SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 02-357

IN THE MATTER OF

DONALD ROSANELLI

AN ATTORNEY AT LAW

Dissent

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

We respectfully dissent from the majority's decision that respondent should receive a six-month suspension for his misconduct. Our disagreement with the majority rests on our belief that, while disciplinary cases are fact-sensitive and must be decided on a case-by-case basis, possession of child pornography is a very serious offense that, absent special circumstances, should be met with a long-term suspension.

Courts in other jurisdictions have suspended or "disbarred" attorneys for similar misconduct. Most recently, an attorney in Louisiana was disbarred after pleading guilty to federal statutes prohibiting the smuggling into and possession of child pornography in the

United States. *In re Boudreau*, 815 *So.2d* 76 (La. 2002). In Louisiana, a disbarred attorney may petition for reinstatement after five years, unless the order prohibits the attorney from applying for reinstatement, thus rendering disbarment permanent. Because Boudreau was not barred from applying for reinstatement, the discipline amounted to a five-year suspension.

In Mississippi, an attorney who pleaded guilty to possession of child pornography, in violation of a federal statute, was disbarred in 1998. Disbarment in Mississippi is akin to a three-year suspension and, indeed, on June 20, 2002, Holleman was reinstated. *In re Petition for Reinstatement of Holleman*, 2002 WL 1340977 (Miss. 2002). Because the order disbarring Holleman was apparently not published, the following description of the attorney's misconduct was taken from the reinstatement decision:

> In late 1996 or early 1997, Holleman, while drinking heavily at his office, accessed some publicly available computer images of child pornography on the internet. Holleman did not print any of the computer images, and after briefly viewing some of these images, he believed that he had deleted them from his computer. Following a seizure of Holleman's computer in February 1997, federal agents recovered these images from his computer hard-drive.
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> [*Id.*, slip op. at 1]

In *Wagers v. Kentucky Bar Ass'n*, 973 *SW2d* 845 (1998), the attorney pleaded guilty to a federal statute prohibiting possession of child pornography. After he was temporarily suspended by the Supreme Court of Kentucky, Wagers filed a motion to resign under term of disbarment, which prohibited him from petitioning for reinstatement for a period of five years. The court granted the motion, thus suspending the attorney for at least five years.

Finally, in Wisconsin, an attorney who was convicted of importing and possessing child pornography and trading a small number of the photographs of minors was suspended for five months. *Matter of Bruckner*, 467 *N.W.2d* 780 (Wis. 1991). The court took into account that the misconduct had occurred more than seven years earlier and that Bruckner had not been the subject of subsequent criminal or disciplinary proceedings. One justice dissented, urging the revocation of the attorney's license.

We do not advocate the pronouncement of a bright-line rule mandating a lengthy suspension in cases involving possession of child pornography. We can envision circumstances in which the criminal conduct was more limited, such as possession of only one or several images, or in which the mitigation is substantial. Here, however, respondent joined an internet child pornography service and for about eight months regularly received pornographic materials, which he then "periodically cleaned." At the time of his arrest, respondent possessed twenty-three pictures of children engaged in various sexual acts.

The OAE suggested that we should consider the following mitigating factors: (1) respondent turned himself in to the authorities; (2) he surrendered the contraband; (3) he reported the matter to the Office of Attorney Ethics; (4) he did not suffer a conviction; and (5) his prognosis is good. Our answer to those suggestions is that respondent reported this matter to law enforcement authorities only after his friend threatened to notify them if he did not do so. In addition, the fact that he surrendered the contraband is irrelevant, since the authorities necessarily would have seized the pornographic materials as evidence if he had not. Moreover, just as we do not consider as a mitigating factor an attorney's cooperation

with the disciplinary system – they are required to do so by rule – we should not consider in mitigation respondent's reporting his conviction to the OAE. *Rule* 1:20-13(a)(1) requires attorneys charged with indictable offenses to promptly inform the OAE of the charge. Respondent should not be credited with doing that which he is required to do. The fact that respondent was not "convicted" of a crime is immaterial in light of his guilty plea in which he admitted committing the offense. With respect to respondent's prognosis, we did consider the opinions of three professionals that respondent does not present a risk to children or the general community. We also took into account that this is respondent's first brush with the disciplinary system during his legal career of more than twenty years.

In our view, this case is very similar to *In re McBroom*, 158 *N.J.* 259 (1999). McBroom pleaded guilty to violating a federal statute and received a prison term; respondent pleaded guilty to violating a state statute and was accepted into the pre-trial intervention program; respondent and McBroom's misconduct are virtually identical: both downloaded on their computers images of children engaged in sexually explicit conduct. Respondent used a credit card to join an internet child pornography service, thereby contributing to the perpetuation of this illicit market that exploits and demeans children in particular and society in general. His misconduct was serious and deserving of the same discipline imposed on McBroom. That sanction is also consistent with the majority of the jurisdictions, which, as discussed above, have imposed long-term suspensions for similar criminal offenses.

We, thus, dissented from the majority and would suspend respondent for two years.

Members Lolla and Wissinger join in this dissent.

By: Barbara Schwartz
BARBARA SCHWARTZ