SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 18-182
District Docket No. XIV-2015-0306E

In The Matter of	:
William M. Laufer	:
An Attorney at Law	:

Dissent

Argued: July 19, 2018

Decided: November 27, 2018

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

The charges against respondent stem from his jokingly saying to an adversary during a courtroom recess in a matrimonial case that the Morris County Prosecutor, who was respondent's former partner, is "in his pocket" and "he does what I ask." The statements were made at counsel table, not on the record but nonetheless recorded by the CourtSmart back-up system. Respondent testified that he made the statements in jest. The adversary agreed, testifying that he understood that respondent's statements were "tongue in cheek" and "sarcastic banter." The judge who listened to the audio exchange

in its full context and tone likewise concluded that respondent was "joking with a colleague; an adversary, but a colleague." Respondent has been a respected member of the New Jersey bar for 43 years. He has a well-deserved reputation for character, a long history of contributions to the bar and to his community, and no disciplinary history. While his statements violate RPC 8.4(d) and 8.4(e), the censure recommended by the majority is too severe under these circumstances. There is a big difference between a momentary lapse of judgment and conduct showing a deficiency of character. We recommend an admonition.

There are some things that should not be joked about. A lawyer suggesting that he or she has improper influence over a judge, prosecutor, or other government official is one of them. It is particularly problematic where, as here, the joke was made in a courtroom, in the presence of recording devices. The problem is further compounded by the fact that a cold, flat transcript can never later reflect the original tone of humor or sarcasm. Yet, in evaluating ethics cases, as in the careful application of virtually all law, context counts. If respondent had made the same statements in earnest, intending to intimidate an adversary or influence a client, a censure or greater discipline would likely be appropriate. That, however, is not what happened here. The consistent testimony from all the participants is that it was obvious

that respondent was speaking facetiously. There is no clear and convincing evidence that respondent intended to mislead, intimidate or influence anyone. He did not mean for anyone to take his banter seriously — and evidently no one in the courtroom did.

Our Supreme Court has emphasized many times that "the essential purpose of our system of attorney discipline is to protect the public, not to punish the attorney." In re Witherspoon, 203 N.J. 343, 358 (2010); In re Konopka, 126 N.J. 225, 239 (1991) ("discipline is not imposed in order to punish the attorney but to protect the public against members of the bar who are unworthy of their trust"). Discipline is thus aimed at "the prevention of a re-occurrence" of the unethical conduct. In re Makowski, 73 N.J. 265, 271 (1977).

> Considering how best to protect the public from a particular attorney ordinarily involves considering the ethical lapses both in comparison to our relevant disciplinary precedents and in the context of that attorney's history rather than merely identifying the attorney's specific unethical act. Our evaluation of the appropriate quantum of discipline, therefore, is necessarily fact sensitive.
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> [Witherspoon, 203 N.J. at 358-59.]

We are dealing here with an attorney with a distinguished and unblemished record who made a momentary mistake. Respondent plainly recognizes that he should never have made the statements. He has shown

genuine, heartfelt remorse. He contacted the prosecutor to personally tell him about the statements and sincerely apologized to the prosecutor both before the grievance was filed and after. There is no chance that respondent will ever repeat this mistake. Respondent's moment of misplaced levity does not invalidate the solid character that he has demonstrated both through four decades of law practice and the extensive contributions he has made to his community. That respondent is being disciplined makes crystal clear — to him and to the bar — that jokes of this nature are not acceptable. Beyond this, there is no meaningful risk that discipline more severe than an admonition is needed to protect the public from a recurrence of this violation.

Respondent was charged with violating RPC 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation), RPC 8.4(d) (engaging in conduct prejudicial to the administration of justice), and RPC 8.4(e) (stating or implying an ability to influence improperly a government agency or official). The RPC 8.4(c) charge was properly dismissed because it requires an intent to deceive not present here. In re Hyderally, 208 N.J. 453, 461 (2011). Moreover, because the charges under both RPC 8.4(d) and RPC 8.4(e) are based on the very same conduct, enhancing the discipline because of multiple RPC violations would be inappropriate in this case. The district ethics committee that directly heard the testimony recommended

an admonition. An admonition was similarly imposed for a violation of RPC 8.4(e) in In re Shaw, DRB Docket No. 96-196 (July 24, 1996), where the conduct "was not an attempt to gain an unfair advantage" in the litigation. Id. at 1. In contrast, the censure recommended by the majority has typically been imposed where, unlike here, violations of RPC 8.4(d) or (e) have been accompanied by other, distinct unethical conduct. See, e.g., In re D'Arienzo, 207 N.J. 31 (2011); and In re LeBlanc, 188 N.J. 480 (2006).

There is another troubling aspect of this case that should be highlighted. This matter first became publicized because of the acts of the adversary's client, T.I. The record suggests that he eagerly wanted to weaponize respondent's statements as a way to injure his wife's lawyer. According to respondent, T.I. had already gone through five or six matrimonial lawyers of his own and had sued several of them; had filed ethics charges against experts involved in the case; and filed lawsuits against respondent and his wife, against other members of respondent's firm and their spouses, and against the Superior Court judges who had presided over the case, seeking billions of dollars in damages. T.I. directed his lawyer to order a copy of the CourtSmart transcript and then pointedly read respondent's statements into the court record. He also gratuitously sent a copy of the transcript to The Star-Ledger, which printed an article reporting respondent's statements about the county

prosecutor. That, in turn, led to an internal investigation of the prosecutor's office and to the prosecutor's public announcement denying respondent's statements.

With this background, T.I.'s representation to the trial judge that respondent's comments made him "fearful" is suspect. It certainly does not rise to the level of clear and convincing evidence that respondent's statements had an impact on the litigation. Moreover, it could set a risky precedent to enhance respondent's discipline based on the downstream results of T.I.'s subsequent, superseding use of the transcribed statements by publicly broadcasting them, out-of-context, and evidently for the purpose of damaging respondent. That T.I. intentionally or recklessly made an unfortunate occurrence that much worse cannot fairly be imputed against respondent as an aggravating factor.

Under all these circumstances, including the significant mitigating factors, the appropriate discipline for this isolated ethics lapse is an admonition.

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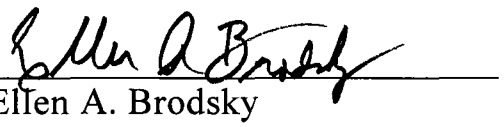
By: 
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