Grievance Administrator,
State of Michigan
Attorney Grievance Commission,

Petitioner/Appellant,

v

N C Deday LaRene, P 16420

Respondent/Cross-Appellant.

Case No. 94-82-JC

Decided: August 24, 1995

BOARD OPINION

On May 4, 1994, the respondent was convicted in the United States District Court for the Eastern District of Michigan, by guilty plea, of the felonies of conspiracy and income tax evasion in violation of 18 U.S.C. 371 and 26 U.S.C. 7201. For the crime of conspiracy, the respondent was sentenced to imprisonment for a period of twelve months. For the crime of tax evasion, the respondent was ordered to serve two years on probation with the condition that he verify his filing of federal tax returns and that he provide financial information to the probation department.

In accordance with MCR 9.120(B)(1), the respondent's license to practice law in Michigan was automatically suspended on May 4, 1994, the date of his conviction. On May 9, 1994, the Grievance Administrator filed a certified copy of the Judgment and Probation/Commitment order. The respondent was ordered to show cause before a hearing panel why a final order of discipline should not be entered. On June 29, 1994, a hearing was held before Tri-County Hearing Panel #27. On August 17, 1994, the panel issued its order suspending the respondent for a period of thirty-three months effective May 4, 1994.

The Grievance Administrator filed a petition for review, claiming the imposition of inadequate discipline in light of the gravity of the respondent's misconduct. The respondent filed a cross-petition for review claiming the imposition of excessive

discipline. Based upon a review of the whole record, and consideration of the arguments presented by the parties, we conclude as follows: The discipline imposed by the hearing panel is consistent with the discipline imposed in cases involving similar criminal conduct. The discipline imposed was an appropriate exercise of the hearing panel's judgment. And, the discipline imposed achieves the primary goal of these proceedings, that is, the protection of the public, the courts and the legal profession.

The record in this case includes the respondent's direct testimony under direct and cross-examination and the following documents from the criminal proceeding: 1) grand jury indictment filed September 16, 1992; 2) superseding information filed December 21, 1993; 3) Rule 11 plea agreement filed December 21, 1993; 4) transcript of the respondent's guilty plea before U. S. District Judge Patrick J Duggan on December 21, 1994; 5) transcript of the sentencing before Judge Duggan on May 4, 1994; and 6) the judgment and probation/commitment order of May 4, 1994. Finally, the parties stipulated to the submission of the respondent's hearing exhibit--a compilation of eighty letters submitted to the Grievance Administrator by the respondent's friends and colleagues. These included three letters from current or former judges, three from current or former prosecutors and fifty-seven letters from attorneys.

In approximately 1975, the respondent began representing Vito Giacalone in a series of criminal cases. At some time in the early 1980s Giacalone asked the respondent for assistance in the negotiation and resolution of a claim arising from Giacalone's prior involvement in a company then known as the Home Juice Company. Giacalone explained to respondent that he had sold his interest in that company in the early 1960s to Albert Allen. At that time, Giacalone and Allen had entered into a written agreement giving Allen sole ownership of the company but obligating Allen to pay Giacalone half of any profits over $564,000 should he ever sell the stock of the company.

Giacalone advised the respondent that Allen was negotiating a sale of the company. He requested that respondent act on his behalf

by negotiating a settlement with Allen for the present value of whatever claim Giacalone might have under the agreement. After some adjustments, it was agreed that Allen would pay Giacalone $420,000. Allen gave the money to the respondent for Giacalone: $150,000 in cash and $270,000 in checks written on Allen's personal account in amounts of $10,000 or less.

The respondent testified:

> Mr Giacalone, I knew, owed the government several hundred thousand dollars in taxes. And I knew and understood that my agreeing to this method of payment in cash and checks which would not trigger the filing of a currency transaction report when they were negotiated, would allow Mr Giacalone to keep the receipt of this money a secret from the government, and insulated from either collection by the government or by any claim by the government that he either had not--willful failure to pay if he did not apply it to his prior debts or if he didn't report it on his income tax returns for evasion of taxes. And I agreed with both Mr Giacalone and Mr Allen that I would help facilitate that result. (Tr. 17)

With regard to his plea of guilty to the charge of tax evasion, the respondent testified:

> Some years before this I borrowed a sum of money from Mr Giacalone, but still owed him about $13,000.
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> Our agreement was that if I was able to negotiate and collect this indebtedness from Mr Allen, he would forgive that. He did forgive and I did not report the forgiveness of that income, which would have been constructive income, the forgiveness of that debt which would have obviously been constructive income to me on my 1986 tax return.
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> And that was essentially the charge to which I pled guilty under the superseding indictment. I did file a tax return for 1986, of course, but I omitted this constructive income and knew, of course, that that was wrong. (Tr. 18)

The issue before the Board is whether the hearing panel order suspending the respondent's license for thirty-three months should

be affirmed and, if modification of the panel's order is warranted, whether discipline should be increased or decreased. In support of the argument that disbarment is the only appropriate sanction in this case, the Grievance Administrator relies, in part, on Matter of Grimes, 414 Mich 483; 326 NW2d 380 (1982) which increased a 120-day suspension to disbarment for an attorney who had been convicted of willful evasion of taxes under 26 U.S.C. 7201 and who had been found to have counseled a client to commit perjury.

Under the Court Rules then in effect, the 120-day suspension imposed by the Board would have entitled Grimes to automatic reinstatement at the conclusion of his term of suspension. In discussing its authority to change a disciplinary order, the Court stated that "we invoke this power only if the disciplinary action imposed by the Grievance Board is inappropriate". Matter of Grimes, supra at 495 citing State Bar Grievance Administrator v Posler, 398 Mich 38, 41; 222 NW2d 511 (1974). The Court held that the Board's discipline order was "inappropriate" in light of its finding that Grimes was guilty of illegal conduct involving moral turpitude, its conclusion that it is "utterly reprehensible" for an attorney at law to actively procure or knowingly countenance the commission of perjury, and its belief that Grimes' reinstatement to good standing should not be automatic.

Grimes does not establish a bright line category of offenses for which disbarment is the only appropriate sanction. Indeed, the Grimes Court reiterated:

> In reviewing the discipline imposed in a given case, we are mindful of the sanctions meted out in similar cases, but recognize that analogies are not of great value.
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> > "As a hypothetical proposition, we find dubious the notion that judicial or attorney misconduct cases are comparable beyond a limited and superficial extent. Cases of this type generally must stand on their own facts". State Bar Grievance Administrator v DelRio, 407 Mich 396, 350; 285 NW2d 277 (1979)
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> > Grimes, supra at 326 NW2d 380, 382.

In weighing the Grievance Administrator's argument that the respondent's misconduct was so singularly reprehensible that disbarment is the only appropriate sanction, we have reviewed the discipline imposed in other cases involving attorneys convicted of conspiracy to defraud the Internal Revenue Service in violation of 18 U.S.C. 371.

In Matter of James C DeVries, DP 96/86, a hearing panel ordered a suspension of four years for the respondent's conviction of conspiracy to defraud the United States in violation of 18 U.S.C. 371 and one count of income tax evasion in violation of 18 U.S.C. 7201. The hearing panel noted the mitigating effect of the respondent's prior unblemished record during seventeen years of legal practice, his sincere remorse, and cooperation with the federal authorities beyond which was required by the terms of his plea agreement. The Grievance Administrator did not appeal.

In Matter of Joseph J Jerkins, ADB 121-88, the respondent was convicted of conspiracy to defraud the United States in violation of 18 U.S.C. 371; three counts of income tax evasion in violation of 26 U.S.C. 7201 and 18 U.S.C. 2; two counts of filing false income tax returns in violation of 26 U.S.C. 7206(1); and aiding and abetting in the preparation of a fraudulent income tax return in violation of 26 U.S.C. 7206(2). The respondent and the Grievance Administrator filed a stipulation for a consent order of discipline in accordance with MCR 9.115(F)(5), agreeing that the respondent should be suspended for two years, eleven months effective February 19, 1988.

In Matter of C Hugh Fletcher, 90-28-JC, the respondent and the Grievance Administrator filed a stipulation for consent order of discipline in accordance with MCR 9.115(F)(5) in which they agreed that the respondent's license should be suspended for three years and one day, effective January 8, 1990 for his conviction of conspiracy to defraud the United States in violation of 18 U.S.C. 371.

In Matter of Lee J Klein, the respondent was convicted of one count of conspiracy in violation of 18 U.S.C. 371. The hearing panel's order suspending his license to practice for thirty months

was appealed to the Attorney Discipline Board by the Grievance Administrator. On December 15, 1994, the Board affirmed the thirty-month suspension. The Grievance Administrator did not appeal to the Supreme Court.

We emphasize that a comparison of the four cases cited above does not imply that an attorney convicted of conspiracy in violation of 18 U.S.C. 371 may necessarily expect a suspension of thirty to forty-eight months. This Board has cited Grimes, supra many times in support of the proposition that discipline must be imposed in light of the unique circumstances of each case. Nevertheless, we are not prepared to say that disbarment is the only appropriate sanction for the criminal conduct in this case or that the hearing panel's decision was clearly "inappropriate" where the thirty-three month suspension ordered by the panel fell within the range of thirty months to forty-eight months for similar convictions.

Our review of the discipline imposed by the hearing panel also includes consideration of the mitigating or aggravating factors which appear in the record. The respondent was licensed to practice law in Michigan in 1971. The panel properly considered the absence of a prior disciplinary record in mitigation. See ABA Standards for Imposing Lawyer Sanctions, Standard 9.32(a). Evidence pertaining to the attorney's character and reputation has also been recognized as a mitigating factor. See ABA Standards for Imposing Lawyer Sanctions, 9.32(g). As noted above, character references were submitted to the panel in the form of eighty separate letters from lawyers, prosecutors, judges and other citizens. At the same time, the record supports our consideration of a dishonest or selfish motive. ABA Standards for Imposing Lawyer Sanctions, 9.22(b) and the respondent's substantial experience in the practice of law. (ABA Standards 9.22(i).

The Grievance Administrator argues strenuously that increased discipline is required in this case on the grounds that the respondent's conduct benefited an individual characterized in the "Statement of Facts" in petitioner's brief as "a reputed organized crime figure", (Petitioner's Brief, p. 1), and a "well-known

organized crime figure", (Petitioner's Brief, p. 2)[1]. In the absence of any evidence in the record concerning Giacalone's character or reputation, we will not address the issue of whether the reputation of the respondent's client, in-and-of-itself, warrants increased discipline.

Similarly, we are unable to find evidentiary support in the record for the petitioner's assertions that the respondent "was the primary conspirator" who took part in "masterminding the conspiracy". (Petitioner's Brief, p. 5), or that the scheme in which he participated was one which he devised. (Petitioner's Brief, p. 13). The respondent testified that he knew and understood that the method of payment by Allen to Giacalone would allow both individuals to hide the transaction from government authorities and that he "agreed" to that method of payment in cash and checks. In cross-examining the respondent, the Grievance Administrator characterized the respondent's role as that of a "courier" who picked up checks from Allen and turned them over to someone who would cash them for Giacalone. The record suggests that it is a reasonable description of the respondent's part in the scheme.

Finally, we have considered the Grievance Administrator's argument that the respondent should not, in any event, be able to petition for reinstatement earlier than July 5, 1997, the date which would mark the end of the respondent's sentence to one year's imprisonment, followed by two years probation, (assuming that the respondent serves the full sentence imposed in the federal court.) The panel's thirty-three month suspension was deemed effective May 4, 1994, the date of the respondent's automatic suspension and he will be eligible to file a petition for reinstatement on or about February 4, 1997. This date could be prior to the expiration of his federal probation.

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[1] When asked on cross-examination whether he knew that Giacalone was "a reputed organized crime figure" the respondent testified "I knew that his name is a notorious one in this community, and I certainly knew the accusations that have been made by the government over the years about Mr Giacalone. And I knew them then and I know them now. (Tr. p. 30).

A similar argument was rejected by the Board in its December 15, 1994 order in Matter of Lee J Klein, 92-299-JC. There the Board ruled:

> The Board has further considered the Grievance Administrator's request that the Board adopt a rule in this case that a respondent may not become eligible to petition for reinstatement to the practice of law while under the supervision of federal parole or probation. That argument has been considered in light of the Supreme Court's order of September 18, 1992 in Grievance Administrator v Elbert L Hatchett, SCT 93393; ADB 91-10-JC reinstating a hearing panel order of suspension for 120 days, including the hearing panel's ruling that the respondent should not be eligible to file a petition for reinstatement while imprisoned in a federal correctional facility but could, under the panel's ruling, file such a petition while on probation or parole or while under supervision in a community center or half-way house.

We are mindful of the Supreme Court's recent decision in Matter of the Reinstatement of Robert A McWhorter, 449 Mich 130 (1995) in which the Court ruled that a disbarred attorney seeking reinstatement could not petition for reinstatement until five years had elapsed from the end of his federal parole. McWhorter does not establish a rule that every criminal conviction resulting in "supervision", including probation, must also result in a suspension of the individual's license to practice law for a period at least equal to the period of probation.

It is axiomatic that the paramount concern in reviewing the appropriate level of discipline is the protection of the public, the courts and the legal profession. We conclude that the hearing panel's order of suspension in this case achieves that goal and should be affirmed.

Board Members John F Burns, C Beth DunCombe, Elaine Fieldman, Barbara B Gattorn, Albert L Holtz and Miles A Hurwitz.

Board Members Marie Farrell-Donaldson and Paul D Newman did not participate.

STATEMENT OF BOARD MEMBER GEORGE E BUSHNELL, JR

I voluntarily recused myself during oral argument because of my vigorously expressed shock at the Grievance Administrator's argument that the notoriety of the respondent's client created an inference that the respondent, therefore, should be subject to extreme discipline.