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SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 06-333
District Docket No. XI-2005-0019E

IN THE MATTER OF	:
MICHAEL KIMM	:
AN ATTORNEY AT LAW	:

Decision

Argued: February 15, 2007

Decided: April 26, 2007

Paul Kreisinger appeared on behalf of the District XI Ethics Committee.

Gerald Miller appeared on behalf of respondent.

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

This is a case that tests the limits of zealous advocacy, limits we conclude were exceeded here.

The case came before us on a recommendation for discipline (reprimand) filed by the District XI Ethics Committee ("DEC"). The two-count complaint charged respondent with violating RPC 3.1 (bringing a proceeding knowing or reasonably believing that it is

frivolous and RPC 8.4(d) (conduct prejudicial to the administration of justice). We determine that a censure is the appropriate discipline.

Respondent was admitted to the New Jersey bar in 1991. He maintains a law practice in Hackensack, New Jersey. He has no history of discipline.

Grievant Grace Meyer, Esq., had known Howard Zidlick since the early 1980s, as a family friend and client. They were parishioners at the same church. Meyer drafted wills for Zidlick and his brother, was named the executrix in their respective wills, and held powers of attorney ("POA") in their behalf. She was not a beneficiary under Zidlick's will. Zidlick had no children and never married. He resided at the Ingleside Nursing Home from about December 1999 until his death, at the age of 91, on April 14, 2002.

Elaine Ruel was also Zidlick's friend and fellow parishioner. Before Zidlick took residence at the nursing home, he had retained Ruel as a home health aide.

At some point, Ruel approached Meyer to request that she replace Meyer as the agent under the POA because Meyer was too busy to handle his business affairs. Meyer acquiesced. She drafted a July 27, 1998 POA for Zidlick, naming Ruel as the attorney-in-fact in charge of Zidlick's business affairs. Meyer continued handling his legal affairs.

Meyer did not discuss the changes with Zidlick until he was about to execute the document. At that time, however, she verified that the changes met with his approval. The POA provided that Ruel was to

> conduct any and all of my affairs without exception; including the sale, refinance, mortgage, transfer, collection and disbursement of funds relative to my real estate . . .
>
> Endors[e] instruments for payment from and/or deposit of money to all of my banking and investment institutions as provided in NJSA 46:28-10, 11 et seq. [sic];
>
> Mak[e] decisions regarding my medical treatment and case management in my best interest, based upon what is known of my wishes.
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> [Ex.P1.]

Also at Ruel's request, Meyer drafted a new will for Zidlick, keeping herself as the executrix, and leaving monetary bequests to Ruel ($100,000), her husband Michael ($50,000), daughter Kelly ($50,000), and the balance in percentage specific bequests to various individuals and charities. Meyer did not confirm Zidlick's "testamentary intent" or discuss the changes with Zidlick until April 20, 2000, the date he executed the new will. Meyer was satisfied that the changes comported with Zidlick's wishes. Six days earlier, on April 14, 2000, Zidlick had signed a one-page memorandum stating that he and his brother had agreed to pay Ruel's federal and state income taxes, as well as her social security taxes.

According to Meyer, Zidlick paid Ruel $12 an hour for home health aide services, which included, among others, shopping, dusting, or bringing meals to him. When Zidlick gave Ruel his POA, he increased this amount to $15 an hour.

At some later point, Ruel began paying herself $55 per hour, even after Zidlick had moved to the nursing home, where he received twenty-four hour care. During the last year of his life, he was bedridden.

Shortly after Zidlick's death, Meyer was qualified as executrix and began the administration of the estate. Thereafter, Ruel billed Meyer $810.71 for services rendered to Zidlick as his agent/"personal care manager" from April 14 to April 26, 2002. Those services included calling the funeral home, talking to nurses, sorting through Zidlick's clothing, cleaning out his room, washing fifteen loads of laundry, and looking for his cemetery deed. Ruel charged $10 for a load of laundry, even though the nursing home provided personal laundry services at sixty-nine cents per day; other laundry charges, such as for sheets, were included in the nursing home's monthly fee of $7,000 to $9,000.

Ruel submitted an additional bill for $415 as a "geriatric care manager" for "going through" and organizing Zidlick's papers, "continued correspondence," going to the post office, calling Zidlick's relatives, copying bills, and delivering Zidlick's papers to Meyer's office.

Meyer was shocked by Ruel's bills. Upon inquiring further into Ruel's activities as Zidlick's attorney-in-fact, she discovered that, while Zidlick was in the nursing home, Ruel regularly made withdrawals from his checking account for: (1) weekly payments to herself, ranging from $691 to $1,000; (2) payments to different pharmacies and stores, without noting the purpose of the payments; and (3) payments to her daughter for visiting Zidlick and for providing him services that the nursing home staff already supplied. From January 2001 to April 14, 2002, Ruel wrote checks to herself totaling approximately $132,000.

At the time that Meyer drafted Zidlick's will naming Ruel and her husband and daughter as beneficiaries, she thought this was a "sweet" gesture and, accordingly, that Zidlick was "blessing" Ruel for taking care of him. Meyer was not aware at this time that Ruel was charging Zidlick $55 an hour for her various services and withdrawing substantial funds from Zidlick's account to pay herself and her daughter, and for the other purposes described above.

After Meyer became aware of these extraordinary charges, she contacted attorney Russell Teschon for advice. Teschon suggested that she refer the matter to the prosecutor's office. Meyer rejected this advice and opted instead to commence civil litigation against Ruel to recover funds that she felt had been "misapplied."

Teschon concluded that Ruel had taken advantage of Zidlick, whom he believed to be incompetent, by paying herself sums to which she was not entitled.[1] Ruel also held herself out to be a geriatric care manager, but was not so certified by the State. Teschon testified that Ruel's rates were in excess even of those rates charged by certified professionals.

On or about September 5, 2002, Teschon filed suit a five-count verified complaint on Meyer's behalf in Bergen County Chancery Division, Probate Part, charging Ruel with breach of fiduciary duty and self-dealing, improper and undue influence on the decedent in connection with the modified will and POA, and fraud. The complaint sought, among other things, to have the bequests to the Ruels and the POA declared null and void, an accounting from Ruel, compensatory and punitive damages, attorneys' fees, and costs.

It was at this point that respondent entered the picture. Ruel retained him to represent her in the Chancery litigation.

The parties initially engaged in discovery through the early part of 2003. According to Meyer, respondent filed a motion to dismiss the complaint, which the court denied. Later, on respondent's subsequent motion, the court dismissed the undue

[1] Teschon did not believe that Zidlick had ever been declared "legally incapacitated" and speculated that action may have been deemed unnecessary because the POA obviated the need for the appointment of a guardian. He also believed that the nursing home had conducted meetings to discuss Zidlick's mental status.

influence claim. The record is silent as to the basis for this dismissal. The claim relating to overbilling remained.

Teschon attempted to engage respondent in settlement negotiations, demanding the return of approximately $66,000 of Ruel's purported fees. By letter dated April 28, 2003, respondent rejected Teschon's settlement offer without making a counter-offer. The next day, believing that a settlement was unattainable, Teschon notified respondent that he intended to retain an expert in the field of geriatric care and to begin preparing for trial.

On May 1, 2003, respondent faxed to Teschon a notice stating that Meyer had no support for the "remaining theory," relating to overbilling Zidlick, making it "frivolous" under R. 1:4-8. He reiterated his demand, apparently first made on January 6, 2003, that Meyer discontinue her Chancery action against Ruel.

At the same time, respondent also faxed to Teschon a copy of a separate complaint he had filed the previous day against Meyer in the Law Division, Bergen County. The complaint charged state and federal "RICO" (Racketeering Influenced and Corrupt Organizations) violations, consumer fraud (N.J.S.A. 56:8-2) violations, and breach of fiduciary duty. As respondent's counsel acknowledged at oral argument, the RICO charges were based on the theory that Meyer had "committed repeated acts of mail and wire fraud" by having placed in the mails the Chancery complaint and related court papers making

assertedly "false" charges against Ruel. Specifically, the Law Division Complaint charged that Meyer

> planned and executed an improper scheme of attempting to disinherit all plaintiffs by asserting that the will had been borne of 'undue influence' and other improprieties by plaintiff Elaine Ruel.
>
> . . . .
>
> 10. Defendant has caused repeated documentary mailings containing materially false statements to be sent through the interstate mail facilities of the United States Postal System [sic] and through the interstate wire facilities of the telephone system. The false statements include (A) assertions that plaintiff Elaine Ruel engaged in acts of undue influence which wrongfully induced the will, and (B) assertions that plaintiff Elaine Ruel failed to perform her functions.
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> 11. As a result, defendant has committed repeated acts of mail and wire fraud, in violation of 18 U.S.C 1331, 1332 and analogous state law. Defendant acted with intent to cause all plaintiffs, not merely Elaine Ruel, to suffer property damage in the form of loss or forfeiture of their vested bequests, and undue incurring of legal expenses.
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> 12. These and other related acts constitute 'predicate acts' within the meaning of the state and federal RICO Acts. Accordingly, defendant has violated the state and federal RICO Acts.
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> [Ex.P10.]

The Law Division complaint sought compensatory damages, trebled, punitive damages, attorneys' fees and costs. The complaint also set forth a jury demand.

Teschon concluded that it would be a conflict of interest for him to represent Meyer in both the prosecution of the Chancery action and the defense of the RICO and consumer fraud claims. He thereupon advised Meyer to seek separate counsel for the defense of these claims and to notify her malpractice carrier of the lawsuit. Meyer then retained Robert Hille to defend her in the Law Division case.

According to Meyer, when she learned about the RICO/consumer fraud claim, she was "in absolute shock" and "sick to her stomach." She testified that she did not want to settle her Chancery lawsuit because she believed that the Ruels had engaged in "terrible" conduct and that "the truth should come out." However, she had "two lawyers beating [her] up to settle." They convinced her that, if she did not agree to settle that case, there would be "protracted litigation, the estate [would] be dwindled down, there would be nothing left for the beneficiaries and [she should] just get this over, get on with [her] life." Meyer testified:

> I felt it was unfair and I thought wow if this is our justice system this is incredible that you could . . . blackmail a person into settling a case and I was horrified . . . .
>
> . . . .
>
> I fought like crazy not to settle. I had two very strong lawyers bearing down on me telling me what the costs would be, how my life would be miserable for the next two years, I'm a grandmother with 18 grandchildren, do you want to bother with this or do you want to live your

> life. I was pressured into settling and reason prevailed. I didn't want to have to live with this for the next two years of my life.
>
> [1T104.][2]

Meyer was aware that she could have asked the court to dismiss the RICO/consumer fraud complaint as frivolous. However, because respondent had not actually served the complaint and summons on her, she believed that the action was not ripe for dismissal.

In a May 8, 2003 telephone conversation, Teschon informed respondent that he had advised Meyer to retain other counsel in the RICO/consumer fraud action and to notify her professional liability insurance carrier of that lawsuit. According to Teschon, respondent acted "shocked" and asked, "[W]hy did you do that . . . she hasn't been personally served so she doesn't have to notify her insurance carrier." Afterwards, he told Teschon, "[M]aybe we can resolve this and how much do you have out in attorney's fees on this estate." Respondent quickly engaged Teschon in settlement discussions, inquiring, among other things, about the balance in the estate account, which was $466,983.86.

At this juncture, Teschon believed that the settlement negotiations were becoming more fruitful. Because of his concern

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[2] 1T denotes the transcript of the ethics hearing on August 29, 2006.

over further depletion of the estate, he told his expert to stop working on the case.

On May 15, 2003, respondent forwarded to Teschon a proposed stipulation of settlement in the Chancery action and a proposed notice of voluntary dismissal of the RICO/consumer fraud action. However, because Teschon was unable to judge "where [respondent] was coming from," he continued prosecuting the Chancery case.

By letter dated May 30, 2003, Teschon informed respondent that, in light of the RICO/consumer fraud action, he was not certain about going forward with a settlement of the Chancery action. He also served respondent with an expert's report in the Chancery action.

At a June 3, 2003 case management conference, Teschon introduced respondent to Robert Hille, the defense counsel retained by Meyer to handle the RICO/consumer fraud case. Respondent then revealed that, just prior to the conference, he had voluntarily dismissed the RICO/consumer fraud complaint. Indeed, respondent had filed a stipulation of dismissal that same day.

During the case management conference, the parties "ironed out" terms of a settlement of the Chancery action. The essential terms were:

> 1. . . . The Executrix withdraws all legal claims against Elaine Ruel and all possible claims against Elaine Ruel and any other beneficiary related to her, and their heirs and assigns.

2. Elaine Ruel admits that the Executrix had reasonable grounds to pursue the claims raised in this proceeding. Elaine Ruel waives all possible legal claims against the Executrix and the estate.
3. As directed by the decedent and as is required under the law, the estate will disburse the assets of the estate as follows:

   A. First Tier. [P]ay Elaine Ruel's pending taxes, along with payment of all estate charges including funeral expenses, other estate taxes; pay the Executrix's statutory commission; pay professional fees including legal and expert fees, in connection with the litigation brought by the Executrix and defense successfully raised by Elaine Ruel;
   B. Second Tier. Pay sum-certain bequests to Elaine Ruel, Michael Ruel and Kelly Ruel;
   C. Third Tier. [P]ay all remaining beneficiaries based on their percentage entitlements under the will.

[Ex.P20.]

Ultimately, the Ruels obtained virtually all the relief they had requested, except that the estate paid only half of their taxes and they incurred $10,000 in legal fees.

Teschon explained that the Chancery case was settled not because of any concern that the RICO/consumer fraud complaint had merit, but because the litigation was becoming too expensive for the estate. Meyer characterized the settlement as follows:

> Well, [Ruel] got everything she wanted plus she got some of her taxes paid, not all that she wanted, I mean it was totally unbelievable. It

> was against my grain, my moral fiber. It was like is this our justice system. It was very disheartening.
>
> [1T75;1T76.]

At the DEC hearing, respondent claimed that the RICO complaint against Meyer had merit because Meyer's own lawsuit was frivolous. He contended his clients had not exerted undue influence on Zidlick and pointed out that Meyer herself had drafted the new will and POA.

Respondent conceded that the complaint failed expressly to plead that Meyer was engaged in a "RICO enterprise," but maintained that such omission was not fatal. To establish the statutory requirement of a "mailing in interstate commerce or use of the wire facilities in interstate commerce," respondent pointed to Meyer's multiple mailings (undertaken, of course, not by Meyer but by her counsel) of the Chancery Division pleadings.

Respondent also opined that it was not necessary to plead that Meyer was involved in a RICO enterprise, only that there must be a RICO enterprise, which "in this case would have been the estate and residual beneficiaries." As to specifying "racketeering activity," respondent referred again to the multiple mailings of court papers as the necessary "predicate acts."

Respondent also explained that he filed the complaint during settlement discussions because he construed Teschon's offers to be demands that his clients forfeit their bequests and that Ruel

disgorge her fees. In contrast, he characterized his own written requests for Meyer to withdraw her claims in their entirety as "settlement offers."

Respondent claimed that he had "substantial prior experience" with RICO cases. Although he billed eight hours for conducting legal research and five hours for drafting the complaint, he conceded that his highly generalized complaint was "pro forma," drafted in accordance with "notice pleading practice." Respondent explained that he never served the complaint because he had reached an understanding with Teschon that the Chancery action would shortly be settled "with essentially all the pay outs being in conformity with the wishes of Mr. Zidlick."

The DEC found, correctly we believe, that the allegations of the civil RICO/consumer fraud complaint were

> frivolous, without merit, and filed with the purpose and intent to threaten and intimidate [Meyer] into relinquishing certain legitimate claims in the underlying estate litigation. Unfortunately, the Respondent's tactics were ultimately successful, to the financial detriment of the beneficiaries of the Estate of Howard E. Zidlick.
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> [HR13¶47.] [3]

Attempting to defend the thin factual allegations of the complaint and the dubious legal theory underpinning the action,

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[3] HR refers to the hearing panel report, dated November 13, 2006.

respondent asserted he was seeking to extend and modify the law, by "lowering the threshold for civil RICO litigation and making the cause of action easier to substantiate at trial." The DEC found that it is "inherently unacceptable for litigants and/or their attorneys to attempt to achieve victory through these sorts of strategically intimidating and overpowering litigation tactics." The DEC concluded that the respondent violated RPC 3.1 and RPC 8.4(d) and recommended a reprimand.

Following a de novo review of the record, we are satisfied that the DEC's conclusion is supported by clear and convincing evidence.

We start with the principle that one has a constitutional right to petition government, free of being subjected to damage claims. That right includes the right of access to the courts. B&K Const. Co. v. NLRB, 536 U.S. 516, 525 (2002). The sole exception is when the litigation is a sham. However, "litigation can only be sham (thereby subject to a damage action) if it is objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." Village Supermarket, Inc. v. Mayfair Supermarkets, 269 N.J. Super, 224, 230 (Law Div. 1993).

Nothing in the record supports a conclusion that Meyer's Chancery complaint was a sham, i.e., objectively baseless. Surely it was not unreasonable for Meyer to conclude that Ruel

was overreaching by using the POA to withdraw funds from Zidlick's checkbook to pay herself and members of her family for services that the nursing home was already providing. This is particularly so, given the substantial amount of such payments over a very short period of time, $132,000, representing a significant percentage of the entire estate. Indeed, as the executrix of Zidlick's estate, Meyer not only had the right to sue to challenge Ruel's actions and preserve the assets of the estate, but she likely had a fiduciary duty to do so.

In any event, there is little question that Meyer's Chancery action was reasonably grounded in the facts and applicable law and that respondent's conclusion that the action was frivolous was unreasonable. Even assuming that Meyer had filed a frivolous action against respondent's client, the law of New Jersey and the rules of Court provide an appropriate remedy in the form of proceedings under the frivolous litigation statute and/or court rule. There was no basis in law or in fact upon which to launch a complaint alleging violations of federal and state RICO statutes or the consumer fraud statute (as the many deficiencies in respondent's pleading demonstrate). The inescapable conclusion is that respondent's counter lawsuit was designed simply to bludgeon Meyer into withdrawing her claims.

An action is frivolous if

> the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person or if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.
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> [Kevin H. Michels, New Jersey Attorney Ethics §28:1-3 at 621 (2007); citing Kutak Commission Comment quoted in the Debevoise Committee Report, 112 N.J.L.J., July 28, 1983.]

Michels cites Ricciardi V. Weber, 350 N.J. Super 453, 472 (App. Div. 2002), for the proposition that it may be reasonable for an attorney, in the hope of promoting swift settlement negotiations, to file a claim without fully investigating the underlying allegations, when the attorney has no reason to believe that the client is lying. Respondent's stated desire to promote such swift settlement negotiations here is highly suspect. He filed the RICO/consumer fraud suit on April 30, 2005 -- seven months after the filing of the original lawsuit -- and avoided meaningful settlement negotiations until Teschon pressed forward with an expert's report and advised him that Meyer would be defending the RICO/consumer fraud charges through other counsel.

N.J.S.A 2C:41-2 of the New Jersey RICO statute sets forth the following prohibited activities:

> a. It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which he

has participated as a principal . . . to use or invest, directly or indirectly, any part of the income, or the proceeds of the income, in acquisition of any interest in, or the establishment or operation of any enterprise which is engaged in or the activities which affect trade or commerce . . . .

b. It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in or activities of which affect trade or commerce.
c. It shall be unlawful for any person employed by or associated with any enterprise engaged in or activities of which affect trade or commerce to conduct or participate, directly or indirectly, in the conduct of the enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
d. It shall be unlawful for any person to conspire . . . to violate any of the provisions of this section.

The federal rules at 18 U.S.C.A. §1962 are virtually identical.

Here, the complaint charged that "Meyer planned and executed an improper scheme to disinherit the plaintiffs." Meyer allegedly did so by asserting in a civil action complaint "that the will had been borne of 'undue influence' and other improprieties by plaintiff Elaine Ruel." Respondent asserted that these charges were themselves false. According to respondent, by mailing the complaint and other documents leveling these allegations, Meyer committed wire and mail fraud.

We recognize that, over the years, courts have construed the federal and state RICO statutes expansively to reach a variety of activities not commonly considered to be "racketeering." But there is no precedent (and respondent has pointed to none) or logic for the charge that pursuing an assertedly abusive lawsuit constitutes "racketeering" or "trade or commerce," within the meaning of those statutes.

Equally untenable was respondent's allegation that Meyer violated the Consumer Fraud Act, N.J.S.A. 56:8-2 et seq. That Act provides:

> The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice . . . .
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> [N.J.S.A. 56:8-2.]

Just as respondent never explained how pursuing a lawsuit can be equated with "trade or commerce" for RICO purposes, he never explained how it constitutes the "sale or advertisement of merchandise or real estate" for consumer fraud purposes.

In light of the obvious legal and factual deficiencies in respondent's RICO/consumer fraud action, we can only conclude -- as did the DEC -- that respondent filed the Law Division complaint as a tactic intended solely to coerce Meyer into essentially withdrawing her Chancery action. This conclusion is further bolstered by the following additional facts and circumstances: (1) respondent filed the complaint not as a counterclaim in the existing action, but as a separate action in a different branch of the Superior Court; (2) respondent did not serve the complaint; (3) respondent faxed only an "informational" complaint to Teschon, and (4) respondent voluntary dismissed the RICO complaint, once he learned that Meyer had retained counsel to defend it and had hired an expert to press forward with the estate litigation.

RPC 3.1 prohibits a lawyer from bringing an action unless the lawyer knows or reasonably believes that there is a basis in law and fact for doing so that is not frivolous. For the reasons discussed above, we find that respondent could not have had such a reasonable belief here. He had no fair basis for concluding that Meyer's estate action was a sham; he filed the Law Division complaint with the sole intent of coercing Meyer to withdraw her claims against the Ruels. He, thus, violated RPC 3.1, as well as RPC 8.4(d).

Respondent claimed also that his First Amendment rights were implicated, and that it would be unconstitutional to discipline him merely because the filing of the RICO/consumer fraud lawsuit appeared to be "harassing" or "oppressive." First, under R. 1:20-15(h) constitutional challenges, raised before a trier of fact, are preserved for Supreme Court consideration. Second, it is difficult to take this contention seriously. There is no constitutional right to proceed with a frivolous action on behalf of a client, and certainly no such right for a licensed attorney to violate the RPCs that govern that attorney's professional conduct.

The remaining issue is the proper quantum of discipline. In cases involving violations of RPC 3.1, the discipline imposed has ranged from an admonition to a one-year suspension. See, e.g., In the Matter of Samuel A. Malat, DRB 05-315 (March 17, 2006) (admonition imposed on attorney who asserted frivolous state law claims (whistleblower) in one matter after having been sanctioned in another matter for asserting the same claims, which had already been deemed frivolous by the court; we found the attorney's conduct careless, rather than intentional; prior ethics history included two three-month suspensions and a reprimand); In the Matter of Alan Wasserman, DRB 94-228 (October 5, 1994) (admonition imposed on attorney with no disciplinary history who filed two frivolous lawsuits against former clients: one for fees, without having first advised the clients of their

right to fee arbitration and, after that suit was dismissed, another suit for the same fees, albeit against insurance carriers, without notice to the former clients and without naming them as parties); In re Silverman, 179 N.J. 364 (2004) (reprimand imposed on attorney who violated RPC 3.1 when, after his client had properly revoked a settlement in a "lemon law" case, he sued the client for legal fees, even though the settlement included legal fees and the client had been told that she would not be required to pay them; aggravating factors included the location of the suit (filed in Pennsylvania, even though the client lived in New Jersey and the car was purchased there) and the amount of damages sought); and In re Yacavino, 184 N.J. 389 (2005) (attorney suspended for six months for, among other things, repeatedly filing frivolous claims by asserting the same claims after the court dismissed them on the merits, failing to expedite litigation, and engaging in conduct prejudicial to the administration of justice by taxing the court's resources).

Respondent's conduct was not careless like that of the attorney in Malat (admonition). He intended to file the complaint, notwithstanding its contrived and frivolous nature, to coerce a settlement. An element of intent was similarly present in Yacavino (six-month suspension), where the attorney repeatedly filed the same actions. However, Yacavino's conduct was more serious because, in re-filing the claims, he defied court orders.

As aggravation here, we consider the ultimate effect of respondent's conduct: the erosion of a substantial portion of the estate's assets. At the same time, we note that respondent has no history of violating RPC 3.1 or any other RPC.

On balance, we do not consider respondent's conduct to merit a suspension. However, in our view, an admonition or a reprimand is insufficient to address the seriousness of his actions. We, therefore, determine to censure him.

In arriving at our conclusions, we cannot overemphasize the importance, in our system of justice, of the zealous advocate. A lawyer must be free to bring to bear, in relation to his or her client's cause, all the creativity and vigor that he or she can muster. At the same time, however, the advocate's zeal has to be - - and is - - tempered and circumscribed by the limits, generous though they be, laid down by the Rules of Professional Conduct. The line between "zealous advocacy" and frivolous pursuit of an action, claim or defense may not always be a bright one and there may be close cases as to which, generally, we would err on the side of the advocate. But we do not see this as a close case. In trying to pressure a fiduciary to withdraw her lawsuit with a wholly contrived treble damage "RICO" and "Consumer Fraud" lawsuit of his own, respondent pushed the envelope much too far.

Members Boylan and Lolla 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
William J. O'Shaughnessy, Chair

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

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Michael S. Kimm
Docket No. DRB 06-333

Argued: February 15, 2007

Decided: April 26, 2007

Disposition: Censure

Members	Disbar	Suspension	Censure	Reprimand	Admonition	Did not participate
O'Shaughnessy			X			
Pashman			X			
Baugh			X			
Boylan						X
Frost			X			
Lolla						X
Pashman			X			
Stanton			X			
Wissinger			X			
Total:			7			2

Julianne K. DeCore
Julianne K. DeCore
Chief Counsel