

2020 WI 81

SUPREME COURT OF WISCONSIN

CASE No. : 2018AP1418-D

COMPLETE TITLE: In the Matter of Disciplinary Proceedings
Against Michael M. Rajek, Attorney at Law:

Office of Lawyer Regulation,
Petitioner,

v.

Michael M. Rajek,
Respondent.

DISCIPLINARY PROCEEDINGS AGAINST RAJEK

OPINION FILED: October 20, 2020

SUBMITTED ON BRIEFS:

ORAL ARGUMENT:

SOURCE OF APPEAL:

COURT:

COUNTY:

JUDGE:

JUSTICES:

Per Curiam.

NOT PARTICIPATING:

ATTORNEYS:

2020 WI 81

NOTICE

This opinion is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 2018AP1418-D

STATE OF WISCONSIN

:

IN SUPREME COURT

**In the Matter of Disciplinary Proceedings
Against Michael M. Rajek, Attorney at Law:**

Office of Lawyer Regulation,

Petitioner,

v.

Michael M. Rajek,

Respondent.

FILED**OCT 20, 2020**

Sheila T. Reiff
Clerk of Supreme Court

ATTORNEY disciplinary proceeding. *Attorney publicly reprimanded.*

¶1 PER CURIAM. We review Referee Allan Beatty's report recommending we publicly reprimand Attorney Michael M. Rajek for professional misconduct and require him to pay the full costs of this proceeding, which are \$8,151.08 as of February 20, 2020. Attorney Rajek has filed an objection to the recommended costs.

¶2 We adopt the referee's findings of fact and conclusions of law. We agree that Attorney Rajek's professional misconduct warrants a public reprimand and we deny Attorney

No. 2018AP1418-D

Rajek's objection to costs and order him to pay the full costs of this proceeding. The Office of Lawyer Regulation (OLR) did not seek restitution in this matter and none is ordered.

¶3 Attorney Rajek was admitted to practice law in Wisconsin in 1974. He has previously been disciplined for professional misconduct. In 1986, he received a private reprimand for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. Private Reprimand 1986-5. In 2006, he received a public reprimand for committing a criminal act that reflected adversely on his honesty, trustworthiness or fitness as a lawyer in other respects, and engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. Public Reprimand of Michael J. Rajek, No. 2006-4 (electronic copy available at <https://compendium.wicourts.gov/app/raw/001848.html>). In 2015, he was found to have committed five counts of professional misconduct, but we imposed no discipline because of the technical nature of the violations. In re Disciplinary Proceedings Against Rajek, 2015 WI 18, 361 Wis. 2d 60, 859 N.W.2d 439.

¶4 On July 30, 2018, the OLR filed a disciplinary complaint alleging four counts of professional misconduct stemming from Attorney Rajek's representation of D.W. in a criminal proceeding. D.W. was charged in August 2011 with three felonies and a misdemeanor in Sawyer County. In September 2011, D.W. hired Attorney Rajek to represent him. There was an oral agreement that D.W. would pay Attorney Rajek a retainer fee of \$30,000. No fee agreement was signed at that time. On

No. 2018AP1418-D

September 22, 2011, D.W.'s wife paid Attorney Rajek a \$5,000 advanced fee for D.W.'s representation. D.W.'s cash bond of \$25,000 was pledged as payment of the balance of Attorney Rajek's fee.¹ At some point, a fee agreement was signed, dated September 25, 2012.

¶5 On September 24, 2012, D.W. pled no-contest to one felony count and the misdemeanor and the State dismissed the other two felony counts. D.W. was convicted and sentenced to two years of incarceration and four years of extended supervision on the felony, and to nine months of jail time for the misdemeanor.

¶6 On January 28, 2013, Attorney Rajek filed a notice of intent to pursue postconviction relief on D.W.'s behalf. On May 13, 2013, Attorney Rajek filed a notice of appeal. In mid-July of 2013, a friend of D.W.'s family who is an Illinois attorney, contacted Attorney Rajek at the family's behest to ask about the status of D.W.'s appeal.

¶7 On July 22, 2013, Attorney Rajek filed a motion in the court of appeals seeking a briefing extension. The motion mentions the Illinois lawyer's request to review D.W.'s file. The court extended the deadline until September 24, 2013. Attorney Rajek then failed to timely file an appellate brief. On October 10, 2013, the court of appeals issued an order

¹ Subsequently the Sawyer County Clerk of Court issued a check dated March 14, 2013, in the amount of \$19,859.11 to Attorney Rajek, after D.W. was sentenced and released from his bond. The amount of this check was the balance from D.W.'s \$25,000 cash bail after fees and costs were subtracted.

No. 2018AP1418-D

stating that unless the brief was filed within five days, or an extension requested, the court would dismiss D.W.'s appeal. On October 14, 2013, Attorney Rajek requested another briefing extension and also moved to withdraw as D.W.'s counsel, stating that D.W.'s family intended to retain the Illinois lawyer as appellate counsel. However, the Illinois attorney had not agreed to represent D.W.

¶8 On October 17, 2013, the court of appeals denied Attorney Rajek's motion to withdraw, noting that the prospective lawyer was not licensed in Wisconsin. The court granted another briefing extension until December 16, 2013. On December 13, 2013, Attorney Rajek requested and received yet another briefing extension.

¶9 On December 26, 2013, Attorney Rajek filed the appellate brief, in which he challenged an aspect of D.W.'s sentencing. The State moved to dismiss the appeal because Attorney Rajek had not first filed a postconviction motion. Attorney Rajek did not respond and on February 6, 2014, the appeal was dismissed because a postconviction motion was a prerequisite to the sentencing challenge.

¶10 Attorney Rajek then filed a motion for reconsideration which the court of appeals granted, extending the time for filing a postconviction motion until April 11, 2014. On April 11, 2014, Attorney Rajek filed a postconviction motion. The circuit court conducted a hearing on that motion in July 2014. The court corrected an error relating to pre-sentence credit and adjusted the sentence structure in a manner favorable to D.W.

No. 2018AP1418-D

¶11 Two years later, D.W. filed a grievance against Attorney Rajek. In August 2016, the OLR contacted Attorney Rajek, requiring a written response to D.W.'s grievance and a copy of the entire case file in the D.W. matter. For essentially the next year, Attorney Rajek either failed to respond or submitted only partial responses to the OLR's repeated requests for information. Attorney Rajek took the position that D.W. was making false representations. Eventually, the OLR filed a complaint and Referee Beatty was appointed.

¶12 Litigation ensued. On May 17, 2019, while the parties were preparing for an evidentiary hearing in this matter, Attorney Rajek notified the referee that he needed to take an immediate six-week medical leave. The referee acceded to the request, canceled the scheduled evidentiary hearing, and suspended other deadlines. At a July 2019 teleconference, Attorney Rajek requested another 30-day delay to address medical needs.

¶13 The evidentiary hearing in this matter was conducted on October 28, 2019. D.W. had died during the pendency of this disciplinary proceeding. D.W.'s wife testified at the evidentiary hearing. As relevant here, D.W.'s wife acknowledged that the signature on the fee agreement was D.W.'s, but she disputed that he had signed the fee agreement on September 25, 2012. D.W.'s wife also testified that she had drafted correspondence so D.W. could request his file from Attorney Rajek. She testified that D.W. never received his file. For

No. 2018AP1418-D

his part, Attorney Rajek flatly disputed the OLR's charges and denied receiving a written request for his file from D.W. D.W.'s successor counsel testified that he only received a "thin" quantity of documents regarding D.W.'s case from Attorney Rajek.

¶14 After the evidentiary hearing, both parties filed post-hearing briefs. On January 31, 2020, Referee Beatty filed a report. After making certain factual findings, the referee concluded that Attorney Rajek had violated three of the four counts of misconduct alleged by the OLR. Specifically, the referee concluded that:

By failing to communicate to D.W., in writing, the scope of his representation and the basis or rate of his fee or expenses for which D.W. would be responsible, before or within a reasonable time after commencing the representation, Attorney Rajek violated SCR 20:1.5(b)(1)² (Count One).

By failing to make a timely filing of a motion for postconviction relief, resulting in the dismissal of

² SCR 20:1.5(b)(1) provides:

The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate as in the past. If it is reasonably foreseeable that the total cost of representation to the client, including attorney's fees, will be \$1000 or less, the communication may be oral or in writing. Any changes in the basis or rate of the fee or expenses shall also be communicated in writing to the client.

D.W.'s appeal, Attorney Rajek violated SCR 20:1.3³ (Count Two).

By failing to timely provide the OLR with a written response to D.W.'s grievance and by willfully failing to furnish requested documents, Attorney Rajek violated SCR 22.03(2)⁴ and SCR 22.03(6)⁵, enforced via SCR 20:8.4(h)⁶ (Count Four).

¶15 However, the referee concluded that the OLR failed to prove Count Three, which alleged that Attorney Rajek violated SCR 20:1.16(d).⁷ The referee determined there was not sufficient

³ SCR 20:1.3 provides: "A lawyer shall act with reasonable diligence and promptness in representing a client."

⁴ SCR 22.03(2) provides:

Upon commencing an investigation, the director shall notify the respondent of the matter being investigated unless in the opinion of the director the investigation of the matter requires otherwise. The respondent shall fully and fairly disclose all facts and circumstances pertaining to the alleged misconduct within 20 days after being served by ordinary mail a request for a written response. The director may allow additional time to respond. Following receipt of the response, the director may conduct further investigation and may compel the respondent to answer questions, furnish documents, and present any information deemed relevant to the investigation.

⁵ SCR 22.03(6) provides: "In the course of the investigation, the respondent's willful failure to provide relevant information, to answer questions fully, or to furnish documents and the respondent's misrepresentation in a disclosure are misconduct, regardless of the merits of the matters asserted in the grievance."

⁶ SCR 20:8.4(h) provides: "It is professional misconduct for a lawyer to fail to cooperate in the investigation of a grievance filed with the office of lawyer regulation as required by SCR 21.15(4), SCR 22.001(9)(b), SCR 22.03(2), SCR 22.03(6), or SCR 22.04(1)."

⁷ SCR 20:1.16(d) provides:

evidence that D.W. had sent Attorney Rajek the letter demanding his file.

¶16 The referee then considered the appropriate discipline for Attorney Rajek's misconduct. Determining appropriate discipline for professional misconduct requires an assessment of: (1) the seriousness, nature, and extent of the misconduct; (2) the level of discipline needed to protect the public, the courts, and the legal system from repetition of the attorney's misconduct; (3) the need to impress upon the attorney the seriousness of the misconduct; and (4) the need to deter other attorneys from committing similar misconduct. In re Disciplinary Proceedings Against Hammis, 2011 WI 3, ¶39, 331 Wis. 2d 19, 793 N.W.2d 884. On balance the referee agreed that a public reprimand was appropriate, together with the imposition of costs.

¶17 No appeal was filed so our review proceeds pursuant to SCR 22.17(2).⁸ In conducting our review, we affirm the referee's

Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

⁸ SCR 22.17(2) provides:

If no appeal is filed timely, the supreme court shall review the referee's report; adopt, reject or modify the referee's findings and conclusions or

No. 2018AP1418-D

findings of fact unless they are found to be clearly erroneous, and we review the referee's conclusions of law on a de novo basis. See In re Disciplinary Proceedings Against Inglimo, 2007 WI 126, ¶5, 305 Wis. 2d 71, 740 N.W.2d 125. We may impose whatever sanction we see fit regardless of the referee's recommendation. See In re Disciplinary Proceedings Against Widule, 2003 WI 34, ¶44, 261 Wis. 2d 45, 660 N.W.2d 686.

¶18 Based upon our review, we accept the referee's findings of fact and conclusions of law in this matter and agree that Attorney Rajek committed the three counts of professional misconduct, as determined by the referee. We dismiss Count Three.

¶19 In recommending a public reprimand, the referee stated that it was "understandable that Attorney Rajek was frustrated by the [D.W.] grievance and the subsequent investigation." The referee acknowledged that D.W. "was a difficult and troubled person who committed a very serious and dangerous offense." However, the referee also observed that Attorney Rajek has demonstrated a pattern of difficulty completing tasks on time.

¶20 On balance, we agree that a public reprimand is sufficient to address this misconduct and is consistent with case law. See, e.g., Public Reprimand of Joseph E. Schubert, No. 2017-7 (electronic copy available at

remand the matter to the referee for additional findings; and determine and impose appropriate discipline. The court, on its own motion, may order the parties to file briefs in the matter.

No. 2018AP1418-D

<https://compendium.wicourts.gov/app/raw/002971.html>) (publicly reprimanding attorney with previous private reprimand for failing to file a timely postconviction motion or notice of appeal and failure to communicate with his client); Public Reprimand of John R. Dade, No. 2012-1 (electronic copy available at <https://compendium.wicourts.gov/app/raw/002427.html>) (publicly reprimanding attorney with prior discipline for failing to perform work for a criminal defendant, failing to communicate, and failing to timely deliver the client's file). This is, however, the fourth time Attorney Rajek has committed professional misconduct. We warn him that our policy of progressive discipline suggests that if he faces professional discipline again, the court is unlikely to consider a reprimand sufficient.

¶21 Finally, we address the question of costs. It is this court's general practice to assess the full costs of a disciplinary proceeding against the attorney being disciplined. SCR 22.24(1m). After the OLR filed its statement on costs, which were \$8,151.08 as of February 20, 2020, Attorney Rajek filed a timely objection noting that OLR counsel had failed to attend a deposition on August 27, 2019, which he claims "cost my office \$2,325.00" although he does not explain how these "damages" were incurred. On June 18, 2020, this court issued an order directing the OLR to provide a status update regarding the pending objection and afforded Attorney Rajek an opportunity to respond.

No. 2018AP1418-D

¶22 On June 25, 2020, the OLR filed a response advising the court that it had not received Attorney Rajek's objection. The OLR provided the requested itemization of costs and agreed that Attorney Rajek should not be held responsible for the costs of the deposition in question, but explained those costs were not included in the statement of costs.

¶23 On July 30, 2020, Attorney Rajek faxed a letter belatedly objecting to being ordered to pay the fees and expenses attributable to the OLR counsel Attorney Hendrix; questioning the cost of a witness the OLR called at the evidentiary hearing; and disputing certain charges recorded by the referee. He also seeks reimbursement from the OLR for a retainer he claims he had to refuse because he was scheduled to attend the deposition at which the OLR failed to appear.⁹

¶24 In its reply, the OLR declined to produce verified time stamps and original documents from OLR's file noting that our rules do not contemplate discovery in matters involving cost objections. SCR 22.24(2). Moreover, our rules explicitly define "costs" as including "fees and expenses of counsel for the office of lawyer regulation." SCR 22.001(3). To the extent Attorney Rajek implies counsel for the OLR stands to benefit financially by handling this case, the OLR notes that the OLR counsel derive no personal monetary benefit from handling lawyer

⁹ On July 31, 2020, Attorney Rajek faxed a nearly identical document entitled Second Objection to Statement of Costs.

No. 2018AP1418-D

regulation cases; cost collections inure to the OLR and the Wisconsin court system.

¶25 We reject Attorney Rajek's objection to the witness fees of J.W. He claims that "no proof of [J.W.'s] expense has been shown or that she was a necessary witness." The record belies this claim. The itemization of costs the OLR filed included the witness' expense voucher and hotel receipt. At the time of the evidentiary hearing, the grievant, D.W., was deceased. J.W. is his widow and she had personal knowledge of some facts and circumstances relevant to this proceeding. We accept the OLR's determination that her testimony would be necessary and helpful to the referee and we reject Attorney Rajek's objection to costs attributable to this witness. Similarly, we flatly reject Attorney Rajek's unsupported objection to two of the referee's cost entries. Finally, we decline to "reimburse" Attorney Rajek for his unsupported claim that he incurred "damages" and "lost income" of \$8,040 in connection with defending himself in this matter.

¶26 After reviewing the record and the OLR's documentation, we conclude that the costs submitted by the OLR are reasonable under the circumstances of this case. Given the nature of the proceedings before the referee and the fact that there was a full evidentiary hearing, we conclude that the OLR's counsel fees, witness fees, and disbursements are justified. We deny Attorney Rajek's objection and conclude that he should bear the full costs of this proceeding.

No. 2018AP1418-D

¶27 IT IS ORDERED that Attorney Michael M. Rajek is publicly reprimanded.

¶28 IT IS FURTHER ORDERED that within 60 days of the date of this order, Michael M. Rajek shall pay to the Office of Lawyer Regulation the costs of this proceeding, which are \$8,151.08 as of February 20, 2020.

