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January 25, 2023

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Edward E. Leineweber
Referee

You are hereby notified that the Court has entered the following order:

No. 2020AP2164-D Office of Lawyer Regulation v. Daniel Key

We review the report and recommendation of the referee, Hon. Edward E. Leineweber, that Attorney Daniel Key be privately reprimanded for his professional misconduct and that he be ordered to pay partial costs of this disciplinary proceeding, which totaled \$8,215.88.

A referee's findings of fact will not be set aside unless clearly erroneous. In re Disciplinary Proceedings Against Eisenberg, 2004 WI 14, ¶5, 269 Wis. 2d 43, 675 N.W.2d 747. We review the referee's conclusions of law de novo. Id. We determine the appropriate level of discipline independent of the referee's recommendation. In re Disciplinary Proceedings Against Widule, 2003 WI 34, ¶44, 261 Wis. 2d 45, 660 N.W.2d 686.

Attorney Key was admitted to the practice of law in Wisconsin in 2006. He received a consensual private reprimand in 2018 "for attempting to keep a client's pre-payment litigation expense as a fee in a contingent fee matter." Private Reprimand No. 2018-7.

In 2016, Attorney Key was asked to prepare a will for a terminally ill woman, C.H., who was recently admitted to the hospital. The principal asset was a family farm. Attorney Key was approached by C.H.'s son and his wife, W.H. and M.H., whom he had represented in a previous unrelated matter. All parties had a phone conference at Attorney Key's office with C.H. in the hospital. C.H. indicated her intent to leave the farm to W.H. and M.H. Attorney Key's paralegal later travelled to the hospital to complete the will using the Wisconsin standard will form. While

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at the hospital, the paralegal learned that C.H. had a daughter, A.D., whom C.H. intended to disinherit. C.H. was reluctant to explain why. Attorney Key's paralegal had several phone calls with him at the hospital to relay information from C.H. and take instructions from Attorney Key. The will was completed, Key reviewed it, and C.H. died a few days thereafter. The total amount billed by Attorney Key was \$620.

The will was submitted to probate, but was challenged by A.D. Attorney Key represented W.H. and M.H. in the probate matter, and he and his paralegal both testified. On March 30, 2018, the probate court rejected the will as a result of undue influence by W.H. and M.H. W.H. then terminated Key's representation and filed a grievance with the Office of Lawyer Regulation (OLR). Attorney Key cooperated in the OLR investigation.

That grievance ultimately resulted in a six-count complaint against Attorney Key. The complaint alleged that Attorney Key: (1) violated his duty of competence under SCR 20:1.1 "[b]y failing to take steps to confirm [C.H.'s] testamentary intent, to ascertain the means by which she might achieve that intent and the consequences of her proposed disposition of her property"; (2) violated his duty to communicate with his client under SCR 20:1.4(a)(2) by failing to advise C.H. of the likelihood of a will contest and what steps could be taken to minimize the risk; (3) violated SCR 20:5.3 "[b]y failing to adequately instruct and supervise his legal assistant"; (4) violated SCR 20:1.7(a)(2) "[b]y representing [W.H. and M.H.] in the probate case contesting the validity of a will prepared by his firm, a proceeding in which he was a necessary fact witness"; (5) violated SCR 20:1.5(a) "[b]y charging his own attorney hourly rate for his assistant's time"; and (6) violated SCR 22.03(6), enforceable by SCR 20:8.4(f) "[b]y misrepresenting to OLR that he discussed [C.H.'s] objectives with her at the outset of the representation, contrary to his sworn testimony in the underlying probate case" and by presenting an affidavit from his assistant that was (allegedly) contrary to her testimony in the probate case. OLR sought a public reprimand and full costs.

The matter was assigned to a referee. The parties agreed to a set of stipulated facts and exhibits, and Attorney Key moved for summary judgment. OLR opposed the motion, but voluntarily dismissed Count Six—the misrepresentation claim. The parties then entered into a proposed stipulation under which Attorney Key would plead no-contest to the remaining charges and OLR would recommend a private reprimand. Attorney Key stated he was waiving any defense to sufficiency of the evidence because "I want it over." After the parties responded to a detailed set of written questions concerning the stipulation, the standard of proof, sufficiency of the evidence, and the legal and factual bases for the remaining counts, the referee issued a proposed order on June 8, 2022, denying the motion to approve the stipulation based on insufficiency of the evidence as to some of the counts, to be explained in a later decision.

In a memorandum decision issued on June, 26, 2022, the referee adopted the parties' proposed stipulated facts and found additional facts based on the parties' stipulated exhibits and written submissions to his questions. The referee concluded that the record contained clear, satisfactory, and convincing evidence to support no-contest pleas as to Count One (lack of competence) and Count Two (failure to communicate). The referee found that it was undisputed that C.H.'s testamentary intent was to bequeath her assets to W.H. and M.H. and disinherit A.D.

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and that the will prepared by Attorney Key accomplished this. However, the referee further concluded that Attorney Key was aware of facts suggesting the possibility of W.H. and M.H.'s potential undue influence over C.H. at the time the will was drafted, had a duty to communicate with C.H. to explain the risks of disinheriting her daughter without further explanation, and failed to take other proper steps to inoculate the will from a subsequent contest.

The referee further concluded that the record did not support no-contest pleas as to the remaining counts, which he characterized as "piling on" by OLR. As to Count Three, the referee found no evidence in the record to support the allegation that Attorney Key failed to supervise his paralegal, noting that Attorney Key gave instructions to the paralegal before she left for the hospital and during several phone calls at the hospital where she relayed information from C.H. As to Count Four, the referee found no evidence of an actual conflict of interest. The referee found that C.H., W.H., and M.H.'s interests were aligned in carrying out C.H.'s expressed intent to leave the farm solely to W.H. and M.H. OLR conceded that the mere fact that Attorney Key testified in the probate matter did not create a conflict, and OLR pointed to no evidence of an actual conflict. Finally, as to Count Five, the referee concluded: "When it comes to piling on, Count Five wins first prize." The referee noted that OLR conceded that Key's total bill was not unreasonable. It found that Attorney Key did not charge for his paralegal's travel time to and from the hospital or for the time he was on the phone with her at the hospital providing instructions. The referee concluded that under these circumstances, SCR 20:1.5(a) did not prohibit Attorney Key from charging his paralegal's time at the same rate as his.

The parties then submitted a second stipulation under which Attorney Key pleaded no contest to Count One and Count Two and OLR agreed to dismiss the remaining counts. The parties again jointly recommended a private reprimand.

The referee recommends that this court accept Attorney Key's no-contest pleas under the second stipulation and recommends a private reprimand as an appropriate sanction for Attorney Key's misconduct. The referee concluded that despite the fact that Attorney Key has a previous private reprimand, another private reprimand was appropriate here due to Attorney Key's cooperation, the nature of the misconduct, which the referee characterized as being well-intentioned, and the lack of any aggravating factors such as taking advantage of a client or wrongfully retaining client funds.

As to costs, OLR agreed to a voluntary reduction of its own costs from \$6,706.35 to \$5,670.35 in recognition of fees incurred relating to the dismissed counts, and argued full referee costs should be imposed. Attorney Key argued for no costs based on what he characterized as overly zealous litigation from OLR. Reviewing the factors under SCR 22.24(1m), as well as this court's decision in In re Disciplinary Proceedings Against Arellano, 2013 WI 24, 346 Wis. 2d 340, 827 N.W.2d 877, the referee concluded that this case presented extraordinary circumstances, which supported a departure from the court's general policy of awarding full costs upon a finding of misconduct. The referee relied primarily on the nature of the misconduct, the number of charges that were dismissed, Attorney Key's cooperation, and the fact that in his view, OLR overcharged the case and proceeded on claims that had no support based on a stipulated record. The referee

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recommends that OLR's costs be reduced to \$2,000 based on the totality of the circumstances. The referee's own costs amount to \$1,509.53.

Having carefully reviewed the entire record in this proceeding, we accept the referee's findings of fact and adopt his conclusions of law. For the reasons the referee set forth in the June 26, 2022 memorandum decision, we accept the parties' second stipulation and accept Attorney Key's no-contest pleas to Count One and Count Two in the complaint. We agree with the referee that the remaining counts lack a factual basis in the record and dismiss them.

In determining the appropriate sanction, we consider the following factors: "the seriousness, nature and extent of the misconduct; the level of discipline needed to protect the public; the need to impress upon the attorney the seriousness of the misconduct; and the need to deter other attorneys from similar misconduct." In re Disciplinary Proceedings Against Zenor, 2021 WI 77, ¶10, 399 Wis. 2d 326, 964 N.W.2d 775. Generally, attorney discipline is progressive in nature absent extenuating circumstances. In re Disciplinary Proceedings Against Dade, 2017 WI 51, ¶9, 375 Wis. 2d 140, 895 N.W.2d 37.

While we agree that Attorney Key committed misconduct by failing to exercise competency and failing to adequately communicate with his client, the referee put the nature of the misconduct in context:

Here [C.H.] near death, sought the respondent's help in making a will. Time was short and, given the distance to her hospital bedside and his own previous commitments, the logistics were difficult. Rather than persisting in his suggestion that she find a lawyer closer to the hospital, Attorney Key relented and attempted to fulfill [C.H.'s] request with the help of his legal assistant. The respondent charged a very modest fee, \$620, and later commented that he would have done the work for nothing if it came to that. While his performance in this matter did not fulfill his duties to his client under the disciplinary code, his heart was in the right place.

Given these circumstances and that this case does not involve any aggravating factors, we agree that a private reprimand is appropriate. See American Bar Association Standards For Imposing Lawyer Sanctions, §§ 3.0, 4.14. A private reprimand is also consistent with how this court has treated other instances of lack of competence and communication by attorneys engaged in probate and estate planning. See, e.g., Private Reprimand 22-02; Private Reprimand 00-02; and Private Reprimand 1997-7.

As to costs, SCR 22.24(1m) sets forth the court's general policy of imposing all costs on a respondent in a disciplinary proceeding upon a finding of misconduct. However, the court may, in its exercise of discretion, reduce costs based on the following factors:

- (a) The number of counts charged, contested, and proven.
- (b) The nature of the misconduct.

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- (c) The level of discipline sought by the parties and recommended by the referee.
- (d) The respondent's cooperation with the disciplinary process.
- (e) Prior discipline, if any.
- (f) Other relevant circumstances.

SCR 22.24(1m). The rule no longer requires an express finding of "extraordinary circumstances" before this court can order reduced costs.¹

In recommending a partial award of costs, the referee relied on this court's decision in Arellano, 346 Wis. 2d 340. In that case, OLR charged 14 counts of misconduct, but dismissed nine of them before the hearing, and ultimately prevailed only on two. Id., ¶4. OLR recommended that the court impose 50% of the costs based on the time it spent pursuing the dismissed charges. Id., ¶52. This court went beyond that recommendation and imposed only 25% of the costs because the two counts of misconduct were "far less serious and of a significantly different nature than originally alleged." Id., ¶55.

The referee here concluded that "[t]he circumstances of the present case look a lot like Arellano." We agree, in part. There are several factors in this case that were not present in Arellano that more strongly support a reduction of costs here. First, the dismissed charges in Arellano were largely the result of changed witness testimony in a highly contested case where the facts were disputed. Id., ¶56. Here, the referee noted that the case involved "a fully stipulated record which did not adequately support four of the six original charges." The referee characterized the additional charges, one of which (the misrepresentation charge) was voluntarily dismissed by OLR with no explanation, as "piling on." The referee noted "[t]he agency's conduct in persisting for years in pressing ultimately unsustainable charges rather than focusing on the two counts that truly and sufficiently address the respondent's ethical failings." OLR has not appealed any of these determinations. In addition, the respondent in Arellano was uncooperative during the OLR investigation and provided misleading statements. Id., ¶¶56–58. Here, Attorney Key was cooperative and was willing to stipulate to some form of misconduct early in the case. The referee concluded that "[i]t's hard to review the yearslong history of this disciplinary proceeding without being sympathetic to Attorney Key's lament that it should never have gone this long or proceeded in this way." We agree.

As Attorney Key stated in one of his filings, "there must be an authority to keep OLR in check." Having closely reviewed the entire record, the court is deeply concerned by the manner in which OLR charged and litigated this case. We have already discussed OLR's conduct in charging and pursuing numerous counts that had no factual basis in the stipulated record. This included a spurious misrepresentation charge that OLR voluntarily dismissed after summary judgment briefing. The record further shows that OLR was dilatory in providing discovery responses and resistive to providing full and complete answers to very pertinent questions posed

¹ See S. Ct. Order No. 05-01B In the matter of review of amendments to Supreme Court Rules relating to Cost Assessment in the Lawyer Regulation System, 2011 WI 58, 334 Wis. 2d XXV (July 6, 2011, eff. Jan. 1, 2012).

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by the referee as to the appropriate standard of conduct for the charged violations. OLR objected to several questions as "call[ing] for speculation" or being "theoretical," and at one point stated: "It is not OLR's duty to affirmatively prescribe a course of action for attorneys to follow. Instead, OLR seeks to enforce violations of professional responsibility rules . . . after the fact." To the contrary, OLR's remit is to "assist[] the Court in supervising the practice of law and protecting the public from misconduct by attorneys,"² not to pursue the greatest number of potential charges in any given case in a vacuum. Given the totality of the circumstances and the factors set forth in SCR 22.24(1m), we believe that it is appropriate to award zero costs to OLR and impose only the referee costs amounting to \$1,509.53.

IT IS ORDERED that the court accepts Daniel Key's no-contest pleas to Count One and Count Two of the complaint;

IT IS FURTHER ORDERED that the remaining counts are dismissed;

IT IS FURTHER ORDERED that Daniel Key is privately reprimanded for his misconduct;
and

IT IS FURTHER ORDERED that within 60 days of this order, Daniel Key shall pay to the Office of Lawyer Regulation the imposed referee costs of this proceeding (\$1,509.53).

Sheila T. Reiff
Clerk of Supreme Court

² <https://www.wicourts.gov/courts/offices/olr.htm>