

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 98-046

IN THE MATTER OF
BRETT K. KATES
AN ATTORNEY AT LAW

Decision
Default [R. 1:20-4(f)(1)]

Decided: April 5, 1999

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

Pursuant to R. 1:20-4(f)(1), the Office of Attorney Ethics ("OAE") certified the record in this matter directly to the Board for the imposition of discipline, following respondent's failure to file an answer to the formal ethics complaint.

The complaint was served by publication and certified mail. Notice by publication was made in the New Jersey Lawyer and New Jersey Law Journal on November 17, 1997 and in the Camden Courier Post on November 9, 1997. In addition, the formal complaint was served at respondent's Cherry Hill address on December 24, 1997, where it was

accepted by an Al Grossman. Respondent did not file an answer, prompting the OAE to certify the record directly to the Board for the imposition of discipline.

This matter was originally before the Board in April 1998. At that time, the Board considered respondent's request for an extension of time and determined to carry the matter until May 1998 to allow respondent to file a motion to vacate the default. Respondent had ten days from receipt of the Board's April 29, 1998 letter to file the motion, which he failed to do.

* * *

Respondent was suspended from the practice of law for three months, effective August 1, 1994, for lack of diligence, failure to comply with a client's reasonable request for information and failure to cooperate with the ethics system. Respondent has not applied for reinstatement to the practice of law. Respondent's latest misconduct occurred while he was suspended from the practice of law.

The Berger Matter

Frieda Berger, an eighty-five year old Florida resident, was concerned that she might be liable for damages in excess of her insurance coverage as a result of a November 1995 automobile accident in which several people were injured. Respondent and his partner, Herbert Schlagman, a Pennsylvania attorney, advised Berger that they would establish a

limited partnership to protect her assets. Respondent was the author of a book titled The Insider's Guide to Asset Protection. Both respondent and Schlagman assured Berger that the partnership plan was legal and that her assets would be protected. Berger was also told that the partnership could be dissolved at any time and that her funds would be returned to her.

On February 21, 1996, Berger gave Schlagman a check for \$5,000 payable to Schlagman. The memo portion of the check read "B. Kates asset protection."

In March 1996, respondent contacted Berger by telephone and told her that additional funds were needed for the partnership. On April 1, 1996, when respondent was under suspension, he traveled to Florida and accompanied Berger to several financial institutions where she had funds on deposit. Berger cashed several certificates of deposits and gave respondent a check for \$6,500, dated April 1, 1996, payable to Brett Kates, Esq.¹ At that time, Schlagman was in the hospital, terminally ill. He died in April 1996.

Berger's insurance company settled all of the accident claims within the limits of her policy. By letter dated August 20, 1996, Berger advised respondent of the settlement and requested that he return her funds. Shortly thereafter, respondent sent certain documents to Berger purporting to be the partnership papers for FFB Associates Limited Partnership, which had allegedly been formed on April 1, 1996, in Pennsylvania. Without Berger's knowledge, Schlagman's wife had been designated as a general partner of the partnership. Berger's first name had been misspelled and her signature had been forged on the documents.

¹ Berger also gave respondent two checks, each in the amount of \$1,500, payable to British West Indies Trust. Those checks were never cashed. Berger subsequently stopped payment on them.

Although there was a date stamp indicating that the partnership documents had been filed with the Pennsylvania Department of State on April 9, 1996, Berger later ascertained that they had never been filed. There was also a document titled “Deed of Settlement,” dated May 6, 1996, whereby Berger purportedly deeded property to “British West Indies Trust” to be held in trust for Berger’s beneficiaries. Again, Berger’s first name had been misspelled and her signature forged on the document.

With the partnership documents respondent included a bill on the letterhead of “Brett K. Kates, Esq.” The bill indicated that, for “professional services rendered in connection with asset protection and preservation program,” Berger was being charged \$11,500. That bill also indicated that \$5,000 had been paid and \$6,500 was due. The \$6,500 sum given to respondent on April 1, 1996 was not reflected on the bill. Respondent never returned any money to Berger.

Respondent was charged with violations of RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) and RPC 8.4(b) (criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer) in the Berger matter.

The Sidell Matter

In July 1996, Scott Sidell retained respondent to draft a limited partnership agreement and establish an asset protection plan to protect Sidell’s assets from potential creditors. Respondent was to establish a limited partnership in Pennsylvania for Sidell. Respondent

held himself out to be a practicing attorney, in good standing, in New Jersey and Pennsylvania. At that time, however, he was under suspension. Respondent billed Sidell \$2,500 for "professional services." He did not include the word "Esq." on the invoice.

On August 16, 1996, Sidell sent a \$2,500 bank check to respondent. The check was deposited in respondent's personal bank account.

Despite Sidell's numerous requests for information, respondent never communicated with Sidell. He also failed to reply to a letter written by another attorney on behalf of Sidell. In fact, respondent had not filed any partnership documents for Sidell.

Respondent was charged with violations of RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) and RPC 8.4(b) (criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer) in the Sidell matter.

The Failure to Cooperate with Disciplinary Authorities

On November 10, 1996, the District IV Ethics Committee ("DEC") served the Sidell grievance on respondent and directed that he reply to the grievance. When respondent failed to reply, the DEC sent a second letter to him on February 13, 1997. Thereafter, the matter was transferred to the OAE.

Meanwhile, on December 13, 1996, the OAE served the Berger grievance on respondent and directed him to reply to that grievance. Because respondent did not reply, an OAE investigator telephoned him. Respondent stated that he was not aware of the grievance and requested that the grievance be "faxed" to him. The OAE attempted to "fax"

the documents to the number provided by respondent, but the transmission was unsuccessful. Thereafter, the OAE investigator left a message for respondent to contact him, which respondent failed to do. Despite three additional letters from the OAE, respondent has never replied to either grievance.

Respondent was charged with violations of RPC 8.1(b) (failure to cooperate with disciplinary authorities) for his failure to reply to the Sidell and Berger grievances.

* * *

Service of process was properly made in this matter. Following a de novo review of the record, the Board found that the facts recited in the complaint support a finding of unethical conduct. Because of respondent's failure to file an answer, the allegations of the complaint are deemed admitted. R. 1:20-4(f)(1).

Although the complaint charged respondent with violations of RPC 8.4(b) for practicing law while suspended, the appropriate rule is RPC 5.5(a). The OAE subsequently requested that the Board consider respondent's conduct as violative of RPC 8.4(d) (conduct prejudicial to the administration of justice) and RPC 5.5(a) (practicing law while suspended). Under In re Logan, 70 N.J. 222 (1976), these amendments would be permitted, inasmuch as the factual allegations would have put respondent on notice that the conduct was violative of these rules. As noted above, the charge that respondent had been practicing law while suspended should have been charged as a violation of RPC 5.5(a), not RPC 8.4(b).

Similarly, respondent's practice of law in contravention of the Court's Order supports the finding of a violation of RPC 8.4(d). Therefore, the complaint was deemed amended to conform to the proofs. Also, respondent failed to reply to the grievances, despite numerous requests by the DEC and OAE, in violation of RPC 8.1(b). Furthermore, after requesting and receiving an adjournment of the matters from the Board in order to file a motion to vacate the default, respondent failed to take any action.

With respect to the violation of RPC 8.4(c), the complaint indicates that from the outset respondent intended to defraud Berger. He told her not to discuss the limited partnership with anyone. He obtained a total of \$11,500 from Berger, which she understood was to be put into a limited partnership for the purpose of "protecting" her assets from pending claims. To obtain additional money from Berger, an eighty-five year old widow, respondent traveled to Florida and accompanied her to her banks. When the claims were settled within a few months of respondent's trip to Florida, Berger requested the return of her money. Respondent then sought to charge Berger \$11,500 for work he did not do. He never returned the funds to Berger.

Additionally, not only were Berger's signatures on the partnership and trust documents forged, but Schlagman's wife had been designated a general partner of the partnership, without Berger's knowledge. Although the partnership documents contained a date stamp indicating that they had been filed with the Pennsylvania Department of State, Berger later ascertained that they had never been filed. Respondent's conduct in the Berger matter was rife with dishonesty and fraud.

In Sidell, the complaint indicates that respondent never intended to perform the services for which he had been retained. He also affirmatively misrepresented his status to Sidell, assuring Sidell that he was an attorney in good standing in New Jersey and Pennsylvania.² See In re Spagnoli, 115 N.J. 504 (1989) (disbarment where attorney accepted retainers without ever intending to act on behalf of his clients).

The level of discipline for practicing law while suspended has generally ranged from a lengthy suspension to disbarment, depending on a number of factors, including the attorney's level of cooperation with the disciplinary proceedings, the presence of other misconduct and the attorney's prior disciplinary history. See, e.g., In re Wheeler, 140 N.J. 321 (1995) (attorney suspended for two years for practicing law while suspended, making multiple misrepresentations to clients and displaying gross neglect, pattern of neglect, negligent misappropriation, conflict of interest and failure to cooperate with the disciplinary authorities). In re Beltre, 130 N.J. 437 (1992) (attorney suspended for three years for appearing in court after having been suspended and misrepresenting his status to the judge, failing to carry out his responsibilities as an escrow agent, lying to the Disciplinary Review Board about maintaining a bona fide office and failing to cooperate with an ethics investigation). In re Costanza, 128 N.J. 108 (1992) (attorney disbarred for practicing law while suspended, gross neglect, lack of diligence, failure to keep clients reasonable informed

² On December 28, 1994, respondent was suspended for three months in Pennsylvania. On August 16, 1995, respondent was suspended for an additional six months, retroactive to December 28, 1994. As of August 29, 1997, he had not been reinstated in Pennsylvania.

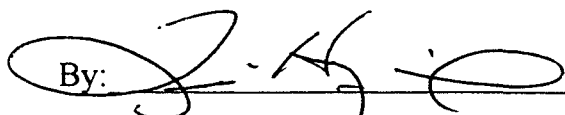
and to explain matters in order to permit them to make informed decisions about cases, pattern of neglect and failure to designate hourly rate or basis for fee in writing) and In re Goldstein, 97 N.J. 545 (1984) (attorney disbarred for misconduct in eleven matters and for practicing law while temporarily suspended by the Court and in violation of an agreement with the Disciplinary Review Board that he limit his practice to criminal matters).

Here, respondent's misconduct did not affect the large number of clients involved in Goldstein's and Costanza's wrongdoing. However, neither of those attorneys displayed the level of fraudulent conduct exhibited by this respondent. Although the complaint did not charge knowing misappropriation of client trust funds, it is clear that respondent hoodwinked Berger in order to obtain her money. She trusted him because he was an attorney and he misused that trust by stealing her funds. The Court has stated that it "will no more tolerate the hoodwinking of helpless clients out of funds in a business venture that is essentially for the benefit of the lawyer than it will outright misappropriation of trust funds." In re Wolk 82 N.J. 326, 335 (1980).

Based on the foregoing, the Board was unanimous in recommending respondent's disbarment. One member did not participate.

The Board further determined to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: 4/5/88

By: 

LEE M. HYMERLING
Chair
Disciplinary Review Board

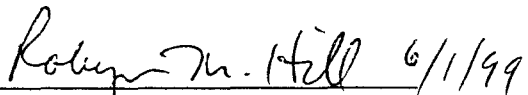
SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Brett K. Kates
Docket No. DRB 98-046

Decided: April 5, 1999

Disposition: Disbar

Members	Disbar	Suspension	Reprimand	Admonition	Dismiss	Disqualified	Did not Participate
Hyerling	x						
Zazzali							x
Brody	x						
Cole	x						
Lolla	x						
Maudsley	x						
Peterson	x						
Schwartz	x						
Thompson	x						
Total:	8						1


Robyn M. Hill
Chief Counsel