Grievance Administrator,

Petitioner/Appellant,

v

James J. Viau, P 43335,

Respondent/Appellee.

96-77-GA

Decided: September 8, 1997

BOARD OPINION

The formal complaint in this matter charged respondent slapped a two-year old child and was convicted by a plea of no contest of the misdemeanor crime of assault and battery. Respondent acknowledged that the incident occurred; it was a single incident; he has no prior criminal or assaultive incidents in his past; and, due to the consumption of alcoholic beverages at the time, he has no recollection of the incident itself. The hearing panel concluded respondent's conduct violated MRPC 8.4(a) and (b) and MCR 9.104(4) and (5). The panel dismissed the charges that respondent's conduct violated MRPC 8.4(c) and MCR 9.104(1), (2), and (3). Following a separate hearing on discipline, the panel issued an order of reprimand with conditions including abstention from the use of alcohol, participation in a mentoring program and counseling with a physician.

The Grievance Administrator has petitioned for review claiming respondent's misconduct warrants a minimum suspension of 180 days coupled with reinstatement proceedings under MCR 9.124. The Attorney Discipline Board has conducted review proceedings in accordance with MCR 9.118 and reviewed the whole record. For the reasons stated, we affirm the hearing panel's decision.

The Grievance Administrator argues that a reprimand, accompanied by corrective conditions, does not send a sufficiently strong message to the public and the bar that violations of the criminal law by an attorney will not be tolerated, and, any

discipline less than 180-day suspension will erode public confidence in the ability of attorneys to police themselves and "further impugn the integrity of the bar."

In certain cases relatively harsh sanctions may be necessary, in part, to instill public trust and confidence in the legal profession. The discipline system should send a strong, clear message, for example, that lawyers who steal, cheat their clients or routinely breach fundamental standards of honesty and integrity are no longer welcome in the ranks of the legal profession. We have likewise ruled that lawyers who steal, cheat or lie in their personal lives must be held accountable to the discipline system, whether or not that conduct arises from the practice of law.

The issue in this case is not whether the respondent should be publicly disciplined for an act which occurred in his personal life rather than in a professional setting. The reprimand imposed by the panel sends a very public message to respondent, his peers, and the public that his loss of self-control in striking a defenseless child warrants our condemnation. The issue presented by the Administrator in this appeal is whether respondent should be exiled from the legal profession for a period of at least six months. That would be followed by reinstatement proceeding during which respondent's entire public and private life would be subject to scrutiny by the Grievance Administrator and a hearing panel.

The hearing panel had an opportunity to hear and observe the respondent and the other witnesses including the child's mother and the professionals to whom respondent turned for treatment and counseling. The panel appropriately considered all of the aggravating and mitigating factors in this somewhat unique factual situation. We endorse the panel's conclusion that:

> The facts of this case do not show immoral, coercive or depraved conduct. A lone incident of unexplained physical violence, in which a helpless child was slapped on her face, shows a person who lost control. While this clearly established a need for intervention and change, no lack of fitness to practice law is supported on this record. No client relationship was involved. No dishonesty of any kind has been established. At both the

> criminal stage and the misconduct phase of these proceedings, Respondent has accepted responsibility for what happened, although he does not recall it. He has also already taken steps to protect himself and the public from a continuation or reoccurrence of such conduct by engaged in group therapy and individual counselling. This Panel's order is intended to reinforce the rehabilitation that has already begun. It is our belief, based upon all of the information presented to us, that suspension of Respondent's license to practice law, as the Administrator requests, is not required to achieve this aim. (HP Report 1/13/97 p. 7)

The second prong of the Grievance Administrator's objection focuses on the conditions imposed by the panel. It is argued that "respondent's action cannot be forgotten or overlooked. They evidence an underlying problem which must be addressed." (Grievance Administrator's Brief, p. 3). In considering this argument, we must be careful to avoid blurring the line between the misconduct charged (an isolated incident involving a single slap of a child) and the aggravating/mitigating factors presented to the panel. Respondent is not charged with alcoholism or with having emotional problems or with suffering from personal or professional burnout.

Society meted out a punishment to respondent through the criminal justice system. Civil actions may be available on the child's behalf. Respondent has been sanctioned publicly by his profession in an order which includes carefully considered conditions involving his abstention from the consumption of alcohol. He is to be supervised by a mentoring attorney to assist him in avoiding the personal or professional pressures which may have contributed to the circumstances leading to this unfortunate incident. The discipline imposed by the panel does not overlook respondent's conduct. Those conditions appropriately address any reasonable concerns regarding his future conduct.

The Board has considered the discipline imposed in other cases involving an attorney's criminal conviction, including the following cases cited by the Administrator.

In Grievance Administrator v James Cohen, ADB 147-89 (1990), the Board increased suspension from 119 days to 120 days [then the

length of suspension requiring reinstatement] for respondent's misdemeanor conviction of attempted conspiracy to manufacture, deliver or possess marijuana with intent to manufacture or deliver a controlled substance. Cohen's criminal offense involved an element of planning and intent which is lacking in the instant case. Furthermore, the decision to increase discipline in Cohen was significantly influenced by the fact that he abused his position as an attorney by facilitating the sale of marijuana from one client to another. Respondent's conduct in this case is not comparable.

The Administrator also cites Grievance Administrator v Peter O'Rourke, ADB 93-191-GA (1995) for the proposition that a suspension requiring reinstatement must be imposed. Respondent O'Rourke committed an uninvited, non-consensual touching of the genitals of a fifteen-year old boy in a lockerroom at a private club. In an opinion increasing discipline from a reprimand to a suspension of 180 days, the Board noted a deviation from the "good morals" required by MCR 9.104(3). The instant matter is distinguishable in virtually every significant respect, including the absence of any allegation of sexual motivation.

Similarly, the absence of a sexual component in this case renders it distinguishable from Grievance Administrator v Stephen Duggan, ADB 92-140-JC (1993). In that case, respondent was convicted of the crime of criminal sexual conduct in the 4th degree as the result of allegations brought by an adult female babysitter. The Board increased discipline from a reprimand to a suspension of 120 days [then the minimum period requiring reinstatement proceedings under MCR 9.123(B)].

Other than the fact that they both involved misdemeanor convictions, the alleged sexual misconduct in Duggan has little applicability to the slapping incident in this case. The Board's opinion in Duggan is also subject to two important qualifying factors.

In September 1994, the Michigan Court of Appeals issued an unpublished opinion reversing Duggan's conviction. In accordance with MCR 9.120(C), the reversal of Duggan's conviction resulted in the immediate automatic vacation of his suspension. No further

disciplinary proceedings were instituted. Citations to the Duggan case should include, at a minimum, a notation that respondent Duggan's suspension was ultimately vacated and that he currently enjoys an unblemished disciplinary record.

More importantly, the Board's opinion in Duggan was partially overruled in a subsequent opinion. In Grievance Administrator v Allen Meyers, 93-94-JC (1995), the Board declined to increase a ninety-day suspension for the respondent's conviction of three counts of criminal sexual conduct in the 4th degree. Addressing the argument that its earlier decision in Duggan established a minimum suspension period in such cases, the Board stated:

> The Grievance Administrator correctly reads the dicta in Duggan as requiring a minimum level of discipline. As such, Duggan was erroneously decided. It is well-established (as our concurring colleagues acknowledge below) that attorney misconduct cases are fact specific, and that discipline must, according, be imposed on a case-by-case basis. Therefore, we expressly overrule Duggan's holding to the contrary. (Grievance Administrator v Meyers, supra, p. 2)

Conclusion:

We adopt the hearing panel's conclusion that this case presents a situation in which, for one brief and otherwise unprecedented moment, respondent "lost control" and struck a two-year old child with whom he had been closely acquainted since her birth. Based upon the entire record, including all of the aggravating and mitigating circumstances, the hearing panel concluded the momentary loss of control does not require respondent's suspension from the practice of law. We agree with that conclusion and affirm the panel's decision.

Board Members Elizabeth N. Baker, C. H. Dudley, Barbara B. Gattorn, Albert L. Holtz, Miles A. Hurwitz, Michael R. Kramer, Kenneth L. Lewis, Roger E. Winkelman and Nancy A. Wonch concur in this opinion.