SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 10-426
District Docket No. XIV-2008-150E

IN THE MATTER OF	
DONALD STUART BURAK	
AN ATTORNEY AT LAW	

Decision

Argued: March 17, 2011

Decided: June 7, 2011

Nitza I. Blasini appeared on behalf of the Office of Attorney Ethics.

Respondent waived appearance for oral argument.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of New Jersey.

This matter came before us on a motion for final discipline filed by the Office of Attorney Ethics (OAE), pursuant to R. 1:20-13, following respondent's guilty plea to one count of

possession of child pornography, in violation of 18 U.S.C.A. § 2252A(a)(5)(B) and (b)(2). The OAE seeks respondent's disbarment. For the reasons stated below, we agree that disbarment is the appropriate measure of discipline in this matter and we so recommend.

Respondent was admitted to the New Jersey bar in 1985. Presently, he is imprisoned at Allenwood Federal Correctional Institution, in White Deer, Pennsylvania. As a result of his criminal conviction, respondent was temporarily suspended on April 23, 2008. In re Burak, 194 N.J. 502 (2008).

On April 9, 2008, respondent appeared in the United States District Court for the District of New Jersey and pleaded guilty to one count of knowingly possessing images of child pornography, which had been downloaded from the internet onto his personal computer. The applicable statute, 18 U.S.C.A. § 2252A(a)(5)(B) and (b)(2), provides that a maximum fine of $250,000 or ten years' imprisonment, or both, shall be imposed on any person who

> knowingly possesses, or knowingly accesses with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported using any means or facility of interstate or foreign commerce

> or in or affecting interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in or affecting interstate or foreign commerce by any means, including by computer.[1]

The facts underlying respondent's arrest and conviction were set forth in the pre-sentence investigation report. Most of the facts recited by the OAE in its brief are taken from this document. In his brief, respondent stated that he did not object to the OAE's statement of facts. Moreover, in a motion for final discipline, we are permitted to consider the pre-sentence investigation report, in determining the appropriate measure of discipline. See, e.g., In re Spina, 121 N.J. 378, 385 (1990). Therefore, in this decision, we relied on the same facts contained in the pre-sentence investigation report.

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[1] Under New Jersey law, possession of child pornography is governed by N.J.S.A. 2C:24-4b(5)(b), which provides:

> (b) Any person who knowingly possesses or knowingly views any photograph, film, videotape, computer program or file, video game or any reproduction or reconstruction which depicts a child engaging in a prohibited sexual act or in the simulation of such an act, including on the Internet, is guilty of a crime of the fourth degree.

However, to protect the identity of the victim of respondent's separate act of alleged criminal sexual contact, described below, we also entered a protective order sealing the entire record in this matter, except for this decision.

Respondent was identified by the FBI through a sting operation carried out on October 9, 2006. When the FBI interviewed him later that month, respondent admitted to trading child pornography on line.

On June 14, 2007, FBI agents went to respondent's Ewing home, at which time he signed two consent forms, one permitting access to his personal computer and AOL account and the other permitting law enforcement personnel to assume his online identity.

Respondent admitted to the FBI agents that he had "actively sent and received child pornography (CP) through the use of his AOL email account" since 1996, a span of ten years. Respondent also showed the FBI agents how to search his email to find the pornographic pictures.

When the FBI conducted image scans of respondent's computer, they found "multiple images depicting child pornography on his computer and his AOL account." According to the pre-sentence investigation report, respondent's computer had

seventy-eight images and nine movies, which included material "that portray[ed] sadistic or masochistic conduct or other depictions of violence," such as bondage.

Under the federal sentencing guidelines, each movie equaled seventy-five images. Thus, respondent was considered to have had 753 child pornography images in his possession. Indeed, at the plea hearing, respondent stipulated that his computer contained "the [federal sentencing] guidelines equivalent of 753 images of child pornography." In reaching our determination of discipline in this matter, one of the factors we considered was that respondent had the equivalent of 753 images of child pornography in his possession.

On this topic, Chair Pashman disagrees with our reliance on the number of images calculated under the federal sentencing guidelines in reaching our determination that respondent should be disbarred. In his view, the number of images taken into consideration should be limited to the actual number of images (seventy-eight) and movies (nine) in respondent's possession.

Although we understand Chair Pashman's concern, we must take into account the necessity of equalizing the qualitative and quantitative differences between the single image of a photograph and the multiple images in a film. We see no reason

to deviate from the federal government's equating a single movie to seventy-five images and no reason why respondent should not be disciplined based on his stipulated possession of the equivalent of 753 images.

Respondent's guilty plea to possession of child pornography was not his first brush with the law for misconduct involving minors. In October 2007, he was admitted into the New Jersey Pretrial Intervention Program (PTI), after he was indicted for criminal sexual contact with a minor female relative. The indictment arose out of the minor's allegation that, during the last three months of 2006, respondent had been touching her inappropriately. In one of the incidents, respondent got into a bed with her, rubbed his hand up and down her thigh, stomach, back, and buttocks, and then went to his bedroom and looked at pornography on his computer, while he masturbated.

Here, too, Chair Pashman disagrees with our decision to consider this incident, in aggravation of respondent's conduct. Although Chair Pashman correctly points out that respondent was never tried for criminal sexual contact, we cannot disregard the fact that respondent did not defend against the charge but, rather, chose to enter PTI.

On July 23, 2008, respondent appeared for sentencing in federal court. At that time, the Assistant United States Attorney stated to the court:

> Mr. Burak attained nearly every sentencing enhancement that was available to him in this case, which lends itself to illustrate the egregiousness of the offense, and obviously he's the guidelines require — or recommend a very severe sentence.
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> [OAEaEx.C10, ll.2-5.][2]

For his part, respondent stated the following to the sentencing court:

> I got involved in this terrible conduct. I was unable to stop for myself, unable to stop for my wife Cindy, who [sic] I love and adore. When Agent Bagle and his partner came to my door, I put my hands out to be cuffed. I felt nothing but relief, and the next feeling I felt was fear about what's going to happen to Cindy and to my step-dad and all the collateral damage that would result from my conduct. I've done what I can do to reduce that collateral damage. I accept full responsibility for my conduct. I will accept whatever sentence that you see fit to impose. I just ask you to be as lenient as possible, if not for my sake, then for theirs. I am truly sorry. Thank you.
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> [OAEaEx.Cp.18,l.18-OAEaEx.Cp.19,l.4.]

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[2] "OAEaEx.C" refers to the transcript of the sentencing hearing, dated July 23, 2008.

In sentencing respondent to ninety-seven months (eight years, one month) in jail, rather than the maximum statutory term of ten years, followed by five years' supervised release, the court noted:

> I also recognize that there is a shadow in his past pertaining to the pretrial intervention that he pled guilty to in — that he agreed to in State Court, but I am very, very impressed with the therapeutic progress that he has clearly made and with the absolute and total acknowledgment of his guilt from the day that he was apprehended by the agents at the doorstep of his house and by the absolute and total acceptance of responsibility in every way that he demonstrated in handling the inevitable consequences of being found out for this crime.
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> There is absolutely nothing that Mr. Burak could have done more than he has done in the 13 months since he was apprehended for this offense. In fact, in his own words, when the two agents came to his home at 6:30 in the morning on a June day 13 months ago and seized all of this truly reprehensible material, one of the agents looked at him and said, "Get help. Get help." And he went and got help, and he has been doing that with a demonstrated dedication ever since. Nor did he allow self-pity or shame to interfere with his continuation to make every single orderly arrangement that he could possibly make for his family and for those with whom he works and those who have depended upon him up until now for their support. . . .
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> [OAEaEx.C21-9 to OAEaEx.C22-6.]

At the sentencing hearing, the court made reference to "a bound volume of [an] extensive number of letters on behalf of Mr. Burak and also one supplemental additional letter submitted actually from Mrs. Burak." The record before us does not include these letters.

Following a review of the record, we determine to grant the OAE's motion for final discipline. Final discipline proceedings in New Jersey are governed by R. 1:20-13(c). Under that rule, a criminal conviction is conclusive evidence of guilt in a disciplinary proceeding. R. 1:20-13(c)(1); In re Magid, 139 N.J. 449, 451 (1995); In re Principato, 139 N.J. 456, 460 (1995). Specifically, the conviction establishes a violation of RPC 8.4(b). Pursuant to that rule, it is professional misconduct for an attorney to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer." Hence, the sole issue before us is the extent of discipline to be imposed on respondent for his violation of RPC 8.4(b). R. 1:20-13(c)(2); In re Magid, supra, 139 N.J. at 451-52; In re Principato, supra, 139 N.J. at 460.

That an attorney's conduct did not involve the practice of law or arise from a client relationship will not excuse the ethics transgression or lessen the degree of sanction. In re

Musto, 152 N.J. 167, 173 (1997). The obligation of an attorney to maintain the high standard of conduct required by a member of the bar applies even to activities that may not directly involve the practice of law or affect his or her clients. In re Schaffer, 140 N.J. 148, 156 (1995). "To the public he is a lawyer whether he acts in a representative capacity or otherwise." In re Gavel, 22 N.J. 248, 265 (1956). Thus, offenses that evidence ethics shortcomings, although not committed in the attorney's professional capacity, will, nevertheless, warrant discipline. In re Hasbrouck, 140 N.J. 162, 167 (1995).

In determining the appropriate measure of discipline, the interests of the public, the bar, and the respondent must be considered. "The primary purpose of discipline is not to punish the attorney but to preserve the confidence of the public in the bar." In re Principato, supra, 139 N.J. at 460 (citations omitted). Rather, many factors must be taken into consideration, including the "nature and severity of the crime, whether the crime is related to the practice of law, and any mitigating factors such as respondent's reputation, his prior trustworthy conduct, and general good conduct." In re Lunetta, 118 N.J. 443, 445-46 (1989).

In cases involving possession of child pornography, the discipline imposed has ranged from a six-month suspension to disbarment. See, e.g., In re Armour, 192 N.J. 218 (2006) (six-month suspension on attorney who, while at work, viewed more than fifty images of child pornography on a government-owned computer; he was sentenced to eighteen months' probation and ordered to pay a $500 fine and $255 in costs, plus a $2 monthly probation fee; he was prohibited from unsupervised contact with children under sixteen-years old and from access to a computer with internet service); In re Haldusiewicz, 185 N.J. 278 (2005) (six-month suspension imposed on deputy attorney general who had downloaded at least 996 images of child pornography on his office's desktop computer; the attorney was sentenced to three years' probation, ordered to pay a $1500 fine and $157 in costs and was prohibited from unsupervised contact with children under the age of sixteen; two psychologists opined that the attorney posed little danger to the community and was unlikely to re-offend in the future; mitigation included the attorney's difficulty in establishing a new professional career at that point in his life and the forfeiture of his pension and other benefits); In re Kennedy, 177 N.J. 517 (2003) (six-month suspension imposed on attorney who admitted to downloading

internet images of children engaged in sexual acts, several hundred of which were found on his computer; the attorney received three years' probation, paid a $5000 fine, and was required to perform 500 hours of community service; two psychologists opined that he was not a risk to the community and that his collection of the images was partially due to a hoarding disorder); In re Rosanelli, 176 N.J. 275 (2003) (six-month suspension imposed on attorney who admitted to possessing twenty-three pictures of children engaged in various sexual acts that he had downloaded from the internet; the attorney was admitted into PTI; a psychiatrist, a therapist, and a psychologist opined that the attorney was not likely to engage in similar misconduct in the future, that he was not a risk to his clients, to children, or to the community, and that there was no "serious sexual psychopathology"); In re Peck, 177 N.J. 249 (2003) (attorney who pleaded guilty to possession of child pornography, a violation of 18 U.S.C.A. § 2252(a)(4)(B), possessed "at least" three magazines depicting minors engaged in sexually explicit conduct; he was sentenced to a fifteen-month prison term, followed by a three-year probationary term; the Supreme Court rejected our determination to impose a one-year suspension, retroactive to the attorney's temporary suspension

of October 25, 2001; instead, the Court's order, entered on July 24, 2003, stated that the temporary suspension of just under two years was "sufficient discipline" for the attorney's misconduct); In re McBroom, 158 N.J. 258 (1999) (two-year suspension imposed on attorney who pleaded guilty in federal court to possession of computer files and images downloaded from the internet, which depicted minors engaged in sexually explicit conduct, a violation of 18 U.S.C.A. § 2252(a)(4); the attorney was sentenced to fifteen months' imprisonment, followed by three years' probation; on remand from the United States Court of Appeals for the Third Circuit, the attorney was resentenced to six months' imprisonment, followed by two months of home confinement; although we noted that the attorney did not have personal contact with the victims, we considered that he was convicted of a crime that carried a maximum five-year prison sentence and a $250,000 fine; the suspension was retroactive to the date of the attorney's temporary suspension); and In re Sosnowski, 197 N.J. 23 (2008) (disbarment for attorney who pleaded guilty in the New Hampshire federal court to possession of child pornography, a violation of 18 U.S.C.A. § 2252A(a)(5)(B); the attorney possessed sixty-seven still images of child pornography and eight sexually-explicit video

files of children engaging in sexual acts and exposing their genitals; in addition, the attorney had placed hidden cameras in his own children's bathroom and bedroom to spy on them for his own deviant gratification; he was sentenced to thirty-seven months in prison with five years of supervised release and was ordered to pay a $100 assessment).

To make an assessment as to whether certain conduct on the part of one offender is better or worse than that of another trivializes the horror of child pornography at any level. Nevertheless, such an assessment must be made to gauge the proper measure of discipline for the offender. In this case, respondent's conduct went well beyond that of the attorneys in the other child pornography possession cases.

Unlike respondent, the attorneys in Rosanelli and Armour (six-month suspensions) were found with fewer than one hundred images in their possession. Respondent, by comparison, possessed the equivalent of 753 images. Moreover, the attorney in Rosanelli was involved in the misconduct for about eight months and the attorney in Armour admitted to viewing the images in a one-month period. Respondent, however, engaged in this misconduct for ten years.

In addition, although the attorney in Kennedy (six-month suspension) had "several hundred" images on his computer and the attorney in Haldusiewicz (six-month suspension) had at least 996 images, respondent admitted that he traded in child pornography, both by sending and receiving the images. Also, the images found on respondent's computer involved "sadistic or masochistic conduct or other depictions of violence," such as bondage.

Respondent's conduct also was more egregious than that of the attorney in Peck, who received a "time-served" suspension for possession of three magazines.[3]

As for the attorney in Sosnowski, who was disbarred, his conduct resulted in a thirty-seven-month sentence. Respondent, however, received a sentence more than two-and-a-half times that which was imposed on Sosnowski.

For several reasons, we are convinced that nothing less than disbarment is required in this case. First, at the time of respondent's identification by the FBI, he had been viewing

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[3] The McBroom decision (two-year suspension) is not instructive because it does not identify the amount of pornography at issue or the time period within which the attorney viewed it.

child pornography for ten years. Second, either at the time or shortly after he was interviewed by the FBI about his child pornography activities, in October 2006, a minor female relative of respondent claimed that he began to have illegal sexual contact with her on a number of occasions. During one such incident, respondent touched her inappropriately and then, within eyesight, viewed pornography on his computer, while he masturbated. He was indicted for criminal sexual contact and was accepted into the PTI program.

Third, at the time that respondent's computer was seized, he had amassed the equivalent of more than 750 images. These images were not "just" child pornography, but also included "sadistic or masochistic conduct or other depictions of violence," such as bondage. Fourth, respondent did not simply view the images; he also traded them with others.

Finally, notwithstanding the sentencing court's recognition of respondent's acceptance of responsibility for his crime, the court imprisoned him for more than eight years of a maximum ten-year term, far in excess of the lengthiest prison term imposed on other attorneys disciplined in New Jersey for this type of misconduct.

We are aware, as Chair Pashman writes, that there is evidence in the record that respondent presents a low risk of re-offending. We note, too, that the sentencing judge alluded to his therapeutic progress. While we certainly hope that respondent will continue with that progress and will not re-offend, our determination is based on the egregious misconduct that he has already committed and for which he was sentenced to more than eight years in jail.

As we noted in Sosnowski, disbarment is the appropriate measure of discipline in cases where the attorney's misconduct "is so immoral, venal, corrupt or criminal as to destroy totally any vestige of confidence that the individual could ever again practice in conformity with the standards of the profession." In re Templeton, 99 N.J. 365, 376 (1985). Based on the conduct that was involved in the Sosnowski case, nothing less than disbarment is required in this matter, given the four most disturbing and distinguishing factors in this case: (1) that the images portrayed acts of sexual violence involving children, (2) that respondent traded these images with others, (3) that he engaged in this odious behavior for a ten-year period, and (4) that he was imprisoned for nearly nine years for this illegal activity. Respondent not only viewed these abhorrent acts of

sexual violence against children, he also made certain that others could do so as well. Accordingly, it is our firm conviction that nothing less than disbarment is justified in this case. We so recommend to the Court.

Chair Pashman filed a dissent, voting to impose a three-year suspension. Member Doremus did not participate.

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs and actual expenses incurred in the prosecution of this matter, as provided in R. 1:20-17.

Disciplinary Review Board
Bonnie Frost, Vice-Chair

By: _____
for Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Donald Stuart Burak
Docket No. DRB 10-426

Argued: March 17, 2011

Decided: June 7, 2011

Disposition: Disbar

Members	Disbar	Three-year Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Pashman		X				
Frost	X					
Baugh	X					
Clark	X					
Doremus						X
Stanton	X					
Wissinger	X					
Yamner	X					
Zmirich	X					
Total:	7	1				1

By Julianne K. DeCore
Chief Counsel