Supreme Court of New Jersey
Disciplinary Review Board
Docket No. DRB 21-208
District Docket No. XIV-2019-0425E

In the Matter of	:
Andrew B. Spark	:
An Attorney at Law	:

Second Corrected Decision

Argued: November 18, 2021

Decided: March 10, 2022

Hillary K. Horton appeared on behalf of the Office of Attorney Ethics.

Kim D. Ringler 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 on a motion for final discipline filed by the Office of Attorney Ethics (the OAE), pursuant to R. 1:20-13(c)(2), following (1) respondent's guilty pleas, in the Sixth Judicial Circuit Court, Pinellas County, Florida, to third-degree felony introduction into or possession of contraband in

a county detention facility, contrary to Florida Statutes § 951.22, and first-degree misdemeanor soliciting for prostitution, contrary to Florida Statutes § 796.07(2)(f), and (2) his guilty plea, in the Thirteenth Judicial Circuit Court, Hillsborough County, Florida to third-degree introduction of contraband to a detention facility, contrary to Florida Statutes § 951.22. The OAE asserted that these offenses constitute violations of RPC 8.4(b) (three instances – committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects) and RPC 8.4(c) (three instances – engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation).

For the reasons set forth below, we determine to grant the motion for final discipline and to impose a three-year suspension, with conditions.

Respondent earned admission to the New Jersey and New York bars in 1993, and to the Florida bar in 1991. He has no prior discipline in New Jersey. At the relevant times, he was practicing law and residing in Florida. On January 21, 2021, the Supreme Court of Florida disbarred respondent. According to respondent, he is eligible to apply for readmission to the Florida bar on August 15, 2024.

On July 1, 2021, as a matter of reciprocal discipline based on the Florida discipline, the Supreme Court of New York, Appellate Division, Third Judicial Department, entered a memorandum and order disbarring respondent in New

York. See 22 NYCRR 1240.13. Respondent will be eligible to apply for re-admission to the New York bar on July 1, 2028. See 22 NYCRR 1240.16(c)(1).[1]

We now turn to the facts of this matter.

On October 13, 2017, respondent entered a Hillsborough County, Florida jail under the guise of official attorney business. As part of a predetermined plan, he visited an attorney-client visitation room, which was secure and unmonitored, and engaged in sexual conduct with a female inmate. Specifically, respondent allowed a female inmate to perform oral sex on him while he took digital photographs of the encounter using an electronic tablet. These digital images were discovered during an investigation of respondent for similar conduct that occurred at a jail in Pinellas County, Florida.

Further investigation into the Hillsborough County incident revealed that, on October 12, 2017, the day prior to the incident, respondent and the inmate had an approximately five-minute telephone call, in which they discussed respondent depositing $10 in the inmate's account. Respondent and the inmate also discussed the best manner to conduct their meeting to avoid discovery. The investigation confirmed that respondent deposited $10 in the inmate's account on October 12, 2017, and that respondent visited the jail on October 13, 2017.

[1] A New York attorney disbarred pursuant to Judiciary Law § 90(4) based on a felony conviction may apply for reinstatement to practice after the expiration of seven years from the effective date of the disbarment.

The investigation also revealed that respondent previously had not represented the inmate.

As a result of the Hillsborough County incident, respondent was charged with first-degree misdemeanor solicitation of prostitution, contrary to Florida Statutes § 796.07(2)(f), and third-degree felony introduction of contraband into a detention facility, contrary to Florida Statutes § 951.22(1).[2]

On December 21, 2017, law enforcement authorities signed the Hillsborough criminal report affidavit and a circuit judge in Hillsborough County issued a warrant for respondent's arrest.

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[2] Florida Statutes § 796.07(5)(a) states: "A person who violates paragraph (2)(f) commits: 1. A misdemeanor of the first-degree for a first violation . . . ." Florida Statutes § 796.07(2)(f), referenced in the statute, states: "It is unlawful to solicit, induce, entice, or procure another to commit prostitution, lewdness, or assignation."

At the time respondent was charged, Florida Statutes § 951.22(1) (2017) stated, in relevant part: "It is unlawful, except through regular channels as duly authorized by the sheriff or officer in charge, to introduce into or possess upon the grounds of any county detention facility as defined in s. 951.23 or to give to or receive from any inmate of any such facility wherever said inmate is located at the time or to take or to attempt to take or send therefrom any of the following articles, which are hereby declared to be contraband for the purposes of this act, to wit: Any . . . recorded communication; . . . ." Florida Statutes § 951.22(2) (2017) provided that a person who violated subsection (1) committed a felony of the third degree.

Effective October 1, 2019, Florida Statutes § 951.22 was amended. The revised statute now classifies the introduction or possession of a recorded communication into a detention facility as a first degree misdemeanor. The revised statute also was amended to include "any cellular telephone or other portable communication device" among the list of contraband, the introduction of which into the detention facility constitutes a felony of the third degree. These statutory amendments were not retroactive and, thus, did not alter the outcome of respondent's criminal cases.

Four days prior to the issuance of that arrest warrant, on December 17, 2017, while visiting a female inmate, respondent, in the Pinellas County Jail, Pinellas County, Florida, created recorded communications using an eight-inch electronic tablet, without advance notice, verification, or consent from authorities. He visited an attorney-client visitation room, which was secure and unmonitored, and engaged in sexual conduct with a female inmate. Specifically, respondent allowed a female inmate to perform oral sex on him, while he recorded the encounter using the electronic tablet.

Respondent was charged with first-degree misdemeanor exposure of sexual organs, contrary to Florida Statutes § 800.03,[3] third-degree felony introduction of contraband to a county detention facility, contrary to Florida Statutes § 951.22, and first-degree misdemeanor soliciting for prostitution, contrary to Florida Statutes § 796.07(2)(f).

On February 8, 2019, respondent appeared before the Honorable Joseph Bulone, Circuit Court Judge, Sixth Judicial Circuit of the State of Florida, Pinellas County, and pleaded guilty to one count of third-degree felony introduction into or possession of contraband in a county detention facility, and

[3] Florida Statutes § 800.03 states, in relevant part: "(1) A person commits unlawful exposure of sexual organs by: (a) Exposing or exhibiting his or her sexual organs in public or on the private premises of another, or so near thereto as to be seen from such private premises, in a vulgar or indecent manner; or (b) Being naked in public in a vulgar or indecent manner."

one count of first-degree misdemeanor soliciting for prostitution. In his allocution in support of the plea, respondent adopted the factual basis set forth by the state prosecutor. Specifically:

> Between the dates of August 8, 2017, and December 6, 2017, [respondent] entered the Pinellas County Jail using his status as a lawyer to meet with an inmate wherein he would exchange money on her commissary for sexual favors, one of which he filmed – it was oral sex he filmed – the inmate performing oral sex on him. He then removed that video . . . from Pinellas County Jail.
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> [Ex.C at 11.] [4]

Judge Bulone accepted respondent's plea, found him guilty of the two counts, and agreed to withhold adjudication.[5] On February 8, 2019, Judge Bulone signed two Orders of Probation. On the third-degree felony introduction of contraband into the county detention facility count, Judge Bulone placed respondent on probation for five years; on the first-degree misdemeanor

[4] "Ex." refers to the exhibits in the OAE's September 17, 2021 brief and appendix in support of its motion for final discipline.

[5] Florida Statutes § 948.01(2) states, in relevant part: "If it appears to the court upon a hearing of the matter that the defendant is not likely again to engage in a criminal course of conduct and that the ends of justice and the welfare of society do not require that the defendant presently suffer the penalty imposed by law, the court, in its discretion, may either adjudge the defendant to be guilty or stay and withhold the adjudication of guilt. In either case, the court shall stay and withhold the imposition of sentence upon the defendant and shall place a felony defendant upon probation. If the defendant is found guilty of a nonfelony offense as the result of a trial or entry of a plea of guilty or nolo contendere, regardless of whether adjudication is withheld, the court may place the defendant on probation."

solicitation of prostitution count, Judge Bulone imposed a twelve-month probationary period, to run concurrently to the five-year probationary period. As a condition of probation, respondent agreed not to practice law in Florida for three years, was required to show proof that he completed an in-patient treatment program, and was required to provide a psychological evaluation to the probation department.

Thereafter, on May 15, 2019, respondent appeared before the Honorable Laura Ward, Circuit Court Judge, Thirteenth Judicial Circuit of the State of Florida, and entered a guilty plea to one count of third-degree felony introduction of contraband into a county detention facility. The government agreed to nolle pros the first-degree misdemeanor solicitation of prostitution charge, and further agreed that respondent's term of probation could run concurrently to the probationary period imposed in Pinellas County.[6]

Respondent adopted the factual basis set forth by the state prosecutor. Specifically:

> On October 13, 2017, [respondent], while in the Hillsborough County Jail, did receive a recorded communication from an inmate on his tablet without receiving authorization from the sheriff or an officer in

[6] According to *Black's Law Dictionary Free Online Legal Dictionary*, 2d Ed., "Nolle prosequi" refers to: "A formal entry upon the record, by the plaintiff in a civil suit or the prosecuting officer in a criminal action, by which he declares that he 'will no further prosecute' the case, either as to some of the counts, or some of the defendants, or altogether." Nolle prosequi is often abbreviated as nolle pros, nol pros, or no pro.

> charge at the Hillsborough County Jail. All this occurred in Hillsborough County. Witnesses can identify [respondent]. The image was discovered on his tablet as a result of a similar incident in Pinellas County in which there had been a search warrant issued on to his tablet.
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> [Ex.D at 8.]

Judge Ward accepted respondent's guilty plea; agreed to withhold adjudication; sentenced respondent to a fifty-six-month probationary term, to run concurrently to his Pinellas County probation; and imposed a seventy-five-hour community service requirement, a drug and alcohol evaluation, and a mental health evaluation.

On July 15, 2019, the Florida bar filed a notice of determination of judgment of guilt against respondent. On August 1, 2019, respondent notified the OAE of his criminal charges, as R. 1:20-13(a)(1) requires.

On October 26, 2020, after a Florida disciplinary hearing on sanctions, a Referee to the Supreme Court of Florida filed a report recommending that respondent be disbarred.

The Referee Report from the Florida disciplinary record detailed that, on October 10, 2017, respondent sent an e-mail to a friend to obtain a sample modeling contract used in the pornography industry, used it to draft his own modeling contract, and then had both inmates involved in the prostitution incidents sign the contract. On November 25, 2017, respondent met with the

Pinellas inmate, whom he had met at a pornography event and knew to be an adult film actress. Respondent asked her if she would be willing to engage in sexual acts with him while she was incarcerated, which he would video record and publish, in exchange for depositing money in her jail account. Respondent told the inmate that he had similar agreements with other female inmates and gave her contact information. The inmate later told her family about the encounter, and her family notified the local authorities.

On January 21, 2021, the Supreme Court of Florida disbarred respondent.

The OAE argued that respondent's pleas to two counts of third-degree felony introduction of contraband into a county detention facility and one count of first-degree misdemeanor soliciting prostitution warrants a three-year suspension. In support of that position, the OAE cited one prior disciplinary case, In re Kapalin, 227 N.J. 224 (2016), discussed below, as the comparable precedent. The OAE described respondent's conduct as "abhorrent and . . . far short of that expected of a member of the bar," but reasoned that discipline less than disbarment was warranted. The OAE emphasized that respondent abused his status as an attorney and "victimized women undergoing the stigma of incarceration," but noted that respondent's victims were not underage, and that his actions did not jeopardize the security of the facility, unlike the introduction of weapons, drugs, or cellular phones.

The OAE, thus, recommended a three-year suspension, without mention of conditions, should respondent apply to be reinstated after the recommended suspension.

On October 25, 2021, respondent, through his attorney, Kim D. Ringler, Esq., filed a brief and certification with exhibits. Respondent also provided certifications from the two inmates with whom he had engaged in the sexual misconduct. Respondent conceded that his admissions of guilt constituted conclusive proof of his misconduct, and that he had violated RPC 8.4(b). However, respondent asked us to consider the lesser sanction of a censure for his misconduct.

Respondent based his request for a censure on several arguments. First, respondent emphasized that the contraband at issue was not the tablet itself but, rather, the communications and images he had recorded on the tablet. Respondent noted that, in Florida, tablets were not defined as contraband in detention facilities under the Florida statutes at issue until nearly two years after respondent's conduct occurred. Thus, his unlawful conduct was limited to recording a communication on his tablet without the authorization of the detention facility.

Moreover, although the OAE referred to respondent's adjudications as "convictions" in certain points in its brief, respondent emphasized that he has

not been convicted, because his adjudications were withheld by operation of Florida law.

Additionally, respondent maintained that the women involved in the incidents at the detention facilities "had longstanding social and intimate relationships with him prior to the time of the criminal conduct."

Respondent also noted that, in the spring of 2015, he obtained steady work as a tour director, something he had done since 2009. He had directed forty-seven tours outside of the United States prior to being terminated due to his arrest. During the time he was working as a tour director, he maintained a solo practice of law. Respondent currently holds a New York City Sightseeing Guide license and a Florida Real Estate license.

In his certification, respondent stated that he had been assisting the Pinellas County inmate (initials ARN) by acting as a liaison to her public defender and performing minor pro bono services, such as obtaining public records and sending demands for the return of her property. Respondent described his relationship with ARN as intimate and as a friendship and stated that he was "infatuated" with her. He further recounted that, on November 25, 2017, he visited ARN and had sexual contact with her, and that ARN asked him to visit again, which he did, on the day at issue in the Pinellas incident. On the day he was arrested, at the time of his arrest, ARN was "actively encouraging

[him] to record another sex tape," when, within minutes, deputies "burst into the room" and arrested him.

In her certification, dated October 20, 2021 and attached as Exhibit C to respondent's certification, ARN stated that she is thirty-two years old; that she has worked in adult entertainment in the past, but currently works in a restaurant; that she is not a victim, "even though [she] has been pressured from multiple sources to say otherwise;" and that everything that happened with respondent was consensual. She further contended that she is not "vulnerable," had not used drugs for several weeks prior to the conduct in question, and that what she did, she "did because [she] wanted to" do it.

Regarding the Hillsborough County inmate (initials EKM), respondent stated that he had known her since 2014, and had dated and been intimate with her. Respondent asserted that EKM asked if he could help her secure an early release from the jail. Respondent admitted that he deposited money in EKM's telephone account so that she could call her mother and that he "broached the idea of a sex tape with her." When respondent visited the jail to see another inmate client about a probate matter, he saw EKM and engaged in sexual conduct with her.

In her certification, dated October 17, 2021 and attached as Exhibit D to respondent's certification, EKM stated that she is thirty-one years old; that her

friendship with respondent started in 2014; that everything she has done with respondent has been consensual and voluntary; and that she is not a victim.

In addition to these factual arguments, respondent based his request for a censure on New Jersey disciplinary precedent, by attempting to distinguish Kapalin and the cases cited therein, and citing the recent case In re Daley, Jr., 2021 N.J. LEXIS 1330 (2021); In the Matter of Charles Canning Daley, Jr., DRB 20-037 (February 3, 2021), discussed below. Respondent further contended that, under New Jersey law, his first-degree misdemeanor solicitation plea would constitute a disorderly persons offense, that his misconduct did not involve violence, and that the contraband at issue was never in the hands of any inmates. Regarding his third-degree felony contraband plea, respondent argued that, unlike the illegal drugs underpinning Kapalin, respondent's contraband – recorded communications – are "not illegal in and of themselves outside the jail."

Respondent also proffered mitigating factors, including his lack of disciplinary history; his voluntary and self-funded admission into a thirty-day inpatient treatment program; his additional treatment ordered as a condition of probation; his consultation with the New Jersey Lawyers Assistance Program; his attendance at Sex Addicts Anonymous; his probation officer has recommended early termination of probation; he performed community service

at the LGBT+ Center Orlando; character letters evidencing respondent's good reputation and character; his acceptance of responsibility and expression of remorse; his cooperation with the OAE and other agencies; the passage of time since the 2017 misconduct; and his service to communities with less access to justice by representing middle-class and poor people with an emphasis on consumer protection and debt collection.

Finally, respondent stated that he is a "good law-abiding person and lawyer, who is not a current threat to the public;" that he has taken "substantial steps to address the behavioral issues at the heart of his judgment lapses;" that since these incidents in 2017, he "has endeavored to demonstrate that he is worthy of continuing to practice law;" and that he has taken meaningful steps to prevent repetition of any future misconduct.

Attached to respondent's certification is a Forensic Psychological Evaluation, from an evaluation on October 15 and 30, 2018, by Donald A. McMurray, Ph.D. In the twelve-page report, Dr. McMurray noted that respondent exhibited the characteristics of a person with hypersexual disorder or sexual addiction. Dr. McMurray suggested that respondent continue in a sexual addiction residential program that provided long-term treatment; following the residential program, that he continue with long-term individual

treatment, including psychotherapy and medication management; and that he participate in community support groups focused on sexual addiction.

Sean P. Jennings, Psy.D., also submitted a report, dated February 26, 2020, stating that respondent had been in treatment with him since December 2019, following successful termination from his prior therapist. Dr. Jennings noted that respondent was engaged in therapy, was compliant, and demonstrated the ability to identify and correct problematic thought patterns. Dr. Jennings diagnosed respondent with adjustment disorder with mixed anxiety and depressed mood. Respondent was discharged from therapy on March 16, 2020.

On September 22, 2021, respondent's probation officer filed a form seeking respondent's early termination of probation. Fourteen reference letters and an award certificate are also attached to respondent's certification.

At oral argument, respondent, through counsel, disputed only the quantum of discipline. He argued that his Florida matters were similar to those designated for pre-trial intervention in New Jersey, and emphasized his continuing counseling and cooperation, and his character.

Following a review of the record, we determine to grant the OAE's motion for final discipline. Final discipline proceedings in New Jersey are governed by R. 1:20-13(c). Under subsection (1) of that Rule, in "any disciplinary proceeding instituted against an attorney based on criminal or quasi-criminal conduct, the

conduct shall be deemed to be conclusively established by any of the following: a certified copy of a judgment of conviction, the transcript of a plea of guilty to a crime or disorderly persons offense, whether the plea results either in a judgment of conviction or admission to a diversionary program, a plea of no contest, or nolo contendere, or the transcript of the plea." Here, respondent entered guilty pleas to criminal conduct, and the transcripts of those pleas are part of the record. See R. 1:20-13(c)(1); In re Magid, 139 N.J. 449, 451 (1995); In re Principato, 139 N.J. 456, 460 (1995).

Respondent's guilty pleas and orders of probation for third-degree felony introduction of contraband into a detention facility, contrary to Florida Statutes § 951.22, and for first-degree misdemeanor solicitation of prostitution, contrary to Florida Statutes § 796.07(2)(f), thus, establish violations of RPC 8.4(b) and RPC 8.4(c). Pursuant to RPC 8.4(b), it is unethical conduct for an attorney to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer." Moreover, pursuant to RPC 8.4(c), it is unethical conduct for an attorney to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Hence, the sole issue is the extent of discipline to be imposed. R. 1:20-13(c)(2); In re Magid, 139 N.J. at 451-52; and In re Principato, 139 N.J. at 460.

In determining the appropriate measure of discipline, we must consider the interests of the public, the bar, and the respondent. "The primary purpose of discipline is not to punish the attorney but to preserve the confidence of the public in the bar." Ibid. (citations omitted). Fashioning the appropriate penalty involves a consideration of many factors, including the "nature and severity of the crime, 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).

The Court has noted that, although it does not conduct "an independent examination of the underlying facts to ascertain guilt," it will "consider them relevant to the nature and extent of discipline to be imposed." In re Magid, 139 N.J. at 452. In motions for final discipline, it is acceptable to "examine the totality of the circumstances," including the "details of the offense, the background of respondent, and the pre-sentence report," before "reaching a decision as to [the] sanction to be imposed." In re Spina, 121 N.J. 378, 389 (1990). The "appropriate decision" should provide "due consideration to the interests of the attorney involved and to the protection of the public." Ibid.

That an attorney's conduct did not involve the practice of law or arise from a client relationship will not excuse an ethics transgression or lessen the degree of sanction. In re Musto, 152 N.J. 165, 173 (1997). Offenses that

evidence ethics shortcomings, although not committed in the attorney's professional capacity, may, nevertheless, warrant discipline. In re Hasbrouck, 140 N.J. 162, 167 (1995). The obligation of an attorney to maintain the high standard of conduct required by a member of the bar applies even to activities that may not directly involve the practice of law or affect his or her clients. In re Schaffer, 140 N.J. 148, 156 (1995).

Here, respondent entered two detention facilities under the mantle of a protected attorney-client privilege and illegally recorded himself having improper sexual contact with female inmates. He pleaded guilty in two Florida courts to two counts of third-degree felony introducing contraband (the recording that he created) to county detention centers and one count of first-degree misdemeanor soliciting prostitution, for which his adjudications were withheld, and he was ordered to complete five years of probation. Respondent accepts, and the record supports, that his admissions constitute misconduct in violation of RPC 8.4(b) (three instances). Moreover, respondent gained access to the female inmates under false pretenses, leveraging his status as an attorney purportedly seeking to confer with his client, when his true purpose was to illegally engage in and record sexual acts. As part of his premeditated plan to commit criminal conduct, he utilized the attorney-client conference rooms in the

jails because he knew that they were secure and unmonitored. Accordingly, he also violated RPC 8.4(c) (three instances).

In sum, we find that respondent violated RPC 8.4(b) (three instances) and RPC 8.4(c) (three instances). The sole issue left for us to determine is the appropriate quantum of discipline for respondent's misconduct.

As noted above, the OAE exclusively relied on In re Kapalin, 227 N.J. 224 (2016). In that case, the attorney was convicted, following his guilty plea, in the United States District Court, District of New Jersey, of conspiracy to smuggle contraband into a correctional facility, contrary to 18 U.S.C. § 371 and 18 U.S.C. § 1791(a). Kapalin leveraged his attorney status to secure meetings with inmates in unmonitored areas, for the purpose of delivering cannabis and tobacco. He was paid approximately $500 cash for each transaction, for a total of approximately $6,000. On a motion for final discipline, the majority of us imposed a three-year suspension, retroactive to the date of Kapalin's temporary suspension underlying his criminal conduct, with the minority recommending that Kapalin be disbarred. In the Matter of Charles Brian Kapalin, DRB 15-385 (August 12, 2016).

In evaluating the appropriate quantum of discipline, our majority block of Members found that the attorney in Kapalin presented significant mitigation that warranted discipline short of disbarment. Specifically, he had a lengthy career

in public service and had further resisted the pursuit of a lucrative position upon retiring as an assistant prosecutor, instead becoming a criminal defense attorney to under-represented communities; had experienced a "perfect storm of clinical depression and financial stress," as described in a psychological evaluation; had experienced the loss of his wife after her prolonged battle with cancer; had navigated his son's battle with cocaine addiction and his theft from respondent and his wife; and had cooperated with federal law enforcement, without requiring that a downward departure motion be filed as a pre-condition. The Court agreed with the majority's imposition of a three-year, retroactive suspension.

Here, respondent attempted to distinguish his misconduct from Kapalin's crime, arguing that Kapalin knew that he was acting unlawfully and that the smuggled contraband would be circulated among the inmate population. He also noted that New Jersey disciplinary precedent has treated drug cases harshly. Respondent argued that his misconduct was more akin to that of the attorney in In re Daley, Jr., in which the attorney received a censure following his guilty plea to unlawful possession of a handgun loaded with hollow point bullets, which he brought into a courthouse. In Daley, the majority of us voted to impose a six-month suspension, and four dissenting Members voted to impose a censure. The Court imposed a censure. 2021 N.J. LEXIS 1330.

Indeed, when conduct involving criminal acts is not of the utmost seriousness, admonitions and reprimands have been imposed. See, e.g., In the Matter of Michael E. Wilbert, DRB 08-308 (February 11, 2009) (admonition for attorney who possessed eight rounds of hollow point bullets, a violation of N.J.S.A. 2C:39-3(f), a fourth degree crime, and a violation of RPC 8.4(b); the attorney attempted to transport hollow point bullets from New Jersey to Florida via airplane; the attorney entered into a PTI program; in mitigation, at check-in, the attorney had declared the bullets to the airline's agent, there was no evidence that he intended to conceal the possession of the bullets, and he had an unblemished disciplinary record in his thirty-seven years at the bar); In the Matter of Shauna Marie Fuggi, DRB 11-399 (February 17, 2012) (admonition for attorney who brought some of her estranged husband's belongings outside on the driveway after he left the marital home for the evening to be with his long-term girlfriend, set them on fire, and sent him a text message informing him that his possessions were aflame; the attorney was charged with third-degree arson, in violation of N.J.S.A. 2C:17-1(b), and successfully completed a PTI program; in mitigation, her action was impulsive due to the context of the marital difficulties; she unsuccessfully attempted to extinguish the fire; only personal property was damaged; she admitted the misconduct; and she cooperated with law enforcement); In re Murphy, 188 N.J. 584 (2006)

(reprimand for attorney who twice presented his brother's driver's license to police in order to avoid prosecution for driving under the influence charges, in violation of RPC 8.4(b), RPC 8.4(c), and RPC 8.4(d); in addition, the attorney failed to cooperate with the OAE's investigation of the matter (RPC 8.1(b)); In re Thakker, 177 N.J. 228 (2003) (reprimand for an attorney who pleaded guilty to harassment, in violation of N.J.S.A. 2C:33-4(a), a petty disorderly persons offense; the attorney harassed a former client, telephoning her repeatedly, after she told him to stop; additionally, the attorney was abusive to the police officer who responded in the matter; despite that police officer's warning, the attorney continued to call the former client and the police officer).

For more serious crimes, censures have been imposed. See, e.g., In re Milita, 217 N.J. 19 (2014) (censure for attorney who pleaded guilty to one count of hindering apprehension by providing false information to a law enforcement officer, a disorderly persons offense (N.J.S.A. 2C:29-3b(4)), and two counts of harassment, petty disorderly persons offenses (N.J.S.A. 2C:33-4(c)); the attorney became angry when two teenagers in a car tailgated him; he made an obscene hand gesture, pulled over, brandished a knife, and then followed the teens for several miles, still brandishing the knife, before being apprehended by police; the attorney first denied that he had a knife, but later admitted to its possession, claiming that it had been given to him by a mechanic to fix his car);

In re Osei, 185 N.J. 249 (2005) (attorney was censured for causing $72,000 worth of damage to his own house, which was the subject of a foreclosure; aggravating factors included the deliberate nature of the attorney's actions and the extent of the damage to the property, which demonstrated that his actions had occurred over a significant period of time; no prior discipline).

Here, based on the disciplinary precedent outlined above, respondent's criminal conduct arguably was less serious than the misconduct addressed in Kapalin, but is demonstrably more egregious than the misconduct in cases where attorneys have received discipline short of a term of suspension. In those matters, the attorneys had successfully completed pre-trial intervention (Daley, Wilbert, Fuggi), or had committed disorderly persons offenses (Milita). Nonetheless, although respondent's misconduct did not involve violence or a threatened act of violence, his attempted production of pornography, with female inmates performing sex acts on him, taken in attorney-client conference rooms in detention centers, is abhorrent and undermines the public's confidence in New Jersey attorneys.

Like the attorney in Kapalin, respondent's crimes were premediated and not reckless or "heat of the moment" incidents. He utilized the attorney-client conference rooms in the detention centers and purposefully abused the most foundational, sacred privilege reserved to attorneys and their clients. Trading on

that privilege for his own sexual gratification, regardless of the whether the acts were consensual, undermines the ability of other lawyers to use these secure accommodations with their clients without a heightened level of suspicion and scrutiny. In turn, such heightened scrutiny and loss of confidence undermines the ability of attorneys to effectively represent their clients.

Moreover, respondent's misconduct involved the vulnerable inmate population, the exchange of money between respondent and the inmates, and pornographic recordings that possibly would garnish respondent monetary gain. Although not violent, his misconduct is serious and warrants a substantial term of suspension. A lesser sanction would only serve to further undermine the confidence of the public in attorneys in New Jersey.

In crafting the appropriate discipline, however, we also consider mitigating and aggravating factors.

In aggravation, respondent's misconduct was for his sexual gratification and possibly for profit; constituted more than one criminal offense; and, the acts, whether consensual or not, occurred with women who were of a vulnerable population. Moreover, respondent entered a guilty plea to soliciting prostitution. Finally, respondent leveraged his status as an attorney to commit his criminal acts.

In mitigation, respondent has no disciplinary history in thirty years as a member of the bar; has partially accepted responsibility for his misconduct; has complied with his probation and the Florida courts; and has taken steps to treat his underlying psychological issues. Compared to the compelling mitigation we considered in Kapalin, however, respondent falls well short.

Therefore, in order to protect the public and preserve confidence in the bar, we determine to impose a three-year suspension.

Notably, respondent's misconduct was met with disbarment in Florida and New York. He is spared from disbarment in New Jersey merely by the permanency of that discipline here, compared to the other jurisdictions. Further, respondent will be eligible to apply for reinstatement in New Jersey years before he is eligible to do so in New York and at or about the same time he is eligible in Florida. Therefore, on balance, a three-year suspension is on par or less severe than imposed by those other jurisdictions.

Additionally, we require the conditions that, prior to reinstatement, respondent continue to attend psychological counseling and provide proof of fitness to practice law, as attested to by a medical doctor approved by the OAE. Further, respondent is directed to provide to the OAE quarterly reports documenting his continued psychological counseling, for a period of two years.

Vice-Chair Singer voted to impose a one-year suspension, with the same conditions, finding respondent's false representations that he had an attorney-client relationship with the two inmates he visited to be serious, warranting a suspension, but not justifying one as long as three years. This is partly because she finds compelling mitigation, namely that he has thirty years at the bar with no prior discipline, has taken significant, well-documented steps to treat his sexual/psychological disorder, has taken responsibility for his misconduct and has fully complied with the terms of his probation, which in one case was even recommended for early termination by his probation officer. It is also because the two women involved acted voluntarily, were not victims and were not vulnerable, having had prior relationships with respondent, and because the contraband involved (videos of sex acts) was not itself illegal like drugs or weapons, and was not introduced into the inmate population, the usual meaning of "contraband." Lastly, Vice-Chair Singer does not find the precedent cited by the majority to be sufficiently on point to support so harsh a sanction.

Chair Gallipoli and Members Joseph and Rivera voted to recommend that respondent be disbarred, finding that his conduct was incongruent with the standard of behavior expected of a New Jersey attorney and that his intentional abuse of his law license should result in the loss of his privilege of being a New Jersey attorney.

Further, Member Joseph believes that there are no circumstances under which prison inmates can be deemed to have had "consensual" sexual relations with their non-spousal/partner attorney, notwithstanding the two victims' certifications to the contrary. Indeed, in Member Joseph's view, New Jersey's own criminal statutes assess such action to be sexual assault. See, N.J.S.A. 2C: 14-2c (2), which states in part:

> c. An actor is guilty of sexual assault if the actor commits an act of sexual penetration with another person under any one of the following circumstances:
>
> (2) The victim is on probation or parole, or is detained in a hospital, prison or other institution and the actor has supervisory or disciplinary power over the victim by virtue of the actor's legal, professional or occupational status.

See also, § 794.011, Fla. Stat. (1974) Sexual battery.

Member Boyer was absent.

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
Hon. Maurice J. Gallipoli, A.J.S.C. (Ret.),
Chair

By: **/s/ Timothy M. Ellis**
Timothy M. Ellis
Acting Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Andrew B. Spark
Docket No. DRB 21-208

Argued: November 18, 2021

Decided: March 10, 2022

Disposition: Three-year suspension.

Members	Three-year suspension	One-year suspension	Disbar	Absent
Gallipoli			X	
Singer		X		
Boyer				X
Campelo	X			
Hoberman	X			
Joseph			X	
Menaker	X			
Petrou	X			
Rivera			X	
Total:	4	1	3	1

/s/ Timothy M. Ellis
Timothy M. Ellis
Acting Chief Counsel