Supreme Court of New Jersey
Disciplinary Review Board
Docket No. DRB 19-012
District Docket No. VII-2016-0025E

In the Matter of

Mark H. Jaffe

An Attorney at Law

Decision

Argued: March 21, 2019

Decided: August 5, 2019

Christine M. Juarez appeared on behalf of the District VII Ethics Committee.

Spencer B. Robbins 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 censure, filed by the District VII Ethics Committee (DEC). The complaint charged respondent with violating RPC 1.5(b) (failure to communicate the basis or rate of the fee in writing to the client); RPC 1.15(d) (failure to comply with recordkeeping requirements); and RPC 8.1(b) (failure to cooperate with disciplinary authorities). We determine to impose a reprimand.

Respondent was admitted to the New Jersey bar in 1988. On June 30, 1998, he received a reprimand for gross neglect, lack of diligence, failure to communicate with a client, and failure to cooperate with an ethics investigation. In re Jaffe, 154 N.J. 136 (1998).

On July 18, 2012, respondent received a reprimand for lack of candor to a tribunal. In that case, based on respondent's misrepresentations, a municipal court judge permitted respondent to withdraw from a case. Respondent also disobeyed the judge's directive to notify the client that respondent had been relieved as counsel. In re Jaffe, 211 N.J. 1 (2012).

On September 27, 2017, respondent received a censure for his misconduct in two consolidated matters. In one matter, respondent failed to file an expungement petition for his client, failed to communicate with the client, made misrepresentations to the court and to his client, prejudiced the administration of justice, and failed to cooperate with disciplinary authorities. In the second matter, respondent lacked diligence in a criminal case, failed to communicate with his client, and failed to protect the client's interests upon termination of the representation. In re Jaffe, 230 N.J. 456 (2017).

Two matters are pending against respondent at the hearing stage alleging misrepresentation and recordkeeping violations.

The testimony at the hearing below was relatively convoluted. Neither grievant nor respondent could remember dates or provide a coherent chronological order of events. Even on issues where they substantively agree, their respective recollections of the details are in conflict.

In the summer of 2016, grievant, Danielle Britton, was charged with driving under the influence and several traffic violations. After appearing pro se at her first two court appearances on the matter, Britton asked the judge for an adjournment to provide her time to decide whether to hire an attorney. Soon thereafter, she received a mail solicitation from respondent and called his office.

In contrast, respondent testified that, while leaving court, a man approached him, seeking help for his girlfriend who had been charged with driving under the influence. Respondent was then introduced to Britton.

Britton further testified that, after an initial phone call with respondent, she met with him at his office on three occasions. Respondent denied that Britton ever came to his office. Both respondent and Britton agree, however, that respondent made three or four court appearances on her behalf. Britton claimed that, at one of those alleged office meetings, respondent provided her with a file containing a copy of the municipal court discovery for her case. Respondent testified that he provided a copy of the discovery to Britton outside of the

courtroom following one of several appearances and that he also sent her a copy by e-mail.

Although respondent admitted that he never presented Britton with a written fee agreement, he and Britton exchanged e-mails regarding a fee. On July 20, 2016, Britton informed respondent that she would be able to pay him $500 on July 29, 2016, an additional $250 on August 12, 2016, and another $250 on August 26, 2016. Respondent replied: "will be happy to start defending you."

Britton testified that, soon thereafter, she delivered a $500 check to respondent's office. Respondent, however, claimed that when he received a bank check in the mail from Britton, he called her immediately because the check should have been payable to the expert whom respondent had advised Britton to hire to challenge her blood-alcohol test results. Respondent told Britton that he would not be cashing the check. Britton testified that she believed that the cost of the expert was included in respondent's fee. She was unwilling to spend any additional money. Ultimately, she chose not to hire an expert and, through respondent, pleaded guilty to driving under the influence.

Respondent submitted to the disciplinary investigator a written reply to the ethics grievance, but requested extensions of time to provide the investigator with his Britton client file. Respondent explained at the ethics hearing that he and his secretary searched for the file, until they realized that one did not exist

because Britton had never come to his office to initiate the representation. He added that, when he met Britton in court, he gave her the only documents he had – the copy of her discovery. Respondent provided the investigator with all his e-mail exchanges with Britton, which were attached as exhibits to the complaint.

At the disciplinary hearing, however, respondent's attorney produced, for the first time, the uncashed check from Britton and a copy of Britton's discovery. Respondent admitted that he did not know where the check was during the investigation, but also that he had found it almost a year prior to the hearing.

Despite respondent's claim that he exchanged several e-mails with Britton establishing a fee agreement, the DEC concluded that respondent violated RPC 1.5(b). He had not regularly represented Britton, but had not communicated to her, in writing, the rate or basis of his fee.

In respect of the recordkeeping allegations, the DEC found a violation of R. 1:21-6(c)(1)(C), which requires attorneys to maintain, for seven years, all retainer and compensation agreements with clients. The panel reasoned that, because respondent had failed to obtain a written fee agreement, he also failed to maintain a copy of an agreement for seven years.

Additionally, the DEC concluded that respondent's failure to deposit Britton's retainer check in his business account violated R. 1:21-6(a)(2). The DEC further found that respondent's failure to maintain the check or other

financial records in connection with his representation of Britton violated R. 1:21-6(c)(1)(I), which requires attorneys to maintain copies of a client's case file "reasonably necessary for a complete understanding of the financial transactions pertaining thereto." Based on the foregoing, the hearing panel found that respondent violated RPC 1.15(d).

Finally, the DEC found that respondent violated RPC 8.1(b) by failing to provide his file, specifically, the uncashed retainer check and the municipal court discovery, during the ethics investigation.

In mitigation, the hearing panel considered that respondent did not cash Britton's check and, therefore, charged her no fee for the services from which she ultimately benefitted. In aggravation, the hearing panel considered respondent's history of discipline. Therefore, based on the principles of progressive discipline and respondent's failure, after all these years, to learn from his prior missteps, the hearing panel recommended a censure.

Following a de novo review of the record, we are satisfied that the DEC's finding that respondent violated RPC 1.5(b) and RPC 8.1(b) is supported by clear and convincing evidence. We determine to dismiss the alleged RPC 1.15(d) violation.

There is no dispute that respondent failed to set forth, in a writing to Britton, the basis or rate of his fee. Respondent offers the excuse that she never

came to his office. This explanation is hollow, at best, because he appeared in court, with Britton, at least three times, and could have provided the required writing on one of those occasions. Therefore, we find that respondent violated RPC 1.5(b).

During the investigation, the investigator asked for respondent's entire client file. Respondent provided several e-mail chains, and requested extensions of time to produce the rest of the file. He claimed that, eventually, he realized there was no file because he never met with Britton in his office and, therefore, never opened a file. The DEC found that respondent violated R. 1:21-6(c)(1)(C), which requires the retention of all retainer and compensation agreements with clients for seven years, because he failed to obtain a written fee agreement and, therefore, he also failed to retain a copy of an agreement for seven years. In our view, however, respondent cannot be faulted for failing to maintain a copy of a document that he never possessed.

The DEC also expanded the recordkeeping charges by citing respondent's failure to deposit Britton's check into his business account, a violation of R. 1:21-6(a)(2), and his failure to maintain the check or other financial records pertaining to Britton's case, a violation of R. 1:21-6(c)(1)(I). Because the complaint did not allege these violations, they cannot serve as the basis for discipline in this matter.

The complaint alleges that respondent violated RPC 1.15(d) because he failed to provide the investigator with his full case file. Although this failure supports the RPC 8.1(b) charge, it does not constitute a failure to comply with the recordkeeping rule. Therefore, we dismiss the RPC 1.15(d) charge.

Respondent, however, failed to cooperate with the investigator. He turned over to the investigator only correspondence between himself and Britton. Yet, at the hearing, he produced the municipal court discovery and an uncashed check. The discovery was available to him from the first request for his file because, as he admitted at the hearing, he e-mailed a copy to Britton and, therefore, he could have provided the same electronic copy to the investigator. Further, he admitted at trial that he had found the uncashed check nearly a year earlier. His failure to produce it to the investigator during that year, along with his failure to produce the municipal court discovery, violated RPC 8.1(b).

In sum, respondent violated RPC 1.5(b) and RPC 8.1(b). We determine to dismiss the alleged violation of RPC 1.15(d).

Conduct involving the failure to memorialize the basis or rate of a fee, as RPC 1.5(b) requires, typically results in an admonition even if accompanied by other, non-serious ethics offenses. See, e.g., In the Matter of John L. Conroy, Jr., DRB 15-248 (October 16, 2015) (attorney failed to provide the client with a writing setting forth the basis or rate of his fee when he drafted a will, living

will, and power of attorney, and processed a disability claim for a new client, a violation of RPC 1.5(b); lack of diligence, failure to communicate with the client, practicing law while administratively ineligible, and failure to cooperate with an ethics investigation also found; no prior discipline in forty-year legal career) and In the Matter of Osualdo Gonzalez, DRB 14-042 (May 21, 2014) (attorney failed to set forth in writing the basis or rate of the fee, a violation of RPC 1.5(b); failure to communicate with the client, and failure to abide by the client's decisions concerning the scope of the representation also found; no prior discipline).

Reprimands have been imposed on attorneys who, in addition to violating RPC 1.5(b), have defaulted, have a disciplinary history, or have committed other acts of misconduct. See, e.g., In re Yannon, 220 N.J. 581 (2015) (attorney failed to memorialize the basis or rate of his fee in two real estate transactions, a violation of RPC 1.5(b); discipline enhanced from an admonition based on the attorney's prior one-year suspension); In re Gazdzinski, 220 N.J. 218 (2015) (attorney failed to prepare a written fee agreement in a matrimonial matter; the attorney also failed to comply with the district ethics committee investigator's repeated requests for the file, a violation of RPC 8.1(b), and violated RPC 8.4(d) by entering into an agreement with the client to dismiss the ethics grievance against him, in exchange for a resolution of the fee arbitration between them);

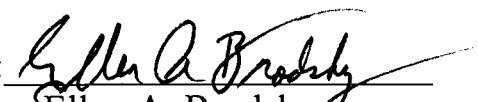
and In re Kardash, 210 N.J. 116 (2012) (in a default matter, the attorney failed to prepare a written fee agreement in a matrimonial matter).

Here, respondent's misconduct is akin to that of the attorney in Gazdzinski, despite the additional RPC 8.4(d) violation in that matter. Both respondent and Gazdzinski violated RPC 1.5(b) and then failed to cooperate in an ethics investigation. Therefore, we determine that respondent's misconduct should be met with a reprimand. Despite his disciplinary history, we believe that the discipline need not be enhanced further.

Chair Frost, Vice-Chair Clark, and Member Rivera voted for a censure. Member Gallipoli 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
Bonnie C. Frost, Chair

By: 
Ellen A. Brodsky
Chief Counsel

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DISCIPLINARY REVIEW BOARD
VOTING RECORD

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Disposition: Reprimand

Members	Reprimand	Censure	Recused	Did Not Participate
Frost		X		
Clark		X		
Boyer	X			
Gallipoli				X
Hoberman	X			
Joseph	X			
Rivera		X		
Singer	X			
Zmirich	X			
Total:	5	3	0	1

Ellen A. Brodsky
Chief Counsel