

STATE OF MAINE

SUPREME JUDICIAL COURT

DOCKET NO. BAR-07-01

ANDREW NICHOLSON

Plaintiff

v.

DECISION and ORDER

BOARD OF BAR EXAMINERS

Defendant

This is an appeal from a decision of the Board of Bar Examiners denying the application of Dr. Andrew Nicholson for admission to the Maine Bar. The Board found that Nicholson failed to prove, as required by M. Bar Admission R. 9(a) (2006), that he possessed the requisite good moral character necessary to practice law in the State of Maine. Nicholson appealed this decision, seeking a hearing de novo before a single justice of the Supreme Judicial Court. M. Bar Admission R. 9(d)(6) (2006). Upon consideration of the testimony and exhibits, and the arguments of counsel, I deny the application for admission.

I. BACKGROUND

A. Nicholson's Conviction for Possession of Child Pornography

In May 2002, Nicholson—then a licensed physician engaged in family practice—mailed an order, along with \$80 cash, to purchase two videotapes portraying ten and eleven-year-old children engaged in explicit sexual acts. Unbeknownst to Nicholson, the individual from whom he sought to make the purchase was part of an undercover Postal Inspection Service sting operation.

Several weeks later, Nicholson was stopped by a U.S. Postal Inspector after he picked up what he believed was a package containing the videos he had ordered. Nicholson subsequently waived his *Miranda* rights, wrote out a confession, and provided consent to a search of his home computer. In his written statement, Nicholson claimed, “This is the first time I have possibly received illegal pornography.”

Nicholson had begun acquiring illegal child pornography over the Internet in the fall of 2001. When Nicholson consented to the search of his home computer by the postal inspector, he did not expect the authorities to find child pornography stored in the computer because he employed a software program to erase the adult and child pornography he had downloaded. For reasons not fully explained by the record evidence, the software had failed to erase Nicholson's most recent online activities and the Maine Computer Crimes Task Force found over 80 digital

photographs—some duplicates—of child pornography on the computer, including photographs of naked children, children engaged in sexual contact with other children, and two separate series of nine photographs of female children or adolescents having sex with adult men. As to the later photographs, it is difficult to discern the ages of the two females, but Nicholson did testify before the Board that he had seen and possibly downloaded images of adult males engaged in sexual contact with prepubescent children.

The Federal authorities deferred prosecution to the State authorities, although Nicholson's conduct could have resulted in charges that he violated federal child pornography statutes, which at the time carried sentences of up to fifteen years. *See* 18 U.S.C. § 2252 (2002); 18 U.S.C. § 2252A (2002). At the urging of the Knox County District Attorney's office, Nicholson voluntarily submitted to a polygraph examination. After the polygraph examiner determined that Nicholson's denials of ever having touched a child in a sexual manner, ever having touched a child's genitals for sexual gratification, and ever having had sexual contact with a child other than for medical purposes, all since 1992, did not indicate deception, the prosecuting attorney and Nicholson arrived at a plea agreement. On January 30, 2003, Nicholson pled guilty in the Superior Court (Knox County, *Warren, J.*) to a single misdemeanor count of possession of sexually explicit material, 17 M.R.S.A. § 2924(2)(A), (B) (2002) (now codified at

17 M.R.S. § 284(1)) for which he was sentenced to 364 days imprisonment, with all but seventy-two hours suspended. He was also placed on probation for a year, during which time he was required to submit to random searches for pornography, undergo psychological treatment, and restrict his medical practice to patients who were eighteen years of age or older.

This was not Nicholson's first attempt to purchase videos depicting children engaged in sexually explicit conduct. In February or March of 2002, Nicholson mailed \$200 to the Philippines for videotapes of child pornography. The videos never arrived.

B. Restriction of Nicholson's Medical License and His Subsequent Psychological Evaluation and Counseling

The day before he pled guilty to possession of sexually explicit material, Nicholson entered into a consent agreement with the Maine Board of Licensure in Medicine, pursuant to 10 M.R.S. § 8003(5)(B) (2006) and 32 M.R.S. § 3282-A (2006). As part of the consent agreement, Nicholson agreed to: (1) restrict his practice of medicine to adults over the age of 18; (2) participate in ongoing treatment with a board-approved therapist experienced in the treatment of sexual offenses; and (3) be placed on probation indefinitely, subject to the Board of Licensure's reevaluation one year later. Following the one-year reevaluation, any

alteration to the consent agreement would be “in the sole discretion of the [Board of Licensure].”

1. Psychological Evaluations

As part of the Board of Licensure’s investigation into Nicholson’s actions, the Board referred Nicholson to a clinical psychologist for a psychological evaluation. The psychologist filed a comprehensive report with the Board of Licensure on October 1, 2002, that included his opinion that Nicholson qualified as a “pedophile.”

While the term “pedophile” is defined differently in different research and may or may not include the criteria of having actually committed an offense, it is the opinion of the undersigned that Dr. Nicholson would qualify under the definition provided in the Diagnostic and Statistical Manual of Mental Disorders (fourth edition), or DSM-IV.¹

The psychologist also reported that although Nicholson demonstrated the “psychological capacity to curtail his behavior before it reaches the level of a direct offense against a child,” it was unclear whether he would choose to do so. For this reason, the psychologist concluded that Nicholson posed a “meaningful level of risk.”

The psychologist conducted a second evaluation of Nicholson on March 1, 2004, and, as a result, revised his previous assessment that Nicholson posed a

¹ The Board contends that this excerpt constituted an actual diagnosis while Nicholson contends that this excerpt is not a diagnosis because it fails to address the “axis” requirements for a diagnosis under DSM-IV.

“meaningful level of risk” down to a “minimal” overall risk, based in part on Nicholson’s continued treatment with a licensed clinical social worker. A third evaluation was conducted on March 7, 2005, at which time the psychologist retained this lowered risk assessment. The psychologist reached this conclusion aware that Nicholson had admitted to experiencing two relapses involving his purchasing and downloading of adult pornography.²

2. Counseling

As part of his consent agreement with the Board of Licensure, Nicholson has participated in on-going therapeutic counseling with a licensed clinical social worker. This treatment continues to the present. At the hearing on August 3, 2007, the social worker testified that Nicholson had gained insight into his problems and had made “real changes” in his life. He further stated that Nicholson had learned to use more acceptable methods for dealing with stress and now presented minimal risk of re-offending. Drawing on his four years of experience with Nicholson, the social worker also expressed the opinion that Nicholson does not meet the definition of a pedophile, although the social worker had not rendered his own diagnosis of Nicholson.

² Although Nicholson’s psychologist referred to Nicholson’s actions as a “relapse,” his licensed clinical social worker characterized the actions as a “lapse.” Although these terms may have clinical significance, the proper characterization of Nicholson’s action is not consequential to this decision.

3. Status of the Consent Agreement

In the years since the consent agreement was entered into, the Board of Licensure in Medicine has continued to review the agreement, each time choosing to continue with the terms as written. Nicholson, therefore, remains precluded from treating patients under the age of eighteen. After the Board of Licensure's 2006 review once again resulted in a continuation of this limitation, Nicholson petitioned the Superior Court (Kennebec, *Marden, J.*) to review the Board's decision not to lift the restrictions on his medical license. The court affirmed the Board's decision, a decision which itself was recently affirmed by the Law Court. *See Nicholson v. Board of Licensure in Medicine*, 2007 ME 141, --- A.2d ---.

C. Nicholson's Law School and Bar Applications

In January 2003, two weeks before his guilty plea to possession of sexually explicit material, Nicholson applied for admission to the University of Maine School of Law. Nicholson did not disclose in his application that he was then under investigation by the U.S. Attorney's Office and the Knox County District Attorney's office. The application itself was not introduced as evidence. According to Nicholson, however, the application did not request information that required him to report a pending criminal investigation, only arrests and

convictions.³ Nicholson informed law school officials of his conviction and the consent agreement approximately eight months later in the fall of 2003, shortly after he was matriculated as a law student and had begun attending classes.

In December 2005, Nicholson filed an application for admission to the bar. As required by M. Bar Admission R. 5 (2006), Nicholson reported the fact of his conviction and the consent agreement with the Board of Licensure in Medicine in his written application. Nicholson sat for the February 2006 bar examination and in April he received notice from the Board that he had passed the examination. The Board also informed Nicholson that it would not issue him a certificate recommending his admission until after it had completed its moral character investigation.

The Board held an evidentiary hearing in January 2007 to determine whether Nicholson was of good moral character. *See* M. Bar Admission R. 9(d) (2006). A month later, the Board issued its decision denying Nicholson's application for admission to the Maine Bar. The Board concluded, by a vote of four-to-one, that Nicholson failed to prove by a preponderance of the evidence that he possessed the requisite good moral character to practice law, as required by M. Bar Admission R. 9(a).⁴ Nicholson subsequently filed this timely appeal.

³ Nicholson and the Board have stipulated that Federal authorities never formally arrested Nicholson at the time he was apprehended by the postal investigator.

⁴ The Board's decision concluded as follows:

II. DISCUSSION

A. Legal Standard

In an application for admission to the Maine bar, the burden of establishing good moral character rests with the applicant. M. Bar Admission R. 9(d)(6)(D); *see also Application of Spurling*, 595 A.2d 1062, 1064 (Me. 1991). This burden remains on the applicant throughout the proceedings, rather than shifting to the Board of Examiners after a prima facie showing of good moral character. *Id.* In an appeal from a decision of the Board denying admission, the court considers both questions of fact and law de novo. M. Bar Admission R. 9(d)(6)(C).

B. Good Moral Character

“Good moral character” entails honesty, integrity, respect for the law, and respect for the rights of others. *See ABA CODE OF RECOMMENDED STANDARDS FOR BAR EXAMINERS, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS (2007) [hereinafter ABA STANDARDS].* “The attributes of character that are

As applicant’s counsel observed in argument, the determination of what constitutes good moral character is a difficult one for which there are relatively few helpful precedents, and which is necessarily extremely fact-specific. It is likewise highly dependent on personal judgments of credibility, sincerity and intent. While concluding that the applicant does not, at this juncture, meet the standard necessary for admission, the Board notes that the applicant may seek an enlargement of time for admission from a Justice of the Supreme Judicial Court pursuant to 4 M.R.S.A. § 805-A(3), and the Board will accept reapplication for admission a year from the date of this decision. During the intervening period the Board would encourage the applicant to continue to address the issues discussed at the hearing. Expanded treatment by appropriate professionals is likewise encouraged, and the applicant is invited to submit regular reports to the Board from psychiatric or psychological professionals with appropriate expertise in support of such reapplication.

relevant . . . are those pertinent to the trust placed in lawyers by the public and clients as well as to the requirement that lawyers in this state comply with the Maine Bar Rules.” M. Bar Admission R. 9(a). While the good moral character standard eludes precise definition, courts must strive to apply the standard in a consistent manner, always mindful of our duty to protect the public. *See Konigsberg v. State Bar of California*, 353 U.S. 252, 262-63, 273 (1957).

When an applicant’s record of conduct includes information adverse to the applicant’s moral character—such as a prior conviction, the making of false statements or omissions, or prior professional disciplinary action—a variety of factors may bear on the weight to be given to the prior conduct. These include, but are not limited to: (1) the applicant’s age at the time of the conduct; (2) the frequency and recency of the conduct; (3) the seriousness of the conduct; (4) the evidence of rehabilitation; (5) the applicant’s candor in the admissions process; (6) the materiality of any omissions or misrepresentations; (7) the cumulative effect of conduct or information; and (8) the applicant’s current attitude regarding the conduct. *See ABA STANDARDS*. Additional factors that may bear on the determination of a candidate’s good moral character includes the applicant’s positive social contributions since the conduct, the opinions of character witnesses as to the applicant’s current moral fitness, and any other evidence relevant to the applicant’s current honesty, diligence, or reliability. *See ABA STANDARDS; see*

also *Schwartz v. Board of Bar Examiners of N.M.*, 353 U.S. 232, 239 (1957) (requiring that any qualification have “a rational connection with the applicant’s fitness or capacity to practice law”).

C. Nicholson’s Moral Character

As an initial matter, this analysis appropriately begins by recognizing the obvious: As a thirty-six-year-old licensed family physician authorized by law to provide medical care for children, Nicholson’s interest in and involvement with child pornography was grossly immoral. Nicholson knowingly sought through interstate commerce videos that he believed would depict young children engaged in sexually explicit conduct. He also employed the Internet to gain access to photographs depicting both nude children and children engaged in sexual acts with other children and with adults. This course of conduct went well beyond a brief viewing of illegal photographs on an Internet website. *See In re Holleman*, 826 So. 2d 1243, 1245 (Miss. 2002) (granting a conditional reinstatement supported by the state bar to an attorney disbarred four years earlier for “briefly viewing”—but not otherwise printing or ordering through the mail—child pornography available on an Internet website). The State’s agreement to, and the court’s approval of, a plea agreement whereby Nicholson pled guilty to a single misdemeanor count and was incarcerated for only three days in no way lessens the serious immorality associated with his actions.

There is little doubt that Nicholson could not have established the good moral character required for admission to the bar had he been required to do so at the time of his application for admission to law school. His moral character in January 2003, though, is not the focus of this inquiry. The rehabilitative ideal—the notion that one possesses the free will to surmount the mistakes of their past—is firmly rooted in our system. With the passage of time, I must ask whether, notwithstanding Nicholson’s conduct in 2002, he has since rehabilitated himself and now possesses the good moral character necessary to practice law.

1. Findings Supporting Good Moral Character

The evidence establishes several facts that support a positive answer to this question. There is no indication that Nicholson has engaged in any criminal conduct during the ensuing years. To the contrary, he completed his probation without incident and he attended and graduated from law school. While in law school he worked as a volunteer with the Maine Volunteer Lawyers Project. In addition, Nicholson offered two attorneys as character witnesses at the Board’s hearing—one the former Director of the Volunteers Lawyers Project (VLP), and the other Nicholson’s divorce attorney—both of whom testified to having no reservations in recommending Nicholson for admission to the bar. Nicholson has also engaged in long-term counseling, and he testified at length about his effort to understand the causes of his involvement with adult and child pornography, and his

desire to adopt new behaviors intended to assure that he never re-offends. Nicholson explains his long-term interest in adult pornography as a compulsive disorder that served as the gateway to his interest in child pornography, characterizing his condition as a “compulsive disorder not otherwise categorized.”

2. Findings Opposing Good Moral Character

The record evidence also establishes a pattern of occurrences beginning with his apprehension in 2002 that demonstrates a lack of candor or honesty by Nicholson and that reflects negatively on his moral character.

First, in the sworn written statement he gave to the postal inspector in 2002, Nicholson wrote, “this is the first time I have possibly received illegal pornography.” This statement was not true. Nicholson had “received” illegal pornography via the Internet over a period of several months prior to his apprehension.

Second, Nicholson failed to reveal in his law school application that he was under investigation by federal and state authorities for the commission of a crime, and then delayed reporting the fact of his conviction and the consent agreement until after he was matriculated as a student and had begun attending classes. Nicholson failed to make this disclosure even though he pleaded guilty and was convicted only fourteen days after submitting his law school application. Although Nicholson might not have been legally obligated to report this information to the

law school's administration sooner than he did, his decision to wait to report the information until many months later and after he was fully matriculated as a student reflects a lack of candor in his dealings with the school.

Third, Nicholson began his volunteer work with the VLP in 2004. He failed, however, to inform the administration of VLP of his child pornography conviction until December 2006, after he had stopped working as a volunteer and shortly before the Board hearing in January 2007 at which he intended to call the Director of the VLP as a character witness. As a volunteer with the VLP, Nicholson staffed the Family Law Help Line, a role that placed him in direct contact with individuals facing family law disputes that involve child custody issues. Although Nicholson may have feared the stigma his conviction carries, he should have disclosed his history to the director of VLP so that proper oversight of his employment could have been provided.

Fourth, the report of the psychologist's 2005 reevaluation of Nicholson noted that Nicholson stated that the child pornography he had viewed only involved children with peers, not children with adults: "In this context, Dr. Nicholson also states that he wants to reiterate that when he was viewing child pornography it was not pornography of adults with children but was rather limited to children with peers. He also says again that his experience of this material was that it was exciting but not sexually arousing." The digital photographs found on

Nicholson's computer included pictures of female children or adolescents engaged in sexual acts with adult males, and Nicholson testified before the Board that he had viewed and possibly downloaded images of prepubescent children engaged in sexual contact with adult males. When confronted with this contradiction during the Board's hearing, Nicholson testified that his statement to the psychologist referred to the videos he had ordered, and not the photographs on his home computer. The psychologist's report, however, referred to the pornography Nicholson had viewed, and not the videotapes Nicholson had attempted to purchase and had never viewed. By misleading the psychologist as to the nature of the pornography on his computer, Nicholson may have deprived the psychologist of information necessary to make informed judgments.⁵ His effort to explain the contradiction to the Board was also misleading.

Fifth, all applicants seeking admission to the bar are required to have three individuals submit reference questionnaires attesting to the moral character of the applicant. M. Bar Admission Rule 5(b), (c)(4) (2006). As part of this questionnaire, a person providing a character reference must not only attest that to their knowledge the applicant has demonstrated "the character and conduct

⁵ In DSM-IV, the diagnostic criteria for pedophilia includes: "Over a period of at least 6 months, recurrent, intense sexually arousing fantasies, sexual urges or behaviors involving sexual activity *with* a prepubescent child or children (generally age 13 or younger)." AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 528 (4th ed. 1994) (emphasis added). Therefore, whether or not the child pornography possessed by Nicholson involved adults engaged in sexual acts *with* a prepubescent child or children may have been of diagnostic significance.

necessary to assume the trust placed in lawyers by the public and clients,” but must also indicate whether to their knowledge the applicant has previously “been convicted of any crime or pleaded guilty or nolo contendere to any criminal charge” or has “been subject to any disciplinary action.” The three individuals solicited by Nicholson to attest to his character and conduct were a law school professor, a supervisor at the VLP, and a roommate. They all indicated on their reference questionnaires that, to their knowledge, Nicholson had not been convicted of a crime or subject to professional discipline. Nicholson’s failure to inform these persons of his conviction and prior professional discipline demonstrates a lack of candor with the very persons whom he solicited to vouch for his character.

3. Social Worker’s Opinion Regarding Good Moral Character

Nicholson’s counseling social worker testified that he believes that Nicholson possesses good moral character, but I am not persuaded to rest my judgment regarding Nicholson’s character on the social worker’s opinion.

The social worker appears to have deferred to Nicholson’s judgment as to the treatment he needs in three important respects.⁶ First, the social worker

⁶ The social worker has had relatively infrequent contact with Nicholson during the past two years. Although the social worker and Nicholson initially met every two to three weeks, by 2004 they had begun to meet only once a month. Since November 2006, the frequency of their sessions had decreased to once every two to three months.

referred Nicholson for a psychopharmacological evaluation in September 2003, but Nicholson did not follow-through based on his own assessment that the benefit from possible medications would not outweigh the negative side effects.⁷ The social worker acquiesced in Nicholson's resistance to medication, notwithstanding the fact that the psychologist emphasized the possible significance of that resistance in both his 2004 and 2005 evaluation reports. The psychologist noted in 2004:

Dr. Nicholson's position regarding not continuing with medication at this time is interesting to explore as it highlights a possible area of concern. This is the case because, while his explanation may be entirely valid that side effects of the medication outweigh its usefulness, there is also no manner in which to verify that this decision does not also represent a resistance to treatment. Such a resistance may be in part or largely outside the full awareness of the subject. Additional concern may be suggested by his statement, "I'm fully aware of my vulnerabilities at this point." Individuals who have explored their process in depth through the use of therapy (particularly those with an addictive or compulsive process) more typically state that they are aware of the degree to which they are capable of self-delusion and rationalization.

The psychologist reiterated the significance of Nicholson's refusal to consider medication in the 2005 evaluation, and also specifically recommended that Nicholson engage in "more in-depth therapy" to address "narcissistic injuries . . . [that] will continue to be problematic in a number of ways apart from compulsive

⁷ Nicholson had previously used an antidepressant medication for a three-month period at the end of 2002 that he had prescribed to himself or had been prescribed by his ex-wife, who is also a physician. He testified that he stopped taking the medication due its side effects of insomnia and dry mouth.

strivings with pornography.” Notwithstanding this recommendation, Nicholson did not pursue additional or more frequent therapy.

Second, at the outset of their work together in 2003, Nicholson informed the social worker that he was attending the 12-step program, Sex and Love Addicts Anonymous (SLAA). The social worker noted that an SLAA sponsor can be invaluable in aiding recovery, that the support of SLAA and Nicholson’s sponsor had been very helpful, and that Nicholson reported being committed to attending SLAA. Nicholson apparently followed through with this commitment for an undefined period. In 2005, when Nicholson was no longer participating in SLAA, he informed the social worker that he had experienced a relapse involving the use of online adult pornography and had failed to employ the support system the two had developed for such instances. The social worker wrote in his report that he had “persistently confronted [Nicholson] about attending SLAA” and Nicholson had “committed to locate 12 step resources for sexual addiction, Sex Addicts Anonymous or Sex and Love Addicts Anonymous before he returns to USM law school.” Nicholson did not follow through as promised. The social worker testified that for a period of time he was unaware that Nicholson had never resumed his participation in SLAA.

Finally, in his testimony in court, the social worker disputed that the psychologist had determined that Nicholson qualified for the diagnosis of

“pedophile” for purposes of DSM-IV, and he supported Nicholson’s self-diagnosis of “compulsive disorder not otherwise specified.” The social worker likened Nicholson’s use of child pornography to an addiction.

I am not persuaded by the social worker’s rejection or qualification of the psychologist’s diagnosis, or his acceptance of Nicholson’s self-diagnosis. The social worker was not asked, nor did his testimony otherwise establish, whether his opinion regarding Nicholson’s diagnosis was reached in accordance with the standards of his profession. On cross-examination by the Board’s counsel, the social worker acknowledged that DSM-IV does not recognize pornographic addiction as a diagnosis. When asked why he had not rendered his own formal diagnosis of Nicholson, the social worker explained that Nicholson had been referred to the psychologist for that purpose.

Based on the social worker’s testimony, I am left uncertain as to (1) whether he accepts or rejects the results of Nicholson’s psychological evaluation, and, as a consequence, (2) the reliability of his opinion regarding Nicholson’s moral character. In addition, notwithstanding Nicholson’s professional training and experience as a physician, I do not accept his opinion regarding his own diagnosis.

III. CONCLUSION

Under our rules, Nicholson bears the burden of proving by a preponderance of the evidence that he currently possesses the requisite good moral character necessary to practice law. I do not turn a blind eye to the fact that Nicholson has suffered heavy professional and personal consequences as a result of his wrongdoing, that more than four years have passed since his conviction, and that he has spent considerable time and resources attempting to rehabilitate himself and to start a new career. The issue presented, however, is not whether Nicholson has been sufficiently punished for his wrongdoing, but whether he has demonstrated the level of honesty, integrity, respect for the law, and respect for the rights of others required for an individual to assume the trust that the public places in those licensed to practice law.

I have considered the totality of circumstances and have weighed what I find to be the most probative facts supporting and opposing a finding that Nicholson has rehabilitated himself and currently possesses good moral character. I attribute substantial weight to the pattern suggested by the instances of Nicholson's lack of candor, as well as to his resistance to treatment recommendations, because both bear directly on the level of trustworthiness required of members of the bar. Accordingly, I conclude that Nicholson has failed to prove that he possesses the good moral character necessary to practice law in the State of Maine.

The entry is:

Application for admission to the bar is DENIED.

Dated: December 6, 2007

Jon D. Levy, Associate Justice
Maine Supreme Judicial Court