

BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL	:	No. 953, Disciplinary Docket
Petitioner	:	No. 3 – Supreme Court
	:	
	:	No. 131 DB 2004 – Disciplinary Board
v.	:	
	:	Attorney Registration No. 15856
ANDREW F. MALONE	:	
Respondent	:	(Montgomery County)

REPORT AND RECOMMENDATIONS OF
THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

TO THE HONORABLE CHIEF JUSTICE AND JUSTICES
OF THE SUPREME COURT OF PENNSYLVANIA:

Pursuant to Rule 208(d)(2)(iii) of the Pennsylvania Rules of Disciplinary Enforcement, the Disciplinary Board of the Supreme Court of Pennsylvania (“Board”) herewith submits its findings and recommendations to your Honorable Court with respect to the above-captioned Petition for Discipline.

I. HISTORY OF PROCEEDINGS

On October 19, 2004, Office of Disciplinary Counsel filed a Petition for Discipline against Andrew F. Malone, Respondent, arising out of his conviction in the Delaware County Court of Common Pleas of criminal attempt to commit involuntary deviate sexual intercourse. Respondent was placed on temporary suspension by order of the

Supreme Court of Pennsylvania dated September 1, 2004. Respondent filed an Answer to Petition for Discipline on November 18, 2004.

A disciplinary hearing was held on March 9, 2005, before a District II Hearing Committee comprised of Chair Anna M. Durbin, Esquire, and Members Mark Dixon Damico, Esquire, and Michael A. Cagnetti, Esquire. Respondent was represented by John Rogers Carroll, Esquire.

Following the submission of briefs by the parties, the Committee filed a Report on July 26, 2005, and recommended that Respondent be suspended for one year and one day retroactive to September 1, 2004.

Petitioner filed a Brief on Exceptions on August 12, 2005, contending that Respondent should be suspended for five years.

Respondent filed a Brief Opposing Exceptions on August 31, 2005.

This matter was adjudicated by the Disciplinary Board at the meeting on November 9, 2005.

II. FINDINGS OF FACT

The Board makes the following findings of fact:

1. Petitioner, whose principal office is located at Suite 1400, 200 North Third Street, Harrisburg, Pennsylvania, is invested, pursuant to Rule 207 of the Pennsylvania Rules of Disciplinary Enforcement, with the power and duty to investigate all matters

involving alleged misconduct of an attorney admitted to practice law in the Commonwealth of Pennsylvania and to prosecute all disciplinary proceedings brought in accordance with the various provisions of said Rules of Disciplinary Enforcement.

2. Respondent, Andrew F. Malone, was born in 1947 and was admitted to practice law in the Commonwealth of Pennsylvania in 1972. His current address is 3768 Worthington Circle, Collegeville PA 19426. He is subject to the jurisdiction of the Disciplinary Board of the Supreme Court.

3. Respondent has no prior history of discipline.

4. By Order of the Supreme Court of Pennsylvania dated September 1, 2004, based upon a Joint Petition of Petitioner and Respondent, Respondent was temporarily suspended from the practice of law, and the matter was referred to the Disciplinary Board under Pa.R.D.E. 214(f)(1).

5. On December 17, 2002, Delaware County detectives arrested Respondent as a result of the following events:

a. From July through mid-December 2002, Respondent engaged in e-mail and instant messaging communications on the Internet with Agent Michele Deery of the Pennsylvania Attorney General's Office, posing as a mother of two girls, ages seven and nine; in those communications Respondent discussed, inter alia, arrangements to meet with her and the children and to engage in various sexual activities with the three females.

b. On December 17, 2002, Respondent appeared at a Wawa convenience store parking lot for a pre-arranged meeting with Barbie dolls for the “children”, a gift for the “mother”, and sexual lubricant and condoms in his possession.

6. On December 17, 2002, Respondent gave a voluntary statement in which, inter alia, he admitted participating in the foregoing communications and in other Internet communications with a minor in which he discussed sexual activity.

7. On December 18, 2002, a Police Criminal Complaint supported by an affidavit of probable cause was filed against Respondent

8. On July 3, 2003, a Criminal information was filed against Respondent in the Court of Common Pleas of Delaware County.

9. On January 5, 2004, Respondent entered a plea of nolo contendere to the offense of criminal attempt to commit involuntary deviate sexual intercourse, in violation of 18 Pa.C.S.A. §§ 901 and 3123, before the Honorable Charles C. Keeler.

10. On May 24, 2004, Judge Keeler sentenced Respondent to 12 months less one day to 24 months less one day imprisonment, with immediate parole after completion of minimum sentence, credit for good time, five years consecutive probation and authorization for work release, effective June 7, 2004.

11. The crime of criminal attempt to commit involuntary deviate sexual intercourse is a “serious crime” as defined by Pa.R.D.E. 214(i).

12. By letter dated June 8, 2004, John Rogers Carroll, Esquire, Respondent's attorney, reported Respondent's conviction to the Disciplinary Board.

13. Judge Keeler subsequently amended the effective date of sentence to June 28 and then to July 12, 2004.

14. By Order of July 12, 2004, Judge Keeler ordered that Respondent be incarcerated at the George Hill Correctional Facility and granted work release to work at the law office of David T. Videon, Esquire.

15. By letter dated September 20, 2004, Mr. Videon advised the Disciplinary Board of his employment of Respondent.

16. Respondent was incarcerated on July 12, 2004, permitted work release from July 19, 2004 to March 1, 2005, and is on probation until July 2009.

The Offense Conduct

17. When Respondent first contacted Agent Michele Deery of the Pennsylvania Attorney General's Office, she was posing as an adult female with two preteen children in an AOL chatroom titled "yf" (young females). Their introduction occurred via instant message on July 22, 2002.

18. Over the next five months, Respondent and Agent Deery engaged in e-mail and instant message communications on the Internet in which they discussed potential sexual encounters, leading up to a December 17, 2002 pre-arranged meeting at a Wawa convenience store in Media, Pennsylvania.

19. During the discussion between Respondent and Agent Deery, Respondent told her in graphic detail the sexual actions he would engage in with her and the children when they got together.

20. Respondent wanted to meet the undercover agent because he believed she must be “sexually uninhibited if she’s engaged in this type of behavior”. (N.T. 105)

21. Because he was so intent on meeting this woman, Respondent was “willing to do anything she wanted to do to make the connection”, including bringing presents for the woman and the two children, condoms and KY jelly to their meeting on December 17, 2002. (N.T. 107.)

22. Although Respondent claims he did not intend to carry out the sexual activities with the children that he had discussed in the instant messages, Respondent admitted at the hearing that he was “so out of control” that “my addiction had reached a level that I can’t say what I would have done or what I wouldn’t have done. I would like to think that I would not have had any involvement with any children if they were there, but I can’t say that for sure.” (N.T. 110) .

23. Immediately after his arrest, Respondent waived his rights. He admitted to the police his participation in the Internet communication with Agent Deery in which he discussed sexual activity with the children. He told the police that he knew he had a problem and needed help.

Braun Evidence

24. Respondent was psychologically evaluated in June 2003 by Timothy P. Foley, Ph.D, of Ardmore, Pennsylvania.

25. Dr. Foley diagnosed Respondent with Avoidant Personality Disorder, Sexual Addiction and Depression during the time of his misconduct.

26. Respondent's criminal conduct was causally related to his underlying disorders.

27. Dr. Margaret N.C. Baker, Ph.D, a psychologist who treated Respondent beginning shortly after his arrest in December 2002, stated in her report that "Mr. Malone's addiction to the excitement of illicit sex is symptomatic of a deeply ingrained, chronic depression he could not acknowledge."

28. Dr. Foley's statement and Dr. Baker's report unequivocally link Respondent's psychiatric disorders with his misconduct.

29. Respondent has suffered from chronic depression since at least the mid-1980's when he briefly sought treatment from a therapist.

30. Following a long history of sexual dissatisfaction in his marriage, Respondent turned to the Internet to find sexual partners beginning sometime after the summer of 1993. Some of the Internet encounters resulted in meetings with adult females for the purpose of sexual contact.

31. By 2002, Respondent's interest in pornography had increased and he became more interested in sadomasochistic theme sites on the Internet. Respondent had an on-line contact with a 13 year old girl and viewed child pornography. He increasingly

engaged in sexual “role play” while chatting online and assumed “progressively darker thoughts and more ‘forbidden’ personas as time went by”. (N.T. 103-104)

32. During December 2002 Respondent was spending an average of several hours each night connecting with women online and communicating with them through instant messaging.

Recovery Evidence

33. When Respondent told the arresting officers about the sex-related activities he had engaged in online and offline over the course of many years, Respondent “felt a weight lift from [his] shoulders” because it was the first time he had been able to tell anyone about what he had been doing. (N.T. 108).

34. Within a few days Respondent began to meet with Dr. Baker to learn about his psychiatric disorder and obtain treatment.

35. From late December 2002 through July 2003 Respondent attended therapy sessions with Dr. Baker.

36. After he attended his first Sex and Love Addicts Anonymous (SLAA) 12-step meeting in January 2003 at the suggestion of a friend, Respondent recognized that he needed to learn more about sexual addictions.

37. Respondent was referred to Dr. Foley for specialized treatment of his sexual addiction.

38. Dr. Foley performed a complete psychological evaluation on June 20, 2003. As a result of the evaluation and testing, Dr. Foley concluded that Respondent had no sexual attraction to prepubescent children, was not a pedophile, shared none of the characteristics associated with contact sex recidivism, and there was a very low risk for such overt conduct.

39. As part of the presentencing in Respondent's criminal case, the Delaware County Sexual Offender Assessment Board determined that Respondent did not meet the criteria of a sexually violent predator.

40. Dr. Foley recommended to Respondent that he seek inpatient treatment for his sexual addictions at the KeyStone Center for Healing from Sexual Compulsivity and Trauma in Chester, Pennsylvania.

41. The inpatient treatment that Respondent received was comprehensive and confrontational. During his 38 day stay, from July 23, 2003 to August 29, 2003, Respondent attended group sexual compulsivity therapy for four to six hours a day. He also participated in weekly individual and family therapy, and attended support group meetings in the evenings.

42. Respondent described his inpatient treatment at KeyStone Center as "the most intense life altering experience I have ever undergone." (N.T. 120)

43. Respondent was discharged from the KeyStone Center after demonstrating to the professional staff and his peers significant change and improvement in his attitude, thoughts and behaviors regarding his sexual actions.

44. According to Robert Dilbeck, Director of the KeyStone Center Extended Care Unit, Respondent “has invested a significant amount of effort in practicing coping skills and relapse prevention strategies to resist acting on his sexual and emotional impulses.” (Ex. R-4 at p. 2)

45. Once Respondent recognized that he was a sex addict, he began to work hard in therapy and “totally submerged himself into his treatment”. (N.T. 32)

46. Following his discharge from KeyStone Center on August 29, 2003, Respondent has been regularly attending meetings of an offenders group, Sexual Trauma and Recovery (STAR), SLAA and AA, as well as a 12-step recovery group composed solely of lawyers.

47. Although Respondent’s participation in these organizations was interrupted by his imprisonment, except for weekly meetings of STAR, he resumed attending his support group meetings as soon as he was released from prison on March 1, 2005.

48. Respondent and his wife began seeing a therapist together for marriage counseling at the KeyStone Center and continued couples therapy after he was discharged from treatment. They resumed seeing their counselor after Respondent was released from prison. As a result of couples therapy, Respondent is able to discuss his problems with his wife and communicate better.

49. Dr. Foley opined that Respondent has made excellent progress in therapy and has fully integrated his treatment program into his life.

50. Dr. Foley believes Respondent is motivated to continue in his 12-step program because he wants and needs to maintain his marriage, his relationship with his adult children, and a professional relationship in the future.

51. Dr. Foley gave Respondent a positive prognosis provided he adheres to his relapse prevention plan.

Responsibility and Remorse

52. After his arrest, Respondent fully admitted his criminal conduct. He entered a plea of nolo contendere and he engaged in a concentrated course of rehabilitation to overcome his problems.

53. At the sentencing, Allen Stillman, Respondent's therapist in the sex offenders group at the STAR program, and the director of the Montgomery County Court's sex offenders program testified that "I have not seen him [Respondent] trying to move away from any responsibility or consequence of his crime." (Ex. P-10 at p. 15)

54. At his criminal sentencing, Respondent expressed his sorrow for committing the offense and apologized to everyone.

55. Respondent cooperated throughout the disciplinary proceedings.

56. Respondent testified forthrightly at his disciplinary hearing and expressed remorse.

Character Evidence

57. Respondent introduced into evidence four letters written by friends and colleagues attesting to his good character and contributions to the community.

58. Edward Lodge, Respondent's life-long friend, described him as an exemplary citizen, extremely religious and devoted to his children. Mr. Lodge expressed his opinion that Respondent has shown true remorse for his conduct.

59. Charles Kane, a neighbor and friend of more than 20 years, wrote that Respondent and his wife attend church every Sunday and Respondent is a parish lector at their church. Mr. Kane opined that Respondent is a very generous person who gives freely from the heart and he has the highest regard for him.

60. Andrew Cantor, Esquire, a former law partner of Respondent at Wisler Pearlstine Talone Craig Garrity & Potash, wrote that Respondent is a hardworking attorney with high personal integrity and was respected by his peers and readily accepted by clients.

61. David Feldheim, Esquire, who has known Respondent for more than 30 years as a fellow attorney and friend, wrote that he has respected and admired Respondent as a kind, upright and moral man, and who has been a committed husband, father and family man, while giving the utmost to his clients.

62. Respondent has been a parish lector at St. Eleanor Roman Catholic Church for more than 15 years. He has also performed volunteer work for the church and helped recruit new members into the parish ministries.

63. Respondent has been an active member of the Norristown Rotary Club for more than ten years, including serving on the board of directors.

64. Respondent has been a leader in the local Indian Guides program for fathers and sons, coached Little League baseball and volunteered with the Methacton High School wrestling boosters.

65. After his arrest, Respondent read for the blind and dyslexic once or twice weekly, as well as being a mentor for a 21 year old patient at Norristown State Hospital.

III. CONCLUSIONS OF LAW

By his conduct as set forth above, Respondent violated the following Rules of Professional Conduct:

1. The crime of criminal attempt to commit involuntary deviate sexual intercourse is a “serious crime” as defined by Pa.R.D.E. 214(i); conviction of that crime is a per se ground for discipline under Pa.R.D.E. 203(b)(1).

2. Respondent has proved, by clear and convincing evidence, that his depression and sexual addiction were causal factors in his misconduct. Office of Disciplinary Counsel v. Braun, 553 A.2d 894 (Pa. 1989).

3. Respondent is entitled to mitigation of discipline.

IV. DISCUSSION

This matter is before the Disciplinary Board on a Petition for Discipline charging Respondent with violation of the Rules of Disciplinary Enforcement based on his conviction of criminal attempt to commit involuntary deviate sexual intercourse.

The sole issue to be determined is the extent of final discipline to be imposed as this disciplinary proceeding is based upon Respondent's conviction of a serious crime. Pa.R.D.E. 214(f)(1). In order to determine the appropriate discipline the events surrounding the criminal charge must be taken into account. Office of Disciplinary Counsel v. Valentino, 730 A.2d 479 (Pa. 1999). All relevant aggravating and mitigating facts must be considered and evaluated. Office of Disciplinary Counsel v. Chung, 695 A.2d 405 (Pa. 1997).

Respondent's conviction arose from his planned arrangement of and appearance with sexual paraphernalia at a meeting with a woman and her two young daughters, ages seven and nine, for the purpose of engaging in sexual activity with the three females. This crime is repugnant and goes against the legal standards and moral tenets of society. Though Respondent contends after the fact that he does not believe he would have engaged in sexual activity with the children, Respondent's own admission that he was at the height of his addictive behavior and is not sure what he would have done bolsters the finding that at the time of the criminal activity Respondent had the mens rea to have sexual contact with children. Respondent is not fit to practice law in the Commonwealth of Pennsylvania.

Respondent contends that due to a psychiatric disorder he suffered from at the time of the misconduct, and which substantially caused the misconduct, he is entitled to mitigation. Office of Disciplinary Counsel v. Braun, 553 A.2d 894 (PA. 1989). Review of the record demonstrates that Respondent met his burden of proof by clear and convincing evidence.

Respondent introduced the credible expert testimony of Timothy P. Foley, Ph.D. Dr. Foley has a practice dedicated to the assessment and treatment of sex offenders and people dealing with sexual issues. He first met with Respondent in June 2003. Dr. Foley diagnosed Respondent with avoidant personality disorder, sex addiction and depression, which disorders substantially caused Respondent's criminal misconduct. Dr. Foley did not find, in his opinion, that Respondent showed risk factors for a sexual interest in children. Based on Dr. Foley's recommendation, Respondent entered an inpatient treatment program at KeyStone Center. Respondent remained a patient there for 38 days and underwent a comprehensive and confrontational therapy program. In February 2005, shortly before the disciplinary hearing, Dr. Foley again evaluated Respondent and found that he was well-motivated to continue his 12-step treatment program. Dr. Foley opined that the risk of repeated misconduct in the future was very low as long as Respondent continued his treatment regimen.

Respondent offered into evidence the report of Margaret N.C. Baker, Ph.D. Dr. Baker is a licensed psychologist who treated Respondent for sexual addiction on a twice weekly basis starting in December 2002. Dr. Baker opined that with continued

individual psychotherapy and group therapy, as well as involvement in the 12-step sexual addiction program, Respondent is a low risk to the community. Currently, Respondent regularly attends and participates in meetings of Sexual Trauma and Recovery offenders group, Sex and Love Addicts Anonymous and Alcoholics Anonymous, as well as a 12-step recovery group composed solely of lawyers. Respondent goes to couples therapy with his wife.

Other mitigating factors present in this matter are Respondent's remorse and acceptance of responsibility, his unblemished record of practicing law during the last 30 years, his cooperation with Petitioner, the evidence of his good character as attested to by long-time friends and colleagues, and his positive record of community service.

The Hearing Committee recommended a suspension of one year and one day based upon what it found to be the significant mitigating circumstance of Respondent's psychiatric disorder, coupled with his remorse and shame. While the Board is cognizant of Respondent's entitlement to mitigation based upon the clear proof of his sexual addiction, it is persuaded that a lengthier suspension must be imposed to address the heinous nature of Respondent's criminal action. Prior case law addressing inappropriate or criminal sexual activity by a lawyer provides some guidance as to the proper length of suspension. The most similar case is Office of Disciplinary Counsel v. Christie, 639 A.2d 782 (Pa. 1994), wherein Mr. Christie was convicted in Delaware of 13 counts of misdemeanor sex offenses including sexual harassment, indecent exposure, endangering the welfare of a child, and unlawfully dealing with a child. Mr. Christie invited two males, ages 12 and 14, to his

apartment, gave them alcoholic beverages, showed them x-rated videotapes, and masturbated in their presence. Mr. Christie met the Braun standard due to depression and sexual addiction. He expressed remorse and was found to be at low risk of recidivist behavior. Even in light of the very clear mitigating circumstances, the Supreme Court suspended Mr. Christie for five years.

Certainly the actions engaged in by the instant Respondent are no less serious and repugnant, as they involved the real potential for extraordinary harm to young children. The fact that Respondent's criminal misconduct did not involve his practice of law or his clients is of little moment, as his conduct could not reflect more adversely on the legal profession. The Board's charge is not merely to protect the legally consuming public, but the public in general. Respondent's suspension for a period of five years retroactive to his temporary suspension will serve to fulfill the paramount responsibility of protecting the public.

V. RECOMMENDATION

The Disciplinary Board of the Supreme Court of Pennsylvania unanimously recommends that the Respondent, Andrew F. Malone, be suspended from the practice of law for a period of five years, retroactive to September 1, 2004.

It is further recommended that the expenses incurred in the investigation and prosecution of this matter are to be paid by the Respondent.

Respectfully submitted,

THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

By: _____
Francis X. O'Connor, Board Member

Date: February 10, 2006

PER CURIAM:

AND NOW, this 25th day of April, 2006, upon consideration of the Report and Recommendations of the Disciplinary Board dated February 10, 2006, it is hereby

ORDERED that Andrew F. Malone be and he is suspended from the Bar of this Commonwealth for a period of five years, retroactive to September 1, 2004, and he shall comply with all the provisions of Rule 217, Pa.R.D.E.

It is further ORDERED that respondent shall pay costs to the Disciplinary Board pursuant to Rule 208(g), Pa.R.D.E.