SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. 17-389
District Docket No. XIV-2015-0566E

IN THE MATTER OF	:
KEITH T. SMITH	:
AN ATTORNEY AT LAW	:

Decision

Argued: February 15, 2018

Decided: April 26, 2018

Joseph A. Glyn appeared on behalf of the Office of Attorney Ethics.

Keith T. Smith appeared pro se.

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

This matter was before us on a motion for final discipline, filed by the Office of Attorney Ethics (OAE), pursuant to R. 1:20-13(c)(2), following respondent's guilty plea to simple assault, contrary to N.J.S.A. 2C:12-1a3, arising out of an incident involving a friend of his live-in girlfriend's son. The OAE recommends the imposition of either a censure or a three-month suspension. We determine to grant the motion and impose a

six-month suspension on respondent, to be served consecutively to the three-month suspension that we imposed in In the Matter of Keith T. Smith, DRB 17-306 and DRB 17-330 (February 6, 2018), which is pending with the Court.

Respondent was admitted to the New Jersey bar in 1989. At the relevant times, he maintained an office for the practice of law in Egg Harbor Township.

In October 2008, we imposed an admonition on respondent for his mishandling of a personal injury matter, resulting in the dismissal of his client's complaint, which he then failed to reinstate. In the Matter of Keith T. Smith, DRB 08-187 (October 1, 2008) (Smith I). We found that respondent had exhibited gross neglect (RPC 1.1(a)) and a lack of diligence (RPC 1.3), failed to keep the client reasonably informed about the status of the matter (RPC 1.4(b)), failed to explain the matter to the extent reasonably necessary for the client to make informed decisions about the representation (RPC 1.4(c)), and entered into an improper fee-sharing agreement with another attorney (RPC 1.5(e)).

In December 2009, respondent was found guilty of gross neglect, lack of diligence, and failure to communicate with the client in one of four matters. In re Smith, (unpublished, 2009) (Smith II). In all four matters, he was found guilty of failing

to explain the matter in detail to allow his clients to make informed decisions about the representation and entering into an improper fee-sharing agreement with another attorney. Ibid. No discipline was imposed, however, because this second disciplinary matter was "inexorably intertwined" with Smith I. Ibid.

In June 2011, respondent was censured for failure to cooperate with disciplinary authorities (RPC 8.1(b)) in two client matters; and, in one of those matters, for gross neglect, failure to expedite litigation by his non-compliance with discovery rules (RPC 3.2), lack of diligence by allowing his client's complaint to be dismissed twice, the second time with prejudice, and failure to keep the client informed about the status of the case. In re Smith, 206 N.J. 137 (2011) (Smith III). The discipline also encompassed respondent's pattern of neglect (RPC 1.1(b)), resulting from his combined conduct in Smith I, and Smith II, and Smith III, and practicing while ineligible due to his failure to pay the annual attorney assessment to the New Jersey Lawyers' Fund for Client Protection in 2009 (RPC 5.5(a)). Ibid.

Effective February 28, 2017, respondent was temporarily suspended from the practice of law for failure to comply with a determination of the District I Fee Arbitration Committee. In re

Smith, 228 N.J. 2 (2017). He was reinstated on March 27, 2017. In re Smith, 228 N.J. 308 (2017).

On January 11, 2018, the Court imposed a censure on respondent, in a default matter, for his failure to comply with the recordkeeping requirements of R. 1:21-6 (RPC 1.15(d)) and his failure to cooperate with disciplinary authorities. In re Smith, 231 N.J. 397 (2018) (Smith IV). The censure reflected respondent's "propensity to violate the RPCs," as demonstrated by his disciplinary history. In the Matter of Keith T. Smith, DRB 17-007 (July 11, 2017) (slip op. at 10).

Finally, as stated above, on February 6, 2018, we determined to impose a three-month suspension on respondent for his conduct in two client matters. In the Matter of Keith T. Smith, DRB 17-306 and DRB 17-330 (Smith V). In one matter, he practiced while ineligible (RPC 5.5(a)) and failed to comply with the requirements of the Interest on Lawyers Trust Accounts (IOLTA) program. In the other client matter, he engaged in an ex parte communication with a judge (RPC 3.5(b)) and communicated with his domestic violence client's husband who was represented by counsel (RPC 4.2). The matter is pending with the Court.

* * *

On March 17, 2015, an Atlantic County grand jury indicted respondent on two counts of third-degree making terroristic

threats against John Rogers and Rogers' friend, John Creamer, contrary to N.J.S.A. 2C:12-3a, and one count of second degree knowingly and unlawfully possessing a firearm with the purpose of using it unlawfully against the person or property of another, contrary to N.J.S.A. 2C:39-4a. On March 2, 2017, respondent pleaded guilty to one count of third degree simple assault, contrary to N.J.S.A. 2C:12-1a(3), a disorderly persons offense,[1] and agreed to the forfeiture of "all the firearms and weapons seized from his house on September 1, 2014," the date of the incident underlying the guilty plea.

At the plea hearing, respondent testified that, at a time when he was "aggravated and angry," he approached Creamer in an attempt to put him in fear of bodily injury. Specifically, respondent positioned himself "inches" from Creamer's face, screamed at him, and stated that he was going to "beat his ass . . . in such a way to make him believe it." Respondent acknowledged that, based on his threat, Creamer would have understood that respondent's intent was to inflict serious bodily injury on him. The judge accepted respondent's plea and found him guilty of the disorderly persons offense.

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[1] Under N.J.S.A. 2C:12-1(a)(3), a person is guilty of simple assault if he "attempts by physical menace to put another in fear of imminent serious bodily injury."

On March 31, 2017, respondent was sentenced to two years' probation and ordered to pay $130 in fees and assessments. In addition, he was ordered to remain law-abiding and arrest-free, commit no acts of domestic violence, attend a minimum of three Narcotics Anonymous/Alcoholics Anonymous meetings or other substance abuse treatment support meetings per week, complete an anger management class, and forfeit the weapons seized from his home.[2]

* * *

Following a review of the record, we determined to grant the OAE's motion. Final discipline proceedings in New Jersey are governed by R. 1:20-13(c). Under that Rule, a criminal conviction is conclusive evidence of guilt in a disciplinary proceeding. R. 1:20-13(c)(1); In re Maqid, 139 N.J. 449, 451 (1995); In re Principato, 139 N.J. 456, 460 (1995). Specifically, the conviction establishes a violation of RPC 8.4(b). Pursuant to that Rule, it is professional misconduct for an attorney to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer." Hence, the sole issue is the extent of discipline to be imposed

[2] Although the judgment of conviction states that respondent had to attend at least three meetings per week, the sentencing judge required only two.

on a respondent for a violation of RPC 8.4(b). R. 1:20-13(c)(2); In re Magid, 139 N.J. at 451-52; In re Principato, 139 N.J. at 460.

In determining the appropriate measure of discipline, the interests of the public, the bar, and the respondent must be considered. "The primary purpose of discipline is not to punish the attorney but to preserve the confidence of the public in the bar." In re Principato, 139 N.J. at 460 (citations omitted). Thus, many factors must be taken into consideration, including the "nature and severity of the crime, whether the crime is related to the practice of law, and any mitigating factors such as respondent's reputation, his prior trustworthy conduct, and general good conduct." In re Lunetta, 118 N.J. 443, 445-46 (1989).

That an attorney's conduct did not involve the practice of law or arise from a client relationship will not excuse an ethics transgression or lessen the degree of sanction. In re Musto, 152 N.J. 167, 173 (1997). Offenses that evidence ethics shortcomings, although not committed in the attorney's professional capacity, may, nevertheless, warrant discipline. In re Hasbrouck, 140 N.J. 162, 167 (1995). The obligation of an attorney to maintain the high standard of conduct required by a member of the bar applies even to activities that may not

directly involve the practice of law or affect his or her clients. In re Schaffer 140 N.J. 148, 156 (1995).

Respondent pleaded guilty to, and was convicted of, one count of simple assault, a disorderly persons offense. The conviction constituted a violation of RPC 8.4(b), which classifies as "professional misconduct" the commission of "a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."

There is no typical or "baseline" measure of discipline in matters involving an attorney's violent behavior. In re Buckley, 226 N.J. 478 (2016), and In re Goiran, 224 N.J. 446 (2016). Rather, such cases require fact-sensitive analyses. Ibid. To date, in such matters, the Court has imposed either a censure or a three-month suspension.

In support of its assertion that a censure would be warranted for respondent's conviction, standing alone, the OAE relies on In re Milita, 217 N.J. 19 (2014). In that case, the attorney initiated a "road rage" altercation on the belief that he was being improperly "tailgated" by a vehicle. 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 left the scene, Milita followed it through several towns, for nine to twelve miles. Id. at 2-3. While following the young men, he continued to brandish the knife. Id. at 3. During Milita's pursuit of the victims, they called the police, who instructed them to drive to a local hospital, where officers were waiting. Ibid.

At first, Milita lied to the police, denying that 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 recurring problem with his vehicle. Ibid.

Milita entered a guilty plea to hindering apprehension, a disorderly persons offense, and two counts of harassment, petty disorderly persons offenses. Id. at 3, 6. He 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.

On a motion for final discipline, the OAE sought a three-month suspension. Id. at 7. Instead, we imposed a censure and required Milita to continue treatment with a mental health professional until medically discharged. Id. at 8, 14. In choosing to censure Milita, we stressed the following factors: although the attorney's behavior was menacing, he had no

physical contact with the occupants of the other vehicle; he was receiving treatment for psychological and medical issues that contributed to his behavior; and he was not actively practicing law and, thus, the concern for protection of the public was reduced. Id. at 14. Moreover, Milita had no disciplinary history. Id. at 2. The Court agreed with our determination. In re Milita, 217 N.J. 19.

More recently, in In re Buckley, 226 N.J. 478, the attorney violently assaulted a taxi driver in Jersey City. In the Matter of Christopher J. Buckley, DRB 15-148 (December 15, 2015) (slip op. at 4-5). The incident began when the attorney informed the taxi driver that he had only $9 for a $63 fare, and needed to go to his apartment to retrieve his ATM card. Id. at 4. When the taxi driver locked the attorney in the back of the taxi, the situation quickly escalated. Ibid. The attorney, who was 6'5" tall and weighed 280 pounds, began to kick at a door and window of the vehicle. Ibid. Presumably to preserve his vehicle, the taxi driver allowed the attorney to exit, but pursued him, seeking payment of his fare. Id. at 5. In response, the attorney grabbed the taxi driver's face and then struck him with a closed fist, resulting in lacerations to the driver's forehead and upper lip, broken eyeglasses, and pain in his nose and mouth. Ibid.

The police arrived, interviewed the taxi driver, and arrested Buckley, who was in a nearby bar. Ibid. Initially, he was charged with robbery, an indictable offense. Ibid. Ultimately, however, he entered a guilty plea to simple assault, a disorderly persons offense. Id. at 2. Buckley was sentenced to mandatory statutory fines and agreed to pay $750 in restitution to the victim. Id. at 3.

As in this case, the OAE sought either a censure or a three-month suspension. Id. at 6. We imposed a censure, stating that "[b]ut for the mitigation addressed above, the violent behavior under scrutiny in this case – the assault of a taxi driver who was seeking the fare for his services – would result in the imposition of a three-month suspension to protect the public and to preserve confidence in the bar." Id. at 16. Specifically, we found the following mitigating factors: the attorney entered a guilty plea; he openly acknowledged his criminal conduct and exhibited remorse; he agreed to pay a total of $750 in restitution in an effort to make the victim whole; he had no disciplinary history and was a recently-admitted attorney at the time of his misconduct; and, as in Milita, he was not engaged in the practice of law and, thus, the concern for protection of the public was reduced. Id. at 15. The Court

disagreed with our determination and imposed a three-month suspension. In re Buckley, 226 N.J. 478.

In another "road rage" incident, the attorney, angered by the actions of another driver, exited his vehicle, retrieved a baseball bat from the trunk, and struck the driver's vehicle multiple times. In re Collins, 226 N.J. 514 (2016), In the Matter of John J. Collins, DRB 15-140 (December 15, 2015) (slip op. at 3). The multiple blows to the vehicle broke the windshield and a side mirror, and caused the driver and a passenger imminent fear of bodily injury. Ibid.

Collins did not admit striking either of the victims with his fist, attempting to strike either of the victims with the baseball bat, or causing actual injury to either of the victims, as they had claimed. Ibid. Neither the State nor the court required him to address these allegations during his plea allocution. Ibid.

Initially, Collins was charged with aggravated assault, possession of a weapon for an unlawful purpose, and criminal mischief - all indictable offenses. Ibid. Ultimately, however, he entered a guilty plea to two counts of simple assault, and one count of criminal mischief - all disorderly persons offenses. Id. at 1-2. Collins was sentenced to three concurrent one-year terms of probation and was ordered to have no contact

with the victims and to pay mandatory statutory fines. Id. at 3. He agreed to pay $1,500 in restitution. Ibid.

The OAE recommended a six-month suspension. Id. at 6. Instead, we suspended respondent for three months, finding that mitigation and aggravation were in equipoise, and that Collins' violent behavior was more serious than that of the attorney in Buckley. Id. at 20-21. The Court agreed with our determination.

Finally, in In re Gonzalez, 229 N.J. 170 (2017), the attorney, as a result of aggressive interactions on the roadway, initiated a confrontation with twenty-one-year old Julia Bouclier. In the Matter of Ralph Alexander Gonzalez, DRB 16-422 (March 21, 2017) (slip op. at 2). Although Gonzalez claimed that Bouclier had been driving recklessly, he admitted that, after she stopped her vehicle, he exited his vehicle "probably wanting to hurt someone. I would say even worse than that." Ibid.

Specifically, Gonzalez retrieved a golf club from his trunk and swung the club at Bouclier's vehicle "as if he were going to hit it," and then threw the club at her car as she attempted to drive away. Ibid. The club struck Bouclier's vehicle multiple times as it caromed about. Ibid. Gonzalez retrieved the club and closely approached Bouclier's vehicle. Ibid. He could see and hear Bouclier crying and attempting to explain herself, but he was unmoved, stating to her that "this could have been my

daughter and this is a lesson. You don't go running people off the side of the road." Ibid. Nevertheless, respondent then left the scene without contacting the police, rationalizing that "nobody [was] bleeding." Ibid.

Gonzalez admitted that "he lost control over his emotions and is remorseful." Ibid. Ultimately, the police identified and contacted Gonzalez, who cooperated with the police investigation. Ibid. He also reported his charges to the OAE. Ibid.

According to Bouclier, the incident with Gonzalez began when she suddenly braked to avoid a deer. Ibid. She claimed that he began to aggressively "tailgate" her vehicle, and attempted to improperly pass her. Ibid. At some point, she stopped her vehicle at an intersection. Ibid. Gonzalez then exited his vehicle, and began striking the trunk of her vehicle with his golf club. Ibid. When she attempted to leave the scene, he threw the club at her vehicle, striking it again. Ibid. Bouclier called the police, who interviewed her at the scene and photographed two large dents in her trunk and marks on her rear windshield. Ibid. Bouclier was distraught, and reported being unable to sleep for fear that Gonzalez might know where she lived and could hurt her and her family. Ibid.

On June 5, 2015, Gonzalez was admitted into the Pre-Trial Intervention (PTI) Program, conditioned on payment of $2,248.66 in restitution to Bouclier, the successful completion of an anger management course, his agreement to refrain from filing complaints against Bouclier, and his agreement to abide by the terms of the PTI program. Id. at 2-3. Gonzalez accepted responsibility for all damage to Bouclier's vehicle, including the dents that he claimed he did not make, and successfully completed PTI. Id. at 3.

We imposed a three-month suspension on Gonzalez, noting that his misconduct was similar to that of the attorney in Collins, who had received the same discipline, notwithstanding his clean disciplinary record. Id. at 5. In both cases, the attorneys committed an act of road rage, terrorizing his victim on a public street. Id. at 4. We rejected Gonzalez's claim of remorse, citing his state of mind when he exited his car, to wit, that he wanted to hurt someone or even worse than that, in addition to his verbal attack on Bouclier. Ibid.

Moreover, we were troubled that this was Gonzalez's third disciplinary matter, including two prior violations of RPC 8.4(d). Ibid. In our view, Gonzalez had "demonstrated a penchant for lack of respect for the administration of justice." Id. at

5. Thus, he received a three-month suspension in order "to protect the public and to preserve confidence in the bar." Ibid.

Although this case did not stem from an altercation involving automobiles, the fact-sensitive analysis and range of discipline are the same in other types of assault cases. See, e.g., In re Goiran, 224 N.J. 446 (2016). There, the attorney pleaded guilty in a Colorado state court to one count of third-degree assault (knowingly or recklessly causing bodily injury to another person), a Class I misdemeanor. In the Matter of Philip Alexander Goiran, DRB 15-215 (December 18, 2015) (slip op. at 1). The underlying conduct occurred on September 29, 2010, outside of the home of Goiran's in-laws, where his estranged wife resided, along with the couple's dog and cat. Ibid.

On the belief that he and his wife had agreed to his possession of their pets, the attorney telephoned his father-in-law and informed him of his intention to pick up the dog. Id. at 2. His father-in-law replied that he would not comply with the request until he had a chance to speak with his daughter, who had gone out for the evening. Ibid. Goiran went to the home anyway, where he engaged in a verbal confrontation with his father-in-law, which escalated to a physical altercation. Ibid. The attorney struck and bit his father-in-law as they wrestled to the ground. Ibid.

The attorney was sentenced to probation, was required to attend an alcohol evaluation and treatment program, and was ordered to receive domestic violence treatment. Ibid. Subsequently, the Presiding Disciplinary Judge approved the Conditional Admission of Misconduct submitted by the Colorado disciplinary authorities and suspended Goiran from the practice of law in Colorado for sixty days, which was stayed upon the successful completion of a two-year probation term. Ibid.

Following the disciplinary action in Colorado, the attorney self-reported to the OAE his guilty plea and resultant Colorado discipline, cooperated with disciplinary authorities in both jurisdictions, and engaged in substantial rehabilitation efforts. Ibid. He attended ethics courses and domestic violence prevention classes, apologized to his in-laws and his now former wife, and worked to repair his relationship with them. Ibid.

We imposed a censure on Goiran because his conduct was less egregious than that of the attorney in Buckley. Id. at 5. Moreover, substantial mitigation weighed in Goiran's favor. Ibid.

In this case, a fact-sensitive analysis requires the imposition of a six-month suspension on respondent. Like the attorneys in Milita, Collins, and Gonzalez, respondent engaged in menacing, threatening behavior toward someone whose conduct

had enraged him. There are, however, a number of notable factual distinctions between respondent's actions and those of the attorneys in those cases. These additional facts were contained in the pre-sentence investigation report.

Pursuant to N.J.S.A. 2C:44-6(d), "[d]isclosure of any presentence report . . . shall be in accordance with law and the Rules of Court. . . ." Rule 3:21-2(a) requires distribution of the pre-sentence investigation report to the sentencing court, to the defendant, and to the prosecutor, but does not, by its terms, prohibit distribution to others. Although we can discern no specific Court rule that characterizes pre-sentence reports as *per se* confidential, they are clearly comprehensive and invasive reports that include very personal information about the defendant's social, familial, medical, psychological, and financial background. Thus, such reports have been treated as confidential. See, e.g., State v. De George, 113 N.J. Super. 542, 544 (App. Div. 1971). There, in connection with a challenge of a defendant's sentence, the State attached to its brief, and included in its appendix, a copy of the defendant's and co-defendant's pre-sentence reports. The court, *sua sponte*, ordered the reports expunged from the filed documents, noting that they were not a matter of public record, and acknowledging, as a better practice, submitting such reports to a reviewing

court "separately and apart from briefs and appendices in an enclosure appropriately noting that they are for the confidential use of the court."

Notwithstanding the confidential and very personal nature of pre-sentence investigation reports, the Court has recognized our prerogative to receive and review such reports in order to "[reach] an appropriate decision that gives due consideration to the interests of the attorney involved and to the protection of the public." In re Spina, 121 N.J. 378, 389 (1990). In Spina, as in this case, the attorney pleaded guilty to a lesser offense than charged – there, the attorney pleaded guilty in Washington, D.C., to a misdemeanor whereas, here, respondent has pleaded guilty to a disorderly persons offense. However, as here, the plea allocution was sparse, prompting the Court to remand the matter to us "for a statement of any facts, in addition to the conviction itself, . . . relevant on the question of appropriate discipline, based on the written record, . . . and any documents [we found the attorney] to have conceded as accurate, including the pre-sentence report. . . ." Id. at 385.

It is clear, therefore, that we may consider the undisputed facts contained in respondent's pre-sentence investigation report to reach an appropriate determination in respect of discipline to be imposed. A review of the sentencing transcript

discloses that respondent reviewed the pre-sentence report and acknowledged, on the record, that it was "substantially correct and accurate." Therefore, we considered both the facts elicited during respondent's plea and sentencing hearings and the facts set forth in the pre-sentence investigation report. After due consideration of those facts, we determine that, at a minimum, the outrageous conduct described in that report requires the imposition of a three-month suspension. There is, however, respondent's disciplinary history to take into account.

Respondent has an admonition, two censures, and a pending three-month suspension. His misconduct in some of those matters demonstrated a serious lack of professional boundaries. For example, he has engaged in an ex parte communication with a judge, communicated directly with a domestic violence client's husband, who was represented by counsel, and he has allowed a client's civil action to be dismissed twice, the second time with prejudice. As we observed in Smith IV, respondent has a "propensity to violate the RPCs."

Respondent's behavior in this matter demonstrates a lack of boundaries in his personal life as well. Given the disturbing nature of respondent's underlying conduct in this matter and his disciplinary history, we determine to impose a six-month

suspension, to be served consecutively to the three-month suspension imposed in Smith V.

Chair Frost voted to impose a one-year consecutive suspension. Vice-Chair Baugh and Member Gallipoli 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
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Keith T. Smith
Docket No. DRB 17-389

Argued: February 15, 2018

Decided: April 26, 2018

Disposition: Six-Month Consecutive Suspension

Members	Six-Month Consecutive Suspension	One-year Suspension	Did not participate
Frost		X	
Baugh			X
Boyer	X		
Clark	X		
Gallipoli			X
Hoberman	X		
Rivera	X		
Singer	X		
Zmirich	X		
Total:	6	1	2

Ellen A. Brodsky
Chief Counsel