

JUN 08 2022

CLERK OF SUPREME COURT  
OF WISCONSIN

STATE OF WISCONSIN

IN SUPREME COURT

IN THE MATTER OF THE DISCIPLINARY  
PROCEEDINGS AGAINST DANIEL KEY,  
ATTORNEY AT LAW

OFFICE OF LAWYER REGULATION,

Complainant,

Case No. 2021 AP 2164-D

vs.

Case Code 30912

DANIEL KEY,

Respondent.

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**ORDER DENYING MOTION TO APPROVE STIPULATION AND NO CONTEST PLEA**

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The complainant filed the *Notice of Motion and Motion to Approve Stipulation and No Contest Plea* on January 18, 2022, following the *Factual Stipulation* entered between it and the respondent on August 18, 2021, and the parties' *Stipulation and No Contest Plea* reached on November 29, 2022, and filed on December 21, 2021. In considering the motion, the referee understands that the respondent supports the motion, and also seeks the referee's approval, including both stipulations referenced above. For the reasons set forth below and to be further elaborated upon in a forthcoming *Memorandum Decision*, the pending motion must be denied.

**Procedural Status**

SCR 22.14(2) provides as follows:

(2) The respondent may by answer plead no contest to allegations of misconduct in the complaint. The referee shall make a determination of misconduct in respect to each allegation to which no contest is pleaded **and for which the referee finds an adequate factual basis in the record**. In a subsequent disciplinary or reinstatement proceeding, it shall be conclusively presumed that the respondent engaged in the misconduct determined on the basis of a no contest plea. (Emphasis added.)

SCR 22.09, dealing with agreements between OLR and an attorney for the consensual imposition of a private or public reprimand reached prior to the filing of a disciplinary complaint, also requires that any

stipulation for such must be “supported by sufficient facts,” and failing that, “the referee shall not approve the agreement.” SCR 22.09(4).

Hence it is the clear policy of the Court as set forth in these rules that a referee must not approve a stipulated no contest plea merely because the parties understandably want to resolve the matter as stated in their stipulation, but instead must examine the record for a sufficient evidentiary basis to find that the respondent did in fact commit the violation to which he or she proposes to plead no contest

#### **Evidentiary Standard**

In determining whether there is an adequate factual basis as to any particular count of the complaint, the evidentiary standard to be applied is as follows: *Viewing the evidence in the light most favorable to the approval of the stipulation as to such count, can the referee find by evidence that is clear, satisfactory, and convincing that the respondent committed the misconduct alleged in that count? Ref. SCR 22.38.*

#### **Construing the Parties' Agreement**

During these proceedings this question was put to the parties: *Is the no contest stipulation presented to the referee as a package that must be approved or rejected intoto, or is it the parties' intent that the stipulation may be considered count by count, perhaps approving it as to one or more counts but rejecting it as to others?* In responding, the parties disagreed, with the complainant asserting that the stipulation was a “single agreement” which must be accepted or rejected in full, while the respondent averred that it could be accepted or rejected piecemeal, count by count. Since apparently there was no meeting of the minds on this point and the document itself makes no mention of piecemeal consideration, the stipulation for the no contest plea must be accepted or rejected *intoto*.

#### **Rulings on Individual Counts**

After a careful and thorough review of the extensive factual record presented to the referee on the stipulation of the parties, weighing the arguments of the parties in support of and in opposition to the merits of each of the five remaining individual counts of the complaint, and applying the evidentiary standard set forth above, the referee finds that the respondent committed the violations charged in Count One (competence) and Count Two (failure to consult), but that the record is insufficient to support findings that he committed the violations charged in Count Three (failure to supervise), Count Four (conflict of interest) and Count Five (charging an unreasonable fee).

**Stipulation Rejected - Motion Denied**

As held above, the parties' no contest plea stipulation must be either accepted in full or rejected. Since the no contest pleas to Counts 3, 4 and 5 cannot be accepted as being adequately supported in the record, the stipulation must be rejected, and consequently, the motion before the referee must be denied.

NOW, THEREFORE, for the reasons set forth above and to be further elaborated upon in a *Memorandum Decision* to be issued by the referee, and being advised in the premises,

IT IS HEREBY ORDERED as follows:

1. The *Motion to Approve Stipulation and No Contest Plea* shall be, and hereby is, denied.
2. The referee shall take up the respondent's Motion for Summary Judgement following the completion of the Memorandum Decision to follow this order.

Dated this 7<sup>th</sup> day of June, 2022.

  
Edward E. Leineweber, Referee