The 'Legato' Case: Lawyers, Sex Crimes and the Great Conundrum

A look at a New Jersey Supreme Court ruling in a disciplinary matter, which attracted abundant pubic attention, and where the majority opinion and the dissent — at complete loggerheads — are both right.

By Marc Garfinkle | October 30, 2017

On rare occasions, a Supreme Court decision in an ethics-related matter dominates headlines and stimulates discussion. Such decisions usually represent a departure from precedent or have impact upon many lawyers. For example, the decisions eliminating the bona fide office requirement, lifting the ban on attorney advertising, and abolishing the “appearance of impropriety” standard all had broad impact on the profession and would have been fitting fare for this article, had they emerged during the past twelve months.

Instead, we will look at a Supreme Court ruling in a disciplinary matter that attracted abundant pubic attention, where the decision neither parted from precedent nor had any direct impact on the profession at all. Rather, this decision is significant for what it tells us about society, the bar, legal discipline and the relationship among them all. It is also important because the majority opinion and the dissent — at complete loggerheads — are both right. Please read on.

Spawned in the sick, shadowy world of sexual infatuation with children, the *Legato* decision comprises three cases: *In Re: Mark G. Legato, In the Matter of Regan C. Kenyon,* and *In the Matter of Alexander D. Walter* (D-99 Sept. Term 2015 [077464], Decided: May 24, 2017). All were attorneys who were disciplined for criminal convictions arising out of sexual offenses whose victims, or intended victims, were children. Legato and Kenyon had each engaged in lurid communications with undercover police they believed to be young girls. Both men had scheduled at least one

rendezvous with the “girl,” and failed to appear. Both were convicted of third-degree attempted child endangerment. Walter admitted to multiple incidents of masturbating in a swimming pool in the close presence of a nine-year old girl who lived in his home. He was convicted of third-degree child endangerment.

In a disciplinary proceeding, conviction of a crime is conclusive evidence of guilt because it constitutes a violation of RPC 8.4 (Misconduct), which proscribes criminal conduct that reflects adversely on a lawyer’s honesty, trustworthiness or fitness as a lawyer. Accordingly, when the OAE moved for Final Discipline based on the convictions, the Disciplinary Review Board voted to disbar all three. The Supreme Court, which reviews all discipline, proved to be more forgiving than the DRB. Walter was indeed disbarred, a permanent sanction, but Legato and Kenyon were disciplined with indeterminate suspensions, meaning that at some future time, they may apply for reinstatement.

The decision came as no great surprise to many observers in the ethics world. It was consistent with principles set out in earlier cases, most notably, *In re Cohen,* 220 N.J. 7, 11 (2014), where a lawyer-legislator who had been convicted of keeping child pornography in his office had been disciplined with an indeterminate suspension. The *Cohen* court expressly refrained from establishing a bright-line rule requiring disbarment of all attorneys convicted of these crimes. It said its role was to impose the appropriate discipline, a determination driven not only by the gravity of the offense, but also requiring consideration of whether the crime was related to the practice of law, and any mitigating factors such as the respondent’s reputation and prior good conduct.

The *Legato* court, following *Cohen*, ruled there would be no newly-created class of strict liability disbarment crimes like those created by *In re: Wilson,* which mandated automatic disbarment for attorneys who intentionally stole or comingled trust funds. *Wilson* disallows consideration of the any mitigating factors — the amount involved, the number and frequency of violations, the victim’s forgiveness, the attorney’s rehabilitation or other factors. Disbarment is certain.

In the case of sexual misconduct involving children, there is no such rule. Discipline must be based on a fact-sensitive inquiry on a case-by-case basis. Hence, in some cases, as with Legato and Kenyon, an indeterminate suspension may be appropriate. This discipline, in effect, contemplates that a sexually deranged respondent may someday be cured or rehabilitated, since an attorney returning from any character-related suspension must prove rehabilitation to be reinstated. Theoretically, at least, the attorney might eventually be able to offer medical and social proof of having been cured of aberrant tendencies and anti-social behavior and be allowed reinstatement to the bar.

The defense lawyer in me rejoiced at the ruling, relieved that our Supreme Court understood what the public does not: that not all sexual acts against children are forcible rape. This court affirmed the need to discern between species of reprehensible acts. Without minimizing or whitewashing what the lawyers had done, the majority boldly refused to lump together all loosely-related child sex offenses and apply to all offenders the ultimate sanction.

It was bold because it would not be popular. “Normal” people react viscerally to any thoughts of sex involving children, especially prepubescent children. They are unable to look at these matters objectively. They see only vague lines of distinction between forcible sexual assault and internet predation, luring, fondling, solicitation, even peeping, and other acts we call perverted. The unnaturalness of such acts, the sinister circumstances, the innocence of the victim or intended victim, all make it easy for people to see the perpetrators as sub-human. Much of society would rank these criminals as worse than murderers, arsonists, kidnappers, bombers, human traffickers and others. Far beyond disbarment, many people would want these respondents dead. Defense lawyers know that “kiddie sex” cases are among the toughest to try, because the accused loses the presumption of innocence once the charges are read.

Not unlike surgeons who must be unaffected by the sight of blood, lawyers do not lose objectivity with cases that make others uncomfortable. We see these clients as someone’s spouse, uncle, father, sibling or child. We’re not representing faceless perverts who deserve the worst of punishment; our clients are sick — many are capable of healing, rehabilitation and growth. Every defense attorney has seen a client rise from abysmal depths on sentencing day to glorious heights after treatment, support and the passage of time. These respondents deserve that opportunity, as well. The majority got it right.

Having fully endorsed the opinion for the majority’s refusal to react like a squeamish John Q. Public in these cases, I turned to the dissent. Justice Albin alone dissented as to Legato and Kenyon. He said that all three should have been disbarred. This was intriguing. Liberal, insightful Justice Albin believed, as the DRB had, that all three convicted

lawyers should be disbarred. What could he have been thinking?

Let's take a look. Referring to *In re Wilson* and other cases where convictions resulted in disbarment, he wrote:

> It is difficult to reconcile the majority's position that those, such as Legato and Kenyon, who attempt to commit sexual crimes against children, are worthy of reformation and rehabilitation, but those who are driven by desperation to invade a trust account … are not?

He was not suggesting that *Wilson* be overturned. To the contrary, the *Wilson* rationale requires that we see the child sex issue from the public's point of view, since the true issues are public perception of lawyers and public confidence in the profession. We don't automatically disbar all attorneys who steal — just those who steal from clients. Why? To show the world that lawyers' trust accounts are sacrosanct, and that no lawyer who ever stole from trust would ever have the chance to do it twice.

The dissent understood that public confidence in lawyers and jurisprudence must not be shaken by the seeming need to allow a few dishonored colleagues the possibility of reinstatement to the bar. Referring again to the *Wilson* cases, Justice Albin wrote:

> Despite the potential for personal reformation and the severity of the discipline in such cases, we concluded that no result other than disbarment would satisfy the need for continued confidence of the public in the integrity of the bar and the judiciary. The maintenance of public confidence in the bar and our legal system has been the overarching goal of our disciplinary jurisprudence, even if the discipline in individual cases is seemingly harsh.

Sometimes you must cull the herd for the health of the group. The public — the same people who hire us and pay us and trust us and depend on us and refer us to their friends — will always loathe people like the respondents. Even if decades pass, and a future team of psychiatrists gives an ancient Mark Legato and Regan Kenyon clean bills of mental health, the public will still want assurance that those two will never be lawyers. And so, the dissent got it right, too.

The *Legato* case exposes some of the forces at work in legal ethics jurisprudence and reveals the complicated role that the Supreme Court plays as commander-in-chief of our profession and consumer advocate for our clients.

Perhaps next year we can discuss a case that affects *you*.

Garfinkle practices in Morristown, focusing exclusively on legal ethics, attorney discipline, bar admission and judicial misconduct. He is also an adjunct professor at Seton Hall University School of Law.
