SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 15-351
District Docket No. XIV-2011-0641E

IN THE MATTER OF

REGAN CLAIR KENYON, JR

AN ATTORNEY AT LAW

Dissent

Argued: February 18, 2016

Decided: April 4, 2016

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

The online sexual exploitation of children through the use of computers and related networking technologies is a matter of grave concern. When the predator is a lawyer, it demands firm and severe discipline. The charges against respondent stem from his guilty plea to third-degree attempting to endanger the welfare of a child by attempting to engage in sexual conduct that would impair or debauch the morals of the child, in violation of N.J.S.A. 2C:24-4(a) and N.J.S.A. 2C:5-1. During the plea allocution, respondent admitted that he engaged in several explicitly sexual internet chats with a person whom he believed to be a fourteen-year-old girl. He sent images of, and links to, adult pornography. He also arranged to meet with the child but did not appear for the meeting.

As respondent later learned, he was actually interacting with an undercover police officer who had initiated contact with respondent as part of a sting operation. Given the guilty plea to conduct that violates RPC 8.4(b), the sole issue is the appropriate quantum of discipline. In re Infinito, 94 N.J. 50 (1983).

The Board majority recommends respondent's disbarment. That recommendation is within the range of acceptable discipline, especially in light of the Supreme Court's firm warning that "the moral reprehensibility of this type of conduct warrants serious disciplinary penalties, up to and including disbarment." In re Cohen, 220 N.J. 7, 12 (2014). Yet the Court made equally clear it did "not establish a *per se* rule of disbarment" for all cases of sexual exploitation of children and advised that "convictions in egregious cases may result in disbarment." Id. at 18.[1]

We write in dissent because an indeterminate suspension akin to Cohen, rather than disbarment, is the more appropriate discipline in this case. There are two key issues. The first is whether, after a period of suspension (with the psychiatric treatment, participation in Sexaholics Anonymous, and parole supervision required by the criminal sentence), respondent may someday be able to demonstrate to the Court's satisfaction that he is fit to practice law. The second issue is whether this, in contrast to Cohen, is the more "egregious case" that warrants

[1] Respondent's conduct occurred in 2011, several years before the In re Cohen decision.

disbarment. In a nutshell, are we to regard respondent's conduct as a symptom of a psychological problem that may be effectively treated? Or is the conduct such a pernicious and irredeemable stain on respondent's character that it warrants lifetime disbarment?

A. The Possibility of Future Fitness With Treatment.

The Court's imposition of an indeterminate suspension in Cohen rests on a recognition that sexual exploitation of children may be a treatable psychological problem. The Court highlighted that Cohen's repeated use of on-line child pornography could be the result of mental illness borne of his own childhood trauma, that he cooperated in seeking treatment for such illness, and that he had already shown progress. Id. at 18. The notion that meaningful time and treatment *might* redeem Cohen is implicit in the decision to afford him a chance to show the Court proof of fitness after five years. Importantly, the Court left no illusion about the severity of an indefinite suspension. The Court made crystal clear it would conduct a "vigorous review" of any petition for reinstatement. Id. at 19. Fitness might never be proved and reinstatement might never be granted. Time will tell.

Here, recognition that treatment may be effective is also implicit in the sentence imposed in respondent's underlying criminal case. The sentencing judge found that "this is an offense which is grounded quite clearly in a psychological problem."

(Transcript of Sentence, Dec. 6, 2013, 26:1-3). The judge suspended a three-year sentence, instead requiring that respondent

> continue to attend and complete psychological treatment, continue with his treatment providers, maintain a sponsor through his S[exaholics] A[nonymous], continue with this psychologist who is treating him and follow all recommendations of that treatment provider.
>
> [Id., 27:14-18].

Respondent is also subject to lifetime parole supervision. (Id., 27:23). The judge found that respondent's conduct was not compulsive, but was instead based on circumstances not likely to reoccur. She further found that respondent's character and attitude reinforced that he is unlikely to commit another offense.

The possibility that respondent may someday be able to show the Court adequate proof of fitness seems as realistic as in Cohen. Both lawyers were prosecuted for sexual misconduct rooted in a psychological problem. Both accepted responsibility by pleading guilty. Both are required to attend therapy. Both showed progress in treating their problem. Even more, the sentencing judge here affirmatively found that respondent was unlikely to repeat the offense. The expectation that respondent will successfully avoid any future repetition of errant conduct seems at least as promising as the circumstances of Cohen. In this respect, the two cases are comparable.

B. The Severity of the Conduct.

While Cohen calls for disbarment in "egregious cases" of sexual exploitation of children, how to characterize one form of exploitation as more reprehensible than another is not always clear cut. Reasonable minds can differ. Nevertheless, there are some obvious extremes. To distinguish Cohen from prior disbarment cases, the Court noted that the lawyer did not create or disseminate the pornographic photographs of children he viewed. Id. at 17. Nor did he "physically touch or use violence against them." Id. Respondent likewise did none of those things. Nor did respondent meet with a child, and the record is far from clear that he actually would have.[2]

There is no bright line to apply to this case. Comparing respondent's conduct, or other forms of child sexploitation, to the conduct in Cohen is inherently subjective. On the one hand, we have the sexual victimization of the nineteen different children who were photographed (and later viewed by Cohen). "Child pornography, in particular, revictimizes the children involved with each viewing of the same image or video." Id. at 12. On the

---

[2] The indictment alleged that respondent had planned to meet the "child" and that, but for his attendance at a funeral, he would have. However, the record shows that it was the undercover officer who initiated the idea of meeting, not respondent. There is no admission in respondent's plea or elsewhere that he would have met with the "child." At the sentencing, his lawyer squarely denied that respondent would have met the "child" in person and noted that respondent could have but did not appear for the supposed meeting. (Transcript of Sentence, Dec. 6, 2013, 19:23-20:25). The judge made no findings on the issue. In the context of a motion for final discipline, we are limited to what the respondent admitted or did not contest in the underlying criminal proceeding. Rule 1:20-13(c)(2); see In re Goldberg, 142 N.J. 557, 566 (1995) (Court and DRB could rely on the respondent's admissions and on uncontested pre-sentence reports).

other hand, the repetitive viewing of on-line child pornography is arguably a more passive and indirect exploitation than are one-on-one, on-line sexual exchanges with a minor. In the latter, the predator is the active agent in harming a child with sexually explicit conversation and images. Both are stunningly wrong. But Cohen actually did what the law and ethical standards forbid. It is hard to completely ignore that respondent's contact was with an adult police officer, not with a child. What casts serious doubt on respondent's character was his willingness to have sexual exchanges with a fourteen-year-old girl, not that he actually did.[3] We do not see respondent's misconduct as reflecting a deficiency of character markedly worse than does the misconduct in Cohen.

Neither did the criminal court system, which treated Cohen's conduct as more culpable than respondent's. Cohen pleaded guilty to second-degree endangering and served a quarter of a five-year jail sentence. Respondent pleaded guilty to a lesser, third-degree crime of attempted endangering and his entire three-year sentence was suspended. The difference may be explained in part by the subtext of intent. Cohen plainly sought out child pornography on his own initiative – and even carefully used co-workers' computers to cover his tracks. In contrast, law enforcement initiated first

---

[3] According to respondent's therapist, he may have thought he was interacting with an adult pretending to be a child as part of a sexual fantasy. However, that is not what respondent admitted to in pleading guilty. For purposes of discipline, he is bound by his plea.

contact with respondent in an on-line *adult* chat room. He took the bait. It does not come close to excusing respondent's conduct, but we will never know whether he might not have engaged in on-line exchanges with a "child" at all but for the initial contact by undercover police.[4]

C. **Remaining Factors**.

In reaching the final discipline for an attorney's ethics violation, several traditional factors must be weighed in addition to the nature and severity of the crime. These factors include "whether the crime is related to the practice of law and any mitigating factors, such as respondent's reputation, his prior trustworthy conduct and general good conduct." In re Lunetta, 118 N.J. 443, 445–46 (1989). Respondent's crime was not committed in his capacity as a lawyer. Nor has he had any other ethics violations during his ten years of practice. If anything, the record suggests that respondent's misconduct was an isolated, albeit serious, incident by someone with an otherwise unblemished career and a respected professional reputation. All of these factors weigh against disbarment. We are also mindful of the proper place of disbarment in the spectrum of discipline:

> Disbarment is the most severe punishment, reserved for circumstances in which "the misconduct of [the] attorney is so immoral, venal, corrupt or criminal

---

[4] We do not criticize the acts of law enforcement. The undercover officer was presumably engaged in a proper effort to combat on-line sexual predation of children. We are simply reviewing what the circumstances may or may not reveal about respondent's character in the context of his interaction through an on-line adult chat room.

> as to destroy totally any vestige of confidence that the individual could ever again practice in conformity with the standards of the profession."
>
> In re Cohen, supra, 220 N.J. at 15, quoting In re Templeton, 99 N.J. 365, 376 (1985).

Given the psychological roots of this misconduct unrelated to the practice of law, and the justified expectation that respondent's attitude, treatment, and supervision will likely prevent a recurrence, we are not convinced that respondent could never again be trusted to practice in conformity with the Rules of Professional Conduct.

There may even be beneficial side effects from imposing indeterminate suspension rather than disbarment in cases such as this. First, a lawyer charged with attempting to endanger the welfare of a child in this manner may be less inclined to admit his conduct and plead guilty if he concludes permanent disbarment would surely follow. Second, a lawyer suspended indefinitely will have all the more reason to faithfully pursue treatment and unfalteringly avoid any repetition of sexually-related offenses if he knows that these are essential if he is to have any prayer of reinstatement to the practice.

Finally, how the public views respondent's conduct and how it might perceive discipline short of disbarment needs to be considered. A primary purpose of the disciplinary system is to "preserve the confidence of the public in the integrity and

trustworthiness of lawyers in general." In re Witherspoon, 203 N.J. 343, 358 (2010); see In re Magid, 139 N.J. 449, 452 (1995) ("In determining the appropriate discipline, we consider the interests of the public, the bar, and the respondent.") A one-year suspension, as the other dissent in this case recommends, seems too lenient given the Court's precedent. Suspension for an indeterminate period, however, is "the most severe suspension that can be imposed on an attorney." In re Cohen, supra, 220 N.J. at 18. Indeterminate suspension would be for a prolonged period. It might even be permanent; the Court does not have to grant reinstatement. The sanction ultimately could be tantamount to respondent's disbarment. We believe the public would be fully protected and would see this as a deservedly severe and measured discipline.

We therefore dissent. We respectfully recommend that the Court impose on respondent an indeterminate suspension and preclude respondent from petitioning for reinstatement for a period of five years from the effective date of his suspension.

Disciplinary Review Board
Edna Baugh, Vice Chair
Bruce Clark, Member
Peter Boyer, Member

By: ______________________
Ellen A. Brodsky
Chief Counsel