On review, the Board must follow the instruction of the Supreme Court in *Grievance Administrator v Lopatin*, 462 Mich 235; 612 NW2d 120 (2000), by determining whether the hearing panel decision comports with the American Bar Association's Standards for Imposing Lawyer Sanctions (the Standards).

In its report, the hearing panel acknowledged its obligation under *Lopatin* to follow the guidance in the Standards and the panel's report includes a declaration that it had considered the arguments presented on behalf of the Attorney Grievance Commission, the Standards and prior Michigan case history in reaching its decision to order disbarment. In reviewing that decision, we note that while a particular Standard or specific opinions were not identified in the report, it was argued to the panel that the Michigan Supreme Court has held that the presumptive discipline is disbarment when an attorney has been convicted of conduct involving moral turpitude, citing *Matter*

² MCR 9.115(F)(1) allows a hearing panel chairperson to grant one adjournment per party upon a showing of good cause. Additional requests may be granted by the chairperson of the Attorney Discipline Board if good cause is shown.

of *Grimes*, 414 Mich 483; 326 NW2d 380 (1982), and that such a presumption for disbarment for this type of conviction is echoed in Standard 5.11 of the American Bar Association's Standards for Imposing Lawyer Sanctions.

To provide guidance in future cases, clarification as to the applicability of the *Grimes* opinion and ABA Standard 5.11 for cases of this type may be in order.

In *Grimes*, the respondent had been convicted on two felony counts of federal income tax evasion and had been found in a second count of counseling a client to lie to investigators in connections with the tax fraud case. *Grimes* is properly cited to this day for a number of important principles. However, we do not find in *Grimes* a pronouncement that disbarment is the presumptive discipline when a lawyer has been convicted of a crime of "moral turpitude."³ Moreover, we are mindful that the phrase "moral turpitude" has not appeared in the rules governing lawyer conduct in Michigan since the Court's adoption of the Rules of Professional Conduct which became effective October 1, 1988. Under Canon 1 of the former Code of Professional Responsibility which was in effect when *Grimes* was decided, Disciplinary Rule 1-102(A)(3) directed that a lawyer should not "engage in illegal conduct involving moral turpitude." The question of whether *Grimes*' conviction for tax evasion was for a crime of "moral turpitude" was therefore relevant to the Court's analysis under the former Code. The Rules of Professional Conduct in effect since 1988 do not employ that term. Under MCR 9.104(5), a lawyer's conviction of *any* crime, whether a misdemeanor or a felony, constitutes professional misconduct for which an order of discipline may be entered, regardless of whether the conviction, on its face, reflects adversely on the attorney's fitness as a lawyer. *Grievance Administrator v Deutch*, 455 Mich 149; 565 NW2d 369 (1997).

With regard to proper application of the Standards, a finding that disbarment is the presumptive sanction for possession of child pornography under Standard 5.11 would be problematic.⁴ Specifically, the crime of knowing possession of child pornography contains none of

³ The crime for which respondent Phillips was convicted, knowing possession of child pornography, does not necessarily fall, in any event, under the definition of moral turpitude as quoted with approval by the Supreme Court in *Grimes*. Citing 7 CJS, Attorney and Client, section 67, page 958, the Court declared in that opinion that "moral turpitude as a ground for the discipline of an attorney involves fraud, deceit, and intentional dishonesty for purposes of personal gain."

⁴ Standard 5.11 was the only Standard mentioned during the hearing panel proceedings below. There were no citations to the Standards by either party during the review proceedings before the Board.

the necessary elements which are specifically enumerated in Standard 5.11.⁵ Under a plain reading of Standard 5.1, respondent's criminal conduct must therefore fall under Standard 5.12, which states that, absent aggravating or mitigating factors, suspension is generally appropriate when a lawyer knowingly engages in criminal conduct which does *not* contain the elements listed in Standard 5.11 and that seriously adversely reflects on the lawyer's fitness to practice.

The Supreme Court of Washington discussed the question of how the Standards deal with certain criminal offenses in *In re Disciplinary Proceedings Against Day*, 162 Wash 2d 527; 173 P3d 915 (2007), a case involving a lawyer's conviction of first degree child molestation. There, the court considered the argument of the Washington State Bar that the Standards adopted by the ABA in 1986 do not necessarily reflect changing societal attitudes toward sex crimes generally and sexual assault crimes specifically. Finding that this argument was "compelling," the court agreed that "greater societal awareness of sexual crimes against children and the resulting abuse of trust are arguably justifiable reasons for increasing presumptive sanctions for attorneys who engage in such misconduct." *Day*, 162 Wash 2d 540. While the Washington Supreme Court found that it was constrained to affirm the hearing officer's finding that suspension was the presumptive sanction under ABA Standard 5.12 for a conviction of 1st Degree Child Molestation, the court also affirmed the hearing officer's ultimate conclusion that, under all of the circumstances presented, disbarment was the appropriate result.⁶

⁵ ABA Standard 5.11 states:

Disbarment is generally appropriate when:

- (a) a lawyer engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses; or
- (b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

⁶ Washington's Rules of Professional Conduct have expressly retained the prohibition against the commission of acts involving moral turpitude. See Wash RPC. The *Day* court found that the respondent violated

We reach the same result in this case. The levels of discipline set out in the ABA Standards are not absolute but are described in the preface to the Standards as recommended sanctions which are *generally* appropriate, absent aggravating or mitigating circumstances. Moreover, the Supreme Court has cautioned the Board and hearing panels that the directive to follow the ABA Standards should not be viewed as an instruction to abdicate the responsibility to exercise independent judgment. *Lopatin*, 462 Mich at 248 n 13. In this case, the record before the panel, including the sentencing factors discussed in respondent's plea agreement (Petitioner's Exhibit 1) and the government's memorandum with respect to sentencing factors (Petitioner's Exhibit 2), provides insight into the disturbing nature of respondent's conduct. Respondent's criminal conduct in this case went well beyond possession of relatively few images on a computer's hard drive. As described in the plea agreement (Petitioner's Exhibit 1), respondent stipulated that

On or about February 21, 2007, in Seal Beach, California, within the Central District of California, defendant knowingly possessed a DVD+R disc which was found in defendant's laptop computer. In particular, there were at least 250 images of child pornography found on the DVD+R disc, and defendant used his laptop computer to view these images. Out of the 250 images, 21 of them belong to a series of child pornography identified by the National Center for Missing & Exploited Children, and at least 64 of the images depict identified minor victims. At least one image depicted the penetration of a pre-pubescent child, which involved sadistic or masochistic or other depictions of violence. Defendant also distributed some of these images to other adults whom he met online.

Upon review of the whole record, the Board is satisfied that while respondent's criminal conduct is to be considered initially under Standard 5.12 of the American Bar Association's Standards for Imposing Lawyer Sanctions, there is a sufficient basis to warrant an order affirming the hearing panel's order of disbarment.

Board members Thomas G. Kienbaum, James M. Cameron, Jr., Rosalind E. Griffin, M.D., Andrea L. Solak, Carl E. Ver Beek, Craig H. Lubben, Sylvia P. Whitmer, Ph.D, Lawrence G. Campbell, and Dulce M. Fuller concur in this decision.

both Was RPC 8.4(b) and 8.4(i), and found that while the Standards do not specifically address acts of moral turpitude, the presumptive sanction for first degree child molestation would be disbarment under Washington's case law.