STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellant,

v

Paul A. Carthew, P 60940,

Respondent/Appellee,

Case Nos. 10-74-AI; 10-81-JC

Decided: October 11, 2011

Appearances:

Rhonda S. Pozehl, for the Grievance Administrator, Petitioner/Appellant
Kenneth M. Mogill, Respondent/Appellee

BOARD OPINION

Respondent pled no contest to two counts of using a computer to commit a crime, in violation of MCL 752.797(3)(d).[1] The factual basis for this plea was the stipulation of the prosecutor and respondent that the preliminary examinations conducted in the criminal matter would suffice to establish use of a computer to commit the crime of possession of child sexually abusive material in violation of MCL 750.145c(4).[2] Respondent was sentenced to a three-year term of probation, and was not required to register as a sex offender. The judgment of conviction was entered on June 29, 2010, and was filed with the Board pursuant to MCR 9.120 on July 20, 2010. Following a stipulated adjournment, the hearing commenced on December 9, 2010, and concluded on February 17, 2011. The hearing panel issued its report and order suspending respondent for a period of 179 days on May 11, 2011. Pursuant to MCR 9.120(B)(1), respondent was automatically suspended on June 29, 2010, the date of his felony convictions, and remained suspended pending resolution of the disciplinary proceeding. Respondent was reinstated to the practice of law on June 3, 2011.

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[1] MCL 752.797(3) provides the penalties for violation of MCL 752.796.

[2] Petitioner's Ex B (plea hearing transcript).

The Grievance Administrator argues that the panel erred in finding that respondent did not knowingly seek out child sexually abusive material with his computer, and that the 179 day suspension was insufficient. The Administrator seeks "a minimum suspension of 180 days." We conclude that there is proper evidentiary support for the panel's decision; it is not clearly erroneous. Further, it has not been demonstrated that the panel erred in applying the ABA Standards for Imposing Lawyer Sanctions, or caselaw, or in determining that reinstatement proceedings under MCR 9.124 are not necessary in this particular case for the protection of the public, the courts, or the legal profession.

Under our rules, the Grievance Administrator may file with the Board a judgment of conviction showing that an attorney has violated a criminal law and the Board shall then issue an order to show cause why discipline should not be imposed. MCR 9.120(B)(3). Questions as to the validity of the conviction, alleged trial errors and appeals shall not be considered. *Id.* Pursuant to MCR 9.120(B)(2), "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."

However, as our Court has explained:

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

With regard to assessing the nature of the misconduct at issue in a case involving application of the ABA Standards for Imposing Lawyer Sanctions to a particular crime, we have said:

> "[A]ttorney misconduct cases are fact-sensitive inquiries that turn on the unique circumstances of each case." *Deutch*, 455 Mich at 166. . . . Therefore, it is incumbent on the parties to introduce evidence illuminating the true nature of the misconduct. . . . A wide range of disparate conduct may be lumped together under a category such as "assault and battery." For example, there is surely a difference between poking another with one's finger and winding up and striking another with a closed fist. Yet, both might give rise to an assault and battery conviction. That is why the Court has wisely directed the panels to look through such labels and not to abdicate their critical responsibility to inquire into the particular facts of each

> case. [*Grievance Administrator v Arnold M. Fink (After Remand)*, 96-181-JC (2001), pp 13-14, 16 n 5, lv den 462 Mich 198 (2001).]

A careful analysis of the facts leading to a conviction would thus seem even more important when a criminal statute is drawn broadly or can be violated by the commission of various types of conduct, perhaps with differing degrees of intent or levels of impact. For example, this proceeding is based on a conviction for the offense of using a computer to commit a crime, which offense can stem from various types of underlying crimes. The underlying crime in this instance is possession of child sexually abusive materials, and it is obviously the primary focus and area of concern.[3]

The standard of review with respect to factfinding by the hearing panels was restated in *Grievance Administrator v Edgar J. Dietrich*, 99-145-GA (ADB 2001), p 2:

> In reviewing a hearing panel decision, the Board must determine whether the panel's findings of fact have "proper evidentiary support on the whole record." *Grievance Administrator v August*, 438 Mich 296, 304; 475 NW2d 256 (1991). See also, *Grievance Administrator v T. Patrick Freydl*, 96-193-GA (ADB 1998). "This standard is akin to the clearly erroneous standard [appellate courts] use in reviewing a trial court's findings of fact in civil proceedings." *Grievance Administrator v Lopatin*, 462 Mich 248 n12 (2000) (citing MCR 2.613(C)).
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> Because the hearing panel has the opportunity to observe the witnesses during their testimony, the Board defers to the panel's assessment of their demeanor and credibility. *Grievance Administrator v Neil C. Szabo*, 96-228-GA (ADB 1998); *Grievance Administrator v Deborah C. Lynch*, No 96-96-GA (ADB 1997). See also *In re McWhorter*, 449 Mich 130, 136 n 7 (1995).
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> In short, "it is not the Board's function to substitute its own judgment for that of the panels' or to offer a *de novo* analysis of the

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[3] That statute contains various offenses and the pertinent section provides in part that:

> A person who knowingly possesses any child sexually abusive material is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $10,000.00, or both, if that person knows, has reason to know, or should reasonably be expected to know the child is a child or that the child sexually abusive material includes a child or that the depiction constituting the child sexually abusive material appears to include a child, or that person has not taken reasonable precautions to determine the age of the child. [MCL 750.145c(4).]

> evidence." *Grievance Administrator v Carrie L. P. Gray*, 93-250-GA (ADB 1996), lv den 453 Mich 1216 (1996).

Under the clearly erroneous standard referenced by the Court in *Lopatin*, "the reviewing court cannot reverse if the trial court's view of the evidence is plausible. . . . Deference is given to the special opportunity of the trial court to judge the credibility of witnesses. MCR 2.613(C)." *Thames v Thames*, 191 Mich App 299, 301-302 (1991).

Respondent's convictions stem from the discovery of two pictures and three videos on respondent's laptop computer by respondent's then-girlfriend as she was going through the laptop, in contemplation of a break-up, to remove pictures and videos they had taken together. She turned the computer over to police, and forensic examiners opined that the persons in the subject videos appeared to be under the age of 18. After contesting the charges, respondent pled nolo contendere to two counts of use of a computer to commit a crime.

The hearing panel heard evidence, which consisted in part of the live testimony of one detective who investigated the criminal charges, and a transcript of the testimony of another detective who was present at the hearing but was ultimately not called as a witness by the Administrator, and various documents from the criminal file admitted by stipulation of the parties. Respondent also testified, as did four persons well-acquainted with him who spoke of his integrity and trustworthiness around his children and others. In addition, the panel heard from Matthew D. Rosenberg, MSW, CSW, the therapist independently selected by the probation department, who testified at length and was subject to cross-examination by the Administrator.

The Administrator contends that the hearing panel ignored the preliminary exam testimony of Detective DeRosia, arguing: "had the hearing panel considered Detective DeRosia's testimony regarding the forensic examination of Respondent's computer, it would have been extremely difficult to reconcile what Detective DeRosia's forensic examination revealed with the testimony of Respondent and his psychotherapist."

First, the testimony was the subject of supplemental briefing; it could not have literally been ignored. Second, it was within the province of the panel to find that the testimony of Detective DeRosia could be reconciled with the other evidence or, to the extent it could not be, that it was less credible than that of respondent and of the other witnesses who testified on his behalf. The unrebutted testimony of Matthew Rosenberg, the clinician who administered two tests and concluded

that respondent has no sexual disorders (including pedophilia), and testimony from several witnesses who have observed respondent around his own and other children, provide ample evidentiary support for the panel's finding that respondent is not a danger to children, clients or the public in general. There is also proper evidentiary support for the panel's finding that respondent did not intentionally seek pornographic materials involving minors. The panel weighed the evidence, including the testimony of live witnesses and the transcript of Detective DeRosia's preliminary exam testimony, and found respondent to be credible on the point that it was not his intention to seek child sexually abusive materials.

Another argument involves the testimony of Detective Overby, which was based in part on "information relayed to [him]"[4] regarding a MySpace account in the name of Mike Schmidt and supposedly connected to respondent through the use of a credit card. The Administrator argues that this testimony "does not support the hearing panel's finding that Respondent did not intentionally possess child pornography."[5] It is apparent that the panel did not find the testimony of this witness to be credible for various reasons set forth in the panel's report, the transcript and the briefs. Additionally, the test for proper evidentiary support is not whether all of the evidence supports the findings made by the panel, or whether there is some support for a party's contention contrary to the findings of the panel. The test is whether there exists proper evidentiary support in the whole record for the factual findings of the panel, i.e., whether the panel's findings were clearly erroneous. *See, Grievance Administrator v Wilson A. Copeland, II*, 09-48-GA (2011) ("This Board affirms factfinding when there is proper evidentiary support in the record. Although we may review the record very closely and carefully, as we have done in this case, we do not re-sift the evidence and weigh it anew.").

The panel was presented with live and transcribed testimony from detectives, arguments about possible searches conducted by a user of the computer and who may have had access to the computer, testimony that unwanted pop-ups can occur while searching, testimony by respondent about what he was and was not searching for, the size of the pictures saved and assertions about whether he could determine the age of those in the pictures, testimony from a highly experienced

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[4] Tr 2/17/2011, p 35.

[5] Petitioner's Brief, p 11.

clinician about the hallmarks and tendencies of those who have a sexual fixation disorder (paraphilia), and testimony from people who know respondent well, among other things. Although he pled no contest to using a computer to commit a crime, and in the course of doing so, stipulated that the underlying crime of knowing possession of child sexually abusive material could have been proven, such a plea may have been due, in part, to the broad reach of the statute, which appears to punish conduct that is not intentional or even truly "knowing" as those terms are applied in the law generally or in disciplinary matters in particular.[6] As with all discipline cases premised on criminal convictions, it was the responsibility of the parties and the panel to inquire into the specific facts and circumstances giving rise to the conviction. After doing so, this panel found that "it was not [respondent's] intent to view or download material involving underage children; to collect images of underage children or to intentionally go to illegal websites for such images." In short, the panel was given the task of ascertaining the particular circumstances of this offense based on the evidence before it, and we cannot find that its factual determinations are clearly erroneous under the applicable standard of review.

The Grievance Administrator also seeks increased discipline. Our responsibility on review is to examine the factors affecting the assessment of the appropriate level of discipline in light of the ABA Standards and applicable Michigan precedents and attempt to ensure continuity and proportionality in discipline. See, e.g. *Grievance Administrator v Saunders V. Dorsey*, 02-118-AI (ADB 2005). The Administrator agrees with the hearing panel that the applicable Standard among the ABA Standards for Imposing Lawyer Sanctions, is Standard 5.12 (suspension for certain criminal conduct), and does not cite any caselaw on review on the level of discipline.

In discussing the sanction to be imposed, the hearing panel stated, in part:

> In closing argument, counsel for the respective parties called the panel's attention to several Michigan discipline cases. The case of *Grievance Administrator v Arthur Clyne*, Case No. 130-89, resulted in a suspension of 180 days. We note first, that the discipline ordered by the hearing panel in that case was not reviewed by the Attorney Discipline Board. We note, as respondent's counsel pointed out, that respondent Clyne was incarcerated for his criminal offense,

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[6] Compare, e.g., the scienter in MCL 750.145c(4), quoted in footnote 3 ("knows, has reason to know, or should reasonably be expected to know a child is a child," "appears to include a child," and "has not taken reasonable precautions to determine the age of the child"), with MRPC 1.0, Comment, Terminology ("knowingly . . . denotes actual knowledge of the fact in question . . . [which] may be inferred from circumstances").

a factor not present here. Finally, we note that respondent Clyne was not convicted of the offense charged in this case, but was convicted in a United States District Court of using a fictitious name to facilitate the receipt of child pornography through the United States mail in violation of 18 USC 1342. The use of a fictitious name suggests to this panel a level of intent not present in this case.

The panel's attention was also called to the matter of *Grievance Administrator v Dennis E. Moffett*, Case Nos. 06-123-AI; 06-153-JC. In that case, a hearing panel imposed a one year suspension based upon respondent's conviction of two counts of possession of child sexually abusive material [MCL 750.145c(4)] and two counts of Using a Computer to Commit a Crime [MCL 752.796 and MCL 752.797(3)(c)]. As with the *Clyne* matter, the facts of the case are not described in a Board opinion and there may have been reasons unique to that case why neither party sought review by the Board. That case can be distinguished to some extent by respondent Moffett's extensive prior disciplinary history which included two reprimands and a suspension. We note also, that in contrast to respondent Carthew's cooperative attitude during these proceedings, respondent Moffett failed to appear before the hearing panel.

Finally, the panel considered a case offered by the Grievance Administrator, *Grievance Administrator v Adna H. Underhill, Jr.*, Case No. 04-09-AI; 04-23-JC. Respondent Underhill's license was revoked by a hearing panel in July 2004 based upon his conviction of the felonies of child sexually abusive activity and communicating with another by computer to commit a crime [MCL 750.145(C)(2) and MCL 750.145(D)(2)(f)]. Not only do these particular criminal offenses suggest a higher degree of intentional participation by the respondent but, of particular significance is the fact that respondent Underhill had previously been reprimanded and placed on probation for two years in December 1995 based upon his convictions in Colorado of the crimes of promoting sexual immorality and possession of marijuana.

While the panel appreciates the opportunity to compare and contrast these cases cited by the parties, they do not clearly point to a specific level of discipline under the facts of this case.

While the ABA Standards do provide some guidance to panels in determining whether disbarment, suspension or reprimand would generally be appropriate for certain types of conduct, the Standards themselves provide no guidance once a panel has decided that suspension would be appropriate. Perhaps the most important

> question when considering the length of suspension is whether a suspended attorney may be automatically reinstated upon the filing of an affidavit and the fulfillment of any conditions imposed by a panel or whether that attorney should undergo additional scrutiny by another panel in the reinstatement proceedings described in MCR 9.124. If a panel determines that reinstatement proceedings are required for the protection of the public, the courts, and/or the legal profession, a minimum suspension of 180 days must be imposed.
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> It is the hearing panel's unanimous decision that reinstatement proceedings under MCR 9.123(B) and MCR 9.124 are not required in this case. [HP Report (attached), pp 6-7.]

The Administrator seeks to add an additional day, at least, to the 179-day suspension imposed by the panel in order to trigger the reinstatement process under MCR 9.124 and to require a showing that respondent meets the requirements under MCR 9.123(B). The crime at issue is a serious one, and we would not hesitate to impose greater discipline than that ordered by the panel in most or perhaps the great majority of such cases. A felony such as this, which targets the abuse of minors, should ordinarily require a suspension of sufficient length to require reinstatement only upon petition and the requisite showing of current fitness. In fact, respondent does not disagree with this view. However, in this particular case, given not only the length of time respondent was actually suspended, but, more important, the nature of the inquiry at the hearing on discipline and findings by the panel, including the finding that respondent unquestionably does not present a risk to children or others, we cannot determine that the panel erred in concluding that reinstatement proceedings are not required to protect the public, the courts or the legal profession.

The Administrator also argued that the panel should not have focused so much on public protection, but should have also considered deterrence. Initially, we have no reason to believe that the panel disregarded any relevant factors in imposing discipline. Second, deterrence and public protection are logically linked: "the purpose of discipline -- protection of the public, the courts and the legal profession -- may at times best be achieved through the deterrent effect of punishment. It is intended to serve a means of protecting the public by preventing acts of misconduct by others." *Matter of Grimes*, 414 Mich 483, 491; 326 NW2d 380 (1982). Also, while it is by no means clear whether discipline reports would deter one who is drawn to these materials, we nonetheless reaffirm that knowing possession of child sexually abusive materials is serious misconduct. As the Administrator stated, child pornography actually constitutes a photo of a crime scene, proof of the

victimization of children. The panel's decision in this case is not inconsistent with this posture. Although the images were not introduced and the ages of the apparent minors were not established, the panel found, as noted, that the downloading and possession of the subject images was not the result of an interest in or intent to acquire child sexually abusive materials. Notwithstanding this finding, the panel ordered that respondent be suspended for 179 days, and he was actually suspended for nearly a year due to the operation of MCR 9.120(B)(1). This certainly sends a message to the profession that the conduct is not taken lightly.

Finally, it is argued that the panel erred in considering respondent's conduct as outside the practice of law. The Administrator argues that because the laptop that contained the illegal images was also used for legal work, the conduct was related to the practice of law. That analysis is not persuasive. However, it should be understood that:

> "[The] concept of unprofessional conduct now embraces a broader scope and includes conduct outside the narrow confines of a strictly professional relationship that an attorney has with the court, with another attorney or a client." *State v Postorino, 53 Wis 2d 412, 419; 193 NW2d 1 (1972).* [*Grimes*, 414 Mich at 495.]

If it was unsettled before *Grimes*, there can be no question today that various types of conduct may reflect adversely on a lawyer's fitness to practice law, and therefore warrant significant discipline, even if the conduct took place in a setting removed from the practice of law. Embezzlement, for example, may occur in a lawyer's conduct of his or her private affairs (e.g., as treasurer of a club or as the personal representative of a family member's estate), and yet the conduct is so directly in conflict with the core values of the profession (such as trustworthiness, acting in the best interests of others to whom fiduciary obligations are owed), that serious discipline is appropriate. Similarly, a lawyer who abuses the trust of a child has violated such principles, and one who victimizes children by, for example, supporting their exploitation in media which constitutes child sexually abusive materials, has acted in a manner which calls into question the lawyer's fitness to represent others in matters of trust and confidence, whether or not the conduct took place outside the scope of the practice of law.

The panel report shows an understanding of these principles by its diligent inquiry into the facts surrounding respondent's possession of the illegal content. The finding that the images resulted from searches not intended to return child sexually abusive materials provides the context for the

panel's statement that the conduct arose from respondent's "private browsing habits." Nothing in the report suggests that had the panel found, as the Administrator urged in opening statements, that "respondent is a danger to the public" and that "he intentionally possessed the child sexually [abusive] materials,"[7] it would have excused the conduct as private and not grounds for discipline. To do so would have been error.

For all of the foregoing reasons, the order of the hearing panel is affirmed.

Board members William J. Danhof, Thomas G. Kienbaum, William L. Matthews, C.P.A., Andrea L. Solak, Carl E. Ver Beek, Craig H. Lubben, and Sylvia P. Whitmer, Ph.D, concur in this decision.

Board Member James M. Cameron, Jr., was absent and did not participate.

Board Member Rosalind E. Griffin, M.D., dissents and would disbar respondent in light of the nature of the crime involved in this matter.

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[7] Tr 2/17/2011, p 14.

STATE OF MICHIGAN

Attorney Discipline Board

GRIEVANCE ADMINISTRATOR,
Attorney Grievance Commission,

Petitioner,

v

Case Nos. 10-74-AI; 10-81-JC

PAUL A. CARTHEW, P 60940,

Respondent.
_____/

REPORT OF TRI-COUNTY HEARING PANEL #62

PRESENT: Kenneth F. Silver, Chairperson
Mark R. Werder, Member
Geoffrey M. Brown, Member

APPEARANCES: Rhonda S. Pozehl, Associate Counsel
for the Attorney Grievance Commission

Kenneth M. Mogill,
for the Respondent

Mark S. Bilkovic,
for the Respondent

I. EXHIBITS

Please see Index of Exhibits on page 3 of both the December 9, 2010 and February 17, 2011 hearing transcripts.

II. WITNESSES

December 9, 2010
Paul A. Carthew, Respondent
Matthew D. Rosenberg, MSW, CSW

February 17, 2011
Martha Borjkman
Robert Cloutier
Caroline Lombardo
Keith Overby
Christopher Passalaqua

III. PANEL PROCEEDINGS

This matter was commenced July 20, 2010, when the Grievance Administrator filed a notice of filing of judgment of conviction showing that respondent, Paul A. Carthew, was convicted on June 29, 2010, of two counts of using a computer to commit a crime contrary to MCL 752.796, with the underlying crime being possession of child sexually abusive material [MCL 750.145(C)(4)]. In accordance with MCR 9.120(B)(3), the Attorney Discipline Board issued an order directing respondent to appear before Tri-County Hearing Panel #62 to show cause why a final order of discipline should not be entered.

An appearance was subsequently filed on respondent's behalf by attorney Kenneth M. Mogill and the first scheduled hearing date was adjourned by stipulation of the parties. On November 29, 2010, respondent filed a written response to the Board's order to show cause which included his notice of intent to offer specific evidence in mitigation, including (a) evidence that his continued practice of law would not present a danger or risk to the public; (b) evidence of respondent's participation in appropriate mental health treatment; and (c) evidence of mitigating circumstances.

A public hearing was commenced on December 9, 2010. The Grievance Administrator was represented by Associate Counsel Rhonda S. Pozehl. The respondent was represented by attorney Kenneth M. Mogill, as well as attorney Mark S. Bilkovic, appearing as co-counsel.

Following his opening statement, Mr. Mogill called as his first witness, Matthew D. Rosenberg, MSW, CSW. Mr. Rosenberg has a master's degree in clinical social work and stated that he has specialized in sexual abuse, sexual addictions and sexual deviancy treatment and assessments for approximately 16 years. Mr. Rosenberg's resume was submitted without objection. (Respondent's Exhibit 1.)

The witness testified that respondent was referred to him on July 28, 2010, by Agent Harder of the Michigan Department of Corrections and that he has seen respondent approximately twice a month since then as a condition of respondent's probation. Mr. Rosenberg testified to the growth of the pornography industry through the development of various technologies, including distribution through the internet. The witness was specifically asked to describe for the panel the intended and unintended consequences of viewing lawful, albeit pornographic, material on the internet. His testimony regarding the manner in which unintended material may be downloaded appears at page 18 of the December 9, 2010 transcript.

Mr. Rosenberg testified as to the tests he administered to respondent: the Vermont Risk Assessment and the Rosenberg Risk Assessment. In both cases, he testified, respondent scored as a very low risk. This was followed by an additional test called the Bumby Cognitive Distortion Scale which supported the witness' clinical belief that respondent did not exhibit signs of paraphilias, which he defined as a broad term for sexual fixation disorders. (12/09/10 Tr, p 16.) He noted that an individual with a paraphilia, even when under scrutiny, may have a difficult time controlling the problem but that a recent surprise home visit with a forensic examination of respondent's home and office computers and phones found no evidence of any illegal material.

Mr. Rosenberg's written report dated October 6, 2010, was admitted into evidence as respondent's Exhibit 2. In conclusion, the witness testified, that in his clinical opinion, respondent "presents a very low risk for re-offense or any kind of harm to the public clientele." (12/09/10 Tr, p 29.)

The witness was then cross-examined at some length regarding his professional training, his treatment methods and, specifically, his work with respondent. The witness again testified that paraphilia is defined as a sexual fixation disorder; that there are approximately 380 such disorders and that, in his opinion, respondent is not subject to a paraphilia. Mr. Rosenberg also answered questions posed by members of the panel.

Respondent, Paul A. Carthew, testified on his own behalf and was first questioned directly by his counsel. Respondent testified to his educational and professional background, including his graduation from the University of Detroit Mercy Law School in 1996, where he was on the law review; his admission to the bar; his practice of law in the State of Texas from 1996 to 2000; and his return to the State of Michigan.

Respondent testified that at the time of his arrest, he was initially forbidden to have personal contact with his two children, who are now approximately 7 and 10. Respondent testified that he was divorced from his wife (also an attorney) in 2006. At the time of the hearing before the panel, he testified, all supervision of his visitation and parental rights had been removed. (The order removing that supervision was received as respondent's Exhibit 3.)

Respondent testified at some length about the circumstances surrounding his arrest, his plea and his sentencing to three years probation on June 29, 2010. Respondent acknowledged that he used his computer to view explicitly pornographic material but testified emphatically that it was not his intention to look at material involving underage children; to collect images of underage children; to intentionally go to an illegal website for images of underage children or to send emails or receive emails with images of underage children. (12/09/10 Tr, p 98.) Respondent also testified that, as he put it, "the other hard lesson I learned with the internet is that you get things that you ask for and you get things that you didn't ask for and then you get things that you didn't even know that you got, you know." (12/09/10 Tr, p 98.)

Respondent testified that his arrest in 2008 was triggered when the woman he dated following his divorce in 2006 looked at his computer, found images and turned them over to police. (12/09/10 Tr, p 102.) Returning to the subject of his continuing treatment, respondent recounted that he has also treated with a counselor of his own choosing to deal with the stress resulting from the pressures on his personal and professional life.

Under cross-examination, respondent was questioned further about certain restrictions on his shared parenting time after his conviction and the removal of all restrictions effective December 15, 2010, (one week after the hearing before the panel). During the remainder of respondent's cross-examination, respondent testified at least two more times that, at the time of his arrest, he had not intentionally downloaded anything that he considered to be illegal (12/09/10 Tr, p 138) and that he has not knowingly accessed sites that show what he believed to be illegal content. (12/09/10 Tr, p 143.) Shortly after respondent's acknowledgment that he had created and used a certain Yahoo email account in the past, the Grievance Administrator's counsel concluded her cross-examination of respondent and the hearing on December 9, 2010, was concluded at approximately 1:00 p.m.

The panel reconvened on February 17, 2011. Respondent called several witnesses identified prospectively as character witnesses. These witnesses included Robert Cloutier, a client and personal friend of respondent's since approximately 2005 (02/17/11 Tr, pp 5-11); Carolyn

Lombardo, who is the mother of respondent's former secretary and was a babysitter/nanny for respondent's minor children (02/17/11 Tr, pp 47-56); Christopher Passalaqua, a doctor of chiropractic who has known respondent as a friend and client (02/17/11 Tr, pp 64-69); and Martha S. Bjorkman, a friend of respondent and his family (02/17/11 Tr, pp 70-76).

The Grievance Administrator's counsel called detective Keith Overby of the Oakland County Sheriff's Department. Officer Overby testified that he was the officer in charge of respondent's criminal case and he described the procedure that was undertaken to obtain a search warrant to allow examination of respondent's laptop computer. Counsel elicited from this witness, among other things, that he determined that the minor daughter of the complaining witness had established an account on www.MySpace.com; that the MySpace account included email correspondence with an individual identified as "Mike Schmidt" of New York; and that he obtained information during his investigation which led him to conclude that respondent was engaging in email correspondence under the alias of Mike Schmidt. (02/17/11 Tr, pp 32-34.)

Officer Overby was cross-examined by respondent's co-counsel, Mr. Bilkovic. Referring to officer Overby's earlier testimony that "I read a document that showed that the credit cards came back to the name of Paul Carthew," and that these cards were used to pay for an email account. (02/17/11 Tr, p 34.) Officer Overby testified that he was not in possession of any documentation of credit card information in his file relating back to respondent and a MySpace account. (02/17/11 Tr, p 38.) The witness acknowledged that no charges were ever issued against respondent based upon his use of a MySpace account or a Yahoo email address. (02/17/11 Tr, p 44.) Referring back to the witness's testimony on direct examination that when he originally took possession of respondent's laptop "there was images, I think, of a female and a male child" (02/17/11 Tr, p 27), Officer Overby clarified that the photograph in question was of respondent's children and that there was "nothing unusual" or anything that alerted him or caused him any concern related to the photograph. (02/17/11 Tr, p 46.)

At the conclusion of the testimony, counsel for the respective parties were given an opportunity to present their closing arguments. Briefly summarized, counsel for respondent suggested that a suspension of 179 days would be appropriate in this case. The Grievance Administrator's counsel argued for a minimum suspension of three years. In view of the panel's admission into evidence of the somewhat voluminous record in respondent's underlying criminal matter, the parties were offered an opportunity to present further memoranda regarding those exhibits. Both parties filed supplemental arguments on March 3, 2011. On March 8, 2011, the Administrator filed an addendum.

The record having been closed and the parties having had an opportunity to present closing arguments and supplemental memoranda, this matter was taken under advisement.

IV. FINDINGS AND CONCLUSIONS REGARDING MISCONDUCT

This is a proceeding instituted by the Grievance Administrator under the available procedure described in MCR 9.120. The judgment of sentence filed by the Grievance Administrator on July 20, 2010, is a certified copy containing the court's finding that respondent entered a plea of no contest on June 29, 2010, to two counts of using a computer to commit a felony in violation of MCL 752.7973(D). Under MCR 9.120(B)(2),

> (2) 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.

MCR 9.120(B)(3) continues by providing that,

> At the hearing, questions as to the validity of the conviction, alleged trial errors, and the availability of appellate remedies shall not be considered.

We conclude, therefore, that respondent engaged in conduct that violates a criminal law of the State of Michigan in violation of MCR 9.104(5).

V. REPORT ON DISCIPLINE

As in any case in which misconduct has been established, the panel must include an analysis under the American Bar Association's Standards for Imposing Lawyer Sanctions. *Grievance Administrator v Albert Lopatin*, 462 Mich 235, 238, 612 NW2d 120, 123 (2000). A lawyer's criminal conduct is covered under ABA Standard 5.1, titled "Failure to Maintain Personal Integrity." That Standard suggests that, absent aggravating or mitigating circumstances, disbarment is generally appropriate under Standard 5.11 when a lawyer engages in "serious criminal conduct," involving enumerated necessary elements such as fraud, extortion, theft, sale or distribution of controlled substances or the intentional killing of another. Standard 5.11 also suggests that disbarment is appropriate when the lawyer has engaged in "any other intentional conduct involving dishonesty, fraud, deceit or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice."

We find that the required elements in ABA Standard 5.11(a) or (b) are not present in this case nor does the record establish that respondent engaged in intentional conduct as defined in ABA Standard 3.0(b).

The degree of intent necessary to support respondent's plea of no contest to the criminal charges against him was not presented to the panel. As noted above, the facts of the conviction or the validity of the conviction are not before the panel. Nevertheless, "hearing panels are not absolved of their critical responsibility to carefully inquire into the specific facts of each case merely because the Administrator initiates disciplinary proceedings by filing a judgment of conviction . . ." *Grievance Administrator v Deutch*, 455 Mich 149, 169 (1997). As the Attorney Discipline Board has explained:

> *Deutch* and countless other decisions by the Court and this Board require a panel to consider evidence introduced by the Administrator and respondent bearing on particular facts of the misconduct at issue with the object of assessing not only whether rules have been violated, but also what disciplinary response is necessary and proportionate to protect the public, the courts and the legal system. *Grievance Administrator v Arnold Fink*, Case No. 96-181-JC (ADB 2001).

In this case, we find that respondent testified sincerely and truthfully that while he used his computer to view explicitly pornographic, but otherwise legal, material, it was not his intent to view or download material involving underage children; to collect images of underage children or to intentionally go to illegal websites for such images (12/09/10 Tr, p 98); that he had not downloaded anything that he considered to be illegal (12/09/10 Tr, p 138); and that he did not knowingly access sites containing what he believed to be illegal content (12/09/10 Tr, p 143). This testimony was not refuted by the testimony of Officer Overby, by the exhibits or by the suggestion that respondent placed embarrassing but otherwise legal images in such a way that it would not be easily accessible to other persons using his computer. Nor do we adopt the Grievance Administrator's reasoning, in closing argument, that respondent's use of a computer to commit the crime in question necessarily supports or implies an element of deceit.

In short, the criminal conduct in this case does not contain the elements described in ABA Standard 5.11(a), nor does it involve "dishonesty, fraud, deceit or misrepresentation" under Standard 5.11(b).

At the other end of the applicable spectrum in ABA Standard 5.1, Standard 5.13 states that:

> Reprimand is generally appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law.

In the context of the structure of ABA Standard 5.1, "other conduct" refers to conduct which is neither (1) criminal nor (2) the type of dishonesty, fraud, deceit or misrepresentation described in Standard 5.11(b). Respondent's conduct does not meet the definitions in Standard 5.13.

Respondent's criminal conduct therefore appears to fall under ABA Standard 5.12 which states that:

> 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.

While we believe that a suspension is appropriate in this case, we do not imply that it must necessarily follow that respondent "knowingly" engaged in the conduct for which he plead no contest or that the conduct "seriously adversely reflects" on his fitness to practice law. Such conclusions are not necessary for us to find that suspension is called for and we have not drawn those conclusions here.

After determining the appropriate sanction (disbarment, suspension or reprimand), a panel utilizing the ABA Standards for Imposing Lawyer Sanctions considers whether or not aggravating or mitigating factors are present. The panel has considered the aggravating factors identified by the Grievance Administrator's counsel in closing argument and finds that those factors are either not present in this case or are to be afforded little weight in the context of respondent's conduct wholly unrelated to the practice of law. For example, respondent's "substantial experience in the practice of law" was cited as an aggravating factor under ABA Standard 9.22(i). The panel does not believe that this factor is particularly relevant under the facts of this case. In terms of mitigating factors, the panel is inclined to assign somewhat greater weight to the fact that this individual has

no prior disciplinary or criminal record; has demonstrated a cooperative attitude toward these proceedings; appears to have demonstrated remorse and has clearly been subject to other penalties or sanctions.

In closing argument, counsel for the respective parties called the panel's attention to several Michigan discipline cases. The case of *Grievance Administrator v Arthur Clyne*, Case No. 130-89, resulted in a suspension of 180 days. We note first, that the discipline ordered by the hearing panel in that case was not reviewed by the Attorney Discipline Board. We note, as respondent's counsel pointed out, that respondent Clyne was incarcerated for his criminal offense, a factor not present here. Finally, we note that respondent Clyne was not convicted of the offense charged in this case, but was convicted in a United States District Court of using a fictitious name to facilitate the receipt of child pornography through the United States mail in violation of 18 USC 1342. The use of a fictitious name suggests to this panel a level of intent not present in this case.

The panel's attention was also called to the matter of *Grievance Administrator v Dennis E. Moffett*, Case Nos. 06-123-AI; 06-153-JC. In that case, a hearing panel imposed a one year suspension based upon respondent's conviction of two counts of possession of child sexually abusive material [MCL 750.145c(4)] and two counts of Using a Computer to Commit a Crime [MCL 752.796 and MCL 752.797(3)(c)]. As with the *Clyne* matter, the facts of the case are not described in a Board opinion and there may have been reasons unique to that case why neither party sought review by the Board. That case can be distinguished to some extent by respondent Moffett's extensive prior disciplinary history which included two reprimands and a suspension. We note also, that in contrast to respondent Carthew's cooperative attitude during these proceedings, respondent Moffett failed to appear before the hearing panel.

Finally, the panel considered a case offered by the Grievance Administrator, *Grievance Administrator v Adna Underhill*, Case No. 04-09-AI; 04-23-JC. Respondent Underhill's license was revoked by a hearing panel in July 2004 based upon his conviction of the felonies of child sexually abusive activity and communicating with another by computer to commit a crime [MCL 750.145(C)(2) and MCL 750.145(D)(2)(f)]. Not only do these particular criminal offenses suggest a higher degree of intentional participation by the respondent but, of particular significance is the fact that respondent Underhill had previously been reprimanded and placed on probation for two years in December 1995 based upon his convictions in Colorado of the crimes of promoting sexual immorality and possession of marijuana.

While the panel appreciates the opportunity to compare and contrast these cases cited by the parties, they do not clearly point to a specific level of discipline under the facts of this case.

While the ABA Standards do provide some guidance to panels in determining whether disbarment, suspension or reprimand would generally be appropriate for certain types of conduct, the Standards themselves provide no guidance once a panel has decided that suspension would be appropriate. Perhaps the most important question when considering the length of suspension is whether a suspended attorney may be automatically reinstated upon the filing of an affidavit and the fulfillment of any conditions imposed by a panel or whether that attorney should undergo additional scrutiny by another panel in the reinstatement proceedings described in MCR 9.124. If a panel determines that reinstatement proceedings are required for the protection of the public, the courts, and/or the legal profession, a minimum suspension of 180 days must be imposed.

It is the hearing panel's unanimous decision that reinstatement proceedings under MCR 9.123(B) and MCR 9.124 are not required in this case. It must be remembered that in terms of any

potential threat that respondent may pose to the community at large, he is subject to probation for a period of three years, commencing June 29, 2010, under the supervision of the Oakland County Probation Department. In light of the evidence presented regarding respondent's successful completion of his probation requirements to date, we believe that it is highly unlikely that the respondent will violate the terms of his probation in the future. Nevertheless, in the event that such a violation should occur, the public at large will not be left unprotected and we trust that the Oakland County courts and probation authorities will act appropriately. Furthermore, a material violation by respondent of the terms of his probation could result in new disciplinary charges.

While a lawyer is a lawyer 24 hours a day, *Matter of Grimes*, 414 Mich 483; 326 NW2d 380 (1982), evidence in this record does not establish that respondent's conduct was the result of anything other than his purely private computer browsing habits and there is no evidence that his conduct was related to his practice of law, his dealings with clients or courts, or his status as a licensed attorney.

It is the panel's decision that the respondent will be subject to a final order of discipline suspending his license to practice law for a period of 179 days commencing July 12, 2010, the date of his conviction by a no contest plea in the Oakland County Circuit Court, and until his compliance with the reinstatement requirements in MCR 9.123(A).

VI. SUMMARY OF PRIOR MISCONDUCT

None.

VII. ITEMIZATION OF COSTS

Attorney Grievance Commission:	
(See Itemized Statement filed 03/07/11)	$ 633.30
Attorney Discipline Board:	
Hearing held 02/17/11	$ 597.00
Hearing held 12/09/10	$ 792.50
Administrative Fee [MCR 9.128(B)(1)]	$1,500.00
TOTAL:	**$3,522.80**

ATTORNEY DISCIPLINE BOARD
Tri-County Hearing Panel #62

By: _____
Kenneth F. Silver, Chairperson

Dated: May 11, 2011