SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 16-269
District Docket No. XIV-2011-0469E

IN THE MATTER OF	:
DANIEL M. GILLEN	:
AN ATTORNEY AT LAW	:

Decision

Argued: January 19, 2017

Decided: April 25, 2017

HoeChin Kim appeared on behalf of the Office of Attorney Ethics.

Respondent waived appearance for oral argument.

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

This matter was before us on a motion for final discipline filed by the Office of Attorney Ethics (OAE), pursuant to R. 1:20-13, following respondent's guilty plea in Ulster County Court, Kingston, New York, to attempted dissemination of indecent material to minors in the first degree, contrary to New York Penal Law §§ 110 and 235.22.2.

For the reasons stated below, we recommend respondent's disbarment.

Respondent was admitted to the New York bar in 1978 and the New Jersey bar in 1987. Although not a member of the bar, he was registered as in-house counsel for the Commonwealth of Massachusetts from 2008 until 2011. He has no history of discipline in New Jersey, but was declared administratively ineligible to practice on September 24, 2012, based on his failure to comply with his annual registration requirements and to pay his annual registration fee to the Lawyers' Fund for Client Protection (LFCP).

Respondent was disbarred in New York, effective August 25, 2011, based on his felony conviction in the instant matter. He has been ineligible to practice law in New Jersey since September 24, 2012 for having failed to pay his annual fee to the New Jersey Lawyers' Fund for Client Protection (the Fund).

On November 19, 2010, respondent was arrested by the Ulster County Sheriff's Office following an undercover investigation where, starting in January 2010, a female Deputy Sheriff's Officer posed as a fourteen-year old female in online communications with respondent. Respondent arranged to meet the undercover Deputy Sheriff's Officer at the Hudson Valley Mall in Kingston, New York, on November 19, 2010. Respondent was arrested on that date when he arrived at the food court in the

mall. Respondent had brought Viagra and wine coolers with him to the meeting.

On the same day, the Ulster County Sheriff's Office filed two felony complaints and two criminal informations against respondent. The first felony complaint charged that, on January 16, 2010, at 6:39 p.m., respondent attempted to disseminate indecent materials to minors in the first degree, contrary to New York Penal Law §§ 110 and 235.22.2. Specifically, respondent

> intentionally, knowingly and unlawfully engaged in on-line electronic type-written conversation with an Undercover Deputy Sheriff that he believed was a fourteen year old female. Said electronic conversation consisted of the said defendant making several sexual comments on what he would be doing to her sexually and what sexual acts he would be performing on her during the electronic conversation. During said electronic conversation said defendant did send a file via Instant message imaging of an unknown white male's penis.
>
> (Ex.B).

The second felony complaint charged that, on January 16, 2010, at 9:01 p.m., respondent attempted to disseminate indecent materials to minors in the first degree, contrary to New York Penal Law §§ 110 and 235.22. Specifically, respondent

> intentionally, knowingly and unlawfully engaged in on-line electronic type-written conversation with an Undercover Deputy Sheriff that he believed was a fourteen year old female. Said electronic conversation consisted of the said defendant asking

> several sexual questions such as if she has ever performed oral sex and how he was going to perform oral sex on her during the electronic conversation. During said electronic conversation said defendant did send a pornographic web site via instant message chat called cam4.com.
>
> (Ex.C).

The two criminal informations charged that, on November 18, 2010, at 4:30 p.m., respondent (1) attempted to unlawfully deal with a child, contrary to New York Penal Law § § 110 and 260.20.3 in that he "did intentionally, knowingly and unlawfully attempt to provide alcohol to an Under Cover Deputy Sheriff who he believed to be Fourteen years old female [sic]. To wit, said defendant had alcoholic beverages that being wine coolers, in his vehicle for the purpose of providing them to the Under Cover Deputy Sheriff" and (2) possessed a controlled dangerous substance by ultimate users out of the original container, in violation of section 3345 of the Public Health Law of New York in that he "did intentionally, knowingly and unlawfully posses [sic] two prescription Viagra pills in a plastic clear bag."

On August 25, 2011, respondent pleaded guilty before the Honorable Donald A. Williams, County Court Judge, by way of a Superior Court Information, to one count of attempted dissemination of indecent material to minors in the first degree. Respondent admitted that, between January 16 and

November 19 of 2010, knowing the character and content of the communication which described sexual conduct, and which was harmful to minors, he intentionally used a communication system that allowed for the transfer of computer data from one computer to another; that he used that system to engage in communication with a person he believed to be a minor; that, by means of this communication, he attempted to invite or induce a person, whom he believed to be a minor, to engage in either sexual contact with him or sexual conduct for his benefit; that he engaged in electronic online conversation of a graphic sexual nature and, further, established a time and place to meet with what he believed to be a fourteen-year-old female; and that said female was actually an undercover deputy sheriff from the Ulster County Sheriff's Office.

Respondent asked to be heard at sentencing, at which time he informed the court of his rehabilitation efforts. Specifically, he stated that he had attended in-patient therapy and, as of the date of sentencing, had continued with weekly therapy sessions following his discharge from residential treatment.

The judge sentenced respondent to one year in county jail, to be certified and to register as a sex offender, and to pay

surcharges and fees. On October 28, 2011, a certified statement of conviction was entered, reflecting the plea and sentence.

By letter dated August 25, 2011, respondent self-reported to the OAE his guilty plea and his anticipated incarceration in the Ulster County Jail.

Relying on several recent cases, the OAE recommends respondent's disbarment. Specifically, in a child pornography case, the Court noted that "[c]rimes involving the sexual exploitation of children have a devastating impact and create serious consequences for the victims." In re Cohen, 220 N.J. 7, 12 (2014) (indeterminate suspension). With that case as a starting point, the OAE notes that we recently recommended the disbarment of two attorneys who were convicted of endangering the welfare of a child by attempting to engage in sexual conduct that would impair or debauch the morals of a child, In the Matter of Mark Gerard Legato, DRB 15-219 (April 4, 2016), and In the Matter of Regan Clair Kenyon, DRB 15-351 (April 4, 2016), and one attorney convicted of endangering the welfare of a child, In the Matter of Alexander D. Walter, DRB 15-362 (April 4, 2016). Those matters currently are before the Supreme Court.

Although respondent did not submit a brief, on his oral argument form, he indicated that he waived oral argument and

"agree[d] with the conclusions and recommendations of the trier of fact."

Following a de novo review of the record, we are satisfied that the DEC's finding that respondent's conduct was unethical is fully supported by clear and convincing evidence.

Final discipline proceedings in New Jersey are governed by R. 1:20-13(c). Under that rule, a criminal conviction is conclusive evidence of guilt in a disciplinary proceeding. R. 1:20-13(C)(1); In re Magid, 139 N.J. 449, 451 (1995); In re Principato, 139 N.J. 456, 460 (1995). Specifically, the conviction establishes a violation of RPC 8.4(b). Pursuant to that rule, it is professional misconduct for an attorney to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer." Hence, the sole issue before us is the extent of discipline to be imposed on respondent for his violation of RPC 8.4(b). R. 1:20-13(c)(2); In re Magid, supra, 139 N.J. at 451-52; In re Principato, supra, 139 N.J. at 460.

In determining the appropriate measure of discipline, the interests of the public, the bar, and the respondent must be considered. "The primary purpose of discipline is not to punish the attorney but to preserve the confidence of the public in the bar." Ibid. (citations omitted). Rather, we must take into

consideration many factors, including the "nature and severity of the crime, whether the crime is related to the practice of law, and any mitigating factors such as respondent's reputation, his prior trustworthy conduct, and general good conduct." In re Lunetta, 118 N.J. 443, 445-46 (1989).

That an attorney's conduct did not involve the practice of law or arise from a client relationship will not excuse the ethics transgression or lessen the degree of sanction. In re Musto, 152 N.J. 167, 173 (1997). The obligation of an attorney to maintain the high standard of conduct required by a member of the bar applies even to activities that may not directly involve the practice of law or affect the attorney's clients. In re Schaffer, 140 N.J. 148, 156 (1995). "To the public he is a lawyer whether he acts in a representative capacity or otherwise." In re Gavel, 22 N.J. 248, 265 (1956). Thus, offenses that evidence ethics shortcomings, although not committed in the attorney's professional capacity, will, nevertheless, warrant discipline. In re Hasbrouck, 140 N.J. 162, 167 (1995).

In cases involving sexual misconduct, the discipline has ranged from a reprimand to disbarment. See In re Gilligan, 147 N.J. 268 (1997) (reprimand for attorney convicted of lewdness when he exposed and fondled his genitals for sexual gratification in front of three individuals, two of whom were

children under the age of thirteen); In re Pierce, 139 N.J. 533 (1995) (reprimand; attorney convicted of lewdness after he exposed his genitals to a twelve-year-old girl); In re Ferraiolo, 17 N.J. 600 (2002) (one-year suspension for attorney who pleaded guilty to the third-degree offense of attempting to endanger the welfare of a child; the attorney, who had communicated in an internet chat room with someone whom he believed to be a fourteen-year-old boy, was arrested after he arranged to meet the "boy" for the purpose of engaging in sexual acts; the "boy" was a law enforcement officer); In re Gernert, 147 N.J. 289 (1997) (one-year suspension for petty disorderly offense of harassment by offensive touching; the victim was the attorney's teenage client); In re Ruddy, 130 N.J. 85 (1992) (two-year suspension for endangering the welfare of a child; the attorney fondled several young boys); and In re Herman, 108 N.J. 66 (1987) (three-year retroactive suspension for attorney who pleaded guilty to second-degree sexual assault after he touched the buttocks of a ten-year-old boy).

Several cases involving sexual misconduct have resulted in disbarment. See In re Frye, 217 N.J. 438 (2014) (attorney pleaded guilty in the Superior Court of New Jersey to endangering the welfare of a child (third degree), in violation of N.J.S.A. 2C-24-4(a) and failed for fifteen years to report

his conviction to ethics authorities; attorney admitted to being entrusted with the care of a minor girl whom he inappropriately touched on her rectal area; the attorney violated his probation six times over the course of fifteen years by failing to attend mandatory outpatient sexual offender therapy sessions); In re Cunningham, 192 N.J. 219 (2007) (attorney, on three separate occasions, communicated with an individual, through the internet, whom he believed to be a twelve-year-old boy and described, in explicit detail, acts that he hoped to engage in with the boy and to teach the boy; a psychological report concluded that the attorney was a compulsive and repetitive sex offender; attorney did not appear for the Order to Show Cause before the Court); and In re Wright, 152 N.J. 35 (1997) (attorney digitally penetrated his daughter's vagina; behavior occurred over a three-year period and involved at least forty instances of assault).

More recently, the Court imposed an indeterminate suspension in a case involving child pornography. In re Cohen, supra, 220 N.J. 7. There, the attorney, a State Assemblyman at the time of his arrest, pleaded guilty to second-degree endangering the welfare of a child, following an investigation into sexually explicit pornographic images of children discovered on a state-issued desktop computer used by the

attorney and on his private law office computer. Id. at 9. The Court stated that:

> [c]rimes involving the sexual exploitation of children have a devastating impact and create serious consequences for the victims. . . Thus, the moral reprehensibility of this type of behavior warrants serious disciplinary penalties, up to and including disbarment, albeit mitigating circumstances might call for lesser discipline in particular cases. . . Disbarment is the most severe punishment, reserved for circumstances in which 'the misconduct of [the] attorney 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.'
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> [Ibid.]

The Court further observed that "[a]ttorneys who have been convicted of offenses involving the physical sexual assault of children have typically been disbarred by this Court." Id. at 16 (citing In re Wright, supra, 152 N.J. at 35 and In re "X", 120 N.J. 459, 464-65, (1990) (disbarment for attorney who sexually assaulted his three daughters over an eight-year period)).

Further, the Court took the opportunity, in Cohen, to provide insight into its reason for disbarring Frye.[1] The Court

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[1] The Court did not issue an opinion in Frye.

explained that it had based Frye's disbarment sanction on the crime itself, and on his failure to notify the OAE of his conviction for more than fifteen years, "during which he continued to practice law with impunity." Ibid.

More importantly, in Cohen, the Court acknowledged that, over time, society has become more acutely aware of the pernicious effects of sexual crimes against children. It further noted recent changes in the law increasing the severity of those crimes. The Court, cautioned the bar that, although it had not adopted a per se rule of disbarment, convictions in egregious cases will result in disbarment. Id. at 18-19.

As previously noted, we recently decided Legato, supra, where the attorney admitted that he had engaged in explicit conversations with an individual whom he believed was a twelve-year-old girl. The interactions included asking the girl to touch herself in her genital area and telling her that he would like to engage in oral sex with her as well as penetrate her. Unbeknownst to Legato, he was interacting with an undercover police officer. Eventually, Legato engaged in a video chat with the undercover officer during which he unzipped his pants and exposed his erect penis. He admitted that he did so knowingly and purposefully, and that, had the person actually been a twelve-year-old girl, engaging in explicit sexual conversation

with her would have impaired or debauched her morals. Legato also acknowledged that he had scheduled two meetings with the girl, but did not appear for either. He pleaded guilty to and was convicted of third-degree attempting to endanger the welfare of a child by attempting to engage in sexual conduct that would impair or debauch the morals of a child, in violation of N.J.S.A. 2C:5-1 and N.J.S.A. 2C:24-4(a). In the Matter of Mark Gerard Legato, supra, DRB 15-219 (slip op. at 3-4).

We also recently decided Kenyon, supra, and Walter, supra, all cases that involved sexual misconduct involving minors. In Kenyon, over the course of a four-month period, the attorney engaged in multiple internet chats with a person he believed to be a fourteen-year-old girl. Unbeknownst to him, he had been communicating with an undercover law enforcement officer. Kenyon admitted that, in addition to his illicit chats with the girl, he sent her images of, and links to, hardcore adult pornography; that he did so knowingly and purposefully; and that, had the person actually been a fourteen-year-old girl, his interactions with her would have impaired or debauched her morals. Like Legato, Kenyon also admitted that he arranged to meet with the girl, but ultimately did not appear for that meeting. Kenyon also was sentenced to lifetime parole. In the Matter of Regan Clair Kenyon, DRB 15-351 (April 4, 2016) (slip op. at 3-4).

Both Legato and Kenyon urged us to consider, in mitigation, that neither of them posed a continuing danger to the public and that both of them had sought treatment following their arrest and had since made substantial progress in their rehabilitative efforts. Moreover, both attorneys maintained that their conduct was aberrational and they posed no risk for re-offense.

In Walter, the attorney masturbated in the presence of K.P., a nine-year-old girl, who had moved into his home and for whom "he had a legal duty to assume responsibility." Walter admitted that he masturbated in front of K.P. during times when he was alone with her and that he did so for his own sexual gratification. He further admitted that the child observed him masturbating and that his conduct was sexual conduct that would impair or debauch K.P.'s morals. In the Matter of Alexander D. Walter, supra, DRB 15-362 (slip op. at 2).

In analyzing both the Legato and the Kenyon matters, we again considered the Court's observation in Cohen that both society and the courts have a more acute understanding of "the long lasting and pernicious effects of sexual crimes against children." In re Cohen, supra, 220 N.J. at 18-19. We determined that, based on those evolving views, the precedential value of older case law is limited and that the focus more properly belongs on the attorneys' intention and willingness to commit

such a reprehensible act. We could conceive of no explanation for the type of conduct committed by the attorneys and ultimately concluded that, regardless of any rehabilitative efforts and progress, and regardless of the absence of a risk of re-offense, the conduct committed by both attorneys was "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." In re Templeton, 99 N.J. 365, 376 (1985).

In determining to recommend that both attorneys be disbarred for their conduct, we specifically rejected, as mitigation, the rehabilitative progress that our dissenting members had urged, citing In re Cammarano, 219 N.J. 415 (2014). There, the Court stated:

> [The] concerns raised by this case are greater than whether this respondent is capable of rehabilitation . . . . In the end, we are charged with insuring that the public will have confidence in members of the bar . . . . In this case, any discipline short of disbarment will not be keeping faith with that charge.
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> [Id. at 424.]

We applied the same reasoning to Walter's conduct, committed in the presence of a mere child. Walter admitted to masturbating in the presence of K.P. during times when he was alone with her for his own sexual gratification. He nevertheless

urged us to impose only a censure, noting that he did not "physically harm or fondle the child." We noted, however, that the emotional and psychological damage Walter caused the child cannot be accurately measured, and that his conduct will have a profound impact on her life and on the person she will become. In the Matter of Alexander D. Walter, DRB 15-362 (slip op. at 18).

Contrary to the attorneys in Legato and Kenyon, here, respondent appeared for his scheduled meeting, bringing with him alcohol and Viagra. In 2002, an attorney, who appeared for a scheduled meeting with a child for sexual purposes, received a one-year suspension. See Ferraiolo, supra, 170 N.J. 600. Nonetheless, this precedent did not sway us in Legato and Kenyon where, we noted, the attorneys did not appear for a meeting, nor should it here, where respondent appeared for one meeting, bringing along with him, a controlled substance and alcohol. Ferraiolo, therefore, has limited value in our decision in the instant matter. Nor are we swayed by respondent's rehabilitation efforts.

Respondent had salacious online communications with someone whom he, admittedly, believed was a fourteen-year-old girl. He sent her a picture of male genitals and a link to a pornographic website. These communications occurred over the course of

fourteen months, culminating in his agreement to meet with the girl in person. When he arrived, he was arrested and found to have brought Viagra and alcohol. Respondent's conduct was not simply a bad mistake, but, rather, a pattern of behavior over the course of fourteen months that he could have stopped at any time. Instead, he chose to continue to inappropriately and sexually pursue a child.

Thus, in the absence of a contrary court decision in Legato and Kenyon, we remain resolute in our belief that when, as here, an attorney's conduct is so morally reprehensible, "as to destroy totally any vestige of confidence that the individual could ever again practice in conformity with the standards of the profession," that attorney should be disbarred. In re Templeton, supra, 99 N.J. at 376.

For these reasons, we recommend that respondent be disbarred, as he was in New York. Although Member Singer concurs in the Board's determination, she considers this case to be more serious than Legato and Kenyon because here, unlike in those cases, respondent appeared for his scheduled meeting, bringing alcohol and Viagra, demonstrating a clear intent to engage in sexual acts with the "child." Moreover, unlike Legato and Kenyon, respondent here pleaded guilty to much more serious charges and was sentenced to a term of imprisonment.

Members Boyer and Clark voted for an indeterminate suspension.

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs and actual expenses incurred in the prosecution of this matter, as provided in R. 1:20-17.

Disciplinary Review Board
Bonnie C. Frost, Chair

By: 
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Daniel M. Gillen
Docket No. DRB 16-269

Argued: January 19, 2017

Decided: April 25, 2017

Disposition: Disbar

Members	Disbar	Indeterminate Suspension	Did not participate
Frost	X		
Baugh	X		
Boyer		X	
Clark		X	
Gallipoli	X		
Hoberman	X		
Rivera	X		
Singer	X		
Zmirich	X		
Total:	7	2	

Ellen A. Brodsky
Chief Counsel