SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 13-413
District Docket No. XA-2012-0001E

IN THE MATTER OF	:
MICHAEL RESNICK	:
AN ATTORNEY AT LAW	:

Decision

Argued: April 17, 2014

Decided: June 17, 2014

Colleen Cunningham appeared on behalf of the District XA Ethics Committee.

Gerard Hanlon 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 (censure) filed by the District XA Ethics Committee (DEC). The amended complaint charged respondent with violating RPC 1.7(a)(2) (conflict of interest), RPC 1.16, presumably (d) (failure to protect a client's interests on termination of the representation), RPC 3.5(b) (ex parte communication with a

judge), RPC 8.4(a) (violation of the Rules of Professional Conduct) and RPC 8.4(d) (conduct prejudicial to the administration of justice).[1] We determine to impose a censure.

Respondent was admitted to the New Jersey bar in 1988. In 1998, he was reprimanded by consent for failing to abide by a client's decision regarding the representation. Contrary to a client's instruction, respondent accepted a settlement offer, deposited the money in his trust account, and disbursed his fee to himself. In re Resnick, 154 N.J. 6 (1998).

The facts that gave rise to this disciplinary matter are as follows:

In 2008, D C, then D N, filed a domestic violence charge against her then-husband, M A. N, who counter-alleged that C was the abuser. The Jersey Battered Women's Shelter (JBWS) referred C to respondent. Respondent represented C pro bono. He

---

[1] As to the RPC 8.4 charges, although the amended complaint did not cite a subsection of the rule, the presenter's brief referred to subsections (a) and (d).

successfully had the counterclaim against her dismissed and a final restraining order entered against her husband.[2]

On August 28, 2008, C retained respondent to represent her in a divorce proceeding. On September 2, 2008, she paid him a $5,000 retainer and $500 for costs. According to C, respondent had told her that he usually asked for a $12,500 retainer, but that he had reduced that amount because he was aware that she had no money.

On September 10, 2008, C hired respondent to represent her in a municipal court matter. On September 12, 2008, she paid him a $1,500 retainer for that matter, also a reduced fee.[3]

C testified that, when she retained respondent, she was in a "dire [financial] situation," had no job or family with money to lend her, and was selling her engagement ring to provide the $5,500 to respondent. He told her that he would not

---

[2] C later filed a malpractice claim against respondent. The transcript of respondent's deposition in that matter is Exhibit 53. Ciccarelli's deposition transcript is Exhibit 54.

[3] The municipal court charges against C, which were not dismissed, are pertinent to the allegations against respondent.

charge her any additional fees for his legal services in the divorce matter.[4]

On February 16, 2009, while C divorce proceeding was pending, respondent told her that he had developed romantic feelings for her and indicated that he wanted a personal relationship with her. Respondent testified that, after a review of the RPCs, including RPC 1.7, he had concluded that a relationship with C, during the representation, would not violate the rules. He did not consider C to be "vulnerable."

Although respondent testified that C had told him that the feelings were mutual, she denied this statement. According to C, when respondent disclosed his romantic intentions,

> I was trying to digest everything. I mean to me he was an authority figure, I trusted him. I had just come out of being abused every day and this was my lawyer, this was somebody that I looked up to.

---

[4] There is a dispute in the record concerning whether respondent promised to return the retainer that she had paid him for the divorce action. C asserted that respondent offered to refund the retainer and costs of $5,500, a claim that respondent denied, at his deposition.

> And immediately my mind had to go back to two days prior, when he told me I couldn't afford my divorce. And now he's going to handle it for free two days before [sic]. Now, two days later, all of a sudden he wants to be romantic with me and everything was spinning -- is that why he offered to do my divorce for free, to make me feel indebted to him two days later? And I couldn't wrap my mind around everything.
>
> [1T73-7 to 20.][5]

During Ciccarelli's deposition in the malpractice proceeding, she stated that she "didn't feel that [she] had an option to say, 'No thank you, but don't forget you said you are going' - you know -- 'don't let this affect my case.'" She told respondent that she would "think about it," if he left his wife.

C and respondent did become involved in a personal relationship. They began living together and looked for a house together.

On March 7, 2009, respondent was in the apartment he shared with C, spending an evening with his two children. C was not there. Respondent did not contact C

---

[5] 1T refers to the transcript of the DEC hearing on February 4, 2013.

during the evening, which he had previously agreed to do.

C sent an email message to respondent, at 3:51 a.m. on Sunday, March 8, 2009, stating, in part:

> Also, per our telephone conversation that took place in February (just prior to President's day when you expressed your feelings towards me), you mentioned that you would represent me in the divorce "without taking another penny from me" & in fact, "refund my retainer fee because you were making it your mission to fry the scumbag". I trust those things will still happen. I saved every email you sent me (including the one prior to you professing your love when you complimented my very essence) as proof of the fact that you initiated an inappropriate relationship.
>
> After living through the hell I did with Michael, and you knowing what I endured, for you to then take advantage of my vulnerability and turn around & hurt me when all I ever did was love you & try to make you happy is just sickening.[6] You are the most vile person I've ever met & I don't know how you even live with yourself. You are a sick man and I hope you think about what you lost every day for the rest of your life and for the rest of your boring, unloving, cold & distant relationship with [your wife].

---

[6] The details of Ciccarelli's complaints about respondent's behavior toward her are not relevant to our determination in this matter.

> I do not want to speak with you and anything you need to tell me regarding my divorce can be done via detailed email or detailed voice mail. I'm assuming that we are still scheduled for court on Wednesday & I will meet you by security at 8:30 a.m. unless I'm notified otherwise. I will not reply or respond to messages or emails requesting a generic "call back". I hope we don't need to escalate things to the attorney review board because that would be sad.
>
> [Ex30.][7], [8]

C sent a second email message, at 10:05 a.m. that day, stating, in part, "I honestly have NOTHING else to say to you unless it has to do with my divorce."

Despite the change in their relationship, C wanted and expected respondent to continue as her attorney in the divorce proceeding. C testified that, during one of several telephone conversations with respondent that morning, she told him that she wanted him to go to court with her.

---

[7] Ex. 30 is also marked as Exhibit D.

[8] We have included large portions of C emails to respondent in our decision to convey her psychological state and the impact that respondent's actions had on her, as well as the impact that the emails may have had on respondent.

C added that she had no money to retain another attorney.

Respondent testified, at his deposition, that he also thought that he could continue to represent C after their break-up. However, at his request, on Monday, March 9, 2009, his associate, Raquel Vallejo, telephoned C to advise her that she would be representing C at an early settlement panel (ESP) scheduled for March 11, 2009. C had never met with or spoken to Vallejo, prior to that date. Although Vallejo had performed no work on C behalf, C did not object to Vallejo's attending the ESP with her.

During C phone conversation with Vallejo, C questioned whether she would be charged for the representation, in light of respondent's prior statement to her that he would not charge her for her divorce and Tevis claim.[9] Vallejo told C to put her concerns in an email to the firm and that she would consult with respondent. In a March 9,

[9] In Tevis v. Tevis, 79 N.J. 422 (1979), the Court held that marital tort claims, including injuries resulting from domestic violence, must be joined with a pending divorce action.

2009 email sent to Vallejo at 12:15 p.m. and copied to respondent, C stated, in part:

> During a phone conversation initiated by Mr. Resnick on or about February 13, 2009, he advised me that he would "not take another penny from me" and "would refund my retainer fee of $5,500" because he felt so strongly that my husband was using his money & power to further bully me, knowing I did not have the resources to fight him back. . . . However, after verbally promising that to me, he put me in a very awkward position a few days later on February 16, 2009 by expressing his true feelings of "having fallen in love with me during the 6 month professional relationship".
>
> As I mentioned, I am speaking with someone today at 1:30 to learn a little more about my rights as a client with this verbal agreement that Michael Resnick made with me. I am very concerned about what you told me during our conversation today about how because of Mr. Resnick expressing his feelings towards me on February 16, 2008 [sic], I am now only able to be represented by his firm through the ESP and then my case would need to be outsourced to another law firm for Tevis due to conflict of interest. This puts me in a very vulnerable situation through no fault of my own. Mr. Resnick should not have expressed his feelings to me prior to the completion of my divorce knowing that it would affect my ability to see it to fruition through his firm via Tevis if he did. It is apparent now that he made the offer to help me financially as a ploy to stir up emotions of gratitude towards him just before he initiated his desire for a personal relationship with me. I also feel very vulnerable as a layman/non-

> attorney with what is going on and to be candid, it feels very unfair to me that because of a poor choice by Mr. Resnick to mix business with pleasure, I am now left hanging. Afterall [sic], it is Mr. Resnick who took an oath of ethics, yet I'm the one suffering.
>
> If you could please confirm all this to be true, I would certainly appreciate it. I'd also like confirmation directly from Mr. Resnick as well for my files.
>
> [Ex.32.][10]

The next day, at 9:53 a.m., C sent another email to respondent and Vallejo:

> Due to the fact that neither of you responded to the email that Raquel [Vallejo] insisted I send yesterday, I do not feel comfortable going to court tomorrow.
>
> Yesterday, Raquel explained that an adjournment is impossible, however, I feel that due to the circumstances of a personal relationship between Mr. Resnick and myself (initiated by Mr. Resnick) it would certainly justify an adjournment.
>
> I honestly didn't expect a reply to the email as I know Mr. Resnick's "psychological games" however, leaving me hanging the day before court is not only disrespectful but also cruel.

---

[10] Ex.32 is also Ex.O.

> I was hoping to fore go [sic] this option, however, at this point, I feel that I have no other recourse but to contact the Attorney Ethics Grievance Board for assistance with this matter.
>
> [Ex.35.][11]

There is a dispute in the record as to what else Vallejo told C, during their March 9, 2009 conversation. In C March 9, 2009 email, she mentioned a conflict of interest. According to C, Vallejo told her that the firm would not be representing her, after the ESP, "because of the romantic relationship between [respondent] because it was a conflict of interest."

At her deposition in the malpractice proceeding, Vallejo testified that she never told C that she needed to hire another law firm because of a conflict of interest. The following exchange took place at the deposition between Vallejo and Ciccarelli's attorney:

> Q. Did you have a discussion with [C]. . . that she would have to go

---

[11] Ex.35 is also Ex.G.

> to another law firm due to a conflict of interest?
>
> A. No.
>
> Q. Is her statement in here false?
>
> A. To the extent that it reads, yes.
>
> Q. So you didn't -- so you never used the terminology "conflict of interest" with her?
>
> A. I may have, but not in the context that it's expressed here.
>
> [Ex.F at 26-16 to 27-9.]

At his deposition, respondent testified that, after C had threatened to file a grievance against him and had placed restrictions on how he was to represent her and communicate with her, he had no choice but to withdraw from the representation. In respondent's view, C had undermined his firm's ability to represent her.

Respondent testified further, during his deposition, that he had shown Vallejo the March 9, 2009 emails from C and

> indicated [to Vallejo] that we were placed in an untenable difficult position. That, one, [C] was threatening to file an ethical [sic] grievance against the firm. That, second, she had imposed restrictions and parameters that inhibited the firm from representing her.

> And I had indicated to [Vallejo] that because [C] forbade me from communicating with her, except in the form of e-mail that [Vallejo] was to reach out to [C] and advise [C] that we were no longer in a position to represent her.
>
> [Ex. 53 at 115-5 to 15.]

At the DEC hearing, however, respondent testified somewhat differently, during an exchange with the presenter:

> Q. And the purpose of contacting [C] through Ms. Vallejo is to tell her that [Vallejo's] going to go to the ESP with her, correct?
>
> A. Yes.
>
> Q. And that after that, your firm is done representing her, right?
>
> A. No.
>
> Q. That's not true.
>
> A. That is not true.
>
> Q. Isn't it true that [C] placed your firm in an awkward situation and you needed to advise [C] that your firm was done representing her after the ESP?
>
> A. If the context of your question is were we placed in the awkward position after she filed the ethics grievance against me on March 10th, the answer is yes to that.
>
> Q. Okay. Let's turn to P-53, again, page 114, lines 7 through 11. . .

Question: Okay. When the relationship formally concluded or [in] anticipation of that, [Vallejo] spoke to [C] about the fact that the firm was getting out of the case, correct? Your answer: Yes.

Now, turn to page 115, lines 2 through 15. What, if anything, did you tell [Vallejo] to say to [C]? Answer: . . . [Vallejo] was to reach out and [sic] [C] and advise [C] that we were no longer in a position to represent her.

So I ask you, again, Mr. Resnick, based on your testimony today versus what you testified to in your deposition, which is the truth?

A. Well, the truth is, again, as related to the March 10th email that I received from Ms. C, when she actually went forward and filed the ethics grievance, that put us in the untenable position. That's what I testified to at my deposition.

Q. You had Ms. Vallejo call her on March 9th, we're not talking about March 10th. And what I asked you before was did you tell Ms. Vallejo to tell [C] that your firm wasn't representing her anymore. You clearly said that you instructed her to do that in your deposition. You testified here today that you never said that?

A. That's correct. It wasn't until the March 10th email, where Ms. C went forward and filed the grievance.

Q. So you're saying that in P-32, where [C] sends a confirming email to [Vallejo], and CC's you, that says, I am very concerned about what you told me during our conversation today about how because of Mr. Resnick expressing his feelings toward me on February 16, 2008 [sic], I am now only able to be represented by this firm through the ESP. And then my case would need to be outsourced to another firm for Tevis due to conflict of interest. You' re saying that's incorrect and it's just a coincidence?

A. I didn't say it's a coincidence. The question is is it incorrect. That's her statement which is incorrect. That never happened.

Q. You say on March 10th, an email shows that an ethics grievance had been filed, are you referring to P-35?

A. Yes.

Q. Where does it say that an ethics grievance has already been filed?

A. Final paragraph.

Q. Okay. The paragraph that says I was hoping to forego this option, however, at this point, I feel that I have no other recourse but to contact the attorney ethics grievance board for assistance with that matter, that paragraph?

A. That paragraph and the fact that she did file the grievance that day.

Q. You're not clairvoyant though, correct?

. . .

Q. Does this say that I have filed a grievance?

A. It's very clear what it says. I have no other recourse but to contact the attorney ethics grievance board for assistance with this matter. And she did, in fact, file a grievance that day.

Q. You didn't know that she filed a grievance that day, did you?

A. I did not know that at the time. But when I was served a grievance, it showed the date and a time stamp, and she did, approximately two hours after this email was generated.

Q. As of the time you received that email, you did not know for a fact that she filed an attorney grievance?

A. The fact is she filed the grievance that day, [presenter].

[2T133-2 to 137-7.]

By letter dated March 10, 2009 to the Honorable Stephen C. Hansbury, P.J.F.P., respondent requested that the ESP scheduled for the following day be adjourned. Respondent stated that his firm's ability to represent C had been "compromised" and that he had received an email from C requesting an

adjournment. Respondent sent a copy of the letter to C and to his adversary.[12]

On March 10, 2009 at 10:36 a.m., C sent the following email to respondent:

> I received your voice mail (that coincidentally came in within record speed of my email to you notifying you of my intent to contact the Attorney Ethics Grievance Board).
>
> I do not feel comfortable speaking to you due to the fact that me ending our romantic relationship on 3/7/09 caused me to receive a phone call from Raquel on 3/9/09 telling me that your firm would no longer represent me in my divorce case after 3/11/09 and I would need to find another firm. That of course did not coincide with what you told me about our relationship not affecting my divorce (I also have the emails with attachments of court documents regarding my divorce that you forwarded to me during our romantic relationship showing that you were still representing my interest even though we were romantically linked).
>
> In addition to that, when I tried to confirm with her that I would not be billed for her time on the 11th, she requested that I send her an email & she would confirm with a reply, however, that did not happen. You

[12] Unbeknownst to respondent, the ESP was going to be adjourned in any event, because Nonio, Ciccarelli's then-husband, was incarcerated.

> did not reply either and you [sic] as you were cc'd on the email.
>
> Since your firm has left me without representation after a choice you made to pursue a romantic relationship with me, I already contacted agencies for help. I am also aware of a ruling from 1998 against you.
>
> Please confirm that the court has been notified that we will not be there tomorrow. Otherwise, please do not contact me.
>
> I just received your email requesting an adjournment. Please advise if they accept the request.
>
> [Ex.36.]

Also on March 10, 2009, respondent made an appointment to meet with Judge Hansbury. He explained that, in light of Ciccarelli's March 10, 2009, 9:53 email, she was no longer just threatening to file an ethics grievance, but had actually filed it.[13] Thus, he sought guidance from Judge Hansbury about how to "proceed," that is, about "[t]he steps that should be undertaken to be relieved as counsel."

---

[13] It is unclear where the time of respondent's call to Judge Hansbury falls in the sequence of letters and emails on that day.

Respondent and Judge Hansbury met on March 10, 2009, at approximately 4:45 p.m. Respondent conceded that he did not notify C or opposing counsel that he would be speaking with the judge. During their meeting, respondent advised Judge Hansbury of his relationship with C, "the ethics issues," and her March 10, 2009 email. He added that his ability to represent her had been compromised. Judge Hansbury then instructed respondent to hand-deliver a letter to him, seeking to withdraw from the case.

On March 11, 2009, respondent submitted a letter to Judge Hansbury, requesting permission to withdraw as Ciccarelli's counsel.[14] He did not send a copy of the letter to C and his adversary. In his letter, respondent stated, "Yesterday

> [C] transmitted two (2) emails advising she contacted the Office of Attorney Ethics (OAE) with the intent to file a grievance against me." He also stated that it was his "reasonable belief" that C was obtaining substitute counsel.

---

[14] Respondent's letter to Judge Hansbury noted that the ESP had been re-scheduled for April 8, 2009.

Judge Hansbury granted respondent's request. On March 11, 2009, respondent informed his adversary that he had withdrawn from the case. On the same day, respondent forwarded C file to her. He advised her that he had resigned as her counsel of record and that she had been designated as acting pro se.

As previously noted, respondent had represented C pro bono in obtaining a final restraining order against N, C then-husband. N appealed the order. At the ethics hearing, questions were raised on whether respondent's pro bono representation was ongoing, during the time that he and C were romantically involved. Respondent's counsel took the position that respondent did not represent C in the appeal. The presenter argued otherwise. C, too, told the hearing panel that respondent was representing her in connection with N appeal.

In any event, on March 6, 2009, N counsel sent a letter to the appellate division, copied to respondent, withdrawing the appeal. On March 10, 2009, respondent received the letter, which he forwarded to C on March 11, 2009.

C ethics grievance against respondent was dated March 10, 2009 and was date-stamped March 11, 2009. C

testified that she filed the grievance only because neither respondent nor Vallejo was getting back to her. Even after she had filed the grievance, C wanted respondent to remain as her attorney. She testified that, had she known that respondent was going to approach Judge Hansbury about withdrawing from her case, she would have objected to respondent's request.

On March 30, 2009, C filed a malpractice claim against respondent.

C was divorced on May 6, 2009. She was represented by another attorney at that proceeding. Although substitute counsel signed the March 27, 2009 property settlement agreement, C testified that she was forced to negotiate the terms of the divorce herself. She also testified that she was forced to drop her Tevis claim against Nonio, because she did not have counsel and did not know how to proceed on her own.

The presenter urged the DEC to recommend a six-month suspension. Respondent's counsel suggested that, if it is found that respondent violated any RPC, no more than a reprimand should be imposed.

The DEC concluded that respondent violated each of the charged RPCs, that is, RPC 1.7(a)(2), RPC 1.16(d), RPC 3.5(b), RPC 8.4(a), and RPC 8.4(d).

As to RPC 3.5(b), the DEC found that

> [t]here appear[ed] to be no legitimate reason why Respondent approached Judge Hansbury with his problem other than he was the Assignment Judge who could grant the relief that Respondent was seeking. Judge Hansbury was not the judge assigned to his case nor a close friend or former colleague of Respondent. It appears that Respondent simply panicked. Respondent could and should have sought the advice of a trusted colleague with respect to his duty to withdraw as counsel for Grievant immediately while following the New Jersey Rules of Practice.
>
> [HPR10.][15]

The DEC remarked that respondent had not disclosed to either C or his adversary that he had oral and written ex parte communications with Judge Hansbury or that he had sought to be relieved as counsel. The DEC found that Judge Hansbury's relaxation of the procedural rules, by allowing respondent to withdraw from the representation without a formal

---

[15] HPR refers to the hearing panel report.

motion, did not excuse respondent's failure to notify C and his adversary of his intentions and of his ex parte communication.

As to RPC 1.16(d), the DEC noted that respondent sought to withdraw from the representation only after C threatened to contact disciplinary authorities and that he did not take required steps to protect her interests, such as advising her of his intentions and providing notice to her to allow her sufficient time to seek substitute counsel for the ESP.

As to RPC 1.7(a)(2), in the DEC's view,

> [b]y entering into an intimate romantic relationship with Grievant, Respondent assumed the risk that his representation would be materially affected by his personal interest in Grievant, either because the soundness of his judgment might be encumbered by his romantic feelings for Grievant, or, if and when the relationship deteriorated, his judgment might be adversely affected by either his or his client's animosity and "negative" feelings.
>
> [HPR13.]

The DEC pointed out that, although respondent claimed that his representation of C in the pro bono matter had concluded and that he did not continue to represent her in the

appeal of the restraining order, he was "unable to prove [his claim] with documentary evidence or any persuasive testimony."

The DEC cited In re Warren, 214 N.J. 1 (2013), where the Court reprimanded a public defender who had engaged in a sexual relationship with his client and then terminated the representation. There, although there was a significant risk that Warren's representation of his client would be materially affected by his personal interest in her, he, nevertheless, began and then continued the relationship. The DEC found that respondent, too, took a risk, when he chose to become romantically involved with C, while her divorce action was pending:

> The manner in which Grievant came to seek Respondent's representation, coupled with Respondent's belief that Grievant had been abused by her ex-husband, and Respondent's knowledge that Grievant was indebted to him given his promise of waiver of his fees, and saw him as an authority figure in her life, should have heightened Respondent's sensibilities as an officer of the court, and urged him to proceed with great caution relative to his romantic interest in Grievant. There is no reason why Respondent could not have, or should not have, waited until the conclusion of the divorce action before becoming romantically involved with Grievant. Nor is there any reason why Respondent, if compelled to begin a romantic relationship with Grievant during the pendency of the divorce action, did not

> consult with Grievant about withdrawing as her counsel because of the conflicts, and then withdraw as her counsel, and assisted Grievant in securing substitute counsel for the remainder of the matter. By failing to take any of these prudent actions, Respondent assumed enormous risks - not only did he risk jeopardizing his ability to represent his client with the decorum, objectivity and impartiality required, but he risked his legal career.
>
> [HPR14-HPR15.]

As to RPC 8.4(d), the DEC was mindful that C was initially assigned to respondent as a pro bono client by JBWS. Thus, the DEC looked to In re Liebowitz, 104 N.J. 175 (1985) where, as here, the assigned attorney attempted to have a sexual relationship with an assigned client. The Court stated that "[a]n assigned client could reasonably infer that a failure to accede to Respondent's desires would adversely impact on her legal representation" Id. at 180.

Whether respondent had completed his pro bono representation of C, prior to beginning their romantic relationship, was "not as relevant to the Panel's determination as the fact that the origin of this attorney-client relationship was in connection with an assigned pro bono matter involving domestic violence. " The DEC, thus, concluded that respondent engaged in conduct prejudicial to the administration of justice

(RPC 8.4(d)), by engaging in a romantic relationship with a client who had been referred to him by JBWS and continuing the relationship while he was representing her in her divorce proceeding.

The DEC also found that, because respondent "flagrantly violated" RPC 1.7, RPC 1.16, and RPC 3.5, he violated RPC 8.4 (presumably (a)).

As to the measure of discipline, the DEC considered, in aggravation, respondent's prior reprimand and his "complete lack of remorse" for his ex parte communications and the improper termination of the representation. The DEC found respondent's prior discipline "particularly influential in light of the charges in this present matter, namely, the flagrant disregard Respondent has shown for the rules pertaining to ex parte communications and the manner of his improper withdrawal as Grievant's counsel."[16] As to the lack of remorse, the DEC noted that respondent "essentially took the position that 'the judge told me to do it,' when that so clearly was neither the case,

---

[16] It is unclear why the DEC found that respondent's unrelated prior discipline was "particularly influential."

nor was it relevant to his own actions." The DEC added that respondent's "panicked visit" to Judge Hansbury was clear and convincing proof of his serving his own interests, at the expense of his client.

As noted previously, the DEC recommended a censure.

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

Before we address the appropriate findings and the measure of discipline, one point must be discussed. Respondent's counsel made much below of the fact that C had a personal relationship with her subsequent attorney, against whom she later filed an ethics grievance, resulting in an admonition. In the Matter of Peter Ouda, DRB 13-124 (October 25, 2013). Respondent's counsel referred to C as a "predator," pointed to her "pattern of conduct," and elicited testimony that her marriage to Nonio had lasted only two-and-a-half months. None of this has any bearing on the allegations against respondent. The DEC addressed this issue in the panel report, noting that C was not subject to the RPCs. The DEC concluded that the Ouda grievance was not relevant to the

present matter. According to the DEC, although it invited respondent's counsel to explain the relevance of the Ouda grievance to any defense to or mitigation of the ethics charges against respondent, the DEC did not receive a "persuasive response" from counsel.

We agree with the DEC. Any relationship, right or wrong, that C had with Ouda has no bearing on respondent's actions. As the DEC pointed out, C conduct is not governed by the RPCs. Respondent's, however, is.

We find that the DEC's conclusion that respondent was guilty of each of the charged violations is well-supported by the record, with one exception. There is no indication that respondent's actions prejudiced the administration of justice. True, C ESP had to be adjourned, but that was not respondent's fault. The ESP had to be postponed because C then-husband, N, was incarcerated. Although it appears that C sought an additional adjournment of the
proceeding, it was rescheduled for nearly a month after respondent's withdrawal from the case. Any further postponement cannot be traced to respondent's actions. We, therefore, dismiss the alleged violation of RPC 8.4(d).

In determining that respondent is guilty of unethical conduct, we were guided by the Court's pronouncement in In re Liebowitz, supra, 104 N.J. 175, that, although an attorney's sexual relationship with a client is not per se unethical, the relative positions of the parties must be scrutinized to ascertain whether the relationship was prohibited. As the Court noted in Liebowitz, in adopting the Board's decision, "[t]he gravamen of the offense is the opportunistic misconduct toward [the attorney's] *pro bono* client." Id. at 180. In Liebowitz, as in this matter, the attorney was in a superior role, with an assigned client who "could reasonably infer that a failure to accede to the [attorney's] desires would adversely impact on her legal representation." Id.

We also find guidance in In re Rea, 128 N.J. 544 (1992). In Rea, we were faced with a case of "he said/she said" as to whether there had been a sexual relationship between the attorney and an assigned client. The client testified that she had refused Rea's sexual advances, even though he had threatened to "frustrate" her case, if she refused him. In the Matter of James J. Rea, DRB 91-395 (April 20, 1992) (slip op. at 2 to 4). Rea, on the other hand, testified that he and the client had developed a sexual relationship, and that she had never refused

his advances. Id. at 6. He denied threatening to harm her case. Id. at 5. Rea testified that he ended their relationship, when he became aware that the client had psychological problems. Id. at 6.

We found in Rea that, under the circumstances, the attorney "should have exercised more sound judgment, knowing that he was in a relationship with an assigned client who had a history of mental health problems, and who may well have felt that a failure to accede to his sexual advances would have an adverse effect on her legal matters." Id. at 10. Although, in light of the diametrically opposed testimony, we were unable to determine with certainty whether a sexual relationship had developed, we found that, under either scenario, Rea's conduct was unethical. If the client's version of the facts was accurate, then Rea was guilty of unethical conduct, in that he had threatened to jeopardize her case, if she did not agree to a sexual relationship with him. If Rea's version of the facts was accurate, then he was guilty of conduct of the sort that Liebowitz sought to prevent. His client was not in a position to freely consent to a sexual relationship with him either because of her status as an assigned client or because of her past history and mental health.

More recently, we considered In re Warren, supra, 214 N.J. 1, where the Court imposed a reprimand on an attorney who, while assigned to represent a client in a municipal court matter involving theft charges filed by her mother, had sexual relations with the client, knowing that she was involved in a custody dispute with her former husband, was going through methadone withdrawal, and had attempted suicide a year earlier. But see In the Matter of Peter Ouda, supra, DRB 13-124 (October 25, 2013) (admonition for attorney who engaged in a brief sexual relationship with his client six months after the representation began; there was no clear and convincing evidence that the client had not consented to the relationship or was so emotionally vulnerable that she was unable to freely consent to it; the attorney should, however, have terminated the representation after the sexual relationship ended; the imposition of only an admonition, instead of stronger discipline, was based on the attorney's lack of prior discipline in twenty-three years at the bar and absence of adverse effects on the client's case).

One of the essential factors in this case is that, although the relationship was consensual, as in Warren, C was an assigned client, when the representation began.[17] She and respondent were not on an equal playing field and, therefore, unlike in Ouda, the client was not in a position to freely consent to the relationship. Moreover, it was because of their relationship that respondent was representing her at a reduced (or no) fee. C had limited financial resources. As seen from her communications with Vallejo, she was concerned about whether she was being charged for the representation, if respondent was not handling her case. Clearly, their financial arrangement, which came about because of their personal relationship, was of great importance to C.

In addition, respondent became sexually involved with C, knowing that she had fled an abusive relationship. He had to know that she was emotionally vulnerable to his advances. It was respondent who professed his feelings for her, a confession that left her utterly surprised and confused. In

[17] It is unclear whether respondent continued to represent C in the domestic violence matter.

one of her post-break-up communications with respondent, C alluded to "a choice [he] made to pursue a relationship" with her. It is evident from her reaction at the time, that she felt pressured to yield to respondent's romantic advances and, in essence, without a choice. As the DEC appropriately pointed out, C felt "indebted to him given his promise of waiver of his fees."

Moreover, once C threatened to file an ethics grievance against respondent, he impermissibly had an "ex parte" communication with the presiding judge. It is of no consequence that the judge was not assigned to hear C case. Although the exchange did not involve the merits of the case, it did relate to its procedural posture -- the fact that C would be left without legal representation. There was no reason why respondent could not have addressed the judge presiding over the case, either by filing a motion or by requesting an in camera conference, on notice to and with the presence of both C and the adversary.

Attorneys who engage in ex parte communications with judges have received either an admonition or a reprimand. See, e.g., In the Matter of Thomas P. Foy, DRB 97-136 (1997) (admonition for attorney who communicated with a Superior Court judge who

entered a ruling unfavorable to the attorney's former employer; although the attorney did not intend to influence the judge, his conduct violated both RPC 3.5(b) and RPC 8.4(d); the judge then recused himself, requiring another judge to be assigned to the case) and In re Goldring, 178 N.J. 26 (2003) (reprimand imposed on attorney who sent six letters to a judge in a case in which the attorney formerly represented a client; in those letters, the attorney argued facts to the benefit of his former client and was antagonistic to the court, causing the judge to transfer the case to another judge).

For respondent's obvious conflict of interest, ex parte communication with the judge, and improper termination of the representation, we determine to impose a censure, the same quantum of discipline that the DEC considered appropriate. Although the DEC considered, in aggravation, respondent's prior reprimand, we decline to do so. That discipline is remote in time (sixteen years) and stemmed from unrelated misconduct. We have, however, considered that respondent has shown no contrition for his conduct or concern for his client's welfare.

Chair Frost recused herself. Member Hoberman would impose a reprimand. Member Singer would dismiss the matter and has filed a dissenting opinion.

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
Edna Y. Baugh, Vice-Chair

By: Ellen A. Brodsky
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Michael L. Resnick
Docket No. DRB 13-413

Argued: April 17, 2014

Decided: June 17, 2014

Disposition: Censure

Members	Disbar	Reprimand	Censure	Dismiss	Disqualified	Did not participate
Frost					X	
Baugh			X			
Clark			X			
Gallipoli			X			
Hoberman		X				
Singer				X		
Yamner			X			
Zmirich			X			
Total:		1	5	1	1	

Ellen A. Brodsky
Chief Counsel