SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 11-199
District Docket No. XB-2010-0015E

IN THE MATTER OF	
JEFFREY R. GROW	
AN ATTORNEY AT LAW	

Decision

Argued: September 15, 2011

Decided: December 8, 2011

Joann B. Pietro appeared on behalf of the District XB Ethics Committee.

Respondent appeared pro se.

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

This matter was before us on a recommendation for discipline (censure) filed by the District XB Ethics Committee (DEC). The complaint charged respondent with threatening criminal action in order to gain an unfair advantage in a civil

matter (RPC 3.4(g)). We determine that an admonition is the more appropriate level of discipline.

This case was originally before us on June 17, 2010, based on a censure recommendation filed by the DEC under Docket No. DRB 10-149. The complaint in that matter charged respondent with violations of RPC 1.4(b) (failure to communicate with the client) and RPC 1.5(b) (failure to set forth in writing the rate or basis of the legal fee). By letter dated June 25, 2010, we remanded the matter to the DEC for the filing of a single-count complaint, charging respondent with a violation of RPC 3.4(g), and a hearing. Because the RPC 1.4(b) and RPC 1.5(b) charges had already been litigated, we instructed the DEC to add its new findings to the findings it had made in the original complaint and to recommend a sanction based on the totality of respondent's misconduct.

Respondent was admitted to the New Jersey bar in 1975. He has no prior discipline.

In May 2004, Mary Farischon, the grievant, retained respondent to probate her grandmother's will in Morris County. Respondent, who had previously represented Farischon, did not memorialize the fee arrangement. Six months later, however, on November 1, 2004, he disclosed his fee on an inheritance tax

return form, cited as "3½% . . . $7,000." Respondent conceded that the inheritance tax return was the only writing that set forth the fee arrangement between the parties.

Farischon testified that, in May 2004, she and respondent met with her grandmother's stockbroker to recover stock certificates worth about $7,000 and, again, on November 1, 2004, when Farischon signed the inheritance tax return. She claimed that she did not know that the return contained information about respondent's fee. According to Farischon, she simply signed the return, without reading; respondent did not explain it to her. In support of her assertion that she never read the return, Farischon pointed to a mistake in the document, that is, the listing of her father as deceased:

> He never went over the return. Would anybody put down their family deceased? I mean, one, your father, if he had gone over the return with me as much as Mr. Grow says he went over that return, don't you think I would have said to him my dad's not dead, he lives with me? Why wouldn't I admit that? That's what I don't understand. I would never, as God is my witness, I would never take a commission off of an estate that was my

> parents'. My parents lived with me, why would I take money from them?
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> [T87-17 to T88-2.][1]

Farischon claimed that she remained "in the dark" about respondent's fee, until she received a December 1, 2004 letter from him, seeking payment. She added that the letter did not state the amount due. She immediately called respondent, spoke to his secretary, and asked for a bill, but did not receive one.

On December 6, 2004, Farischon received a second demand letter from respondent. It, too, failed to state the amount due. The letter warned, however, that, if she did not pay, respondent would file a lawsuit to collect the debt and threatened criminal action for "theft of services." It did not advise Farischon of her right to request fee arbitration.

Upon receipt of the second letter, Farischon claimed, she spoke directly with respondent and requested a bill, but never received one.

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[1] "T" refers to the transcript of the December 7, 2009 DEC hearing.

On December 9, 2004, respondent wrote to the New Jersey Inheritance Tax Division and enclosed a check for $4,105.52, representing the entire tax due from the estate. Farischon denied having received a copy of that correspondence, before the ethics proceedings.

On May 3, 2005, respondent sent Farischon another letter, this one requesting information about her parents' marital status as of the date of her grandmother's death. Farischon testified that respondent had never previously asked her that question.

Respondent testified that he needed that information for tax purposes. He claimed that he had asked for it on numerous occasions, but that Farischon had given him evasive answers. Thus, he said, he decided to designate her father as a class "D" beneficiary, instead of class "C," the family designation carrying a sizable tax exemption. Respondent reasoned that it was more important to file the return than to leave it unfiled for lack of that information. He also knew that the return could later be amended and a refund obtained for the estate, if he had used the wrong designation.

Farischon recalled speaking to respondent, upon receipt of the letter, and advising him that she would contact the taxing

authorities directly about her parent's marital status. She again asked respondent for a bill for his services. According to Farischon, this marked her final telephone conversation with respondent. In fact, she claimed, "except for those couple of times that I met with [respondent], I never heard anything, never a letter, nothing from him. I never even got a copy of the tax return. Nothing." She stated, once again, that she did not receive a bill.

For the next three years, Farischon had no further dealings with respondent and considered his work on behalf of the estate complete. She testified: "The return was signed. I gave him a check . . . The only thing he was hired to do was the inheritance tax return."

Therefore, Farischon was "shocked" when, in January 2008, she received respondent's summons and complaint demanding payment of $7,057, representing his $7,000 fee and $57 in expenses.[2] Farischon then retained an attorney, Keith Patterson,

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[2] Under separate cover, on January 8, 2008, respondent sent Farischon a letter, advising her of her right to request fee arbitration.

to represent her. According to Farischon, she obtained a copy of her file from respondent and gave it to Patterson, who found several mistakes in the filed tax return, including the listing of her father as deceased. She claimed that Patterson also told her that a penalty had been incurred for the late filing of the return.[3]

Farischon ultimately filed a request for fee arbitration, which resulted in a June 17, 2008 award of $3,500 in respondent's favor.

For his part, respondent denied any wrongdoing in the matter. With regard to the charge that he failed to set forth in writing the basis or rate of his fee, he testified that, although he had not used his usual fee agreement for the matter, he had set out the terms of his fee, very plainly, on the inheritance tax return:

> But if you look in the exhibits here, in exhibit 8, I think, is the return and you look on schedule D, there is my fee, and I used that as, basically, the retainer. Here's the fee agreed upon, I checked 7,000

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[3] There is no evidence to support Farischon's allegation that the estate incurred a penalty or that respondent was responsible for a late tax filing.

> dollars because I explained to her I was taking a percentage, that's how I was going to do it, and I think that's proper. It's in the rules that I can take a percentage of the estate, and I even explained to her, the smaller the estate, the larger the percentage. Because it's only a 200,000-dollar estate, I take a larger percentage in order to get a proper fee out of this.
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> [T57-22 to T58-10.]

Respondent also took issue with Farischon's recollection of other important events in the matter:

> She also says that Keith Patterson told her that [she] didn't take a commission. It's right here, Mary Farischon, executor's commission, 7,000 dollars. Or that I didn't pick up any other expenses, but down here, St. Cecilia's Church, paid by Mary Farischon. All this.
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> That there was ambiguity about my charge, my charge is right there on the return. So [by] the time it was [time] to put money up and everything else, there it is. The estate's figured out, here's what I'm charging, 7,000 dollars, 3½ percent of that estate. There's no ambiguity as to that at all.
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> [T58-12 to T60-6.]

Respondent also denied the charge that he failed to communicate with Farischon. The complaint specifically alleged that he failed to discuss with her the fee arrangement and the estate's penalty for the late filing of the return.

With regard to communications about his fee, respondent recalled that he had orally discussed the fee arrangement with Farischon, prior to drafting the inheritance tax return, and that she had agreed to his three-and-a-half percent fee. He explained that, because Farischon "was in my office all the time," he felt it unnecessary to send her letters detailing their discussions. He acknowledged that he never gave Farischon a choice of the percentage or an hourly rate, stating firmly, "If she didn't like it, she could have gone someplace else."

With respect to the charge that he failed to advise Farischon that he had filed the estate tax return late, respondent initially did not recall that it had been filed untimely. Later, on cross-examination, his review of the inheritance tax return, which included the date of death of the decedent (December 12, 2003), convinced him that he must have filed it a few months late. As indicated above, there is no evidence in the record, beyond Farischon's assertion, that the state assessed a penalty for a late filing.

Lauren Shay, respondent's secretary, also testified at the DEC hearing. According to Shay, Farischon was a frequent visitor in the office, over the course of the representation. She estimated that Farischon had office appointments "at least

twelve times, not including other times where she would just come in without an appointment because she lived in the area." Shay also recalled having been in the room, on November 1, 2004, "[w]hen [respondent] actually went over the inheritance return . . . every item on that return with her before she signed it. I was right there."

Additionally, Shay recalled respondent's concern that (1) Farischon might try to avoid paying his fee, as she had used a separate attorney (not Patterson) to sell her grandmother's house, the single largest asset, and (2) that the attorney had disbursed the entire proceeds of the sale, without regard to respondent's fee or an inheritance tax waiver from the state.

Finally, Shay recalled preparing a draft final bill for respondent, in December 2004, using correspondence in the file and office appointment book information to reconstruct the events of the case. It is unclear from the record if the bill was ever sent to Farischon, prior to the delivery of the file to Patterson.

Farischon's mother, Carolyn, testified briefly at the hearing. Carolyn recalled attending all meetings at respondent's office involving her daughter, including the November 1, 2004 meeting, when Farischon signed the estate tax return. She stated that her daughter had not read the return, that respondent had not

explained it, and that respondent's secretary, Shay, had not been present that day.

The new, post-remand complaint charged respondent with a sole violation of RPC 3.4(g) (a lawyer shall not . . . threaten to present criminal charges to obtain an improper advantage in a civil matter). This charge was based on the December 6, 2004 demand letter sent by respondent to Farischon that stated, in part, "[I]f I do not receive payment by Wednesday, December 8, 2004 I will be forced to file a Complaint in Civil Court and will file criminal charges for theft of services against you. Should I be forced to take this course of action, you will incur additional costs."

At the remand hearing, Farischon testified that, when she received the December 6, 2004 letter, she contacted respondent immediately. She added, "I was pretty upset about being told, I have never had any legal trouble and I saw criminal charges. I contacted his office right away, spoke to him and told him please send me a bill. I don't know what to pay you."
Farischon had no further contact with respondent. In May 2005, when respondent sent her a letter asking for basic information about her parents' marital status, she called respondent to

terminate the representation. She also advised him to send her a final bill.

For his part, respondent conceded that had he sent the threatening letter, claiming frustration with Farischon, who he thought was trying to cheat him out of his fee by using another attorney to sell the main estate asset, the grandmother's house. When asked, respondent replied that he was unaware, at the time of the letter, that it was improper to threaten criminal action to advance a civil claim. He acknowledged that the letter was clear on its face about his intent, but countered that he had not acted on the threat of criminal charges. He also explained his feelings at the time:

> I was pretty irate on December 1st to be honest with you and the more time that passed, the worse I was feeling and December 6th I wrote that letter which I do regret writing that letter, I've never ever done anything like that before, never ever had to and, you know, but I did it and I felt not hearing another word in that interim from the first to the 6th from the house closing to, you know, it was just like time was

> going by and it was kind of solidified in my mind that here's what's going to happen.
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> [RT69-1 to 12.][4]

Respondent later punctuated his expression of remorse, stating, "I wish I hadn't done it, I can't say that enough times, it's not who or what I'm about but, you know, I'm here facing that I did send it and I'm here to say gee wiz, I'm sorry."

The DEC found respondent guilty of violating RPC 1.5(b), in that he had no prior attorney/client relationship with Farischon and failed to set forth in writing the basis of his fee within a "reasonable time."

The DEC also found respondent guilty of the new charge under RPC 3.4(g), and recommended a censure. [5]

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[4] "RT" refers to the transcript of the remand hearing on March 21, 2011.

[5] The RPC 1.5(b) finding is contained in the original hearing panel report, attached as Exhibit A to the May 29, 2011 hearing panel report in this matter. Although the remand panel report stated that respondent was found guilty of an RPC 1.4(b) violation, the original panel found a lack of clear and convincing evidence that he violated that rule.

Upon a de novo review of the record, we are satisfied that the DEC's conclusion that respondent's conduct was unethical was fully supported by clear and convincing evidence.

As to the RPC 1.4(b), charge, there was highly conflicting testimony about the extent to which respondent communicated with his client. On the one hand, respondent and Shay testified convincingly that Farischon had been kept apprised of the status of her case over at least a dozen office appointments, as well as at the time of her numerous impromptu visits to the office. Moreover, both respondent and Shay specifically recalled that respondent had explained the inheritance tax return to Farischon in great detail on the day that she appeared at the office to sign it.

On the other hand, Farischon and her mother testified that respondent had not gone through the return with her, which she then signed unread.

On this issue, the evidence is in equipoise. Two witnesses testified that respondent was in constant communication with the client, while two witnesses recalled that he was not.

In addition, respondent was faulted for failing to explain to Farischon that the tax return was filed late and that the estate would be subject to a penalty. Yet, respondent was unaware that the filing was late, when he filed it. It had to be

pointed out to him, at the DEC hearing, that it was, in fact, filed late.

The highly divergent testimony of four witnesses, juxtaposed with obvious evidence of some communication via letters and at least some office visits, begs for a dismissal of the RPC 1.4(b) charge for lack of clear and convincing evidence. We, thus, determine to dismiss it.

With respect to the RPC 1.5(b) charge, that rule provides that, when the attorney has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, in writing, "before or within a reasonable time after commencing the representation." Respondent acknowledged that he had not previously represented Farischon and that the November 1, 2004 tax return was the first (and only) writing that contained the terms of his fee.

Respondent was retained in May 2004. Was it reasonable, then, for him to submit written confirmation of the fee six months later, in November 2004? Farischon claimed to have been pressing him for a bill, but never received one. Important, too, this simple estate matter was nearing completion, when respondent memorialized the fee, not in a stand-alone fee agreement, but in a tax document – where a client could not be

expected to look for such information. Looking at the relatively short duration of the representation and the indirect manner in which respondent documented his fee, we find that six months was not reasonably close in time to the beginning of the representation and that his inaction for that length of time violated RPC 1.5(b).

In the post-remand complaint, respondent was charged with a sole violation (RPC 3.4(g)) for sending his client a letter in which he threatened to file criminal charges against her, if she did not pay his fee. Farischon testified that she was upset upon receiving the threatening letter. Respondent sought to minimize its impact by stating that he did not act on the threat. We find, nevertheless, that respondent's actions in sending the letter violated RPC 3.4(g).

Conduct involving violations of RPC 1.5(b), even when accompanied by other, non-serious ethics offenses, results in an admonition. See, e.g., In the Matter of Joel C. Seltzer, DRB 09-009 (June 11, 2009) (attorney failed to memorialize the rate or basis of his fee and, in another client matter, failed to promptly deliver funds to a third party; In the Matter of Alfred V. Gellene, DRB 09-068 (June 9, 2009) (in a criminal appeal, attorney failed to furnish the client with a writing that set

forth the basis or rate of his fee; the attorney also lacked diligence in the matter); In the Matter of David W. Boyer, DRB 07-032 (March 28, 2007) (in an estate matter, the attorney failed to provide the client with a writing setting forth the basis or rate of his fee; In the Matter of Carl C. Belgrave, DRB 05-258 (November 9, 2005) (attorney was retained to represent the buyer in a real estate transaction and failed to state in writing the basis of his fee, resulting in confusion about whether a $400 fee was for the real estate closing or for a prior matrimonial matter for which the attorney had provided services without payment; recordkeeping violations also found).

Violations of RPC 3.4(g) have been met with discipline ranging from an admonition to a suspension, depending on the severity of the conduct. See, e.g., In the Matter of Mitchell J. Kassoff, DRB 96-182 (December 30, 1996) (admonition for attorney who, after being involved in a car accident, sent a letter to the other driver indicating his intent to file a criminal complaint against him for assault; the letter was sent the same day that the attorney received a letter from the other driver's insurance company denying his damage claim); In the Matter of Christopher Howard, DRB 95-215 (August 1, 1995) (admonition for attorney who, during the representation of one shareholder of a

corporation, sent a letter to another shareholder threatening to file a criminal complaint for unlawful conversion if he did not return the client's personal property); In re Hutchins, 177 N.J. 520 (2003) (reprimand for attorney who, in attempting to collect a debt on behalf of a client, told the debtor that he had no alternative but to recommend to his client that civil and criminal remedies be pursued); In re McDermott, 142 N.J. 634 (1995) (reprimand for attorney who filed criminal charges for theft of services against a client and her parents after the client stopped payment on a check for legal fees); In re Dworkin, 16 N.J. 455 (1954) (one-year suspension for attorney who wrote a letter threatening criminal prosecution against an individual who forged an endorsement on a government check, unless the individual paid the amount of the claim against him and the legal fee that the attorney ordinarily charged in a criminal matter "of this type;" the Court found that the attorney had resorted to "coercive tactics of threatening a criminal action to effect a civil settlement"); and In re Barrett, 88 N.J. 450 (1982) (three-year suspension for serious acts of misconduct that included the filing of a criminal complaint with the purpose of coercing a party into reaching a civil settlement).

The reprimand case, McDermott, involved similar, but more serious misconduct than that of respondent. McDermott went further than this respondent, threatening to file criminal charges against his client (and her parents) for theft of services and then acting on that threat by filing charges. Here, the misconduct was more like that found in the admonition cases, Kassoff and Howard, both of which involved threatening letters, with no further action on the threat.

In mitigation, we considered that respondent has no disciplinary record in over thirty-five years at the bar. In addition, this is not an instance of an attorney flouting the rules. Rather, respondent was unaware that he could not use the prospect of criminal charges to aid in the collection of his fee. So, too, he expressed sincere remorse for having sent the letter, prompted by feelings of anger and frustration. Although the reason for his dereliction is no excuse, it demonstrates his lack of intent to act unethically.

Based on precedent and the above mitigation, we determine that an admonition sufficiently addresses respondent's conduct.

Vice-Chair Frost recused herself. Members Stanton and Clark did not participate.

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
Louis Pashman, Chair

By: Julianne K. DeCore
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Jeffrey R. Grow
Docket No. DRB 11-199

Argued: September 15, 2011

Decided: December 8, 2011

Disposition: Admonition

Members	Disbar	Suspension	Admonition	Dismiss	Disqualified	Did not participate
Pashman			X			
Frost					X	
Baugh			X			
Clark						X
Doremus			X			
Stanton						X
Wissinger			X			
Yamner			X			
Zmirich			X			
Total:			6		1	2

Julianne K. DeCore
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Chief Counsel