SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 12-202
District Docket No. VIII-2004-0079E

IN THE MATTER OF	
TOBY G. KLEINMAN	
AN ATTORNEY AT LAW	

Decision

Argued: May 17, 2012

Decided: June 26, 2012

Howard Duff appeared on behalf of the District VIII Ethics Committee.

Frederick J. Dennehy 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 recommendation for a reprimand filed by the District VIII Ethics Committee (DEC). The complaint charged respondent with failing to return an unused retainer, a violation of RPC 1.5(a) and RPC 1.16(d) (count one); overreaching, by charging a client an unreasonable fee, a violation of RPC 1.5(a) (count two); and charging an

unreasonable fee by "double-billing" a client, a violation of RPC 1.5(a) (count three). On December 9, 2010, after three days of hearings, the presenter filed a motion to dismiss counts two and three of the complaint. The presenter asserted that, upon further review of the evidence, including the testimony presented at the hearing, he believed that he could not prove, by clear and convincing evidence, the allegations of counts two and three of the complaint (overreaching and double-billing). The DEC granted the presenter's motion. The DEC, thus, considered only count one of the complaint, alleging failure to return an unused retainer. For the reasons expressed below, we dismiss the remaining count of the complaint.

The charges stem from respondent's representation of grievant Mary Adams in several post-judgment matrimonial matters in 1998.

Respondent was admitted to the New Jersey bar in 1990. She has no disciplinary history. She practices with the law firm of Adler & Kleinman, in Middlesex County.

This case has a long and protracted history. Although the events encompassed by the ethics complaint took place in 1998, Adams filed the grievance six years later, on November 19, 2004. One month later, on December 18, 2004, Adams filed a civil complaint against respondent, alleging breach of contract, over-billing, and malpractice. The allegations in the civil complaint

were substantially the same as those in the grievance. The formal ethics complaint was filed on June 23, 2005.

In 2005, we and, subsequently, the Court, granted respondent's motion to stay the ethics proceeding during the pendency of the civil complaint. At some point, the Superior Court, Middlesex County, dismissed the civil complaint against respondent.

On December 9, 2010, the presenter and respondent entered into a factual stipulation. On December 22, 2010, they entered into an addendum to the stipulation.

In addition to the matrimonial case, Adler & Kleinman represented Adams, from 1996 to 2004, in a civil suit against a third party. That lawsuit ended in a settlement containing a non-disclosure agreement, whereby Adams would be liable for damages if she revealed information about the defendant or the case. On January 8, 2010, based on the presenter's motion for a protective order, the DEC Vice-Chair, Kim Connor, entered an order requiring the civil lawsuit to be referred to during the ethics hearing only as "the collateral matter."

On January 31, 2012, after the DEC decision had been transmitted to us, Adams asked the Office of Attorney Ethics (OAE) to redact additional portions of the record that she alleged violated the non-disclosure agreement, as well as a

March 3, 2006 order entered by Judge Mathias Rodriguez in the collateral matter. The March 3, 2006 order, which Adams refers to as the "Court Protective Order," requires respondent, respondent's law firm, respondent's counsel, and respondent's counsel's law firm to abide by the non-disclosure agreement and bars them from divulging any reference to the claim, except by in camera inspection.

On April 20, 2012, we denied Adams' April 12, 2012 request to seal extensive portions of the record and for other relief. In our view, the existing protective orders, requiring the parties to abide by the non-disclosure agreement, were sufficient.

On May 7, 2012, Adams submitted a letter asking us to correct our April 20, 2012 order regarding respondent's counsel's "misrepresentations" to us, on which we relied in denying her requests; to clarify whether we intend to continue enforcing Judge Rodriguez's March 3, 2006 protective court order; to grant her permission to file a petition with the Supreme Court, under seal, concerning our "disregard" of court rules and the Court's decision in R.M. v. Supreme Court of New Jersey[1]; and to grant a stay of the "whole matter being released

[1] In R.M. v. Supreme Court of New Jersey, 185 N.J. 208 (2005), the Court held that R. 1:20-9, which, at that time, mandated that a grievance filed against an attorney remain confidential until the filing of a formal complaint, was an impermissible restriction on the First Amendment rights of grievants.

into public records until there is a decision from the Supreme Court."

Because Adams has provided no additional grounds for us to reconsider our April 20, 2012 order, we deny her May 7, 2012 application.

The facts that gave rise to this disciplinary matter are as follows:

Adams retained respondent on two occasions, in 1995 and 1998, to represent her in several post-judgment matrimonial matters in Hunterdon County. Although the allegations in the ethics complaint stem from the second period of representation, a discussion of the initial representation will present a more complete picture of the circumstances surrounding the matter, particularly the complex nature of the case.

Adams had been represented by Arthur Garvin, Esq., when she was divorced from John Adams, in May 1992. After the divorce, Adams obtained a restraining order against John. Because John violated the restraining order, he was placed on probation.

Immediately before Adams retained respondent, a judge in Hunterdon County had entered an order permitting John unsupervised visitation with the parties' two sons. Adams was very concerned about her sons' safety because John had a long history of domestic violence, had been diagnosed as psychotic,

had a history of bipolar illness, and was not medication-compliant. Adams was frightened of John. She was especially concerned about her older son, who appeared to be developing his own mental health issues. Upon receipt of the order, Adams was outraged and distraught, believing that her son would be destroyed if he were required to have unsupervised visitation with John.

Adams retained respondent on June 23, 1995, entering into a written fee agreement on that date.

Respondent filed an order to show cause, requesting that John have no contact with his sons. Although respondent submitted a certification from an expert, indicating that the older son could suffer another psychotic break, from which he might not recover, if he had contact with John, a different judge denied respondent's request. That judge also denied respondent's motion to stay the order pending appeal. Respondent then filed an emergent motion for leave to appeal, resulting in the following Appellate Division order, entered on June 13, 1996:

> In light of the uncontroverted facts that the father, defendant John Adams, is mentally ill and that the parties' son [] is emotionally disturbed, and in light of the opinion of [the son's] treating therapist that a resumption of supervised visitation probably will have an adverse impact on [the son's] recovery and stability, we are persuaded that, despite some differences of opinion in the record regarding this issue,

> the resumption of visitation should be delayed pending a plenary hearing. Accordingly, that part of the April 22 order denying appellant's motion to suspend visitation is reversed as to [the son]. A plenary hearing regarding this issue shall be held by July 31, 1996.
>
> [Ex.R-10].

Respondent did not charge Adams a fee for filing the emergent appeal.

Pursuant to the Appellate Division order, the trial court held hearings through December 1996, reserving its decision. In April 1997, the judge ordered that John was to have no contact with the older son for one year, at which time the son would be evaluated. By April 1997, respondent no longer represented Adams.

Adams and respondent gave different reasons for the termination of the representation. According to Adams, she retained another attorney for financial reasons. Adams asserted that, although respondent had previously reduced her hourly fee from $250 to $200, respondent informed her, after John filed another motion for visitation, that her fee would be $250 per hour. Therefore, Adams retained attorney Joe Strauss.

Respondent, however, produced a March 7, 1997 letter that she had sent to Adams, explaining that she had completed the work for which she had been retained, that Adams had failed to

follow her advice in connection with other motions that John had filed, and that, because of other commitments, she could not represent Adams in those new matters, noting that there was adequate time for Adams to retain other counsel. In addition, the disciplinary stipulation indicated that respondent had withdrawn from the representation.

On February 6, 1998, about eleven months after respondent's representation ended, the judge entered an order permitting visitation between John and the parties' younger son and appointing a psychiatrist to supervise the visitation. John had chosen the psychiatrist without Adams' concurrence. Although Adams was interested in filing a motion to disqualify the judge, Strauss refused to do it because he practiced in Hunterdon County.[2]

On February 11, 1998, Adams and respondent entered into another retainer agreement. According to respondent, after the February 6, 1998 order was entered, Adams "begged" respondent to resume her representation. Respondent asserted that she was reluctant to represent Adams a second time because Adams was a labor-intensive client, who sometimes called and faxed documents multiple times a day, requiring respondent to be available to her

[2] According to the stipulation, Adams independently filed complaints against the judge and the psychiatrist on June 3, 1998 and May 17, 1999, respectively.

at all times. Adams conceded that, during the first period of representation, she had prepared questions for respondent's use during cross-examination of expert witnesses, had told respondent how much time she could spend on a brief that the trial court had ordered, and had a great deal of input about the hearing. Adams, however, denied that respondent had been reluctant to resume the representation.

The February 11, 1998 retainer agreement contained the following reductions from the standard hourly fees of the law firm's attorneys: Robert Adler's fee - $350 to $300, respondent's fee - $275 to $250, and Daniel Epstein's fee - $175 to $150. In addition, faxes and copy charges were to be billed at one-half the usual rates. Adams gave respondent a $20,000 retainer, as provided in the fee agreement. Although Adams testified that she signed the retainer agreement as it was presented to her, she acknowledged that she may have negotiated the hourly fees of the law firm's attorneys.

Respondent constantly discounted her bills. At the end of both representations, she had reduced her bills to Adams by $73,000. Moreover, according to the stipulation, Adams regularly reviewed her bills and frequently requested fee reductions. Adams admitted that she had reviewed respondent's monthly bills, at the time they were submitted.

After the collateral matter was settled, Adams signed a June 27, 2003 settlement sheet, which provided: "settle outstanding attorneys fees from matrimonial case w Adler & Kleinman . . . was 23,508.98 plus interest since 1998, settlement is now $18,000."

On May 1, 1998, the judge orally ruled that John was to have immediate visitation with his younger son, supervised by the psychiatrist; that Adams was to sign a contract with the psychiatrist, whereby Adams waived her right to take any action against him, in the event of his malpractice; and that her younger son's psychologist was to provide his notes to John. Respondent asserted that, although at the time of the ethics hearing, a provision precluding a client from suing a mental health professional was not unusual, it was not common in 1998.

Adams was very upset with the judge's ruling, believing that it would not be in her son's interests for John to have the notes from her son's therapy sessions, because her son might not be as forthcoming with his therapist, if he knew that his father would be receiving those notes. A few days after the entry of the order, Adams signed the contract with the psychiatrist, "under duress."

On May 1, 1998, Adams and respondent entered into another fee agreement, whereby respondent would file an emergent

interlocutory appeal with the Appellate Division and, if necessary, would seek relief from the New Jersey Supreme Court. The fee agreement provided for a fixed fee of $31,000.

In addition to the motion for leave to appeal, supported by a fifty-six page brief, respondent filed a motion for a stay of the judge's order, a motion to submit an overlength brief, and a motion to supplement the record, as well as other documents.

Meanwhile, on May 18, 1998, the judge denied respondent's motion for a stay of his May 1, 1998 order. On May 29, 1998, the judge issued a written order encompassing and supplementing his May 1, 1998 rulings. On June 19, 1998, the judge entered an order denying various applications that John had filed and denying respondent's request for a plenary hearing to determine whether the court should appoint an independent expert to evaluate the parties and their child.

On June 22, 1998, the Appellate Division denied the emergent application. On June 26, 1998, respondent and Adams entered into another fee agreement, whereby respondent would file an appeal as of right from the May 18 and May 29, 1998 orders; a motion for a finality determination; a motion for a stay with the trial court; a motion for a stay in the Appellate Division, if necessary; an appeal of the June 19, 1998 order; a motion for a stay of that order; and a motion to consolidate the

appeals. Respondent's fixed fee for these services was $25,000. On September 10, 1998, the Appellate Division granted the motion to consolidate the appeals.

In addition to the Appellate Division filings, respondent explored the possibility of proceeding directly to the Supreme Court. To that end, respondent's associate, Daniel Epstein, discussed several procedural options with a staff attorney in the Supreme Court Clerk's Office. According to Epstein, the staff attorney informed him that respondent could file a motion for direct certification to the Supreme Court, within ten days of the submission of briefs in the Appellate Division.

On July 2, 1998, respondent and Adams entered into another fee agreement, whereby respondent would file an application with the Supreme Court for review of all of the issues that were denied by the Appellate Division in the emergent motion. This is the fee that is the subject of the ethics complaint. The fixed fee for that application was $20,000. The fee letter provided that, to undertake this representation, the law firm would be required to commit attorneys to work weekends and after hours and to set aside other work.

On November 24, 1998, respondent informed Adams, in writing, that, although she would continue to represent her in the Appellate Division and the Supreme Court, as well as in the

collateral matter, she would no longer represent her in the trial court. At that time, no motions were pending in the trial court. On December 26, 1998, Adams instructed respondent not to file any documents with the Supreme Court.

An addendum to the stipulation between the presenter and respondent provided:

> If testimony were taken of Daniel Epstein, Toby Kleinman and Robert Adler, they would testify that they did work on the Supreme Court matter. They would testify that some of that work is evidenced in timeslips maintained by Robert Adler (See attached Exhibit R-14). Mr. Adler would testify as to his record keeping on this matter and how some of the timeslips were destroyed when their office sustained significant damage by Hurricane Floyd in 1999. Robert Adler would also testify that the actual work done by them was destroyed when their office sustained water damage as a result of Hurricane Floyd; that in 1998 their office had no backup computer system; that Robert Adler suffered a heart attack in 1999 and never returned to work in that office. Mr. Adler would testify about regular meetings regarding drafts of work in July and August. The Presenter has no recollection of seeing the timeslips in the approximately 28 boxes of material provided by Toby Kleinman which he read through in 2005.
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> [Addendum to Stipulation.]

According to Adams, respondent told her that the emergent application to the Supreme Court was required to be filed immediately. Adams asserted that, several days later, she contacted Daniel Epstein, who told her that the Supreme Court

appeal could not be filed until a "benching" (presumably briefing) schedule had been set and that no work had yet been done on the Supreme Court appeal.

In August 1998, respondent informed Adams that the judge who had been assigned to her case had been transferred from the family division. Adams believed that, with that judge no longer involved, there was no need to pursue the Supreme Court matter. Adams alleged that, in September 1998, she instructed respondent not to do any additional work in the Supreme Court matter and that she requested a fee refund for the Supreme Court case and for the appeal of the June 19, 1998 order. Adams testified, somewhat inconsistently, that respondent had replied that (1) she would determine how much work Epstein had done in the Supreme Court case and (2) the fee agreements provided that the fees were earned and that she would not receive a refund.[3]

Adams explained that, although she had verbally instructed respondent, in September 1998, to stop all work on the Supreme Court case, she sent the confirming letter on December 26, 1998, after receiving respondent's November 24, 1998 letter,

[3] To the extent that the fee agreement provided for a non-refundable retainer, we note that R. 5:3-5, prohibiting non-refundable retainers in matrimonial matters, was adopted effective April 5, 1999, after the execution of the July 2, 1998 fee agreement.

indicating that she would continue to represent Adams in the Appellate Division and the Supreme Court.

In the stipulation, respondent conceded that she had not filed any papers in the Supreme Court for Adams, that Adams had received no actual benefit for the work performed in the Supreme Court matter, for which she had paid $20,000, that it would have been reasonable for respondent to refund a portion of the retainer to Adams, and that respondent "cannot prove that it was not reasonable not to refund a portion of the retainer".

At the end of the testimony below, the presenter urged the DEC to admonish respondent. The DEC permitted Adams to present argument in support of an application for a refund of legal fees. Adams claimed that she had "lost hundreds of thousands in billing fraud," adding, "I am asking for reimbursement and I am asking for it now. No more putzing around and I mean that."

In turn, respondent's counsel noted that Adams' "civil proceeding [against respondent] concluded with a decision that awarded Ms. Adams no fees."

The DEC concluded that it did not have the authority to award Adams a fee refund.

Also at the conclusion of the testimony, the presenter and respondent agreed to the admission of exhibits consisting of copies of some of the faxes that Adams had sent to respondent.

Among those documents is a June 6, 1998 fax, in which Adams indicated that she spoke to "Sharon," who said "the only angle is the Supreme Court, and if that doesn't work, the Fed Supreme Court." Adams testified that she had had a consultation with an attorney named Sharon Ransavage, who did not accept her case.

The DEC pointed out that the only issue to be resolved was "whether the $20,000 flat fee that was paid for the Supreme Court appeal was reasonable." The DEC determined that respondent had led Adams to believe that the Supreme Court petition needed to be pursued on an emergent basis, despite the absence of any actual urgency.

The DEC noted that it could not find any court rule providing a mechanism for an attorney to bypass the Appellate Division and file a direct appeal to the Supreme Court.[4] The DEC concluded that, even if such a procedure existed, the likelihood that the Court would hear the appeal on an expedited basis was "infinitesimal."

The DEC opined:

> It was not reasonable for Ms. Kleinman to have recommended that the Supreme Court petition be prepared on an expedited basis. It was not reasonable for the Respondent to

[4] At the end of the presenter's case, respondent's counsel had asked the DEC to dismiss the complaint, asserting, among other things, that R. 2:12-2 permits parties to seek direct review by the Supreme Court, thereby, bypassing the Appellate Division.

> send a courier to Ms. Adams' home to reinforce the false urgency of the situation.[5] It was not reasonable for Ms. Kleinman to have pried a $20,000 retainer from a person who had shown consistent concern for her dwindling finances in order to pursue a legal course of action that a reasonable attorney would believe had little or no likelihood of being successful.

The DEC determined that respondent violated RPC 1.5(a) by charging an unreasonable fee. After weighing aggravating and mitigating factors, which it failed to identify, the DEC recommended a reprimand.

Following a de novo review of the record, we are unable to agree with the DEC's finding that respondent's conduct was unethical.

It is clear from the record that respondent represented Adams under very difficult circumstances. Adams' former husband suffered from a severe mental illness, had been diagnosed as psychotic, and had violated a restraining order. She understandably was reluctant to submit her children, one of whom suffered from his own mental health issues, to unsupervised

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[5] The only reference in the record to a courier appears in the pleadings. The complaint alleged that to lead Adams to believe that the matter was urgent respondent had sent a courier to Adams' home to obtain her signature on the retainer agreement and to pick up a check for the $20,000 retainer. Respondent's answer to the complaint asserted that she had sent a courier for the retainer check because Adams had told her that the $25,000 check that Adams had issued for the Appellate Division retainer fees would not clear the bank due to insufficient funds.

visitation with their father. She made it clear that the safety and well-being of her children were of paramount importance to her.

During the initial period of the representation, from June 1995 to March 1997, respondent successfully filed an emergent motion for leave to appeal, resulting in the reversal of the order granting John unsupervised visitation with the parties' older son. After the judge held a hearing, pursuant to the Appellate Division remand order, he ruled that John was not to have contact with his older son for one year. At the end of that period, the son would be evaluated so that the court could assess the then-existing circumstances, before fashioning an appropriate visitation order. At this point, respondent terminated the representation, as no matters were pending.

While Adams was represented by other counsel, the judge entered an order permitting visitation between John and the parties' younger son and appointing a psychiatrist chosen by John to supervise the visitation. Once again, Adams sought respondent's services. According to respondent, although she was reluctant to resume the representation because Adams was a very demanding client, she agreed, after Adams begged her to do so. The retainer agreement provided for reduced hourly fees of the law firm's attorneys, as well as discounted office charges.

This representation was not as successful as the first one. The judge ordered that John was to have immediate visitation with his younger son, supervised by the psychiatrist, and that Adams was to sign the psychiatrist's contract, which contained a waiver of her right to sue him for malpractice. The order also required the son's therapist to disclose his notes to John, including comments about John that the son had shared with the therapist. Adams, outraged by this order, authorized respondent to file an emergent motion for leave to appeal, as well as other motions, with the Appellate Division and, if necessary, with the Supreme Court. She also instructed respondent to appeal subsequent orders entered by the court.

Daniel Epstein, respondent's associate, discussed with a staff attorney from the Supreme Court Clerk's Office several methods for bringing the matter before the Supreme Court on an expedited basis. The record contains a memo from Epstein to respondent, confirming their discussion, including a procedure to file a motion for direct certification, within ten days of the submission of briefs in the Appellate Division.[6]

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[6] R. 2:12-2(a) provides that a "motion for certification of an appeal pending unheard in the Appellate Division shall be served and filed with the Supreme Court and the Appellate Division within 10 days after the filing of all briefs with the Appellate Division."

Because Adams instructed respondent to refrain from pursuing the matter in the Supreme Court, the brief was not filed. Although some timeslips remain, many of the firm's records, including other time records and the work product that Epstein had prepared, were either damaged or destroyed by Hurricane Floyd. The addendum to the stipulation between the presenter and respondent's counsel, dated December 22, 2010, provides that Epstein, Adler, and respondent would testify that they had worked on the Supreme Court matter. Although the stipulation also provides that the presenter had no recollection of seeing timeslips in the twenty-eight boxes of material that he reviewed in 2005, we do not consider the absence of such a memory, five years later, as clear and convincing evidence of the non-existence of those documents.

This case illustrates the difficulty encountered by respondents when, through no fault of their own or of the disciplinary system, cases are heard a long time after the occurrence of the relevant events. Adams filed a grievance against respondent six years after the termination of the representation. The relevant events occurred twelve years before the ethics hearing took place. Even if respondent's records had remained intact, instead of being damaged by a storm, it would

have been reasonable -- in fact, permitted by RPC 1.15(a) -- for respondent to have destroyed those records.

In addition, despite the acknowledgement in the stipulation that Adams had received no benefit from the law firm's work on the Supreme Court matter, Adams instructed respondent not to pursue that course of action, thus rendering that effort fruitless. Furthermore, although the stipulation provided that it would have been reasonable for respondent to refund a portion of the retainer to Adams, this acknowledgement by respondent does not amount to clear and convincing evidence of unethical conduct. We could just as easily determine from the facts, as stipulated, that it was reasonable for respondent not to have refunded a portion of the retainer to Adams.

Moreover, after the DEC dismissed counts two and three of the complaint, the only remaining charge was the allegation in count one that respondent violated RPC 1.16(d) and RPC 1.5(a), by failing to return an unused retainer. Yet, the DEC framed the issue as "whether the $20,000 flat fee that was paid for the Supreme Court appeal was reasonable." The DEC then analyzed the factors, listed in RPC 1.5(a), applicable to the determination of whether a fee is reasonable. In this regard, the DEC appears to have confused its role with that of a fee arbitration committee. The issue before the DEC was not whether respondent's

fee was reasonable. While an attorney's fee may, at times, be so unreasonable as to constitute overreaching, in this case, the only issue before the DEC was whether respondent acted unethically, when she failed to return all or a portion of the $20,000 fixed fee for the Supreme Court services. That was the only charge remaining in the ethics complaint, after the remaining charges were dismissed.

In our view, the record does not contain clear and convincing proof of an ethics violation in this case. To the contrary, the facts militate in favor of a finding that Adams had authorized the work to be performed in the Supreme Court and had remained interested in pursuing that course of action until December 26, 1998, when she directed respondent to cease that undertaking. According to the addendum to the stipulation, respondent, Adler, and Epstein would testify that they had worked on the Supreme Court matter. In addition, if Adams had verbally instructed respondent to cease working on that matter, in September 1998, there would have been no reason for respondent to notify Adams that she would continue to work on the Supreme Court case, in November 1998, when she withdrew from the trial court case. Finally, given Adams' habit of submitting numerous documents to respondent, as seen by the multitude of faxes sent to her, it appears inconsistent for Adams to have

waited until December 1998 to instruct respondent, in writing, to refrain from working on the Supreme Court brief.

In essence, the complaint asks that we second-guess respondent's appellate strategy. It is true that it appears unlikely that the Court would have agreed to review the trial court's orders, before giving the Appellate Division the opportunity to do so. We cannot conclude, however, that respondent's attempt to seek such review was an ethics violation, particularly under the circumstances of the underlying case, in which the well-being and safety of Adams' children were at stake.

Furthermore, cases in which attorneys have been found to have violated the reasonable fee requirement of RPC 1.5(a) typically involve more acute conduct or outrageous circumstances not present here. See, e.g., In the Matter of Raymond L. Hamlin, DRB 09-051 (June 11, 2009) (attorney charged a $50,000 contingent fee, although he had recovered nothing for the client, who had rejected a $150,000 settlement offer); In re Weston-Rivera, 194 N.J. 511 (2008) (in eighteen cases, attorney took a contingent fee greater than that to which she was entitled pursuant to R. 1:21-7(d)); In re Read, 170 N.J. 319 (2001) (attorney collected almost $100,000 in fees in one matter, when $15,000 would have been reasonable and in another matter overcharged an estate by

$47,000); and In re Hinnant, 121 N.J. 395 (1990) (attorney attempted to collect $21,000 in fees for his representation in a $91,000 real estate transaction).

Here, the DEC found that respondent sent a courier to pick up the retainer fee, in an effort to mislead Adams into believing that the Supreme Court matter was more urgent than it actually was. We are unable to agree with this finding because there is no evidence to support it. The fact that respondent used the services of a courier to collect a check does not support a finding that she misled Adams. Respondent explained that Adams' check in payment of the legal fees for the Appellate Division matter was not backed by sufficient funds.

Because the record does not contain clear and convincing evidence of unethical conduct, we determine to dismiss the complaint and to deny Adams' request that we reconsider our April 20, 2012 order, denying her request to seal portions of the record and for other relief.

Member Clark did not participate.

Disciplinary Review Board
Louis Pashman, Chair

By: Isabel Frank
For Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Toby G. Kleinman
Docket No. DRB 12-002

Argued: May 17, 2012

Decided: June 26, 2012

Disposition: Dismiss

Members	Disbar	Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Pashman				X		
Frost				X		
Baugh				X		
Clark						X
Doremus				X		
Gallipoli				X		
Wissinger				X		
Yamner				X		
Zmirich				X		
Total:				8		1

By Julianne K. DeCore
Chief Counsel