IN THE SUPREME COURT OF THE STATE OF DELAWARE

In the Matter of a Member of the Bar of the Supreme Court of Delaware	§ § § §	
TYLER PATRICK NIXON, Respondent	§ §	No. 188, 2012

Submitted: May 25, 2012
Decided: July 25, 2012

Before **BERGER**, **JACOBS**, and **RIDGELY**, Justices.

ORDER

This 25th day of July 2012, it appears to the Court that:

(1) This is a lawyer disciplinary proceeding regarding Tyler Patrick Nixon's ("Respondent's") admissions of violation relating to a Petition for Discipline. On February 4, 2011, Respondent was suspended on an interim basis from the practice of law in Delaware. A Panel of the Board on Professional Responsibility (the "Panel") filed a Report and Recommendation on Sanctions (the "Report"), dated April 9, 2012. The Panel made findings of fact and recommended a two-year suspension with conditions.

(2) The Court has carefully reviewed this matter. We conclude that the Panel's findings and recommendation of a two-year suspension are appropriate. As to the conditions of reinstatement, it appears those recommendations are

premature. Any determination as to the conditions of Respondent's reinstatement should be considered in conjunction with Respondent's petition for reinstatement.[1]

NOW THEREFORE, IT IS ORDERED that the Report filed by the Board on Professional Responsibility on April 9, 2012 (copy attached), is hereby APPROVED with the exception of the recommendation on conditions of reinstatement. The Respondent is SUSPENDED as a member of the Bar of the State of Delaware. The period of suspension shall be for two years retroactive to February 4, 2011, and shall continue until Respondent petitions this Court for reinstatement and demonstrates his fitness to practice law in the State of Delaware.

BY THE COURT:

/s/ Henry duPont Ridgely
Justice

[1] *See IMO Member of the Bar: Rodriguez*, 2002 WL 432019, at *1 (Del. Mar. 14, 2002); *IMO Member of the Bar: Howard*, 765 A.2d 39, 45 (Del. 2000).

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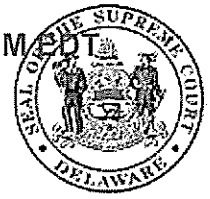

April 9, 2012

Richmond Williams, Esquire
1313 North Market Street
Wilmington, DE 19894

Stephen D. Taylor, Esq.
Carvel State Office Building
820 N. French Street, 11th floor
Wilmington, DE 19801

re: In re Nixon: Board Case No. 2011-0007-B
Report and Recommendation on Sanction

Dear Mr. Taylor:

Enclosed for filing with The Court, please find the original Report and Recommendation on Sanctions issued by the Board on Professional Responsibility today.

I certify that copies of the Report are being hand delivered by Parcels and emailed this day to:

Patricia Bartley Schwartz, Esquire
Office of Disciplinary Counsel
820 N. French Street, 11th Floor
Wilmington, DE 19801
Email: patricia.schwartz@state.de.us

- and -

Tyler Patrick Nixon, Esquire
905 North Van Buren Street
Wilmington, DE 19806
Email: tylernixon@aol.com

Sincerely,

Richmond L. Williams, Esq.
Panel Chair
Board of Professional Responsibility

RLW/cj
Encl.
cc: Tyler Nixon, Esq., w/encl.
Patricia Schwartz, Esq., w/encl.

BOARD ON PROFESSIONAL RESPONSIBILITY

OF THE

SUPREME COURT OF DELAWARE

IN THE MATTER OF A MEMBER	)	**CONFIDENTIAL**
OF THE BAR OF THE	)	
SUPREME COURT OF DELAWARE	)	Board Case No. 2011 – 0007B
TYLER PATRICK NIXON,	)	
RESPONDENT	)	

REPORT AND RECOMMENDATION ON SANCTIONS

A panel of the Board on Professional Responsibility consisting of Richmond L. Williams, Esquire, Chair; Daniel F. Wolcott, Jr., Esquire; and Carey C. McDaniel conducted a Sanctions Hearing on February 9, 2012, regarding Tyler Patrick Nixon's ("Respondent") admissions of violation relating to the Petition for Discipline filed against Respondent in this matter. The Office of Disciplinary Counsel ("ODC") was represented by Patricia Bartley Schwartz. Respondent appeared Pro Se. This is the Panel's Report and Recommendation following the Sanctions Hearing.

Findings

Respondent was admitted to the practice of law in 2004. (Petition and Answer, Para 1).

On January 10, 2011, Respondent was charged with 6 felonies and a misdemeanor relating to illicit drugs and firearms found during the search of his home. (Petition and Answer, Para 3).

On February 4, 2011, the Court suspended Respondent on an interim basis as a result of the multiple felony charges against him. (Petition and Answer, Para 2).

On August 4, 2011 Respondent pled guilty to 3 misdemeanor counts: two for possession of controlled substances and one for drug paraphernalia. (Petition and Answer, Para 4).

Respondent was incarcerated for 60 days. (Superior Court Sentence Order, ODC Exhibit 2).

The Petition for Discipline was filed January 4, 2012. On January 27, 2012, with consent of ODC and approval of the Board, Respondent Answered the Petition by admitting the alleged violations.

At the hearing, Corporal Robert Cassidy of the Delaware State Police Troop 2 Drug Unit testified for ODC. He testified about the execution of a search warrant at Respondent's home and the circumstances leading to Respondent's arrest. On cross-examination he admitted that the circumstances he observed were not consistent with the sale of controlled substances. (Cassidy, 11, 21-23, 29-35).[1]

ODC called Respondent as its other witness and asked him to confirm the factual circumstances connected with the charges in question, including his guilty plea to misdemeanor charges. (Nixon, 116). In addition, he testified that he now abstains and will continue to abstain from the use of controlled substances (Nixon, 107) and that the substances were for personal use, not sale or distribution. (Nixon, 112). He testified about the significant personal consequences resulting from his arrest and suspension from the practice of law, including his incarceration, loss of livelihood and likely loss of his home. (Nixon, 112).

Respondent called a number of witnesses who described his conduct as a lawyer and a citizen. He was described as a diligent, caring lawyer who was honest and ethical and went the extra yard for his client. He was not afraid to stand up for people and if he thought the cause was just often took cases even though he knew he wouldn't get paid for them. Outside of his practice of law, he was known as a person who was politically active and a strong advocate for open government. (*See*, Williams, 43-45; Matthews, 52-57; Jenson, 60-61; Kushner, 73-77; Adelman 81-82; Murphy, 85-87; Fulcher, 95-97; Marshall 138-141).

After careful review of the evidence, including the testimony of Corporal Cassidy and the Respondent, we conclude that the controlled substances were for Respondent's personal consumption and not for distribution or sale in spite of Respondent's possession of large quantities of marijuana and MDMA (Ecstasy). Stated another way, we find that ODC has not proven by clear and convincing evidence that Respondent was involved in selling or distributing controlled substances. We also conclude that no individual, other than Respondent, was harmed as a result of his illegal conduct.

The Panel's role in a sanctions case is to recommend to the Court the sanctions it considers appropriate in light of the evidence it has heard. The Court will consider the Panel's recommendations, but such recommendations are not binding upon the Court.

[1] References are to the transcript of the hearing conducted on February 9, 2012 and shall be presented with the name of the witness and transcript page numbers.

Sanctions Determination

The Supreme Court explains its role and the process it follows in determining sanctions as follows:

> This Court has exclusive authority and wide latitude in disciplining the members of our Bar. Thus while the Board's recommendations of the appropriate sanction to be imposed are helpful, they are not binding on this Court. In formulating an appropriate sanction, this Court looks to the framework set forth in the ABA Standards for Imposing Lawyer Sanctions ("ABA Standards") and to relevant precedent.
>
> In making an initial determination of an appropriate sanction, the Court begins by examining three key factors: (a) the ethical duty violated; (b) the lawyer's mental state; and (c) the extent of the actual or potential injury caused by the lawyer's misconduct. After weighing these three factors and making an initial determination of an appropriate sanction, the Court then will look at the aggravating and mitigating circumstances of the particular case to determine if the discipline should be increased or decreased. (Footnotes omitted).

In re Howard, 765 A.2d 39, at 42 (Del. 2000).

Duties Violated

Count 1.

Rule 8.4(b) provides that it is misconduct for a lawyer to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."

Respondent has admitted this charge of misconduct and, based upon the evidence in the record, we find that Respondent violated Rule 8.4(b) as alleged and admitted. Respondent's conviction of the misdemeanor charges of Possession of Ecstasy, Marijuana and Drug Paraphernalia are criminal acts in violation of Rule 8.4(b).

Count 2.

Rule 8.4(d) provides that it is misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice."

Respondent has admitted this charge of misconduct and, based upon the evidence in the record, we find that Respondent violated Rule 8.4(d) as alleged and admitted. Respondent's conviction on the criminal charges of possession of ecstasy, possession of marijuana and possession of drug paraphernalia, establishes that Respondent engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d).

Section 5 of the ABA Standards provides guidance on how to determine the presumptive sanctions for violations that result from a lawyer committing criminal acts. It appears to consolidate the nature of the duties violated, state of mind and harm into a unified set of criteria.

> 5.1 Failure to Maintain Personal Integrity
>
> . . . upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving commission of a criminal act that reflects adversely on the lawyer's ... fitness as a lawyer . . .:
>
> 5.11 Disbarment is generally appropriate when:
>
> (a) a lawyer engages in serious criminal conduct a necessary element of which includes intentional interference with the administration of justice... or the sale, distribution or importation of controlled substances....
>
> 5.12 Suspension is generally appropriate when a lawyer knowingly engages in criminal conduct which does not contain the elements listed in 5.11 and that seriously adversely reflects on the lawyer's fitness to practice.
>
> 5.13 Reprimand is generally appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law.
>
> 5.14 Admonition is generally appropriate when a lawyer engages in any other conduct that reflects adversely on the lawyer's fitness to practice law.

The primary issue regarding the initial determination of sanction (presumptive sanction) called for in the ABA Standards is whether the appropriate sanction is disbarment (under ABA Standard 5.11) or suspension (under ABA Standard 5.12). Neither ODC nor Respondent asked us to consider lesser sanctions.

ODC argues that Respondent's admitted conduct constituted "felonious behavior" even if he was not convicted of a felony, and, therefore, the presumptive penalty is disbarment. ODC argues that the rule followed by the Court is that attorneys engaging in <u>any</u> type of felonious conduct are always subject to disbarment. (ODC, 165-180)

Respondent disagrees that his conduct was "felonious", argues that conduct that could result in a conviction for a felony ("felonious conduct") does not automatically result in disbarment (but the Court should look to whether the underlying conduct meets the criteria of 5.11, not its classification in the criminal law system adopted by the legislature) and suggests that the Court should impose a suspension in his case. He argues that the *Howard* case is most similar to his, since it involved violation of the law without allegation of moral turpitude, dishonesty, theft,

violence or actual harm to another person (criteria for the application of Standard 5.11) and, therefore, suspension, not disbarment is appropriate. (Nixon 187-194).

While the ultimate determination of the sanction is exclusively the responsibility of the Supreme Court, it is the obligation of the Board to recommend what it believes is the appropriate sanction under the circumstances. Thus, we address the positions offered by the parties.

We have carefully reviewed the decisions cited by the parties and find that it is true that in the decisions cited by ODC, when attorneys were convicted of felonies, they were disbarred. However, we find that the Court did not explicitly adopt this as a rule. We believe that when the violation of the Rules relates to a criminal act, the Court looks at the nature of the conduct underlying the crime and applies Guideline 5.1 of the ABA Standards. If the underlying conduct meets the test of 5.11, it finds disbarment is appropriate. If it finds that the criteria of 5.11 are not met, but the misconduct is still a serious criminal act, Section 5.12 applies and a suspension is the presumptive penalty.

ODC has cited to a series of cases that it argues establish that if a party engages in "felonious conduct", whether convicted of that crime or not, disbarment is warranted. We find most of the cases unhelpful and inapposite as all but two involve felony convictions in which the lawyer's underlying behavior clearly met the criteria for disbarment under 5.11. One matter, *In re Enna*, 971 A.2d 110 (Del. 2008), involved misdemeanor convictions and a plea to felonies that would be dismissed if probation were successfully completed. However, as was pointed out by Respondent, the underlying conduct involved violence and a blatant disregard for specific court orders including a protection from abuse order and resulted in harm to individuals (Enna's children and former wife).[2] (Nixon, 187-188). The other matter, *Howard*, involved a lawyer charged with several felony drug charges and who pled to misdemeanor counts.[3]

We reviewed the Court's decisions in *Melvin*, 807 A.2d 550 (Del. 2002) and *In Re Amberly*, 996 A.2d 793 (Table), 2010 WL 2184031, both of which resulted in suspensions. Melvin was charged with felony and misdemeanor charges including tampering with evidence, hindering prosecution and criminal contempt after he ignored a PFA order and concealed or destroyed his wife's journal that might have aided in lodging criminal charges against him. He pled to two misdemeanor counts. His sanction was an 18-month suspension, retroactive to the date of his interim suspension. Amberly was charged with making a false statement to a tribunal and received a 6-month suspension.

[2] We note that the Court adopted the recommendation of disbarment, but not necessarily the rationale used by the Panel in making its recommendation. In *Enna*, the Panel did not discuss the applicability of ABA Standard 5.11.

[3] The Supreme Court's opinion in *Howard* indicates that he pled guilty to two misdemeanors, one of which was Criminal Solicitation. The opinion also indicates he was arrested for drug-related felonies. We assume that ODC would have been able to prove by clear and convincing evidence that Howard committed felonies.

We also reviewed Commentary to the ABA Standards for assistance in determining whether Standard 5.11 or 5.12 applied. In referring to 5.11 the Commentary states:

> A lawyer who engages in any of the illegal acts listed above has violated one of the most basic professional obligations to the public, the pledge to maintain personal honesty and integrity. This duty to the public is breached regardless of whether a criminal charge has been brought against the lawyer. ...
>
> In imposing final discipline in such cases, most courts impose disbarment on lawyers who are convicted of serious felonies.

ABA Standards, at 36. Thus, ODC appears to be correct in pointing to the underlying conduct as a basis for determination of the applicability of 5.11 or 5.12. On the other hand, the Commentary does not appear to support ODC's assertion that conviction of a felony, per se, is grounds for disbarment. According to the Commentary disbarment is appropriate for those who are "convicted of serious felonies." *Id.* The Commentary for 5.12 also supports this conclusion.

> Lawyers who engage in criminal conduct other than that described above in Standard 5.11 should be suspended in cases where their conduct seriously adversely reflects on their fitness to practice. As in the case of disbarment, a suspension can be imposed even where no criminal charges have been filed against the lawyer. Not every lawyer who commits a criminal act should be suspended, however. As pointed out in the Model Rules of Professional Conduct:
>
>> Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty or breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.
>
> The most common cases involved lawyers who commit felonies other than those listed above, such as the possession of narcotics or sexual assault.

ABA Standards, at 37. Thus, it appears that the drafters of the ABA Standards not only intended that the Court consider the underlying conduct, but that it also consider whether the conduct, if felonious, was "serious" and is of the type of conduct falling within the provisions of 5.11 before disbarment is imposed. It specifically distinguished criminal conduct such as possession of narcotics (even if constituting a felony) from the type of conduct that falls within 5.11.

In the present case, Respondent has admitted facts that could constitute a felony.[4] However, he pled to, and was convicted of, misdemeanor charges. When we look to the underlying conduct as suggested by the Commentary, the record is absolutely clear that, except for the quantity of marijuana and MDMA, there was no evidence that Respondent was in the drug business. He did not have large amounts of cash in the premises, he did not have the supplies that would be used to break the drugs down into smaller quantities for resale and the MDMA in his possession was not consistent with that intended for resale. We note that the arresting officer agreed that what he observed when executing the search warrant was not consistent with a person selling drugs. (Cassidy, 29-35).

Unlike in *Melvin* and *Amberly*, there is no evidence in the record against Respondent of disregard for the sanctity of the justice system or dishonesty. Unlike *Enna*, there is no evidence in the record against Respondent of violence or threatening and no harm to any individual, except himself.

After careful review of the evidence on the record, , we find that ODC has failed to meet its burden of proving by clear and convincing evidence that Respondent's misconduct meets the criteria of 5.11 ("serious criminal conduct a necessary element of which includes intentional interference with the administration of justice... or the sale, distribution or importation of controlled substances...."). Thus, the presumptive penalty is suspension.

Having determined the presumptive penalty, we must evaluate the aggravating and mitigating factors in making a final recommendation to the Court.[5]

After reviewing the record, we find:

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[4] Specifically, the quantity of MDMA in Respondent's possession would meet the definition of "Trafficking" under 16 Del. C. Section 4753.

[5] The Aggravating and Mitigating Factors are:

Aggravation: 1. Prior disciplinary offenses. 2. Dishonest or selfish motive. 3. Pattern of misconduct. 4. Multiple offenses. 5. Bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency. 6. Submission of false evidence, false statements or other deceptive practices during the disciplinary process. 7. Refusal to acknowledge wrongful nature of conduct. 8. Vulnerability of victim. 9. Substantial experience in the practice of law. 10. Indifference to making restitution. 11. Illegal conduct, including that involving the use of controlled substances.

Mitigation: 1. Absence of a prior disciplinary record. 2. Absence of a dishonest or selfish motive. 3. Personal or emotional problems. 4. Timely good faith effort to make restitution or rectify consequences of misconduct. 5. Full and free disclosure to disciplinary board or cooperative attitude toward proceedings. 6. Inexperience in the practice of law. 7. Character or reputation. 8. Physical disability. 9. Mental Disability. 10. Delay in disciplinary proceeding. 11. Interim rehabilitation. 12. Imposition of other penalties or sanctions. 13. Remorse. 14. Remoteness of prior offenses.

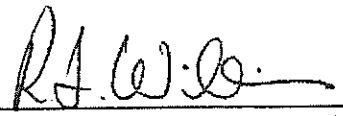
1. Petitioner does not have a prior disciplinary record.
2. Petitioner is a veteran, having served in the first Gulf War.
3. Petitioner is a politically involved, public-spirited advocate for open government and good government.
4. He has done substantial *pro bono* work on behalf of the under-represented and vulnerable members of society
5. Petitioner was highly praised for his level of professionalism and expertise by lawyers, clients and co-workers.
6. Petitioner showed substantial and sincere remorse for his conduct, which led to violations of his duties to the Court and his moral responsibility to his clients, friends and family.
7. He has been under supervision as part of his criminal probation and has remained drug free.
8. He has been in contact with Bar Association services for attorneys with issues.
9. Brandywine Counseling reported, according to a report dated November 17, 2011 with respect to future drug and alcohol treatment, that none was indicated.

The ODC does not contend that there are aggravating factors in this case. Upon review, other than aggravating factor 11 (illegal conduct), which overlaps with the misconduct itself, we find that there are no aggravating factors. There are a number of mitigating factors in this matter: absence of a prior disciplinary record, absence of a dishonest or selfish motive, full and free disclosure to ODC, character and reputation, imposition of other penalties (the criminal sanctions, which included serving jail time) and remorse. We find that the factor "reputation" does not fully recognize the benefit that Respondent has provided to the community through his extensive public service as a lawyer, through *pro bono* work and public advocacy. Several witnesses observed that the state will be worse off if Respondent is unable to provide these public services in the capacity of a barred attorney. We give particular weight to his contributions in this area.

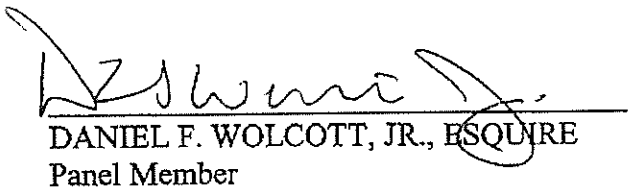
The Court in *Howard* found that the mitigating factors outnumbered, but did not outweigh, the aggravating factors. We find that in this case they do. However, this finding does not lead us to recommend reduction of the sanction of suspension to some lesser sanction, but to the recommendation of a suspension for a shorter period than that imposed in *Howard*.

For these reasons, we recommend that the Court impose a suspension for the period of two years, retroactive to January 11, 2011, the date of Respondent's interim suspension. As a condition of reinstatement, Respondent would need to submit to drug testing to show that he is no longer using illicit substances and demonstrate that he has met the conditions of his probation and/or parole and has not been charged with or convicted of any other crimes involving illicit substances during the period of suspension. Upon reinstatement, Respondent would be subject to probation for a period of two years during which he would be subject to random drug tests as directed by ODC and such other conditions as the Court may deem appropriate.

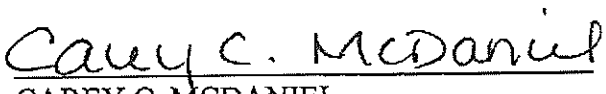
Board on Professional Responsibility



RICHMOND L. WILLIAMS, ESQUIRE
Panel Chair



DANIEL F. WOLCOTT, JR., ESQUIRE
Panel Member



CAREY C. MCDANIEL
Panel Member

Date: April 9, 2012