Grievance Administrator,
State of Michigan
Attorney Grievance Commission

Petitioner/Appellant,

v

Jack Carpenter, P 11640

Respondent/Appellee.

Case No. 93-261-GA

Decided: February 13, 1995

BOARD OPINION

The formal complaint charged that between January 1, 1987 and April 1, 1989, the respondent engaged in multiple acts of illegal sexual contact with a female child who was seven years old when the acts were initiated and nine when they ended. In his answer to the complaint, the respondent admitted the explicit allegations of misconduct, including the charge that his conduct was in violation of MCR 9.104 (1-5); Michigan Rules of Professional Conduct, MRPC 8.4 (a-c) and the Michigan Penal Code MCL 750.520 (c) (criminal sexual conduct in the second degree). Following a separate hearing limited to factors bearing upon the appropriate level of discipline, the hearing panel issued an order suspending the respondent's license to practice law for seven months. The grievance administrator has petitioned for review on the grounds that the nature of the respondent's misconduct warrants a significant increase in discipline. We increase discipline to a suspension of five years.

The essential facts in this case, as recited in the panel's report and the briefs filed by the parties, are not in dispute. For approximately six months, in early 1986, the respondent was romantically involved with a woman who was the mother of two young

children. Although the romantic involvement ended, the respondent remained close friends with the woman and her children. The record reflects that respondent treated the woman and her children as his surrogate family and that he provided financial assistance to them.

In the summer of 1987, when the women's daughter was not quite seven years old, respondent engaged in four to six episodes of inappropriate sexual fondling with the minor child. The respondent testified that he confessed these incidents to this child's mother in the summer of 1987. He further testified that he offered to report his conduct to the county prosecutor but that he was dissuaded by the child's mother. In 1988, the respondent moved to Eugene, Oregon. There was a hiatus in his contacts with the minor child until the spring of 1989 after the child's mother moved her family to Eugene. The respondent testified that he resumed his sexual contact with the child in early 1989 and that it ended in April 1989. He continued to see the child and her family on a regular basis until 1992.

In 1992, the respondent felt compelled to disclose his past conduct to the Department of Social Services in Cheboygan County. A criminal investigation was conducted and the respondent gave a taped interview to a police investigator. In the resulting criminal proceedings, the respondent negotiated a plea agreement under which he plead guilty to one count of criminal sexual conduct in the fourth degree, (a two year misdemeanor) and sentencing was delayed for one year. The agreement further provided that if the respondent met the conditions of probation during a one year period, the charges would be reduced to aggravated assault (a one year misdemeanor), with the provision that if any incarceration was imposed after one year, the period of incarceration would not exceed six months.

At the time the plea agreement was negotiated, civil litigation against the respondent was instituted on behalf of the

child. The respondent accepted the mediation award and he paid the resulting judgment in full.

The respondent testified that he severed his employment with his law firm when he reported his conduct to authorities in April 1992, and that he had not practiced law since the filing of the formal complaint in December 1993.

In addition to the respondent's testimony, the hearing panel received the testimony of the special prosecutor who handled the criminal charges, the police officer who obtained the respondent's statement in the criminal investigation and an attorney (and former judge) who testified to the respondent's reputation as an attorney in the Petoskey area.

The aggravating and mitigating factors considered by the hearing panel are discussed in its report. The panel noted the serious nature of the respondents conduct and stated:

> "Sexual abuse of children is an act which has ramifications for the victim which will last throughout their [sic] entire life. In fact, the various reports of human services professionals which were filed at the hearing by respondent indicate that although these were mild to moderate incidents of sexual abuse, the victim will, in all likelihood, require individual therapy for anywhere from six to eighteen months to two years when she becomes an adult and very well may benefit from marital counseling for one to two years in order to overcome problems she has with forming intimate relationships". (Hearing panel report 3/1/94 page 2-3)

The panel further reported its conclusion that although the respondent had sought therapy, he apparently kept essential information from his counselors for a considerable period and that it was presented not with a single instance of sexual misconduct

but twelve to fifteen acts during a two year period. The panel's report continued:

> "Of perhaps even more importance, the report of Dr. Barbara Jones-Smith indicates that respondent, although he may be low-risk of repeating his acts, should not be left unsupervised with young children under the age of 10. The District Court Order that was entered in the criminal case in this matter restricts his contact with children to those over the age of 16. The conclusion that is made here is that those people who are more intimately involved in the details of the criminal case believe that the respondent is not someone in whom you can repose trust to make proper decisions regarding his relationships with children" (Hearing panel report page 4)

In mitigation, the hearing panel pointed to testimony that respondent had been an attorney of considerable talent for many ears and had an exemplary record of providing excellent legal services for many years. The panel also was impressed by the fact that respondent had voluntarily reported his crimes and attempted to right the wrongs he had committed by paying money to and on behalf of his victims. Finally, the panel was impressed with the fact that respondent's offenses did not arise in the context of his legal practice.

We do not see how any of this mitigates against the fact that respondent sexually assaulted a seven year old child and continued the assaults until she was nine. The written psychological assessment dated August 9, 1992 which was offered to the hearing panel as an exhibit by the respondent concluded that the respondent should not be in the presence of female children under the age of ten without the supervision of other adults. That respondent has been an able lawyer and paid damages to his victims has no direct bearing on whether his sexual crimes disqualify him from sustaining the trust which is inherent in the privilege of practicing law.

The fact that respondent should not be left alone with young children certainly does.

Neither the Attorney Discipline Board nor the Michigan Supreme Court has issued an opinion which addresses the appropriate discipline for conduct amounting to criminal sexual conduct in the second degree. However, the rule in attorney discipline cases is that each case must be decided on its own facts, Matter of Grimes, 414 Mich 483; 326 NW2d 380, (1981) and this case is no exception.

Within the last several years, the licenses of three Michigan Attorneys have been revoked following their felony convictions of criminal sexual conduct, first degree. (See Matter of Dale F. Glabach, ADB Case No. 91-38-JC; Matter of James J. Fehrman, Case No. 92-148-JC; and Matter of Hugo J. Mack, Case No. 93-80-JC.) However, those cases involve criminal convictions for forcible rape and all three attorneys were imprisoned at the time discipline was imposed. In two cases, the attorney consented to the entry of an Order of Revocation. In the third matter, the respondent did not participate in the proceedings. These cases do not assist our analysis in this case.

Some guidance is provided by cases from other jurisdictions involving convictions for improper sexual conduct with a minor. In Matter of Herman 108 NJ 66, 527 A2d 868 (1987) the Supreme Court of New Jersey imposed a suspension of three years, with conditions of reinstatement including continued psychiatric counseling and a report by a psychiatrist that the respondent would be unlikely to engage again in such conduct.

The Supreme Court of Florida reached the same result, suspension of three years, in a case involving an attorney who pled nolo contendere to the crime of attempted sexual activity with an older child (between the ages of twelve and eighteen) with whom he stood in a position of custodial authority but where mitigating

circumstances were present. <u>Florida Bar v Corbin</u> 540 Southern 2d 105 (FLA 1989). We also note the indefinite suspension imposed by the Supreme Court of Kansas in <u>Matter of Wilson</u> 832 P2d 347 (Kan 1992) in which the court found that the respondent's conviction of two counts of indecent liberties with a child, a class C felony, constituted commission of a criminal act reflecting adversely on his trustworthiness and fitness to practice law.

To some degree, the facts advanced in and the expert's testimony of the lasting affect of the injury to respondent's victim are substantially similar to those recited by the court in the <u>Matter of Herman supra.</u> There the New Jersey Supreme Court ruled that the mitigation was outweighed by the aggravating effect of the damage to the victim:

> "This was a serious crime of moral turpitude involving a child of tender years. The young victim required weeks of counseling, but a traumatic event such as this will long leave its scar on the victim. Childhood should be a time of trust and happiness, not one of abuse by an adult seeking sexual gratification. <u>Matter of Herman</u>, 527 A2d 868, 870.

As indicated above, cases involving the discipline of attorneys are necessarily fact sensitive and are difficult to compare beyond a superficial extent. See <u>Grimes</u>, <u>supra</u>. Moreover, while the Board must determine whether the panel's factual findings have adequate evidentiary support, the Board possesses a somewhat greater measure of discretion with regard to its ultimate decision. <u>In re Daggs</u>, 411 Mich 304, 318-319 (1981); <u>Grievance Administrator v August</u>, 438 Mich 296, 304 (1991).

Therefore, upon review of the facts in this case, we conclude that although respondent, after a significant delay, attempted to mitigate the results of his misconduct, that misconduct warrants a suspension of his license to practice law in Michigan for a period of five years.

It is axiomatic that discipline for misconduct is not intended as punishment for wrongdoing, but is imposed for the protection of the public, the court and the legal profession. See MCR 9.105. In this case, punishment for respondent's criminal conduct has been meted out by the criminal justice system in the respondent's community and he has paid a debt to the victim of his acts as determined in the civil court.

This is not a case where respondent has "paid enough" and should therefore be treated more leniently in the disciplinary forum. His actions had criminal, civil and ethical consequences each of which must be addressed separately. We may be mindful that respondent stepped up to his criminal and civil responsibilities but that does not necessarily mean that we should lessen the disciplinary consequences of his conduct.

Given the nature of the respondent's misconduct, we are not prepared to say whether any discipline imposed in this case is likely to act as an effective deterrent to such conduct in the future, either by the respondent or by other attorneys who may be prone to such activities. However, that is not our task. We are charged with the responsibility of meting out discipline which affords protection to the public, the courts and the legal profession. The dissent indicates a belief that this respondent is not "dangerous". We do not need (and are not competent) to determine whether respondent is a danger to others in the criminal sexual misconduct sense. The respondent has endangered the public's trust in the legal profession and its members. Allowing this very serious misconduct to result in anything less than very serious discipline would further erode that trust.

We have focused upon the duty entrusted to the Board by the Supreme Court to take action which may be required to safeguard public confidence in the legal profession. This rationale for the imposition of discipline for failure to maintain personal integrity

is well stated in the American Bar Association's Standards for Imposing Lawyer Sanctions, Sec. 5.0:

> "The most fundamental duty which a lawyer owes the public is the duty to maintain the standards of personal integrity upon which the community relies. The public expects the lawyer to be honest and to abide by the law; public confidence in the integrity of officers of the court is undermined when lawyers engage in illegal conduct."

This rationale resonates in the statement of general principles found in MCR 9.103(A):

> "The license to practice law in Michigan is, among other things, a continuing proclamation by the Supreme Court that the holder is fit to be entrusted with professional and judicial matters and to aid in the administration of justice as an attorney and counselor and as an officer of the court."

Our decision to increase discipline to a suspension of five years does not constitute a statement that this is the only appropriate level discipline in every case involving improper sexual activity. We have determined, however, that under the facts of this case, public confidence in the legal profession and, ultimately, the legal system as a whole, will be irreparably harmed by discipline less than that which we now impose. The respondent's particularly selfish and harmful conduct warrants a suspension of five years and until he has undergone the scrutiny of reinstatement proceedings conducted under MCR 9.123(B) and MCR 9.124.

Board Members John F Burns, George E Bushnell, Jr., C Beth DunCombe, Linda S Hotchkiss, M.D. and Miles A Hurwitz
Board Member Barbara B Gattorn did not participate.

DISSENTING OPINION

Of: Marie Farrell-Donaldson, Elaine Fieldman and Albert L Holtz.

We dissent from the Board's decision to increase discipline to a five-year suspension. The Board's decision is more severe than Respondent's criminal punishment and more severe than the amount of discipline which the Grievance Administrator requested.

I.

Respondent admitted that he had sexual contact during a two-year period with a child under the age of ten. The sexual contacts included intermittent instances where he touched her on the buttocks and four or five instances where she touched his penis. These instances of sexual contact occurred between 1987 and 1989. The Respondent received therapy and turned himself in to the authorities in 1992.

Respondent had been romantically involved with the child's mother before the incidents began. After the romantic relationship ended, Respondent remained friends with and helped support the family.

In the summer of 1987, Respondent told the child's mother about the incidents and said that he should report himself. The mother insisted that Respondent not report the incidents because her ex-husband (the child's father) "would kill them."

In 1989, after Respondent had been in therapy, he ceased the sexual touchings, but continued to see the child four to five times per week. At that time, Respondent told the child that the touchings were wrong, it was his fault (not hers), and they could not touch each other again.

Three years later (without any further incidents of sexual touchings), Respondent reported himself to the authorities. Shortly before he turned himself in, Respondent (through therapy) came to the conclusion that the child would probably need therapy because of the incidents. He told the mother that the child would need therapy and set aside money for the child's treatment and college education. The mother continued to insist that Respondent not report himself. [1]

Respondent was charged criminally for his conduct and offered his plea of guilty to one count of criminal sexual conduct in the fourth degree. Under the terms of a delayed sentence order entered June 21, 1993, those charges would be reduced to aggravated assault if Respondent met certain conditions of probation during the one-year period. The plea agreement provided that incarceration (if ordered, but not required) would not exceed six months.

On behalf of her daughter, the mother sued Respondent civilly. Respondent insisted that the child not be deposed (against the advice of counsel) because he did not want the child to undergo any further ordeal. Respondent accepted the mediation award and paid the judgment in full. In addition, Respondent has agreed to pay for therapy for the child, the child's college education and therapy for the mother.

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[1] Respondent testified that several things prompted him to report the incidents:

1) Through therapy he learned that he had been a battered child and wanted to protect the child.

2) Through therapy he realized that he should report himself.

3) He noticed bruises on the younger sibling and suspected that the mother's boyfriend (the father of the younger child) had been abusing her.

Respondent severed employment with his law firm when he reported his conduct to the authorities (April, 1992) and has not practiced law since the filing of the formal complaint in this action (December, 1993).

The hearing panel found misconduct and ordered a suspension of seven months. The panel weighed the various factors and stated:

> The testimony at the hearing established clearly that Respondent has been an attorney of considerable talent for many years. He has an exemplary record, providing excellent legal services to his clients. The letters of recommendation from the various judges in northwest Michigan indicate that Respondent has made a substantial contribution to the practice of law in northern Michigan.
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> It does not need to be restated here that the criminal offense for which Respondent has been convicted is a most serious one. Sexual abuse of children is an act which has ramifications for the victim which will last throughout their entire life. In fact, the various reports of human services professionals which were filed at the hearing by Respondent indicate that although these were mild to moderate incidents of sexual abuse, the victim will, in all likelihood, require individual therapy for anywhere from six (6) to eighteen (18) months to two (2) years when she becomes an adult and very well may benefit from marital counseling for 1-2 years in order to overcome problems she has with forming intimate relationships.
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> It is also clearly evident from the evidence produced at the hearing that this is a most unusual case. Rarely, if ever, do sex offenders come forward and voluntarily report their criminal behavior. Very rarely do offenders engage in the activities in which Respondent here has engaged, in his efforts to right the wrongs he has committed. It must be noted in mitigation that Respondent has paid considerable sums to or for the benefit of the victim and her immediate family. The Respondent has also remained supportive of the

> family, or attempted to remain supportive of the family, in more positive ways. He has also gone to great lengths to obtain the necessary counseling and treatment for his own particular problems.
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> It should also be noted that the offenses for which the Respondent is brought here occurred in situations which were apparently unrelated to his practice of law. Neither the victim nor her mother were his clients. His relationship with the victim and her family did not arise out of Respondent's role as an attorney.

II.

Recently, the Attorney Discipline Board has been faced with several cases involving lawyers who have engaged in offensive conduct not directly related to the practice of law. We recognize that such conduct may subject a lawyer to discipline if it "reflects adversely on the lawyers honesty, trustworthiness, or fitness as a lawyer." MCR 9.104(3)(5); MRPC 8.4.[2] There is no claim that Respondent is not competent. And, his conduct was not related to honesty or trustworthiness. The questions thus become what is meant by the phrase "fitness as a lawyer," and does the phrase include Respondent's conduct. There are no Michigan cases directly on point. The argument is that because Respondent has committed serious and offensive acts, he is unfit to be a lawyer. We would welcome guidance on the important questions of what is meant by the phrase "fitness as a lawyer," and assuming (which we do) that Respondent's conduct comes within the definition, how to assess discipline in such situations.

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[2] In this case, the grievance administrator did not proceed under MCR 9.120, which permits the grievance administrator to file a formal complaint based on a conviction of a criminal offense. Rather, the grievance administrator chose to litigate the conduct itself rather than submit the conviction of a criminal offense as evidence of misconduct.

The court rules require that we be careful to measure the amount of discipline against the purpose of discipline--not "as punishment for wrong-dong, but for the protection of the public, the courts, and the legal profession." MCR 9.105.

The criminal court accepted a plea agreement which could result in Respondent's conviction for aggravated assault (a one-year misdemeanor) and a sentence calling for little or no incarceration. In civil proceedings, the parties agreed that payment of damages of $70,000 was an appropriate resolution. To be sure, neither the criminal nor civil courts can rectify the harm to the child or place the child in a position as if the conduct had never happened. Nevertheless, our imperfect civil and criminal justice systems attempt to remedy whatever harm has been done. In this case, Respondent himself attempted to remedy the harm by providing funds for the child's therapy and coming forward to report his conduct.

The attorney discipline system is not meant to remedy the harm to the child in this case or to correct any perceived leniency in the criminal or civil result. Part of our function is to protect the public from dangerous lawyers. We leave it to the criminal justice system to protect the public from dangerous persons. There is no evidence that Respondent is a dangerous lawyer. [3] While the integrity of the profession may require imposition of a significant discipline in this case or other cases where lawyers commit offensive or criminal acts not related to the practice of law, this case does not warrant a five year suspension, which is almost the equivalent of revocation, the most severe discipline.

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[3] The evidence further shows that respondent is not now a dangerous person (assuming that is a relevant question outside of the criminal justice system). To the contrary, the evidence is unrefuted that the conduct ceased in 1989 and there were not further incidents of sexual contact, although respondent continued to see the child.

We do not suggest (as the majority states) that Respondent's discipline should be reduced because he has "paid enough." To the contrary, we find that Respondent's conduct does reflect on his fitness as a lawyer and we would increase discipline. By the same token however, Respondent's discipline should not be increased because some may believe he has not paid enough.

In determining the amount of discipline, the Board has traditionally considered mitigating factors.[4] This case presents significant mitigating factors, including Respondent's exemplary professional record, self-reporting, total cooperation, and treatment.

During argument, the Grievance Administrator, a former Wayne County assistant prosecuting attorney and former Recorder's Court judge, recognized that there was significant mitigation in this case and said:

> Quite frankly there are substantial mitigating factors in this case that would mitigate against revocation. We do accept that there are substantial mitigating factors here.
>
> This is an unusual case in that he did self-report; that he has made restitution; that he has shown remorse. There are substantial mitigating factors, but likewise there are substantial aggravating factors.

Transcript of oral argument before the Attorney Discipline Board at p 2-3 (emphasis added).

When asked directly about mitigation, the assistant grievance administrator listed the following evidence:

1) Respondent reported his actions--there was no investigation going on at the time.

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[4] Apart from the offense itself, there are no aggravating factors.

2) Respondent voluntarily entered treatment.

3) Respondent made a settlement in a civil suit and did not put the child through unnecessary trauma in regard to that suit.

4) Respondent has shown remorse.

Counsel for the grievance administrator said that Respondent is "entitled to substantial mitigation" and said that in his experience as "a [Wayne County] prosecutor and with numerous sexual cases, I don't think that I have quite frankly ever seen the instances where the . . . perpetrator has come forth this far" (Transcript of oral argument before the Attorney Discipline Board at pp 7-8).

In considering all of the mitigating and aggravating factors, the Grievance Administrator recommended a suspension of three years and indicated that revocation would be inappropriate.

Despite the criminal court's finding, the panel's imposition of a seven-month suspension, and the Grievance Administrator's urging of a three-year suspension, this Board has increased discipline to a five-year suspension. The Board has rejected the evidence of mitigation, submitted by Respondent and recognized by the Grievance Administrator, without stating what else Respondent could have done.[5]

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[5] The majority rejects the evidence of mitigation because it does not diminish the fact that Respondent sexually assaulted a child. The majority then concludes that because a psychologist opined that although Respondent is a low risk, he should not be left unsupervised with children under the age of ten, he is "disqualified . . . from sustaining the trust which is inherent in the practice of law." The trust associated with the practice of law primarily involves things such as maintaining client confidences, being candid with clients and tribunals, safekeeping client property and acting in the interest of clients. The practice of law does not typically involve being left alone with young children. This Board has frequently imposed discipline of less than five years where lawyers have breached "trusts"

While Respondent's conduct is offensive and serious, we (as well as the Grievance Administrator) do not believe that a five-year suspension is appropriate and recognize the substantial mitigation presented. Accordingly, we dissent from the imposition of a five-year suspension and would order a suspension somewhere between the seven months ordered by the panel and three years urged by the Grievance Administrator.

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directly related to the practice of law (e.g., misappropriation cases). In these cases, the mitigating evidence (if any) does not diminish the fact that the respondent misappropriated client funds, but the mitigating evidence is not rejected for that reason.