

Supreme Court of New Jersey  
Disciplinary Review Board  
Docket No. DRB 20-071  
District Docket No. XIV-2018-0143E

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In the Matter of  
Annmarie P. Smits  
An Attorney at Law

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Dissent

Decided: February 10, 2021

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

I write separately to express my disagreement with the six-member Board majority who recommend suspending respondent for three months based on her conviction of the 4th-degree crime of endangering the welfare of a child (in this case an older teen), a conviction subject to dismissal upon her successful completion of a two-year pre-trial intervention program. Unlike the majority, I do not believe that precedent supports imposition of a suspension in this case. Rather, like the OAE which recommended discipline in the range of a reprimand or censure, I believe that only a reprimand is supported by our precedent and is the just and fair discipline to impose on respondent who has no prior ethics

infractions in twenty-four years at the bar, whose crime was not one of violence or born of dishonesty but was instead the result of a lapse of judgment under unique circumstances unlikely ever to recur and having no relationship to the practice of law or her relationship with any client.

In making this decision, I focus on the core purpose of attorney discipline which is “not to punish the offender, but to protect the public against members of the bar who are unworthy of the trust and confidence essential to the relationship of attorney and client.” In re Gallo, 178 N.J. 115, 122 (2003), quoting In re Pennica, 36 N.J. 401, 418-19 (1962). Stated slightly differently, “[t]he 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. 456, 460 (1995). Both the facts and applicable precedent lead me to conclude that suspending this respondent will promote no legitimate purpose of our disciplinary system, as stated in these cases. A suspension also would be improperly punitive where her misdeed not only did not relate to her practice of law but also did not demonstrate more than a lapse of judgment during a short stressful period of time resulting from an unexpected, sudden accident.

In summary, the criminal charge here grows out of events occurring on February 2, 2018, three years ago, when, as described in the majority opinion, a handgun legally owned by respondent accidentally discharged, firing one bullet

through the closet wall of the room in which respondent was packing her belongings preparatory to moving her residence. Having passed through the wall, the bullet struck and lodged in the area of the right upper thigh and buttock of an older teen who was in the next room. Respondent and a friend who was present cleaned the wound of the minor who was in no outward distress. Respondent also called her ex-husband who was an emergency medical technician, reporting the incident to him and asking him to come over. But she never called 911 or took the minor to a hospital, a failure that led to the neglect charge which is the subject of this ethics case. When the minor eventually was seen at a hospital later that day, it was determined that no stitches were required. Fortunately, the minor sustained no permanent injury.

Turning now to the lack of precedent supporting the majority's decision: Saying (at p. 11) that terms of suspension generally have been imposed when an attorney commits or threatens acts of violence, the majority concludes (at p. 13) that respondent's conduct was akin to the attorney's actions in In re Gonzalez, 229 N.J. 170 (2017) where a three-month suspension was imposed on an attorney who had a disciplinary history -- prior reprimand and admonition -- was indicted for third-degree possession of a weapon for unlawful purpose and fourth-degree criminal mischief growing out of a road-rage incident during which the attorney exited his car, swung a golf club at the victim's vehicle and

threw it at her car as she attempted to drive away striking her vehicle multiple times, causing damage to the car and leaving the victim with insomnia, fearful of another attack; and In re Marcinkiewicz, 240 N.J. 207 (2019), imposing a one-year suspension on an attorney who pleaded guilty to two third-degree crimes, aggravated assault and endangering the welfare of a child, where during an alcoholic blackout the attorney inflicted severe injuries on her 8-week-old daughter. Having cited Marcinkiewicz, the majority, however, quickly acknowledges that in fact it is not truly applicable because that attorney “caused severe injuries” and “respondent’s failure to seek medical treatment . . . did not cause further injury to the minor.” Thus, Gonzalez remains as the only precedent cited in support of the majority’s recommended discipline.

In my opinion, Gonzalez also is inapplicable to the present matter. Not only did Gonzalez have two prior ethics infractions whereas respondent here has a clean ethics record after twenty-four years of practice but, more importantly, Gonzalez engaged in a frightening, prolonged violent physical attack on another person, causing property damage and continuing anxiety for the victim. In contrast, respondent’s offense, failing to take a minor for treatment, was non-violent causing no damage, despite the risk of possible harm from her inaction.

Even the two censure cases cited by the majority involved attorneys who engaged in more dire and serious acts than did respondent since their

wrongdoing extended over periods of time and caused property damage or made victims fearful. In the censure case, In re Milita, 217 N.J. 19 (2014), the attorney, angry because two teenagers were tailgating him, brandished a knife at them and followed them for several miles, still brandishing the knife. He then gave false information to the police officer who apprehended him. And in In re Osei, 185 N.J. 249 (2005), the attorney, acting over a significant period of time, deliberately caused \$72,000 worth of damage to his own house that was in foreclosure.

The OAE, recommending either a reprimand or a censure, notes that “[a]ttorneys who have violated RPC 8.4(b) for offenses relating to abuse or neglect of a child for non-sexual acts have received a reprimand,” citing two cases, In re Costill, 174 N.J. 563 (2002) and In re Sierzega, 229 N.J. 517 (2017). (OAE Brief, at 8). It says correctly, as does the majority opinion, that no case is directly on point with the current one.

But of the cases cited by the majority and by the OAE, these two reprimand cases in my opinion give the clearest guidance, although even the misconduct in these cases may be viewed by some as more serious than respondent’s. Both Costill and Sierzega involved neglect of children; both attorneys (like respondent here) had no disciplinary history. Attorney Costill left his two infant children alone in his car on a cold, dark, January night for almost

an hour while he drank in a nearby bar. Attorney Sierzega got into a motor vehicle accident after drinking, with his seven-year old daughter in the car. The children in both these cases were much younger and more helpless than the older teen in this case and, given their tender ages, were under the total control of their attorney parents who put them at risk of injury.

In short, respondent, with a heretofore unblemished ethics history in twenty-four years of practice, made a single mistake of judgment, unrelated in any way to her representation of clients. Her suspension is not supported by any of the cited precedent. Nor are there any aggravating factors to justify it. She reported her conviction quickly to ethics authorities, cooperated fully with them entering into a disciplinary stipulation, and took responsibility for her actions. Her mistake in judgment, made under unique circumstances, is virtually certain not to be repeated and a suspension is unnecessary to protect the public or preserve public confidence in the bar. In short, a reprimand is adequate and fair discipline in this case.

Disciplinary Review Board  
Anne C. Singer, Esquire

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