***People v. Philip M. Falco III*. 15PDJ101. July 7, 2016.**

A hearing board suspended Philip M. Falco III (attorney registration number 27930) from the practice of law for nine months, with the requirement that he petition for reinstatement, if at all, under C.R.C.P. 251.29(c). In such a proceeding, Falco will bear the burden of proving by clear and convincing evidence that he has been rehabilitated, has complied with disciplinary orders and rules, and is fit to practice law. Falco's suspension took effect August 11, 2016.

In 2015, Falco pleaded guilty to attempted third-degree assault. In the underlying incident, the hearing board found, Falco struck his then-wife with a closed fist several times while pinning her on a bed. He then pulled her off the bed. Falco's wife, who was then twenty weeks pregnant, suffered a concussion. The couple's three children were present in the home at the time of the assault. The hearing board found that Falco then made false statements about the incident to the sheriff's deputy who responded to a 9-1-1 call placed by Falco's wife.

Falco's violent conduct violated Colo. RPC 8.4(b), which provides that it is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects. Please see the full opinion below.

SUPREME COURT, STATE OF COLORADO ORIGINAL PROCEEDING IN DISCIPLINE BEFORE THE OFFICE OF THE PRESIDING DISCIPLINARY JUDGE 1300 BROADWAY, SUITE 250 DENVER, CO 80203	
Complainant: THE PEOPLE OF THE STATE OF COLORADO **Respondent:** PHILIP M. FALCO III	Case Number: **15PDJ101**
OPINION AND DECISION IMPOSING SANCTIONS UNDER C.R.C.P. 251.19(b)	

Philip M. Falco III ("Respondent") pleaded guilty to attempted third-degree assault upon his then-wife. That conduct violated Colo. RPC 8.4(b), which provides that it is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects. Respondent's misconduct warrants a fully served suspension for nine months, with the requirement that he petition for reinstatement under C.R.C.P. 251.29(c) and demonstrate, among other things, that he has been rehabilitated.

I. PROCEDURAL HISTORY

On November 18, 2015, Geanne R. Moroye, Office of Attorney Regulation Counsel ("the People"), filed a complaint against Respondent, alleging he violated Colo. RPC 8.4(b). Bennett S. Aisenberg and H. Paul Himes filed an answer on Respondent's behalf on December 15, 2015, admitting that Respondent violated Colo. RPC 8.4(b). The People then filed an unopposed motion requesting judgment on the pleadings on December 21, 2015. Presiding Disciplinary Judge William R. Lucero ("the PDJ") granted the motion on January 20, 2016.

In a scheduling order issued on December 22, 2015, the PDJ set a disciplinary hearing for April 4, 2016. On March 7, 2016, Darren R. Cantor and David M. Beller substituted as counsel for Aisenberg and Himes. That same day, Respondent filed an unopposed motion to continue the hearing date based on his substitution of counsel. The PDJ granted the motion and reset the hearing for June 1, 2016.

On that date, a Hearing Board comprising James R. Christoph and Andrew A. Saliman, members of the bar, and the PDJ held a hearing under C.R.C.P. 251.18. Moroye represented the People, and Respondent appeared with Cantor and Beller. During the hearing, the Hearing Board considered the stipulated facts and rule violations, stipulated exhibits S1-S3, and the testimony of Amber Falco, Kyle Michieli, and Respondent.

II. FACTS AND RULE VIOLATIONS

Respondent took the oath of admission and was admitted to the bar of the Colorado Supreme Court on March 31, 1997, under attorney registration number 27930.[1] He is thus subject to the jurisdiction of the Colorado Supreme Court and the Hearing Board in this disciplinary proceeding.[2]

As established by the PDJ's order granting judgment on the pleadings, Respondent was convicted of attempted third-degree assault, which constitutes a violation of Colo. RPC 8.4(b). That rule provides that it is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.[3]

Respondent's Criminal Case

Respondent's conviction and this disciplinary case are premised on his assault of his then-wife, Amber Falco, on December 1, 2013. Respondent pleaded guilty in Adams County to attempted third-degree assault, domestic violence, on February 3, 2015.[4]

In his criminal case, Respondent was sentenced to twelve months of probation with a domestic violence evaluation and domestic violence counseling.[5] His probation required (1) domestic violence group therapy—ninety-minute classes over the course of nine months; (2) two-hour weekly anger management classes for nine months; (3) regular visits with his probation officer; and (4) random drug and alcohol EtG tests.[6] Respondent completed his probation after nine months. He was also required to pay $1,474.50 in fines and costs.[7]

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[1] Respondent is also a certified public accountant in Colorado and a licensed lawyer in New York. His law practice focuses on tax matters.

[2] *See* C.R.C.P. 251.1(b).

[3] Colo. RPC 8.4(b). Respondent's conduct was also grounds for discipline under C.R.C.P. 251.5(b), which states that any criminal act reflecting adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects is grounds for discipline.

[4] Stip. Facts ¶ 9. The case was lodged in Adams County County Court under case number 2013M2369. Stip. Facts ¶ 9.

[5] Stip. Facts ¶ 11.

[6] Stip. Facts ¶ 11. Respondent testified—and we have no reason to doubt—that he had no positive drug or alcohol test results during his probation.

[7] Ex. S3. Respondent testified without contradiction that he also had to spend one night in jail as part of his criminal matter.

Testimony at the Disciplinary Hearing

At the time of the assault on December 1, 2013, which we address further below, Respondent was at home with Ms. Falco and their three children, who were aged one, three, and five.[8] Ms. Falco was twenty weeks pregnant.[9] Four days after the assault, on December 5, 2013, Respondent filed for divorce.[10] Dissolution was entered on November 4, 2014.[11]

Many of the facts underlying the assault are disputed. We summarize in turn the accounts provided at the disciplinary hearing by Ms. Falco, Officer Kyle Michieli, and Respondent. We then make our own findings as to the key factual allegations.

We set forth Ms. Falco's testimony in the following four paragraphs. According to Ms. Falco, on December 1, 2013, she and Respondent argued in their garage while getting out Christmas decorations. Respondent made belittling comments, including saying she was "just a piece of trash," and accused her of having an affair with someone she met in her emergency medical technician school. She grew frightened that he would hit her. She went into the house, got her phone, and entered "9-1-1," planning not to place the call unless Respondent struck her. While she was in the kitchen, near where her children were watching a movie, Respondent grabbed the phone from her hand and hit her on her face. She managed to get her phone, then pushed past him and ran to the bedroom. She tried to call 9-1-1 and screamed out her address, but the call did not go through. Although she had tried to lock the door, Respondent kicked the door in, pushed her onto the bed, and punched her in the face multiple times with a closed fist while he straddled her stomach. She was able to push and kick him off her, but he grabbed her foot and pulled her off the bed. When she was able to stand up, she reached for her phone to call the police, but Respondent prevented her from doing so, while threatening to destroy her life and take her children.

Ms. Falco testified—and Respondent admits—that the couple's children then walked into the bedroom.[12] According to Ms. Falco, she rushed her two youngest children into the car—all three of them shoeless—and drove away from the house. After driving around the block in tears for about half an hour, she decided to call 9-1-1 from a pay phone. The Adams County police met her, and she signed a consent form allowing them to search her home. She had bruises on her face, her head hurt, she saw double, and she felt sick and dizzy. She did not seek medical treatment at the time, however, because she wanted to ensure that her five-year-old son at home was safe. The next day, Ms. Falco visited St. Anthony's North Hospital, where she was diagnosed with a concussion, as confirmed by hospital records.[13]

[8] *See* Stip. Facts ¶ 5.
[9] Stip. Facts ¶ 3.
[10] Stip. Facts ¶ 8.
[11] Stip. Facts ¶ 8.
[12] Stip. Facts ¶ 5.
[13] Ex. S2.

For several weeks, she said, she continued to experience headaches, nausea, light-headedness, dizziness, and fogginess.[14]

Ms. Falco testified that Respondent had physically assaulted her on one prior occasion, in 2010.[15] She said that he punched her in the face while she was holding her daughter, who was two years old at the time. Ms. Falco called the police, Respondent fled the house, and he was arrested a couple of days later. According to Ms. Falco, he begged her to go into hiding in a Breckenridge condominium to avoid service of a subpoena to testify in the criminal case then pending. She complied; when she did not appear to testify in court, the case was dismissed and sealed.

Kyle Michieli, an Adams County Sheriff's Office patrol deputy, testified at the disciplinary hearing about his response to Ms. Falco's 9-1-1 call on December 1, 2013, as detailed in the following two paragraphs. Michieli was dispatched to a gas station to meet Ms. Falco, who was at her car with two children. Michieli observed that Ms. Falco was "upset," "crying," and "very scared." He detected no signs that she had been drinking. Ms. Falco told him that she and Respondent had argued in their garage while she was holding a ladder for him. She further related that Respondent became very upset, followed her into the house as she tried to call the police, then punched her in the face multiple times, grabbed her wrist, and pulled her hair. Michieli observed a mark about two inches long near her right eye, a mark under her other eye, and a swollen lip. He said that Ms. Falco was not bleeding but appeared to have the precursor to a bruise.

After speaking with Ms. Falco, Michieli drove to the Falco home to contact Respondent and to check on the five-year-old. He banged on the door and rang the doorbell but there was no answer, so he obtained Ms. Falco's written consent to search the home. Michieli also called Respondent's phone a few times. When Michieli reached Respondent, Respondent said he was not home. Michieli then stated that he had a consent form to search the home, and Respondent admitted that he was in fact present, whereupon he opened the door. According to Michieli, Respondent reported that he and Ms. Falco had been in the garage, "he was up on the ladder, [] she was holding it, and that a wreath fell and hit her in the face, she got upset, took the kids, and left." Michieli observed and photographed redness on both of Respondent's knuckles—particularly on his right hand—which Michieli described as the type of redness that typically results from throwing punches. Michieli did not observe any skin abrasions on Respondent's hands.

Finally, as described below, Respondent testified about the events of December 1, 2013, as well as about his background and other facts. He provided a different account of the assault than did Ms. Falco. Respondent claimed that when he hit Ms. Falco she was lying face down on the bed and he was not straddling her; he insisted that he "in no way harmed the unborn child." He testified that he did not hit Ms. Falco with a fist, but rather struck her

[14] A document that Ms. Falco received from St. Anthony's North Hospital stated that continuing symptoms of a concussion may include dizziness, headache, nausea, confusion, and difficulty with memory. Ex. S2.

[15] The People did not elicit this testimony from Ms. Falco; she offered it on her own initiative.

with an open hand about three times on the side of her head. In explanation for the red marks on his knuckles that Michieli observed, Respondent said that he had been trying to extricate a bristly wreath and that he in general does a lot of "hands-on work" around the house. He conceded that the wreath did not fall on Ms. Falco's face, but he resisted the inference that he had made a false statement to Michieli. He insisted that the wreath did fall, even if it did not fall directly onto Ms. Falco. He also asserted that none of the altercation took place in the kitchen. Respondent said he never told Michieli that he was not home on December 1, 2013, claiming they merely had a "miscommunication." Respondent further testified that Ms. Falco was intoxicated on the evening of the assault, and that she usually drank "four bottles of wine a day."

Turning to Respondent's other testimony, Respondent attested that his family is his "whole purpose." He noted that his eldest child lost his vision in 2012 as the result of a burst cyst, and Respondent has taken him to Harvard University for special treatment. Respondent also testified that his fourth child—the child with whom Ms. Falco was pregnant on December 1, 2013—died when she was six weeks old, at a time when she was in Ms. Falco's custody.

Respondent testified that he has "freely" admitted to hitting Ms. Falco. As soon as he hit her, he testified, "everything changed." His entire disposition and constitution transformed, he said, upon realizing that he had permanently damaged his family. He has grown more mindful and empathetic toward others and is more aware of his own anger barometer. He is very grateful for the anger management classes he took during his probation, he said. As an example of how he has put those lessons into place, he said that when their infant died, he "did not lash out" at Ms. Falco, and rather than requesting an explanation of what happened to the child, he "let it go." He feels "extremely guilty" for what he did to Ms. Falco, he averred; "something like this won't ever happen again," he said, as he's "not that type of person."

As to the incident in 2010 that led to the dismissed criminal case, Respondent testified that he did not strike Ms. Falco. He alleged that Ms. Falco was "extremely intoxicated" on that day, as she was on "many occasions." He did not remember being intoxicated himself, though he may have drank. Respondent further testified that Ms. Falco later retracted her allegation that he had struck her and attributed the allegation to a childhood flashback.

Having carefully considered Respondent's manner and demeanor on the witness stand, the Hearing Board generally does not find his testimony in this case to be credible. A number of Respondent's factual statements were inconsistent with the testimony of Ms. Falco and Michieli. We found Michieli to be particularly credible as an uninterested party. We also note that Respondent in subtle but numerous ways sought to minimize his own conduct and to malign Ms. Falco. As just a few examples, he mentioned his ex-wife's drinking several times, he insinuated that she was to blame for the death of their infant, and he maintained that he did not endanger his unborn child, even though the uncontested facts

show that he dragged his pregnant wife off the bed and struck her with enough force to cause a concussion. His credibility was further impugned by the false statements he made to Michieli on the day of the assault and by his refusal to acknowledge those misrepresentations at the disciplinary hearing.

With this assessment, the Hearing Board finds by clear and convincing evidence that Respondent struck Ms. Falco with a closed fist several times. Her concussion and the redness that Michieli observed on Respondent's knuckles make it highly implausible that Respondent hit her with an open hand, as he claims. In addition, the injuries on Ms. Falco's face—not the side of her head—convince us that Respondent hit her while he was pinning her face-up on the bed. As to the alleged incident in 2010, the limited testimony on this matter does not rise to the level of clear and convincing evidence. We thus do not take the 2010 alleged assault into account in assigning a sanction. Finally, based on several considerations, including Respondent's efforts to minimize his own conduct and to blame Ms. Falco, we find that he has not been rehabilitated from the underlying issues that led to his assault upon Ms. Falco.

III. SANCTIONS

The American Bar Association *Standards for Imposing Lawyer Sanctions* ("ABA *Standards*")[16] and Colorado Supreme Court case law guide the imposition of sanctions for lawyer misconduct.[17] When imposing a sanction after a finding of lawyer misconduct, a hearing board must consider the duty violated, the lawyer's mental state, and the actual or potential injury caused by the lawyer's misconduct. These three variables yield a presumptive sanction that may be adjusted based on aggravating and mitigating factors.

ABA *Standard* 3.0 – Duty, Mental State, and Injury

Duty: Under the ABA *Standards*, a violation of Colo. RPC 8.4(b) is a dereliction of a lawyer's duty owed to the public. Both in representing clients and in their personal conduct, lawyers are expected to uphold the principle that disputes must be resolved by observing accepted legal and moral standards, and without recourse to violence. Respondent failed in that regard.

Mental State: The evidence shows—and both parties agree—that Respondent committed the assault with a knowing state of mind.

Injury: By failing to uphold his duty to maintain his personal integrity, Respondent damaged the public's trust in the legal profession. More important, Respondent caused his family serious physical and emotional injury. Ms. Falco suffered a concussion, which caused pain and other physical symptoms, and she endured the emotional trauma and indignity of being assaulted in the supposed safety of her own home. Respondent's children, even if

[16] Found in ABA *Annotated Standards for Imposing Lawyer Sanctions* (2015).
[17] *See In re Roose,* 69 P.3d 43, 46-47 (Colo. 2003).

they did not witness the assault, in all likelihood heard the fight and witnessed their visibly battered and distraught mother fleeing their home and summoning the police—an experience that could cause serious and lasting psychological harm to the children. Children exposed to domestic violence are "at risk for a range of effects on their emotional, social, and cognitive functioning."[18] Such children may, for instance, become predisposed to commit violence themselves, fail to thrive or to develop primary attachments to their caretakers, or "experience severely diminished self-esteem, depression, withdrawal, developmental delays or regression, apathy, separation anxiety, guilt, shame, insomnia, and/or suicidal ideation."[19] Finally, by assaulting Ms. Falco when she was pregnant, Respondent placed his unborn child at risk of serious injury.

ABA *Standards* 4.0-7.0 – Presumptive Sanction

The presumptive sanction in this case is established by ABA *Standard* 5.12, which states that suspension is generally warranted when a lawyer knowingly engages in criminal conduct that does not contain the elements listed in ABA *Standard* 5.11 and that seriously adversely reflects on the lawyer's fitness to practice.[20] Here, Colorado case law makes plain that the infliction of bodily harm on another person seriously adversely reflects on a lawyer's fitness to practice.[21] This is because lawyers who engage in violence undermine the legal system itself, which "requires respect, restraint, and resort to the legal process."[22]

ABA *Standard* 9.0 – Aggravating and Mitigating Factors

Aggravating circumstances include any considerations that may justify an increase in the degree of the sanction to be imposed, while mitigating circumstances include any factors that may warrant a reduction in the severity of the sanction.[23] The parties have proposed that we apply a variety of aggravators and mitigators. As explained below, we apply three aggravating factors—one with particular weight—and three mitigating factors—one of which carries little weight.

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[18] Lois A. Weithorn, "Protecting Children from Exposure to Domestic Violence: The Use and Abuse of Child Maltreatment," 53 *Hastings L.J.* 1, 84-85 (2001) (noting also that "[e]ven children who do not contemporaneously observe violent incidents may still be affected deleteriously by these occurrences"); *see also Custody of Vaughn*, 664 N.E.2d 434, 437 (Mass. 1996) ("Particularly for children the sense that the place which is supposed to be the place of security is the place of greatest danger is the ultimate denial that this is a world of justice and restraint, where people have rights and are entitled to respect.").

[19] Phyllis A. Roestenberg, "Representing Children When There Are Allegations of Domestic Violence," 28 Nov. *Colo. Law* 77, 77 (Nov. 1999).

[20] The elements listed in *Standard* 5.11 include dishonesty, theft, sale of controlled substances, intentional killing, and other elements that do not apply here.

[21] *In re Hickox*, 57 P.3d 403, 405 (Colo. 2002).

[22] *Iowa Supreme Court Attorney Disciplinary Bd. v. Deremiah*, 875 N.W.2d 728, 735 (Iowa 2016); *see also In re Grella*, 777 N.E.2d 167, 171 (Mass. 2002) ("[e]ngaging in violent conduct is antithetical to the privilege of practicing law").

[23] *See* ABA *Standards* 9.21 & 9.31.

Refusal to Acknowledge Wrongful Nature of Conduct – 9.22(g): Though Respondent professed to take responsibility for his misconduct, the Hearing Board does not believe he has in fact done so. In several of his comments, he downplayed the nature of the assault and the resulting injury. For instance, he repeatedly pointed to Ms. Falco's own use of alcohol (while ostensibly disclaiming the relevance of her drinking) and he minimized how his actions affected his children and placed his unborn child in jeopardy. We therefore consider this factor in aggravation.

Vulnerability of Victim – 9.22(h): Respondent assaulted his wife in the marital home, in a place where it was unlikely that anyone would come to her aid.[24] Moreover, Ms. Falco was a pregnant mother of three young children at the time of the assault, which makes her a particularly vulnerable victim. This factor merits considerable weight in aggravation.

Substantial Experience in the Practice of Law – 9.22(i): Although Respondent has practiced law for nearly twenty years, we find this factor "not relevant since greater or lesser experience would not necessarily make the misconduct at issue here less likely."[25]

Illegal Conduct – 9.22(k): That Respondent's assault was a criminal offense is without question an aggravating factor here.

Absence of Prior Disciplinary Record – 9.32(a): We consider in mitigation the fact that Respondent has not been disciplined in his two decades of practice.

Absence of Dishonest or Selfish Motive – 9.32(b): Respondent asserts he is entitled to application of this mitigating factor, arguing his actions were impulsive. We disagree. Through the use of violence, Respondent was attempting to exercise control over a family member in a vulnerable position.[26] We cannot find such conduct to be unselfish. Indeed, most Colorado Supreme Court disciplinary cases involving domestic violence have not applied this mitigator.[27] We also find it inappropriate to apply this factor in light of the credible evidence that Respondent made dishonest statements to Michieli after Ms. Falco's 9-1-1 call.

Timely Good Faith Effort to Make Restitution or Rectify Consequences of Misconduct – 9.32(d): Respondent urges us to apply ABA *Standard* 9.32(d) on the grounds that he completed probation in his criminal case. Although Respondent forcefully argued that no Colorado case prevents application of this mitigator when the effort in question is made

[24] *People v. Brailsford,* 933 P.2d 592, 595 (Colo. 1997) (noting that in an assault in the family home, "it was unlikely that [the lawyer] would be interrupted by anyone coming to the aid of the victim").
[25] *In re Hickox*, 57 P.3d at 407. We note that the People did not request application of this factor.
[26] *See State v. Zurmiller*, 544 N.W.2d 139, 142 (N.D. 1996) (Levine, J., concurring) (noting that domestic violence is a means of exercising control over a partner); Roestenberg at 78 (observing that "[i]n cases in which domestic violence is present, []the dynamics are such that one party exercises control over the other with violence and emotional abuse").
[27] *See, e.g.*, *In re Hickox*, 57 P.3d at 406-07; *People v. Musick*, 960 P.2d 89, 93 (Colo. 1998).

pursuant to a court order, Respondent is wrong on the law. ABA *Standard* 9.4(a) states that forced or compelled restitution is neither aggravating nor mitigating, and we thus decline to consider Respondent's probation in mitigation.

Cooperative Attitude Toward Proceedings – 9.32(e): Respondent cooperated in this proceeding by stipulating to entry of judgment on the pleadings, thus helping to conserve prosecutorial and judicial resources. We apply relatively little weight in mitigation to this factor, however, because it appears that Respondent had no colorable basis for contesting entry of judgment under the circumstances.[28]

Delay in Disciplinary Proceedings – 9.32(j): Respondent argues that we should consider this factor in mitigation because the disciplinary hearing took place two-and-a-half years after the assault. Yet Respondent did not enter his guilty plea until February 2015—the same month he reported his misconduct to the People. The People filed their complaint about nine months later. We reject Respondent's request to apply this mitigator for several reasons. Respondent himself could have sped the disciplinary process by reporting his assault to the People immediately after the event, since the assault itself was an act that reflected adversely on his fitness to practice law.[29] Yet he waited to contact the People until after his conviction. Respondent later requested a continuation of the disciplinary hearing, which was initially scheduled for April 2016, when he decided to switch counsel.[30] Finally, courts have generally applied this mitigating factor only where delays are significantly lengthier than the claimed delay here.[31]

Imposition of Other Penalties or Sanctions – 9.32(k): Respondent spent one night in jail, paid fines and costs, followed probationary conditions, and now has a conviction on his criminal record. We consider these other penalties in mitigation.

Remorse – 9.32(l): Respondent argues that we should consider his deep remorse as a mitigating factor. We decline to do so. As explained above, Respondent's claim of remorse was not fully credible, and we do not believe he has truly acknowledged the nature of his misconduct or the damage he caused his family.

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[28] *See, e.g.*, C.R.C.P. 251.20(a) (providing that a certified copy of a judgment of conviction conclusively establishes the conviction and commission of the crime for disciplinary purposes). We note that ABA *Standard* 9.32(e) also mentions full and free disclosure to the hearing board, but here we have found that Respondent was not forthcoming in the disciplinary hearing.

[29] *See Musick*, 960 P.2d at 92 ("we have never held that a complaint must charge a violation of the criminal law before physically assaultive behavior can be found to reflect adversely on a lawyer's fitness to practice law").

[30] *See, e.g, Fla. Bar v. Varner*, 992 So. 2d 224, 230 (Fla. 2008) (declining to consider delay in mitigation when the respondent himself had filed motions for extension).

[31] ABA *Annotated Standards for Imposing Lawyer Sanctions* at 485-89 (collecting cases).

Analysis Under ABA *Standards* and Case Law

The Colorado Supreme Court has directed the Hearing Board to exercise discretion in imposing a sanction and to carefully apply aggravating and mitigating factors.[32] We are mindful that "individual circumstances make extremely problematic any meaningful comparison of discipline ultimately imposed in different cases."[33] Though prior cases are helpful by way of analogy, hearing boards must determine the appropriate sanction for a lawyer's misconduct on a case-by-case basis. The Colorado Supreme Court has suggested that cases predating the 1999 revision to this state's disciplinary system carry less precedential weight than more recent cases.[34]

Here, the People request imposition of a six-month, fully served suspension. Respondent, meanwhile, argues that a fully stayed suspension is the appropriate sanction for his misconduct. He cites a variety of cases in which attorneys who were violent toward family members or romantic partners were granted stayed suspensions through conditional admissions of misconduct or hearing board opinions or were offered diversion agreements by the People. We refer Respondent to the Colorado Supreme Court's directive that "diversion agreements[] are not binding precedent and citation to them has been discouraged by this court."[35]

The seminal Colorado case on domestic violence in an attorney disciplinary matter is *In re Hickox*.[36] In that case, the Colorado Supreme Court commented:

> We have traditionally taken a serious view of misconduct by an attorney involving the infliction of bodily harm on another. In numerous recent decisions, we have considered similar conduct and found it sufficiently serious to warrant suspension. In each case, the length of the suspension depended on the seriousness of the assault and the aggravating and mitigating factors present.[37]

The respondent in *In re Hickox* caused his estranged wife injuries when he angrily turned her arm behind her back while escorting her up a staircase, causing her to stumble and fall.[38] He then failed to report his conviction to disciplinary authorities, believing that the victim's filing of a grievance relieved him of the duty to report.[39] In rejecting the hearing board's

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[32] *See In re Attorney F.*, 285 P.3d 322, 327 (Colo. 2012); *In re Fischer*, 89 P.3d 817, 822 (Colo. 2004) (finding that a hearing board had overemphasized the presumptive sanction and undervalued the importance of mitigating factors in determining the needs of the public).
[33] *In re Attorney F.*, 285 P.3d at 327 (quoting *In re Rosen*, 198 P.3d 116, 121 (Colo. 2008)).
[34] *Id.*
[35] *In re Hickox*, 57 P.3d at 406 n.2. Of course, hearing board opinions and approvals of conditional admissions of misconduct by the PDJ similarly lack precedential force. *Roose*, 69 P.3d at 48.
[36] 57 P.3d 403.
[37] *Id.* at 405.
[38] *Id.* at 404.
[39] *Id.*

imposition of a private admonition, the Colorado Supreme Court considered two aggravating factors and three mitigating factors as well as the comparatively moderate level of violence at issue, ultimately determining that the lawyer should serve a suspension of six months.[40]

The *Hickox* court cited six pre-1999 cases involving a lawyer's violent conduct, and we briefly review several of those cases here. In *People v. Musick*, a lawyer physically assaulted his girlfriend on three separate occasions, causing her pain but no serious injury; he also threatened to throw her out of a sixteenth-floor window and restrained her with a belt.[41] Taking into account three aggravators and three mitigators, one of which carried relatively little weight, the Colorado Supreme Court suspended the lawyer for one year and one day.[42] In *People v. Reaves*, a lawyer pleaded guilty to a misdemeanor harassment charge after engaging in a "pushing and shoving match" with his wife, and he pleaded guilty to a petty offense of disorderly conduct after throwing a drink at his wife, grabbing her, and engaging in another "pushing and shoving match."[43] He also was convicted of driving while ability impaired.[44] The Colorado Supreme Court approved the parties' stipulation to a six-month suspension based on consideration of one aggravating factor and at least four mitigators.[45] Last, in *People v. Shipman,* a lawyer pleaded guilty to driving while ability impaired and also to assault and battery upon his wife.[46] The lawyer's wife stated that he threw her on the floor and attempted to strangle her, but the lawyer averred that he only "pushed her"; that factual discrepancy was not resolved in the disciplinary opinion.[47] The lawyer also failed to report his conviction to disciplinary authorities.[48] Taking into account two aggravators and six mitigators, the Colorado Supreme Court approved a stipulation to a six-month suspension.[49]

We note that other jurisdictions in recent years have tended to impose served suspensions for incidences of domestic violence.[50] In imposing a two-year suspension for a

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[40] *Id*. at 405-08.
[41] 960 P.2d at 90.
[42] *Id*. at 93.
[43] 943 P.2d 460, 461-62 (Colo. 1997).
[44] *Id*. at 461.
[45] *Id*. at 462.
[46] 943 P.2d 458, 459 (Colo. 1997).
[47] *Id*.
[48] *Id*.
[49] *Id*. at 460.
[50] *See, e.g, Fla. Bar v. Schreiber*, 631 So. 2d 1081, 1081-82 (Fla. 1994) (suspending for 120 days a lawyer who "beat up his girlfriend" on a single occasion and requiring the lawyer to attend a program for batterers of women); *Deremiah*, 875 N.W.2d at 730, 739 (suspending a lawyer indefinitely with no possibility of reinstatement for at least three months, with the requirement of a reinstatement hearing, where the lawyer broke into his girlfriend's house on one occasion when she was not home and on another occasion punched her in the face multiple times and pulled out a clump of her hair); *In re Cardenas*, 60 So. 3d 609, 610, 614 (La. 2011) (suspending for one year, with six months deferred upon probationary compliance, a lawyer who was convicted of committing a domestic battery while a child was present in the residence); *Grella*, 777 N.E.2d at 173-74 (suspending for two months a lawyer who engaged in a single but sustained physical assault upon his wife, and

domestic assault, the Oklahoma Supreme Court stated that it is "incumbent on this Court to protect the public by sending a message to other lawyers that this misconduct is considered a serious breach of a lawyer's ethical duty and will not be tolerated."[51] Case law from across the country indicates a growing awareness among courts of the corrosive nature of domestic violence[52] as well as an increasing recognition of how acts of domestic violence reflect negatively upon a lawyer's fitness to practice.[53]

Here, as noted above, the presumptive sanction is without question suspension. Because the ABA *Standards* provide little direction as to the appropriate length of a suspension, we rely in significant measure on Colorado case law for guidance.[54] *In re Hickox* is by far the strongest case law authority based on the relative recency of the decision and the court's effort to cull guiding principles from a survey of past Colorado case law.[55] As noted above, the *Hickox* court held that the length of a suspension in a case involving violence depends on the seriousness of the conduct and the nature of the aggravation and mitigation.[56]

In the present case, the Hearing Board finds that the level of violence Respondent inflicted upon Ms. Falco was more aggravated than the level of violence in *Hickox*, and the balance of aggravating and mitigating factors weighs more heavily in favor of aggravation than in *Hickox*. We recognize, however, that while the sanctions analysis in *Hickox* was predominantly focused on the act of domestic violence, rather than the lawyer's failure to report his conviction, the lawyer's failure to report may have contributed to a somewhat—though not greatly—harsher sanction. Taking all considerations into account, the Hearing Board concludes that the sanction most consistent with *Hickox*—and with other relevant case law and our own sense of fairness and proportionality—is a fully served nine-month

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commenting that although a longer suspension was warranted, the high court was bound to accord "substantial deference" to the two-month recommendation made by the hearing board); *State ex rel. Okla. Bar Ass'n v. Zannotti*, 330 P.3d 11, 13, 17 (Okla. 2014) (suspending for two years a lawyer who smashed an ex-girlfriend's phone, then head-butted her, ordered her to undress, and put his hands tightly around her neck); *cf. Matter of Magid*, 655 A.2d 916, 917-19 (N.J. 1995) (publicly reprimanding a lawyer who punched, knocked to the ground, and kicked a romantic partner but explaining that this was an matter of first impression in New Jersey and cautioning that the court "in the future will ordinarily suspend an attorney who is convicted of an act of domestic violence").

[51] *Zannotti*, 330 P.3d at 17.

[52] *See, e.g., Vaughn*, 664 N.E.2d at 437-38 (commenting that "courts have too often failed to appreciate the fundamental wrong and the depth of the injury inflicted by family violence. In subtle and overt ways the decisions of courts fail to take these factors into account and have treated them with insufficient seriousness . . . .").

[53] *See, e.g., Grella*, 777 N.E.2d at 171; *Matter of Principato*, 655 A.2d 920, 922 (N.J. 1995).

[54] We also observe that sister jurisdictions usually consider a six-month fully served suspension to be the baseline sanction where suspension is the presumptive sanction, with the length to be adjusted upwards or downwards from that baseline based on aggravators and mitigators. *See, e.g., In re Cummings*, 211 P.3d 1136, 1140 (Alaska 2009); *In re Moak*, 71 P.3d 343, 348 (Ariz. 2003); *In re Stanford*, 48 So.3d 224, 232 (La. 2010); *Hyman v. Bd. of Prof'l Responsibility*, 437 S.W.3d 435, 449 (Tenn. 2014); *In re McGrath*, 280 P.3d 1091, 1101 (Wash. 2012).

[55] 57 P.3d at 405-06.

[56] *Id.* at 405.

suspension, with the requirement that Respondent petition for reinstatement under C.R.C.P. 251.29(c). In petitioning for reinstatement, he will be required to prove by clear and convincing evidence, among other things, that he has been rehabilitated. Because Respondent does not genuinely and fully acknowledge his misconduct, we cannot be assured, short of this requirement, that he will refrain in the future from the type of violence that has brought him before us.[57]

IV. CONCLUSION

Respondent committed a violent assault on his pregnant wife while his children were present in the family home. That conduct represented a "raw assault on the basic individual right to physical security that lies at the core of civilized society."[58] Moreover, the assault ran counter to Respondent's role as a lawyer, since "[t]he essence of the conduct of a lawyer is to facilitate the resolution of conflicts without recourse to violence, for law is the alternative to violence."[59] In this disciplinary case, Respondent has not been fully candid, nor has he given the Hearing Board any confidence that his misconduct will not recur. The appropriate sanction for Respondent's conduct is a nine-month served suspension with the requirement that Respondent formally petition for reinstatement.

V. ORDER

The Hearing Board therefore **ORDERS**:

1. **PHILIP M. FALCO III**, attorney registration number 27930, is **SUSPENDED FOR NINE MONTHS**. The suspension will take effect upon issuance of an "Order and Notice of Suspension."[60]

2. Respondent **SHALL** promptly comply with C.R.C.P. 251.28(a)-(c), concerning winding up of affairs, notice to parties in pending matters, and notice to parties in litigation.

3. Within fourteen days of issuance of the "Order and Notice of Suspension," Respondent **SHALL** comply with C.R.C.P. 251.28(d), requiring an attorney to file an affidavit with the PDJ setting forth pending matters and attesting, inter alia, to notification of clients and other jurisdictions where the attorney is licensed.

4. If Respondent wishes to resume the practice of law after serving his suspension, he **MUST** file a petition for reinstatement under C.R.C.P. 251.29(c).

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[57] In making this determination, we note our concern that violence against romantic partners is often correlated with violence against children. *See, e.g.*, Weithorn at 83.

[58] *Deremiah*, 875 N.W.2d at 738.

[59] *Grella*, 777 N.E.2d at 171.

[60] In general, an order and notice of sanction will issue thirty-five days after a decision is entered pursuant to C.R.C.P. 251.19(b) or (c). In some instances, the order and notice may issue later than thirty-five days by operation of C.R.C.P. 251.27(h), C.R.C.P. 59, or other applicable rules.

5. The parties **MUST** file any posthearing motion or application for stay pending appeal with the Hearing Board **on or before July 28, 2016**. Any response thereto **MUST** be filed within seven days.

6. Respondent **SHALL** pay the costs of these proceedings. The People **SHALL** submit a statement of costs **on or before July 21, 2016**. Any response thereto **MUST** be filed within seven days.

DATED THIS 7th DAY OF JULY, 2016.

Original Signature on File
WILLIAM R. LUCERO
PRESIDING DISCIPLINARY JUDGE

Original Signature on File
JAMES R. CHRISTOPH
HEARING BOARD MEMBER

Original Signature on File
ANDREW A. SALIMAN
HEARING BOARD MEMBER

Copies to:

Geanne R. Moroye Office of Attorney Regulation Counsel	Via Email g.moroye@csc.state.co.us
Darren R. Cantor David M. Beller Respondent's Counsel	Via Email Darren@cantorlaw.net David@rklawpc.com
James R. Christoph Andrew A. Saliman Hearing Board Members	Via Email Via Email
Christopher T. Ryan Colorado Supreme Court	Via Hand Delivery