SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 91-395

IN THE MATTER OF :
JAMES J. REA, :
AN ATTORNEY AT LAW :

Decision and Recommendation
of the
Disciplinary Review Board

Argued: February 26, 1992

Decided: April 20, 1992

Dana C. Argeris appeared on behalf of the District IX Ethics Committee.

Richard A. Amdur appeared on behalf of respondent.

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

This matter was originally before the Board on an appeal by the grievant from the decision of the District IX Ethics Committee (DEC) to dismiss the matter. The Board determined to grant the appeal and to hold oral argument thereon.[1]

Respondent was admitted to the New Jersey bar in 1965 and has been engaged in practice in Howell Township, Monmouth County. In August 1988, respondent, then a public defender in Howell Township, was assigned to represent Donna Cancassi in a DWI matter. Cancassi originally met with respondent's partner, Ernest Bongiovanni, who began pursuing the matter on her behalf. On or about February 23,

[1]A fee arbitration hearing was held in this matter on January 25, 1991. Respondent sought the payment of $1,200. The committee determined that no money was due respondent.

1989, Cancassi telephoned Bongiovanni to discuss the DWI matter. Respondent answered the telephone and began discussing the case with Cancassi. The two also talked about a possible personal injury claim arising from an accident Cancassi had suffered the previous day. Respondent suggested that Cancassi meet with Bongiovanni and himself that evening at a bar/restaurant in Howell, the Ivy League.[2] She did so. After Bongiavanni left the restaurant, respondent invited Cancassi to have dinner with him and with another couple, friends of respondent. During the dinner, respondent agreed to represent Cancassi in the personal injury action. Cancassi signed a contingent fee agreement while still in the restaurant. From this point on, there is very little agreement as to the facts of this matter, as related by Cancassi and respondent.

It was Cancassi's testimony that, after they finished dinner, respondent asked her to accompany him to the home of a friend in Bradley Beach, which she did.[3] After spending some time at the friend's home, respondent drove her around in his car for the remainder of the evening. During the ride, respondent requested that she go to a motel and engage in sexual activities with him, at one time threatening to frustrate her case, if she refused. When she resisted his advances, however, respondent apologized for his

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[2]At the time that Cancassi met with respondent, she was wearing a neck brace and had stitches in her face from the accident the previous day.

[3] Respondent disputed Cancassi's testimony that they visited his friend that evening. He maintained that they had gone "nowhere near there" (T3/8/91 396).

behavior. Cancassi testified further that, during the course of their drive, which lasted the entire night, she asked to leave the car. Respondent, however, refused to let her out, never stopping the car. She explained to respondent that she had to be home at 7:00 am to take her children to school. Respondent refused to take her back to the Ivy League, where she had left her car, because he feared harassment from the local police if he entered the area at night. Consequently, respondent drove Cancassi home, picked up her children and, with Cancassi, drove them to school. Thereafter, he took her back to the Ivy League to get her car.

According to Cancassi, because respondent apologized for his behavior that night, she agreed to date him on further occasions. Indeed, on the following evening, the two attended church together.[4] Both parties agree that, over the course of the next three weeks, they saw each other numerous times. Cancassi testified that, on three occasions, she met with respondent in motel rooms to discuss her personal difficulties and various legal matters in which she was involved. She believed he was staying in the motel because he was separated from his wife. Cancassi vehemently denied that there was any sexual contact between them at any time.

According to Cancassi's testimony, on March 10, 1989, her car and respondent's car were taken to a garage near his home for repairs. Respondent's secretary then drove them to respondent's

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[4] Although respondent did recall attending church with Cancassi, he did not recall doing so the following evening.

house to get his other vehicle. She testified that, while she was in the house, respondent asked her to have sex with him, again threatening to harm her case if she did not agree. She refused. She testified further that, while she was still in the house, respondent went into the bathroom and then called her to the room, where she found him with his pants down, masturbating. Respondent asked her if she would like to assist him. When she refused, he invited her to watch him, at which time she left the house and sat outside in his jeep until he emerged and drove her to her car. Cancassi testified that respondent agreed to have Bongiovanni represent her from that point on.

Cancassi went on to say that there was no contact between her and respondent after the March 10 incident until May 9, 1989, just prior to her scheduled court date and after she had left a telephone message for Bongiovanni. Respondent telephoned Cancassi, explaining that Bongiovanni was no longer representing her and persuaded her to meet him at a restaurant. The two had dinner and, according to Cancassi, respondent told her that he would represent her and that he had "worked something out with the judge" (T3/1/91 73). On the parking lot of Cancassi's home, they had another argument concerning her refusal to have sex with him. He again made threats to jeopardize her legal matters. When Cancassi tried to leave the scene, respondent grabbed her wrist, preventing her from leaving the car. It was still her understanding that Bongiovanni would appear in court on her behalf (T3/1/91 211).

On her scheduled court date, Cancassi found respondent in

court to represent her, allegedly ignoring her. The judge determined that Cancassi's matter would not be heard at that time, apparently because the court schedule was crowded that evening. Cancassi asked respondent to explain to the judge that she was ready to go forward on the matter and that she had a witness with her who would be unable to appear at a later date. Respondent refused, telling her to speak with the judge herself. Her case was adjourned.[5] Cancassi then went to the Howell Township Police and provided a statement outlining her dealings with respondent.

Respondent's testimony regarding his relationship with Cancassi was quite different. He testified that he had no specific recollection of the first evening they spent together, following the dinner at the Ivy League, but recalled that they did spend some time together taking long drives. Respondent conceded that it was possible that they had gone driving the first evening they were together (T3/8/91 250). He disputed Cancassi's testimony that he refused to take her home and attempted to take her to a motel. He further denied threatening to harm her case (T3/8/91 251). Respondent vehemently denied the March 10, 1989 incident, stating that he did not believe that Cancassi had ever even been in his home (T3/8/91 339). He also denied that Cancassi ever requested that Bongiovanni represent her again.

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[5] Apparently, the substituting attorney for respondent had some difficulty in obtaining the file from him. Cancassi's case was heard at a later date. While the panel report indicates that she was acquitted, she testified that, in fact, she had been forced to hire a costly expert witness and that the charge had been downgraded.

Respondent's testimony was that he and Cancassi did develop a social relationship and, in fact, did engage in sexual relations on three to five occasions (T3/8/91 338). He testified further that Cancassi never refused his advances toward her (T3/8/91 412). He also testified that, as the relationship went on, he began to realize that Cancassi had emotional and psychological problems. He was aware, for instance, that Cancassi's mother had committed suicide, that her father had abused her, that she had been married twice previously and that there had been difficulties with her ex-husband (T3/8/91 343). Specifically, respondent testified that Cancassi had told him that her ex-husband used to force her to watch him masturbate (T3/8/91 345). He was further aware that, at the time he was seeing her, Cancassi was receiving psychological treatment (T3/8/91 344). Respondent contended that he terminated their relationship on May 9, 1989, the evening he and Cancassi had dinner, prior to her court appearance. Respondent explained that he ended the relationship when he became aware of Cancassi's psychological problems. With regard to their argument on the parking lot, respondent testified that he had told Cancassi about her psychological problems and that he would pursue her legal matters but would not keep their social relationship. He allegedly grabbed her wrist to prevent her from leaving before he was finished speaking to her (T3/8/91 273-4). Respondent admitted that he appeared in municipal court on Cancassi's behalf and that the judge decided that her case would not be heard that night. He explained that he did not believe it would have been proper for him

to attempt to dissuade the judge from his decision to postpone the case. He eventually turned the file over to substituted counsel. With regard to the personal injury matter, respondent indicated that he would have continued to represent Cancassi, "depending upon [her] attitude" (T3/8/91 367).

* * *

The complaint charged respondent with violations of RPC 1.7(b) (conflict of interest: lawyer's interest materially limited by other interests), RPC 8.4(d) (conduct prejudicial to the administration of justice), RPC 8.4(e) (stating or implying the ability to improperly influence a government agency or official) and RPC 1.16 (a)(1) and (2) (failing to withdraw from representation). The DEC determined that respondent was not guilty of any unethical conduct in his dealings with Cancassi.

In its report, the DEC discussed In re Liebowitz, 104 N.J. 175 (1985), which does not necessarily prohibit a sexual relationship between an attorney and the client. While it was disturbed by the relationship between respondent and Cancassi, whom it described as "a very troubled woman" (Panel Report at 449), the DEC did not find any misconduct on respondent's part. The DEC did note, however, that he should have terminated his representation of Cancassi at the time that he severed their relationship.

Specifically, the DEC found that there was no clear and convincing evidence that respondent had threatened to improperly handle Cancassi's matter. In addition, the DEC did not believe

Cancassi's testimony that there was no sexual relationship between her and respondent or that she and respondent never kissed or embraced. The DEC noted that the harder question in this matter was whether the relationship between Cancassi and respondent was truly consensual, the issue raised in Liebowitz. The DEC concluded that it was.

CONCLUSION AND RECOMMENDATION

Upon a de novo review of the record, the Board agrees with the findings of the DEC that the record does not reveal clear and convincing evidence that respondent threatened to jeopardize Cancassi's case if she refused his sexual advances. As noted in its report, the DEC concluded that Cancassi's version of the facts was not credible and that a sexual relationship did exist between her and respondent. The Board defers to the DEC with respect to those intangible aspects of the case not transmitted by the written record, such as witness credibility and demeanor. Dolson v. Anastasia, 55 N.J. 2, 7 (1969). The Board is, however, unable to concur with the DEC's finding that respondent's conduct was not unethical under Liebowitz. To the contrary, the record clearly and convincingly establishes that respondent's conduct toward Cancassi was precisely the type of conduct condemned by Liebowitz.

That case involved sexual misconduct between an attorney and his pro bono client. Reasoning that the client could not have truly consented to the attorney's sexual advances because the

attorney was in a position of superiority or dominance, the Court found that the attorney was guilty of opportunistic misconduct toward his pro bono client. The Court imposed a public reprimand and agreed with the Board's finding 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. Here, too, Cancassi was an assigned client. She may well have felt that a refusal might have had an adverse impact on respondent's representation of her interests.

Indeed, if respondent's version of the facts is to be accepted, it cannot necessarily be said that Cancassi's consent was voluntary. In this regard, an excerpt from her testimony is telling:

> THE WITNESS: ... -- I trusted this man. I thought he was sincere. I gave him the benefit of the doubt from the first time he threatened me if I didn't go to bed with him. He apologized. I thought he was sincere. And I --
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> MR. KREIZMAN: He apologized the first time?
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> THE WITNESS: Yes. And I -- during -- from February 23rd until this March 10th, I trusted him as my friend, as my lawyer, I trusted him, I confided in him with my personal life, my problems and the things that he offered to help me with. He -- I thought he cared.
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> [T3/1/91 69-70]

At another point during the proceeding, Cancassi stated: "I

was afraid. I mean I was scared to argue with him" (T3/1/91 58).[6] It is doubtless, thus, that she felt in a position of inferiority. In addition, respondent should have known that, because of Cancassi's past history of unpleasant experiences, her consent could not have been freely given. As noted above, respondent knew that Cancassi had psychological problems. He testified that he ended their relationship because of those problems. Apparently, they were severe enough to cause respondent to attempt to have Cancassi's medical records made a part of the DEC hearing in his defense (T3/1/91 120). Under these circumstances, respondent 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. This is particularly true here, where the client had a history of abusive relationships with men.

The Board was faced with a case of "he said/she said" and diametrically opposed testimony. But under either version of the facts, respondent's conduct was troubling. If Cancassi's version of the facts is true, then respondent is unquestionably guilty of unethical conduct, in that he threatened to jeopardize her matter if she did not agree to a sexual relationship with him. By the same token, if respondent's contention that they were sexually

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[6] It is not clear whether Cancassi meant that she was afraid to argue with respondent because she feared he might physically harm her or because she feared he would jeopardize her legal matters.

intimate is to be believed, then, too, his conduct was disturbing. For although the Board agrees with respondent that Liebowitz does not stand for the proposition that a sexual relationship with a client is per se unethical, the Board is convinced that respondent's conduct is of the sort that Liebowitz seeks to prevent. Cancassi was a client who either was not in a position to freely consent to a sexual relationship with respondent because of her position as an assigned client, or one who, because of her past history and mental health, lacked the capacity to consent. Furthermore, the fact that respondent did not terminate his professional relationship with Cancassi, after the social relationship ended, reflects very poor judgment on his part. Respondent's conduct in this matter violated RPC 8.4(d) and 1.16(a)(1) and (2).

The Board considered, in aggravation of the above misconduct, respondent's belligerent behavior before the DEC, the misleading answer respondent filed and his cavalier attitude toward his duty to be candid in his answer. As to the latter, the following exchange regarding paragraph nine of the complaint took place before the DEC:

BY MR. ARGERIS:

Q Okay. That says, and I'm quoting now, Miss Cancassi and respondent began to date and saw each other five to ten times over the next ten months -- two months. Ms. Cancassi denies any sexual relationship developed....

Q Now, if you would refer to your response in your Answer to that paragraph, please.

A Paragraph nine?

Q Yes. And does that not say deny, we met to discuss her many legal problems on several occasions?

A That's right.

Q Okay.

A That's what it says.

Q Now, hearing your testimony here today, you did not have, exclusively, a legal relationship with Donna Cancassi, did you?

A I never said I did.

Q But you did deny in response to paragraph nine that you began to date and saw each other five to ten times.

A No, we saw each other probably more than five to ten times.

Q So you were denying paragraph nine because of the insufficient number of times she said you dated, is that what you're saying?

A Yeah, I saw her more than that, much more.

Q So that I understand, you deny that rather than you denied that there was a dating relationship?

A Absolutely, that's right.

[T3/8/91 292-3]

Paragraph six of the complaint stated that Cancassi and respondent left the restaurant together in respondent's car after their first meeting. In his answer, respondent denied that paragraph stating: "Deny that we left together. She went home and I went about my business." Respondent testified before the DEC that his recollection was vague as to the events of that evening. Nonetheless, he specifically denied the allegations of that paragraph, rather than stating that he did not recall the facts with certainty.

With regard to the incorrect statements in his answer, respondent stated "[s]o if we pled this a little bit sloppy, we apologize" (T3/8/91 303). The Board finds that respondent, in his answer to the ethics charges, was not merely sloppy but, rather, engaged in half truths to frustrate the disciplinary process. In fact, some of the statements contained in the answer were downright misleading. In In re Gavel, 22 N.J. 248 (1956), the Court held that the attorney

> ...was obliged to make not merely an answer to the specific allegations of the numbered paragraphs of the complaint but a full, candid and complete disclosure of all facts reasonably within the scope of the transactions set forth in the charges against him. R.R. 1:16-4 contemplates that after complaint and answer the committee shall have the opportunity to investigate informally and consider the charges made in the light of the explanation furnished by the attorney, and the absence of any unprofessional or unethical conduct to dismiss the complaint. Any sophistry or half-truth or other tactic which has as its purpose or effect the frustration of the disciplinary proceeding is deceitful and indefensible from an ethical standpoint and contrary to the spirit of the rules.
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> [Id. at 263-4]

After consideration of the relevant circumstances, which include respondent's sexual misconduct and the lack of candor in answering the formal ethics complaint, the Board unanimously recommends that respondent be publicly reprimanded. Three members did not participate.

The Board further recommends that respondent be required to reimburse the Ethics Financial Committee for administrative costs.

Dated: 4/20/1992

By _____
Raymond R. Trombadore
Chair
Disciplinary Review Board