SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 15-176
District Docket No. XIV-2010-0373E

IN THE MATTER OF	:
MICHAEL P. RAUSCH	:
AN ATTORNEY AT LAW	:

Decision

Argued: September 15, 2015

Decided: December 15, 2015

To the Honorable Chief Justice and Associate Justices of the Supreme Court of New Jersey.

This matter came before us as an appeal by the Office of Attorney Ethics (OAE) from a post-hearing dismissal by the District IV Ethics Committee (DEC). We determined to bring it on for oral argument as a presentment. The complaint charged respondent with violating 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) and RPC 8.4(d) (engaging in conduct

prejudicial to the administration of justice). We determined to impose a censure.

Respondent was admitted to the New Jersey bar in 1994 and the Pennsylvania bar in 1995. He practices primarily in Pennsylvania and has no history of discipline in either state.

On August 1, 2004, John Fisher, a Pennsylvania attorney, was involved in a single-car accident while driving a Porsche 911 Carrera. Fisher claimed he suffered injuries because of a defective airbag and subsequently brought a products liability claim against Porsche and other claims against Knopf Automotive, the dealership that serviced the automobile. Fisher represented himself in the liability action and respondent represented Porsche.

During the discovery period, respondent filed a motion to compel the inspection of the vehicle. On July 15, 2010, following oral argument at the Lackawanna County Courthouse, the discovery master granted the motion.

Immediately following the hearing and the decision, Fisher became red-faced and continued to question the discovery master regarding the propriety of his ruling. Eventually, Fisher moved to the doorway, thereby preventing respondent from exiting. After the discovery master told the parties to leave, they

walked into the court administrator's office. Still agitated, Fisher continued to speak belligerently to respondent as the two moved from the office to the hallway. Fisher continued to taunt respondent, allegedly spewing expletives while the parties proceeded through glass doors that led to a stairwell.

Despite respondent's repeated attempts to end the conversation and to be left alone, Fisher continued to verbally assault him with obscenities and insults. Once the two men were in the stairwell, Fisher continued to berate respondent, who had his back to Fisher the majority of the time. Based on Fisher's demeanor, his anger, and his actions to that point, respondent was concerned that Fisher would do something physical and so, feared for his safety.

Eventually, while still in the stairwell, respondent reached a tipping point and "bull rush[ed]" Fisher, backing him up against the wall. As part of the rush, respondent hit Fisher in the face with his right hand, having taken three swings at Fisher during the altercation. Eventually, bystanders in the hallway entered the stairwell and separated the two men. The courthouse security cameras captured only some of the incident on video.

Fisher did not seek or require medical attention. Nevertheless, he promptly filed criminal charges against respondent, alleging felony assault and simple assault. In exchange for dismissing the charges, Fisher demanded $50,000 from respondent. Pennsylvania authorities did not pursue the felony charges. Respondent was admitted to, and successfully completed, Pennsylvania's Accelerated Rehabilitative Disposition program.[1] Subsequently, the simple assault charge was dismissed and expunged.[2]

Respondent admitted that he should not have struck Fisher. He asserted, however, that, based on Fisher's actions, his pursuit of respondent, his demeanor, his verbal abusiveness, and his verbal aggression, respondent believed his actions were reasonable. Respondent expressed regret for his actions, and stated that he wished they had not happened. He did not deny striking Fisher, but was remorseful for the incident. He also conceded that he had overreacted to the perceived threat and

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[1] This program is similar to New Jersey's Pretrial Intervention program.

[2] Although expungements are confidential, respondent raised the issue at the DEC hearing and, thus, waived the confidentiality.

believes that, in the future, he would not react in the same manner if confronted with a similar situation.

Respondent noted that, because of his altercation with Fisher, he has experienced significant consequences, personally and financially. He lost his position with White and Williams, was out of work for a period of time, lost Porsche and other clients, and suffered personal embarrassment and turmoil in his family and home life. He estimated that the incident cost him nearly $250,000 in lost income.

In its presentation to the DEC hearing panel, the OAE noted respondent's four-year career as a Special Federal Agent with the Department of State Bureau of Diplomatic Security and his professional training in protective security operations and self-defense. He received various forms of security training, including how to react to security threats.

At the hearing before the DEC, respondent called Nancy Campbell, Esq., as a witness. She testified that she had experienced similar assaultive behaviors by Fisher in Pennsylvania. Campbell testified that Fisher had mistreated her in an almost identical fashion as he had respondent. She had been reduced to tears by his assaultive behavior. She testified

that, had she been a male attorney, she would have probably "slugged" him.

Two members of the hearing panel (the panel chair and the public member) determined that the record lacked clear and convincing evidence of unethical conduct and that no discipline was warranted. In making its decision, the DEC noted that it did not have the benefit of Fisher's perspective. Fisher did not participate in this matter at any level. The panel chair and the public member, however, considered Campbell's testimony significant, if not dispositive.

The DEC determined that the security video footage was inconclusive and did not reflect much of the interaction between the two men. Without the benefit of testimony from Fisher or bystanders to the incident, the DEC believed that the OAE had not met its burden of proof. Rather, the majority noted, the only evidence presented supported the conclusion that Fisher is a bully, prone to outbursts and threatening behavior, that he was menacing and threatening to respondent and that, although respondent attempted to get away from Fisher, respondent eventually feared for his own safety.

Further, the DEC determined that an actionable assault was not reflected in the video, which showed a normal human being

who had been pushed beyond his limit and who had responded the way most normal men would respond.

The third panel member filed a dissent, finding that respondent had committed a criminal assault for which there was no excuse, and therefore, had violated RPC 8.4(b).

Following a de novo review of the record, we disagree with the DEC's finding that the record lacked clear and convincing evidence that respondent acted unethically.

Indeed, our review leads us to the conclusion that the record contains clear and convincing evidence that respondent violated RPC 8.4(b) and (d), by assaulting Fisher in the courthouse after a hearing in which they were adversaries.

Any misbehavior, private or professional, that reveals a lack of good character and integrity essential for an attorney constitutes a basis for discipline. In re LaDuca, 62 N.J. 133, 140 (1973). Whether the activity arises from a lawyer-client relationship or is wholly unrelated to the practice of law is immaterial. In re Suchanoff, 93 N.J. 226, 230 (1983); In re Franklin, 71 N.J. 425, 429 (1976). A criminal conviction is conclusive evidence of an attorney's guilt in disciplinary proceedings. In re Kinnear, 105 N.J. 391, 395 (1987). The lack of a criminal conviction or even an indictment for a crime,

however, is not a requirement for discipline to be imposed. In re Housbrouck, 140 N.J. 162, 166-67 (1995). Even an acquittal will not bar discipline from the same allegations. In re Rigolosi, 107 N.J. 192 (1987). Hence, in our view, an expungement, too, cannot preclude a finding that the underlying conduct violated the RPCs.

Although respondent was charged with simple assault, he successfully completed Pennsylvania's version of a pretrial intervention program and the charges were ultimately expunged. Notwithstanding the lack of conviction or any testimony to contradict respondent's depiction of the events as self-defense, the surveillance video submitted with the record speaks for itself. Respondent clearly assaulted Fisher. Despite his self-defense claim, respondent never alleged that Fisher touched him. Yet, the video clearly depicted respondent violently throwing punches at Fisher as he drove Fisher against a wall. Respondent threw no fewer than three punches and ceased his assault only when bystanders intervened.

It is uncontested that Fisher was an unpleasant person and acted inappropriately. Indeed, had he been licensed to practice law in New Jersey, he likely would have faced significant discipline for his behavior. See, e.g., In re Stolz, 219 N.J.

123 (2014) (three-month suspension for attorney who made "sarcastic," "wildly inappropriate," and "discriminatory" comments to his adversary). Fisher's inappropriate and obnoxious conduct is not a justification, however, for anyone, especially another attorney in a courthouse, to assault another person. Respondent maintains that he felt he was in danger when he reached the top of the stairs with Fisher still pursuing and verbally assaulting him. Without more, we cannot accept that respondent acted with any sense of proportional response. Throwing multiple punches and driving Fisher up against a wall was well beyond the realm of an appropriate reaction. Respondent himself conceded that he overreacted to the perceived threat and that, given the same set of facts, he would not react in the same manner.

In support of its argument for discipline, the OAE cited In re McAlevy, 69 N.J. 349 (1976). In that case, the attorney was defending a police officer charged with official misconduct. McAlevy and the deputy attorney general (DAG) prosecuting the case began arguing in a side bar. McAlevy lodged physical threats against the DAG. On another occasion, McAlevy physically attacked the DAG and the two wrestled in the trial judge's chambers; the judge referred the case to the Court. McAlevy

eventually apologized and conceded that the DAG's instigating actions and comments, while mitigating factors, did not excuse his behavior. He gave assurances that he would not engage in another such altercation. The Court held that respondent's actions constituted a serious violation of the then applicable Code of Professional Responsibility. In re McAlevy, 69 N.J. at 349-351. The Court reprimanded McAlevy, warning him that similar episodes in the future would result in more drastic disciplinary action. Id. at 352.

In 1997, the Court decided In re Viggiano, 153 N.J. 40 (1997), also cited by the OAE. Viggiano was involved in a minor traffic accident. In the Matter of Thomas J. Viggiano, DRB 97-112 (November 18, 1997) (slip op. at 1). He exited his vehicle, walked to the other vehicle, where the female driver was still seated, and began striking her with a closed fist. Ibid. Police officers arrived at the scene and attempted to physically restrain the attorney and end his assault on the victim. Id. at 1-2. Rather than submit, the attorney began to push and kick the police officers. Id. at 2.

We voted to impose a three-month suspension on Viggiano and required him to submit proof of fitness to practice law, prior to reinstatement. Id. at 3. In our decision, we cautioned that,

"any act of violence committed by an attorney will not be tolerated." Ibid. Condemning the attorney's physical assault of the other motorist and the police, we determined that "[n]othing less than a suspension would be appropriate for this kind of violent behavior." Ibid. The attorney had no disciplinary history. Id. at 1. The Court agreed with our determination.

After Viggiano, several cases involving attorneys who committed acts of violence resulted in terms of suspension. See, e.g., In re Bornstein, 187 N.J. 87 (2006) (six-month suspension for attorney who fell backward while walking up the stairs at a Boston train station and, inexplicably assaulted a doctor who broke respondent's fall and tried to assist him; the attorney began to choke the doctor and slammed his head several times against a Plexiglas® window, "causing the window to open") and In re Gibson, 185 N.J. 235 (2005) (one year suspension on a motion for reciprocal discipline for attorney who was involved in a bar fight in Pennsylvania, was arrested for disorderly conduct and public drunkenness, and spat on and hit a police officer upon being handcuffed; the attorney was convicted of aggravated assault, simple assault, and aggravated harassment of a police officer, as well as the summary offenses of disorderly conduct and public drunkenness).

In 2006, however, an attorney received a censure for his violent and assaultive behavior. In re Jacoby, 188 N.J. 384 (2006). There, during a domestic violence assault, the attorney choked his wife and threw her into two walls. In the Matter of Peter H. Jacoby, DRB 06-068 (June 6, 2006) (slip op. at 3). Because of his actions, his wife suffered a dislocated shoulder. Ibid. The attorney was charged with both an indictable-level aggravated assault and simple assault. Id. at 4.

The attorney eventually pleaded guilty to simple assault and was sentenced to a one-year period of probation, continued psychiatric treatment, and the imposition of statutory fines. Id. at 6. We determined that a suspension was the presumptive discipline in cases involving domestic violence. Id. at 13. Thus, despite Jacoby's claimed diagnosis of bi-polar and intermittent explosive disorders, we determined that a three-month suspension was warranted. Id. at 15-17. The attorney had no disciplinary history. Id. at 2. The Court, however, disagreed with our determination and imposed a censure.

More recently, the Court decided In re Milita, 217 N.J. 19 (2014). There, the attorney became involved in a "road rage" altercation after he believed he was being improperly "tailgated." In the Matter of Martin J. Milita, Jr., DRB 13-159

(December 3, 2013) (slip op. at 2). The incident began with an exchange of hand gestures between the vehicles, but soon escalated when the attorney pulled over, partially emerged from his vehicle, and brandished a knife at the two young men in the other vehicle. Ibid. When the other vehicle drove by, Milita followed it through several towns, for approximately nine to twelve miles. Id. at 2-3. While following the young men, the attorney continued to brandish the knife. Id. at 3.

During the attorney's pursuit of the victims, they called the police, who instructed them to drive to a local hospital, where officers were waiting. Ibid. The attorney initially lied to the police, denying he had brandished a knife. Ibid. Later, he admitted having a knife, but claimed that his mechanic had given it to him to fix a problem with his vehicle. Ibid. The attorney ultimately entered a guilty plea to hindering apprehension, a disorderly persons offense, and two counts of harassment, petty disorderly persons offenses. Id. at 3, 6. The attorney was sentenced to three concurrent one-year periods of probation, 100 hours of community service, and the imposition of mandatory statutory fines. Id. at 6.

The OAE recommended that a three-month suspension be imposed on Milita. Id. at 7. Granting the OAE's motion for final

discipline, we instead concluded that a censure was appropriate and required the attorney to continue treatment with a mental health professional until medically discharged. Id. at 8, 14. In determining a censure to be the proper discipline, we stressed the following factors: although the attorney's behavior was menacing, he had no physical contact with the occupants of the other vehicle; the attorney was receiving treatment for psychological and medical issues that contributed to his behavior; and the attorney was not engaged in the practice of law and, thus, the concern for protection of the public was reduced. Id. at 14. The attorney had no disciplinary history. Id. at 2. The Court agreed with our determination.

Simultaneously with our decision in the instant matter, we also issue a decision in In the Matter of Christopher J. Buckley, DRB 15-148 (December 15, 2015). There, the attorney negotiated a $63 fee for a taxi ride from Manhattan to Jersey City. Upon arrival, he told the driver he did not have the money and needed to go to his apartment to get his ATM card. The driver locked the doors, keeping Buckley trapped in the back. He was released and started to walk away, but the cab driver followed. Buckley eventually spun around and punched the driver in the face, breaking his glasses and causing lacerations. We

determined that the facts in Buckley and prior case law illustrate that disciplinary cases involving violent conduct by attorneys require fact-sensitive considerations. Simply put, there is no typical or "baseline" measure of discipline for these cases and we should decline to declare one, such as was implied in Viggiano. In 1997, Viggiano had warned the bar that "any act of violence committed by an attorney will not be tolerated" and that "[n]othing less than a suspension" would likely be imposed for violent behavior. Declining to follow that implication, we voted to impose a censure on Buckley.

The instant matter, again, illustrates that a bright-line rule as alluded to in Viggiano is inappropriate. First, when Viggiano was decided, no quantum of discipline between a reprimand and a term of suspension existed. A censure became available only in 2002. Second, these cases are all fact-sensitive and, therefore, have a clear need for a case-by-case determination.

The behavior here, while egregious, is far less serious than the conduct in many assault cases. Nonetheless, significant discipline is warranted to protect the public by confirming to the bar that violence will not be tolerated, especially in a

courthouse where the public should feel safe in its pursuit of justice.

Respondent, through his attorney, argues that a dismissal is appropriate. The OAE proposed a censure as the appropriate quantum of discipline for respondent's misconduct.

We consider, in mitigation, that respondent has no history of discipline in New Jersey or Pennsylvania, he lost his job with White and Williams along with many of his clients because of this incident, and he suffered a great humiliation both professionally and personally. Further, this incident occurred four years prior to the date of the hearing below. More than five years have elapsed since the incident and the record does not address this delay.[3] Respondent has had no further encounters with the disciplinary system in New Jersey or Pennsylvania. Moreover, respondent was not subject to any disciplinary action in Pennsylvania in relation to this incident. He has shown great remorse and every indication is that this behavior was aberrational.

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[3] Although the OAE filed the ethics grievance against respondent in 2010, the DEC hearing was not conducted until November 2014.

Based on the foregoing, we determine to impose a censure, as in Buckley. In our view, a suspension will not provide any greater measure of protection to the public than would a censure.

Member Singer voted for an admonition, and filed a separate dissenting decision. Members Baugh and Clark did not participate.

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
Bonnie C. Frost, Chair

By: 
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Michael P. Rausch
Docket No. DRB 15-176

Argued: September 15, 2015

Decided: December 15, 2015

Disposition: Censure

Members	Disbar	Admonition	Censure	Dismiss	Disqualified	Did not participate
Frost			X			
Baugh						X
Clark						X
Gallipoli			X			
Hoberman			X			
Rivera			X			
Singer		X				
Zmirich			X			
Total:		1	5			2

Ellen A. Brodsky
Chief Counsel