

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 17-049
District Docket No. XIV-2016-0099E

IN THE MATTER OF
ANDREW MICHAEL CARROLL
AN ATTORNEY AT LAW

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Decision

Argued: April 20, 2017

Decided: August 22, 2017

HoeChin Kim appeared on behalf of the Office of Attorney Ethics.

Respondent, through counsel, waived appearance for oral argument.

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

This matter was before us by way of a disciplinary stipulation between the Office of Attorney Ethics (OAE) and respondent, submitted pursuant to R. 1:20-15(f). Respondent admitted violating RPC 1.7(a)(2) (conflict of interest) and RPC 8.4(d) (conduct prejudicial to the administration of justice) by

engaging in an improper sexual relationship with an assigned client.

The OAE and respondent both urged us to impose a reprimand. For the reasons set forth below, we determine that a reprimand is the appropriate sanction for respondent's misconduct.

Respondent earned admission to the Pennsylvania bar in 2003 and the New Jersey bar in 2004. At the relevant times, he was employed as an Assistant Public Defender with the Office of Parental Representation in Trenton, New Jersey. He has no history of discipline, but is currently administratively suspended in Pennsylvania. Respondent now engages in the private practice of law.

Respondent and the OAE entered into a disciplinary stipulation, dated January 31, 2017, which sets forth the following facts in support of respondent's admitted ethics violations.

In October 2015, in the normal course of his employment at the Office of the Public Defender (OPD), respondent was appointed to defend L.S. against allegations that she had abused her minor son. The Division of Child Protection and Permanency (DCPP) alleged that L.S., an alcoholic, had gotten drunk and passed out while caring for him. Due to L.S.'s struggles with alcoholism, her son was placed in the custody of his maternal

grandmother. The DCPD sought to curtail L.S.'s parenting time and implement supervised visitation.

On October 30, 2015, after representing L.S. at an Order to Show Cause in family court, respondent offered to drive her home; the weather was inclement due to Hurricane Patricia. L.S. declined respondent's offer, but, shortly thereafter, she and respondent began texting each other, including messages that were sexual in nature. On the day before Thanksgiving, respondent and L.S. consummated a sexual relationship.

Respondent admits that, after their first sexual encounter, he began to question L.S.'s mental state, due to her texting and calling him "at all hours of the night and morning hours after Thanksgiving." Despite commencing the sexual relationship with L.S., and having concerns regarding her mental health, respondent failed to withdraw as her assigned counsel, and continued representing her in connection with the family court proceedings. He also continued the sexual relationship with her.

In January 2016, L.S. disclosed her sexual relationship with respondent to a friend, who reported the inappropriate relationship to the OPD. The OPD investigated the matter, and, during an interview, L.S. "alleged that respondent had brought a bottle of vodka to her home upon their first meeting, after which they got drunk and had sex." L.S. also stated that "she

was afraid of respondent, did not want to lose custody of her son, and wanted another attorney to represent her." As a result of its investigation, the OPD terminated respondent's employment, effective February 3, 2016, assigned a new attorney to represent L.S., and reported respondent's misconduct to the OAE.

Respondent admitted to the OAE his inappropriate sexual relationship with L.S., but denied providing her with alcohol or coercing her in any manner. Respondent maintained that "L.S. could have terminated their personal relationship at any time without affecting his representation as he always fought for her best interest." The stipulation further states, however, that, due to her status as an assigned client and her alcoholism, L.S. "lacked the capacity to freely consent to a sexual relationship with respondent."

Respondent stipulated that he violated (1) RPC 1.7(a)(2) by representing L.S. because there was a significant risk that the representation would be materially limited by the personal interest of the lawyer; and (2) RPC 8.4(d) by engaging in conduct prejudicial to the administration of justice.

* * *

Following a de novo review of the record, we find that the facts contained in the stipulation clearly and convincingly

support respondent's admitted ethics violations.

In October 2015, respondent was assigned to defend L.S. in respect of her serious family court matter. Given his trusted status as L.S.'s appointed counsel, he was aware that she was suffering from alcoholism so severe that she had lost custody of her son. Despite his knowledge of her condition, he sought and commenced a sexual relationship with L.S. He did not disclose that relationship to the OPD or withdraw as her counsel, despite questioning her mental status. Instead, he chose to continue that sexual relationship.

Although respondent freely admitted his inappropriate sexual relationship to the OAE, he maintained that "L.S. could have terminated their personal relationship at any time without affecting his representation as he always fought for her best interest." Yet, respondent also conceded that, due to her status as an assigned client and her alcoholism, L.S. "lacked the capacity to freely consent to a sexual relationship" with him.

By engaging in a sexual relationship with L.S., while serving as her appointed counsel, respondent created "a significant risk" that his representation of her would be materially limited by his own interests. Respondent's concession that L.S. "lacked the capacity to freely consent to a sexual relationship" removes any doubt that his conduct violated RPC

1.7(a)(2). Respondent immediately should have withdrawn from the representation of L.S. upon commencing an intimate relationship with her. Instead, he continued to represent her until the OPD conducted its own investigation and terminated his employment, requiring the appointment of new counsel. Respondent's conduct wasted the family court's and the OPD's resources, and, thus, additionally violated RPC 8.4(d).

The only remaining issue is the proper quantum of discipline for respondent's violations of RPC 1.7(a)(2) and RPC 8.4(d). Appointed counsel who have engaged in sexual relationships with their assigned clients have been routinely reprimanded.

In In re Liebowitz, 104 N.J. 175 (1985), the Court held that, although an attorney's sexual relationship with a client is not per se unethical, the relative positions of the parties must be scrutinized to ascertain whether the relationship was prohibited. In that case, a court-appointed attorney attempted to have a sexual relationship with an assigned client. Observing the attorney's superior role, the Court stated 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. The Court further opined that

"[t]he gravamen of the offense is the opportunistic misconduct toward [the attorney's] pro bono client." Id. at 180.

In In re Rea, 128 N.J. 544 (1992), we were faced with a case of "he said, she said" as to whether there had been a sexual relationship between the attorney and an assigned client. The client testified that she had refused the attorney's sexual advances, even though he had threatened to "frustrate" her case, if she refused him. In the Matter of James J. Rea, DRB 91-395 (April 20, 1992) (slip op. at 2-4). The attorney, on the other hand, testified that he and the client had developed a sexual relationship, and that she had never refused his advances. Id. at 6. He denied threatening to harm her case. Id. at 5. He testified that he ended their relationship when he became aware that the client had psychological problems. Id. at 6.

We determined that, under the circumstances, the attorney "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." Id. at 10. Although, in light of the diametrically opposed testimony, we were unable to determine with certainty whether a sexual relationship had developed, we found that, under either scenario, the attorney's conduct was

unethical. Specifically, if the client's version of the facts were accurate, then the attorney was guilty of unethical conduct, because he had threatened to jeopardize her case, if she did not agree to a sexual relationship with him. If the attorney's version of the facts were accurate, then he was guilty of conduct of the sort that Liebowitz sought to prevent. His client was not in a position to freely consent to a sexual relationship with him either because of her status as an assigned client or because of her mental health issues.

In In re Warren, 214 N.J. 1 (2013), the attorney was assigned to represent a client in a municipal court matter involving theft charges filed by her mother. He had sexual relations with the client, knowing that she was involved in a custody dispute with her former husband, was undergoing methadone withdrawal, and had attempted suicide a year earlier. In the Matter of Bruce K. Warren, Jr., (DRB 12-360) (April 4, 2013) (slip op. at 3-5).

Most recently, we considered an attorney's improper sexual relationship with a client whom he had initially represented, pro bono, after referral from the Jersey Battered Women's Shelter. In re Resnick, 219 N.J. 620 (2013). He subsequently represented her, for a fee, in connection with her divorce from her alleged abuser. In the Matter of Michael Resnick, DRB 13-412

(June 17, 2014) (slip op. at 2). During the pendency of her divorce proceedings, the attorney informed the client that he desired a personal relationship with her. He asserted, during his District Ethics Committee hearing, that he had consulted the RPCs and did not believe that such a relationship would constitute unethical conduct. Id. at 3-4. The client denied that the romantic feeling was mutual, testifying that she perceived the attorney as an "authority figure . . . somebody that [she] looked up to." Id. at 4. She further asserted that she was in a "dire [financial] situation," and that, in conjunction with his romantic overtures, the attorney had offered to refund his \$5,500 retainer, which she had sold her engagement ring to pay. Id. at 3-4. The client also claimed that, two days prior to his confession of love, the attorney had advised her that she "couldn't afford her divorce." Id. at 5.

Eventually, the parties engaged in a consensual sexual relationship. Ibid. They began living together and even shopped for a house together. Ibid. That relationship ended acrimoniously, at the client's behest. Id. at 6-7. She expected him to continue to represent her, for free, as he had allegedly promised to do. Ultimately, the attorney withdrew from the representation, via an ex parte proceeding, after the client filed an ethics grievance against him. Id. at 11-12, 18.

We determined that the attorney's sexual relationship with the client was improper. Specifically, the attorney became sexually involved with his client knowing, due to the prior pro bono representation, that she had fled an abusive relationship. He, thus, knew that she was emotionally vulnerable to his advances. Despite these concerns, he professed his romantic feelings for her, a confession that left her both surprised and confused. We determined that the client "felt pressure to yield to [the attorney's] romantic advances," and that, thus, the attorney had engaged in an impermissible conflict of interest, among other ethics infractions, including the improper ex parte termination of representation. Id. at 32, 34.

But see In the Matter of Peter Ouda, (DRB 13-124) (October 25, 2013) (admonition for attorney who engaged in a brief sexual relationship with his client (the same client as in Resnick) six months after the representation began; there was no clear and convincing evidence that the client had not consented to the relationship or was so emotionally vulnerable that she was unable to freely consent to it; the attorney, however, should have terminated the representation after the sexual relationship ended; the imposition of only an admonition, instead of stronger discipline, was based on the attorney's lack of prior discipline

in twenty-three years at the bar and the absence of adverse effects on the client's case).

In respect of respondent's violation of RPC 8.4(d), conduct prejudicial to the administration of justice typically results in the imposition of either a reprimand or a censure, depending on other factors present, including the existence of other violations, the attorney's ethics history, whether the matter proceeded as a default, the harm to others, and mitigating or aggravating factors. See, e.g., In re Gellene, 203 N.J. 443 (2010) (reprimand for attorney found guilty of conduct prejudicial to the administration of justice and knowingly disobeying an obligation under the rules of a tribunal, after failing to appear on the return date of an appellate court's order to show cause and failing to notify the court that he would not appear; the attorney was also guilty of gross neglect, pattern of neglect, lack of diligence, and failure to communicate with clients; mitigating factors considered were the attorney's financial problems, and his battle with depression and significant family problems; his ethics history included two private reprimands and an admonition); In re Geller, 177 N.J. 505 (2003) (reprimand for attorney who failed to comply with court orders (at times defiantly) and the special master's direction not to contact a judge; the attorney also filed

baseless motions accusing judges of bias against him, failed to expedite litigation and to treat with courtesy judges, his adversary, the opposing party, an unrelated litigant, and a court-appointed custody evaluator, used means intended to delay, embarrass or burden third parties, made serious charges against two judges without any reasonable basis, made unprofessional and demeaning remarks toward the other party and opposing counsel, and made a discriminatory remark about a judge; in mitigation, we considered that the attorney's conduct occurred in the course of his own child custody case); In re D'Arienzo, 207 N.J. 31 (2011) (censure for attorney who failed to appear in municipal court for a scheduled criminal trial, and thereafter failed to appear at two orders to show cause stemming from his failure to appear at the trial; by scheduling more than one matter for the trial date, the attorney inconvenienced the court, the prosecutor, complaining witness, and two defendants; in addition, failure to provide the court with advance notice of the conflicting calendar prevented the judge from scheduling other cases for that date; prior three-month suspension, two admonitions, and failure to learn from similar mistakes justified a censure); and In re LeBlanc, 188 N.J. 480 (2006) (censure for attorney's misconduct in three client matters, including conduct prejudicial to the administration of justice

for failure to appear at a fee arbitration hearing, failure to abide by a court order by his failure to produce information, and other ethics violations; mitigation included, among other things, the attorney's recognition and stipulation of his wrongdoing, his belief that his paralegal had handled post-closing steps, and a lack of intent to disregard his obligation to cooperate with ethics authorities).

Respondent's decision to engage in a sexual relationship with L.S., requiring the assignment of new counsel for L.S., constituted unethical conduct, in violation of both RPC 1.7(a)(2) and RPC 8.4(d). Even if we accept respondent's position that no element of coercion colored L.S.'s decision to engage in a sexual relationship with him, L.S. was a client assigned to him, pursuant to his trusted role as a Public Defender. L.S. and respondent, thus, were not on an equal playing field, and, as respondent conceded, she lacked the capacity to freely consent to a sexual relationship. Accordingly, respondent's assertion that "L.S. could have terminated their personal relationship at any time without affecting his representation as he always fought for her best interest" is of no moment, as it wholly ignores his superior position over her, as her assigned counsel. As set forth in

Liebowitz, such a lopsided dynamic creates an "inherent element of coercion."


Moreover, whether or not respondent supplied the alcohol for their first romantic encounter, he knew that she was suffering from severe alcoholism, and even questioned her mental health after they had sex. Yet, with that knowledge, he engaged in sexual intercourse with her and then persisted in the sexual relationship, despite his logical reservations. Simply put, he should have known better.

There is no additional aggravation to consider. In mitigation, respondent has no prior discipline. Thus, in our view, a reprimand is the appropriate quantum of discipline for respondent's misconduct.

Member Gallipoli did not participate.

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
Bonnie C. Frost, Chair

By: 
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

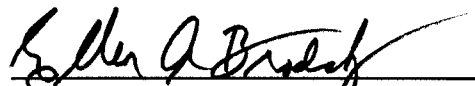
In the Matter of Andrew M. Carroll
Docket No. DRB 17-049

Argued: April 20, 2017

Decided: August 22, 2017

Disposition: Reprimand

Members	Reprimand	Recused	Did not participate
Frost	X		
Baugh	X		
Boyer	X		
Clark	X		
Gallipoli			X
Hoberman	X		
Rivera	X		
Singer	X		
Zmirich	X		
Total:	8		1


Ellen A. Brodsky
Chief Counsel