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[Filed 10/31/08]

STATE OF VERMONT

PROFESSIONAL RESPONSIBILITY BOARD

In re: Martha M. Davis | PRB File No. 2008.065

Decision No. 117

The parties filed a Stipulation of Facts and Joint Recommendations as to Conclusion of Law and Sanctions. The Hearing Panel accepts the parties' stipulated facts and recommendations, and orders that Respondent be suspended for a period of three months for possession of marijuana and marijuana cultivating equipment for violation of Rules 8.4(b) and 8.4(h) of the Vermont Rules of Professional Conduct. In addition, Respondent is placed on probation for a period of one year in accordance with the terms set forth below.

Facts

In October of 2007, law enforcement officers executed a search of Respondent's home in Windsor. According to the officer's affidavit, they found about two and one-half (2½) pounds of marijuana, thirty-six (36) small marijuana plants, and marijuana cultivating equipment. For the purposes of this proceeding only, Respondent does not contest the information set forth in the affidavit. After charging Respondent with possession of less than two ounces of marijuana, the Windsor County State's Attorney referred Respondent's case to the court diversion program for first time offenders.

In January of 2008, Respondent successfully completed her diversion contract, and the criminal case against her was dismissed in February 2008.

There are a number of mitigating factors present. Respondent has no prior disciplinary record. Respondent cooperated fully with the disciplinary proceedings. Respondent had no dishonest or selfish motive and has expressed remorse for her conduct. In addition, Respondent suffers from migraines and polymyalgia rheumatica, a chronic pain syndrome. Although Respondent does not have a prescription for the medical use of marijuana, Respondent used marijuana to alleviate her pain and physical symptoms. Respondent sought help from her therapist and willingly engaged in substance abuse/addiction therapy during the course of these disciplinary proceedings.

In aggravation, having been admitted to the Vermont bar in 1977, Respondent has substantial experience in the practice of law.

Conclusions of Law

Rule 8.4(b)

Rule 8.4(b) of the Vermont Rules of Professional Conduct provides that it is professional misconduct for a lawyer to:

engage in a "serious crime," defined as illegal conduct involving any felony or involving any lesser crime a necessary element of which involves interference with the administration of justice, false swearing, intentional misrepresentation, fraud, deceit, bribery, extortion, misappropriation, theft, or an attempt or a conspiracy or solicitation of another to commit a "serious crime."

In Vermont, a felony is any crime for which the maximum term of imprisonment is more that two years. 13 V.S.A. § 1. Possession of ten pounds or more of marijuana or cultivation of more than twenty five plants is a felony punishable by a maximum of fifteen years in prison. 18 V.S.A. 4230(a)(4).

The Rule has no requirement that the lawyer be convicted of the crime, only that she engage in the conduct. This issue was addressed in the Rhode Island case of In re McEnaney, 718 A.2d 920 (1998), in which the attorney was charged with possession of marijuana and cocaine. The lawyer pled nolo contendere and received probation. In Rhode Island, "G.L.1956 § 12-18-3 provides that upon completion of a probationary period subsequent to a nolo contendere plea, the plea and probation shall not constitute a conviction for any purpose." Id. at 921. The attorney completed probation and then argued, in essence, that his conviction could not be used to prove that he had engaged in professional misconduct. The McEnaney court stated that

Rule 8.4(b) . . . provides that it is professional misconduct for a lawyer to 'commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer.' In entering a nolo contendere plea, respondent has admitted to sufficient facts to be found guilty of the crimes charged. Accordingly, we believe that professional discipline is warranted whether or not respondent is convicted."

Id. at 921.

Under a similar statute in New Mexico, the Court imposed discipline for criminal activity for which there was no conviction. In re Treinen, 131 P.3d 1282 (N.M. 2006). Courts of other jurisdictions have concurred, concluding that a criminal charge and/or conviction is not required to impose sanctions for unprofessional conduct. People v. Perrine, 2005 WL 1621210, 4 (Cal.App. 2nd Dist. 2005) ("Acquittal of an attorney in a criminal trial does not bar the institution against him of disbarment proceedings even where the issues in both proceedings are identical."); People v. Peters, 82 P.3d 389, 398 (Colo. O.P.D.J. 2003) ("Violation of Colo. RPC 8.4(b) does not depend upon either the actual charging of a criminal violation or conviction thereupon."); In re Segal, 430 Mass. 359, 363, 719 N.E.2d 480, 485 (1999) ("We conclude that

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S.J.C. Rule 4:01, § 11, does not prevent the board from conducting a bar disciplinary proceeding after an attorney has been acquitted in a substantially similar criminal matter."); Attorney Grievance Commission of Maryland v. Boyd, 333 Md. 298, 313, fn 13, 635 A.2d 382, 389, fn 13 (1994) ("Respondent also argues that the lack of prosecution by federal or state authorities precludes a disciplinary charge and finding of misconduct in this matter. That argument is without merit.") (citing Attorney Grievance Commission v. Baldwin, 308 Md. 397, 402, 519 A.2d 1291 (1987)).

Respondent has admitted, for purposes of this proceeding, that she possessed a felony amount of marijuana. Accordingly, we find Respondent violated Rule 8.4(b).

Rule 8.4(h)

Rule 8.4(h) of the Vermont Rules of Professional Conduct provides that it is professional misconduct for a lawyer to engage in conduct "which adversely reflects on the lawyer's fitness to practice law." An attorney owes a duty to both the public and the legal profession. In discussing the duties of attorneys to the public, the Commentary to Section 5 of the ABA Standards for Imposing Lawyer Discipline states:

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.

Both this Board and the Supreme Court have considered a number of cases in which a violation of Rule 8.4(h) has been found when a lawyer engaged in criminal activity. Several of these cases involve illegal drugs. In the cases of In re Berk, 151 Vt. 524 (1991) and In re Mayer, 159 Vt. 621 (1992), the attorneys were charged with attempting to purchase cocaine for their personal use and that of their friends. Both attorneys were found to have violated the predecessor to Rule 8.4(h). In In re Doherty, a case with similar facts to the present one, the attorney was charged with felony marijuana possession

after a search of his home. Decision No 71, dissenting opinion adopted by Supreme Court Entry Order dated June 17, 1994. The Court upheld the Board's conclusion that this conduct adversely reflected on the attorney's fitness to practice law. Id.

Based upon these cases, we find Respondent violated Rule 8.4(h).

Sanctions

The parties have stipulated to a three months suspension in this case. It is consistent with both the ABA Standards for Imposing Lawyer Discipline and Vermont case law.

ABA Standards

It is well established that the ABA Standards for Imposing Lawyer Discipline may be applied to determine the appropriate sanction in a disciplinary case. In re Berk, 157 Vt. at 532; In re Warren, 167 Vt. 259 (1997). Under the schema of the ABA Standards, we look at the duty violated, the lawyer's mental state and the nature and extent of any injury or potential injury to determine the appropriate sanction.

Here, Respondent violated her duty to the public to maintain standards of personal integrity. She acted knowingly and, though no clients were injured by her conduct, there is injury to the public confidence in the integrity of the legal system and in the integrity of Vermont lawyers. Accordingly, suspension is the presumptive sanction. Section 5.12 of the ABA

Standards provides:

Suspension is generally appropriate when a lawyer knowingly engages in criminal conduct which does not contain the elements listed in Standard 5.11 and that seriously adversely reflects on the lawyer's fitness to practice.[1]

The next step in the ABA plan is to determine whether the presumptive sanction should be increased or decreased due to mitigating and aggravating factors. There are a number of mitigating factors here. Respondent has no prior disciplinary record, ABA Standards §9.32(a). She has cooperated with Disciplinary Counsel. ABA Standards §9.32(a). She had no selfish or dishonest motive, ABA Standards §9.32(e). Respondent has expressed remorse and regret that her conduct brought the legal profession into disrepute. ABA Standards §9.32(b).

A physical disability or impairment may also be a mitigating factor. ABA Standards §9.32(h). Respondent suffers from two medical conditions and finds that marijuana is of some help in relieving her physical symptoms. Although her marijuana use predated her medical conditions, her continued use of marijuana was, in part, an attempt to alleviate her physical symptoms.

In addition, interim rehabilitation can be a mitigating factor. ABA Standards §9.32(j). Through the Court ordered diversion program, Respondent was required to undergo a substance abuse assessment and follow the recommendations of a substance abuse counselor. She met with the counselor five times, and tested negative for marijuana on January 8, 2008.

As for aggravating factors, Respondent has substantial experience in the practice of law, having practiced law for approximately 30 years. While the mitigating factors are considerable, they are not sufficient to reduce the sanction to reprimand.

In addition, suspension is consistent with prior Vermont decisions. The case most closely similar to the present case is Doherty, supra. In Doherty, a search of respondent's home resulted in the discovery of an unspecified amount of marijuana, three marijuana plants, and drug paraphernalia. The Doherty respondent was charged with possessing a felony amount of marijuana, but the respondent was not convicted of a felony. In Doherty the Supreme Court imposed a two month suspension.

The Berk and Mayer cases, cited above, involved a senior lawyer and his young associate. Berk was arrested in New Jersey while attempting to purchase cocaine for his personal use, and to share with his associate, Mayer. Criminal charges against both lawyers were sent to diversion, and neither was convicted of a crime. Berk was suspended for six months, while Mayer was suspended for two months. Berk received a longer suspension due to his greater experience as an attorney and his role as the instigator of the transaction.

There is one other Vermont case involving possession of marijuana. In re PRB Decision No. 2, (Feb. 25, 2000). In this case, a young lawyer left her bag in a courthouse. When a security officer looked into the bag for identification, he found a pipe and a very small amount of marijuana. The Hearing Panel imposed an admonition based upon the small amount of marijuana involved, respondent's inexperience as a lawyer,[2] and respondent's accepting responsibility for her actions.

Thus, the discipline in these Vermont drug cases ranges from admonition for a small amount of marijuana to six months for purchasing cocaine to share with an associate. We find the facts of the present case most similar to Doherty. Both attorneys had been admitted for a substantial period of time when a search warrant turned up marijuana at their residences. The difference between the two cases is the sheer volume of marijuana found in the present case. In Doherty the officers found three plants and an unspecified amount of marijuana. In the present case 36 plants were found together with two and one half pounds of marijuana. Though the amount of drugs found in Respondent's case is larger, the mitigating factors in her case are also stronger than those present in the Doherty case.

We believe that the recommended suspension of three months is consistent with precedent and approve it.

We are also concerned that Respondent's marijuana use is of long standing. In order to protect the integrity of the legal system, a period of probation is required to assure that Respondent remains in remission.

Probation

1. Respondent is placed on probation as provided in Administrative Order 9, Rule 8A(6), for a minimum term of twelve months, which term may be renewed for an additional period, as provided by A.O.9 Rule 8(A)(6)(a). The term of probation shall commence on the date on which the decision in this matter becomes final.

2. At the commencement of probation, Respondent shall select a Vermont licensed alcohol and drug counselor to participate in and oversee her probation. This counselor shall serve as the probation monitor required by A.O.9 Rule 8(A)(6)(b). Respondent's choice of counselor shall be submitted to the Office of Disciplinary Counsel for approval no later than five days after this decision becomes final. In the event that Respondent chooses Tim Hebert, M.S., L.A.D.C. as her counselor, that choice is approved and need not be approved by Disciplinary Counsel.

3. In the event that the approved counselor shall become unavailable during the term of probation, Respondent shall submit an alternate name to the Office of Disciplinary Counsel for approval as substitute counselor.

4. Respondent shall have regular monthly meetings with a Licensed Alcohol and Drug Abuse Counselor. The meetings shall focus on

a. Relapse prevention strategies (how to avoid using marijuana and to learn to deal with pain, stress and anxiety in other ways);

b. Learning about the long-term physical and psychological effects of marijuana use, and

c. Other issues as appropriate.

5. At no time shall Respondent go more than six weeks without meeting with an approved counselor.

6. Respondent shall provide random urinalysis samples, upon request of the counselor, at the Mt. Ascutney Hospital and Health Center laboratory.

7. It shall be Respondent's responsibility to secure quarterly written reports from her counselor describing her compliance with the terms of probation. The reports shall be sent to Disciplinary Counsel.

8. Probation shall be terminated at any time after the initial twelve month period or any renewal term thereof upon the filing of an affidavit by Respondent showing compliance with the

conditions of probation and an affidavit by the probation monitor stating that probation is no longer necessary and the basis for that conclusion. Such affidavits shall be filed with the Program Administrator of the Professional Responsibility Board with copies to Disciplinary Counsel.

9. The absence of a filing of such affidavits after twelve months shall be considered a recommendation of continued probation by the counselor.

10. In accordance with A.O. 9, Rule 8(A)(6), the probation counselor shall then file a brief written recommendation with the Office of Disciplinary Counsel

11. Should the Office of Disciplinary Counsel desire to renew the term of probation for an additional period, it shall notify Respondent via certified mail, return receipt requested. Should Respondent wish to be heard on this issue of renewal of probation, she shall file a request for hearing and serve a copy of the request on the Office of Disciplinary Counsel.

12. Respondent shall bear all costs associated with this probation.

Order

Respondent, Martha M. Davis, is hereby SUSPENDED from the practice of law for a period of three months, commencing on the date this decision becomes final. In addition she shall be on probation for a period of twelve months in accordance with the probation terms set forth above.

Respondent shall promptly comply with the provisions of A.O. 9, Rule 23 regarding notification to clients and courts of the suspension.

Dated as of this 31st day of October, 2008.

Hearing Panel No. 10

FILED 10/31/08

/s/

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Lon T. McClintock, Esq., Chair

/s/

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Kristina Pollard, Esq.

/s/

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Robert Bergman, D.V.M.

[1]The Panel has not applied § 5.11 of the ABA Standards because the criminal conduct listed in § 5.11 is more serious in nature than the criminal conduct involved in the present case.

[2]The respondent in this matter had been admitted for only one year.