Grievance Administrator,

Petitioner/Appellant,

v

Angelo J. Polizzi, P 34324,

Respondent/Appellee.

95-69-JC

Decided: July 9, 1996

BOARD OPINION

On February 14, 1996, Tri-County Hearing Panel #1 issued its order suspending the respondent's license for thirty months commencing April 1, 1995, the date of the respondent's conviction in the United States District Court for the Eastern District of Michigan in the matter of U. S. v Angelo J. Polizzi, CR 93-90017-01-AA. The Attorney Discipline Board has considered the Grievance Administrator's petition for review seeking increased discipline. The Board has conducted review proceedings in accordance with MCR 9.118 and has considered the record before the panel and concludes that the hearing panel's order should be affirmed.

The Attorney Discipline Board's power to modify the discipline imposed by a hearing panel should be exercised with some discretion. In that respect, the Board's supervisory role over its appointed hearing panels is not unlike the Supreme Court's authority to change the discipline imposed by the Board. In discussing that authority, the Court stated that "We invoke this power only if the disciplinary action imposed by the Grievance Board is inappropriate". Matter of Grimes, 414 Mich 483, 495; 326 NW2d 380 (1982), citing State Bar Grievance Administrator v Posler, 398 Mich 38, 41; 222 NW2d 511 (1974).

The Court's opinion in Grimes, cited for the proposition that the appropriate discipline for felony convictions involving moral turpitude is disbarment, does not establish a bright-line category of offenses for which disbarment is the only appropriate sanction.

Indeed, the Court reiterated in Grimes:

> 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.
>
> > 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; 285 NW2d 277 (1979). Grimes, supra at 326 NW2d 380, 382.

As we said in affirming the thirty-three months imposed for an attorney's felony conviction in Grievance Administrator v LaRene, 94-82-JC (Brd. Opn. 8/24/95), we are not prepared to say that disbarment is the only appropriate sanction for the criminal conduct in a particular case or that the hearing panel's decision was clearly "inappropriate" where the suspension ordered by the panel fell within the range of discipline meted out for similar convictions. [1]

Our inclination to give deference to a hearing panel's assessment of discipline is strengthened where, as in this case, the hearing pane's report includes a thorough discussion of the aggravating and mitigating factors which have been considered and where it is clear that those factors have evidentiary support in the record. The report on discipline in this case is well-reasoned and we specifically adopt the panel's conclusions on the weight to be given to those factors which have been recognized as having an effect on the appropriate level of discipline. (The panel's report is attached as an appendix to this opinion. The panel's conclusions as to discipline appear at pages 7-9.)

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[1] While not the deciding factor in this case, we are certainly aware of our order of December 18, 1995 in Grievance Administrator v David M. Foster, Case # 94-202-JC affirming a thirty-month suspension following the respondent's federal felony conviction. Respondent Foster was convicted of causing the failure to file a currency transaction in violation of 31 U.S.C. 5324(1). However, there is otherwise more than a superficial resemblance between the arrests and convictions of respondents Foster and Polizzi, including the enticements offered to both by the same government agents.

Finally, we agree with the hearing panel's conclusion that In re McWhorter, 449 Mich 130 (1995), Reh. Den. 450 Mich 1208 (1995) does not impose a "rule" requiring the imposition of a suspension equal in duration to the term of respondent's probation. We agree with the panel's analysis of McWhorter's applicability in a discipline case. (Appendix, pp. 15,16.) We also agree that the question of what will constitute a sufficient length of time free of federal supervision to permit the respondent to demonstrate his fitness for reinstatement may be considered during reinstatement proceedings under MCR 9.124.

Board Members George E Bushnell, Jr., C. H. Dudley, M. D., Elaine Fieldman, Barbara B. Gattorn, Miles A. Hurwitz, Michael R. Kramer and Kenneth L. Lewis concur in this opinion.

Board Members Marie Farrell-Donaldson and Albert L. Holtz were absent and did not participate in this decision.

STATE OF MICHIGAN

ATTORNEY DISCIPLINE BOARD

GRIEVANCE ADMINISTRATOR,
Attorney Grievance Commission,
State of Michigan,

Petitioner,

v   Case No. 95-69-JC

ANGELO J. POLIZZI, P34324,

Respondent.
______________________________/

REPORT OF TRI-COUNTY HEARING PANEL NO. 1
MICHIGAN ATTORNEY DISCIPLINE BOARD

At a session of Tri-County Hearing Panel No. ___ held on ____________.

Present: Kenneth J. Logan, Chairman
John E. Johnson, Jr., Member
John J. Ronayne, III, Member

Appearances: Donald D. Campbell, Counsel for Petitioner
F. Philip Colista, Counsel for Respondent

HEARING DATES

The public hearings in this matter were held on October 18, 1995, November 29, 1995 and December 6, 1995. All panel members were present at all hearings.

RECORD

Transmitted with this report are the pleadings and other filed papers, the exhibits admitted into evidence, and the certified transcripts of the proceedings, as follows:

A) PLEADINGS AND OTHER PAPERS

	Pleading	Date Filed/Served
1.	Grievance Administrator's Notice of Filing Judgment of Conviction	April 4, 1995
2.	Attorney Discipline Board Order to Show Cause	May 11, 1995
3.	Notice of Adjournment With Date	May 25, 1995
4.	Respondent's Sanction Memorandum	October 18, 1995
5.	Notice of Hearing	November 9, 1995
6.	Notice of Hearing	December 1, 1995

B) PETITIONER'S EXHIBITS

A. Portions of the transcript of the testimony of Angelo Polizzi in Criminal Action No. 93-CR-90017-AA

B. Portions of the transcript of the testimony of Angelo Polizzi in Criminal Action No. 93-CR-90017-AA

C) RESPONDENT'S EXHIBITS

1. Certified copy of Order Granting Government's Motion to Reduce Sentence, USA v Angelo Polizzi.

INTRODUCTION

On his plea of guilty, Respondent was convicted on April 4, 1995 of an unlawful conspiracy in violation of 18 USC §371. Respondent was initially sentenced to a 60-month term of incarceration followed by a two-year term of "supervised release." He was also fined $20,000. As directed by MCR 9.120, Respondent's license to practice law was automatically suspended effective the date of his conviction.

Pursuant to the Attorney Discipline Board's Order to Show Cause of May 11, 1995, a hearing was held before this panel with respect to the matter of discipline.

I. FINDINGS OF FACT

The facts relating to Respondent's conduct are largely undisputed. By way of background, Respondent graduated from both college and law school with a distinguished academic record. Upon graduation from law school in 1982, he entered the private practice of law. In 1985 he joined the firm with which he was most recently associated and was made a partner in 1991. Throughout his tenure with the firm, and to this day, Respondent was and is highly regarded, both personally and professionally.

It is safe to say that Respondent's social and family life was hardly middle class. Although there were repeated euphemistic references to Respondent's "extended family," it is clear that "organized crime family" could have been accurately substituted. Despite the environment in which he was raised, and to some extent with which he must of necessity continue to have social interaction, Respondent avoided any legal entanglement until the events giving rise to these proceedings.

Respondent's criminal conduct took place in 1989 and 1990. The most insightful description of that conduct and its origins was provided by the testimony of John Chambers, the senior partner of Respondent's law firm. On behalf of the firm, Chambers investigated and monitored the criminal proceedings against Respondent after his indictment in 1993. Among other things, he

reviewed a substantial portion of the extensive recordings of conversations between Respondent and undercover government agents. He also attended criminal proceedings including those in which Respondent testified at the behest of the government.

In 1988, Respondent was introduced to two "businessmen," Thomas DePaulo and Roger Rossi, by Nicholas Vivio. Vivio was a long-time acquaintance of Respondent's father whom Respondent had known since childhood and referred to as an "uncle." DePaulo and Rossi were in fact undercover agents for the Internal Revenue Service. That introduction commenced a year-long courtship of Respondent by the two federal agents, who were apparently quite skilled in their undertaking.

At the conclusion of approximately a year of essentially social contacts, the two agents proposed a clearly criminal enterprise. Respondent accepted the invitation. Using cash funds which Respondent clearly understood to be the proceeds of illegal activity, Respondent orchestrated a small group which employed legitimate businesses to change small bills into larger bills. By the time the enterprise concluded, approximately $1.3 million had been processed. For his efforts, Respondent earned approximately $20,000, which he dutifully reported to the Internal Revenue Service as income.

After his plea of guilty, Respondent testified for the government against a number of other participants in the conspiracy. Despite the fact that those defendants were acquitted, the government was sufficiently satisfied with Respondent's cooperation that it moved for a reduction of Respondent's sentence. In response to the motion, Respondent's sentence was reduced to four years probation.

II. DISCIPLINE

The imposition of discipline does not rise to the level of even an inexact science. Clearly this is a case which warrants revocation or suspension. The ABA Standards for Imposing Lawyer Sanctions, Standard 9.0 provide guidance with respect to the factors which may be considered as aggravating or mitigating circumstances.

There are several potentially aggravating factors. The Respondent's conduct may be characterized as "dishonest." (Id., Std. 9.22(b)). There is also evidence which would support a conclusion that the Respondent's conduct was the product of a "selfish motive" or the prospect of personal gain. That conclusion, while facile, would probably be erroneous. The uncontradicted testimony of the Respondent's psychologist suggests that Respondent's motivations were more subtle and unrelated to the prospect of personal gain. Common sense reinforces this conclusion. Respondent's compensation from the practice of law was considerable and there is nothing to suggest his life style was extravagant. The fact that income tax was paid on the income from the Respondent's illegal activity is inconsistent with selfish motive, as is that fact that Respondent's pre-tax income from his illegal activity was approximately equal to his charitable contributions from the same period. In fact, given the totality of

the circumstances, Respondent's motivation is an enigma and his conduct largely inexplicable.

Also of potential relevance is whether Respondent's conduct constituted a "pattern" or "multiple offenses" (id., Std. 9.22(b) and (c)). This inquiry cuts both ways. On the one hand, there was only one criminal scheme or conspiracy. On the other hand, that conspiracy was of substantial duration and involved numerous discrete transactions.

There are a number of potentially mitigating considerations. Respondent has no prior disciplinary record (id., Std. 9.32(a)). Respondent's motivation (id., Std. 9.32(b)), and "emotional problems" (id., Std. 9.32(c)) have already been discussed. There is nothing which would suggest that his disclosures in these proceedings have been less than "full and free" or his attitude less than "cooperative" (id., Std. 9.32(e)). By analogy, it is relevant that Respondent appears to have cooperated fully with law enforcement authorities. A number of credible witnesses testified to their belief that Respondent's conduct was an aberration and that Respondent was otherwise a person of commendable reputation and character (id., Std. 9.32(g)). Obviously, there has been the "imposition of other penalties and sanctions" (id., Std. 9.32(k)). An analogous consideration is Respondent's uncontradicted testimony that as a result of his cooperation with law enforcement authorities he has to some extent been socially stigmatized and his

relationship with his family impaired. Finally, there is abundant evidence of remorse (id., Std. 9.32 (l)).

Although not specifically identified in the ABA Standards as a mitigating factor, it is in the view of this panel not without relevance that Respondent embarked upon his criminal undertaking not on his own initiative but only after being courted for nearly a year by skilled undercover agents. Similarly, Respondent's criminal conduct did not involve the practice of law in any respect and was of the sort that could have been perpetrated by a lay person.

In light of the foregoing, it is the panel's conclusion that Respondent's license to practice law should be suspended for a period of 30 months, effective April 4, 1995.

A word of caution: nothing in this opinion should be read as justifying or excusing Respondent's conduct or tending to absolve him from responsibility for his conduct. His conduct was seriously wrong and intolerable. On the other hand, this panel is charged by MCR 9.115(J)(3) to consider "all relevant evidence of aggravation or mitigation." It is in the discharge of this obligation that the factors discussed above have been considered.

III. McWHORTER

The Grievance Administrator has argued for disbarment. In the absence of disbarment, the Grievance Administrator argues strenuously that this panel is constrained by In re McWhorter, 449 Mich 130 (1995), reh den 450 Mich 1208 (1995), to impose a suspension equal in duration to the term of Respondent's probation (four years) plus some additional unspecified time. McWhorter does not support the result for which the Grievance Administrator argues.

McWhorter is a reinstatement case involving an attorney whose litany of criminal accomplishments reads like a bad law school exam. His attempt to gain reinstatement produced in the Supreme Court a fragmented set of opinions. Justice Brickley, joined by Justice Mallett, was of the opinion that conduct while "under the supervision of parole authorities"[2] should not be considered in determining if reinstatement is warranted under MCR 9.123(B). Only the petitioner's conduct during an "appreciable time"[3] or a "sufficient time outside the supervision of parole authorities"[4] would support reinstatement. Taking the process a step further,

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[2]449 Mich at 141.

[3]449 Mich at 139.

[4]449 Mich at 141.

Justice Brickley by analogy to MCR 9.123[5] appeared to be of the opinion that in the instance of a disbarred attorney anything less than five years while not under supervision is not the required "sufficient" or "appreciable" time.

Justice Brickley's opinion is fertile ground for speculation. In the first place, it is not clear whether the "five year rule" applies only to McWhorter based upon the facts of that case, or is a rule of universal application. Justice Brickley's approach raises a number of interesting considerations. It clearly creates two species of disbarments: one consisting of cases involving incarceration and/or parole/probation, and the other consisting of those cases which do not. In the former instance, the language of MCR 9.123(D)(1) and (2)[6] would in most instances clearly no longer mean what it says. As a practical matter, MCR 9.123(D)(1) and (2) would hardly ever apply to a lawyer whose disbarment involved criminal activity.

Even within that class which involves criminal activity, interesting questions are raised. A lawyer who was simply

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[5]"(2) An attorney whose license to practice law has been revoked may not file a petition for reinstatement until 5 years have elapsed since revocation of the license."

[6]"(1) An attorney whose license to practice law has been suspended may not file a petition for reinstatement earlier than 56 days before the term of suspension ordered has fully elapsed.

(2) An attorney whose license to practice law has been revoked may not file a petition for reinstatement until 5 years have elapsed since revocation of the license."

incarcerated for two years would be entitled to petition for reinstatement after seven years. A lawyer who was not incarcerated but rather given five years probation would not be eligible for reinstatement for ten years. One wonders if that is an intended result. Even more intriguing would be those cases involving suspension rather than disbarment. In the instance of a suspension, a convenient analogy to MCR 9.123(D)(2) is not available. What then is to be the "sufficient" or "appreciable" time? Justice Brickley offers no guidance, but symmetry might suggest that a petitioner must spend an amount of time outside of supervision equal to the term of the suspension. Again, the approach would create two distinctly different species of suspension.

Although the opinion announces a "five year rule," it is not at all clear what the rule means. As discussed above, Justice Brickley first observed that "five years ... is a sufficient period outside the supervision of parole authorities ... to evaluate his fitness to practice law."[7] Clear enough. Then, however, Justice Brickley describes an entirely different function and purpose of the "five year rule":

> "In accord with this decision, even though five years have elapsed since petitioner's disbarment, we find that he is not eligible for reinstatement and would impose this additional period of time to review his fitness. We are persuaded that this addresses the problem identified

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[7]449 Mich at 142.

> by one commentator: 'The disbarred attorney may file another petition at a later date. In light of this, it would be helpful if the rules provided a minimum spacing between subsequent petitions to prevent a lawyer whose petition is denied from immediately filing another petition.' Martin, Dean & Webster, Michigan Court Rules Practice (3d ed), p 579, author's comment to MCR 9.123." (emphasis added)[8]
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> 449 Mich at 142-143.

If the "five year rule" is nothing more than spacing requirement - a minimum time between successive petitions - it is not even arguably applicable to the instant case.[9] If read and applied only in the second manner described by Justice Brickley, McWhorter was a victim of his own timing. He applied for reinstatement while still subject to parole and therefore clearly could not demonstrate a "sufficient" or "appreciable" time free of the constraint of parole. Applying the "five year rule" in the second sense, he cannot re-apply for five years. If he had, on the other hand, waited a period of time ultimately adjudged "sufficient" or "appreciable" after being released from parole before applying for

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[8]While the author's comment to MCR 9.123 was certainly valid when written, it was not valid at the time McWhorter was decided. Nearly sixteen months prior to that decision, MCR 9.123 was amended in several respects, including the addition of MCR 9.123(D)(3):

> "(3) An attorney whose license to practice law has been revoked or suspended and who has been denied reinstatement may not file a new petition for reinstatement until at least 180 days from the effective date of the most recent hearing panel order granting or denying reinstatement."

[9]As discussed below, Justice Cavanaugh clearly reads the "five year rule" in this second context, "a minimum spacing between subsequent petitions."

reinstatement, the "five year rule," if it is only a "minimum spacing between subsequent petitions,"[10] would have had no application.

It is thus not entirely clear whether the five-year rule" is one rule, or two rules. If it is one rule, it is not clear which rule it is.

The concurring opinions of Justice Riley (Justice Boyle joining) and Justice Weaver are much more straightforward. The distaff members of the Court were simply of the opinion that McWhorter should be permanently disbarred with no opportunity to gain reinstatement -- a hardly remarkable conclusion given McWhorter's criminal career. Justice Riley concurred in the result only, and Justices Riley and Boyle concurred solely because of the "absence of a majority recognizing the proposition that there should be 'permanent' disbarment!"[11]

Justice Cavanaugh apparently reads Justice Brickley's "five year rule" as merely "provid[ing] a minimum spacing between subsequent petitions."[12] He concurred, but noted that he was of the opinion if the Court wanted "to set that minimum spacing [between

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[10]Justice Brickley, Concurring Opinion, 449 Mich at 142.

[11]449 Mich at 144.

[12]449 Mich at 146.

successive petitions] at five years" it should employ its rule making authority.[13]

Justice Levin dissented.

McWhorter might ultimately be viewed as merely another skirmish in the Court's struggle to resolve the "permanent disbarment" issue. Assuming the issue is ultimately resolved, McWhorter could quite possibly be relegated to the category of historical footnote. While it cannot be so categorized today, it nonetheless has no application to this case. McWhorter is clearly a reinstatement case involving a disbarred attorney. This is a discipline matter involving a suspension. The question of Respondent's reinstatement is for another panel at another time. It is not the province of this panel to insinuate itself into that decision. Some other panel, not this panel, will decide what constitutes an "appreciable" or "sufficient" length of time free of supervision so as to permit Respondent to demonstrate that he is entitled to reinstatement.

Practical considerations also dictate that this panel does not project itself into the reinstatement process or permit considerations germane to reinstatement to influence decisions regarding discipline. While Respondent is presently subject to a four-year term of probation, Exhibit 1 indicates that it is not

[13] 449 Mich at 146.

only possible but perhaps likely that his probation will end after one year. Given this contingency, the Grievance Administrator's reading of McWhorter is particularly unappealing.

IV. **SUMMARY OF PRIOR DISCIPLINE**

- NONE -

V. **ITEMIZED STATEMENT OF COSTS**

Attorney Discipline Board	$1,185.00
Attorney Grievance Commission	842.50
Total:	$2,027.50

Kenneth J. Logan, Chairman

John E. Johnson, Jr., Member

John J. Ronayne, III, Member