SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 14-116
District Docket No. VIII-2012-0011E

IN THE MATTER OF	:
JAMES A. KEY, JR.	:
AN ATTORNEY AT LAW	:

Decision

Argued: July 17, 2014

Decided: July 30, 2014

Willard Shih appeared on behalf of the District VIII 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 (reprimand) filed by the District VIII Ethics Committee (DEC). The complaint charged respondent with violating RPC 1.15(d) (recordkeeping), RPC 3.1 (meritorious claims), and RPC 5.3 (failure to supervise a non-lawyer assistant). We determine that a censure is the appropriate form of discipline in this matter.

Respondent was admitted to the New Jersey bar in 1974. He maintains an office for the practice of law in Fords, New Jersey.

In February 1996, respondent received an admonition for lack of diligence and failure to communicate with the client. Specifically, after respondent filed an appeal, he failed to correct certain deficiencies, as a result of which the appeal was dismissed. In addition, the client retained him to file a complaint against Channel Home Center, arising out of a 1991 incident. Although he filed the complaint, it was subsequently dismissed for lack of prosecution. In the Matter of James A. Key, Jr., DRB 95-418 (February 20, 1996).

In November 1996, respondent received a second admonition, also for lack of diligence and failure to communicate with a client. In imposing only an admonition, we considered respondent's candor and admission of wrongdoing. We also noted that the ethics infractions in the two admonition matters were "part and parcel of the same pattern of conduct." In the Matter of James A. Key, Jr., DRB 96-357 (November 25, 1996).

In 2007, respondent was reprimanded for negligent misappropriation of client funds and recordkeeping violations. In re Key, 189 N.J. 302 (2007). The Court ordered respondent to complete a course in trust accounting.

* * *

In September 2006, Vincent and Joyce Hughes retained respondent to represent them in connection with a civil claim arising from a construction project on their home. Respondent's retainer agreement required the Hugheses to pay him a $10,000 non-refundable retainer. Respondent's fees would be billed at $350 per hour. The retainer agreement also provided that the Hugheses would pay the costs and expenses associated with the case.

Respondent testified that his procedure was to keep handwritten notes for his time and expenses, to have that information entered into his computer, and then to have the handwritten notes and invoices destroyed. During the time that respondent represented the Hugheses, he employed one or more non-lawyer assistants, who were responsible for maintaining itemized time entries and documentation of his expenses. Respondent testified that he was aware that his assistants had failed to do so. He claimed that he had been unable to locate a competent assistant until 2010 or 2011.

Between January 7, 2008 and July 30, 2009, respondent sent the Hugheses four invoices, without any supporting documentation, such as itemized time entries. He explained that, at the Hugheses' request, he had not sent them monthly bills

because they were going through "a hardship." Besides, he added, his assistants often failed to complete his billings monthly.

Ultimately, a fee dispute arose between respondent and the Hugheses, who elected to proceed to fee arbitration.[1] At the fee arbitration proceeding, respondent did not provide documentation to support his bills or a breakdown of his costs. When the fee arbitration panel gave him an opportunity to supply such documentation, he produced a list of work completed on the Hugheses' behalf, some of which had no time entries.

At the ethics hearing, respondent admitted that the invoices that he had compiled for the fee arbitration proceeding did not reflect contemporaneous time records and that he had no such records. He told the panel that he had re-created the time spent on the case by reviewing the file, as well as some documents and information on a laptop computer and on an "electronic calendar." He explained that he had no "supporting documents" or "records from the computer" because of a September 2011 computer crash. He added that, for certain periods between September 2006 through January 2009, he had been unable to re-create the time spent on the file, either because he had found

[1] Although fee arbitration proceedings are confidential, respondent is deemed to have waived the confidentiality by testifying about the fee arbitration matter, at the ethics hearing.

nothing on the file to back it up or because, as a sole practitioner, he had had no time "to look hard enough."

Respondent offered the testimony of David Brantley, a computer expert who had assisted him, after the computer failure. Brantley was able to recover some documents, but not all that had been lost. Brantley continues to provide unspecified services to respondent's law firm.

In December 2011, the fee arbitration panel directed respondent to refund $8,250 to the Hugheses. On January 20, 2012, respondent appealed from the fee arbitration determination. On January 27, 2012, apparently unaware that the panel's determination was stayed because of the pending appeal, the Hugheses filed a complaint against respondent, in special civil part, seeking to obtain the $8,250 refund ordered by the fee arbitration committee. On February 28, 2012, respondent filed an answer and counterclaim, in which he sought to re-litigate the reasonableness of his fees. In those pleadings, respondent called the fee arbitration decision "grossly erroneous" and asked the court, among other things, to find the Hugheses in breach of their contractual duty to him, dismiss their complaint, and enter judgment on the counterclaim.

On March 20, 2012, about one month after respondent filed his counterclaim, Office of Board Counsel notified him that his

appeal had been dismissed. Respondent did not dismiss his counterclaim, however.

In May 2012, the court entered a judgment confirming the fee arbitration award. The judge ruled that there was no need for a trial because the issue had already been decided by the fee arbitration committee. In June 2012, respondent forwarded a check to the Hugheses for $8,250.

By way of explanation for his actions in the civil proceeding, respondent testified that, initially, the Hugheses had admitted that they owed him $4,250. Therefore, when the fee committee had directed him to refund $8,250 to the Hugheses, he had felt aggrieved and incensed. He conceded, at the ethics hearing, that he knew that he could not re-litigate the reasonableness of his fee in the civil proceeding, but claimed that he had filed his answer "on an emotional basis." At oral argument before us, respondent acknowledged that filing the counterclaim had been "ill-advised."

In mitigation, respondent testified that he had entered the practice of law to "fight for the little person;" that he has tried to act ethically in his dealings with people; that he has been an attorney for thirty-eight years; that he has served on the Supreme Court's Committee on Character; and that he has been a prosecutor and a municipal court judge in Roselle and

Plainfield. He told the DEC that he now records his time in a book that is retained after his time is entered in a computer.

* * *

The DEC concluded that respondent violated RPC 1.15(d) by failing to keep records of the expenses incurred and time billed on the Hugheses' matter, as required by R. 1:21-6. In the DEC's view, "the violations found during the random audit [in connection with the 2007 reprimand matter] should have served as a very loud wake-up call to Mr. Key that he needed to seriously reconsider how he was managing his firm's recordkeeping. Appropriate time keeping goes hand in hand with the appropriate management of an attorney trust account." The DEC found respondent's and Brantley's testimony about the 2011 computer failure irrelevant, because that problem had occurred after respondent's representation of the Hugheses. Therefore, the DEC reasoned, it did not serve as an excuse for respondent's failure to provide itemized bills to the Hugheses, from 2006 to 2009.

The DEC also found that respondent violated RPC 5.3 by failing to make reasonable efforts to ensure that the conduct of his assistants "was compatible with meeting his professional obligations to keep expense and billing records" in the Hugheses' matter.

Finally, the DEC concluded that respondent inappropriately sought to re-litigate the fee dispute in court "and that he did so in a manner that he should have known was frivolous." The DEC noted that respondent had only one defense to the Hugheses' civil action - that the fee arbitration determination was stayed pending his appeal - a defense that he did not assert. In fact, the DEC further noted, respondent did not advise the civil court of the pending appeal. In finding that respondent's conduct in this regard violated RPC 3.1, the DEC stated the following:

> The hearing panel agreed with Mr. Key's statement that he was guided by his emotions in the fee dispute with the Hugheses. The panel did not find this to be a mitigating factor; we found it to be an aggravating factor. As a member of the bar for over thirty years, Mr. Key should have been able to manage his anger more appropriately and he should have recognized that his failure to prevail in the fee arbitration was due solely to his own recordkeeping failures and that it was not due to any acts or omissions by the Hughes [sic].
>
> [HPR¶54.][2]

As to the mitigation presented, while the DEC was impressed by respondent's passion for the practice of law and his honesty throughout the ethics hearing, it "could not find that this passion and honesty mitigated [his RPC] violations." Although, at the conclusion of the ethics hearing, the DEC noted on the

[2] "HPR" refers to the hearing panel report.

record that respondent's service on the Committee on Character, his thirty-eight years at the bar, and his efforts to improve his billing practices mitigated his conduct, the hearing panel report states otherwise. Apparently, the DEC reconsidered its position on these proposed mitigating factors.

In aggravation, the DEC remarked that respondent had filed the counterclaim out of anger, failed to accept responsibility for the fee award at the mediation in the special civil part suit, failed to accept the fee arbitration award until the judge denied him a trial and entered a judgment against him, and has been disciplined for recordkeeping violations.

The DEC suggested that respondent might benefit from having "a case management program" in place in his practice and from taking courses in law office management.

* * *

Following an independent, de novo review of the record, we find that the DEC's conclusion that respondent's conduct was unethical was fully supported by clear and convincing evidence. We are unable to agree, however, with all of the DEC's findings.

Specifically, the first count of the complaint charged that, by failing to "maintain itemized time entries and documentation supporting expenses," respondent violated RPC 1.15(d) ("A lawyer shall comply with the provisions of R. 1:21-6

("Recordkeeping") of the Court Rules"). R. 1:21-6(c) ("Required Bookkeeping Records") enumerates the records that attorneys who practice in New Jersey must maintain for a period of seven years. Records of the time that an attorney spends performing legal services for the client are not included in that list. Therefore, respondent did not violate any disciplinary or Court rule by failing to ensure that his time entries were properly recorded and preserved.

On the other hand, records of the expenses and costs incurred on behalf of a client must be kept in a current status and maintained for a period of seven years. R. 1:21-6(c)(1)(D),(F), and (I). By failing to "maintain [such records] in a current status and retain [them] for a period of seven years after the event that they record[ed]," respondent violated R. 1:21-6 and, in turn, RPC 1.15(d).

The second count of the complaint alleged that respondent failed to supervise non-lawyer employees - his administrative assistants - by not ensuring their maintenance of "itemized time entries and documentation supporting expenses." Here, we find that respondent violated RPC 5.3 on both scores. Although the rules do not require the maintenance of the time entries - only of the records pertaining to expenses and costs associated with the case - it is axiomatic that time entries are essential to

the accuracy of billings to the client. By failing to make sure that his non-lawyer employees performed this important task, respondent violated RPC 5.3.

The third and final count of the complaint charged that, by filing an answer and counterclaim in the Hugheses' civil action, respondent asserted a frivolous claim, a violation of RPC 3.1. At this point, a recap of the chronology of the fee arbitration and civil proceedings is in order.

In December 2011, the fee arbitration committee directed respondent to refund $8,250 to the Hugheses. Under R. 1:20A-3(e), the party who obtains a favorable result in a fee arbitration proceeding may, by summary action brought pursuant to R. 4:67, obtain a judgment in the amount of the refund. On January 20, 2012, however, respondent filed an appeal from the committee's determination. R. 1:20A-3(e) provides that, "in the event of an appeal, no enforcement of the Fee Committee's determination will occur while that appeal is pending before the Board."

On January 27, 2012, the Hugheses filed a civil action against respondent, presumably seeking to obtain a judgment against him for the $8,250 fee award. At that juncture, however, because of respondent's appeal, the Hugheses could not have pursued the enforcement of the fee committee's

determination by obtaining a judgment against respondent. Moreover, the civil court had no jurisdiction to review the fee committee's decision. "In any application for the entry of a judgment in accordance with this rule, no court shall have jurisdiction to review a fee arbitration committee determination. Said review is reserved exclusively to the Disciplinary Review Board under R. 1:20-15(l)." R. 1:20A-3(e). It may be logically inferred that respondent had not disclosed the fee award to the court, inasmuch as he had asked the court to adjudicate the fee controversy. As already said, respondent filed a counterclaim against the Hugheses, seeking the dismissal of their complaint and the entry of a judgment in his favor.

On March 20, 2012, respondent was advised of the dismissal of his appeal. As a result, the fee arbitration determination stood as affirmed. Even then, respondent continued with his counterclaim. Two months later, the judge, by then presumably aware of the fee committee's decision, entered a judgment in favor of the Hugheses.

Unquestionably, thus, by seeking to re-litigate the fee dispute already decided by the fee committee, in contravention of the rule that confers no jurisdiction on a court to review a

fee arbitration determination, respondent asserted a frivolous claim, in violation of RPC 3.1.[3]

The sole issue left for determination is the quantum of discipline for respondent's ethics violations, mitigated or aggravated by certain factors.

Attorneys who have asserted or controverted a frivolous issue in a proceeding have received discipline ranging from an admonition to a censure. See, e.g., In the Matter of Samuel A. Malat, DRB 05-315 (March 17, 2006) (admonition for attorney who asserted state law claims that did not comply with the New Jersey Tort Claims Act after the court had already sanctioned the attorney in another suit for asserting state law claims that were frivolous for the same reason; prior reprimand and two three-month suspensions); In the Matter of Alan Wasserman, DRB 94-228 (October 5, 1994) (attorney admonished for filing a frivolous action against his former clients seeking the collection of an $89,000 fee, without first attempting to collect a $62,000 fee awarded to the clients in a civil suit; after the attorney's collection suit was dismissed, he filed another one, this time against the insurance carriers; no prior

[3] In doing so, respondent also violated RPC 8.4(d) (conduct prejudicial to the administration of justice). Because, however, the complaint did not charge respondent with a violation of that rule, as required by R. 1:20-4(b), we refrain from making a finding in this context.

discipline); In re Silverman, 179 N.J. 364 (2004) (reprimand imposed on attorney who agreed to represent a client free of charge and who, after the client rejected a settlement offer that would have included a portion of the attorney's legal fee, sued the client for the collection of the fee, alleging breach of contract; no prior discipline); In re Hallett, 167 N.J. 610 (2001) (reprimand for attorney who filed a frivolous notice of appeal knowing that it would be "kicked back;" the attorney also failed to communicate with the client and failed to prepare a written fee agreement; no prior discipline); In re Giannini, 212 N.J. 479 (2012) (attorney censured for various instances of "unprovoked, inflammatory, disparaging, and fictitious statements" about various judges and parties in pleadings that the attorney filed on behalf of his sister; the attorney also made frivolous discovery requests and alluded to matters that were either not relevant or not supported by admissible evidence, when he made outrageous statements in his pleadings knowing them to be untrue; no prior discipline); and In re Kimm, 191 N.J. 552 (2007) (censure for attorney who filed a "contrived" treble damage RICO and consumer fraud suit in the Law Division with the sole purpose to coerce his adversary into withdrawing her Chancery Division action; no prior discipline).

Respondent also failed to supervise his non-lawyer staff and to comply with the recordkeeping provisions of R. 1:21-6. Attorneys found guilty of both infractions have been either admonished or reprimanded. See, e.g., In re Bardis, 210 N.J. 253 (2012) (admonition imposed; as a result of attorney's failure to reconcile and review his attorney records, an individual who helped him with office matters was able to steal $142,000 from his trust account, causing a shortage of $94,000; mitigating factors were the attorney's deposit of personal funds to replenish the account, numerous other corrective actions, his acceptance of responsibility for his conduct, his deep remorse and humiliation for not having personally handled his own financial affairs, and the lack of a disciplinary record); In re Mariconda, 195 N.J. 11 (2008) (admonition for attorney who delegated his recordkeeping responsibilities to his brother, a paralegal, who then forged the attorney's signature on trust account checks and stole $272,000 in client funds; in mitigation, it was considered that the attorney's brother was his closest confidant and friend, whom the attorney trusted implicitly; that the attorney recognized that "his trust was misplaced and his reliance on his brother should not have been unconditional;" that the attorney discharged the initial accountant because the accountant did not uncover the brother's

misdeeds or maintain accurate records; that the attorney retained a new accountant, who maintained fully compliant books and records; and that the attorney had an unblemished career of thirty years, prior to the incidents); In the Matter of Lionel A. Kaplan, DRB 02-259 (November 4, 2002) (attorney admonished for failure to supervise his bookkeeper, which resulted in recordkeeping deficiencies and the commingling of personal and trust funds; mitigating factors considered were the attorney's cooperation with the Office of Attorney Ethics (OAE), including entering into a disciplinary stipulation, his unblemished thirty-year career, the lack of harm to clients, and the immediate corrective action that he took); In re Deitch, 209 N.J. 423 (2012) (reprimand imposed; as a result of attorney's failure to supervise his paralegal-wife and also poor recordkeeping practices, $14,000 in client or third-party funds was invaded; the paralegal-wife stole the funds by negotiating thirty-eight checks made out to herself by either forging the attorney's signature or using a signature stamp; no prior discipline); In re Murray, 185 N.J. 340 (2005) (attorney reprimanded for failure to supervise non-attorney employees, which led to the unexplained misuse of client trust funds and to negligent misappropriation; the attorney also committed recordkeeping violations); and In re Bergman, 165 N.J. 560

(2000), and In re Barrett, 165 N.J. 562 (2000) (companion cases; attorneys reprimanded for failure to supervise secretary/bookkeeper/office manager who embezzled almost $360,000 from the firm's business and trust accounts and from a guardianship account; the attorneys cooperated with the OAE, hired a CPA to reconstruct the account, and brought their firm into full compliance with the recordkeeping rules; a bonding company reimbursed the losses caused by the embezzlement).

As to the mitigating circumstances that respondent advanced, we find them unpersuasive. We are aware that he has been an attorney for some forty years, but his disciplinary record is not unblemished. Also, his service on the Committee on Character and his public employment as a prosecutor and municipal court judge should not serve to mitigate his conduct. To the contrary, they should have heightened his awareness of the duty to comply with the rules of the profession.

In aggravation, we have considered that this is respondent's fourth brush with the disciplinary system. Furthermore, this is not the first time that he has run afoul of the recordkeeping rules. His 2007 reprimand stemmed from recordkeeping violations and were responsible for his negligent misappropriation of client's funds. Having been disciplined for deficient accounting practices, respondent should have been

especially attentive to the proper maintenance of his attorney records.

Taking into account the totality of the circumstances, we find that a censure, rather than the reprimand recommended by the DEC, is the suitable sanction for respondent's ethics offenses.

Vice-Chair Baugh and Member Singer voted for a reprimand.

We also require respondent to submit to the OAE, within ninety days of the Court's order, proof of satisfactory completion of a law office management course approved by the OAE.

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
Bonnie C. Frost, Chair

By: Ellen A. Brodsky
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of James A. Key, Jr.
Docket No. DRB 14-116

Argued: July 17, 2014

Decided: July 30, 2014

Disposition: Censure

Members	Disbar	Suspension	Reprimand	Censure	Disqualified	Did not participate
Frost				X		
Baugh			X			
Clark				X		
Gallipoli				X		
Hoberman				X		
Rivera				X		
Singer			X			
Yamner				X		
Zmirich				X		
Total:			2	7		

Ellen A. Brodsky
Chief Counsel