

GETTING REAL WITH NEIL

By

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On Thursday, May 6, 2004, Neil Goldschmidt (“Goldschmidt”) publicly acknowledged a long-ago sexual relationship with a 14 year old babysitter while he was the Mayor of Portland. Several days later, he filed a Form B resignation with the Oregon State Bar (hereinafter “the Bar”). The Form B moots the need for the Bar to consider whether or how he would have been disciplined if he had not resigned, assuming that there was no other wrongdoing of any kind.¹ In our view, the discipline would have been severe.

Four preliminary points are worth getting out of the way:

- The stated purpose of attorney discipline is not to punish wrongdoing by attorneys but to protect the public. *In re Glass*, 308 Or 297, 304, 779 P2d 612 (1989).
- The fact that Goldschmidt was on inactive status at the time his conduct came to light is not a defense. The Supreme Court has jurisdiction over active and inactive Bar members. *In re Smith*, 318 Or 47, 50, 861 P2d 1013 (1993).
- As a general proposition, government lawyers and government officials who happen to be lawyers are held to the same standards of attorney ethics – neither higher nor lower – than lawyers in private practice. *See In re Gustafson*, 333 Or 468, 488 n. 10, 41 P3d 1063 (2002).
- There is no statute of limitations in disciplinary proceedings. *State ex rel Joseph v. Mannix*, 133 Or 329, 336, 288 P 508 (1930).

Turning to the merits, the fact that the relationship appears to have been unrelated to the practice of law is not a defense. Although some ethical rules only apply to attorneys acting as such, others apply 24/7/365. This includes DR 1-102(A)(2), which subjects a lawyer to discipline for

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¹ See Bar Rule 12.7.

committing, in or outside of practice, “a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness to practice law.” Moreover, DR 1-102(A)(2) does not require a criminal conviction as a prerequisite for discipline. *In re Kimmell*, 332 Or 480, 31 P3d 414 (2000). In fact, a criminal acquittal does not prevent the Bar from proceeding, and the Bar need only prove its case by clear and convincing evidence rather than proof beyond a reasonable doubt. *In re Allen*, 326 Or 107, 119, 949 P2d 710 (1997).

In the present case, the criminal acts are clear. A sexual relationship between an adult and a 14 year old is statutory rape. *See, e.g.*, ORS 163.355 (2003). In fact, the crime of rape in the third degree has been the same since 1971.

So what does such repeated criminal activity say about the lawyer’s fitness as a lawyer? From a disciplinary point of view, the answer almost certainly is “a lot”. This was manifestly serious, unambiguous criminal and prolonged conduct. It also reflected a triumph of personal gratification over the commonly acknowledged duties of adults to children. Such behavior shows a serious disrespect for law and an equally serious disrespect for the rights of potentially vulnerable individuals. These are qualities that the public needs lawyers to have.²

In *In re Wolf*, 312 Or 655, 826 P2d 628 (1992), the Oregon Supreme Court suspended Rob Wolf for 18 months as a result of a one night stand in the back of a limousine with a 16 year old personal injury client. In all likelihood, the only thing that saved Wolf from disbarment was the lack of a complaint by the minor or her parents. Although Goldschmidt’s case is different in several respects, the differences cut both ways. We believe that *In re Wolf* would have set the floor, but not the ceiling, on the sanction that Goldschmidt would have received.

² In order for a criminal act to reflect adversely on a lawyer’s fitness to practice law, there must be a rational connection between the criminal conduct and the lawyer’s fitness to practice law aside from the criminality alone. *In re White*, 311 Or 573, 589, 815 P2d 1257 (1991). The *White* court considered the following factors important: (1) The lawyer’s mental state, (2) whether the act demonstrates disrespect for the law, (3) the presence or absence of a victim, (4) the extent of actual or potential injury to the victim, and (5) the presence or absence of a pattern of criminal conduct. *Id.*