STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellant,

v

Kevin R. Floyd, P 43583,

Respondent/Appellee,

Case No. 05-25-JC

Decided: August 21, 2006

Appearances:

Wendy A. Neeley, for Grievance Administrator, Petitioner/Appellant
Kevin R. Floyd, In Pro Per, Respondent/Appellee

BOARD OPINION

The Grievance Administrator petitioned the Attorney Discipline Board for review of the hearing panel order entered November 16, 2005 which found that the respondent's misdemeanor conviction constituted professional misconduct but warranted the entry of an order imposing "no discipline." For the reasons state below, we are persuaded that an order of suspension, with conditions, is the appropriate sanction in this case.

Panel Proceedings

This proceeding is based upon respondent's misdemeanor conviction of the crime of assault and battery in violation of MCL 750.81. Under the procedure described in MCR 9.120, the case was commenced February 7, 2005 when the Grievance Administrator filed a certified copy of the judgment of sentence from the 17th District Court in Grand Rapids showing that respondent, Kevin Floyd, entered a plea of no contest to the charge of assault and battery on July 19, 2004. At sentencing, on October 29, 2004, respondent was sentenced to 30 days in jail with credit for 16 days served.

Under MCR 9.120, the judgment of conviction stands as conclusive proof that the lawyer has committed a crime. Under the Supreme Court's decision in Grievance Administrator v Deutch, 455 Mich 149; 565 NW2d 369 (1997), if the Grievance Administrator elects to bring a conviction before a hearing panel and establishes that the attorney has engaged in conduct that violates a criminal law of a state of the United States, the panel must enter an order of discipline,

regardless of whether the conviction involves conduct which reflects adversely on the individual's fitness to practice law. The only issue before the panel, therefore, was the type of discipline to be imposed. The parties appeared before Kent County Hearing Panel #2 in Grand Rapids on October 17, 2005. The Administrator's counsel commenced the proceeding by offering petitioner's exhibits 1-7 which are documents and plea agreement transcripts from the cases of People v Kevin Floyd, Case 03-10458-FH and Andrea Morgan-Floyd v Kevin Floyd, Case No. 03-4822-PP (a personal protection matter). Witness Steven McLaughlin, an assistant Kalamazoo County prosecutor, handled the case involving Mr. Floyd from the initial review of the police reports through sentencing and a subsequent probation violation hearing. Taken together, his testimony and the court documents show that respondent was bound over to Kent County Circuit Court on charges of aggravated stalking and assault and battery. On July 19, 2004, respondent entered a no contest plea to the assault and battery charge and the stalking charge was dismissed. At that hearing, the judge conducted an evidentiary hearing to determine whether there was an independent factual basis upon which to accept the no contest plea. In lieu of any testimony from respondent, the judge simply read from the police report:

> It appears that the complainant in this case is the defendant's wife. I know from previous hearings that he and his wife either have gone through or are going through a divorce and child custody and visitation issues in the Family Division of this circuit court.
>
> Apparently, as they met face to face on [May 23, 2003] and as witnessed by at least one other person, an argument ensued. The defendant pulled the complainant toward him and knocked her to the ground by hitting her in the chest. Counsel, do you feel the elements are satisfied? [Ex 2, p 9.]

At sentencing in October 2004, respondent was ordered to spend 30 days in jail (with credit for 16 days already served), pay costs and fines of $395 and was placed on probation for 24 months. At that time issues of restitution, oversight and an anger management course were reserved. He was also directed to perform 40 hours of community service. The sentence was later amended in January 2005 to further provide that respondent was to pay $16,999.44 to the complainant, Andrea Morgan-Floyd, and was not to have any verbal, written, electronic or physical contact with her mother. In July 2005, there was a further hearing on respondent's alleged violations of those probation terms - that he had failed to report for probation in November 2004; that he had failed to arrange for any community service; that he had failed to register for anger management counseling; and that he had failed to pay costs or restitution. Consequently, on July 12, 2005, Mr. Floyd was found to be in violation of his probation order. Probation was revoked and he was ordered to serve 93 days in jail, with credit for 23 days served.

The panel also received testimony from Charles F. Justian, a senior assistant prosecutor for the Muskegon County prosecutor's office, with regard to charges that respondent had violated a personal protection order. He testified that respondent was the subject of a personal protection order obtained by his wife in May 2003. That order had been renewed and, at the time of the discipline hearing, there was a five-year protection order in place.

Respondent Kevin Floyd explained to the panel that he was an assistant Kent County prosecuting attorney from 1989 to 2004 and that the May 23, 2003 incident which resulted in the assault charge occurred when he was an assistant prosecutor. He stated that the city attorney's office in Grand Rapids originally declined to charge him but that assault charges were later added to aggravating stalking charges filed in October 2003. His account of the incident on May 23, 2003 differs from the police report.

According to his testimony, he and his ex-wife confronted each other in the driveway at her home while their minor son was in her car. She took the keys from his car and threw them over his head. He testified that when he turned to get his keys:

> She began to hit on me with both fists. I raised my arm like this, I stepped back in self defense, and she fell to the ground. That was the basis for this alleged assault and battery. [Tr, pp 69-70].

Respondent also addressed the PPO violations. (That testimony appear at pp 71-81 of the transcript.) They involved incidents when he was at a storage facility while his wife was using it; when he allegedly sat next to his ex-wife in the bleachers at their son's baseball game; and when he went to his son's school. Respondent acknowledged that he did not pay restitution when the probation order was in effect and pointed out that there is currently no order in effect requiring restitution.

In closing arguments, the Administrator's counsel argued for a suspension of at least one year, citing Standard 5.12 of the ABA Standards for Imposing Lawyer Sanctions [suspension is generally appropriate when a lawyer knowingly engages in criminal conduct which does not contain the elements listed in Standard 5.11 (fraud, extortion, theft, etc.) and that seriously adversely reflects on the lawyer's fitness to practice]. She also referred to Standard 6.22 which states:

> Suspension is generally appropriate when a lawyer knows that he or she is violating a court order or rule, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding.

For his closing, respondent's counsel argued that the accusations against respondent, and his resulting no-contest plea, must be considered in the context of bitter on-going divorce proceedings and he emphasized respondent's otherwise unblemished record as an attorney.

On November 16, 2005, the hearing panel below issued its "Order of Discipline Imposing 'No Discipline,'" a type of discipline order specifically authorized by our Supreme Court in Grievance Administrator v Deutch, supra. The panel explained its decision in its report on discipline:

> Following the American Bar Association's Standards for Imposing Lawyer Sanctions as required by Grievance Administrator v Lopatin, 462 Mich 235 (2000), we find that Respondent violated a duty owed to the public in that his criminal act reflects adversely on his fitness as a lawyer in a respect other than honesty or trustworthiness.
>
> We further find that none of the sanctions recommended by the ABA Standards for this type of misconduct apply to Respondent's misconduct. Specifically, Respondent's criminal conduct does not contain the elements listed in ABA Standard 5.11 (Disbarment). Also, Respondent's conduct does not involve dishonesty, fraud, deceit or misrepresentation which are elements of ABA Standard 5.13 (Reprimand). Because the sanction of ABA Standard 5.14 (Admonition) cannot be imposed by this panel, see MCR 9.106(6), the remaining available sanction is that provided by ABA Standard 5.12 (Suspension). [Footnote omitted.] We find, however, that it was not established that Respondent's criminal conduct contained the critical element for imposition of a Standard 5.12 sanction. While we do not look lightly upon, or condone in any fashion, Respondent's criminal act, we do not find that the assault or assault and battery upon his wife, under the circumstances, 'seriously adversely reflects on the [Respondent's] fitness to practice.' [Footnote omitted.]

> We are aware that an attorney may be disciplined for activity unrelated to the practice of law, Grievance Administrator v Nickels, 422 Mich 254, 260 (1985), and that it is the responsibility of every member of the Bar to carry our their activities, both public and private, with circumspection, In re Grimes, 414 Mich 483, 494 (1982). However, under the unique circumstances of this case we do not feel any discipline should be ordered. As stated in Grievance Administrator v Martin S. Deutch; 94-44-JC:
>
> > Professional discipline does not exist to enhance or multiply the effects of criminal penalties or other consequences suffered by an attorney. It serves a purpose more narrow and yet more critical to the protection of the bar, the courts and the members of the public utilizing legal services.
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> We believe that purpose [footnote omitted] will not be served by the imposition of a sanction upon Respondent nor diminished by a failure to do so. Accordingly, we order that no discipline be imposed upon Respondent. [HP Report, pp 2-3.]

Discussion

In reviewing a panel's determination as to the appropriate level of discipline, we are guided by the following standard:

> While the Board affords a certain level of deference to a hearing panel's subjective judgment on the level of discipline, the Board possesses, of necessity, a relatively high measure of discretion with regard to the appropriate level of discipline. Grievance Administrator v James H. Ebel, 94-5-GA (ADB 1995), citing Grievance Administrator v August, 438 Mich 296, 304 (1991); Matter of Daggs, 411 Mich 304, 381-319 (1981). Such discretion allows the Board to carry out what the Court has described as the Board's "overview function of continuity and consistence in discipline imposed." [Matter of Daggs, supra, p 320.]
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> [Grievance Administrator v David A. Woelkers, 97-214-GA (ADB 1998), pp 6-7, lv den 602 NW2d 579 (1999).]

And, in reviewing a panel decision to enter an order finding misconduct but imposing no discipline, we are mindful of pronouncements by the Court and by this Board, such as that found in Grievance Administrator v Ralph E. Musilli, No. 98-216-GA (ADB 2000):

> An order finding misconduct and imposing no discipline will rarely be entered. Grievance Administrator v Bowman, 462 Mich 582, 589 (2000), citing Grievance Administrator v McFadden, No.

> 95-200-GA (ADB 1998), lv den 459 Mich 1232 (1998) . . . . For an order finding misconduct but imposing no discipline to be appropriate, the misconduct would have to be so highly technical, the mitigation so overwhelming, or the presence of other special circumstances so compelling that the imposition of a reprimand would be practically unfair.

After our review of the record we cannot conclude that an order imposing no discipline would be appropriate. Or, to put it another way, we cannot say that respondent's misconduct was technical or that there exists some other compelling reason to withhold discipline for the misconduct established by his plea of guilty to the misdemeanor of assault and battery in violation of MCL 750.81 (assault or assault and battery of spouse, former spouse, etc.). We understand that respondent is embroiled in an acrimonious divorce proceeding, and we are cognizant of respondent's position that his wife intended to "criminalize" their divorce proceedings and "make [respondent] look like a person less deserving of custody than her." However, the sentencing judge was not convinced that respondent was blameless. The judge noted respondent's abilities and public service, but also spoke of a "shadow side" of respondent's personality brought out by his relationship with his wife.

We agree with the Administrator that a suspension is appropriate in this case. ABA Standard 5.12 and our caselaw suggest that a suspension is generally appropriate for crimes involving elements of violence. See, e.g., Grievance Administrator v Arnold Fink (After Remand), No. 96-181-JC (ADB 2001), lv den 465 Mich 1209 (2001).

The Administrator cites Grievance Administrator v Marvin Bartlett, No. 03-133-JC (HP Consent 2004) (30-day suspension for misdemeanor domestic violence conviction), and two Colorado decisions involving domestic violence – People v Lawrence R. Hill, 71 P 3d 1023 (2003) (attorney broke stepson's nose in altercation while drunk; six-month suspension stayed pending completion of probationary term and conditions), and In re Hickox, 57 P3d 403 (2002) (actual six month suspension imposed in light of prior disciplinary record). To these, we might add Grievance Administrator v James Viau, Case No. 96-77-GA (ADB 1997) (affirming reprimand with conditions for slapping a child while intoxicated), Grievance Administrator v Lafayette Beers, 90-116-JC (HP1990) (reprimand based on attorney's misdemeanor conviction of assault and battery), Grievance Administrator v Mark Devenow, 99-160-JC (2001) (reprimanded following four misdemeanor convictions including assault and battery, trespassing and malicious destruction of library books), and Grievance Administrator v Steven E. Ford, 04-126-JC (60-day suspension for misdemeanor of aggravated assault).

Conclusion

A suspension of 30 days is appropriate in light of the offense committed here and similar discipline cases. In addition, respondent will be required, within 90 days, to file with the Attorney Discipline Board and the Grievance Administrator documentation from an appropriate

clinician referred by the State Bar of Michigan's Lawyers and Judges Assistance Program evidencing that respondent has been evaluated, and, if necessary, commenced treatment or counseling as appropriate, including, if warranted, anger management counseling. Respondent shall also file with the Board and serve upon the Grievance Administrator quarterly verification of the continuation of such treatment, if any, and, within 14 days of completion, respondent shall file a report by the treatment provider verifying completion of treatment.

Board members William P. Hampton, Lori M. McAllister, and Marie E. Martell concur in this decision.

Board Members William J. Danhof and William L. Matthews, C.P.A., concur in the decision not to enter an order imposing no discipline and in the imposition of the condition regarding evaluation and treatment by an anger management counselor, but would impose a reprimand instead of a suspension.

Board members Rev. Ira Combs, Jr., George H. Lennon, Billy Ben Baumann, M.D., and Hon. Richard F. Suhrheinrich were absent and did not participate.