Supreme Court of New Jersey
Disciplinary Review Board
Docket No. 20-168
District Docket No. XIV-2019-0036E

In the Matter of	:
Frank A. Tobias, Jr.	:
An Attorney at Law	:

Decision

Argued: November 19, 2020

Decided: March 31, 2021

Ashley L. Kolata-Guzik appeared on behalf of the Office of Attorney Ethics.

Joshua M. Nahum appeared on behalf of respondent.

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 January 2020 guilty plea and conviction, in the Superior Court of New Jersey, of one count of third-degree aggravated assault, contrary to

N.J.S.A. 2C:12-1b(12). This offense constitutes a violation of RPC 8.4(b) (criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer).

For the reasons set forth below, we determine to grant the motion for final discipline and to impose a six-month suspension.

Respondent earned admission to the New Jersey bar in 1992 and to the New York bar in 1994. At the relevant times, he maintained an office for the practice of law in Perth Amboy, New Jersey. Respondent has no disciplinary history in New Jersey.

On December 13, 2018, respondent became angry when M.C., his then fiancée, confronted him at a restaurant where he was drinking alcoholic beverages with his friends. Respondent and M.C. then drove, in separate vehicles, to a parking lot near respondent's office. Respondent began to yell and curse at M.C., and then grabbed her head and "smashed it against the [vehicle] door frame twice." Respondent then tried to go inside his office but, after M.C. screamed that she was bleeding, he entered his vehicle and fled. A police officer dispatched to the scene observed that M.C. was bleeding from the top left side of her head and called an ambulance, which transported her to a hospital for treatment. Respondent admitted that, during the incident, he was under the influence of alcohol.

A grand jury indicted respondent on one count of third-degree aggravated assault against M.C., who met the definition of a victim of domestic violence, under N.J.S.A. 2C:25-19.

On January 6, 2020 respondent entered a guilty plea to one count of third-degree aggravated assault, in violation of N.J.S.A. 2C:12-1b(12).[1] At the January 6, 2020 plea hearing, respondent provided a sworn allocution that he became involved in a physical altercation with M.C. and that, as a result, he caused M.C. significant and severe bodily injury. Specifically, respondent admitted that he caused M.C. to sustain a "gash to her head."

On March 6, 2020, the Honorable Andrea Carter-Latimer, J.S.C. sentenced respondent to three years of probation and ordered him, as a condition, to submit to random drug and alcohol testing. Judge Carter-Latimer found that, in aggravation, there was some risk that respondent would commit another offense, based on his 2017 conditional discharge for misdemeanor

[1] N.J.S.A. 2C:12-1b(12) provides that a person is guilty of aggravated assault if he "[a]ttempts to cause significant bodily injury or causes significant bodily injury purposely or knowingly or, under circumstances manifesting extreme indifference to the value of human life, recklessly causes significant bodily injury to a person who, with respect to the actor, meets the definition of a victim of domestic violence."

assault; Judge Carter-Latimer further cited the need to deter respondent and others from violating the law.[2]

In mitigation, Judge Carter-Latimer found that respondent was likely to respond affirmatively to probationary treatment. She acknowledged two letters in the file from the victim, dated six months earlier, wherein M.C. stated that she did not feel that she was a victim; that respondent is a "good man;" and that she had hoped that the matter would not "get this far;" and asked the Court permission to see respondent. Respondent likewise requested permission to see the victim. A no-contact provision had been part of respondent's pretrial release order, but Judge Carter-Latimer determined not to include the no-contact provision as a condition of respondent's sentence. Respondent further was ordered to pay mandatory fines and costs.

Respondent failed to report his criminal charges to the OAE, as R. 1:20-13(a)(1) requires.

The OAE urged that a six-month suspension is the appropriate quantum of discipline for respondent's misconduct, relying primarily on In re Edley, 196 N.J. 443 (2008); In re Jacoby, 206 N.J. 105 (2011) (Jacoby II); and In re Park, 225 N.J. 609 (2016), all discussed below. The OAE also cited In re

[2] Respondent's prior charges of violent conduct and harassment previously were dismissed.

Paragano, 227 N.J. 136 (2016), but noted that it was distinguishable from the instant matter, because Paragano received a three-month suspension after pleading guilty to simple assault. During an argument with his wife, Paragano had "recklessly" pushed her, bruising her knee. In the Matter of John O. Paragano, DRB 15-366 (August 4, 2016) (slip op. at 2). He was sentenced to two years of probation and ordered to submit to drug and alcohol evaluations and to seek counseling for his mental health and anger management issues. Id. at 3. Paragano, a former municipal court judge, had a prior censure recommended by the Advisory Committee on Judicial Conduct and imposed by the Court, for domestic violence and causing a motor vehicle accident, both while under the influence of alcohol; he pleaded guilty to driving under the influence of alcohol. Id. at 11-12. The OAE argued that, in the present matter, respondent's violent actions in smashing the victim's head against a door frame twice and causing severe bodily harm was more egregious than pushing someone and causing a bruise, as in Paragano, and therefore warranted discipline greater than a three-month suspension.

The OAE also cited cases involving non-domestic assaultive behavior in support of its argument for the imposition of a six-month suspension. See, e.g., In re Viggiano, 153 N.J. 40 (1998) (three-month suspension for attorney, who, after a minor traffic accident, exited his vehicle and assaulted the driver of the

other vehicle, striking her in the face with his fist; when the police responded and attempted to restrain the attorney, he began to push and kick the officers); In re Bornstein, 187 N.J. 87 (2006) (six-month suspension imposed on attorney, in a default matter; the attorney fell backward while walking up the stairs at a Boston train station; when a doctor broke his fall and tried to assist him, the attorney inexplicably began to choke the doctor and slam his head, several times, against a plexiglass window; we determined to impose a three-month suspension but, due solely to the default status of the matter, enhanced the discipline to six months); and In re Gibson, 185 N.J. 235 (2005) (one-year suspension for attorney who was involved in a bar fight in Pennsylvania; police responded and arrested the attorney for the summary offenses of public drunkenness and disorderly conduct; later, at the police station, when an officer attempted to handcuff him, the attorney, who was still intoxicated, spat on and hit the officer; we made clear that the decision to impose a one-year suspension was not necessarily based on a comparison of Gibson's conduct to that of other attorneys who had been disciplined for assaultive criminal conduct, but rather was grounded largely in our conclusion that there was "no reason to deviate from Pennsylvania's determination inasmuch as the record before us is incomplete . . . and Pennsylvania – which had the opportunity to review the entire record and, therefore, better assess the facts - was convinced

that a one-year suspension was appropriate"). But see, In re Nealy, 205 N.J. 264 (2011), also acknowledged by the OAE (censure imposed on attorney who assaulted a federal officer; special agents from the United States Department of State, Diplomatic Security Service, went to the attorney's office to interview him and his wife in connection with a federal investigation; when the attorney became increasingly agitated and aggressive, the agents began to leave and instructed the attorney to contact them to arrange for an appointment for the interview; the attorney followed them to the exit and, when his wife came out of her office and stood between him and the agents, the attorney pushed her out of the way, and then pushed one of the agents against a wall and struck him with his hands and arms; after he was arrested and charged, the attorney was accepted into a federal court diversionary program, which he successfully completed, and the charges were dismissed; the parties entered into a stipulation that recited the fact that no one was seriously injured as a result of the attorney's actions).

In summary, the OAE asserted that, in the present case, given respondent's "disproportionate and unjustified" act, which caused M.C.'s head wound, a six-month suspension is the appropriate sanction. The OAE compared respondent's actions to that of the attorney in Bornstein (six-month

suspension),[3] yet distinguished Paragano (three-month suspension), because respondent's assault was more egregious than that of the attorney in Paragano. The OAE recognized no mitigating factors, and in aggravation, emphasized respondent's failure to report his criminal charges to the OAE and the gravity of the victim's wound. Finally, the OAE emphasized that domestic violence is a serious crime and concluded that, because respondent's misconduct was severe, and in the absence of mitigation, a six-month suspension was warranted.

In his August 19, 2020 letter brief to us, respondent, through counsel, requested the imposition of no more than a three-month suspension for his misconduct, maintaining that he had accepted responsibility for his actions; has an exemplary reputation as a professional who practices with dignity and integrity; is the sole source of income for his minor son who resides with him; has no prior discipline in twenty-eight years at the bar; and the incident was isolated and unrelated to his law practice. Respondent also noted that the incident occurred while he was under the influence of alcohol, although he did not offer it as an excuse. He claimed he was having lunch with a former

[3] The discipline in Bornstein was enhanced from a three-month suspension to a six-month suspension because it was a default matter. In the Matter of Eric H. Bornstein, DRB-06-073 (May 24, 2006) (slip op. at 10).

girlfriend, prior to an office holiday party, which precipitated the events at issue. Respondent maintained that his actions were not intended to cause harm, and that he has taken steps to ensure that no such event will be repeated, by entering a program for alcohol abuse after the incident occurred, and currently sees a therapist once a week for ongoing treatment to combat alcohol abuse.

In addition, respondent submitted a letter from the victim, addressed to the Middlesex County Prosecutor's Office, in which she stated that she lied to the police about the incident because she was upset after she found respondent with another woman in the restaurant. She explained that the parties entered into a "screaming match" outside his office; she "went at [respondent] and we struggled;" and then she "fell into" the car door because she was wearing high heels. The victim stated that respondent did not hurt her intentionally, and that her injury was minor. Respondent also submitted a January 14, 2020 statement from the victim in which she asserted that respondent did not assault her; the incident was a misunderstanding due to her own insecurities and jealousy; and respondent is not a criminal.

Respondent argued that the following caselaw concerning "intimate partner violence" supports a suspension of no greater than three months: In re Margrabia, 150 N.J. 198, 203 (1997) (discussed below); In re Toronto, 150

N.J. 191 (1997) (three-month suspension imposed on attorney who pleaded guilty to simple assault for his alleged attempt to strangle his former wife with a telephone cord; the Court also considered his misconduct involving misrepresentations to ethics investigators in another matter involving sexual misconduct and tax violation contentions for which he received a reprimand); and In re Howard, 143 N.J. 526 (1996) (three-month suspension imposed on attorney who was convicted of vehicular homicide after recklessly driving over and killing her husband with her car, following an argument between the couple). Respondent remarked that in Margrabia, Toronto, and Howard, the attorneys' conduct was more severe than his own, and that none of the attorneys received discipline in excess of a three-month suspension. Therefore, respondent urged us to impose no more than a three-month suspension.

Following a review of the record, we determine to grant the OAE's motion for final discipline. 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 Magid, 139 N.J. 449, 451 (1995); In re Principato, 139 N.J. 456, 460 (1995). Respondent's conviction of third-degree aggravated assault, contrary to N.J.S.A. 2C:12-1b(12), thus, establishes a violation of RPC 8.4(b). Pursuant to

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

In determining the appropriate measure of discipline, we must consider the interests of the public, the bar, and the respondent. "The primary purpose of discipline is not to punish the attorney but to preserve the confidence of the public in the bar." Ibid. (citations omitted). Fashioning the appropriate penalty involves a consideration of many factors, 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).

The Court has noted that, although it does not conduct "an independent examination of the underlying facts to ascertain guilt," it will "consider them relevant to the nature and extent of discipline to be imposed." In re Magid, 139 N.J. at 452. In motions for final discipline, it is acceptable to "examine the totality of the circumstances" including the "details of the offense, the background of respondent, and the pre-sentence report" before "reaching a

decision as to [the] sanction to be imposed." In re Spina, 121 N.J. 378, 389 (1990). The "appropriate decision" should provide "due consideration to the interests of the attorney involved and to the protection of the public." Ibid.

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. 165, 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).

In sum, we find that respondent violated RPC 8.4(b). The only remaining issue is the appropriate quantum of discipline to be imposed for his misconduct.

The OAE recommended a six-month suspension. Respondent requested that we impose no more than a three-month suspension.

With few exceptions, as the Court announced in In re Margrabia, 150 N.J. 198, 201 (1997), a three-month suspension is the ordinary measure of discipline imposed on an attorney who has been convicted of an act of

domestic violence. Prior to Margrabia, attorneys who had been convicted of acts of domestic violence generally had been reprimanded. See, e.g., In re Magid, 139 N.J. 449, and In re Principato, 139 N.J. 456. In Magid, however, the Court recognized both society's and the New Jersey Legislature's growing intolerance of domestic violence and warned that future incidents of domestic violence would result in harsher disciplinary sanctions. In re Magid, 139 N.J. at 453. Specifically, the Court stated that discipline greater than a reprimand was appropriate in such cases, announcing that "the Court in the future [would] ordinarily suspend an attorney who is convicted of an act of domestic violence." Id. at 455. Nevertheless, the Court was constrained to reprimand the attorney in Magid because it had "not previously addressed the appropriate discipline to be imposed on an attorney who is convicted of an act of domestic violence." Ibid. In In re Principato, 139 N.J. at 463, the Court repeated its warning to future perpetrators of domestic violence.

The attorney in Margrabia was convicted of simple assault. In re Margrabia, 150 N.J. at 200. He received a thirty-day suspended sentence and a two-year term of probation, was ordered to perform 200 hours of community service, and was required to pay $160 in costs and penalties. Ibid. He also was required to attend AA meetings and to complete the People Against Abuse program. Ibid.

We determined that Margrabia should be reprimanded because he had "acknowledged that his conduct was wrong and improper; he ha[d] already fulfilled the conditions attached to his criminal conviction; and he did not display a pattern of abusive behavior." Id. at 201. The Court disagreed, finding instead that Margrabia had committed his misconduct seven months after the Court's pronouncements in Magid and Principato, and that he was, therefore, on notice of the potential consequences. Accordingly, the Court suspended Margrabia for three months. Id. at 203.

In 2006, following the decisions in Magid, Principato, and Margrabia, the Court imposed only a censure on an attorney who pleaded guilty to a simple assault of his wife. In re Jacoby, 188 N.J. 384 (2006) (Jacoby I). Although the Court did not issue an opinion in Jacoby I, the facts were somewhat unusual. Specifically, in that case, the attorney's assault appeared to be an aberration. Moreover, he took immediate responsibility for the assault, returning home the next day to care for his wife, driving her to doctor appointments, and paying for her unreimbursed medical expenses; he paid all her personal bills, which she previously had paid from her earnings, and continued to pay these personal expenses after she returned to her employment. Immediately following the incident, the attorney sought professional help for his mental illness, including voluntarily entering an anger

management program, and exhibited extreme remorse for his behavior. In addition, Jacoby had been the single parent of three children following his first wife's death more than twenty years earlier and had changed course in his career, becoming in-house counsel to AT&T, so that he could devote sufficient time to the emotional needs of his children, who continued to be dependent on him. Moreover, since the incident of domestic violence, Jacoby and his wife had been in marriage counseling and moved to Washington, D.C. together so that he could continue his employment with AT&T. Finally, Jacoby's reputation, character, and prior good conduct were stellar.

Following Jacoby I, cases involving domestic violence have resulted in the imposition of terms of suspension. In 2008, the Court imposed a three-month suspension on an attorney who punched his girlfriend in the face and then attempted to strangle her. Hours later, he left two voicemail messages on her cell phone, threatening to kill her children and her parents. In re Edley, 196 N.J. 443 (2008). The attorney entered a guilty plea to third-degree criminal restraint.

In 2011, the Court imposed a one-year suspension on the same attorney it had censured in Jacoby I, after he assaulted his wife a second time. In re Jacoby, 206 N.J. 105 (2011) (Jacoby II). In the second incident, Jacoby repeatedly slapped his wife in the face, causing her nose to bleed, and pinned

her to the floor, where he held her against her will and threatened to kill her. He was convicted of a felony offense, in Virginia, and served one year of a three-year prison sentence.

In 2016, the Court imposed a three-month suspension on an attorney who entered a guilty plea to third-degree aggravated assault, admitting that he had attempted to cause significant bodily injury to his mother by forcing her to take a quantity of prescription medication. In re Park, 225 N.J. 609 (2016). In imposing only a three-month suspension, we emphasized that respondent's misconduct was "directly linked to, although not excused by, both mental health issues and contemporaneous abuse of his prescription medication." In the Matter of Jae Hoon Park, DRB 15-218 (April 15, 2016) (slip op. at 18).

Since the Magid decision in 1995, the New Jersey bar has been on notice that "the Court in the future [would] ordinarily suspend an attorney who is convicted of an act of domestic violence." In re Magid, 139 N.J. at 455. A review of the case law since Magid, Principato, and Margrabia leads us to conclude that a term of suspension is the proper quantum of discipline in this matter. In Edley (2008), Jacoby II (2011), and Park (2016), the Magid warning was enforced, and terms of suspension were imposed on attorneys who committed acts of domestic violence. See, e.g., In re Hyderally, 233 N.J. 596 (2018) (three-month suspension imposed on attorney who pleaded guilty to

simple assault by grabbing his girlfriend by the throat and slamming her into a wall, causing injuries to her neck, jaw, and left arm; in aggravation, we noted the attorney's prior reprimand for making inappropriate sexual advances to at least two women who were his legal aid clients); and In re Pagliara, 232 N.J. 327 (2018) (three-month suspension imposed on attorney who pleaded guilty to third-degree aggravated assault after he punched his wife, which caused her nose to bleed; the attorney was admitted to the pre-trial intervention program, and ordered to attend an anger management program and pay $311.02 in restitution).

More recently, in In re Fulford, 237 N.J. 252 (2019), the Court imposed a three-month suspension on an attorney who was convicted of simple assault, a disorderly persons offense, of his former spouse. Respondent and his former spouse engaged in a verbal argument when he arrived at her residence to pick up their two children in connection with his parenting time. In the Matter of Preston I. Fulford, DRB 18-132 (October 16, 2018) (slip op. at 3). Respondent did not promptly leave, but lingered, and his former spouse confronted respondent with a long-handled ice chipper in an attempt to convince him to vacate the property. Id. at 3-4. Respondent pulled the chipper from her hands and hit her in the head with it, in front of their children, causing her to fall and temporarily lose consciousness. Id. at 3-4,14. We recognized, in aggravation,

that respondent committed the assault in front of his children, and acknowledged, in mitigation, that respondent had no disciplinary history. Id. at 14.

To craft the appropriate discipline in this case, we also considered the aggravating and mitigating circumstances. In aggravation, respondent failed to report the criminal charges to the OAE. He also caused the victim to suffer a severe head wound after smashing her head against a car door frame twice, and then fled the scene. In mitigation, respondent entered a program for alcohol abuse and continues treatment, and has no prior discipline in twenty-eight years at the bar.

Although respondent claimed to have accepted responsibility for his criminal conduct, in his brief to us, he has attempted to pursue a collateral attack of his own guilty plea and conviction, producing documents that tend to undercut his guilty plea and conviction. His futile attempts violated R. 1:20-13(c)(2), which provides, in pertinent part, that in a motion for final discipline

> [t]he sole issue to be determined shall be the extent of final discipline to be imposed. The Board and Court may consider any relevant evidence in mitigation **that is not inconsistent with the essential elements of the criminal matter for which the attorney was convicted or has admitted guilt as determined by the statute defining the criminal matter**. No witnesses shall be allowed and no oral testimony shall be taken; however, both the Board and the Court may consider written materials otherwise allowed by this

> rule that are submitted to it. Either the Board or the Court, on the showing of good cause therefore or on its own motion, may remand a case to a trier of fact for a limited evidentiary hearing and report consistent with this subsection. (emphasis added)

We, thus, accord no weight to respondent's "after-the-fact" attempts to undermine his criminal conduct, which endeavors are contrary to his sworn guilty plea allocution and conviction. It was disconcerting that respondent offered statements from the victim to prove that he did not intend to cause her injury. We were tempted to inquire whether respondent attempted to convince us that he lied during his sworn allocution in Superior Court, and that he did not commit an act of domestic violence, despite his guilty plea to exactly that. In any event, respondent's behavior in this respect is troubling.

To be sure, society has taken a stricter view of domestic violence, and has become more cognizant of the serious and pervasive impact that perpetrators have on their victims, and our culture as a whole. These significant aggravating factors, thus, warrant the enhancement of the discipline to a six-month suspension.

On balance, given the extreme nature of respondent's misconduct, we, thus, conclude that the aggravation outweighs the mitigation, and determine that a six-month suspension is the quantum of discipline necessary to protect the public and preserve confidence in the bar.

Chair Clark and Members Boyer, Rivera, and Singer voted to impose a three-month suspension.

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
Bruce W. Clark, Chair

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

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Frank A. Tobias, Jr.
Docket No. DRB 20-168

Argued: November 19, 2020

Decided: March 31, 2021

Disposition: Six-Month Suspension

Members	Six-Month Suspension	Three-Month Suspension	Recused	Did Not Participate
Clark		X		
Boyer		X		
Gallipoli	X			
Hoberman	X			
Joseph	X			
Petrou	X			
Rivera		X		
Singer		X		
Zmirich	X			
Total:	5	4	0	0

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