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

IN THE MATTER OF	
MICHAEL L. RESNICK	
AN ATTORNEY AT LAW	

Dissent

The majority has recommended that respondent receive a censure. I dissent from that recommendation for the reasons that follow and recommend that the complaint against him be dismissed or, at most, that an admonition be imposed.

This case concerns a love affair gone bad, but apparently a true love affair, in which both parties expressed deep feelings for each other. There is no dispute that all the conduct at issue between the respondent and his female client, DeAnna Ciccarelli ("Ciccarelli"), was purely consensual and began a considerable time after they first met. Moreover, although respondent first represented this client *pro bono* in a domestic abuse case involving her then-husband after a referral from a

battered women's shelter, that representation at the lower court level[1] had ended successfully before any personal relationship began. Also before a personal relationship began, Ciccarelli retained respondent, in August 2008, to represent her in her divorce action, giving him a $5,000 retainer plus $500 for costs. A few weeks later, she also retained him to represent her in a municipal court case, paying him a $1,500 retainer.

On February 16, 2009, after respondent and Ciccarelli had known each other for about six months, respondent told her that he wanted a romantic relationship with her and soon respondent left his wife and the two moved in together. The majority agrees that the relationship was purely consensual.

However, within a few weeks of their moving in together, Ciccarelli suddenly and unpredictably had a change of heart, moved out, and accused respondent of "initiating an inappropriate relationship" with her, while at the same time

---

[1] There is some factual dispute as to whether respondent continued to handle an appeal of that matter, which he denied, and the DEC made no finding one way or another. Apparently, there was no clear and convincing evidence of this continued representation but, either way, for the reasons discussed below, this should not be a determinative factor.

telling him, "all I ever did was love you." That same email, sent on March 8, 2009, demanded that respondent refund her retainer, claiming he had promised to represent her for nothing, and told him to communicate with her only in writing or by voice mail, while at the same time demanding that he continue to represent her and suggesting that, if he did not represent her for nothing, she would file an ethics complaint against him.

The record shows that respondent was emotionally devastated by this sudden turn of events. He also correctly realized that, under these emotionally charged circumstances and with her threatening to file ethics charges, he could not continue the representation. Indeed, she did file an ethics grievance against him two days later, on March 10, 2009.

Respondent then did the one thing that has the colorable feel of an ethics violation: not knowing, apparently, what to do, he went to see the Presiding Family-Part judge in the county in which his client's matrimonial case was pending and spoke to him *ex parte* about his need to be relieved of the representation. The judge with whom he met, on March 10, 2009, was not the judge handling the matrimonial case and there is no allegation that the discussion involved the merits of the pending litigation. At their meeting, respondent explained what

had occurred and said he wanted to withdraw from the case. The judge advised him to hand-deliver a letter, asking to withdraw. On March 11, 2009, the next day, respondent followed the judge's suggestion, but did not copy his client or his adversary on the letter. Based on that letter, the judge immediately relieved respondent as counsel for Ciccarelli and respondent immediately notified both his client and his adversary that he had withdrawn. He also forwarded his client's file to her and, having confirmed that an adjournment of one upcoming event in her case had been granted, so advised her.

One more fact, ignored by the majority, is relevant for the reasons discussed below. Ciccarelli also had a sexual relationship with the attorney who represented her in her matrimonial case after respondent withdrew and, when she filed an ethics grievance against him, the Board did not find her emotionally unstable. That grievance was resolved by imposing an admonition by consent. In the Matter of Peter Ouda, DRB 13-124 (October 25, 2013). The admonition was imposed not because Ouda had a sexual relationship with his client, Ciccarelli, but because he did not terminate his attorney-client relationship after the personal relationship ended. Therefore, the Board found that Ouda violated RPC 1.7(a)(2) and 8.4(a)

"because there was a significant risk that [his] representation might have been materially limited by [his] personal interest, an impermissible conflict of interest." Ouda's sexual relationship with Ciccarelli began in September 2009, only six months after her relationship with respondent ended.

The question remains: what ethics violation did respondent commit warranting a censure? As in Ouda, the majority in this case considers the relationship to be consensual but, here, unlike in Ouda, it nonetheless said the personal relationship itself created a conflict, in violation on RPC 1.7(a). It based this conclusion solely on the fact that respondent's relationship with Ciccarelli began as a *pro bono* representation, albeit six months earlier, apparently seeing this fact as a "bright line" that necessarily requires finding an RPC violation. I do not think this is the correct analysis, based on the facts here, nor do I think it is the necessary conclusion from the precedent cited by the majority.

I start from the proposition that New Jersey ethics rules are not *per se* violated by a consensual relationship between attorney and client and no case so holds. In fact, as noted in Kevin H. Michels, New Jersey Attorney Ethics: The Law of New Jersey Lawyering §19:3-2(d) at 455 (2014), our Supreme Court

refused to adopt as too broad ABA proposed Rule 1.8(j), which prohibits a sexual relationship with a client, unless that relationship existed before the start of the attorney-client relationship.

The reason that a few cases – only a few New Jersey cases have been decided in this area – have found ethics violations when an assigned attorney initiates a sexual advance with a client is that, under the circumstances of those cases, it was believed that the client could not voluntarily consent, in that the attorney was viewed as being in a superior position, therefore injecting an "inherent element of coercion." In re Liebowitz, 104 N.J. 175, 179 (1985). As Liebowitz said, the "gravamen of the offense is the opportunistic misconduct toward his *pro bono* client." Moreover, in Liebowitz, the attorney propositioned and all but physically assaulted the female assigned client the first time he met her. Even with this extreme behavior, Liebowitz was only reprimanded.

Similarly, in In re Rea, 128 N.J. 544 (1992), the attorney was a public defender assigned to represent the grievant in a DWI case and propositioned her the very day they met and later as well. While the facts of that case were complex and disputed, Rea was reprimanded because the Board felt that the

client lacked the capacity to consent because of psychiatric problems for which she was undergoing treatment and/or because of her status as an assigned client, and because Rea did not terminate his professional relationship with her, when their social relationship ended.

One other case cited by the majority is In re Warren, 214 N.J. 1 (2013), where the attorney was also reprimanded for having a sexual relationship with his client. This was a six-week relationship that began with respondent's offer to drive her home, after a first court appearance on the day the two met. The Board considered the most important fact to be that the client was assigned, this time in a criminal case. So, the Board said, the two "were not on an equal playing field and she was not in a position to freely consent to the relationship." Exacerbating the situation was that the attorney knew the client had attempted suicide the prior year and was undergoing methadone treatment for drug dependence. Thus, she was found to be "emotionally vulnerable to his advances."

This case is distinguishable from those cited. **First,** while his attorney-client relationship began as a *pro bono* referral, it developed into a retained relationship with the client paying respondent retainers of $5,500 in one matter and

$1,500 in a second one. **Second**, although Ciccarelli had been in an abusive relationship with her husband (to whom she had been married only two and a half months), the record, unlike that in the Warren and Rea cases, reveals no history of psychiatric treatment or problems and certainly none of which respondent was aware. **Third**, and of most critical importance differentiating this case from all others cited, no sexual relationship began until six months after the two met, and the evidence shows that, at that time, the romantic feelings were mutual, appeared sincere, and the two were in love with each other. Not only did Ciccarelli move in with respondent, who had left his wife, but she wrote emails to respondent saying things such as, "all I ever did was love you," and speaking about planning their future life together:

> Honey, I am so happy right now. . . . It really feels like a new day and now we can focus on making our life with [your] kids as happy and well adjusted as possible. We will give them stability & a home full of love. I of course realize that my role in their lives won't be immediate but I am so excited for the day to come when I can be a part of their lives. . . . I love you so much!!!!

Given these facts, so different from those in Rea, Warren, and Liebowitz, it cannot be said that, six months after meeting

respondent, Ciccarelli did not freely and voluntarily consent to this relationship. Moreover, the record shows that his feelings for her were deep and real – not opportunistic – and he waited to act on them for a significant time after beginning to represent her in her spousal abuse case and, in fact, until after that case was concluded. Therefore, I believe that a conflict arose for the first time only when she withdrew from that relationship and threatened respondent with disciplinary action.[2]

With regard to respondent's withdrawal from representing this client, there is no question that he had to withdraw as soon as she ended their social relationship. Indeed, continuing to represent her was untenable after her threat and her irrational demand limiting the way in which he was to communicate with her, because these actions placed him in a

---

[2] While the majority rejects Ciccarelli's repetitive sexual conduct, first with respondent and then Ouda, as a factor to be considered, I think that this too supports a finding that she was willing in both cases to engage in a sexual relationship and that no "inherent element of coercion" was operating. The Board found no such "coercion" in Ouda's actions with her, only six months after she engaged in the same behavior with respondent, and it seems inconsistent that the same behavior a few months earlier could reasonably be thought to be coerced.

conflicted position. Accordingly, the order relieving respondent as her attorney was necessary and inevitable, and he was correct to seek to be relieved as quickly as possible. Indeed, failure to do exactly that was the cause of the admonishment in Ouda.

The majority in this case recognizes that respondent "could not continue the representation." While it seems to feel there is importance to the time when the grievance was actually filed and the time when respondent knew it had been filed, it seems clear to me that a conflict arose as soon as Ciccarelli ended the social relationship and began threatening to file an ethics complaint. At that point, respondent had to terminate the attorney/client relationship quickly and he did so.

The only question that remains is the manner with which he accomplished that inevitable and necessary result. The DEC that heard the case thought that respondent's *ex parte* communication with the judge was merely the result of panic. Certainly, respondent was under emotional pressure at that time and did not exercise the best professional judgment. He should have filed a motion, which would have been granted.

However, again, this situation is distinguishable from those cases cited by the majority, where attorneys were disciplined for improper *ex parte* communications. In this case, respondent's *ex parte* communication was not with the judge hearing his client's matrimonial case and there is no claim that respondent communicated with the assignment judge in order to affect the result of that case or spoke with the judge about the merits of the litigation. He only sought to remove himself as quickly as possible from a situation that he undoubtedly found embarrassing and no harm was done as a result. Indeed, he obtained quickly the inevitable and necessary result, being allowed to withdraw from the now conflicted representation, and immediately transferred his client's file to her, facilitating her retention of new counsel.

Our cases are highly fact-sensitive and attorney discipline is not rendered as punishment, but rather to protect the public and the integrity of the bar. Under the unique facts of this case and given the additional fact that this respondent has only one long-ago, minor ethics violation over a professional life of about twenty-five years, I consider respondent's contact with the judge under these unique circumstances a *de minimis* violation and would dismiss this case. Alternatively, I would

admonish respondent for his *ex parte* communication, in violation of RPC 3.5(b).

Disciplinary Review Board
Anne C. Singer, Member

By: Ellen A Brodsky
Ellen A. Brodsky
Chief Counsel