SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 15-351
District Docket No. XIV-2011-0641E

IN THE MATTER OF	:	
REGAN CLAIR KENYON, JR.	:	
AN ATTORNEY AT LAW	:	Dissent

Argued: February 18, 2016

Decided: April 4, 2016

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

A five-member majority recommends that respondent be disbarred. Three Board members recommend imposition of an indeterminate suspension and have filed a dissent. I too dissent from the recommendation for disbarment but believe that an indeterminate suspension also is unjustified. For the following reasons, I recommend that a suspension of one year be imposed.

We are asked to impose discipline on respondent following his guilty plea in New Jersey Superior Court on June 27, 2013 to the third-degree offense of attempting to endanger the welfare of a child. The facts are discussed in detail in the majority's opinion. Suffice it to say here that respondent's conviction grew out of a sting operation in which an undercover police officer approached respondent in an internet adult "chat room" pretending to be a

that he participated with "her" in "several internet chats" over a four-month period, sent "her" "sexually explicit adult images" and links to adult pornography, and thereby would have "impaired or debauched the morals of the person if she had been under sixteen." (Plea Transcript at pp. 19-20). He also agreed to meet "her" but never did so, saying later that he never intended to attend the meeting, and the record shows that it was the undercover officer who initiated the idea of meeting.

Following his plea, he was given a suspended three-year sentence with life-long parole supervision by a judge who found him unlikely ever to repeat his conduct (Sentencing Transcript at p. 28) during a sentencing proceeding at which the prosecutor acknowledged having no evidence that he ever met anyone through a chat room. (Id. at 12). The judge also found that respondent's offense was "grounded quite clearly in a psychological problem," that he had "expressed deep remorse for his actions" and had sought treatment and counseling. (Id. at 26).

Indeed, the record in this case shows that immediately after respondent's arrest, he began psychological counseling that he has continued regularly to the present date at his own expense. Psychological reports show that although he suffers from a "sexual addiction," a type of personality disorder, he evidences no tangible or identifiable intent to harm children and there is no

indication that he has a sexual preference for children. He, himself, says that he is not drawn to children. And the sentencing judge said that her reading of respondent's psychological reports indicated to her that the disorder for which he is being treated does not involve children. (Sentencing Transcript at p. 14).

Respondent has not been suspended from practicing law and has practiced part-time after losing his law firm job following his arrest. He lives with his wife and two young daughters and there seems to be a loving and supportive relationship within the family and no suggestion of danger to his daughters. There is no evidence of repeat behavior since his arrest over four and one-half years ago.

In short, there is no evidence that respondent would on his own have initiated any type of sexual encounter with a child. Nor was there a real child or harm done to anyone. Respondent, whose misbehavior grew out of a now-diagnosed sexual addiction causing him to frequent adult chat rooms, has expressed remorse, taken responsibility for his actions, and engaged in extensive therapy. His certification to the Board is credible, detailed, sincere, and reflects insight gained from the therapy in which he continues to be engaged. Among topics it discusses are his current legal practice as a sole practitioner, the fact that clients have stayed with him despite knowing of his arrest and a description of free

legal services he provides, concluding by saying that he finds his "current practice, though limited, tremendously fulfilling."

Disbarring respondent based on this record for what is certainly less serious criminal sexual behavior than most,[1] is to effectively announce a rule of *per se* disbarment for any sexual crime involving children. Our Supreme Court has not adopted such a rule and our precedent does not support disbarment here.

The majority acknowledges that discipline in cases of sexual misconduct involving children ranges from reprimand to disbarment. After summarizing a group of such cases, it devotes a substantial part of its opinion (at pp. 15-17) discussing In re Legato, DRB 15-219, which is being transmitted to the Court with the instant opinion. In Legato, five Board members[2] voted to disbar the attorney based on facts remarkably similar to those here. Like respondent, Legato communicated in an adult chat room with a person he was told was a twelve-year-old girl after he was targeted in a sting operation by an undercover police officer; no real child was involved; Legato set up two meetings with the "child" but never appeared for either one and said he never intended to; he pleaded

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[1] More serious sexual offenses include, for example, rape or other violent sexual acts; sexually touching a child; paying for, selling or distributing child pornography; and exposing oneself to a child.

[2] I was not present when Legato was argued and decided and accordingly I have no vote in that case.

guilty to the same third-degree offense as respondent and received a suspended sentence; he was evaluated at the Adult Diagnostic Center at Avenel which found "no clear indication of compulsive sexual behavior as it specifically relates to juveniles" and no evidence of his sexual interest in children; like respondent, the sentencing court found him unlikely to commit another offense; like respondent, his license was not suspended and he has continued to practice since his indictment on May 7, 2012, almost four years ago.

While there are marked similarities between Legato and the instant matter, the majority's reliance on Legato to support its disbarment recommendation here is questionable, given that both decisions are being transmitted to the Court simultaneously and, thus, the Court has not yet had an opportunity to review the Legato decision.

Turning now to other precedent cited by the majority, the three disbarment cases cited are all distinguishable from this case either because the offense conduct was so much worse or because significant aggravating factors were present. In In re Frye, 217 N.J. 438 (2014), the Court ordered disbarment of an attorney who inappropriately touched the rectal area of a minor girl in his care, pleaded guilty to a third-degree charge of endangering the morals of a minor but failed to report his

conviction to the ethics authorities for 15 years; violated his probation six times by failing to attend mandatory sex offender therapy sessions; and showed no remorse. The Court later explained that it disbarred Frye "based on the crimes themselves and respondent's failure to notify the OAE of his conviction for more than fifteen years, during which he continued to practice law with impunity." In re Cohen, 220 N.J. 7, 16 (2014) (emphasis added). In In re Cunningham, 192 N.J. 219 (2007), the attorney, caught up in a sting operation, communicated on the internet with a person he thought was a twelve-year-old boy. Unlike respondent here, he was diagnosed as a compulsive, repetitive sex offender, admitted his intent to meet the "child" although he had not finalized those arrangements (respondent here said he never intended to meet), and although this Board voted to suspend Cunningham for two years, he was disbarred when he did not appear in response to the Court's Order to Show Cause. Although the Court did not write an opinion, its disbarment order mentioning Cunningham's non-appearance seemed to be influenced by that fact. Lastly, in In re Wright, 152 N.J. 35 (1997), the attorney was convicted of aggravated sexual assault and disbarred for sexually assaulting his daughter at least forty times over a three-year period, behavior far more serious than that here.

The case most similar to respondent's (and Legato) is In re Ferraiolo, 170 N.J. 600 (2002), although it involved indisputably more serious behavior. Ferraiolo was suspended for one year after pleading guilty to a third-degree attempt to endanger the welfare of a child after he, too, communicated in a "chat room" with an undercover officer pretending to be a fourteen-year-old boy. However, unlike respondent and Legato, Ferraiolo actually went to meet the "boy" and admitted that he intended to engage in sexual acts with him. And he admitted frequenting internet chat rooms specifically set up to introduce older men to younger boys and that he had "chatted" with underage boys before.

None of these cases cited by the majority support respondent's disbarment.

Legal precedent also does not support respondent's indeterminate suspension, a harsh form of discipline that the Court has imposed only once and appears to have reserved for especially serious offenders who are teetering on the cusp of disbarment. The other dissent in this case urges this form of discipline.

Rule 1:20-15A(a)(2) provides for indeterminate suspension, which is to be "for a minimum of five years" "[u]nless the Court's Order provides otherwise." Its one use in In re Cohen, 220 N.J. 7 (2014) involved a more serious offense than that here. Cohen, a

State legislator, pleaded guilty to second-degree endangering the welfare of a child based on his actions seeking out and printing thirty-four pornographic images of nineteen underage girls on his State-issued and law office computers. He was immediately suspended and sentenced to five years in State prison. Not only did the legal system view Cohen's behavior as more serious than respondent's, shown by his plea to a more serious felony and his significant custodial sentence but, the Court considered Cohen's offense to be especially serious because it "revictimizes the children involved with each viewing." Id. at 12. The Court also condemned Cohen's use of a receptionist's computer to download pornography, thus exposing "an innocent third party to the risk of criminal liability." Id. at 17. In contrast, as the other dissent says, respondent's acts may be considered less serious than Cohen's because respondent's crime was initiated not by him but by undercover police, without which this case might never have arisen.

Cohen is the most recent Supreme Court decision concerning attorney discipline for sexual crimes involving children. It makes clear that there is no *per se* disbarment in New Jersey for such crimes but that "egregious cases may result in disbarment going forward." Id. at 18. Disbarment, said the Court, is "reserved for circumstances" in which the misconduct "is so immoral, venal,

corrupt or criminal as to destroy totally any vestige of confidence that the individual could ever again practice in conformity with the standards of the profession." Id. at 15. But the Court did not just state this standard without explanation. To make clear the types of cases it intended to describe that would qualify for disbarment, the Court provided examples, among which are: (1) In re Burak, 208 N.J. 484 (2012) (attorney had 753 pornographic images of children engaging in sadistic or masochistic conduct and images of violence such as bondage that he had viewed and traded over ten-year period; he received eight-year prison sentence; and he was also indicted for sexual contact with a minor female); (2) In re Sosnowski, 197 N.J. 23 (2008) (attorney possessed sixty-seven images of child pornography and videos of children engaging in sexual acts and also placed hidden cameras in child's bathroom and bedroom; he received a thirty-seven-month prison sentence); and (3) cases of physical sexual assault of children, such as In re Wright, supra (attorney convicted of aggravated criminal sexual assault for digitally penetrating his minor daughter's vaginal area). Respondent's "chat room" activities do not come close to these unsettling examples.

In short, said Cohen, factors to be considered are whether the case involved touching, physical violence, dissemination of pornography to others, and, whether the respondent suffered from

mental illness or sexual abuse himself. Although Cohen did not disbar the attorney, it was intended to serve as notice to the bar that egregious offenses in this area "may result in disbarment going forward." Cohen, supra, 220 N.J. at 18.

Respondent's conduct occurred in 2011, before the Court's notice to the bar in Cohen. But even if it had occurred after Cohen, factors showing the type of "egregiousness" discussed in Cohen are absent here: there was no touching or physical violence or even attempted touching; the case does not involve pornography or its distribution; and, in mitigation, respondent has a mental disorder albeit one not implicating children, for which he has diligently engaged in treatment with substantial positive effect.

Because it is not the role of the disciplinary system to punish but to "preserve the confidence of the public in the bar," id. at 11, an indeterminate suspension here is too harsh. Respondent's offense and arrest occurred five years ago and he pled guilty almost three years ago, during which time he retained his license and was allowed to continue practicing law. He has clients who trust him despite knowing of his conviction. He has proven during that period that, as the sentencing judge said, he is not likely to reoffend and, through therapy, he has gained

insight into his addictive behavior.[3] A long delay in filing a disciplinary case has long been recognized as a mitigating factor. In re Verdiramo, 96 N.J. 183, 187 (1984).

The majority relies on In re Cammarano, 219 N.J. 415 (2014) to show that the Court has rejected the "similar defense" that a "sting" initiated criminal behavior. In Cammarano, the lawyer was a public official who was sentenced to two years in federal prison for accepting bribes. In announcing Cammarano's disbarment, the Court said, "[a]n elected official who sells his office...betrays a solemn public trust. This form of corruption is corrosive to our democracy and undermines public confidence in honest government, and its rippling pernicious effects are incalculable." Id. at 417. While it is true that Cammarano rejected the "sting" as mitigation of the attorney's misconduct, id. at 423, it did so because it found a public official's taking a bribe so harmful that *nothing* could mitigate its seriousness. Indeed, Cammarano is notable for its loud and clear announcement that a public

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[3] There is another problem with imposing an indeterminate suspension in this case. The other dissent says that such a suspension gives respondent a chance to "show the Court adequate proof of fitness." But here five years have already passed in which respondent has been in therapy, reaching the point where his therapist says he is no threat, among other positive findings. What more would he need to show before being reinstated? To require him to show "proof of fitness" and wait five *more* years to do so is redundant when he already has effectively done so by "his extraordinary and successful efforts" over the past five years, as described by his psychologist.

official's accepting a bribe merits *per se* disbarment, id. at 421, in stark contrast to the Court's rejection of a *per se* disbarment rule in Cohen. The contrast is especially clear because the two cases were decided within about one month of each other. Cammarano is exactly the type of case involving attorney dishonesty and obvious general societal harm as to justify *per se* disbarment[4] and so is distinguishable from the instant case where the quantum of discipline should depend on specific facts and not a "*per se*" rule. In any event, that respondent's crime was initiated as a "sting" is not the crux of his defense nor is it the basis of my dissent. It is only one factor to be considered.

I take issue with the majority's opinion for another reason. It refuses to consider (at pp. 21-22) any evidence that respondent offers in mitigation. It says it is disregarding: (a) his well-documented strides in therapy because it simply does not matter what he might do in the future; and (b) his argument that he has accepted responsibility (as he clearly did by pleading guilty)

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[4] Other cases where the Court has announced *per se* disbarment rules also involve dishonest acts of attorneys acting within the scope of their role as attorneys. E.g., In re Wilson, 81 N.J. 451, 460-61 (1979) (calling the intentional misappropriation of client funds an "offense against common honesty" that requires the "strictest discipline" "to preserve public confidence in this Court and in the bar as a whole"). While the attorney here committed a serious crime, it did not reflect on his honesty nor was it performed in his role as an attorney; hence his continued practice poses no threat to his clients.

because he told his therapist "in his initial history" he actually thought he was engaging with an adult who was participating in a sexual fantasy, even though that same therapist found respondent to be "open, honest, and forthright" and to have "faced very painful truths about himself," and "acknowledged and accepted full responsibility ... without minimizing or denying either the extent of his sexual behavior or the impact that his behavior has had ...." The dissent also fails to consider in mitigation the lengthy delay in filing this disciplinary proceeding, discussed above. In re Verdiramo, 96 N.J. 183, 187 (1984).

The Court has directed that mitigating facts be considered, e.g., In re Lunetta, 118 N.J. 443, 445-46 (1989); In re Cohen, supra, 220 N.J. at 9, but the majority has refused to do so.[5] (Opinion, at 21).

In short, no New Jersey precedent supports either disbarring or indeterminately suspending respondent. For the disciplinary system to function in the public interest, our decisions should be, and usually are, fact-sensitive and based on precedent.

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[5] Despite its stated refusal to consider mitigating factors, the majority says it is not arguing for a per se disbarment rule in cases of sexual misconduct involving children. (Opinion, at 21 n.8). It seems to me that these statements are in conflict. While it is possible that mitigation, once considered, may be insufficient to alter otherwise proper discipline, refusing to consider mitigation at all is effectively to adopt a *per se* rule based on the unethical conduct alone. Thus, as a practical matter, that is what the majority opinion is recommending.

Discipline for sexual crimes involving children is problematic, however, because of the emotional response such crimes evoke, prompting some to see "red" whenever the words "sex" and "child" appear in the same sentence. But we in the disciplinary system owe it to our fellow attorneys as well as the public to recognize obvious gradations in seriousness of criminal behavior, even where crimes involve children unless and until the Court pronounces a *per se* rule of disbarment or indeterminate suspension for all such offenses. To date, the Court has said just the opposite. In re Cohen, supra.

I do not mean to minimize the seriousness of respondent's unethical behavior. As the other dissent correctly says, doubt is cast on respondent's character by his seeming willingness to have sexual exchanges with a fourteen-year old. But that dissent also correctly says that the record "suggests that respondent's conduct was an isolated, albeit serious, incident by someone with an otherwise unblemished career and respected professional reputation." Indeed, the entirety of the record here indicates that this unethical conduct was aberrant. Accordingly, it is hard to see that disbarment or an indefinite suspension would do more to "preserve the confidence of the public in the integrity and trustworthiness of lawyers in general," In re Witherspoon, 203

N.J. 343, 358 (2010), than would a one-year suspension, which itself is significant discipline.

In conclusion, respondent has shown over almost five years since his arrest that he is no danger to the community and that clients, knowing of his conviction, nonetheless trust him to provide legal counsel. Indeed, respondent's acts were unrelated to his practice of law, a factor to be considered in all disciplinary matters, and they involved no dishonesty. Thus, he poses no threat to any client. Under all these circumstances, he should be allowed the opportunity to salvage his career. I would impose a suspension of one year, like that imposed in Ferraiolo where the crime was actually more serious than respondent's, with the condition that respondent show his continued engagement in therapy and compliance with conditions of his parole when he applies for reinstatement.

Disciplinary Review Board
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