

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 96-151

IN THE MATTER OF :
PHILIP TORONTO, :
AN ATTORNEY AT LAW :

Decision

Argued: June 19, 1996

Decided: November 18, 1996

Robert L. Ritter appeared on behalf of the District IIB Ethics Committee.

Raymond F. Flood appeared on behalf of respondent.

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

This matter was before the Board based on a recommendation for discipline filed by the District IIB Ethics Committee (DEC). In a four-count amended complaint, respondent was charged with the following ethics violations: RPC 8.4(a) (violating the Rules of Professional Conduct); RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation); and RPC 8.4(d) (conduct prejudicial to the administration of justice) (count one). These charges stemmed from respondent's failure to make a full, candid and complete disclosure to the DEC investigator about his sexual

relationship with grievant under oath, in his answer to the complaint (count one). Respondent was also charged with violations of RPC 8.4(a), (c) and (d) for making false written statements to the DEC during its initial investigation (count two) and with violations of RPC 8.4(b) (criminal conduct) and 8.4(c) (count three). These charges stemmed from respondent's failure to report, withhold and pay taxes and other required financial obligations associated with grievant's employment, in violation of 26 U.S.C. §§ 7207 and 7203 and N.J.S.A. 54:52-6, 8-12 and 14 and N.J.S.A. 43:21-16. The DEC presenter withdrew the fourth count of the complaint because those charges had already been considered by the Board, in January 1996, in a motion for final discipline filed by the Office of Attorney Ethics (OAE).

Respondent was admitted to the New Jersey bar in 1982. He has an office in Lodi, New Jersey.

Nancy Barra filed a grievance against respondent in October 1993 for events that occurred beginning in 1984 through 1988. Barra and respondent did not have an attorney/client relationship. She met respondent while a high school freshman: respondent was her freshman English teacher. Respondent was single and approximately twenty years older than Barra.

According to Barra, she became friendly with respondent while in high school. During her sophomore year, she began grading papers for respondent. Throughout her high school years, she visited respondent at his house two or three times a week. They also went shopping together and respondent drove her to school.

After Barra graduated from high school in 1984, respondent helped her obtain a summer job at the Carlstadt Recreational Department. She worked there five days a week from 8:00 A.M. until 3:00 or 3:30 P.M. From there, Barra went to respondent's law office, where she worked from four to 7:00 P.M. five days a week, typing letters and wills. At that time, respondent was renting office space from a law firm in Rutherford, New Jersey. He did not yet have a full-time law practice. According to Barra, at the end of each week, respondent paid her in cash at the rate of \$7.00 per hour. Barra explained that, because her parents were divorced, she was trying to earn money for her college education. She claimed that she was able to save approximately \$1,000 that summer.

The ethics grievance filed by Barra depicted a somewhat more lurid relationship between her and respondent than that to which she testified at the DEC hearing. The grievance alleged that respondent inappropriately touched her when she was only sixteen years old, that respondent invited her to his home for annual Fourth-of-July picnics when she was seventeen and eighteen and served her alcoholic drinks, and that he used his law office for "his sexual gratification" and "sexual abuse" of Barra over a four-year period. Barra alleged that respondent "would always break out into hives on his neck and say to her 'this is not right, this is statutory rape, I can lose my job.'" Barra did not, however, specify what respondent meant by those statements or when they were made. According to Barra, respondent made her promise never to tell anyone about their relationship because "they would not

understand and he could get into a lot of trouble." Exhibit C-1.

Barra traveled from Florida to testify against respondent at the DEC hearing. She claimed that her first physical contact with respondent occurred in the summer of 1984, when respondent took her for a day of swimming at the Playboy Club in Vernon, New Jersey. It was there that he first kissed her. She testified that respondent would call her "sometimes during the week at night to come and type in the office. And we hadn't had sexual intercourse but we would kiss and touch and things like that." T37-38.¹ In 1984, Barra was eighteen years old. She turned nineteen in September of that year.

In the fall of 1984, Barra was scheduled to begin college in North Carolina. Her mother did not drive and, at that point, Barra was no longer in contact with her father. Respondent, therefore, offered to drive Barra to school. Barra claimed that she and respondent had intercourse for the first time during that trip. She added that, prior to arriving at school, she and respondent checked into a Howard Johnson's motel and consummated their sexual relationship. According to Barra, their relationship continued until 1988, during her school breaks, until 1988. Barra also contended that she worked for respondent during those breaks.

In the summer of 1985, Barra worked full-time as a waitress at the Heights Sweet Shop, in Hasbrouck Heights, New Jersey, a luncheonette allegedly co-owned by respondent and a friend.

¹ T denotes the transcript of the December 18, 1995 DEC hearing.

Respondent helped her get that job, too. Barra testified that she worked from 6:30 A.M. to 2:30 P.M. and was paid in cash \$100 per week plus tips. She claimed that respondent paid her. Barra also testified that taxes were not withheld from her earnings, but did not explain how or why she was aware of this fact.

According to Barra, in November 1988, she was diagnosed with a venereal disease, Human Papilloma Virus (HPV); respondent was the only one with whom she had had a sexual relationship. She informed respondent about her condition during the Thanksgiving 1988 school break. According to Barra, respondent contended that he was unfamiliar with the condition, but gave her \$200 in cash to help defray the medical expenses incurred because of the virus and also gave her a \$100 check in January 1989. Exhibit C-9.

Barra's condition apparently had serious medical consequences. (No expert medical testimony was offered at the hearing.) Barra wanted to undergo surgery to eliminate the symptoms of her condition. There was no guarantee, however, that the surgery would cure the problem. Nevertheless, Barra wanted respondent to pay for her medical expenses, since she believed that he was the only source from which she could have contracted the disease. Respondent, however, denied to Barra that he had the disease or had infected her and would not give her any more money towards the medical expenses. Barra, therefore, contacted Mr. Presto (the attorney from whom respondent rented office space at the time) and asked him to talk to respondent about the situation. After speaking with respondent, Presto informed Barra that respondent

denied having had a sexual relationship with her and also denied having HPV.

Thereafter, Barra threatened respondent that, if he did not give her \$100,000, she would "go public" about their relationship, which she ultimately did. Respondent refused to give her more money, claiming that he did not have \$100,000 and that, in any event, he was not responsible for her condition.

In March 1994, unbeknownst to respondent, Barra taped a telephone conversation between them. In that conversation, Barra unsuccessfully attempted to get respondent to admit that he had transmitted the disease to her.

According to Barra, she waited so long to file a grievance because (1) it was only through discussions with friends that she realized that she had been respondent's victim and (2) she was concerned that no one would believe her. Prior to filing a grievance, Barra had contacted several attorneys about pursuing a personal injury claim. She also contacted the county prosecutor about filing criminal charges against respondent. Barra claimed that she had been informed that the statute of limitations had run for both a civil and a criminal matter.

As of the date of the DEC hearing, Barra had discontinued any efforts to obtain funds from respondent.

* * *

According to respondent, he admitted that he and Barra had become friendly while Barra was still in high school. He denied that Barra had ever visited him at his home or that he had

taken her shopping. He admitted that, after Barra's freshman year in high school, she did some typing for him at school for school-related matters. Respondent added that Barra was always "respectful and friendly" and that they cared about each other in "a professional sense."

Respondent claimed that he and Barra became intimate only by late 1985 or 1986 and then only infrequently. He denied having sexual relations with Barra when he dropped her off at college in North Carolina, in the fall of 1984.

Respondent contended that, in March 1992, Barra threatening to "go public" about their relationship if he did not give her the \$100,000. She apparently also contacted respondent's wife (he had become engaged in 1992 and married shortly thereafter) to discuss her medical condition.

Respondent denied having the disease or even being diagnosed or treated for it. At some unknown point, respondent and his wife divorced. Respondent admitted that his wife's attorney had informed him that his wife had undergone surgery for the same condition (HPV) and that she was planning to sue respondent for damages.

As to the allegations of improprieties in connection with Barra's employment, respondent testified that, because Barra was a close friend, he never considered her to be a part-time employee and did not view theirs as an "employment relationship." Respondent asserted that Barra had volunteered to type for him. He denied that he paid her \$7.00 per hour in 1984, finding that sum to

be excessive back then. Respondent added, however, that he always offered Barra money when she worked for him and that he had to "fight" with her to take the money. Respondent claimed that Barra never wanted to accept money from him because she was so "appreciative" that he had helped her get other jobs.

According to respondent, he resigned from his teaching position in 1985 to practice law on a full-time basis. He was also, at some point, elected mayor of Lodi, New Jersey. Respondent recalled that it was not until November 1985 that he hired his first full-time secretary. Respondent maintained that he always filed the appropriate tax forms with the government and always withheld taxes for his employees. He admitted that he had not filed forms in Barra's behalf because she worked so infrequently; he considered any payments to her as a gift. Respondent estimated that, in the summer of 1984, he had paid Barra no more than \$300. He claimed that, after Barra returned from college, any work she did for him was not only infrequent but also non-legal, related to his political involvement, for which she would not accept remuneration. Barra confirmed that she did not accept any payments from respondent once the nature of their relationship changed.

Finally, respondent denied co-ownership in the Heights Sweet Shop. He explained that he had loaned money to a friend who had purchased the luncheonette and that he had done "paperwork" in connection with his friend's purchase of the shop. Respondent conceded that he had helped Barra get a job at the luncheonette, but denied that he had paid her for working there.

* * *

In connection with the investigation of Barra's grievance, on July 7, 1994, respondent wrote the following letter to the DEC investigator who initially handled Barra's grievance: "I have never employed Ms. Barra for secretarial purposes since her only availability would have been during summers and I have never employed summer help or had more than one secretary at any given time." Exhibit C-4.

The initial formal ethics complaint charged respondent with the following (third count):

* * *

2. In the summer of 1984, respondent offered to take Ms. Barra to her first semester at college in North Carolina.
3. Instead of taking Ms. Barra to her dormitory, respondent registered at a motel whereupon he engaged in sexual intercourse with her.
4. Their intimate relationship continued over the next several years, carried on over school breaks and in the summer. Respondent continued to encourage the relationship with Ms. Barra, as aforesaid, and forbade her from disclosing the relationship to anyone in the New Jersey area.
5. In or about November 1988, Ms. Barra was diagnosed as having Human Papilloma Virus (HPV), a sexually transmitted disease.
6. The respondent is Ms. Barra's only sexual partner. When she advised him of her condition he did not deny that he transmitted it to her and gave her money towards her medical expenses. He has admitted to her that he has the disease.

7. The knowing transmission of a sexual disease is a criminal act pursuant to N.J.S.A. 2C:34-5.
8. As such it is violative of R.P.C. 8.4.

[Exhibit C-5]

In his verified answer to count three, respondent denied the allegations in paragraphs one through eight in their entirety, stating: "Respondent did not have any sexual relationship with Complainant in 1984. . . . Respondent has never been diagnosed with any sexually transmitted disease and therefore could not have infected Complainant." Exhibit C-6. However, in the answer to the amended complaint, respondent admitted that he had had a sexual relationship with Barra. The following exchange took place at the DEC hearing, when respondent was asked whether his answer to the initial complaint was a full, candid and complete disclosure about his relationship with Barra:

- A. I was making a full disclosure with regard to the allegations in count three, which go on to accuse me of transmitting a sexual disease, which goes on to say that I had intercourse with her in 1984, which goes on to say that this intimate relationship continued over the next several years. So to admit to that would be to admit that it started at some point and continued.

* * *

- Q. The question is: Do you believe that there was anywhere in your verified answer that you acknowledged having a sexual relationship with Nancy Barra at any time?

- A. No, I don't think that's what I'm being charged with.

* * *

Q. The question is: Is there anywhere in your answer to the third count of the first complaint that you admitted or acknowledged anywhere that you had a sexual relationship with Nancy Barra?

A. No.

Q. Did you feel that your answer to the third count of the complaint which alleges in part that you had an intimate relationship with this person who was your former high school student, did you feel that you were under any obligation to tell the Committee that yes, you had had a relationship with her but at a later time but there was nothing wrong with it?

A. No.

Q. You didn't feel any such obligation?

A. No. Absolutely not. I felt that what had to be done was this charge has to be answered. And if I had a relationship with someone who is an adult, I'm an adult and a private relationship that was not my client I certainly do not have to deny or affirm that fact to an Ethics Committee.

But what I'm specifically charged in a count with doing certain acts at certain times that would make me a violator of certain criminal statutes as well as ethical statutes, then I have to answer that clearly and succinctly stating I did not have that relationship in 1984.

Q. And you didn't feel a compunction to tell the Committee that you did have it, though in '85 and '86?

A. That's not a charge for which I was being -- no. The way this complaint is worded and the way it is set forth, the wording, what they're asking me to state, no, I don't think that in any way I would deny that nor that I think I would have to admit or deny that. It wasn't an issue of the complaint.

Q. Did you disclose anywhere in your answer to the initial complaint, not the grievance but the formal complaint, that you did drive Miss

Barra to college in August of 1984?

A. I don't believe I did, no.

[T129-132]

* * *

The DEC found that, while there were credibility problems with both grievant and respondent, in most instances Barra was a more believable witness. The DEC, nevertheless, found that there was insufficient evidence to sustain a finding that respondent had violated State and Federal statutes by failing to report cash wages paid to Barra for either secretarial services rendered during the summer of 1984 or while she was employed as a waitress during the summer of 1985. The DEC, therefore, dismissed the charges of the second and third counts of the amended complaint.

As to the allegations concerning improper sexual conduct, the DEC noted that both Barra and respondent had testified that no physical contact had occurred between the two until Barra had attained the age of consent. The DEC found that, nonetheless, the nature of the relationship between the two was troublesome due to their age difference and the fact that respondent, as Barra's teacher, was viewed as a "mentor to his student." The DEC concluded that there was no ethics violation on respondent's part, however, because the relationship that transpired was between consenting adults and not entered into under the guise of respondent's position as an attorney.

The DEC found, though, that respondent failed to cooperate

with its investigation by not making a full and candid disclosure of all facts, as required by R. 1:20-3(f) and In re Gavel, 22 N.J. 428 (1956). The DEC remarked that, throughout the investigation and in the answer to the initial complaint, respondent denied any wrongdoing and denied having a sexual relationship with Barra. The DEC found that respondent violated RPC 8.4(c) in this regard. The DEC recommended the imposition of a suspension.

* * *

Upon a de novo review of the record, the Board is satisfied that the DEC's conclusion that respondent was guilty of unethical conduct is clearly and convincingly supported by the evidence. The DEC properly determined that there were insufficient proofs to sustain a finding that respondent violated State and Federal laws by not withholding and paying payroll taxes. Thus, there was no evidence to sustain a violation of RPC 8.4(b).

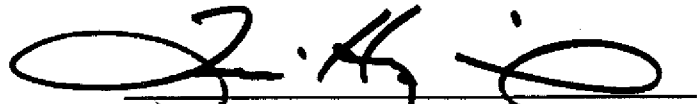
Respondent's only infractions were his misrepresentations to the DEC. Respondent initially denied to the DEC investigator that he had been sexually involved with Barra, denied that he had employed Barra as a secretary and was less than forthright at the DEC hearing about his answer to the complaint. His conduct in this regard was clearly unethical and violative of RPC 8.4(c). An admonition was imposed where an attorney failed to cooperate with the DEC and asserted during the DEC hearing that he had personally served a subpoena, knowing that to have been untrue. In the Matter

of Lester T. Vincenti, Docket No. DRB 94-303 (1994). However, in In re Kasdan, 115 N.J. 451, 471 (1989), a matter involving misrepresentations to a client, the Court stated that it has consistently held that intentionally misrepresenting the status of lawsuits warrants a public reprimand (now a reprimand). Misrepresentations to the DEC warrant nothing less.

Here, respondent was untruthful in a pleading submitted under oath — the answer to the complaint — and, at the DEC hearing, continued to insist that he was under no duty to disclose his sexual relationship with Barra. Under these facts, the Board unanimously determined to impose a reprimand. Two members did not participate. One member recused himself.

The Board further determined to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: 11/14/96


LEE M. HYMERLING
Chair
Disciplinary Review Board