ENTRY ORDER

2014 VT 77

SUPREME COURT DOCKET NO. 2014-203

JULY TERM, 2014

In re Aaron Smith, Esq.	}	Original Jurisdiction
	}	
	}	From:
	}	Professional Responsibility Board
	}	
	}	PRB NO. 2012-183

In the above-entitled cause, the Clerk will enter:

¶ 1. On June 17, 2014, a hearing panel of the Professional Responsibility Board issued a decision recommending that respondent Aaron Smith, Esq., be disbarred from the office of attorney and counselor at law effective from the date of his earlier interim suspension from the practice of law on August 5, 2013. Respondent has not appealed from that order, and this Court has declined to review the matter on its own motion. Therefore, pursuant to Administrative Order 9, Rule 11.D(5)(c), the order of disbarment is final, and shall have the full force and effect as an order of this Court.

BY THE COURT:

Paul L. Reiber, Chief Justice

☒ Publish

☐ Do Not Publish

John A. Dooley, Associate Justice

Marilyn S. Skoglund, Associate Justice

Beth Robinson, Associate Justice

Geoffrey W. Crawford, Associate Justice

STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

In re: Aaron Smith
PRB File No. 2012.183

Decision No. 162

This matter was heard on the issue of sanctions before Hearing Panel No. 7, Harland Miller, Esq., Chair, Mark Hall, Esq. and Stephen Carbone on April 3, 2014. The parties filed a stipulation of facts and recommended conclusions of law. The Hearing Panel accepts the stipulated facts and conclusions and recommends that Respondent be disbarred for conviction of possession of child pornography, a federal felony, in violation of Rule 8.4(b) of the Vermont Rules of Professional Conduct.

Facts

Facts Relating to Arrest and Conviction

On February 28, 2012, Respondent was arrested by federal law enforcement agents and charged with possession of child pornography. On August 5, 2013, the Vermont Supreme Court entered an order immediately suspending Respondent's license to practice law on an interim basis pending final disposition of these disciplinary proceedings.

On September 6, 2012, Respondent pled guilty to one felony count of possession of child pornography, in violation of Title 18 of the United States Code, §2252(a)(4)(B).

Respondent was incarcerated in a series of state and federal facilities beginning in September of 2012, while he awaited his sentencing hearing. During his incarceration, Respondent learned of information relevant to another criminal matter unrelated to his

own. Respondent testified as a government witness in the other criminal matter, providing helpful information in that matter and receiving due consideration in his own sentencing as a result.

On June 17, 2013, the U. S. District Court for the District of Vermont imposed judgment against Respondent and sentenced him to time served, plus five years of supervised release with conditions, including registration pursuant to the Sex Offender Registration and Notification act, 40 2U. S. C. §16901,*et.seq.* Thereupon, Respondent was released from the custody of the US Bureau of Prisons and began his term of supervised release.

The parties also stipulated that possession of child pornography, is a "serious crime," for purposes of Rule 8.4 (b) of the Vermont Rules of Professional Conduct and that child pornography causes serious harm to its child victims and others.

Facts Relating to Earlier Life

Respondent testified that he grew up in the San Jose, California, area. His parents were divorced when he was seven years old. For a period of six to eight months when he was ten years old his older brother sexually molested him. He finally told his mother, the abuse stopped, and she arranged counseling for him for a period of two years.

According to the Respondent's testimony, when Respondent was twelve years old his mother began dating, and an older woman spent the night at his house. She sexually molested him for a period of six years whenever she would stay at his house. He received no counseling as a result of that abuse.

Respondent graduated from college in 2007 when he was in his early 30s. Before that, he had had difficulty with education. He could not focus and would not do his

homework, though he was tested very high for intelligence. It was not until he moved to Vermont in 2002, that he thought about accomplishing something with his life and decided that he wanted a college degree. He spent a year at a junior college, a year at Norwich University and then graduated from Woodbury College in 2006. He graduated from Vermont Law School in 2010 and was admitted to the Vermont bar in December of that year.

After graduating from law school, Respondent worked at a title insurance company and after he passed the bar exam he became title counsel. He worked there until asked to resign after his arrest.

Facts Relating to Pornography

At the time of his arrest, Respondent's computer was seized by federal agents. According to the Government's Sentencing Memorandum, Respondent's computer contained "more than 700 files that legally constitute child pornography, and tens of thousands of additional files depicting child sexual exploitation." (Exhibit B, Page 7).

Respondent testified that it was his practice to enter a broad search term for pornography. He was not specifically looking for child pornography. He would receive it mixed in with regular pornography. He would go through the downloads and delete what he did not want. When he saw child pornography that fit his desires, he would look at it. In his selection and viewing he did not discriminate as to age.

At the time he searched for and downloaded the child pornography, he knew that it was a criminal offense and did think about that at the time but did not think about the consequences for his law license. When he downloaded the images, he did not think about the children. He now understands that they are victimized at the time the pictures

are made and this victimization continues with the distribution and any time the pictures are viewed.

A week after his arrest Respondent sought counseling and is now in treatment with another counselor. He believes that he has changed. He has spent a lot of time dealing with his life and the harm he has done to others and is determined never to end up in this position again. He testified that he has been told that he has a pornography addiction which he deemed to be like any other addictive illness and is committed to not having pornography in his life again. He has a wife, who is supportive, and a young son.

Conclusion of Law

The parties have stipulated that Respondent violated Rule 8.4 (b) of the Vermont Rules of Professional Conduct.

Rule 8.4 (b) 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 involve interference with the administration of justice, false swearing, intentional misrepresentation, fraud, deceit, bribery, extortion, misappropriation, theft, or an attempt or conspiracy or solicitation of another to commit a 'serious crime.'"

The United States Code defines the possession of child pornography as a felony offense, and Respondent was convicted of this felony in federal court. We thus find that Respondent violated Rule 8.4 (b).

Sanctions

The Supreme Court has long held that in determining the appropriate sanction it is appropriate to look to the *ABA Standards for Imposing Lawyer Sanction (ABA*

Standards), *In re Warren*, 167 Vt. 259, 261 (1977); *In re Berk*, 157 Vt. 524, 532 (1991), (citing *In re Rosenfeld*, 157 Vt. 537, 546-47 (1991)).

In applying the ABA Standards, we look to the duty violated, the lawyer's mental state, any actual or potential injury and the presence of aggravating and mitigating factors.

The Duty Violated

Lawyers owe duties to their clients, the public, the legal system and the profession. A lawyer's most important duty is that which he or she owes to a client. There were no clients involved in this case, but important duties were breached.

Section 5 of the ABA Standards deals with violations of the duties which lawyers owe to the public. The introductory commentary to Section 5.0 of the ABA Standards states as follows:

> 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.

Respondent violated this duty when he engaged in serious criminal conduct.

Respondent's Mental State

Under the ABA Standards categorize a lawyer's mental state may be characterized as intentional, knowing, or negligent.

> The most culpable mental state is that of intent, when the lawyer acts with the conscious objective purpose to accomplish a particular result. The next most culpable mental state is that of knowledge, when the lawyer acts with the conscious awareness of the nature or attendant circumstances of his or her conduct both without the conscious objective or purpose to accomplish a particular result. The least culpable mental state is negligence, when a lawyer fails to be aware of the substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable

lawyer would exercise in the situation. *ABA Standards Chapter II, Theoretical Framework.*

Respondent acted intentionally when downloading and viewing pornographic images and videos of children. He knew that his search terms would result in the downloading of child pornography, and he intentionally viewed this conduct. Thus, his mental state is one of intent, the most serious under the ABA Standards.

Injury and Potential Injury

The injury caused by Respondent's conduct is one of the more important factors influencing our decision that this is a disbarment case. Respondent's conduct caused extreme harm to the children depicted in the photographs and videos which he downloaded and stored on his computer.

In a Virginia sentencing opinion in a child pornography case, *United States v. Cruikshank*, 667 F. Supp. 2d 697 (S.D. Va. 2009) the court discussed the harm caused by possession of child pornography, and the recognition of that harm by the U. S. Congress:

> This offense is serious. By paying for access to images of child pornography, [the defendant] supported the creation and distribution of images depicting the sexual abuse of children by driving up demand for new images and rewarding those who create them. See United States v. Duhon, 440 F.3d 711, 719 (5th Cir.2006) ("possession of child pornography is not a victimless crime. A child somewhere was used to produce the images downloaded ... because individuals like [the defendant] exist to download the images.").
>
> The harm caused by child pornography cannot be overstated. Congress has found that child pornography " is a form of sexual abuse which can result in physical or psychological harm, or both, to the children involved." Child Pornography Prevention Act of 1996, Pub.L. No. 104-208, 121, 119 Stat. 3009, 3009-26 (1996) (codified as amended at 18 U.S.C. 2251). Congress has determined that " where children are used in its production, child pornography permanently records the victim's abuse, and its continued existence causes the child victims of sexual abuse continuing harm by haunting those children in future years." Id. It has explained its belief that mere " existence of and traffic in child pornographic images creates the potential for many types of harm in the

community and presents a clear and present danger to all children." *Id.* 121, 110 Stat. at 3009-27.

What is so troubling to the panel is the nature of the injury to these children; there were more than 700 files which constituted child pornography in the legal sense and thousands of images and videos depicting child sexual exploitation. This is a staggering number of children who have been subjected to this harm and the harm to these children will continue as long as these images are available on the internet and as long as there are individuals like Respondent who will download and view them.

Aggravating Factors

This injury is linked to one of the aggravating factors which we are to consider under the ABA Standards, the vulnerability of the victims, *ABA Standards § 9.22(h).* The victims of Respondent's crime are children, and according to the U. S. Attorney's Sentencing Memorandum in the Criminal case, Respondent had collected "an enormous number of files depicting sadistic sexual abuse of prepubescent children, some as young as toddlers". Exhibit B, Page 1. These are extremely vulnerable victims and the damage to them continues as the images continue to be viewed. We consider this to be an aggravating factor of great weight.

We also find a pattern of misconduct, *ABA Standards § 9.22(c).* This was not an isolated instance, but ongoing downloading and viewing of child pornography.

Mitigating Factors

There are also mitigating factors. Respondent has no prior disciplinary record, *ABA Standards 9.32(a),* and he has cooperated with the disciplinary process, *ABA Standards 9.32(e).*

Application of the ABA Standards

There are two sections of the ABA Standards which cover an attorney's serious violation of duties owed to the public.

Section 5.11 provides that:

> 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, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution or importation of controlled substances; or the intentional killing of another . . . .
> (b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

Section 5.12 provides that:

> 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.

Since Respondent's conduct does not contain any of the specific elements listed in Section 5.11, he makes the argument that his conduct should be more reasonably covered by the suspension provisions of Section 5.12. We reject this argument for several reasons. These two sections make a distinction in the mental state of the lawyer. The disbarment section refers to intentional conduct, the suspension provisions, to knowing conduct. Respondent's mental state was more than knowing, he intentionally committed the felony for which he was convicted and knew at the time that he was doing so. Another factor that we must weigh in determining the level of sanction is the issue of the extent of the injury. In this case, the injury was serious. There was no evidence as to the number of individual children involved in the images and videos on Respondent's computer, but it is reasonable to assume severe and ongoing injury to a substantial

number of children.

There are also mitigating factors present. We agree that Respondent is inexperienced in the practice of law, a potential mitigating factor, *ABA Standards § 9.32(f),* but since the violation did not arise in the context of the practice of law we do not consider this to be significant. He has received other punishment in the federal court sentence, *ABA Standards § 9.32(k).* Respondent also argues that his history of abuse as a child is a personal or emotional problem that we should consider in mitigation., *ABA Standards § 9.32(c).* We will discuss this factor in more detail in our discussion of the Vermont cases, but we do not consider these to be significant mitigating factors either.

To summarize the application of the ABA Standards, Respondent's mental state of intent, the extent of the injury to the children involved and to the legal system, and the vulnerability of the victims all argue strongly for disbarment. The mitigating factors are not of sufficient weight to alter our decision.

Vermont Cases

There are no cases in Vermont dealing with discipline for possession of child pornography, but there are a number of cases where attorneys were disciplined for engaging in serious crimes.

In general, where the serious crime involves the misappropriation of client funds, the attorneys have been uniformly disbarred by the Vermont Supreme Court. The actual felony convictions varied but the underlying loss of client funds resulted in disbarment. *In re Ruggiero*, 117 Vt. 663 (2005) (embezzlement of client funds), *In re Daly*, 2006 VT 32, (interstate transportation of stolen property and filing a false tax return), *In re Sinnott*, 2005 VT 109, (interstate transportation of stolen property), *In re Hunter*, 171 Vt. 653

(2000), (disbarment for mail fraud).

George Harwood was disbarred for comingling and misappropriating client funds, though since he was able to repay the funds he was not criminally charged. *In re Harwood*, 2006 VT 15.

Frederick Lane was Treasurer of the Chittenden County Democratic Party. He used money from the party's account for his personal expenses. He repaid the money and was not charged with a crime. Lane conceded that he had engaged in serious criminal conduct and was disbarred. *In re Lane*, 174 Vt. 550 (2002).

There are, in fact, no recent Vermont disbarment cases which do not in some way involve the misuse of funds entrusted to the attorney. Respondent argues that because hearing panels and the Supreme Court have made this distinction, that we should consider this to be a suspension case. He points to two recent cases in which the attorney was suspended for conviction of a serious crime not related to the practice of law. We agree that on their face the facts in these cases are closer to those in Respondent's case than are the cases involving funds entrusted to the attorney. There are, however, important differences.

In *In re vanAlstyn*, PRB Decision No. 112 (2008), the attorney was convicted of extortion (a felony) and stalking. While practicing in Vermont, vanAlstyn had a relationship with a woman in his office. He relocated to California, became addicted to methamphetamines, and when the woman tried to end the relationship, he engaged in a campaign of harassment and stalking. In deciding on the appropriate sanction the panel wrote:

> Were we to consider only the criminal conviction and the illegal behavior leading up to it, we would have no hesitation in recommending to the Supreme Court that

> Respondent be disbarred. Not only would this be consistent with the ABA Standards and prior Vermont cases involving conviction of a felony, but it would underscore as well as our belief that it is incumbent on attorneys to maintain high standards of personal integrity, and that absent extraordinary circumstances, one who fails to do so should be denied the right to practice law

The panel went on to consider in some detail these "extraordinary circumstances" which it deemed "quite remarkable." vanAlstyn's drug addiction eventually led to the loss of his job, alienation from his family and arrest for drug possession. While in jail he made the determination to turn his life around, which he did first on his own and then with AA, an intensive court based diversion program, a faith based support group and later a Lawyer's Assistance Program of the California bar, a five year voluntary program involving individual and group therapy and random drug testing. vanAlstyn successfully completed the drug diversion program. In addition he testified about his altered perception of his girlfriend's actions and acknowledged that his perspective was skewed by his drug addiction. In this case the panel found that that "exceptional leniency is appropriate in exceptional circumstances," and suspended Respondent for a period of one year, which together with the period of interim suspension resulted in a suspension in excess of three years.

The other recent case is *In re Neisner*, PRB Decision No. 119 (2009), suspension increased from one to two years on appeal, *In re Neisner*, 2010 VT 102. Neisner was involved in an accident with a motorcycle, left the scene of the accident (twice) and then later told the police that his wife had been the driver. He was eventually convicted of four criminal charges, including one felony. Both the hearing panel and the Court considered substantial mitigating factors in this case. Neisner is a sole practitioner in a small town. He had also been the town moderator for years. At the town meeting after

his arrest, he apologized publicly to the town, and was reelected moderator for the next year. He also presented substantial character evidence of both his support for his local community and the community's support for him. Alcohol played a role in the misconduct and Neisner sought help immediately after the accident and continued as an active participant in AA.

In comparing these two cases to the present case, it is the substantial difference in both the aggravating and mitigating factors which have convinced us that disbarment is the appropriate sanction in the present case.

In both *Neisner* and *vanAlstyn,* substance abuse, alcohol for Neisner and methamphetamines for vanAlstyn, played a part in the crimes themselves. Both of these attorneys recognized this fact after the criminal acts, and both made substantial and ongoing personal efforts to overcome their addictions. vanAlstyn sought help from AA, a drug diversion program which he successfully completed and from the California Bar. Neisner immediately sought help for alcoholism and continued with the program. Both attorneys evidenced a real understanding of how their substance abuse had contributed to the misconduct and also some personal understanding of how they had changed in the process.

The mitigating factors listed in Section 9.32 (i) involve mental disability of chemical dependency including alcoholism or drug abuse. Although the Respondent testified that he was addicted to pornography, there was no evidence suggesting that addiction to pornography is a mental disability recognized by the medical profession, so no diagnosis or pathology was established for purposes of Section 9.32(i). Respondent argues that his history of child sexual abuse is the type of "personal or emotional

problem" that can be considered in mitigation under the ABA Standards, §9.32(c). What he does not do is make a credible and direct link between the abuse he suffered as a child and his use of child pornography. In *Neisner* and *vanAlstyn* the link is reasonably direct. It is the addiction to alcohol and methamphetamines that set up the pathway to the criminal behavior. Respondent does not make that direct connection We do not want to make light of the damage that child sexual abuse can cause, but Respondent has not shown any direct link between his early abuse and his later use of child pornography.

Respondent suggests that his use of pornography is similar to other addictive behavior and that he is dealing with it in therapy. We applaud this effort, but we did not hear evidence of the same kind of hard work to overcome addiction problems which we found in the two suspension cases. In both those cases, this effort was demonstrated by concrete evidence. In *Neisner*, his public apology to his town, his reelection as moderator his commitment to AA and the substantial evidence of good character presented were persuasive to the panel. In *vanAlstyn*, the completion of a drug diversion program and successful participation in the Lawyer's Assistance Program were evidence of his hard work dealing with his drug addiction.

In the present case, as well as these two suspension cases, the injury is to the legal profession. All three attorneys violated their duty "to maintain the standards of personal integrity upon which the community relies." *ABA Standards §5.0.* We believe, however, that in assessing the question of "personal integrity" it is essential to examine the underlying behavior which led to the violation. All three attorneys committed felonies. In *Neisner*, the ones injured by his crime were his wife, who was initially set up to accept responsibility for the offense, and the motorcycle operator who was injured. In *vanAlstyn*

the criminal activity was directed at his former girlfriend. These individuals suffered real injury and the fact of an attorney being responsible for such injuries reflects negatively on the profession. The victims of Respondent's criminal behavior were numerous and they were young children. We believe that this is another important distinction. The number of victims, their extreme vulnerability and the substantial and on-going injury inflicted upon them is we believe injury to the legal profession of a different magnitude and underscores our conviction that Respondent should be disbarred.

Cases from Other Jurisdictions

A number of other jurisdictions have dealt with discipline of attorneys for possession of child pornography. For the most part the attorneys have been disbarred, though there are several cases of lengthy suspensions.

In a case from California earlier this year, *In re Grant*, 2014 BL 18343 (Cal. Jan. 23, 2014), the facts are similar to the present case. The attorney was convicted of possession of child pornography. The issue before the California Supreme Court was whether the crime was one of moral turpitude which requires disbarment under their disciplinary rules. The Court concluded "that the knowing possession or control of child pornography involves moral turpitude in every case." The Court wrote:

> Child pornography harms and debases the most defenseless of our citizens. Its production, sale, and distribution are intrinsically related to the sexual abuse of children in two ways. First as a permanent record of a child's abuse, the continued circulation itself harms the child who participated. . . . Second, the traffic in child pornography provides an economic motive for its production. Under either rationale, child pornography is proximately linked to the sexual abuse of children, a most serious crime and an act repugnant to the moral instincts of a decent people (citations omitted).

The issue of moral turpitude was before the Court in the District of Columbia in another case of an attorney convicted of possession of child pornography. *In re Wolff,*

490 A.2d 1118 (D.C. 1985). The court stated that moral turpitude can be defined in three ways:

> (1) The act denounced by the statute offends the generally accepted moral code of mankind;
>
> (2) The act is one of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men or to society in general, contrary to the accepted and customary rule of right and duty between man and man; or
>
> (3) Conduct contrary to justice, honesty, modesty, or good morals. *Id.*

The court found that possession of child pornography was a crime of moral turpitude and the attorney was disbarred.

Respondent presented one letter in support of his good character, as a mitigating factor under ABA Standards §9.32(g). We did not find this persuasive in the way that the panels did in *Neisner* and *vanAlstyn* where there was considerable evidence of character and reputation. In a case from Canada, *Law Society of Upper Canada v. Sloan*, 2012 ONLSHP 0176 (Province of Ontario, 2012), the attorney was convicted of possession and distribution of child pornography. The attorney presented a series of letters attesting to his reputation, his willingness to work for clients without payment, his mentoring of young lawyers and his commitment to the profession. This was not sufficient to reduce the court's decision to revoke the attorney's license.

In a Minnesota case, *In re Flynn,* 679 N.W.2d 330 (Minnesota Supreme Court 2004), the attorney was convicted of possession of child pornography. In a decision based on a stipulation which is not included in the opinion, the court suspended the attorney for five years. Under our Rules a disbarment is similar to a five year suspension since after that time the attorney may apply for readmission, Administrative Order 9 Rule 8 (A)(1).

Conclusion

There is nothing in the cases from other jurisdictions that would persuade us that disbarment is not the appropriate sanction in Vermont for possession of child pornography. It is not just the fact that Respondent was convicted of a serious crime that leads us to recommend disbarment, it is the serious harm that this crime inflicted on a large number of very vulnerable victims. The Hearing Panel acknowledges that possession of child pornography is not a crime specifically enumerated in *ABA Standards Section 5.11,* however, due to the severity of the felony and its impact on the victims of the crime, we feel that this violation more closely falls within the parameters of Section *5.11* and not *Section 5.12.* Were we to compare the harm to the legal system caused in the present case to the disbarment cases discussed above involving theft from clients, we believe that public confidence in the integrity of lawyers is at least if not more compromised by a conviction for possession of child pornography.

Recommendation

The Hearing Panel recommends to the Vermont Supreme Court that Aaron Smith be disbarred for violation of Rule 8.4(b) of the Vermont Rules of Professional Conduct and that the period of disbarment commence on August 5, 2013, the date of his interim suspension.

Dated: June 17, 2014

Hearing Panel No. 7

Harland L. Miller III, Esq., Chair

Mark Hall, Esq.

Stephen Carbone

ENTRY ORDER

SUPREME COURT DOCKET NO. 2013-285

JULY TERM, 2013

In re Aaron Smith, Esq.	}	Original Jurisdiction
	}	
	}	
	}	Professional Responsibility Board
	}	
	}	PRB NO. 2012-183

In the above-entitled cause, the Clerk will enter:

Disciplinary counsel and respondent Aaron Smith, an attorney admitted to the practice of law in the State of Vermont, have filed with the Court a "stipulation to interim suspension." The parties agree that respondent has been convicted of a "serious crime" within the meaning of Administrative Order 9, Rule 17.C and stipulate to his immediate interim suspension pursuant to Rule 17.D ("The Court shall place a lawyer on interim suspension immediately upon proof that the lawyer has been convicted of a serious crime regardless of the pendency of any appeal."). The stipulation is supported by a certified copy of a judgment of conviction of respondent of one count of possession of child pornography in the United States District Court for the District of Vermont.

Accordingly, the Court orders:

1. That respondent Aaron Smith's license to practice law is immediately suspended on an interim basis pending final disposition of the underlying disciplinary proceeding.

2. That respondent shall comply with all of the provisions of Administrative Order 9, Rule 23.

BY THE COURT:

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Marilyn S. Skoglund, Associate Justice

Brian L. Burgess, Associate Justice

Beth Robinson, Associate Justice