NOT FOR PUBLICATION

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

MATTER OF:

Michael Alan JIMENEZ, D2022-0068

Respondent

FILED
JAN 18 2023

ON BEHALF OF RESPONDENT: Robert J. DeGroot, Esquire

ON BEHALF OF EOIR: Paul A. Rodrigues, Disciplinary Counsel

ON BEHALF OF DHS: Toinette M. Mitchell, Disciplinary Counsel

IN PRACTITIONER DISCIPLINARY PROCEEDINGS
Notice of Intent to Discipline Before the Board of Immigration Appeals

Before: Noferi, Temporary Appellate Immigration Judge[1]; Brown, Temporary Appellate Immigration Judge; Malphrus, Deputy Chief Appellate Immigration Judge

Opinion by Temporary Appellate Immigration Judge Noferi

NOFERI, Temporary Appellate Immigration Judge

The respondent will be suspended from practice before the Board of Immigration Appeals, the Immigration Court, and the Department of Homeland Security ("DHS") for 1 year, effective upon issuance of this order.

I. FACTS AND PROCEDURAL HISTORY

On November 30, 2021, the respondent pled guilty to endangering the welfare of children in violation of N.J. Rev. Stat. § 2C:24-4b(5)(b)(iii) (2013) (Pet. for Immediate Suspension, Attachment 1). This offense qualifies as a felony and a serious crime as defined in 8 C.F.R. § 1003.102(h). N.J. Rev. Stat. § 2C: 43-6 (2013). On May 12, 2022, the Disciplinary Counsel for the Executive Office for Immigration Review ("EOIR") and the Disciplinary Counsel for DHS jointly petitioned for the respondent's immediate suspension from practice before the Board of Immigration Appeals, the Immigration Courts, and DHS. We granted the petition on June 1, 2022.

On June 8, 2022, the respondent filed a motion to stay the immediate suspension order and a brief in support of his motion. In his brief, the respondent argues that it is in the interest of justice for the Board to set aside his immediate suspension order due to the hardship his suspension will impose on his clients and the nonprofit organization for which he works. He contends that he is

[1] Temporary Appellate Immigration Judges sit pursuant to appointment by the Attorney General. See 8 C.F.R. § 1003.1(a)(4).

not a danger to the community and is counsel of record in approximately one hundred matters with numerous indigent and under-served clients depending on him for representation (Respondent's Br. in Support of Mot. to Stay at 5-6). He further asserts that he has participated in both group and individual therapy sessions weekly for the past 6 years and that his doctor states that it is clinically recommended that he return to work as an attorney without restrictions (Respondent's Br. in Support of Mot. to Stay at 6-7). He also claims that, of his own accord, he installed monitoring software to report his internet activity to his doctor (Respondent's Br. in Support of Mot. to Stay at 7), and he notes that he has not been involved in or disciplined for unlawful activities or misconduct since his arrest. *Id.* The respondent additionally states that his misconduct should be considered in light of the fact that he was abused as a child. *Id.* In support of his arguments, the respondent has submitted an affidavit, a statement from his employer, a statement from his doctor, and a copy of his conviction record.[2]

The Disciplinary Counsels oppose the respondent's motion to stay the immediate suspension order. The Disciplinary Counsels argue that the respondent has not provided good cause for setting aside the order because he has not disputed the fact that he has been convicted of a serious crime and the regulations require immediate suspension under these circumstances. (Gov't Opp. to Mot. to Stay at 3). The Disciplinary Counsels further contend that harm to the respondent's clients and employer are a natural by-product of a disciplinary suspension and do not provide a basis for setting aside a properly issued order (Gov't Opp to Mot. to Stay at 3). In addition, the Disciplinary Counsels maintain that the steps the respondent has taken to address the conduct that led to his criminal conviction are mitigating factors to be considered in assessing the appropriate level of discipline to impose, not factors justifying setting aside the immediate suspension order (Gov't Opp. to Mot. to Stay at 3-4). Finally, the Disciplinary Counsels state that staying these proceedings pending the outcome of any disciplinary proceedings in New York is not warranted because the proceedings are based on the respondent's criminal conviction not any discipline that might be imposed in New York (Gov't Opp. to Mot. to Stay at 4).

On June 22, 2022, the respondent filed a letter brief in response to the Disciplinary Counsels' opposition to his motion to set aside the immediate suspension order. In the letter brief, the respondent argues that the Disciplinary Counsels minimize the remarkable actions he has taken to obtain treatment and to devote his career to representing indigent people. The respondent contends that the Disciplinary Counsels' arguments overlook the most important inquiry, namely, whether immediate suspension is necessary to protect the public (Respondent's Letter Br.) (unpaginated). The respondent also claims that the respondent's home state of New York is in a better position to conduct a thorough disciplinary investigation and that the Board should wait to impose discipline

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[2] The respondent also claims that the immediate suspension order was improperly issued because the Disciplinary Counsels did not provide a certified record of conviction from the New Jersey court (Respondent's Mot. to Stay at 8-9). The respondent, however, does not dispute the fact that he was convicted or the fact that his offense constitutes a serious crime as defined in 8 C.F.R. § 1003.102(h). The Disciplinary Counsels further note that the respondent provided this conviction record to the Disciplinary Counsels and has not disputed the accuracy or authenticity of the record (Gov't Opp. to Mot. to Stay at 3). The lack of a certified conviction record therefore does not justify invalidation of the immediate suspension order.

until after New York has completed its review of the respondent's conduct (Respondent's Letter Br.) (unpaginated). Further, the respondent maintains that he should be allowed to continue to practice because his crime was not one of greed but one resulting from a complex mental illness, and the respondent notes that he has taken the necessary steps for treatment and rehabilitation. The respondent argues that all the mitigating factors he has presented are relevant to the question whether an immediate suspension order should be set aside, despite the Disciplinary Counsels' arguments to the contrary.

Before we could rule on the respondent's motion to stay the immediate suspension order, the respondent filed an answer to the charges in the Notice of Intent to Discipline. In the answer, the respondent admits the essential facts contained in the allegations of the Notice of Intent to Discipline and does not contest the disciplinary charge. The respondent, however, notes that his conviction did not touch on the practice of law and was substantially influenced by childhood trauma (Respondent's Answer at 1). The respondent also points out that he was not required to register as a sex offender as a result of the conviction and that two doctors and the Superior Court of New Jersey (the sentencing court in his criminal case) have concluded that he is not at risk to re-offend (Respondent's Answer at 2).

In addition, the respondent lists a number of other mitigating factors relevant to his case: he has not been convicted of or committed any other unlawful conduct, he has rehabilitated himself through extensive therapy and continues to obtain both individual and group therapy on a weekly basis, he practices public interest law and works for a non-profit organization serving indigent clients, he receives minimal and below market compensation for his work, he has not been disciplined for any ethical violations during his career, his employer will have difficulty finding a qualified attorney to take his place, he has a stable and solid family life including a 30-year relationship with his wife, and he has a history of extensive volunteerism (Respondent's Answer at 3-5 and 6-14). The respondent further asserts two affirmative defenses: (1) that it would be a grave injustice to discipline him given his rehabilitation, his volunteerism, and the influence of childhood trauma on his crime, and (2) that the Disciplinary Counsels have not conducted an adequate investigation of the issue and should permit New York to investigate first for disciplinary violations (Respondent's Answer at 5). Moreover, the respondent requests a hearing (Respondent's Answer at 5-6).

The respondent has submitted declarations or letters from several individuals in support of his arguments (Respondent's Answer, Exhibits A, 1, 2, 4-11 and B, 1). The respondent also maintains that any suspension or sanction imposed on him would be punitive in nature and contrary to the stated goals of nearly every attorney discipline system, which are to protect the public and the integrity of the legal system (Respondent's Answer at 14). The respondent therefore asks that, if any sanction is imposed, it be less than a suspension (Respondent's Answer at 15).

On July 11, 2022, the Disciplinary Counsels for EOIR and DHS filed a motion for summary adjudication. In the motion, the Disciplinary Counsels argue that summary proceedings are appropriate in this case because there is no material issue of fact regarding the underlying basis for discipline (Gov't Mot. for Summary Adjudication at 3-4). The Disciplinary Counsels further maintain that the respondent's arguments regarding grave injustice do not provide a basis for a

hearing in his case (Gov't Mot. for Summary Adjudication at 3-4). The Disciplinary Counsels explain that the respondent's grave injustice argument is based largely on claims of mitigating factors, which are relevant to the disciplinary sanction imposed but not to whether the disciplinary charge has been sustained (Gov't Mot. for Summary Adjudication at 4). The Disciplinary Counsels also contend that disbarment is the appropriate sanction in the respondent's case. The Disciplinary Counsels acknowledge the mitigating factors the respondent has presented, but they argue that these factors do not outweigh the serious nature of the crime of possessing or viewing child pornography (Gov't Mot. for Summary Adjudication at 4-5). The Disciplinary Counsels additionally point out that the Board has long held that disbarment is the appropriate sanction when an attorney has been convicted of a serious crime (Gov't Mot. for Summary Adjudication at 5).

On July 26, 2022, the respondent submitted a response to the Disciplinary Counsels' motion for summary adjudication. The respondent argues that his case is distinguishable from the cases the Disciplinary Counsels have cited in support of their claim that disbarment is the appropriate sanction. The respondent also reiterates his claim that the purpose of disciplinary proceedings is to protect the public and not to punish the attorney, and he asserts that imposing disbarment in this case would serve only to punish (Respondent's Response) (unpaginated). Finally, the respondent asserts that there is no logical basis for prohibiting the Board from finding that a grave injustice would occur if discipline were imposed in this matter, and the respondent maintains that, given the serious nature of the proposed sanction of disbarment, the Board must undertake all efforts to consider the matter, including holding a hearing (Respondent's Response) (unpaginated).

II. ANALYSIS

The regulations governing attorney discipline proceedings allow summary proceeding before this Board in two situations: (1) when the proceedings involve reciprocal discipline, or (2) when the practitioner has been convicted of a serious crime as defined in 8 C.F.R. § 1003.102(h). *See* 8 C.F.R. § 1003.103(b); 8 C.F.R. § 1003.106(a). In this case, the Disciplinary Counsels charge that the respondent is subject to summary proceedings because he has been convicted of a serious crime, namely endangering the welfare of a child.

The respondent has not contested the allegations or the charge in the Notice of Intent to Discipline. In particular, the respondent has not contested the allegation that he pled guilty to endangering the welfare of children in violation of N.J. Rev. Stat. § 2C:24-4b(5)(b)(iii) or the allegation that he was sentenced to a probation of 2 years with conditions for this offense (Notice of Intent to Discipline). The respondent also has not challenged this Board's conclusion that his offense is a serious crime as defined in 8 C.F.R. § 1003.102(h). These facts are sufficient to establish that summary disciplinary proceedings are appropriate. *See* 8 C.F.R § 1003.103(b)(1); *see also* 8 C.F.R. § 1003.102(h). The lack of dispute also establishes that there is not a material issue of fact in dispute regarding the basis for summary disciplinary proceedings. *See* 8 C.F.R. §1003.106(a)(1). The respondent accordingly has not met his burden of establishing that a hearing is necessary. *Id.*

The respondent argues that he is entitled to a hearing because grave injustice would result if he is disciplined in summary proceedings (Respondent's Answer at 6). The Disciplinary Counsels, however, are correct that the regulations provide a "grave injustice" exception to summary proceedings only when the proceedings are based on reciprocal discipline, not on a criminal conviction. 8 C.F.R. § 1003.103(b)(1), (2)(iii). Moreover, we agree with the Disciplinary Counsels that the issue in dispute in this case is the appropriate sanction for the respondent's offense, not whether the respondent is subject to discipline. We accordingly deny the respondent's request for a hearing. *See* 8 C.F.R. § 1003.106(a)(1); 8 C.F.R. § 1003.103(b). We further find that, due to his conviction for a serious crime, the respondent is subject to discipline before the Board of Immigration Appeals, the Immigration Courts, and DHS. *See* 8 C.F.R. § 1003.103(b); 8 C.F.R. § 1003.102(h).

The Notice of Discipline proposes that the respondent be disbarred from practice before the Board, the Immigration Courts, and DHS. The respondent argues that the mitigating factors in his case demonstrate that a lesser sanction or no sanction would be more appropriate. The American Bar Association, *Annotated Standards for Imposing Lawyer Sanctions* (2015) ("ABA Standards"), which are instructive but not binding upon us, recognize that each disciplinary case involves unique facts and circumstances. ABA Standards, Standard 9.0 at 413. The ABA Standards state that, in striving for fair and consistent disciplinary sanctions, consideration must be given to the facts pertaining to the misconduct and to any aggravating or mitigating factors. *Id.* We weigh all relevant information to determine the appropriate sanction.

First, the respondent has been convicted of knowingly possessing, knowingly viewing, or knowingly having under his control, through any means, including the Internet, less than 1,000 items depicting the sexual exploitation or abuse of a child. *See* N.J. Rev. Stat. § 2C:24-4b(5)(b)(iii). He accordingly has been convicted of an offense involving child pornography.

The Supreme Court of the United States has recognized the seriousness of offenses involving child pornography and the importance of the state's interest in protecting victims of these crimes. The Court further has noted that materials produced by child pornographers permanently record the abuse and that the pornography's continued existence causes the victims continuing harm. *Osborne v. Ohio*, 495 U.S. 103, 109-11.

This Board has found offenses involving child pornography to constitute both particularly serious crimes and crimes involving moral turpitude. In *Matter of R-A-M-*, 25 I&N Dec. 657, 660 (BIA 2012), we stated that offenses relating to child pornography are intrinsically serious and directly related to the sexual abuse of children, who are among the most vulnerable members of society. We acknowledged that possession of child pornography is not per se a particularly serious crime, but we also noted that the act of possessing child pornography victimizes the children involved and continues to harm their reputation and their emotional well-being. *Id.* at 661. Further, after examining the particular facts and circumstances of the noncitizen's crime in that case, we concluded that it did constitute a particularly serious crime for the purposes of section 241(b)(3)(B)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3)(B)(ii). *Matter of R-A-M-*, 25 I&N Dec. at 662.

In *Matter of Olquin*, 23 I&N Dec. 896 (BIA 2006), we concluded that a noncitizen's conviction

for possession of child pornography in violation of a Florida statute constituted a crime involving moral turpitude. In reaching this conclusion, we noted that child pornography is intrinsically related to the sexual abuse of children and that the sexual exploitation of children is a particularly pernicious evil. *Matter of Olquin*, 23 I&N Dec. at 897.

We accordingly agree with the Disciplinary Counsels that the respondent's offense is a serious and concerning crime. The respondent, however, is correct that the purpose of disciplinary proceedings is not to punish the attorney but to protect the public. *See* 8 C.F.R. § 1003.101(a) (giving the Board and Adjudicating Officials the authority to impose disciplinary sanctions if they find it is in the public interest to do so); *see also* ABA Standards, Standard 1.1 (stating that the purpose of disciplinary proceedings is "to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely properly to discharge their professional duties to clients, the public, the legal system, and the legal profession").

The annotations to Standard 1.1 of the ABA's Standards further state that punishment is not an objective of disciplinary proceedings. ABA Standards at 11; *see also In Re Cohen*, 100 A.3d 529, 531 (N.J. 2014) (stating that the primary purpose of disciplinary proceedings is not to punish the attorney but to preserve the confidence of the public in the bar). We therefore must consider whether sanctioning the respondent for his offense is necessary to protect the public or to fulfill the other purposes of disciplinary sanctions, given all the circumstances of the respondent's case.[3] *See* ABA Standards at 35 (indicating that a disciplinary sanction must reflect the unique facts and circumstances of each case).

The respondent has identified several mitigating factors that we weigh in considering the appropriate sanction, if any. First, the conduct underlying the respondent's conviction occurred 6 years ago in 2016 (Respondent's Br. in Support of Mot. to Stay, Exh. 1, Respondent's Declaration; Petition for Immediate Suspension, Attachment 1). Second, the respondent was sentenced only to probation (Petition for Immediate Suspension Attachment 1). Third, the respondent was not required to register as a sex offender (Respondent's Br. in Support of Mo. to Stay, Exh. 1, Respondent's Declaration; Petition for Immediate Suspension, Attachment 1). Fourth, the Judgment of Conviction from the respondent's case lists as a mitigating factor the fact that the respondent's character and attitude indicate that he is unlikely to commit another offense (Petition for Immediate Suspension, Attachment 1).

Fifth, the psychologist who has treated the respondent since 2016 has concluded that the respondent is considered low risk for re-offense and has recommended that the respondent return to work as an attorney without restriction (Respondent's Answer, Exh. 2 at 13-14). The psychologist who conducted the psychosexual evaluation and actuarial risk assessment also concluded that the respondent is not likely to commit a contact or non-contact sexual offense in the future or engage in future criminal activity (Respondent's Answer, Exh. 1 at 3-12).

Sixth, the respondent has no other criminal convictions or arrests and has no history of

[3] The ABA Standards recognize that upholding the integrity of the legal system, assuring the fair administration of justice, and deterring other lawyers from similar misconduct are the primary purposes of lawyer discipline. ABA Standards at 1.

disciplinary violations. Seventh, the respondent has taken extensive steps toward rehabilitation including participating in both individual and group therapy on a weekly basis, and voluntarily installing self-monitoring software that sends a report to his doctor (Respondent's Br. in Support of Mo. to Stay, Exh. 1, Respondent's Declaration). Eighth, the respondent's offense did not involve a client or his practice of law and does not raise questions regarding his honesty or his fitness to practice. Finally, the respondent has submitted letters and copies of awards documenting his good character and his commitment to volunteering and he did inform the Disciplinary Counsels of his criminal conviction.[4] *See* ABA Standards, Standard 9.32 (listing factors that may be considered in mitigation).

Weighing against these mitigating factors is the aggravating fact that the respondent's offense involved a vulnerable victim, namely children. *See* ABA Standards, Standard 9.22 (listing factors that may be considered in aggravation).

This truly is a difficult case. There is no doubt that the respondent has been convicted of a very serious and reprehensible offense. The respondent, however, has submitted extensive evidence showing his rehabilitation and his commitment to change. He also has established that this offense is his only criminal transgression and that he did not have criminal violations either before or after this offense, which occurred 6 years ago. Further, the respondent is correct that, while reprehensible, this offense occurred outside of his legal practice, did not involve clients, and does not reflect upon his ability to practice law.

Given all the facts and circumstances of this particular case, we conclude that disbarment is not an appropriate sanction at this time. *See* 8 C.F.R. § 1003.101(a); *see also In Re Cohen*, 100 A.3d at 531-32 (discussing the range of sanctions imposed for convictions relating to child pornography, including several cases involving convictions for the same offense where a 6 month suspension was imposed); *cf. Matter of Duffy*, 70 N.Y.S.3d 508 (N.Y. App. Div. 2018) (disbarring an attorney for conviction related to child pornography); *Matter of St. Clair*, 821 N.Y.S.2d 684 (N.Y. App. Div. 2006) (suspending attorney for 3 years for misconduct surrounding and underlying child pornography offense). We instead will suspend the respondent from practice before the Board of Immigration Appeals, the Immigration Courts, and the DHS for 1 year from the date of this order.[5]

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[4] The Disciplinary Counsels state that the respondent did not notify them within 30 days as required by the regulations, but they indicate that the respondent's notice was only approximately 2 weeks late (Notice of Intent to Discipline).

[5] Because the respondent is currently suspended under our June 1, 2022, order of suspension, his suspension can become effective immediately. *See, e.g.*, 8 C.F.R. § 1003.105(d)(2) (indicating that a practitioner who has not been suspended pursuant to an immediate suspension order should be given at least 15 days to comply with the terms of an order of suspension or disbarment).

ORDER: The Board hereby suspends the respondent from practice before the Board of Immigration Appeals, the Immigration Courts, and the DHS for 1 year, effective upon issuance of this order.

FURTHER ORDER: The respondent must maintain compliance with the directives set forth in our prior order. The respondent must notify the Board of any further disciplinary action against him.

FURTHER ORDER: The contents of the order shall be made available to the public, including at the Immigration Courts and appropriate offices of the DHS.

FURTHER ORDER: The respondent may petition this Board for reinstatement to practice before the Board, the Immigration Courts, and the DHS under 8 C.F.R. § 1003.107.