Supreme Court of New Jersey
Disciplinary Review Board
Docket No. DRB 23-091
District Docket No. XIV-2022-0111E

In the Matter of	:
Nino F. Falcone	:
An Attorney at Law	:

Decision

Argued: June 21, 2023

Decided: October 4, 2023

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

Joseph P. Castiglia 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 reciprocal discipline filed by the Office of Attorney Ethics (the OAE), pursuant to R. 1:20-14(a), following the Court's July 19, 2022 Order censuring respondent and imposing a permanent bar from future judicial service in connection with an Advisory Committee on

Judicial Conduct (the ACJC) proceeding brought against him in his capacity as a municipal court judge.

The OAE asserted that, in the ACJC matter, respondent was determined to have violated the equivalents of New Jersey RPC 8.4(b) (committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects), RPC 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation), and RPC 8.4(g) (engaging, in a professional capacity, in conduct involving discrimination – sexual harassment).

For the reasons set forth below, we determine to grant the OAE's motion and conclude that a one-year suspension is the appropriate quantum of discipline for respondent's misconduct.

Respondent earned admission to the New Jersey bar in 1984. During the relevant period, he maintained a practice of law in North Bergen, New Jersey and served as a judge in the Municipal Court for the Township of North Bergen.

On October 2, 2001, respondent was reprimanded for his mishandling of two personal injury matters, in violation of RPC 1.1(a) (committing gross neglect); RPC 1.3 (lacking diligence); RPC 1.4(b) (formerly RPC 1.4(a)) (failing to communicate with a client); and RPC 8.4(c). In re Falcone, 169 N.J. 570 (2001) (Falcone I). In that matter, respondent represented a

husband and wife in separate personal injury actions. In both actions, respondent allowed his clients' civil complaints to be dismissed, took no measures to reinstate them, and performed no additional work in furtherance of his clients' interests. He also failed to respond to his clients' repeated requests for information. Further, he misrepresented the status of both cases, falsely informing his clients that their cases were progressing and that any delays were attributable to the court. In the Matter of Nino F. Falcone, DRB 00-135 (February 6, 2001) at 2-3,7-8.

On December 9, 2009, respondent was censured for having violated RPC 1.15(a) (failing to safeguard funds); RPC 1.7(b) (engaging in a conflict of interest); and RPC 8.4(c). In re Falcone, 201 N.J. 12 (2009) (Falcone II). In that matter, respondent represented the seller in a real estate transaction. He received the buyer's $12,000 check representing a deposit for the sale; however, he lost the check and, therefore, never deposited it in his trust account. Nonetheless, the following week, respondent sent a letter to the mortgage company, representing that he was holding the buyer's $12,000 deposit. Further, he knowingly allowed his client to sign the real estate settlement statement which contained a misrepresentation with respect to the deposit.

Respondent also engaged in a concurrent conflict of interest by representing a client in the sale of a house to the buyer and, at the same time, representing the buyer in her purchase of another property. Although respondent could have cured the conflict by obtaining a written waiver from both clients, he admittedly failed to do so. In determining to impose a censure, we weighed, in aggravation, that respondent had failed to learn from his prior mistakes since his prior reprimand stemmed, in part, from his misrepresentations. In the Matter of Nino F. Falcone, DRB 09-102 (September 29, 2009) at 7.

Effective September 12, 2019, following his arrest for fourth-degree criminal sexual contact, in violation of N.J.S.A. 2C:14-3(b), the Court temporarily suspended respondent from his judicial duties.

On August 31, 2020, respondent retired from judicial office.

On July 19, 2022, the Court adopted the findings and recommendations of the ACJC and censured respondent for his violation of Canon 1, Rule 1.1 of the Code of Judicial Conduct (a judge shall participate in establishing, maintaining, and enforcing, and shall personally observe, high standards of conduct so the integrity, impartiality, and independence of the judiciary is preserved); Canon 1, Rule 1.2 (a judge shall respect and comply with the law); Canon 2, Rule 2.1 (a judge shall act at all times in a

manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety); and Canon 5, Rule 5.1(A) (a judge shall conduct extrajudicial activities in a manner that would not demean the judicial office). In addition, the Court permanently barred respondent from future judicial office. In re Falcone, 251 N.J. 476 (2022).

We now turn to the facts of this matter.

The events underlying this matter occurred on August 29, 2019, when J.D.,[1] a business acquaintance of respondent, went to his law office on behalf of her employer, a physician, with whom respondent had maintained a long-standing attorney-client relationship.

Specifically, J.D. was employed as the office manager for the physician's medical practice, where she had worked since April 2007. She also managed several of her employer's rental properties. Respondent, a real estate attorney, represented J.D.'s employer in various legal matters related to the rental properties he owned. Periodically, respondent met with J.D., in his office, to

[1] To preserve the victim's anonymity, she is referred to by the initials J.D. for "Jane Doe." In re Seaman, 133 N.J. 67, 75 (1993) (directing that "judicial disciplinary cases involving … activities that humiliate or degrade those with whom a judge comes into contact, should preserve the anonymity of the alleged victim."). For the same reason, her employer's name has been omitted from our decision in this matter.

discuss legal issues regarding the rental properties and any pending legal disputes.

Respondent and J.D. had known one another since 2007, by virtue of her employment with the physician. In addition, respondent previously had represented J.D. and members of her family in personal legal matters and, as of August 29, 2019, they had known one another for twelve years. Given the proximity of respondent's law office to J.D.'s office, which were located on the same block, J.D. occasionally would walk to respondent's office without an appointment.

On August 29, 2019, as she consistently had done in the past, J.D. went to respondent's law office at her employer's request, without an appointment, to discuss her employer's then-pending real estate matters. When she arrived, which was "around lunchtime," J.D. rang the doorbell and respondent "buzzed" her into the building. Respondent was seated at a conference table when J.D. entered his second-floor office. No one else was present in his office on that date. J.D. sat across from respondent and, after a brief discussion about her recent birthday and visit to Spring Lake, J.D. discussed the real estate legal issues with respondent. At the conclusion of the meeting, respondent and J.D. embraced in a hug.

The circumstances of the embrace were contested.

According to J.D., respondent approached her at the conclusion of their meeting, said happy birthday, and "leaned towards a hug" with outstretched arms. J.D. testified that she previously had never hugged respondent, who is forty-five years older than her, during their twelve-year professional relationship. Although she felt uncomfortable, J.D. testified that she gave respondent a "halfway hug," at which point respondent pulled her toward him into a prolonged embrace. Respondent also began rubbing her back "up and down" with both of his hands.

J.D. testified that she was "uncomfortable," and immediately attempted to push respondent away, but respondent placed his hands on either side of her breasts and ribcage and held her tightly. J.D., who is 5'5" continued to resist, however, respondent, who is 5'10" and weighs approximately 280 pounds, placed his hands directly on her breasts and squeezed them, prompting J.D. to push him away.

Respondent then grabbed J.D.'s wrist and, according to J.D., said "come on, let me touch you, let me play with you." J.D. recounted that all she could think about in this moment was "trying to get out [of the] office because he's a heavy guy and he's grabbing my wrist and he's like, come on, let me touch you, let me play with you and I'm like no, no." J.D. continued to struggle with respondent, repeatedly telling him "no," until he eventually released her wrist.

Once respondent released J.D.'s wrist, he reached for his wallet and offered J.D. "birthday money," which she refused. J.D. testified that she abruptly left respondent's office, "ran down the steps," and returned to her workplace, where she told her boss what had just transpired.

Respondent, on the other hand, testified that, after he and J.D. had concluded their discussion relating to the real estate matter, he "got up to escort her out," and she informed him it was her birthday to which he replied "congratulations, happy birthday." According to respondent, J.D. then told him to hug her because it was her birthday, to which he replied "I prefer not to." (OAEbp7;T88). However, J.D. had her arms outstretched, came closer to respondent, and hugged him; in response, he patted her back.

Although he admittedly touched the sides of J.D.'s breasts after reluctantly hugging her, he denied squeezing the front of her breasts. Respondent maintained that he was "embarrassed" and that the touching had been "accidental."

> It was not something that I usually hug people, or clients or anything else. And when she moved away and I moved away, we both moved away from each other, simultaneously, I sensed that there was a change in her manner and in her whatever, that something had occurred in her that alerted me to say that was not appropriate. I was also surprised by my behavior, the fact that my – as we moved away from each other, my hand did touch the side of her breast, and I felt embarrassed by the whole gesture.

[T88-T89.] [2]

Respondent denied grabbing J.D.'s wrist, pulling her toward him, offering her money, or stating anything similar to "let me touch you or let me play with you."

J.D. testified that, immediately upon her return to her office, she told her employer about what respondent had just done, stating that she felt "disgusted," "violated," "angry," and "upset" by respondent's physical and verbal assault. Later that same day, while crying in her office restroom, J.D. also told her co-worker what respondent had done to her.

That evening, after J.D. told her husband about the events of the day, they went to the Teaneck Police Department to report the incident; the department advised her to go to the Hudson County Prosecutor's Office. When J.D. told her mother, who worked with victims of sexual assault, her mother directed J.D. to the special victims unit (the SVU) of the Hudson County Prosecutor's Office.

The next day, on August 30, 2019, J.D. was interviewed by a detective within the SVU. Using a recorded telephone line located in an interview room, J.D. called respondent – this investigation tactic is known as a "consensual

[2] "T" refers to the transcript of the January 26, 2022 ACJC formal hearing;
"ExD" refers to the ACJC's April 6, 2022 findings and recommendations to the Court;
"Rb" refers to respondent's June 2, 2023 letter brief to the Board.

intercept." During the consensual intercept, which was video and audio recorded, respondent admitted to J.D. that he had touched her "inappropriately;" thanked her for not telling her employer; and apologized to her, asking "why didn't [she] smack him or kick him in the ass when he did what he did."[3]

> **J.D.:** I feel uncomfortable. I've known you for years and I've been wanting to talk to you … I didn't tell the doctor nothing. I didn't want to bring – I wanted to talk to you, but, you know, you touched my breasts and then you asked me to play with me and …
>
> **RESPONDENT:** I know, it was just an impulse, and I do apologize. And I would appreciate if you don't talk to the doctor about it. All right?
>
> ---
>
> **J.D.:** Like did you think by you touching my breasts or asking me to play with me that I was going to let you do that? …
>
> **RESPONDENT**: No, no, it was – oh, my God, J.D. I don't know what it was, but it's over. You know I didn't mean to do it. You should have slapped my face, kicked [me] in the ass or something, you know. I know, J.D., you're not that kind of a person, of course you're not … And I'm sorry I caused a certain amount of anxiety.
>
> **J.D.:** What are you sorry about?
>
> **RESPONDENT:** I'm sorry that I did something that I shouldn't have done, and I really apologize. Absolutely.

[3] A video recording and a transcript of the consensual intercept were admitted into evidence during the ACJC proceeding but were not included as part of the OAE's motion. The below colloquy was excerpted from the ACJC's presentment to the Court.

> **J.D.:** I want to hear you say, though. I want you to hear what you did to me ….
>
> **RESPONDENT:** I inappropriately touched you, okay, that's what I did, and it –
>
> **J.D.:** Right.
>
> **RESPONDENT:** -- was not in any way to embarrass you – or I'm embarrassed to talk about it, absolutely embarrassed. And I want you to feel comfortable that it will never, ever happen again, that's all.
>
> [ExDpp10-11, quoting P-11.]

In the course of the SVU's investigation, detectives interviewed J.D., her husband, her employer, and her co-worker.[4] Respondent attempted to contact J.D. by telephone following the incident but, prior to the filing of any criminal charges, J.D. did not speak to him.

On September 12, 2019, respondent was arrested and charged with fourth-degree criminal sexual contact, in violation of N.J.S.A. 2C:14-3(b). On March 12, 2020, he was admitted into the pretrial intervention program (PTI). On May 18, 2021, after successfully completing the conditions of PTI, the charge against respondent was dismissed.

[4] The accompanying witness statements were admitted by the ACJC as fresh complaint evidence supportive of J.D.'s credibility, and not for the truth of the matters asserted within each statement. Exhibits P-4, P-5, P-7, and P-17. The witnesses did not testify at the ACJC proceeding.

On June 7, 2021, following its investigation, the ACJC issued a formal complaint, charging respondent with having violated Canon 1, Rule 1.1; Canon 2, Rule 2.1; and Canon 5, Rule 5.1(A) of the Code of Judicial Conduct, based upon his offensive touching of J.D. and the resulting criminal charge.

In respondent's July 27, 2021 verified answer submitted to the ACJC, he admitted certain factual allegations, denied others, and denied having violated the charged Canons.

The ACJC hearing, at which J.D. and respondent both testified, took place on January 26, 2022. Respondent was represented by Jeffrey G. Garrigan, Esq.

J.D. testified, as detailed above, as to her account of the events that occurred that day. In addition, she testified that, just prior to the August 29, 2019 incident, respondent had complimented her on two occasions which, although she found it "a little unusual," she "didn't think anything of it because I've known him for so many years" and "never expected for what happened to have happened."

When questioned whether it was possible respondent accidently or inadvertently had touched her breasts, J.D. stated "no." Further, she testified that respondent had never told her that his actions were accidental or that she had misinterpreted his actions.

On cross-examination, she explained that the events that transpired left her "in a complete shock" that day. She explained:

> It was just affecting everything. I felt disgusted, I felt violated, I felt – I didn't – I was just angry, I was upset, I didn't know what to do, where to turn at the current moment. I didn't even want to go home and tell my husband what was going on because he would have knew I came home and he would have asked me what happened and it would have made the situation worse.
>
> [T52.]

J.D. testified that, following the incident, respondent called her office two or three times to speak with her; however, she declined to speak with him. She testified that she believed respondent had reached out to her in an attempt to bribe her. Specifically, during cross-examination, she explained:

> Like why else would he be calling my office right away the day after he did that? Why would he be calling my office? If it was a matter to do, he could have asked to speak to my employer which he did not. He specifically asked to speak with me. Come on. He could have asked to speak to my employer if it had something to do with any other matter, not with me right after it happened. I don't own those properties, my employer does, not me. I just work for my employer. He could have directly spoke to him about any other matter, not ask to speak to me.
>
> [T55-T56.]

J.D. also acknowledged that, during the consensual intercept, respondent did not specifically state that he had grabbed or squeezed her breasts.

Respondent, as detailed above, denied having intentionally touched the side of J.D.'s breast; denied touching the front of her breasts; denied offering her money from his wallet; and denied stating anything similar to "let me touch you or let me play with you." When questioned why he had hugged J.D., after having testified that he had told J.D. he preferred not to hug her, respondent stated "[s]he came closer to me" and "she had extended her arms" and "was looking for a hug." Respondent testified that he patted her on her back "to congratulate her on her birthday." Respondent disputed J.D.'s version of events.

Although he admitted that he had attempted to call J.D. the day after the incident, he claimed it was to remind her employer that he had two summonses that needed to be handled. When J.D. did not take his phone call, he left a message with her employer's office and, a few days later, "two other employees of the doctor's office came to [his] office and picked up the two summonses."

When questioned about his admissions to J.D. during the consensual intercept, respondent claimed he had apologized to J.D. for "inadvertently and inappropriately" touching the sides of her breasts as she was getting away from the hug. Respondent testified that he "understood why she was upset. I was upset. I understood why she was embarrassed. I was embarrassed." Respondent also explained that he had wanted J.D. to know that the situation was "totally out of character" for him. Specifically, respondent stated:

> And I was trying to make it known to her that this was something that was totally out of character. There was never, ever going to be a personal, you know, I never thought of it that I would get caught in a situation that would be embarrassing to me, as well as to the client. And I tried to apologize for it and I think I tried to apologize and I did not realize that she was also taping me at the same time.
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> [T92.]

During his cross-examination, respondent reiterated that he had apologized to J.D. during the consensual intercept simply because he "sensed that she was offended." Specifically:

> Q: We are hearing today for the first time, Judge, that it was inadvertent when you touched the victim's breasts. If that's what you say, if that's your position that it was inadvertent, it wasn't intentional, you didn't mean it, why did you apologize according to my count eight times to the victim during that phone call?
>
> A: Because I sensed she was offended, that when she moved away from me that she was not the same person when we were talking in the conference room. She was offended. I understand that.
>
> Q: She was offended did you say?
>
> A: She was offended, as well I was offended.
>
> Q: What were you offended about?
>
> A: Because it should never have happened. There should never have been an embrace, there should never have been a hug because that's not what I do.
>
> Q: But you did that this day, didn't you?

> A: Yes, because she says, hug me, it's my birthday. For 15 years I've known her and why not. I mean, if she says it's her birthday, she's asking for a hug, she's coming close to me, what else is there to do, but just get over it.
>
> [T105-T106.]

Respondent explained that, when he told J.D. during the consensual intercept that she should have slapped him or kicked his ass, he did so because she was offended. "I said if you were offended, I apologize. And if you want to slap me in the face and kick me in the ass, that's fine." Further, he explained that his apology to her was for his inadvertent touching of her breasts.

Respondent also testified that the touching was not done for his own personal gratification or malice. Nor did he do it to embarrass or humiliate J.D. When asked by a member of the ACJC whether he could think of any reason why J.D., who had known respondent for more than twelve years at the time of the incident, would testify as she did regarding respondent having squeezed her breasts, respondent replied:

> It's hard for me to fathom after 15 years of association with J.D., it's very, very difficult for me to understand why she would say that and it's equally difficult for me to understand why she brought these charges against me. And that, to me, is I think it's going to be with me for the rest of my life, I mean, the embarrassment of this allegation, the embarrassment of having my family go through it, the notoriety that was given to the court, and it's still something that I wrestle with every day,

> Judge, and I don't quite understand why this happened this way.
>
> [T111.]

Respondent admitted to having been charged with criminal sexual contact, for which he was admitted into and successfully completed PTI. He was not required to plead guilty to the criminal charge, which ultimately was dismissed. When questioned why he had agreed to go into PTI, respondent explained:

> Well, it was a horrible experience to be arrested, I mean, I was concerned about my wife of 52 years, I was concerned about my daughter, I was concerned about my three grandchildren and I didn't want to put them through the ordeal of a trial. I didn't want them to suffer as much as I've been suffering as a result of the charge. So, I thought that PTI upon [my attorney's] recommendation was the appropriate way on which we could resolve this matter without going through an embarrassing trial.
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> [T94-T95.]

Finally, he explained that he had represented female clients over the course of his legal career and had never been accused of acting inappropriately Likewise, while acting as a municipal court judge – a position he had held for thirty-two years prior to his retirement – no complaints had been made against him regarding his behavior. In fact, prior to August 29, 2019, respondent testified that he had never hugged a client or a client's representative. Further, respondent had retired as a professor of English at New Jersey City University

after forty-seven years of service and, during his tenure, he had never been accused of anything even remotely similar to what J.D. had accused him of doing.

On April 6, 2022, the ACJC filed its presentment with the Court, in which the committee concluded that the evidence had clearly and convincingly established that respondent had committed fourth-degree criminal sexual contact, in violation of N.J.S.A. 2C:14-3(b), as well as the charged violations pursuant to the Code of Judicial Conduct.

In reaching its determination, the ACJC acknowledged the "stark dichotomy" between J.D.'s account of the events occurring at the conclusion of the business meeting, and respondent's account. The committee determined, however, that respondent had been "duplicitous" when testifying in defense of the ethics charges, that his testimony was contrived and, indeed, lacked any semblance of credibility.

> Having considered Respondent's and J.D.'s testimony and the evidence of record, we find J.D.'s account, which is supported by the record, credible, and Respondent's newly proffered version of events, which bears no reasonable relationship to the evidence of record, wholly contrived. Indeed, at points, Respondent's proffered testimony is demonstrably inconsistent with that of his statements to J.D. during a recorded telephone conversation less than two weeks after the events of August 29, 2019.
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> [ExDp7.]

For instance, the ACJC noted that respondent had admitted, during the consensual intercept, that he inappropriately touched J.D. in the manner she described and had asked to let him "play with her," both of which he attributed to an "impulse." Yet, while testifying before the ACJC, respondent attempted to "recast his admittedly inappropriate touching of J.D. as an 'accident' that was limited to the 'side[s] of [J.D.'s] breasts' occurring while they were separating from a hug that J.D. purportedly initiated."

The ACJC also concluded that respondent's proffered explanation that his use of the word "impulse," during the consensual intercept, related to his having "inadvertently" touched J.D.'s breasts as incredible.

> Respondent's proffered explanation does not coincide with that to which he attributed the impulse, namely, his touching of J.D.'s breast and asking J.D. to allow him to "play" with her. Indeed, at no point during their recorded conversation on September 11, 2019 did Respondent deny intentionally touching J.D.'s breasts or state that J.D. initiated their embrace.
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> Respondent's proffered account is, likewise, incongruous with his statements to J.D. during the Consensual Intercept, wherein he requested J.D. not discuss the incident with her employer and asserted that she should have "slapped [his] face, kicked [him] in the ass or something …" in response to his offensive touching of her breasts and body. Had the encounter between J.D. and Respondent occurred as Respondent described and his touching of her breasts merely accidental, there would have been no reason for J.D. to slap or kick Respondent and no reason to keep the incident a secret from J.D.'s employer.

[ExDpp12-13.]

On the other hand, the ACJC found J.D. to be credible, highlighting the consistency of her testimony and her August 29, 2019 telephone statement to the SVU, mere hours after the incident, as well as her recorded, in-person interview with the SVU detective on August 30, 2019, both of which were admitted to evidence. Moreover, the ACJC noted that "J.D.'s demeanor when testifying before this Committee, which included moments in which she wept openly, resembled J.D.'s recorded demeanor during the SVU's investigation and further buttressed J.D.'s credibility."

After weighing the evidence, the ACJC concluded that respondent had acted with intent when he grabbed J.D.'s breasts, without her consent, having by his own admission "acceded to an 'impulse' to do so." Further, the ACJC found that respondent repeatedly had sought to avoid accountability for his conduct both "when interacting with J.D. immediately thereafter and when appearing before this Committee more than two years later." Indeed, the ACJC emphasized:

> In this regard, Respondent attempted initially to assuage J.D. with an offer of "birthday money," which she refused. Failing that, Respondent promised J.D. he would never repeat this misconduct and coupled that apology with a request that she not tell her employer about his aberrant behavior. When ultimately required to account publicly and for the first before this Committee for his victimization of J.D., Respondent

> again sought to conceal his misconduct by recasting himself the victim of an unfortunate accident involving J.D.'s breasts that is wholly at odds with the facts of record. Respondent's demonstrable dishonesty, under oath, has revictimized J.D. who was compelled to relive this painful experience publicly with the knowledge that Respondent denies any responsibility for its occurrence.
>
> These circumstances – Respondent's physical and verbal assault of J.D., attempts to solicit her silence, and demonstrably false testimony before this Committee – shock the conscience and reveal a lack of self-control and sound judgment of Respondent's part, and a disrespect for the rule of law and judicial disciplinary process.
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> [ExDpp13-14.]

The ACJC concluded that respondent's offensive touching of J.D.'s breasts, standing alone, warranted a censure and his permanent disqualification of judicial service. The ACJC emphasized that "had Respondent held judicial office at the time of these proceedings, we would be recommending his removal from office."

Respondent's additional misconduct – namely, his pervasive and persistent attempts to conceal his misconduct, initially with an offer of money to J.D. and thereafter by testifying falsely before the committee – cemented the committee's recommendation. The ACJC concluded that respondent's false swearing and attempts to manipulate the victim "irretrievably impugn [his] integrity and that of the Judiciary."

In mitigation, the ACJC considered six character letters submitted by four attorneys and two former clients, but stated that "[w]hile we appreciate these comments and recognize [r]espondent's service as a municipal court judge for the past 32 years, neither mitigates [r]espondent's significant abuses in this instance."

Accordingly, the ACJC recommended that respondent receive a censure and be permanently barred from judicial office. On July 19, 2022, the Court adopted the ACJC's findings and recommendation. In re Falcone, 251 N.J. 476 (2022).

Respondent failed to notify the OAE of his judicial discipline, as R. 1:20-14(a)(1) requires.

In support of its motion, the OAE asserted that respondent's unethical judicial conduct equated to violations of RPC 8.4(b); RPC 8.4(c); and RPC 8.4(g).

The OAE acknowledged the wide range of discipline that has been imposed for offensive touching and sexual harassment but argued that respondent's conduct was most similar to the attorneys in In re Wolfson, 178 N.J. 457 (2004), and In re Gernert, 147 N.J. 289 (1997), who, respectively,

received six-month and one-year terms of suspension.[5] Both cases are discussed in detail below.

In aggravation, the OAE emphasized that respondent's testimony before the ACJC was deemed "duplicitous." Further, respondent failed to report his judicial discipline to the OAE, as R. 1:20-14(b)(1) requires. Thus, the OAE recommended that respondent's misconduct be met with a six-month or one-year term of suspension.

In both his written submission to us and during oral argument, respondent, through his counsel, acknowledged the severity of the offense but urged imposition of a censure based upon substantial mitigation. In his brief, respondent did not dispute the misconduct, stating only that "[w]hether the event

[5] The OAE also cited the following disciplinary precedent where lesser discipline was imposed: In re Pinto, 168 N.J. 111 (2001) (reprimand; attorney sexually harassed a vulnerable client; attorney engaged in "extremely crude," explicit conversations about what he could do sexually with the client; on one occasion massaged her shoulders, kissed her on the neck; on another occasion, he slapped the client on her buttocks); In re Hyderally, 162 N.J. 195 (1999) (reprimand; on a motion for reciprocal discipline, attorney made sexual advanced toward two legal aid clients); In re Pearson, 139 N.J. 230 (1995) (reprimand; attorney had a sexual relationship with a client who lacked the capacity to freely consent to the relationship due to her mental health and personal history); In re Liebowitz, 104 N.J. 175 (1985) (reprimand; attorney engaged in sexual misconduct with an assigned client; he invited the client to his apartment, asked her to enter his bedroom and sit on the bed next to him while he made telephone calls; unbuttoned the top of her dress; kissed her on the lips, and removed his clothing; after the client told him that she had to leave and went into the living room, the attorney pulled her back toward the bedroom, touched her, and placed her hand on his genital area); In re Addonizio, 95 N.J. 121 (1984) (three-month suspension; attorney convicted of fourth-degree criminal sexual assault).

occurred exactly as the complaining witness said, or as the respondent remembers, it remains deserving of a censure." During oral argument, respondent admitted that it was a brief moment of serious misconduct, explaining that good people sometimes do inexplicable things.

In support of a censure, respondent argued that his misconduct was most analogous to the attorney in In re Liebowitz, 104 N.J. 175 (1985), who was reprimanded for his sexual misconduct with a client. In Liebowitz, the attorney was appointed to represent an indigent client in a child custody dispute. At their initial meeting, the attorney invited the client to dinner that evening and, subsequently, to his apartment. The client believed she was going to his apartment to discuss her impending court hearing. Id. at 177. While at the attorney's apartment, the client consumed a small amount of alcohol and, at the attorney's request, went to his bedroom and sat next to him on the bed while he made business telephone calls. The attorney suggested they commence sexual activity but when he unbuttoned the top of her dress, the client verbally resisted and pushed his hand away. The attorney then kissed her on the lips, and she stated "I think I had better go." Ibid.

The attorney then removed his clothing, urged her to join him, but the client reiterated that she had better leave. When she returned to the living room, the attorney, completely nude, followed her, urging that she return to the

bedroom and pulling her back into the bedroom and onto the bed. He then touched her intimate parts and placed her hand on his genital area to assist his sexual gratification. Ibid. The client then insisted on leaving, and the attorney relented.

In imposing a reprimand, the Court, adopting the Board's decision, accorded significant weight to the following mitigating factors: lack of prior discipline; that the attorney was fully aware of the seriousness of his conduct and had discontinued his practice of socializing with clients; and proof of his good character. Id. at 181.

Based upon the similarities between Liebowitz and the instant case, respondent maintained that the discipline should be in accord. Although respondent acknowledged, in response to our questioning, that Liebowitz was decided in 1985, he argued that fairness required that the imposition of severe discipline for similar misconduct be prospective only. Further, respondent distinguished matters where more severe discipline had been imposed, citing In re Gallo, 178 N.J. 115 (2003) (attorney sexually preyed on vulnerable clients; acts were directly related to the practice of law); In re Sicklinger, 228 N.J. 525 (2017) (three-month suspension; the attorney had engaged in years' long pattern of inappropriate sexual conduct); In re Addonizio, 95 N.J. 121 (three-month suspension; attorney pleaded guilty to a fourth-degree crime).

Next, respondent argued that, as the reviewing entity, we need not conclude that respondent had fabricated his version of events, notwithstanding the ACJC having "excoriate[d] him for giving what it thought was contrived testimony." Rather, respondent maintained:

> Experience teaches us that a victim is likely to remember a terrible experience in the worst light; and that a perpetrator, especially in the case of an aberrational event, is likely to remember it in a way that minimizes his guilt, often because he is unable to admit even to himself that he did such a thing.
>
> [Rbp4.]

Stated differently, a conclusion that J.D.'s version of events occurred does not require a determination that respondent "lied." Rather, respondent argued that common experience is such "that people often remember things as they wish had been rather than as it may have been."

Respondent acknowledged his disciplinary history but argued that it should not be considered in aggravation based on its remoteness (reprimand (2001) and censure (2009)), and that both matters involved dissimilar misconduct to the instant matter.

In mitigation, respondent referred to his long and distinguished career in education, at the bar, and on the bench, "entirely unmarred by any other act of sexual misconduct." In further mitigation, respondent stated that the conduct was aberrational. Indeed, respondent has been married for fifty-two years, is a

father and grandfather, and "save this single aberrational event, has been above reproach." Further, respondent, who is eighty-two years old, is winding down his practice of law and intends to retire by December 31, 2023.

Alternatively, respondent urged that we defer any term of suspension until such time as respondent seeks readmission to the bar, following his impending retirement. In support, respondent cited In re Sicklinger, 228 N.J. 525 (2017), where the Court imposed a deferred three-month disciplinary suspension for an attorney's act of lewdness, pending the attorney's application for readmission to the bar, as the attorney's law license already had been administratively revoked. Respondent further asserted that the attorney in Sicklinger had engaged in more severe sexual misconduct and, thus, a three-month suspension "should be the upper limit of the disciplinary spectrum" in the instant matter.

Following our review of the record, we determine to grant the OAE's motion for reciprocal discipline. In New Jersey, judicial discipline serves as the basis for reciprocal attorney discipline. In accordance with R. 1:20-14(c), where a judge has been removed or disciplined pursuant to R. 2.14 or R. 2.15, those proceedings "shall be conclusive of the conduct on which that discipline was based in any subsequent disciplinary proceeding brought against the judge arising out of the same conduct." R. 1:20-14(c). In such circumstances, attorney disciplinary proceedings may be taken, in accordance with R. 1:20-14(a)(2)

through (5), and "[t]he sole issue to be determined . . . shall be the extent of final discipline to be imposed." R. 1:20-14(b)(2) and (3). See also In re Yaccarino, 117 N.J. 175, 183 (1989) ("determinations made in judicial-removal proceedings are conclusive and binding in subsequent attorney disciplinary proceedings").

Like attorney disciplinary proceedings, New Jersey judicial disciplinary proceedings are subject to a clear and convincing standard of proof. R. 2:15-15(a). Upon presentment to the Court by the ACJC of its recommendation for judicial discipline, the Court independently determines whether the record satisfies that demanding burden of proof. In re Williams, 169 N.J. 264 (2001). "Clear-and-convincing evidence is that which produce[s] … a firm belief or conviction as to the truth of the allegations sought to be establishes, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the precise facts at issue." In re Seaman, 133 N.J. at 74-75. Here, the Court adopted the ACJC's findings and recommendations. In re Falcone, 251 N.J. 476.

Generally, reciprocal discipline proceedings in New Jersey are governed by R. 1:20-14(a)(4), which provides in pertinent part:

> The Board shall recommend the imposition of the identical action or discipline unless the respondent demonstrates, or the Board finds on the face of the

> record on which the discipline in another jurisdiction was predicated that it clearly appears that:
>
> (A) the disciplinary or disability order of the foreign jurisdiction was not entered;
>
> (B) the disciplinary or disability order of the foreign jurisdiction does not apply to the respondent;
>
> (C) the disciplinary or disability order of the foreign jurisdiction does not remain in full force and effect as the result of appellate proceedings;
>
> (D) the procedure followed in the foreign matter was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or
>
> (E) the unethical conduct established warrants substantially different discipline.

In our view, subsection (E) applies in this matter because the unethical conduct established by the record warrants substantially different discipline. Specifically, pursuant to disciplinary precedent, respondent's violations of the Rules of Professional Conduct warrant the imposition of a term of suspension, and not the discipline (a censure) imposed in connection with the judicial disciplinary proceeding, which is governed by different Rules and precedent than those governing attorney discipline in New Jersey. Likewise, although respondent also was permanently barred from judicial service, disciplinary precedent does not support disbarment for his misconduct.

Turning to the charged violations, we determine that the record contains clear and convincing evidence that respondent violated RPC 8.4(b), RPC 8.4(c), and RPC 8.4(g).

RPC 8.4(b) prohibits an attorney from committing "a criminal act that reflects adversely on a lawyer's honesty, trustworthiness or fitness as a lawyer." Respondent violated this Rule when, without consent, he touched and squeezed J.D.'s breasts. Respondent's conduct in this respect constituted criminal sexual contact, a crime of the fourth degree. See N.J.S.A. 2C:14-3(b).

Although respondent was charged with fourth-degree criminal sexual contact, in violation of N.J.S.A. 2C:14-3(b), that charge was dismissed following his successful completion of PTI. It is well-settled, however, that a violation of RPC 8.4(b) may be found even in the absence of a criminal conviction. See In re Gallo, 178 N.J. 115, 121 (2003) (the scope of disciplinary review is not restricted, even though the attorney was neither charged with nor convicted of a crime); In re McEnroe, 172 N.J. 324 (2002) (the attorney was found to have violated RPC 8.4(b), despite not having been charged with or found guilty of a criminal offense).

Criminal "sexual contact" is defined as "an intentional touching by the victim or actor, either directly or through clothing, of the victim's or actor's intimate parts for the purpose of degrading or humiliating the victim or sexually

arousing or sexually gratifying the actor." N.J.S.A 2C:14-1(d). Pursuant to N.J.S.A. 2C:14-3(b), a person is "guilty of criminal sexual contact if he commits an act of sexual contact with the victim under any of the circumstances set forth in [N.J.S.A. 2C:14-2(c)(1) through (5)]," among which includes committing the act "without the victim's affirmative and freely-given permission but the victim does not sustain severe personal injury." N.J.S.A. 2C:14-2(c)(1).

Here, the evidence presented to the ACJC clearly and convincingly established that, on August 29, 2019, respondent grabbed and squeezed J.D.'s breasts, without her permission or consent. Respondent's conduct was for his own sexual gratification. Indeed, he implored J.D. to let him "play" with her. J.D. unequivocally testified as to respondent's offensive touching of her breasts, against her will and despite her protestations. Immediately following the incident, she reported respondent's misconduct to her employer and, subsequently, her co-worker. Later that same date, she told her husband that respondent had grabbed her breasts, without her permission, and, together, they went to the police department to file a report. In the course of the ensuring criminal investigation, a detective took witness statements from J.D.'s employer, co-worker, and husband; those statements were admitted to evidence by the ACJC to demonstrate that J.D. had made consistent, fresh complaints about respondent's conduct. "Consistency of testimony, both internally and

between witnesses, is an important indicator of truthful testimony." In re Seaman, 133 N.J. at 88.

Further, during the consensual intercept, respondent repeatedly apologized to J.D., claiming that he had acted on "impulse." The video recording and transcript of the consensual intercept were admitted to evidence by the ACJC, without objection by respondent. Although respondent attempted, during the judicial disciplinary proceeding, to walk back from his admissions and apologies made during the consensual intercept – a call that took place within two weeks of the incident – we, as did the ACJC, reject his belated explanation as incredible. Specifically, respondent's explanation to the ACJC that the apologies he had made to J.D. during the consensual intercept, along with his use of the word "impulse," solely related to his accidental touching of J.D.'s breasts are simply implausible and strain credulity. Further, the ACJC, having had the opportunity to observe respondent's credibility during the disciplinary hearing, rejected his testimony as "duplicitous," "dishonest," and "incredible." To the contrary, the clear and convincing evidence established that respondent touched J.D.'s breasts, without her consent, on impulse for the purpose of his own sexual gratification. Respondent, thus, violated RPC 8.4(b).

Next, respondent violated RPC 8.4(c), which prohibits an attorney from engaging "in conduct involving dishonesty, fraud, deceit, or misrepresentation"

when, immediately after he had grabbed her breasts and while she was attempting to flee his office, respondent reached for his wallet and attempted to assuage her with an offer of money. When that did not work, during the consensual intercept, he promised to never repeat the misconduct and asked J.D. to not tell her employer about what he had done to her. Respondent's conduct in this respect was dishonest and deceitful and, thus, in violation of RPC 8.4(c).

We likewise conclude that respondent's conduct violated RPC 8.4(g), which states:

> It is professional misconduct for a lawyer to: engage, in a professional capacity, in conduct involving discrimination . . . because of race, color, religion, age, sex, sexual orientation, national origin, language, marital status, socioeconomic status, or handicap where the conduct is intended or likely to cause harm.

The Court's official comment (May 3, 1994) to that Rule provides:

> [t]his rule amendment (the addition of paragraph g) is intended to make discriminatory conduct unethical when engaged in by lawyers in their professional capacity. It would, for example, cover activities … outside of the courthouse, whether or not related to litigation, such as treatment of other attorneys and their staff; bar association and similar activities; and activities in the lawyer's office and firm. …[P]urely private activities are not intended to be covered by this rule amendment….
>
> "Discrimination" is intended to be construed broadly. It includes sexual harassment, derogatory or demeaning language, and, generally, any conduct towards the named groups that is both harmful and discriminatory.

We have no trouble concluding that respondent's conduct was discriminatory within the meaning of RPC 8.4(g). Respondent engaged in discrimination – more specifically, sexual harassment – by touching J.D.'s breasts, without her consent, while she was visiting him in his law office in connection with respondent's legal representation of J.D.'s employer. See In re Vasquez, __ N.J. __, 2023 N.J. LEXIS 490 (the attorney engaged in discriminatory conduct within the meaning of RPC 8.4(g) when, while serving as a drug court prosecutor, he repeatedly left the courtroom to speak with A.E., a drug court participant, after her court appearance had concluded; described her tattoos as "hot;" appeared at her place of employment on two occasions; and provided him with his telephone number; we acknowledged that the record contained no allegation that respondent had requested a sexual relationship but concluded that the attorney had abused his position of power and, thus, engaged in discriminatory conduct); In re Regan, 249 N.J. 17 (2021) (attorney violated RPC 8.4(g) when he sent a vulgar and sexually explicit e-mail to his matrimonial client prior to the conclusion of their attorney client relationship; we concluded that the e-mail was derogatory and demeaning and constituted sexual harassment, a form of gender discrimination; the attorney's subjective intentions and beliefs that his e-mail would be well-received did not obviate the fact that he sent the e-mail from his law firm e-mail address, and the client asserted she

had been harmed because the e-mail left her shaking and scared); In re Witherspoon, 203 N.J. 343 (2010) (attorney violated RPC 8.4(g) by sexually harassing four women by offering his legal services in exchange for sex; he also discriminated against two of the women on the basis of their sexual preference); In re Seaman, 133 N.J. 67 (a Superior Court judge sexually harassed his law clerk, in violation of the Code of Judicial Conduct, including Canon 3A(4), which states a judge should be impartial, and should not discriminate because of race, color, religion, age, sex, sexual orientation, national origin, marital status, socioeconomic status, or handicap, by repeatedly making sexual remarks toward her and by inappropriately touching her).

In sum, we grant the motion for reciprocal discipline and find that respondent violated RPC 8.4(b), RPC 8.4(c), and RPC 8.4(g). The sole issue left for our determination is the proper quantum of discipline for respondent's misconduct.

Discipline for sexual misconduct involving offensive touching or sexual harassment has ranged from a reprimand to a term of suspension.

Discipline less than a term of suspension was imposed in the following cases. In re Pinto, 168 N.J. 111 (reprimand, with the condition of sensitivity training, for an attorney who sexually harassed a vulnerable female client, in violation of RPC 8.4(g); during a conference with the client in his office, the

attorney questioned her about her physical appearance, and engaged in "extremely crude," explicit conversations about what he could do sexually with her; on one occasion, the attorney massaged the client's shoulders, kissed her on the neck, and told her that she should show herself off, "show whatever you have;" on another occasion, the attorney was called upon to help the client jump start her car and, upon completing that task, he exclaimed, "[t]his is what a real man can do," and then slapped the victim on the buttocks in the presence of her son and daughter; regardless of the attorney's subjective intent, we and the Court determined that his behavior was "demeaning, crude and vulgar" and, thus, "likely to cause harm" to his client; no prior discipline); In re Hyderally, 162 N.J. 95 (reprimand; the attorney had made sexual advances toward two legal aid clients in violation of RPC 8.4(d) (engaging in conduct prejudicial to the administration of justice); no prior discipline); In re Pearson, 139 N.J. 230 (reprimand; attorney hugged his client, put his hands on her buttocks, and pushed his head into her chest and commented about the size of her breasts; violation of RPC 8.4(d); although the attorney also had been charged with violating RPC 8.4(b) for his criminal sexual contact, we determined (without explanation) to refrain from making a criminal finding in that matter; in aggravation, we weighed the vulnerability of the client; in mitigation, the attorney had no prior discipline in nearly twenty years at the bar); In re Regan,

249 N.J. 17 (censure; the attorney sent an improper, sexually explicit e-mail to his client two days after her divorce had been finalized, in violation of RPC 3.2 (failure to treat with courtesy and consideration all persons involved in the legal process) and RPC 8.4(g); the attorney's e-mail constituted derogatory and demeaning sexual harassment; no prior discipline).

Terms of suspension ranging from three months to one year were imposed in the following cases. In re Addonizio, 95 N.J. 121 (three-month suspension; the attorney pleaded guilty to fourth-degree criminal sexual contact, in violation of 2C:14-3(b); violation of former DR 1-102(A)(6) (now RPC 8.4(b)); in imposing a three-month suspension, the Court concluded that seriousness of the misconduct warranted a suspension, and that "public and profession will be best served by a period of suspension;" although the attorney's association with the victim arose from an attorney-client relationship, the offense was not related to the practice of law; in mitigation, the Court considered that the conduct was aberrational and unlikely to recur); In re Garofalo, 229 N.J. 245 (2017) (six-month suspension; attorney admitted he had sexually harassed two female employees of the law firm where he had worked through hundreds of e-mails in which he used misogynist language and extended crude invitations to drink, dine, vacation, and engage in sex with him; none of the attorney's overtures or e-mails were welcomed and, with one victim, continued for years following a

brief relationship; the attorney's e-mail campaign continued despite another victim's explicit instruction that he stop communicating with her; further, the attorney disregarded his law firm's contemporaneous directive that he stop communicating with her; the attorney also lied to the OAE in the course of its investigation; violations of RPC 8.1(a) (knowingly making a false statement of material fact in a disciplinary matter); RPC 8.4(b); RPC 8.4(c); and RPC 8.4(g); in aggravation, we considered the prolonged nature of the harassment and the attorney's failure to heed warnings from the victim, the police, and his law firm; no prior discipline; we had recommended a censure, however, the Court determined that a six-month suspension was appropriate and the attorney consented to the discipline; the Court did not issue a decision); In re Wolfson, 178 N.J. 457 (six-month suspension; the attorney pleaded guilty to fourth-degree criminal sexual contact, in violation of N.J.S.A. 2C:14-3(b), and was admitted to PTI, for intentionally touching the breast of a female employee at his doctor's office; violation of RPC 8.4(b); no prior discipline; we had recommended a three-month suspension); In re Witherspoon, 203 N.J. 343 (2010) (one-year suspension; attorney sexually harassed three female bankruptcy clients and the adult daughter of a fourth client; violations of RPC 1.7(a)(2) (engaging in a conflict of interest) and RPC 8.4(g); in all four matters, the attorney repeatedly offered woman legal services in exchange for sexual favors; attorney committed

additional misconduct, in violation of RPC 5.5(a)(1) (practicing law while ineligible) and RPC 1.15(d) (failing to comply with the recordkeeping requirements of R. 1:21-6); prior discipline including an admonition; two reprimands; and a censure; we had recommended a three-month suspension); In re Gernert, 147 N.J. 289 (one-year suspension; on a motion for final discipline, attorney pleaded guilty to petty disorderly offense of harassment by offensive touching for kissing the victim on the cheek and intentionally touching her breast, in violation of N.J.S.A. 2C:33-4(b) (RPC 8.4(b)); in aggravation, the victim was the attorney's teenaged client; in further aggravation, the attorney was a public official; no prior discipline in twenty-three years at the bar).

Lengthier terms of suspension and disbarment are reserved for more egregious sexual offenses, including those involving the use of force or the threat of force, and sexual crimes against children – misconduct not implicated here. See, e.g., In re Lynch, 253 N.J. 3 (2023) (eighteen-month suspension; the attorney pleaded guilty to one count of stalking after he set his romantic sights on a stranger at a train station (RPC 8.4(b)); the attorney's victim initially welcomed him as a friend; however, the attorney ignored her clear statements that she only wanted a friendship and, instead, projected his sexual desires onto her – repeatedly and incessantly sending her thousands of sexual and abusive text messages; the attorney also left a voicemail on his victim's cellular phone

offering to draft a contract to enable him to have unprotected sexual intercourse with her; no prior disciplinary in thirty-five year career; in aggravation, the attorney caused such fear in his victim that she purchased a firearm and joined a shooting club); In re Waldman, 253 N.J. 4 (2023) (three-year suspension, on motion for final discipline; the attorney pleaded guilty to one count of cyberstalking following the end of his four-month dating relationship with his victim (RPC 8.4(b)); after the breakup, the attorney, for the next four years, engaged in a course of conduct that threatened his victim's safety and caused his victim substantial emotional distress; the attorney sent his victim hundreds of harassing and threatening e-mails, created various blogs and posted complaints about the breakup, and repeatedly threatened violence against his victim, including to kidnap and rape her with a knife; demanded she have sexual intercourse with him; and threatened other acts of violence against his victim; the victim obtained two restraining orders against him, both of which he violated); In re Frye, 217 N.J. 438 (2014) (disbarment for attorney who pleaded guilty in the Superior Court of New Jersey to endangering the welfare of a child (third degree), in violation of N.J.S.A. 2C:24-4(a) and who failed, for fifteen years, to report his conviction to ethics authorities; the attorney admitted to being entrusted with the care of a minor girl whom he inappropriately touched on her rectal area; the attorney violated his probation six times over the course

of fifteen years by failing to attend mandatory outpatient sexual offender therapy sessions).

In our view, respondent's offensive touching of J.D. is most analogous to that of the attorneys in Wolfson and Gernert, who received six-month and one-year terms of suspension, respectively, for their offensive touching of women. Both matters were before us on motions for final discipline, pursuant to R. 1:20-13(c).

In Wolfson, the attorney had intentionally touched the breast of a female employee in his doctor's office while he was receiving a medical test. In the Matter of William F. Wolfson, DRB 03-205 (October 17, 2003) at 2. The attorney pleaded guilty to fourth-degree criminal sexual contact, in violation of N.J.S.A. 2C:14-3(b) and, like respondent, was admitted to the PTI program. The attorney also had admitted that, over a period of three to four years, he had touched six female employees at his doctor's office. He expressed deep remorse for his misconduct and, according to his psychologist's report, the behavior was aberrant and out of character for the attorney. In determining the appropriate quantum of discipline, we acknowledged the wide range of discipline imposed in sexual misconduct matters but concluded that the attorney's misconduct was most similar to the attorney in In re Addonizio, 95 N.J. 121, who received a three-month suspension for similar misconduct. Id. at 5. We recommended a

three-month suspension; however, following an order to show cause, the Court suspended the attorney for six-months.

In Gernert, the attorney pleaded guilty to harassment by offensive touching, in violation of N.J.S.A. 2C:33-4(b), for touching the breast of his client's sixteen-year-old daughter. The attorney was sentenced to probation for a period of five years; fined $325; and ordered to undergo psychiatric counseling. In the Matter of Richard C. Gernert, DRB 95-435 (July 15, 1996) at 1. The attorney in Gernert committed the misconduct after the victim had met with him at his office to seek protection against her boyfriend, who harassed and assaulted her. While at his office, the attorney stroked the victim's hand and talked to her about personal matters that had nothing to do with the visit. Id. at 2. Afterward, he offered her a ride home, kissed her, and intentionally touched her breast. Ibid. The victim was afraid to decline his advances.

In aggravation, we determined that the attorney in Gernert took advantage of his position of trust and betrayed the victim's trust in him. Id. at 4. Further, we determined that the attorney's conduct was worse than the attorney in Addonizio, who received a three-month suspension, because, not only was the victim his client, but the attorney was the town's prosecutor at the time of the misconduct.

> Attorneys who hold public office are vested with the public's trust. Because of their higher visibility to the

> public, their conduct is subject to closer scrutiny. Similarly, in the event of misconduct, the degree of discipline imposed must be higher in order to assure the public that any transgressions will be harshly sanctioned and, thus, maintain the public's confidence in the integrity of the system.
>
> [Id. at 4-5.]

We acknowledged significant mitigation, including the absence of prior discipline in the attorney's twenty-three years at the bar, his status as a veteran, and that he already had been criminally punished. However, we heavily weighed the vulnerability of the client; the existence of an actual attorney-client relationship; and the special status of the attorney as a public official. Id. at 5. Thus, we recommended a one-year suspension, and the Court agreed.

Here, respondent's misconduct is arguably more serious than the attorney's misconduct in Wolfson. Unlike Wolfson, respondent's misconduct occurred in the context of an attorney-client relationship (albeit indirect since J.D.'s employer, and not J.D., was the client), a distinguishing and more serious consideration that would justify a lengthier term of suspension. Further, unlike Wolfson, who had expressed since remorse and contrition for his misconduct, respondent continued to deny his wrongdoing and, instead, cast blame on the victim. On the other hand, the attorney in Wolfson admittedly touched the breasts of more than one woman; whereas, here, respondent's offensive touching was limited to one victim and was an isolated incident.

Respondent's misconduct, on the other hand, is less severe than that of Gernert, who committed an act of sexual misconduct against a vulnerable sixteen-year-old girl who had come to him for protection against a boyfriend who had harassed and assaulted her. Like Gernert, however, respondent was a public official at the time of the misconduct and committed the misconduct in connection with an attorney-client relationship, factors that we accorded significant weight in determining to impose a lengthy term of suspension.

Respondent's reliance on In re Liebowitz, 104 N.J. 175, in support of discipline less than a term of suspension, is misplaced. In that matter, the OAE charged Liebowitz, a court-appointed lawyer, with having violated the Rules of Professional Conduct for engaging in sexual conduct with his client. Although the client filed criminal charges against him, Liebowitz had been exonerated of all criminal charges, first when the grand jury declined to indict him and, subsequently, when a trial judge found him not guilty following a trial on a charge of lewdness, a disorderly persons offense. Id. at 178. Though the attorney's misconduct was egregious, at issue was not whether the attorney's conduct was criminal, but rather whether the client was in a position to freely consent to a sexual relationship with her court-appointed lawyer and, in fact, the Court, adopting the Board's decision without comment, stated that "[t]he gravamen of the offense is the opportunistic misconduct toward [the attorney's]

pro bono client." Id. at 180.

The Court held that the relative positions of the parties must be scrutinized to ascertain whether the relationship was prohibited. Observing the attorney's superior role (a court-appointed lawyer for an indigent client), the Court stated that "[a]n assigned client could reasonably infer that a failure to accede to [the attorney's] desires would adversely impact on her legal representation." Id. at 180. The Court concluded that Liebowitz held a position of superiority or dominance and had taken sexual advantage of an assigned client, in violation of RPC 8.4(d) (former DR 1-102(A)(5) and (6) – conduct prejudicial to administration of justice and adversely reflecting on his fitness to practice law), which required that he be reprimanded. Ibid.

Since Liebowitz, the Court has adopted a harsher view when imposing discipline on attorneys that have engaged in sexual offenses, such as it did the Wolfson, Witherspoon, and Garofalo cases cited herein. In each of those cases, the Court imposed terms of suspension ranging from six-months to one-year, rejecting our recommended lesser quantum of discipline. Indeed, in 2010, twenty-five years following its Liebowitz decision, the Court described the reprimand it imposed on the attorney in Liebowitz as "a rather modest penalty" for the attorney's "blatantly inappropriate sexual activities toward an indigent client." In re Witherspoon, 203 N.J. at 354. The Court in Witherspoon analyzed

the variety of discipline imposed upon attorneys for their sexual indiscretions, acknowledging that it had been wide ranging and, with respect to inappropriate sexual activities directed toward a client or vulnerable individual, inconsistently enhanced. Citing, by example, its decision in Liebowitz, the Court stated that, although it had "adopted [the Board's] recommendation [of a reprimand] without comment," its subsequent decisions "have charted a different course." Id. at 356. The Court declined to adopt a bright line rule regarding the appropriate quantum of discipline for attorneys who engage in sexual misconduct but stressed that its evaluation is "necessarily fact sensitive." Id. at 359. Thus, the Court in Witherspoon determined to impose a one-year suspension, and not the three-month suspension we had recommended, for an attorney's misconduct that included bartering his legal services in exchange for sexual favors from four women, three of whom were his clients.

As a final point, we reject respondent's argument, raised during oral argument before us, that we are foreclosed from imposing a term of suspension (unless prospective) because disciplinary precedent involving similar sexual misconduct, such as the reprimand imposed in Liebowitz, was met with less severe discipline. As a preliminary matter, discipline is inherently fact specific and, thus, rarely does the Court create bright-line rules with respect to the quantum of discipline imposed for misconduct. See Witherspoon, 203 N.J. at

503. Indeed, the Court has imposed wide-ranging discipline for similar misconduct, dependent upon the unique facts and circumstances of each case. Since Liebowitz, the Court has suspended attorneys for committing nearly identical sexual misconduct to that of respondent. See Gernert (1997; one-year suspension) and Wolfson (2004; six-month suspension). Thus, respondent should have known that his misconduct could be met with a range of discipline, to include a term of suspension. As a final point, we would be remiss if we did not point out that the Liebowitz decision, upon which respondent relies, was decided nearly forty years ago and, since that time, the perception, understanding, and treatment of sexual violence has considerably evolved.

Accordingly, based upon the above-cited precedent, and Wolfson and Gernert in particular, we determine that at least a six-month suspension is the quantum of discipline required for respondent's misconduct. In crafting the appropriate discipline, we also considered mitigating and aggravating factors.

There is no mitigation to consider.

In aggravation, respondent has a disciplinary history, which includes a reprimand (2001) and a censure (2009). The Court has signaled an inclination toward progressive discipline and the stern treatment of repeat offenders. In such scenarios, enhanced discipline is appropriate. See In re Kantor, 180 N.J. 226 (2004) (disbarment for abandonment of clients and repeated failure to cooperate

with the disciplinary system). Here, despite the passage of time and contrary to respondent's arguments, progressive discipline is warranted in light of respondent's prior discipline and, specifically, his failure to learn from his past mistakes. In 2001 and 2009, respondent was disciplined for, like here, engaging in dishonest and deceitful conduct, in violation of RPC 8.4(c) – albeit under much different factual circumstances.

In Falcone I, respondent misrepresented the status of his clients' cases, falsely informing his clients that their cases were progressing and that any delays were attributable to the court. In Falcone II, in connection with a real estate transaction, respondent falsely stated in a letter to the mortgage company that he was holding the buyer's $12,000 deposit when, in fact, he had lost the check and never deposited the check in his trust account. Further, he knowingly allowed his client to sign the real estate settlement statement which contained a misrepresentation with respect to the deposit.

Here, despite having a heightened awareness of his obligation to comport himself with the standards set forth by the Rules of Professional Conduct and the integrity and honest character demanded from members of the bar, respondent attempted to silence J.D. by offering to give her money under the guise of her birthday and, further, by asking that she not tell her employer what he had done to her. Respondent's actions in this respect were dishonest and

deceitful and, though his prior discipline was remote, demonstrate a pattern of dishonest behavior.

Further, respondent was a municipal court judge at the time of the misconduct and, thus, as a public official, he was vested with the public's trust. Respondent abandoned that trust through his misconduct and, as we recognized in Gernert, his transgression must be harshly sanctioned to maintain the public's confidence in the integrity of the system.

In further aggravation, respondent has shown no remorse or contrition for his misconduct. Indeed, he continued to deny that he committed the misconduct and, worse, during his testimony before the ACJC, he re-casted himself as the victim and blamed J.D.

Also in aggravation, respondent failed to promptly notify the OAE of his judicial discipline, in violation of R. 1:20-14(b)(1).

On balance, we determine that the presence of serious aggravating factors and the absence of any mitigating factors, serves to justify the imposition of a one-year suspension as the quantum of discipline necessary to protect the public and preserve confidence in the bar.

As a final point, because respondent's law license is currently in active, not retired,[6] status, we deny his request that the suspension be delayed until such time as he seeks to return to the active practice of law, following his impending retirement. On rare occasions, we have delayed the imposition of a disciplinary suspension where the attorney already was on retired status; however, to do so in the instant matter would, in effect, amount to no discipline. See In re Broderick, __ N.J. __ (2022), 2022 N.J. LEXIS 115 (one-year suspension for attorney who committed misconduct while on retired status; the Court ordered the suspension be deferred until such time as respondent no longer satisfied the requirements of retired status).[7]

Vice-Chair Boyer and Members Menaker and Campelo voted to impose a six-month suspension. Members Menaker and Campelo also would require, as a condition precedent to reinstatement, that respondent attend an OAE-approved sensitivity training class with an emphasis on sexual harassment.

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[6] An attorney who wishes to retire from the practice of law may do so at any time without Court Order. Pursuant to R. 1:28-2(b), an attorney may request an exemption from payment to the New Jersey Lawyers' Fund for Client Protection by submitting a certification of retirement indicating that they are "retired completely from the practice of law." At any time, however, an attorney on retired status can reactivate their law license by updating their registration status and paying the attorney registration fee for the current year.

[7] Effective February 25, 2022, Broderick's one-year suspension commenced, following the Court's confirmation that Broderick had submitted his 2022 annual attorney registration and, thus, had re-activated his law license from retired status. In re Broderick, __ N.J. __ (2022), 2022 N.J. LEXIS 184.

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 Nino F. Falcone
Docket No. DRB 23-091

Argued: June 21, 2023

Decided: October 4, 2023

Disposition: One-year suspension

Members	One-year suspension	Six-month suspension
Gallipoli	X	
Boyer		X
Campelo		X
Hoberman	X	
Joseph	X	
Menaker		X
Petrou	X	
Rivera	X	
Rodriguez	X	
Total:	6	3

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