SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 05-347
District Docket No. XIV-04-573E

IN THE MATTER OF	
BRAD SAHL	
AN ATTORNEY AT LAW	

Decision

Argued: February 16, 2006

Decided: March 23, 2006

Nitza Blasini appeared on behalf of the Office of Attorney Ethics.

Robert Agre appeared on behalf of respondent.

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

This matter was before us on a recommendation for discipline (reprimand), filed by the Honorable Marvin M. Rimm, J.T.C. (retired), sitting as special master.

Respondent was admitted to the New Jersey bar in 1999. He has no prior discipline.

On January 13, 2003, the Office of Attorney Ethics ("OAE") filed a formal ethics complaint against respondent, alleging the

commission of a criminal act and sexual harassment. The matter was heard by another special master, the Honorable Joseph M. Nardi, J.S.C. (retired), who died prior to rendering a decision. The matter was then turned over to a second special master, the Honorable John G. Himmelberger, J.S.C. (retired), who decided the matter on the record developed before Judge Nardi.

Judge Himmelberger dismissed the complaint for lack of clear and convincing evidence, prompting the OAE to file a post-hearing ethics appeal with us. In mid-2004, we granted the OAE's appeal and remanded the matter for a new hearing before a different special master.

The matter is now before us on the new and the original records.

The complaint alleged violations of RPC 8.4(b) (commission of a criminal act that reflects adversely upon the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects) and RPC 8.4(g) (engaging, in a professional capacity, in conduct involving discrimination based on sex).

The incident giving rise to the ethics charges occurred on January 28, 2000. Respondent, then a twenty-six-year old new attorney, attended an early morning Super Bowl pre-game event in Philadelphia, known as "the Wing Bowl." He consumed several mixed alcoholic drinks and returned home in the late morning.

Upon his return, he went across the street to visit with his neighbors, the "S" family.[1] Mr. S. offered respondent a beer, which he drank while regaling the events of the Wing Bowl, in their kitchen. At some point, Mr. S.'s seventeen year-old daughter, N.S., came downstairs to eat breakfast, and stayed there while respondent and her father talked about the Wing Bowl.

Shortly thereafter, Mr. S. departed for a doctor's appointment, leaving respondent and N.S. in the house alone. This was not unusual, as respondent was a frequent visitor in the house and a friend of the family. In fact, respondent had represented N.S. six weeks earlier, on December 16, 1999, regarding a probation violation.[2] He had done so free of charge, as a favor to the S. family.[3] That matter had been concluded and no further action was required by respondent in that case. On January 28, 2000, a weekday, N.S. was "cutting school."

According to respondent, N.S. tried to light a cigarette in the house after her father left. Respondent admonished her that she was not allowed to smoke in the house, and should go outside

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[1] The name "S" and "N.S." are used to protect the name of the Ss' then-minor daughter.

[2] The record contains no details about the nature of N.S.'s troubles in the juvenile court.

[3] N.S.'s father testified briefly, at the hearing before the special master, that the representation was not ongoing in nature.

to smoke. Therefore, N.S. went outside to smoke. Respondent went home.

According to N.S., respondent invited her to come over to his house to smoke and to talk about her personal problems, such as disobeying her parents.

Respondent, however, took issue with that account, claiming that N.S. followed him to his house and sat in his living room to smoke a cigarette and talk.

According to N.S., respondent then went to his refrigerator and pulled out two beers, one for him and one for her. Respondent, in turn, stated that he had gone to the refrigerator to get a beer for himself, but found none. Therefore, N.S. went to her house to get one and returned moments later with two beers. By both accounts, respondent and N.S. drank the beer together in respondent's living room. Respondent admitted that he did not try to stop N.S. from drinking the beer in his house.

The complaint charged respondent with having violated that part of N.J.S.A. 2C:33-17(a) that reads:

> Anyone who purposely or knowingly offers or serves or makes available an alcoholic beverage to a person under the legal age for consuming alcoholic beverages or entices or

engages that person to drink an alcoholic beverage is a disorderly person.[4]

After watching television and drinking a single beer each in the living room, respondent invited N.S. upstairs to his bedroom to watch television on a channel that was unavailable on the living room television. N.S. recalled being "skeptical" about the invitation to go upstairs, but thought little of it because "to me he was a lawyer and he was a friend so I wasn't thinking of – along the lines of what happened."

In the bedroom were a bed, a desk and a chair. Respondent sat on the bed with his back against the headboard. N.S. also sat on the bed, perpendicular to him, with her back against the wall. During the almost two-hour interval to follow, the two remained clothed, respondent in a t-shirt and gym shorts, N.S. in a top and running pants.

After a few minutes of sitting on the bed, N.S. repositioned herself and willingly sat cradled in respondent's lap, with her back against his chest, his back against the headboard. Respondent had his arms about her waist, while he intermittently rubbed her neck, arms and shoulders over her clothes and kissed the back of her neck.

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[4] For purposes of RPC 8.4(b), a disorderly person's offense is a criminal act. In re Maqid 139 N.J. 449 (1995); In re Principato, 139 N.J. 456 (1995).

N.S. then laid face down on respondent's bed with respondent next to her, his body "positioned like a T." Respondent then rubbed her back and "her bottom." In fact, both respondent and N.S. testified that respondent had asked to give her a "massage" and that she had agreed.

According to both respondent and N.S., respondent tried to touch her on areas that she found objectionable, such as her breasts and buttocks. The testimony of both parties established that, when asked not to touch those areas of her body, respondent complied with the requests.

When asked if she had tried to leave at this point, N.S. testified that she knew that she was free to leave, but did not do so because, by that time, she was "scared." N.S. recalled that she retreated to the desk, in order to get away from respondent, who then picked her up and carried her back to the bed.

Respondent vehemently denied that N.S. ever left the bed, or that he carried her back to the bed from the desk. Respondent conceded, however, that he had become "visibly aroused," with his pelvis "in contact with her side."

N.S. stated that, once back on the bed, respondent was "grinding" his pelvis on her. She recalled that respondent was "very forceful, like he wanted something, and I wasn't giving it

up." At the height of the ordeal, N.S. recalled, respondent was on top of her, grinding, while she tried to push him off. Respondent, however, denied "grinding" on top of N.S.

N.S. also claimed that, at least twice during the bedroom scene, respondent told her that she "owed" him. She interpreted that to mean payment for the earlier representation. Respondent denied, as a "total fabrication," that he ever told N.S. that she owed him sex for the representation.

Now highly aroused, respondent sat up next to N.S. on the edge of the bed, took N.S.'s hand, and placed it on his penis, over his shorts. According to respondent, the two "laughed about it" and, once he removed his hand, N.S. "began to manipulate" him to climax, at which point he moved his shorts to the side and "finished the act."

N.S., however, denied that account, stating, "I remember that he started – he got up and made me – he wanted me to touch his penis." N.S. recalled that "he took my hand and put it on his penis," that she immediately pushed him away, "and then he pulled out his penis and started masturbating in front of me."

In both respondent and N.S.'s version of events, respondent then retreated to the bathroom to "clean up."

When respondent returned to the bedroom, N.S. was still there. Within a few minutes, the two were back downstairs,

where, N.S. testified, they talked for several minutes more, before she finally left the house.

According to respondent, when N.S. departed the house, "there was nothing to indicate she was upset or unhappy or in any way disturbed or bothered. She seemed fine."

On the other hand, N.S. claimed that she had been very upset when she left respondent's house, that he told her not to tell anyone, and that he stated "this never happened," as she left.

Once back home, N.S. called a confidante, Ronald Patterson, and told him what had occurred. Unbeknownst to N.S., that same day, Patterson reported the incident to her parents and then to the local police.[5]

In a May 5, 2005 brief to the special master, respondent's counsel argued that the incident was a purely private, consensual encounter between respondent and N.S., who was, at age seventeen, old enough to consent to the affair.

In a January 23, 2006 brief to us, respondent's counsel also argued that N.S.'s testimony was not credible, pointing out

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[5] Patterson testified at the hearing that N.S. had, in fact, called him that day, very upset about the incident. He was eager to report it to the police because of his mistaken belief that respondent was the same individual who had reportedly touched N.S. inappropriately at a Wawa store. Patterson realized that a different individual had been implicated in the Wawa incident, but only after involving the police in this matter.

that she had given inconsistent versions of events at various points in the aftermath of the incident. Counsel urged us to discount N.S.'s testimony as not credible.

The complaint charged respondent with having violated N.J.S.A. 2C:14-3(b):

> b. An actor is guilty of criminal sexual contact if he commits an act of sexual contact with the victim under any of the circumstances set forth in section 2C:14-2c (1) through (4).

The "circumstances" set out in 2C:14-2c (1) through (4) are:

> (1) The actor uses physical force or coercion, but the victim does not sustain severe personal injury;
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> (2) The victim is on probation or parole, or is detained in a hospital, prison or other institution and the actor has supervisory or disciplinary power over the victim by virtue of the actor's legal, professional or occupational status;
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> (3) The victim is at least 16 but less than 18 years old and:
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> > (a) The actor is related to the victim by blood or affinity to the third degree; or
> > (b) The actor has supervisory or disciplinary power of any nature or in any capacity over the victim; or
> > (c) The actor is a resource family parent, a guardian, or stands in loco parentis within the household;
>
> (4) The victim is at least 13 but less than 16 years old and the actor is at least four years older than the victim.

N.J.S.A. 2C:14-1 defines sexual contact as:

> an intentional touching by the victim or actor, either directly or through clothing, of the victim's or actor's intimate parts for the purpose of degrading or humiliating the victim or sexually arousing or sexually gratifying the actor. Sexual contact of the actor with himself must be in view of the victim whom the actor knows to be present.

The OAE argued below that the combination of respondent's status as an attorney, his representation of N.S. six weeks earlier, and her age, left the two on unequal footing. The OAE contended that respondent had great leverage over N.S. as a result of his status as an attorney.

The complaint also charged respondent with a violation of RPC 8.4(g), which states that it is unethical to

> engage, in a professional capacity, in conduct involving discrimination (except employment discrimination unless resulting in a final agency or judicial determination) because of race, color, religion, age, sex, sexual orientation, national origin, language, marital status, socioeconomic status, or handicap, where the conduct is intended or likely to cause harm.

With respect to this RPC, the OAE argued below that respondent, "an attorney in a position of trust, engaged in sexual conduct that was discriminatory and likely to cause harm to the victim, a seventeen year-old girl at the time." The OAE was conclusory in its argument that respondent's conduct

discriminated against N.S. No additional facts were presented in support of this charge. However, the OAE cited several disciplinary cases where male attorneys had discriminated against female clients, based on their gender.

In mitigation, respondent submitted nine character letters from other attorneys. The letters generally allude to respondent's good character, youth, and inexperience at the time of the incident. Finally, respondent expressed remorse for his behavior.

The special master found that respondent violated RPC 8.4(b) by serving alcohol to a minor, and by forcing himself on N.S., criminal conduct within the meaning of N.J.S.A. 2C:14-3(b). The special master recommended a reprimand. He dismissed the RPC 8.4(g) charge, not on the basis of the terminated representation, but as inapplicable to the facts of the case.

Upon a de novo review of the record, we are not satisfied that the special master's conclusion that respondent was guilty of unethical conduct is supported by clear and convincing evidence. For the reasons detailed below, we determine to dismiss this matter.

The record contains two highly divergent "he said, she said" versions of the events of January 28, 2000. It is possible that the real story behind this clumsy encounter probably falls

somewhere in the middle. Certainly, both parties could have exercised better judgment.

There are two aspects of respondent's conduct that implicate RPC 8.4(b). The first is with respect to N.S.'s beer-drinking in respondent's house. Although respondent and N.S.'s stories differ as to who supplied the beer, they both conceded that N.S. consumed a beer in respondent's house without his objection. Again, N.J.S.A. 2C:33-17(a) states that

> Anyone who purposely or knowingly offers or serves or makes available an alcoholic beverage to a person under the legal age for consuming alcoholic beverages or entices or engages that person to drink an alcoholic beverage is a disorderly person.

Obviously, if we were convinced that respondent supplied the beer to N.S., we would find him guilty of serving alcohol to a minor.

However, if N.S. brought the beer to respondent's house, respondent would not be guilty, because he did not offer the beer, serve it, or make it available to N.S. Rather, if N.S. brought beer to respondent's house, she is the one who made it available, not respondent. We find no provision in the statute requiring a person in respondent's position to take steps to prevent a minor from drinking alcohol under such circumstances. Factually, we find the testimony on the issue in equipoise. It is equally possible that respondent supplied, or N.S. supplied,

the beer consumed that day. In the absence of a statutory duty to prevent N.S.'s beer-drinking in respondent's house in the manner that he claims it occurred, we cannot find clear and convincing evidence of criminal conduct in this regard. Therefore, as to the beer charge, we dismiss the allegation of a violation of RPC 8.4(b).

Next, we reject respondent's argument, raised by counsel periodically in the record below and at oral argument before us, that the matter should be dismissed because no criminal charges were ever filed against respondent. It is well-settled that, even where no criminal charges are filed against an attorney, violations of RPC 8.4(b)[6] may be found. In In re McEnroe, 172 N.J. 324 (2002), we declined to find a violation of RPC 8.4(b) because the attorney had not been charged with the commission of a criminal offense. In re McEnroe, Docket No. 01-154 (DRB January 29, 2002) (slip. op. at 14). The Court reinstated the RPC 8.4(b) charge and found the attorney guilty of violating that rule, despite the absence of any criminal charges against the attorney. See also In re Rigolosi, 107 N.J. 192 (1987) (attorney disbarred for conduct involving dishonesty, fraud, deceit or misrepresentation and conduct prejudicial to the

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[6] Respondent argued unsuccessfully below that the ethics matter should be dismissed because no criminal charges were ever filed against him.

administration of justice, which conduct reflected adversely on the attorney's fitness to practice law; the attorney had been acquitted of criminal charges relating to the attempted bribery of a state policeman into dismissing charges against a suspect).

The second aspect of respondent's misconduct relates to his sexual advances. Here, too, respondent's and N.S.'s versions of events are widely divergent.

Respondent claims that N.S. was a willing participant in the events of that day – that she willingly went to his bedroom and sat with him for almost two hours while he caressed and massaged her. According to respondent, she was "fine" the whole time, never suggesting that there was a problem with his advances – she was always free to leave. Also, because N.S. was seventeen at the time, the statute would have prevented her consent only in very limited circumstances, which were not present here (N.J.S.A. 2C:14-3(b); N.J.S.A. 2C:14-2(c)(3)). Respondent sought to dispel the notion that his actions were forceful or coercive, maintaining that they were just one-sided – in effect, unrequited.

According to respondent's version of events, he explored the allowable bounds of his advances as he went along. When he touched N.S.'s breast, he was asked to stop – so he stopped. When he touched N.S.'s buttocks, he was asked to stop, and he

did so. In this scenario, when respondent became visibly aroused, N.S. thought it funny. She never tried to leave or get away from him.

So, too, in respondent's scenario, he placed her hand on his penis and she willingly "manipulated" it. At the last possible moment, he pulled his shorts aside, finished the act, and then left her alone in the room while he went into the bathroom. Still, N.S. stayed. In respondent's scenario, he had no way to know that she was upset about the incident, because she was still there when he returned.

On the other hand, we have N.S.'s version of events, a version that would be consistent with criminal sexual contact, as provided in N.J.S.A. 2C:14-2(c)(1): 1) climbing on top of N.S., holding her down and grinding on her; 2) removing her from her retreat on the desk, putting her back on the bed, and holding her down against her will; 3) telling N.S. that she "owed" him for the representation; 4) forcibly placing her hand on his penis; and 5) masturbating in front of her to gratify himself.

Applying the latter facts to the statutes cited, respondent would be guilty of criminal sexual contact under N.J.S.A 2C:14-3(b), having used "force or coercion . . . and . . . sexual contact, either a touching by the victim or actor, either

directly or through clothing, of the victim's or actor's intimate parts for the purpose . . . of sexually gratifying the actor . . . in view of the victim whom the actor knows to be present." N.J.S.A. 2C:14-1.

Once again, however, we are unable to ascribe more or less credibility to one version of events – either respondent's or N.S.'s. We cannot find by the clear and convincing standard that respondent engaged in the criminal conduct alleged in the complaint. Therefore, we dismiss the allegation of a violation of RPC 8.4(g) in this context as well.

The OAE's additional argument that respondent had a position of power over N.S. (N.J.S.A. 2C:14-2c(2)(2)(b)) is unpursuasive. Respondent was no longer N.S.'s attorney on January 28, 2000. That relationship had been a one-day representation, casually arranged between respondent and Mr. S., for no fee. Mr. S. confirmed for ethics authorities that the representation had terminated on December 16, 1999, the day of N.S.'s probation hearing.

Finally, with regard to the OAE's argument that respondent is guilty of discrimination or sexual harassment, the pertinent portion of the rule states that it is unethical to "engage, in a professional capacity, in conduct involving discrimination . . . because of . . . sex . . . where the conduct is intended or

likely to cause harm" (RPC 8.4(g)). Again, the evidence establishes otherwise. In addition, the OAE ultimately conceded, at oral argument before us, that the record could not support the charge as well. Consequently, we voted to dismiss the RPC 8.4(g) charge as well.

For the reasons cited above, we determine to dismiss the complaint in its entirety. Member Lolla did not participate.

Disciplinary Review Board
Mary Maudsley, Chair

By: Julianne K. DeCore
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Brad S. Sahl
Docket No. DRB 05-347

Argued: February 16, 2006

Decided: March 23, 2006

Disposition: Dismiss

Members	Dismiss	Reprimand	Admonition	Disqualified	Did not participate
Maudsley	X				
O'Shaughnessy	X				
Boylan	X				
Holmes	X				
Lolla					X
Neuwirth	X				
Pashman	X				
Stanton	X				
Wissinger	X				
Total:	8				1

Julianne K. DeCore
Julianne K. DeCore
Chief Counsel