GRIEVANCE ADMINISTRATOR,
Petitioner/Appellant,

v

JAMES M. COHEN, P-12017,
Respondent/Appellee.

ADB 147-89

Decided: July 30, 1990

MAJORITY BOARD OPINION

The respondent, James M. Cohen, offered a plea of no contest in the Macomb county Circuit Court to the high misdemeanor of attempted conspiracy to deliver a controlled substance (marijuana). In subsequent disciplinary proceedings, the respondent admitted that his criminal conviction constituted professional misconduct as charged in the Grievance Administrator's formal complaint and the hearing panel focused its attention upon the mitigating and aggravating factors offered by the parties. The hearing panel ordered that the respondent's license to practice law be suspended for 119 days. A petition for review has been filed by the asking the Attorney Discipline Board to consider whether a suspension of 119 days is appropriate in light of the nature of the respondent's admitted misconduct. It is the Board's conclusion that the hearing panel order of discipline should be modified and that the respondent's license to practice law should be suspended for 120 days and until he has established his fitness to practice law in reinstatement proceedings conducted in accordance with MCR 9.124.

The respondent was charged with the felony of conspiracy to manufacture, deliver or possess marijuana with the intent to deliver or manufacture that controlled substance. The terms of the respondent's plea agreement allowing him to enter a plea of no contest to the misdemeanor charge of attempted conspiracy is set forth in the record before the panel. Upon acceptance of his plea, the respondent was sentenced to two years probation with the first three months served on an electronic tether program. The respondent was ordered to pay a fine of $100 and costs of $4000 and was ordered to engage in 400 hours of community service.

The Grievance Administrator does not challenge the hearing panel's findings with regard to the respondent's conduct underlying his criminal conviction and the hearing panel's factual findings are therefore adopted in full. Briefly summarized, the respondent testified that in 1985 his client, Marvin Friedland, began acting "irrationally". This client's harassing behavior eventually included at least two threats against the respondent and his family if the respondent did not help Friedland sell a truckload of marijuana. The panel concluded that one of the threats occurred in respondent's office where Friedland pointed a gun at the respondent. The respondent agreed to participate in a conference call with Friedland and another client in order to facilitate the sale of marijuana. The respondent testified that he did not contact the police because of his fear of Friedland. The panel concluded that the respondent did not receive, nor was he promised, financial gain from the intended transaction. There is no evidence in the record below that the respondent has ever used or possessed illegal drugs.

Upon its consideration of the testimony of Mr. Cohen and his character witnesses, the panel concluded that no aggravating factors had been presented. In mitigation, the panel cited the respondent's prior unblemished record during seventeen and one-half years of practice, his participation in the transactions as a facilitator rather then as a principal, the lack of financial inducement or benefit and his apparent remorse.

The Attorney Discipline Board does not lightly undertake the modification of a discipline order fashioned by a hearing panel. Those decisions, which are based upon the hearing panel's unique opportunity to observe the respondent's demeanor and to make assessments of his or her character, should always be given appropriate deference. However, the Board has also recognized that its exposure to a broad range of cases puts it in a position to attempt to assure, to the extent possible, reasonable uniformity among the numerous volunteer hearing panels. "The Board provides an opportunity for respondents, complainants, and the Grievance Commission to receive at least a second stage of consideration." Matter of Robert A. Grimes, #35939-A (Brd. Opn. p. 118) (1981), [discipline modified by the Supreme Court, Matter of Grimes, 414 Mich 483 (1982)].

With this case, the Board is presented with an opportunity to consider whether any guidelines may be promulgated in cases involving an attorney's participation in the distribution of controlled substances. Under the circumstances, we do not believe that a suspension allowing for automatic reinstatement sends an appropriate message to the public, the courts or members of the legal profession.

The Grievance Administrator has filed a brief in support of her petition for review citing eleven discipline cases in Michigan since 1978 involving attorneys convicted of drug-related crimes. In five cases, the attorney's license was revoked. In the other cases, suspension were imposed ranging from six months to five years. The respondent, however, notes that those cases all involved felony convictions and, he argues, were therefore not comparable to his high misdemeanor offense. The respondent, in turn, has cited cases resulting in suspensions of 119 days or less for attorneys convicted of non drug-related felonies or drug-related misdemeanor convictions.

Looking first at the cases cited by the Administrator, we agree with the respondent's position that the distinction between felony and misdemeanor convictions has some relevance. Our Supreme Court has distinguished felonious conduct by an attorney from lesser forms of misconduct by its promulgation of MCR 9.120(A)(1) which directs that an attorney convicted of a felony is automatically suspended pending further disciplinary proceedings. See also Matter of Grimes, 414 Mich 483 (1982) in which an attorney's willful evasion of income tax was found to constitute "felonious conduct" involving moral turpitude. (Disbarment was ordered in that case.)

The cases cited by the respondent include cases based on felony convictions for malicious destruction of property and vehicular manslaughter. We believe that it is the drug-related offenses which are more immediately relevant to our analysis in this case. We turn our attention, therefore, to four discipline orders issued since 1985 involving an attorney's conviction of a drug-related misdemeanor.

In Matter of Wendell N. Davis, Jr., DP 171/84, the respondent was reprimanded by the Muskegon Hearing Panel based upon evidence that he entered a plea of guilty to the charge of possession of marijuana. The hearing panel considered the mitigating effect of the respondent's prior unblemished record and evidence of his remorse and rehabilitation. The panel's order was not appealed to the Attorney Discipline Board by either party and the level of discipline was not considered by the Attorney Discipline Board.

In Matter of James W. Daly, ADB 124-88, the Grievance Administrator and the respondent entered into a consent order suspended respondent's license for 120 days effective July 7, 1988 as a resolution of a complaint charging acts of negligence and failure to answer a Request for Investigation. Although separate charges were not filed with the Board resulting from the respondent's misdemeanor conviction for possession of marijuana, the stipulation for consent order of discipline expressed the understanding of the parties that the consent discipline would encompass any disciplinary charges resulting from that conviction.

In another consent discipline matter, Matter of Douglas R. Shapiro, ADB 236-88 (6/6/89) the Grievance Administrator and the respondent stipulated to the entry of a reprimand following the respondent's conviction of the offense of operating a vehicle under the influence of a controlled substance and the respondent plea of guilty to the charge of possession of a controlled substance (cocaine) less than fifty grams with eventual dismissal of that charge under a delayed-sentencing program. The stipulations for consent discipline in Daly and Shapiro were each approved by the Attorney Grievance Commission and a hearing panel and neither matter was considered by the Board.

The only recent case considered by the Attorney Discipline Board involving a drug-related misdemeanor was Matter of Mark L. Davis, ADB 47-89 (3/22/90). Respondent was convicted in the State of Colorado of the misdemeanor of possession of less than eight ounces of marijuana. In disciplinary proceedings in that state, the Supreme Court of Colorado suspended his license for a period of one year. Reciprocal discipline proceedings in accordance with MCR 9.104 were then instituted in Michigan resulting in a hearing panel's decision to imposed a suspension of 119 days. In an opinion issued March 22, 1990, the Board affirmed the panel's decision. It should be noted, however, that the Michigan proceedings were not directly based upon the respondent's criminal conviction but were based upon the reciprocal provisions of MCR 9.104. In that case, the hearing panel and Board wrestled with the question of whether or not a one-year suspension in Michigan would be "identical" to a one-year suspension in Colorado in light of the different reinstatement standards in the two jurisdictions. Although a majority of the Board concluded that the panel had properly applied the reciprocal discipline rule, we noted:

> We hasten to emphasize that there is considerable merit to the Grievance Administrator's argument that the nature of the respondent's misconduct could support a more severe form of discipline. If the respondent had been subject to discipline in Michigan solely on the basis of his drug-related conviction, it is entirely possible that this Board might have imposed a longer suspension . . . Our decision to affirm the hearing panel's action in

> this case should not be construed as a decision to set a precedent in future cases involving attorneys found to have participated in the distribution of an illegal drug."

Matter of Mark L. Davis, supra. (Members Burns, Gurwin and Harrison concurring in the result; Member Zegouras would have increased discipline to a suspension of one year.)

As noted above, a distinction has been drawn in this juris-diction between disciplinary proceedings resulting from misdemeanor convictions and those resulting from felonious conduct. We are not convinced, however, that that distinction should exclude other important factors. We note, for example, that the Standards for Imposing Lawyer Sanctions compiled by the American Bar Association's Joint Committee of Professional Sanctions and approved by the ABA House of Delegates directs that imposition of a sanction in cases involving commission of a criminal act should include consideration of whether the criminal conduct "reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." (Standards for Imposing Lawyer Sanctions, 5.1.) Those Standards suggest that, absent aggravating or mitigating circum-stances, disbarment is generally appropriate when:

> 5.11(a) "A lawyer engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution or importation of controlled substances." (Emphasis added.)

We agree that the seriousness of criminal conduct may be defined by the elements of the crime rather than by a distinction between felonies and misdemeanors.

We have carefully considered the whole record in this case and believe that the hearing panel properly weighed the mitigating effect of the respondent's prior unblemished record and the character testimony given on his behalf. In our consideration of the record and our observation of the respondent, we are impressed with his sincerity and remorse and we have considered the sentence imposed in the criminal matter.

Nevertheless, we are confronted with the inescapable fact that the respondent was not only convicted of a crime involving the distribution of an illegal substance but that he abused his position as an attorney by facilitating the sale of marijuana from one client to another client. A lawyer, as an officer of the court, has certain responsibilities to society and to the individuals he or she is called upon to prosecute or defend in cases involving the sale or possession of drugs. It is in absolute contravention of those duties that a lawyer would allow himself or herself to become a participant in a scheme to assist the flow of illegal drugs.

It is this factor, the complete incompatibility between an attorney's duties to uphold the law and participation, whether by threats or otherwise, in a plan to subvert the law, that persuades us that discipline in this case must be increased from 119 days to 120 days. That increase of one day will subject the respondent to the reinstatement requirements of MCR 9.123(B) and MCR

9.124 and he will have the burden of establishing his eligibility for reinstatement by clear and convincing evidence.

The standards enumerated in MCR 9.123(B) include demonstration that the suspended attorney has a proper understanding of and attitude toward the standards that are imposed on members of the bar and that he or she can safely be recommended to the public, the courts and the legal profession as a person fit to aid in the administration of justice as a member of the bar and as an officer of the court. We believe that such reinstatement proceedings are appropriate in this case.

Regardless of our sympathy for Mr. Cohen, we increase discipline in this case not for the purpose of punishing him but in recognition of the principle that the purpose of discipline--protection of the public, the courts and the legal profession--may at times be best achieved through the deterrent effect of punishment and that "protection" and "punishment" are not irreconcilable concepts under the rules governing our discipline system. Matter of Grimes, supra.

John F. Burns, Hon. Martin M. Doctoroff, Remona A. Green, Robert S. Harrison and Linda S. Hotchkiss, M.D.

DISSENTING OPINION

Hanley M. Gurwin

I would affirm the suspension of 119 days imposed by the hearing panel in this case for two reasons. First, I believe that greater deference should have been given to the unanimous opinion of the hearing panel. It is they who had the opportunity to consider first-hand the testimony of the respondent and his witnesses. Secondly, I simply do not agree with the majority in this case that the possible "protection" afforded to the public by requiring reinstatement outweighs the very real "punishment" which is meted out in this decision. The respondent has carried out the sentence imposed in the criminal matter and he has complied with the terms of the discipline imposed by the hearing panel. I do not agree that a further suspension is warranted.

DISSENTING OPINION

Theodore P. Zegouras

I would increase discipline in this case to a suspension of one year. In Matter of Mark L. Davis, cited in the majority opinion, I stated my surprise that I was the lone Board Member expressing the view that a one-year suspension for an attorney convicted of a drug-related misdemeanor was entirely appropriate. I continue to believe that such discipline is warranted when an attorney aids, rather than hinders, the flow of illegal drugs in this country.