Grievance Administrator,
State of Michigan
Attorney Grievance Commission,

Petitioner/Appellant,

v

Stephen D. Duggan, P 32930,

Respondent/Appellee.

Case No. 92-140-JC

Issued: July 19, 1993

BOARD OPINION

The respondent, an attorney with an otherwise unblemished record since his admission to the bar in Michigan in 1981, was convicted by a jury in Oakland County Circuit Court of the crime of criminal sexual conduct in the fourth degree in violation of MCL 750.520(E)(1)(A). The criminal offense for which the respondent was convicted is a misdemeanor carrying a maximum sentence of two years imprisonment. The respondent was sentenced to two years probation under terms which include 100 hours of community service and psychological counseling.

Disciplinary proceedings were instituted with the filing of a Judgment of Conviction in accordance with MCR 9.120(B)(3). After consideration of the mitigating evidence consisting of testimony from several former associates and a circuit judge regarding the respondent's personal and professional reputation, the hearing panel ordered that the respondent be reprimanded. A petition for review has been filed by the Grievance Administrator who argues that the nature of the respondent's criminal conduct warrants a suspension of at least 120 days. We agree. The respondent's license to practice law shall be suspended for a period of 120 days and until the respondent has established his fitness to resume the practice of law to the satisfaction of a panel, the Board or the Supreme Court as the result of the reinstatement proceedings described in MCR 9.123(B) and MCR 9.124.

The suspension of the respondent's license to practice law in Michigan shall be stayed, however, while the respondent's conviction is pending before the Michigan Court of Appeals. In the event the Court of Appeals reverses the respondent's conviction, the order of suspension issued by the Board will be vacated as required by MCR 9.120(C). Upon entry of an order by the Court of Appeals affirming the respondent's conviction, the suspension of the respondent's license to practice law shall become effective twenty-one days after entry of the Court's order.

The disciplinary proceedings in this case are based entirely upon a judgment of sentence entered by Oakland County Circuit Court Judge Alice Gilbert on April 23, 1992, showing that the respondent was found guilty by a jury of the crime of criminal sexual conduct in the fourth degree. The judgment of sentence filed by the Grievance Administrator was accompanied by a copy of the information filed by the Oakland County Prosecutor on February 24, 1989 which alleges that on January 10, 1989, the respondent engaged in sexual contact with another person, using force or coercion to accomplish the sexual contact. Other than these two documents, the record in this case is devoid of any

evidence tending to cast light upon the age of the victim, her relationship, if any, to the respondent, the nature of the "force or coercion" referred to in the information, or any other circumstance surrounding the conduct which led to the respondent's conviction. (Information of that nature is provided in the respondent's brief in opposition to the petition for review. That information, which does not appear in the record below, has not been considered by the Board)

Although the respondent explained to the hearing panel that he denied guilt in the criminal proceedings and has appealed his conviction, the respondent concedes that a certified copy of the Judgment of Conviction provides an adequate basis for the imposition of professional discipline. He argues, however, that the reprimand imposed by the panel is appropriate under the circumstances.

In support of that position, the respondent has cited to the panel and to the Board a number of prior discipline cases in which reprimands were imposed. Nine cases in particular are cited in which an attorney's misdemeanor conviction for offenses including possession of a controlled substance, assault and battery and possession of usurious loan records, resulted in a reprimand.

As a general rule, strict reliance upon the level of discipline imposed in other cases is inappropriate. The Supreme Court has warned:

> "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 the limited and superficial extent. Cases of this type generally must stand on their own facts.'" State Bar Grievance Administrator v DelRio, 407 Mich 336-350; 285 NW2d 277 (1977)
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> Matter of Grimes, 414 Mich 483; 326 NW2d 380, 382 (1982).

The reprimand cases cited by the respondent do not include a case involving the specific crime for which the respondent stands convicted. The Board is urged to consider them, however, on the grounds that most of them have elements which reflected adversely on the lawyer's fitness to practice law in contrast to the respondent's conviction which, it is alleged, does not involve elements of dishonesty, fraud, deceit, misrepresentation or lack of trustworthiness and therefore does not implicate his fitness to practice law.

Following the Supreme Court's admonition, we agree that the reprimand cases cited by the respondent are comparable only to a very limited extent. We specifically reject the argument that because some misdemeanor convictions have resulted in reprimands a benchmark has been established for future cases involving misdemeanors. Such a policy would, over time, result in a "lowest common denominator" system for imposing discipline regardless of the unique factors presented in each case. The difficulty in comparing this case to other matters resulting in reprimands is underscored by the fact that the respondent was convicted of a high misdemeanor carrying a potential penalty of two years imprisonment while the cited cases do not include high misdemeanors or cases involving criminal sexual conduct.

More importantly, however, we are not persuaded that the conviction in this case does not call the respondent's fitness to practice law into question. Without any information in the record regarding the precise nature of the acts which resulted in respondent's conviction, we are left to consider whether an attorney convicted of criminal conduct involving the use of force or coercion to accomplish sexual conduct has demonstrated a lack of those personal qualities essential to a fitness to practice law. In short, criminal sexual conduct involving the use of force or coercion can and must be described as a crime reflecting upon those fundamental traits described as one's "character". In that respect, two cases cited by the Grievance Administrator are particularly relevant.

> "Membership in the bar is a privilege burdened with conditions. A fair private and professional character is one of them. Compliance with that condition is essential at the moment of admission; but it is equally essential afterwards". [Citations omitted]. "Whenever the condition is broken, the privilege is lost." Matter of Rouss, 221 NY 81; 116 NE 782 (1917) [Cardozo, J.]
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> "The bar is a noble calling. One who becomes a member of the legal profession is not embarking on a career in trade. Rather, he or she is enlisting as a participant in the administration of justice. . .Membership in our honorable profession is a privilege which places special burdens upon those choosing to pursue it. . . their character must be not only without stain but without suspicion. . . Lawyers stand as a shield. . .in defense of right and to ward off wrong. From a profession charged with such responsibilities, there must be exacted those qualities of truthspeaking, of a high sense of honor, of granite discrection, of the strictess observance of fiduciary responsibility, that have throughout the centuries been compendiously described as 'moral character'." Matter of Shillaire, 549 AT2d 336, 337 (DC App 1988) [Citations omitted]

The Board has ruled in previous cases that there are some types of misconduct which, by their nature, require suspension of sufficient length to trigger the reinstatement proceedings described in MCR 9.123(B) and MCR 9.124. The Board has ruled, for example, that notwithstanding significant mitigating factors, an attorney's deliberate misrepresentation to a client regarding the status of a case required an increase in discipline from a thirty-day suspension to a 120-day suspension to insure that reinstatement should be conditioned upon an affirmative showing of those criteria listed in MCR 9.123(B). Matter of Ann Beisch, DP 122/85 Brd. Opn. (2/8/88). We believe that the criminal conduct in this case, by its nature, has sufficiently called the respondent's "moral character" into question that reinstatement proceedings are required.

Board Members John F. Burns, Elaine Fieldman, Linda S. Hotchkiss, M.D. and Miles Hurwitz concur.

Board Member George E. Bushnell, Jr. concurs in the Board's opinion but would increase discipline to a suspension of 180 days.

Board Member Theodore P. Zegouras would increase discipline to a suspension of thirty days.

Board Member C. Beth DunCombe did not participate in this decision.