SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 13-221
District Docket No. XIV-2011-0258E

IN THE MATTER OF

ROGER PAUL FRYE

AN ATTORNEY AT LAW

Decision

Argued: November 21, 2013

Decided: December 19, 2013

Maureen G. Bauman appeared on behalf of the Office of Attorney Ethics.

Respondent appeared pro se.

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. The OAE recommends respondent's disbarment for his 1999 guilty plea to third-degree endangering the welfare of a child, in violation of N.J.S.A. 2C:24-4(a). That statute provides that any person who "engages in sexual conduct which would impair or debauch the morals of . . . a child under the age of 16 is

guilty of a crime of the third degree." For the reasons expressed below, we determine that a two-year suspension and conditions are appropriate.

Respondent was admitted to the New Jersey bar in 1982, the Pennsylvania bar in 1977, and the Massachusetts bar in 1990.

Although respondent has no history of discipline, there is one matter pending before the Court that we considered at our January 2013 session. There, we voted to impose a reprimand for respondent's misrepresentations in an appellate brief. Specifically, respondent misrepresented that, when he pleaded guilty to refusal to submit to chemical testing of his breath, he lied to the court that he had consumed alcohol. We found that respondent's misrepresentation in his brief violated RPC 3.3(a)(1) (false statement of material fact or law to a tribunal), RPC 8.4(c) (misrepresentation), and RPC 8.4(d) (conduct prejudicial to the administration of justice). In the Matter of Roger Paul Frye, DRB 12-268 (January 17, 2013).

Before we turn to the details of the conduct that formed the basis for respondent's guilty plea -- and, consequently, the basis for the OAE's motion for final discipline -- we address a procedural argument that respondent raised in a letter to us, dated November 6, 2013, and also at oral argument before us.

In this letter, respondent claimed that his due process rights had been violated because he was deprived of "an evidentiary hearing at the District level, much like other disciplinary matters before the DRB by the OAE. Respondent was never afforded the opportunity to present evidence in this [sic] favor in a formal, due process complaint [sic] hearing." Respondent conceded, however, that he does not want to "drag" the minor through another proceeding, so many years after the fact, in this "sensitive . . . matter."

In replying to respondent's raised concerns, Office of Board Counsel (the OBC) pointed to paragraph (c)(2) of R. 1:20-14, which allows the OAE Director, at the conclusion of all criminal matters, "to file directly with the Board . . . a motion for final discipline based on a criminal conviction or admission of guilt specifying the sanction requested." That paragraph of the rule further provides:

> The sole issue to then be determined shall be the extent of final discipline to be imposed. The Board and the Court may consider any relevant evidence in mitigation that is not inconsistent with the essential elements of the criminal matter for which the attorney was convicted or has admitted guilt as determined by the statute defining the criminal matter. No witnesses shall be allowed and no oral testimony shall be taken; however, both the Board and the Court may consider written materials otherwise allowed by this rule that are submitted to it. Either the Board or the Court, on the showing of good cause therefore [sic] or on its motion, may remand a case to a trier of fact for a

> limited evidentiary hearing and report consistent with this subsection.
>
> Nothing in this rule shall be construed to preclude the Office of Attorney Ethics from filing a complaint and proceeding by hearing where the Director determines that procedure to be appropriate.

At oral argument before us, respondent renewed his contention that his "procedural due process rights" have been violated because "there has been no evidentiary hearing in this matter" and that, had there been a hearing, he, his therapist, and the minor's father would have testified on his behalf.

At this juncture, a Board member pointed out to respondent that R. 1:20-13 allows the OAE to proceed by way of a motion for final discipline and, further, that an evidentiary hearing would require the victim's testimony, which, respondent agreed with that Board member, would have been "rather painful." Respondent continued to argue, however, that R. 1:20-13 is unconstitutional, "as applied in this case."

In short, respondent does not want an evidentiary hearing that would require his victim's testimony. He wants an evidentiary hearing to present mitigation for his behavior. He wants solely mitigating factors, rather than the actual details of his criminal conduct, to be presented at an evidentiary hearing that, he complains, he did not have a fair opportunity to have.

The answer to respondent's argument, which was communicated to him in the OBC's letter of November 13, 2013, is that R. 1:20-13, which has been in effect since 1984 and has not been declared unconstitutional, allows the OAE to file a motion for final discipline, instead of a formal ethics complaint. It is true, that the OAE may opt to file a formal complaint, but it is not required to do so and chose not to do so in this instance. It is also true that the Board, upon a showing of good cause or on its own motion, may remand a case to a trier of fact for a limited evidentiary hearing.

In this case, however, neither good cause was shown nor did we see a compelling need for a remand.[1] Respondent had an opportunity to present the mitigation that he wished us and the Court to consider, consistent with R. 1:20-13. That rule allows us and the Court to consider any relevant mitigation that is not inconsistent with the essential elements of the offense to which respondent pleaded guilty. In reaching our determination, we carefully reviewed respondent's submission to us, including his

[1] In light of the age of the criminal conduct in this matter (sixteen years) and the nature of respondent's crime, a 1998 sexual offense against a minor victim, there is a strong possibility that the victim, who is now approximately twenty-five years old, would either be unavailable to testify or unwilling to revisit an emotionally disturbing episode in her life. We, therefore, determine to proceed on the existing record before us.

treating therapist's report. Therefore, he cannot be heard to complain that his due process rights have been violated by a lack of opportunity to present any mitigating factors that he wished to be considered.

In addition to the above constitutional issue, respondent voiced his concerns that these proceedings might violate his right to privacy. We wish to make clear that our goal is to protect the privacy rights of respondent's victim, rather than respondent's. We have taken steps to protect those rights by issuing a protective order sealing the disciplinary record and placing the matter for oral argument on our private calendar.

The facts of this matter are as follows:

On April 28, 1999, before Judge Stephen W. Thompson, respondent entered a guilty plea to count one of an accusation charging him with the third-degree offense of endangering the welfare of a child. The accusation alleged only that "[o]n or about the 19th day of June, 1998 . . . . the defendant did endanger the welfare of [the minor], by engaging in sexual conduct which would impair or debauch the morals of the child."

The only facts elicited from respondent at the plea hearing, were that, on June 19, 1998, "I was entrusted with the care of [the minor], and I had consumed excess alcohol. [The minor] had a complaint, in her mind, a perceived medical

condition with respect to her rectum. I responded to her plea -- to her request by touching her in an inappropriate fashion; with intent to 'impair or debauch' her morals." Respondent admitted that he touched the minor in the "rectal area."

At the August 13, 1999 sentencing, respondent was directed, under Megan's Law, to register with local police departments wherever he resides and to give ten days' advance notice, before moving. Although not required to reside in New Jersey, respondent was to report to the Camden County Probation Department.

The sentencing judge considered the need for deterrence as an aggravating factor and, as mitigating factors, respondent's lack of prior "delinquency or criminal activity," the likelihood that he would respond to probationary treatment, and the absence of prior convictions of other offenses. Finding that the mitigating factors outweighed the aggravating factor and that the plea agreement was fair, the judge imposed a sentence of five years' non-custodial probation and ordered that respondent have no uninitiated contact with the victim, that he be subject to community supervision for life and possible DNA testing, and pay fines and penalties. On January 31, 2000, respondent's sentence was amended to vacate the DNA testing only. All of the

remaining terms and conditions of his sentence remained in "full force and effect."

In September 2003, respondent was found guilty of violating the terms of his probation. According to an accusation, respondent failed to report to his probation officer, as directed, on six dates (October 17, 2001, March 6, 2002, June 6, 2002, January 6, 2003, March 5, 2003, and April 8, 2003) and failed to attend sex therapy, twice per month. On September 19, 2003, respondent was sentenced to continued probation. During the plea for his violation of probation, respondent pointed out that, since the charges were filed against him, his attendance at probation and at therapy sessions had been "perfect."

Respondent's August 16, 2013 certification to us stated that, in 1998, he appeared before a Camden County Grand Jury in connection with the criminal matter. The grand jury issued a nol pros or no indictment finding. According to respondent, his criminal attorney incorrectly advised him that the nol pros marked the end of the matter. He claimed that, afterwards, the prosecutor threatened that "he would keep the matter in front of further grand juries until he secured an indictment." Based on the prosecutor's threats and his attorney's acknowledgment that he had made a mistake, his attorney recommended that he either go to trial or enter a plea agreement. Respondent asserted that,

because he did not want the minor or her family to go through the stress of a trial, he accepted the plea.

Respondent also claimed that he was never "arrested" for a probation violation, but was "summoned" to court for allegedly having missed some probation appointments, a circumstance that he described as a miscommunication between himself and his probation officer.

Respondent annexed to his certification to us a copy of a March 25, 2000 assessment from his treating therapist, Dr. Amber T. Samaroo. He pointed out that the assessment was performed to educate the court on his "present risk of re-offending in the future." He noted the doctor's recommendation that he attend an "out-patient sexual offender treatment program and an alcohol treatment program." He claimed that he attends group sex offender therapy on a biweekly basis and expressed his willingness to maintain that commitment for the rest of his life.

According to respondent, the unfortunate, fifteen-year old offense against the minor was the product of very poor judgment on his part. He claimed that, despite the offense, he is "not a pedophile," that the offense was "unfortunate and the most shameful moment in his life," and that it does not reflect adversely on his fitness as a lawyer.

Respondent admitted to Dr. Samaroo that he drank excessively, between 1993 and 1998, and that, although he was under the influence of alcohol at the time of the offense, he did not blame his misconduct on his alcohol abuse.

According to Dr. Samaroo, at the time of her assessment, respondent was very worried about "community notification," the effect it would have on his family, and the ramifications it would have on his employability. Respondent told Dr. Samaroo that he "hopes to make amends [to the victim] for the pain and suffering he has brought upon [her] through his actions."

Dr. Samaroo noted that respondent admitted his sexual misconduct and was able to express great remorse for the pain and suffering that he brought on his minor victim and that he was a low risk for "re-offending in the near future." Although Dr. Samaroo acknowledged that there is no accurate way to determine whether an individual will commit another sexual offense, she added that, with counseling interventions, individuals are less likely to repeat those actions in the future.

According to Dr. Samaroo, respondent has to address his life stressors. She noted that research on recidivism shows that extreme stressors are generally precursors to an individual re-offending. She expressed her concerns that respondent had not

been attending sexual offender after-care counseling to help him address the abuse he caused to the minor victim.

In Dr. Samaroo's "clinical opinion," respondent was at a low risk of re-offending, but must attend an out-patient sexual offender treatment program and an alcohol treatment program to provide him with the guidance and support necessary to address his life's stresses. Such attendance "should be made mandatory if there is a reduction in his tier notification."

Citing In re Thompson, 197 N.J. 464 (2009) (attorney disbarred based on his conviction for sexual exploitation of a minor, in violation of U.S.C.A. §2251(a) and (2)), the OAE noted that the Court has taken an increasingly harsh view of attorneys who engage in sexual misconduct involving children. The OAE referred to a number of cases, including In re Ferraiolo, 170 N.J. 600 (2002) (one-year suspension for attorney who communicated through the internet with an individual whom he believed to be a fourteen-year old boy, but was actually an investigator posing as a boy; the attorney discussed sexual acts in explicit detail that he hoped to engage in with the boy, sent naked photographs of a male, purportedly himself, arranged to meet the boy to engage in sexual acts, and admitted to engaging in similar activities before but denied showing up for the meetings); In re Cunningham, 192 N.J. 219 (2007) (disbarment for

attorney who, 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); In re Sosnowski, 197 N.J. 23 (2008) (attorney disbarred for possessing child pornography and video-recording children using the bathroom in his house); and In re Wright, 152 N.J. 35 (1997) (attorney disbarred for digitally penetrating his daughter's vagina; behavior occurred over a three-year period and involved at least forty instances of assault).

The OAE argued that respondent's conduct was more egregious than Cunningham's. The OAE noted that, although the sentencing judge remarked that respondent lived a "law-abiding life prior to this crime" and would likely respond positively to probationary treatment, respondent did not remain law-abiding. He violated his probation on six specific dates and twice failed to attend sex therapy. The OAE also pointed to respondent's failure to report his criminal conviction to that office, as required by R. 1:20-13(a). The OAE only discovered the charges while researching an appeal that respondent submitted in connection with his prior ethics matter.

Respondent, in turn, contended that the OAE's brief improperly cited facts that were not specifically proven in a court of law. Respondent compared his conduct to that of the attorney in In re Gilligan, 147 N.J. 268 (1997) (reprimand). Gilligan exposed himself to three non-consenting individuals, two of whom were under the age of thirteen. Respondent observed that, like Gilligan, he was sentenced only to five years' probation. He urged us to consider that, although Gilligan apparently did not submit to any kind of sexual offender psychotherapy, he, respondent, continues to undergo psychotherapy and "will continue to do so for the rest of his life to assure this Court and other parties that he has no intent of reoffending and is taking steps to assure the public in that regard."

Respondent also argued that, unlike Ferraiolo (one-year suspension), his offense did not constitute "a threat to the public." In his view, disbarment is unwarranted because he has not been diagnosed as a repetitive, compulsive sex offender, as in Cunningham. He added that he is sixty-two years old, has not committed another offense in fifteen years, and actively participates in therapy. He asked us to impose an admonition (his certification called for discipline no greater than a

reprimand) and to require him to continue his psychotherapy on an indefinite basis.

Following a review of the record, we determine to grant the OAE's motion for final discipline.

The existence of a criminal conviction is conclusive evidence of respondent's guilt. R. 1:20-13(c); In re Gipson, 103 N.J. 75, 77 (1986). Respondent's guilty plea to having violated N.J.S.A. 2C:24-4(a) constitutes a violation of RPC 8.4(b) (commission of a criminal act that reflects adversely on the attorney's honesty, trustworthiness or fitness as a lawyer). Only the quantum of discipline to be imposed remains at issue. R. 1:20-13(c)(2); In re Lunetta, 118 N.J. 443, 445 (1989).

The sanction imposed in disciplinary matters involving the commission of a crime depends on numerous factors, including the "nature and severity of the crime, whether the crime is related to the practice of law, and any mitigating factors such respondent's reputation . . . prior trustworthy conduct, and general good conduct." In re Lunetta, supra, 118 N.J. at 445-46.

The fact that respondent's offense does not relate directly to the practice of law does not negate the need for discipline. Even a minor violation of the law tends to lessen public confidence in the legal profession as a whole. In re Addonizio, 95 N.J. 121, 124 (1984).

Respondent pleaded guilty to the third-degree offense of endangering the welfare of a child under the age of sixteen, a violation of N.J.S.A. 2C:24-4(a). At his guilty plea proceeding, respondent told the judge that he had touched the child "in her rectal area," "in an inappropriate fashion," and "with the intent to impair or debauch her morals." No other details about respondent's sexual conduct toward the child are reflected in the criminal record.

The paucity of such details, however, does not prevent a finding that respondent's conduct was despicable. He had no good intentions, but clear immoral intentions, when he touched the child. He admitted that he intended to debauch her morals. The on-line Merriam-Webster Dictionary defines the verb to debauch as to seduce from chastity, to lead away from virtue or excellence, to corrupt by sexuality. In the absence of a medical explanation, such as a total loss of comprehension of the wrongfulness of the act, what impulse motivated a man of approximately forty-seven years of age to intentionally touch a child in her rectal area with the intent to sexually corrupt her morals? The answer, whatever it might be, cannot be anything short of repulsive.

What discipline is, thus, appropriate for this respondent? In In re Maiorino, 170 N.J. 407 (2002), an attorney received a

reprimand for entering a plea of no contest to an information filed in Connecticut for fourth-degree sexual assault on a fifteen-year old girl. The information did not contain details of the specific conduct. However, the essential facts were not in dispute. While at a party, the attorney was photographed with a fifteen-year-old girl, clad only in her underwear. Another photo showed him with his arm "along her breast," also while she was wearing only her underwear. A third picture showed them lying together on a couch, fully clothed, while he was holding her breast.

In imposing only a reprimand, we considered the attorney's youth and immaturity, as documented by his therapist; his remorse; the aberrational nature of the conduct; the fact that the conduct was not related to the practice of law; the attorney's action in seeking treatment; and letters attesting to his good character from friends and from his former and current employer.

In In re Wong, 157 N.J. 77 (1999), the Court also imposed a reprimand on an attorney who twice assaulted a minor, while he was helping her practice gymnastics. The attorney touched the victim between her legs, near her inner thigh, and also digitally penetrated her vagina. The incident occurred prior to the attorney's admission to the New Jersey bar.

In Wong, we pointed out that cases dealing with sexual offenses, particularly those involving children as victims, are fact-sensitive and that many factors must be considered, including the circumstances leading up to the wrongdoing, the consequences to the victim, the attorney's prior record and reputation, the passage of time, and the attorney's rehabilitation. In that case, against the nature of the misconduct and the negative perception of a bar that would allow such conduct by its members, we considered the attorney's many accomplishments, the delay in prosecuting the matter, and the fact that the victim had achieved her peace. We determined to make the attorney "pay a price," but in a constructive way: a reprimand and 250 hours of community services that did not involve activities with children.

A three-month suspension was imposed in In re Addonizio, 95 N.J. 121 (1994). There, the attorney pled guilty to one count of an accusation charging him with committing aggravated sexual conduct on an eight-year old boy, by performing fellatio on the victim. He was sentenced to two years' probation, provided that he receive psychiatric treatment until discharged. The attorney presented testimony that he was experiencing numerous personal problems at the time of the incident, including marital problems and depression. In addition, he was taking a diet suppressant

prescribed by his physician and was consuming large amounts of beer. We found that the combination of the circumstances caused him to act in an atypical manner that led to the offense in question.

We were also convinced that Addonizio's behavior was an isolated incident that was unlikely to reoccur. We stated, "It is clear from the uncontroverted testimony of respondent and his psychiatrist, that, but for the combination of emotional factors affecting [him], together with the manipulative nature of the child involved, the offense would not have occurred."

A one-year suspension was imposed in In re Gernert, 147 N.J. 289 (1997). In that case, the attorney was convicted of a petty disorderly offense of harassment by offensive touching. He admitted that he had touched the breast of a teenage victim. He received five years' probation and was ordered to pay fines, not to have contact with the victim or her family, and to undergo psychiatric counseling. We found that the attorney's conduct was worse than that in Addonizio, because not only was the victim his client, but also the attorney was the town's prosecutor, at the time of the offensive conduct.

In Gernert, the conduct occurred after the victim had met with him at his office to seek protection against her boyfriend, who harassed and assaulted her. While at his office, the

attorney stroked the victim's hand and talked to her about personal matters that had nothing to do with the visit. Afterwards, he offered her a ride home, kissed her, and touched her inappropriately. The victim was afraid to decline his advances. We found that the attorney took advantage of his position of trust and betrayed the victim's trust in him.

In 1997, the Court disbarred an attorney who, over a four-year period, had sexual contact with eight different boys. In re Palmer, 147 N.J. 312 (1997). The attorney had entered a guilty plea to seven counts of a third-degree crime of aggravated criminal sexual contact and one count of fourth-degree criminal sexual contact. He admitted that he touched the "private parts" of eight boys whom he had employed at a recreational complex that he owned. The attorney was sentenced as a repetitive sexual offender, received a five-year term of incarceration, and was ordered to pay a fine and to make restitution for counseling costs incurred by the victims.

In 1990, another attorney was disbarred, following his guilty plea to three counts of second-degree sexual assault. The attorney had sexually assaulted his three daughters, over a period of eight years. In re X, 120 N.J. 459 (1990). See also In re Wright, supra, 152 N.J. 35 (attorney was disbarred for

digitally penetrating his daughter's vagina at least forty times over a three-year period).

A very significant aggravating factor here is respondent's failure to notify the OAE of his guilty plea, as he was required to do by R. 1:20-13(a)(1). For a staggering period of almost fifteen years, respondent's guilty plea remained unknown to the disciplinary authorities. Not only did he continue to practice law with impunity, but his horrific conduct continued undetected.

It should be noted that the legislature has recognized society's growing and rightful intolerance of sexual crimes against children. For instance, section (b) of the statute under which respondent pleaded guilty, N.J.S.A. 2C:24-4, was amended, effective August 14, 2013, to enhance the severity of crimes involving child pornography and to define "child" as a person under the age of eighteen, rather than sixteen. In keeping with the evolution of society's moral attitude toward sexual crimes against children, the legislature acknowledged that more severe treatment of such offenses is justified.

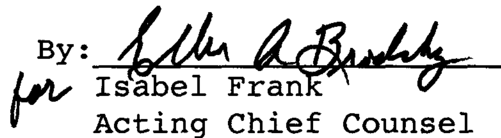
In the attorney disciplinary setting, too, the treatment of lawyers who commit sexual crimes against children must be a reflection of society's increasing intolerance toward such crimes. We, therefore, determine that respondent should be

suspended for two years and that, until discharged, he be required to continue with psychotherapy by a therapist approved by the OAE and with treatment for his alcohol addiction.

In a dissenting opinion, Chair Frost and Member Doremus voted to recommend respondent's disbarment. Member Gallipoli did not participate. Members Singer and Hoberman abstained.

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 Baugh, Vice-Chair

By: 
for Isabel Frank
Acting Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

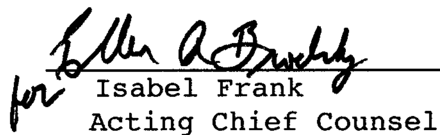
In the Matter of Roger P. Frye
Docket No. DRB 13-221

Argued: November 21, 2013

Decided: December 19, 2013

Disposition: Two-year suspension

Members	Disbar	Two year-Suspension	Reprimand	Abstained	Disqualified	Did not participate
Frost	X					
Baugh		X				
Clark		X				
Doremus	X					
Gallipoli						X
Hoberman				X		
Singer				X		
Yamner		X				
Zmirich		X				
Total:	2	4		2		1



Isabel Frank
Acting Chief Counsel