Book

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 00-049

IN THE MATTER OF	:	
HARRY J. PINTO, JR.	:	Decision
AN ATTORNEY AT LAW	:	

Argued: April 13, 2000

Decided: October 19, 2000

William J. McGovern, III appeared on behalf of the District X Ethics Committee.

Lee S. Trumbull 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 based on a recommendation for discipline filed by the District X Ethics Committee ("DEC").

The complaint alleges violations of RPC 8.1(a) (knowingly making a false statement of material fact in connection with a disciplinary matter); RPC 8.4(a) (violating or attempting to violate the Rules of Professional Conduct); RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) and RPC 8.4(g) (engage, in a professional capacity, in conduct involving discrimination because of

sex, where the conduct is intended or likely to cause harm).

Respondent was admitted to the New Jersey bar in 1965 and maintains an office for the practice of law in Morristown, New Jersey. He has no disciplinary history.

* * *

This matter concerns inappropriate comments made by respondent to a client, Nurije Koliq. Koliq did not file a grievance against respondent. The ethics investigation was initiated by the DEC after the Rockaway Borough police department sent a copy of a May 8,1997 police incident report to the DEC.

In November 1996, Koliq retained respondent to represent her in a divorce action filed by her husband. Although the retainer agreement is dated November 12, 1996, respondent testified that it was signed on November 20, 1996.[1]

Sometime in March or April 1997, Koliq told Jeffrey Crawford, a Rockaway Borough police officer, that her attorney was sexually harassing her and asked what she should do. Crawford told Koliq to discuss the problem with another attorney. On May 8, 1997, Koliq consulted with Carmen Caponegro, another Rockaway Borough police officer. According to the police incident report, Koliq told Caponegro that

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[1] Respondent argued that the agreement was signed at the conclusion of Koliq and respondent's November 20, 1996 interview and that any inappropriate comments that he made prior to that time could not violate RPC 8.4(g). We have carefully reviewed the record and, in light of applicable law, conclude that the argument is without merit and does not warrant further discussion in a written opinion.

respondent had engaged in numerous acts of sexual harassment. These included questioning Koliq about her physical appearance, making extremely crude remarks about what he would like to do with her during sex, massaging her shoulders, kissing her on the neck, telling her she should "show yourself off, show whatever you have" and telling her that he had "slept with other clients."

The DEC sent the May 8, 1997 police report[2] to respondent and requested that he reply to it. In his reply, respondent denied the allegations made by Koliq.

During the investigation, Koliq produced to the DEC investigator two audio tapes of conversations with respondent. Koliq had made the tapes without respondent's knowledge, during conferences at respondent's office. At one of the conferences, respondent asked Koliq if she were dating anyone, told her she looked nice and, using vulgar language, asked if she had breast enlargement or just "a good bra." Respondent also told Koliq that, while dating another woman, "I had her clothes off a lot (undecipherable). I could never figure out why she looked like so big when she would wear certain dresses and why she didn't look so big when I had her clothes off ... Cause it never mattered. It just never was that significant. I looked at her. I got turned on. I ripped her clothes off. We made love, we were happy.... (undecipherable)."

At that conference, respondent also used a crass term to refer to Koliq's

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[2] Koliq did not file a criminal complaint against respondent.

husband.

During the second tape-recorded office conference, respondent said to Koliq: "I'll make a deal with ya', instead of giving me wild sex when this is over, pose for me. I'm serious, with your clothes on. You know (undecipherable)." Respondent then told Koliq that he had been "a commercial photographer part time in New York," had "won a Second Place in the Greenwich Village Art Show for photography" and had two "spreads" in Playboy. He also told her that he could "make your skin look warm or cold; I can make you look fat or thin" and that "I can make your chest look twice the size or half the size."

Koliq testified that, during her initial telephone conference with respondent, he asked her how attractive she was. However, according to Koliq, she kept her appointment with him because he assured her that he could assist her with all of her problems, including a sensitive issue as to her youngest child, and could secure adequate support for her and her six children.

Koliq's husband, through his attorney, paid respondent $5,000 to represent Koliq. Koliq testified that she did not seek new counsel when respondent made comments of a sexual nature to her because she did not have funds to retain another attorney and her husband had told her that he would not pay any additional legal fees. She added that she did not work and relied on her husband for support for herself and her children. Koliq testified that she had only six years of schooling, was "given" to

her husband in marriage at age sixteen and was emotionally and physically abused by him during their marriage.

Koliq further testified that, in addition to the statements contained in the police incident report and in the two tape-recorded conversations, respondent made the following inappropriate comments:

a. When her friend accompanied Koliq to respondent's office, respondent asked them if they were lesbians;

b. Respondent told her that her boyfriend was too young and that she needed an older man;

c. Respondent advised her to wear shorter skirts to attract men because she only had a "couple more years" before her "looks start to go down";

d. Respondent said he was a "breast man," loved women with big breasts, told her that she should get breast implants and that he would get the funds for the breast implants from her husband by misrepresenting the purpose for the funds;

e. Respondent told her, in crude language, that he wanted to have sex with her; and

f. Respondent told her that he knew a man who could "get rid" of her husband for $1,500.

According to Koliq, respondent also invited her to dinner, wine tastings, polo matches and to the Bahamas for a weekend, but she never accepted the invitations.

Koliq testified that, following one meeting with respondent, she could not start her car. Her son, daughter Sophia and Sophia's friend, Tiffany White, were in the car. According to Koliq, after respondent started the car for her, respondent stated "this is

what a real man can do" and then slapped her on the buttocks. White confirmed Koliq's testimony about this incident.

Respondent, in turn, testified that he had asked Koliq if she was dating anyone because that was the way in which Koliq usually began their meetings. He also stated that he had asked her if she had breast enlargement or just "a good bra" because, in an earlier telephone conversation, she had told respondent that she needed $5,000 for breast enlargement surgery and that, prior to his question, Koliq had taken off her jacket and stuck out her chest. According to respondent, he used the same crude language for breast enlargement that Koliq had used during their prior conversation even though he had been "shocked" at her use of the term. However, on the tape recording, there was no indication that respondent was uncomfortable using the phrase.

As to his comments about his sexual relations with another woman, being "turned on" and ripping off her clothes, respondent testified that it was a "parable" to explain to Koliq that appearances were not important and that "love is not the shape of your body, love is the person inside." Finally, according to respondent, he referred to Koliq's husband using a crass term because that is how Koliq referred to him.

With respect to his comment that "I'll make a deal with ya, instead of giving me wild sex when this is over, pose for me," respondent stated that it was made in response to an earlier comment by Koliq that she would "be enormously personally grateful" if respondent obtained the good results assured to her. At that time,

according to respondent, he replied "I only work for cash." Respondent continued that, during a later conversation, Koliq had made some other statement that he "interpreted as being suggestive of the nature of the gratefulness that [Koliq] would express." He admitted that Koliq had never used the expression "wild sex," but maintained that his comment was prompted by Koliq's earlier suggestions that she would show her appreciation to him through some sort of sexual favor.

Respondent conceded that, in his reply to the grievance, he did not mention that Koliq had engaged in sexually provocative behavior toward him.

As to the van incident, respondent admitted that he started the engine for her and that Koliq's son, daughter and Tiffany White were present. He denied having touched Koliq or commented that "this is what a real man can do." According to respondent, he had no recollection of having touched Koliq.

Except for the incidents that were tape-recorded by Koliq, respondent denied all of the remaining incidents listed in the police report, charged in the complaint or mentioned in Koliq's testimony. Respondent maintained that Koliq's testimony was motivated by fear that she would be prosecuted for having filed a false police report if she did not persist in her story that respondent had sexually harassed her. Respondent did not posit a plausible theory for why Koliq would have filed a false police report in the first place.

Rockaway Borough police officers Robert Wheatley and Jeffrey Crawford

confirmed Koliq's testimony regarding the emotional and physical abuse she suffered at the hands of her husband and her reliance on her husband for financial support. They reported having been called to Koliq's house on numerous occasions because of domestic violence. However, according to Wheatley and Crawford, Koliq's behavior changed after her husband moved out of the house. They described Koliq as dressing seductively and initiating sexually-oriented conversations with them and other police officers.

Wheatley further testified that, in the spring of 1997, Koliq told him that her attorney was sexually harassing her and that she was thinking of reporting his behavior to the prosecutor's office, but was concerned that she would not be believed. According to Wheatley, he advised her to tape-record her conversations with respondent.[3] Wheatley also testified that, sometime before Koliq's November 1998 birthday, she told him that she was going to get breast enlargement surgery for her birthday present, using the same crude phrase that respondent had used on the tape.

Crawford, too, testified that respondent had told him about her attorney's conduct.

Carlos Burlingham, a psychiatrist and friend of respondent, testified that respondent had spoken with him in November 1996 about referring a female client to him for a psychiatric evaluation. However, respondent did not tell him the name of the

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[3] Koliq testified earlier that Crawford had told her to tape-record her conversations with respondent.

client and the client never contacted him. Therefore, Burlingham could not corroborate respondent's testimony that he had advised Koliq to seek psychiatric assistance from Burlingham.

Burlingham also testified that he had known respondent since 1975 and that he had never seen "anything abnormal or pathological" in respondent's behavior.

Respondent requested that we also consider the affidavit of Susan Valiante, respondent's former secretary. The hearing panel did not admit the affidavit into evidence because respondent did not call her as a witness. In a disciplinary proceeding, the rules of evidence are relaxed and hearsay evidence is permitted. R. 1:20-7(b). Therefore, we considered the affidavit.

Count one of the ethics complaint alleges that respondent's conduct toward Koliq violated RPC 8.4(g).

Count two of the complaint charges that respondent violated RPC 8.1(a) and RPC 8.4(a) and (c) when he denied, in his reply to the grievance and in statements to the DEC investigator, that he had told Koliq that he was a photographer and would like to photograph her, that he had made comments to Koliq about her personal appearance and that he had invited her to have a personal or sexual relationship.

At the hearing, the presenter added another alleged instance of a violation of RPC 8.1(a) and RPC 8.4(c), namely, a November 20, 1996 letter that respondent allegedly sent to Koliq. According to respondent, he typed the letter himself on

November 20, 1996, immediately after meeting with Koliq. The letter purports to list various statements made by Koliq and respondent during the interview. Koliq denied having received the November 20, 1996 letter, which respondent did not mention in his September 15, 1997 reply to the grievance. The presenter maintained that respondent created the letter sometime after September 15, 1997.

* * *

The DEC found that respondent subjected Koliq to sexual overtures and inappropriate sexual comments, including remarks about her "personal physical attributes" and his own sexual activities with another woman, in violation of RPC 8.4(g). Although the DEC remarked that "many aspects" of Koliq's testimony was confusing or not credible, it found that much of her testimony was believable. Some of the problems with Koliq's testimony was attributed to the fact that English is not her primary language and that she was a reluctant witness. The DEC characterized Koliq as "an extremely vulnerable and unsophisticated victim."

The DEC further found that, in addition to the tape-recorded remarks, respondent had made many of the other comments contained in the police report and mentioned during Koliq's testimony. The DEC also found credible Koliq's testimony that respondent had kissed her on the neck and Koliq and White's testimony that respondent had touched Koliq's buttocks.

In contrast, the DEC found that respondent's explanations were not "realistic or believable." It found him to be "unconcerned and arrogant" and with an "utter lack of remorse for any pain or discomfort he may have caused [Koliq]."

With respect to the allegations contained in count two of the complaint, the DEC expressed "doubts as to the authenticity"of the November 20, 1996 letter. However, the DEC concluded that the presenter had not proven by clear and convincing evidence that the letter was not authentic or that respondent had made misrepresentations in his reply to the grievance or in his statements to the investigator.

The DEC recommended a three-month suspension for respondent's misconduct.

* * *

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

During the ethics hearing, respondent admitted that it was his voice on the tapes. In addition, a witness corroborated Koliq's testimony that respondent had touched her on the buttocks. The DEC found that Koliq's testimony to be credible. We defer to that finding, as the DEC had the opportunity to observe Koliq's demeanor. We find, thus, clear and convincing evidence that respondent was guilty of unethical conduct in those instances.

There remains the issue as to whether there is clear and convincing evidence that respondent made the additional comments alleged by Koliq and whether he massaged Koliq's shoulders and kissed her neck. There were no witnesses to these incidents. The DEC , however, found credible Koliq's testimony as to most of them, including the massage and kiss.

In In re Seaman, 133 N.J. 67 (1993), the Court addressed the issue of whether uncorroborated testimony of a victim of sexual harassment may satisfy the clear and convincing evidence standard. In Seaman, there were witnesses to only two of the many incidents alleged by the victim. The Court concluded that "uncorroborated evidence may satisfy a burden of proof based on the standard of clear-and-convincing evidence." Id. at 84.[4] The Court also found that, in sexual harassment cases, "the victim's communication of the alleged harassment to others can serve to corroborate or support testimony of those events." Id. at 85.

Koliq told three police officers, at different times, about respondent's inappropriate conduct; six of those incidents are contained in the police report. Koliq's statements to the police corroborate her testimony as to those incidents. Furthermore, the hearing panel, which had the opportunity to observe the demeanor of Koliq and of respondent, found much of Koliq's testimony credible and

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[4] The Court also observed in Seaman that the "uncorroborated testimony of a victim is sufficient to meet the law's highest standard of evidence -- guilt beyond a reasonable doubt." Id. at 82.

respondent's not credible. We, therefore, again defer to the DEC's assessment of the witnesses's credibility and find that respondent's inappropriate sexual comments were not limited to those that were tape-recorded by Koliq and that respondent inappropriately touched Koliq on two occasions.

Respondent argued that he did not violate RPC 8.4(g) because he did not intend to harm Koliq. However, the rule also prohibits an attorney from engaging in discriminatory conduct "likely to cause harm." According to the comments to the rule, the term "'discrimination' is intended to be construed broadly. It includes sexual harassment, derogatory or demeaning language, and, generally, any conduct towards the named groups that is both harmful and discriminatory."

Respondent's comments and actions toward his client were demeaning, crude and vulgar. Koliq described their effect on her as follows:

> I knew he wasn't looking at me concentrating on my face, he was looking at my breasts and I felt like a bug when you fall into a spider's nest and the spider comes and plays with you. He does whatever he wants because you're stuck there and you cannot leave because your husband has paid for him, and no matter what you do or say this guy doesn't want to do anything, all he wants to do is sleep with you and then he'll work on your divorce.

In Seaman, the Court found that Judge Seaman's remarks of a sexual nature to his law clerk, his lifting of her skirt, placing his hand under her skirt and attempting to place her hand on his crotch constituted sexual harassment and violated, among other canons, Canon 3A(4) of the Code of Judicial Conduct. Canon 3A(4) provides

that a "judge should be impartial, and should not discriminate because of ... sex...."

We find, thus, that there is clear and convincing evidence that respondent violated RPC 8.4(g).[5]

The DEC properly dismissed for lack of clear and convincing evidence the charge that respondent fabricated the November 20, 1996 letter sometime after he replied to the grievance. The only suggestions that the letter was not authentic were Koliq's testimony that she never received it and the fact that respondent did not refer to the letter in his reply to the grievance. However, Koliq also testified that she did not receive certain correspondence from the DEC investigator and that her husband frequently intercepted her mail. Moreover, the fact that respondent did not refer to the letter in his reply does not constitute clear and convincing evidence that the letter was fabricated.

The DEC also dismissed the charge that respondent violated RPC 8.1(a) and RPC 8.4(c) when he denied, during the ethics investigation, the allegations contained in the police incident report. In his reply to the grievance, respondent specifically addressed the police report and stated "I deny all improper actions. The statements she

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[5] In any event, respondent's actions also violated RPC 8.4(d) (conduct prejudicial to the administration of justice). Although respondent was not specifically charged with a violation of that rule, the facts in the complaint gave him sufficient notice of the alleged improper conduct and of the potential violation of RPC 8.4(d). Furthermore, the record developed below contains clear and convincing evidence of a violation of that rule. In light of the foregoing, we could have, but did not, deem the complaint to be amended to conform to the proofs because we found the conduct to be in violation of RPC 8.4(g). R. 4:9-2; In re Logan, 70 N.J. 222, 232 (1976).

set out were not made." Respondent testified that his denial of the incidents was not a violation of the ethics rules because he had forgotten about them. Given the nature of the statements made by respondent to his client, it is implausible that he could have forgotten them. Therefore, we find clear and convincing evidence that respondent violated RPC 8.1(a) and RPC 8.4(c).

There remains the issue of discipline. In the past, reprimands have been imposed in cases dealing with an attorney's sexual misconduct toward clients. See In re Pearson, 139 N.J. 230 (1995); In re Rea, 128 N.J. 544 (1992); and In re Liebowitz, 104 N.J. 175 (1985). Even where the attorney has wrongfully denied the sexual misconduct, only a reprimand has been imposed. See In re Hyderally, 162 N.J. 95 (1999).

We are mindful of precedent in cases dealing with inappropriate sexual behavior toward clients. However, cases are fact-sensitive. Aggravating factors justify increased discipline. A four-member majority was so appalled by the crude and vulgar language that respondent used with his client, his inappropriate touching of her, his attempt to blame her for his actions and his demeaning attitude toward her, that we voted to suspend him for three months. Indeed, were it not for precedent, we would have imposed a greater sanction, especially because respondent took advantage of a vulnerable client.

Our decision as to the appropriate sanction is also a recognition that society's attitude toward sexual harassment has changed and that "much conduct that would have

been considered acceptable twenty or thirty years ago would be considered sexual harassment today. As community standards evolve, the standard of what a reasonable woman would consider harassment will also evolve." Lehman v. Toys 'R' US, Inc.,132 N.J. 587, 612 (1993). See, also, In re Seaman, supra, 133 N.J. at 99 ("sexual harassment of women by men is among the most pervasive, serious, and debilitating forms of gender discrimination.")

Although no less disturbed by respondent's misconduct than the members who voted to suspend him, three members believed that they were constrained by precedent. Hence, they voted to reprimand respondent. One member recused himself and one member did not participate.

We unanimously determined that, while suspended, respondent is to complete twenty hours of sensitivity training, the course to be approved by the Office of Attorney Ethics.

Finally, we unanimously warn attorneys that, in the future, conduct similar to respondent's will ordinarily result in a suspension from the practice of law.

We further determined to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: 10/9/2009

By: _____
ROCKY L. PETERSON
Vice-Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY

DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Harry J. Pinto, Jr.
Docket No. DRB 00-049

Argued: April 13, 2000

Decided: October 19, 2000

Disposition: Three-month suspension

Members	Disbar	Three-month Suspension	Reprimand	Admonition	Dismiss	Disqualified	Did not Participate
Hymerling			X				
Peterson		X					
Boylan							X
Brody			X				
Lolla		X					
Maudsley		X					
O'Shaughnessy			X				
Schwartz		X					
Wissinger						X	
Total:		4	3			1	1

Robyn M. Hill 2/15/01
Robyn M. Hill
Chief Counsel