

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 : Dissent

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

The Board's five-member majority has recommended that
respondent be censured. I dissent from that recommendation for
the reasons that follow and recommend that he be admonished, or
alternatively, that the grievance be dismissed (as was
recommended by the District IV Ethics Committee that heard this
case).

This case presents the question: What is the appropriate
discipline for an attorney with a spotless sixteen-year
disciplinary history who, having been made fearful for his own
safety by the repeated angry taunts, obscenities, and insults of
another attorney who was following him in close pursuit, strikes
that attorney in what can only be described as an aberrant act
caused by the great pressure of the moment?

The facts as stated by the majority decision are undisputed, including the fact that the striking by respondent caused no injury to the other attorney, John Fisher ("Fisher"), that respondent feared for his own safety by Fisher's close pursuit and ongoing, angry, red-faced verbal assault, and that respondent tried repeatedly to end the conversation with Fisher and to get away from him by entering a staircase in the courthouse where the physical altercation occurred after Fisher followed him there.

Although the majority finds, counter to the DEC's decision (from which one panel member dissented), that respondent violated RPCs 8.4(b) and 8.4(d), I question those findings. First, I do not believe that respondent's spontaneous act borne of fear was "a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer" (RPC 8.4(b)) or was "conduct that is prejudicial to the administration of justice" (RPC 8.4(d)). There was no suggestion or finding that respondent hit Fisher gratuitously, or with advance planning, or with intent to hurt him; rather the evidence showed this hitting to be a reflexive, self-protective act and respondent, who testified extensively before the DEC, was found to be credible. Indeed, the DEC's "Report Recommending Dismissal," describing how Fisher's aggressive verbal assault began after losing a motion hearing to

respondent, found (at ¶18) that Fisher "spewed profanities," "taunted," "yelled," "invaded Respondent's personal space," was "menacing" and "demeaning" and that Fisher's "saliva repeatedly sprayed Respondent as Fisher verbally abused [him]." The Report then stated its findings that:


9. Respondent's uncontested testimony was that Respondent, although feeling threatened, did not respond in kind but rather did everything in his power to disengage from Fisher by attempting to leave the building:
 - a. Respondent did not verbally engage Fisher but packed his briefcase and exited the court room, followed very closely by Fisher.
 - b. Respondent hurried down the hallway, with Fisher still "glued" to Respondent's back.
 - c. Respondent attempted to duck into an exit fire stairway but was unable to shake Fisher's pursuit.
10. As Respondent moved through the stairwell, Fisher's assaultive behavior (never once contradicted by the evidence) finally physically and emotionally overwhelmed Respondent.
11. Respondent testified without contradiction that he feared for his physical safety

With such findings, none of which are found by the majority to be against the weight of the evidence, I do not see clear and convincing evidence of an ethics violation or how imposition of a censure is justified. Indeed, the DEC's public member felt so

strongly that respondent committed no ethics violation and should not be disciplined that she took the unusual step of writing separately to state her conclusion.

No case cited by the majority in which attorneys were censured for assaultive acts, i.e. In re Jacoby, 188 N.J. 384 (2006); In re Milita, 217 N.J., 19 (2014); see, also, In the Matter of Christopher J. Buckley, DRB 15-148 (December 15, 2015), is even close to similar to this case where respondent acted out of fear caused by the provocative aggressive acts of the other person. Moreover, I am aware of no ethics decisions in this State imposing on attorneys the duty of absolute control over their reasonable emotions and fears under stressful provocative circumstances -- and there is no finding that respondent's fears were not reasonable. But even if such rule were to be announced, the unusual circumstances here are so mitigating as to justify at most only imposition of an admonition.

Disciplinary Review Board
Anne C. Singer

By: 
Ellen A. Brodsky
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