

IN THE SUPREME COURT OF THE STATE OF DELAWARE

In the Matter of a Member	§	
of the Bar of the Supreme Court	§	No. 125, 2013
of the State of Delaware:	§	
ERIC MICHAELS, <sup>1</sup>	§	Board Case No. 2012-0079-B
	§	
Respondent.	§	

Submitted: May 1, 2013

Decided: May 23, 2013

Reissued: June 11, 2013<sup>2</sup>

Before **STEELE**, Chief Justice, **JACOBS** and **RIDGELY**, Justices.

**ORDER**

This 23rd day of May 2013, it appears to the Court that the Board on Professional Responsibility (“Board”) has filed a March 18, 2013 Report on this matter pursuant to Rule 9(d) of the Delaware Lawyers’ Rules of Disciplinary Procedure (the “Procedural Rules”). The Office of Disciplinary Counsel (“ODC”) filed objections to the Board Report, and Respondent filed a response to the ODC’s Objections. The Court has reviewed the matter pursuant to Rule 9(e) of the Procedural Rules and concludes that the Board’s Report should be approved.

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<sup>1</sup> The Court *sua sponte* assigned a pseudonym to the Respondent. Supr. Ct. R. 7(d).

<sup>2</sup> This Order is being reissued so that the case will be made publicly available for citation purposes.

NOW, THEREFORE, IT IS ORDERED that the Report filed by the Board on Professional Responsibility on March 18, 2013 is hereby **APPROVED**, and the Petition for Discipline is **DENIED**;

1. In its Petition for Discipline, the ODC alleged that in February 2012, Respondent was involved in a domestic incident in public during which he grabbed his minor daughter by her ponytail, held her head at an angle, and refused to let her go.<sup>3</sup> Respondent took that action to prevent his troubled, minor daughter from again attempting to run away from home, in the context of an intensely stressful family situation. For that conduct, the Respondent was convicted of Offensive Touching, which is an unclassified misdemeanor, in the Family Court. This case, by its nature and in these specific circumstances, should not have warranted intervention by the ODC.

2. The ODC nonetheless charged the Respondent with having violated Rules 8.4(b) and 8.4(d) of the Delaware Lawyers' Rules of Professional Conduct (the "Rules"). Rule 8.4(b) states that "[i]t is professional misconduct for a lawyer to . . . commit a criminal act that reflects adversely on the lawyer's honesty,

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<sup>3</sup> Because he suffered a traumatic injury from falling off of a roof, Respondent requested the ODC to delay presenting its Petition for Discipline to the Preliminary Review Committee ("PRC"), to afford Respondent sufficient time to prepare for the PRC meeting. The ODC denied Respondent's request. The PRC then approved the ODC's Petition and offered Respondent a private admonition, which he declined. Although these background facts do not influence our disposition of this matter, we are troubled that the ODC would refuse Respondent's reasonable request to delay the PRC meeting. The record does not disclose the ODC's reasons for refusing the Respondent's request.

trustworthiness or fitness as a lawyer in other respects.” Rule 8.4(d) provides that “[i]t is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice.”

3. A hearing panel of the Board found unanimously that the ODC had not met its burden of establishing, by clear and convincing evidence, that Respondent had violated either Rule. In its Report, the Board found “*no principled basis*—let alone clear and convincing evidence—to support the conclusion” that Respondent had violated Rule 8.4(b). The Board further found, “for the same reasons,” that Respondent had not violated Rule 8.4(d). Consequently, the Board recommended that the Petition be denied.

4. The ODC objected to the Board’s Report on the basis that *every* criminal conviction must necessarily violate Rule 8.4(b). Because Respondent was convicted of Offensive Touching, he therefore violated Rule 8.4(b). In his response to the ODC’s Objections, Respondent disputes that claim.

5. This Court has the “exclusive authority for disciplining members of the Delaware Bar.”<sup>4</sup> It has “an obligation to review the record” and

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<sup>4</sup> *In re Katz*, 981 A.2d 1133, 1149 (Del. 2009).

“independently” determine “whether there is substantial evidence to support the Board’s factual findings.”<sup>5</sup> The Board’s conclusions of law are reviewed *de novo*.<sup>6</sup>

6. The ODC’s interpretation of the scope of Rule 8.4(b) is overbroad. By its very language, Rule 8.4(b) implicates only criminal conduct that reflects adversely on a lawyer’s fitness to practice law. We have found no case, in Delaware or any other jurisdiction, where Offensive Touching, under factual circumstances such as those involved here, has led to professional discipline.

7. Title 11, Section 601 of the Delaware Code defines Offensive Touching, in relevant part, as:

Intentionally touch[ing] another person either with a member of his or her body or with any instrument, knowing that the person is thereby likely to cause offense or alarm to such other person . . . .<sup>7</sup>

Offensive Touching is neither an inherently violent nor sexual offense. Although it is a criminal act, it does not, in and of itself, “reflect[] adversely on [a] lawyer’s honesty, trustworthiness or fitness” to practice law under Rule 8.4(b), nor is it “prejudicial to the administration of justice” under Rule 8.4(d).

8. Respondent’s criminal conviction for Offensive Touching, which he committed to prevent his child from running away from home, bears no

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<sup>5</sup> *In re Fountain*, 878 A.2d 1167, 1173 (Del. 2005) (internal quotation marks and citation omitted).

<sup>6</sup> *In re Abbott*, 925 A.2d 482, 484 (Del. 2007) (citation omitted).

<sup>7</sup> 11 Del. C. § 601(a)(1).

relationship to Respondent's fitness to practice law. In these unique factual circumstances, the ODC should not have intervened. Because the case was not an appropriate subject of a Petition for Discipline, we adopt the Board's Report and deny the Petition for Discipline.

The matter is hereby **CLOSED**.

BY THE COURT:

/s/ Jack B. Jacobs  
Justice