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SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 93-287

IN THE MATTER OF

GARY LESSER,

AN ATTORNEY AT LAW

Decision and Recommendation
of the
Disciplinary Review Board

Argued: October 20, 1993

Decided: September 21, 1994

Harry J. Riskin appeared on behalf of the District X Ethics Committee.

Respondent appeared pro se.

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

This disciplinary matter was before the Board on a recommendation for public discipline filed by the District X Ethics Committee ("DEC"). The formal complaint charged respondent with violations of RPC 1.3 (lack of diligence), RPC 1.4(a) (failure to respond to client's reasonable requests for information), RPC 1.7(b) (conflict of interest) and RPC 1.15(a), (b), (c) and (d) (failure to keep client funds separate and to otherwise safeguard client funds, failure to promptly notify client of receipt of funds and failure to comply with the recordkeeping provisions of R.1:21-6).

Respondent was admitted to the New Jersey bar in 1969.

In or about 1986, respondent was retained by Parsippany Dental Associates ("PDA") to perform collection services relative to its delinquent accounts. Parsippany Dental Associates was a corporation in which Dr. William Gross and Dr. Allan Monack held equal shares for many years. Prior to his retention by Parsippany Dental Associates, respondent had maintained a close personal and professional relationship with Dr. Monack, which apparently prompted Dr. Monack to recommend to Dr. Gross that PDA utilize respondent's services for their collection files.

Respondent was initially contacted by Diane Berke, PDA's office manager, who retained respondent by telephone. Discussions regarding respondent's fee arrangement also occurred during that initial telephone conversation. Basically, respondent was to perform collection services on a contingency basis. When he received monies on account, he would deduct his fees and costs and remit the remainder to PDA. There was no written agreement memorializing this arrangement. Respondent was not charged with a violation of RPC 1.5(c).

After respondent was retained, Diane Berke periodically sent him a copy of those client ledger cards with delinquent balances that she wished him to pursue. Each of those client ledger cards bore the legend "Parsippany Dental Associates." The client ledger card constituted the complete patient file forwarded by Berke to respondent in each case.

On April 18, 1990, Berke wrote to respondent to request a status report on twenty-five matters that PDA had referred to him

for collection over a period of several years. Exhibit C-1. Berke wrote this letter to respondent for two reasons. First, there had been no activity on these accounts for quite some time and she wanted to adjust PDA's records either to write the accounts off as uncollectible or to accurately reflect their current collection status. In addition, she testified, she received at least one phone call from a patient (Pacella) whose account had been forwarded to respondent and who wanted to schedule further appointments with one of the dentists. When advised by Berke that no further appointments could be scheduled until her outstanding balance was satisfied, the patient insisted that the bill had previously been paid. Berke, therefore, specifically asked respondent in her letter to check the Pacella account in order to determine whether the Pacellas had made payment to him. When Berke received no written response to her letter, she called respondent's office on several occasions and spoke with various members of his staff, who told Berke that they would "get to it." On one occasion, when Berke pursued discussion of the Pacella matter with a member of respondent's staff, she was told that "Mr. Lesser deposits everything and he distributes it as he sees fit." T19[1].

Having received no response to her request for a status report, Berke again wrote to respondent on April 22, 1991, over one year later, to request a status report on the accounts referenced in her April 18, 1990 letter. That letter (Exhibit C-2), which was faxed to respondent, specifically requested that respondent

[1] T denotes the DEC hearing transcript of June 22, 1993.

telephone Berke upon receipt of the letter. Berke made it clear that an immediate reply from respondent was imperative, inasmuch as she needed to provide the requested information to PDA's accountant. Berke received no response to her letter. Therefore, having become frustrated by respondent's lack of attention to her requests, Berke sent respondent a certified letter, dated October 2, 1991 (Exhibit C-3), discharging him as collection counsel.

Thereafter, Berke referred PDA's collection work to a collection agency. However, she continued to receive telephone calls from patients, indicating that they had already satisfied their delinquent balances. She, therefore, telephoned respondent again on January 7, 1992, apparently to attempt to obtain a status on each of the active accounts to which she had referred in her previous letters. According to Berke, during that conversation, respondent promised to fax within an hour the balances of each of the patients listed in her October 2, 1991 letter. When he did not do so, Berke called respondent again on several occasions between January 7, 1992 and January 10, 1992. It should be noted that, while Berke spoke with respondent's staff on several occasions prior to January 7, 1992 (and possibly to respondent himself), she only began to log her contacts or attempts to contact respondent on that date. Exhibit C-7.

Following her several attempts to contact respondent after their January 7, 1992 telephone conversation, Berke finally received a letter from respondent, dated January 17, 1992 Exhibit C-5. That letter set forth the status of eighteen of the twenty-

five files about which Berke had inquired. The letter further indicated that, in several of the matters, respondent had received payment from various patients and that payment to PDA would follow. However, Berke testified, PDA received no payments from respondent on these matters. In fact, Berke telephoned respondent on February 20, 1992 to follow up on the status of the files not addressed in respondent's January 17, 1992 letter and to pursue PDA's non-receipt of those funds promised "to follow." She was not able to speak to respondent on that occasion. She, therefore, wrote to him on February 20, 1992 (Exhibit C-6), requesting that he provide PDA with the remaining information requested, as well as the payments on the other cases that respondent had promised to forward. She received neither from respondent, whereupon she had no further contact with him.

Respondent appeared pro se at the DEC hearing. He testified that he viewed Berke's initial request for a status report as an "outrageous request to do useless work." T85. Respondent apparently misinterpreted PDA's request as one for a list and status of all PDA files he had ever handled "with no distinction as to anything." T58. He viewed this as an impossible task for several reasons. Respondent maintained that he had no way of distinguishing the PDA collection files from the collection files he handled for Dr. Monack's practice, in which Dr. Gross was not a shareholder or partner. This was so because respondent designated every collection file that came in from PDA and from Dr. Monack's other practice as Monack v. _____, despite the fact

that every "file" (i.e. ledger card) that was sent to respondent by PDA for collection bore the legend "Parsippany Dental Associates." Since respondent had done collection work for Dr. Monack for quite a while before Dr. Gross' association with him, in respondent's view, it would have taken an inordinate amount of time to comply with Berke's request because his office was not computerized and he had apparently devised no other way to keep track of the collection files. As a result, he would have to physically review every Monack collection file, a task that he "had absolutely no desire to do." T60. This was especially so in light of the fact that the relationship between Dr. Gross and respondent's friend, Dr. Monack, had deteriorated to such a point that it was evident that there would be a parting of the ways between the two and that respondent's relationship with PDA would, thus, be coming to an end. T101-102. While respondent initially testified that he did not know of the deterioration of the relationship between Dr. Gross and Dr. Monack at the time he received Berke's first request for information, he later indicated, in response to a specific question by the hearing panel, that he considered Berke's initial request to be unreasonable "when [he] knew that the relationship between [himself] and them is dead or critical." T68, 88, 101-102.

In order to comply with PDA's status request, respondent contended, he first needed from PDA a list of every account he had ever handled for PDA. This was so because he suspected that there might have been situations where the patients had made payments on their delinquent bills directly to PDA and not to him. Respondent,

therefore, felt that he may have been entitled to fees and/or costs on any such cases. However, nowhere in the record does respondent substantiate this suspicion other than to say that this was an occasional practice in any type of collection work. In any event, such a list would have provided him with the final accounting he needed to terminate his relationship with PDA. In addition, respondent maintained that he requested of PDA an authorization signed by both Dr. Gross and Dr. Monack authorizing respondent to make disbursements funds received to Dr. Gross. He apparently never received any such authorization.

While respondent asserted that either he or his office staff made it clear to PDA exactly what was needed, Berke testified that respondent only requested the list of accounts (for a final accounting) during their last conversation, which was several months after she discharged him. In addition, she testified, respondent never asked her for a list of accounts where direct payments had occurred. Finally, she understood any request respondent may have made for a list of files before their final conversation to mean a list of "active" files or files with open balances. She stated that she provided respondent with such a list by virtue of her two initial letters.

Respondent admitted, on several occasions during the DEC hearing, that he had no intention of complying with Berke's request until she first addressed what he termed his "legitimate business problems:"

> When the cooperation that I feel I am entitled to so all my legitimate business problems can

> be resolved is basically ignored, that is the reason that you might say that there is a failure to communicate with the client. That is not in fact what is occurring. What is occurring is a one-sided attitude which required that I act first, provide the information that is requested, and quite frankly the information that was requested, I don't think that the requester has any idea of the amount of time and effort that was required to go through and pull out, as we understood it, quite frankly, all their files. [T67. See also T60, 70, 86, 95 and 109.]

Respondent took that very same position with regard to the disbursement of funds due to PDA. As noted earlier, Berke testified that PDA had not received any of the funds that respondent had identified in his January 17, 1992 letter as having been collected. Respondent admittedly did not remit any such funds to PDA. In fact, during a colloquy with a panel member, respondent made it clear that he intentionally failed to remit monies due PDA:

> MR. SIMON: The letter to you of October 2, 1991, C-2 in Evidence, says that your services on behalf of Parsippany Dental are being -- let me read it.
>
> This Certified receipt number P9342095175 is to inform you that Parsippany Dental Associates is dismissing your service of collecting the following past due amounts, and then it lists a number of accounts. Did you attempt to make any arrangements with Parsippany Dental as to what you are owed, what they've owed, finishing out these particular accounts?
>
> THE WITNESS: I had been trying to do precisely that since 1990 time frame when our relationship started to go down hill. That is exactly what -- I didn't want anything more than that. I wanted to finish up with them. You do your homework, I will do my homework. I will spend time and let's finish all the accounts and deal with the issues going further in the future, like I had mentioned that had to do with the warrants and judgments that are out there from these collection

cases. I can't talk to myself. That is what I was dealing with. What I wanted was precisely that. Do this once, not waste any more of my time.

MR. SIMON: That was pretty important?

THE WITNESS: To get it done, sure. There were phone calls and it was disturbing me.

MR. SIMON: Not a single letter did you write, not one single letter indicating how important this was, how the relationship is now terminated, we've got to get this handled. Not one letter?

THE WITNESS: I wasn't going to waste my time on these. As far as I was concerned I was going to let that thing sit there until the end of time, because I wasn't getting, I still believe that, the cooperation I was entitled to. I mean, I wanted to get it done. They were aware of it. It was no big deal, but it wasn't going to be me first. That is the only way it was presented to me. (Emphasis supplied).

[T108-109. See also T84.]

Respondent took this position in spite of the fact that the Rules of Professional Conduct impose upon him an affirmative obligation to turn over client property — here, money — as soon as possible. In response to that specific question posed by a panel member, respondent stated:

I don't doubt for a moment that that is the correct interpretation, however, when in my mind there probably is going to be funds owed to me by them, I an entitled, I feel, to a reasonable accounting from them. I probably laid out, I don't know, hundreds of dollars, okay, in costs and expenses for all their files.

How was that going to be reimbursed to me? When I had to sue them after I released the funds? I mean, all I wanted from the day one was somebody to sit and discuss this matter with me, but I wasn't going to waste my time with it.

[T110.]

In conjunction with his testimony regarding his decision not to release funds to PDA, respondent was asked about his recordkeeping procedures. Essentially, respondent testified, when a collection account came in, he would set up a client ledger card only if the delinquent balance was large. He did not set up client ledger cards on those balances he considered to be too small to justify such an effort. Instead, in those cases, he would simply use the client file and apparently make notes in it. T79. It was evident, and respondent admitted, that he did not always deposit monies received on these accounts into his trust account. Rather, if the amounts were large — a determination he alone made — the payment was deposited into his trust account. If they were small, however, he would sometimes deposit them directly into his business account (if he had enough of his fees in the trust account to cover the client's portion) and simply make the appropriate adjustment on the client ledger card for the larger matter, the funds for which remained in the trust account. For example, in the Pacella and Stefanak matters, respondent testified that he received $2,000 and $400 on account, respectively. He deposited those monies into his trust account and did not take his fee. Client ledger cards existed on those matters because respondent considered the amounts large enough to justify the effort. However, when respondent received funds on the Condon and Kramer accounts, $102.00 and $82.00 respectively, respondent deposited them directly into his business account and deducted the amount due the client from his fee on the Pacella or Stefanak ledger cards. He did this in at

least one other matter. T79-84. Respondent viewed this procedure to be simpler for him in terms of recordkeeping. There is no evidence in the record to suggest that respondent did not have sufficient fees in the trust account to cover these deposits into his business account.

When asked whether his friendship with Dr. Monack played any part in his decision to withhold disbursements of funds to his client, PDA, respondent answered in the negative and again reiterated that it was, rather, a decision based upon his perception of PDA's lack of attention to his requests. Respondent later modified his answer to say that his relationship with Dr. Monack affected his decision not to disburse the funds only to the extent that he did not want to be the subject of criticism by two feuding partners, one of whom was his friend, for having wrongfully disbursed funds to the other. Given the conflicting testimony between respondent and Berke relative to respondent's failure to disburse to PDA monies due, a panel member asked respondent why he did not address this rather important issue in a letter to the client. He answered:

> I had been trying to resolve this thing with that office since the very first time we had what I call outrageous requests to do useless work. All my requests are ignored. I wasn't going to write a letter. I wasn't going to waste my time.
>
> I was fed up with the whole situation. . . .
> [T85.]

Upon further questioning by yet another panel member concerned by respondent's failure to put anything in writing to the client during the course of this dispute, respondent testified:

By no means could this be characterized as a major client. This collection work is an extremely small percentage financially and time-wise of my practice. And if it wasn't for the fact that it started out with my friend many years ago, somebody walked in with it today or five years ago. I wouldn't bother with it. It isn't worth the time and effort to write letters and go through the aggravation that I went through in this situation.

MS. VERPLANCK: So is the answer if this had been bigger potatoes, so to speak, you would have gone through the effort to send letters?

THE WITNESS: I would have taken it upon myself to do it in a different manner. We are not talking about substantial amounts of money. Whether I had to do it with a letter, I wasn't going to spend any more time on these files than I thought was necessary. The amounts involved are insignificant. It is a dead issue between myself and the client. . . .

[T94-95.]

* * *

The DEC was clearly disturbed not only by respondent's conduct in this matter but also by his attitude and ostensible indignation over any inquiry into his conduct. The DEC found respondent guilty of violations of RPC 1.3 and RPC 1.4(a), both for his failure and refusal to pursue or otherwise respond to PDA's reasonable requests for information. In addition, the DEC found respondent guilty of a violation of RPC 1.15(a) for his failure to keep his client's property separate from his own and of RPC 1.15(b) for his failure to promptly notify his client upon receipt of funds in which the client had an interest and his failure to promptly deliver to his client funds to which it was entitled. The DEC expressly rejected respondent's claim that he did not disburse the funds to PDA in part because he did not want to be accused by either of the feuding partners of improper disbursal. The DEC noted, in this regard,

that many of the funds had been received in 1988 – two years before the conflict between Drs. Monack and Gross began. The DEC, therefore, felt that respondent could easily have disbursed at least those funds to the corporation. Finally, the DEC found respondent guilty of a violation of RPC 1.15(d) for his failure to comply with the recordkeeping requirements of R.1:21-6. The DEC did not find clear and convincing evidence that respondent failed to keep funds separate in those instances where there was a question of respective interests between respondent and the client. It, therefore, recommended dismissal of the allegations of a violation of RPC 1.15(c). Similarly, the DEC did not find clear and convincing evidence of the existence of a conflict of interest and, therefore, recommended the dismissal of the charge of a violation of RPC 1.7(b).

The DEC recommended public discipline for respondent's misconduct.

CONCLUSION AND RECOMMENDATION

Upon a de novo review of the record, the Board is satisfied that the DEC's finding that respondent was guilty of unethical conduct is supported by clear and convincing evidence. Respondent not only commingled his client's funds with his own, but he also failed to promptly notify his client of receipt of funds and, further, failed to promptly disburse those funds to his client, all in violation of RPC 1.15(a) and (b). In addition, respondent

clearly and, indeed, intentionally failed to comply with the recordkeeping provisions of R.1:21-6, in violation of RPC 1.15(d). Finally, respondent failed to promptly comply with his client's reasonable requests for information, in violation of RPC 1.4(a).

The Board considers respondent's refusal to provide his client with a status report or other accounting until PDA first provided him with a list of files he was handling as nothing more than an attempt on respondent's part to shift to his client a burden and responsibility that was rightfully his from the beginning. PDA entrusted accounts to him for collection and accurately designated the origin of those accounts as "PDA" accounts. Respondent then, for some odd reason, chose to misdesignate those accounts and apparently devised no other system for tracking them. He placed himself in an impossible situation and then sought to visit the consequences of this mishandling upon his client.

The Board agrees, however, with the DEC's finding that the record did not clearly and convincingly support a finding of a conflict of interest on respondent's part. While one cannot help but speculate that respondent's relationship with Dr. Monack, at least in part, prompted his refusal to comply with PDA's status requests and to disburse funds to PDA, it is possible that respondent's conduct was motivated by sheer self-interest — his articulated concern for "getting paid." Similarly, the record did not clearly and convincingly demonstrate that respondent failed to keep separate funds where there existed a dispute — if any such funds truly existed.

The issue remaining then is the appropriate form of discipline for respondent's "recordkeeping" violations and for his steadfast refusal to comply with his client's reasonable and repeated requests for information. At the outset, it should be noted that respondent was not charged with either knowing nor negligent misappropriation and there is no evidence to suggest that either charge could be supported. Clearly, had the amounts respondent deposited directly into his business account exceeded the amount of excess fees he claimed to have in his trust account, then we would be faced with the issue of, at least, negligent misappropriation. Aside from respondent's own testimony on this issue, there is no evidence, such as an audit report, a bank statement or even a client ledger card, to show that client funds were affected by respondent's practices. Nevertheless, respondent's recordkeeping infractions were not only serious and potentially threatening to client funds, they were also intentional. This is not a case where respondent failed to comply with the recordkeeping requirements because he did not know what they were. Respondent failed to comply with the recordkeeping requirements because it was inconvenient. The amounts involved, in his opinion, were too "insignificant" to justify the trouble to comply with the rules.

The Court has publicly reprimanded or suspended attorneys for recordkeeping violations. See, e.g. In re Lazzaro, 127 N.J. 390 (1992) (attorney publicly reprimanded for inadequate recordkeeping, which resulted in several instances of negligent misappropriation); In re Fucetola, 101 N.J. 5 (1985) (attorney publicly reprimanded

for "flagrant recordkeeping violations combined with an apparent lack of comprehension of the proper operation of an attorney's accounts"); In re Hennessey, 93 N.J. 358 (1983) (attorney publicly reprimanded for flagrant recordkeeping errors resulting in minor shortages in the trust account); In re Lewinson, 126 N.J. 515 (1992) (attorney publicly reprimanded for recklessly inadequate recordkeeping and an apparent lack of knowledge of or experience with the proper accounting procedures, which resulted in several instances of negligent misappropriation). It is true that, in all of these cases, client funds were affected by the improper recordkeeping practices. The Board, however, considers the apparent absence of impact upon client funds in this matter to be merely fortuitous and, therefore, not meritorious of different treatment.

Furthermore, the Court has imposed harsher discipline in those cases where the attorney's recordkeeping practices were not the result of ignorance of the rules but, rather, of a conscious neglect because of a distaste for recordkeeping or because the attorney perceived himself be too busy to keep the appropriate records. See, e.g. In re Ichel, 126 N.J. 217 (1991) (attorney suspended for six months) and In re Librizzi, 117 N.J. 481 (1990) (attorney suspended for six months). The Board recognizes that both of these cases involved serious and extensive recordkeeping deficiencies on a regular basis (i.e. there were no cash receipts or disbursements journals, no client ledger cards, no running balances in trust account checkbook and no regular reconciliations,

in addition to the commingling extended over a period of several years). In this case, while respondent's recordkeeping violations might not have been as pervasive, the record discloses that respondent commingled funds on approximately five occasions and that he did not keep client ledger cards on an unspecified amount of "smaller" cases. However, in addition to his recordkeeping violations, regardless of the extent or frequency, respondent deliberately withheld from his client monies to which it was entitled. Respondent admits, in effect, that he held his client's funds hostage as leverage to get what he wanted — an accounting. He considered this action justified by virtue of his unfounded suspicion that PDA may have received funds directly on delinquent accounts and failed to forward his fee. Yet, he did not write to PDA requesting that information and advising that he would refuse to release any funds to them until the money issue could be resolved. If a dispute of that nature truly existed, respondent certainly was obligated to so advise his client and to settle that dispute, either amicably or through litigation. (There is no evidence to suggest that any of PDA's funds were used by respondent or otherwise invaded). Apparently, PDA did not know such a dispute existed. As noted by the DEC, the initial reason for respondent's refusal to disburse the funds due PDA could not be determined. It is fairly clear, however, that if a legitimate reason did exist, it is not strongly demonstrated in this record.

The Board recognizes that the purpose of discipline is not the punishment of the offender, but "protection of the public against

an attorney who cannot or will not measure up to the high standard of responsibility required of every member of the profession." In re Getchius, 88 N.J. 269, 276 (1982), citing In re Stout, 76 N.J. 321, 325 (1978). The severity of the discipline to be imposed must comport with the seriousness of the ethics infraction in light of all the relevant circumstances. In re Nigohosian, 86 N.J. 308, 315 (1982). Mitigating factors as well as aggravating factors are, therefore, relevant and may be considered.

There are substantial aggravating factors present in this matter. First, respondent's cavalier attitude towards his client's property and his client's legitimate requests persisted both throughout the DEC hearing and the hearing before the Board. Nowhere in the record is there any sign that respondent attempted to recognize any wrongdoing on his part, except to say that he regretted the tone (but not the content) of his alleged several conversations with PDA staff members. In short, his attitude was one of arrogance and disdain. Second, apparently, respondent still has not filed suit against PDA (assuming it owes him money, as respondent claims) or forwarded the funds due to PDA, though he acknowledges that they are due. He continues to hold those funds hostage until he gets what he wants. Finally, respondent was the subject of a private reprimand only five years ago, for deducting legal fees and disbursements from a deposit in a real estate transaction without his client's prior consent.

After considering the totality of the circumstances, the Board is of the of the opinion that respondent's various violations of

the recordkeeping requirements of R.1:21-6, as well as his steadfast and improper refusal to release funds due to his client and to promptly comply with his client's reasonable requests for information, merit a three-month suspension from the practice of law. The Board unanimously so recommends. In addition, prior to reinstatement, respondent should be required to fully account for and remit to PDA all funds due and to further provide an audit of his attorney trust and business accounts, at his own expense, for a period of two years. The audit should be certified by an accountant approved the Office of Attorney Ethics. Three members did not participate.

The Board further recommends that respondent be required to reimburse the Ethics Financial Committee for administrative costs.

Dated: 9/21/94

By: Elizabeth L. Buff
Elizabeth L. Buff
Vice-Chair
Disciplinary Review Board