DISCIPLINARY REVIEW BOARD

OF THE

SUPREME COURT OF NEW JERSEY

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August 3, 2017

Mark Neary, Clerk
Supreme Court of New Jersey
P.O. BoX970
Trenton, New Jersey 08625

Re: In the Matter of Anthony D. Seymour
Docket No. DRB 17-138
District Docket No. XIV-2012-0657E

Dear Mr. Neary:

The Disciplinary Review Board has reviewed the motion for discipline by consent (a censure to a three-month suspension or such lesser disciplinary sanction as the Board deems warranted), filed by the Office of Attorney Ethics (OAE), pursuant to R. 1:20-10(b)(1). Following its review of the record, the Board determined to grant the motion and to impose a censure on respondent for his violation of RPC 1.5(a) (unreasonable fee), RPC 1.5(b) (failure to communicate in writing the basis or rate of the fee), and RPC 1.7(a) (concurrent conflict of interest).

Specifically, respondent represented "X,"[1] a ninety-two-year-old nursing home resident, retired World War II naval officer, and

[1] Although this matter is before the Board as a consent to discipline, it appears that a special master initially had been appointed, presumably in anticipation of a hearing. The special master issued a case management order, placing all exhibits relating to respondent's client's medical condition under seal

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retired Madison Avenue advertising executive. Although respondent had served as X's counsel since 1997, the relevant period in this matter runs from February 15, 2010 to August 30, 2012. During that time, respondent billed X $92,122.50 in fees, of which $19,522.50 represented charges for non-legal services. X died in September 2015.

Respondent met X in the mid-1980s, through his father-in-law, who was X's life-long friend and had served as X's closest advisor and attorney for years. By the time respondent's father-in-law retired, in 1987, X had developed a familial relationship with respondent and his family. Upon X's friend's advice, X chose respondent to serve as his attorney.

In 1997, respondent prepared a will and powers of attorney (POAs) for X. Although respondent charged X $350 for the work, his fee was not reduced to writing.

Apparently, respondent did not provide any further services, legal or otherwise, to X, until the year 2010. When that representation commenced, respondent charged X $250 per hour for legal and non-legal services. The rate of the fee was not reduced to writing. Respondent increased his rate two more times, in January (to $275) and October (to $375) 2011, again, without reducing the new rate to writing. Respondent's failure to reduce his fee to writing, at any point during his representation of X, violated RPC 1.5(b).

On February 15, 2010, X called respondent, told him that he had fallen and hit his head, and asked respondent whether he required medical attention. Respondent arranged for an ambulance to take X to Hackensack University Medical Center (HUMC).

The parties stipulated that, when X was hospitalized, he was elderly and infirm, but of sound mind, and that he continued to be of sound mind throughout the year. In support, the parties offered a

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and requiring the parties "to maintain the confidentiality of [the client's] medical condition." Because respondent's client's medical condition and personal circumstances are essential to a complete understanding of respondent's conduct and the Board's recommendation, the Board determined to refer to the client's medical condition, when necessary, but to honor the protective order by referring to the client as "X."

November 4, 2010 letter written by an investigator with the State of New Jersey Office of the Ombudsman for the Institutionalized Elderly, who had interviewed X regarding an anonymous report that he was the victim of "financial funny business." The investigator was not able to substantiate the report, and specifically noted that X did not believe that he was being exploited. That letter notwithstanding, the parties also offered the May 3, 2012 report of geriatrician Stefanos Pantagis, M.D., in which Dr. Pantagis concluded that, at the time of X's 2010 admission to HUMC, he was found to be experiencing "the early sequalea [sic] of dementia, depression, [and] loss of ability to care for self."

According to the stipulation, X was "proudly independent and self-sufficient," a "cautious, hands-on, micromanager of [his] own affairs," and a "detail oriented, organized individual who wanted to be fully informed when it came to . . . personal and financial affairs." Indeed, when X was hospitalized, in February 2010, he directed respondent to bring his voluminous and "very organized" records, which he maintained in notebooks, so that he could review with respondent any needed changes to his finances. Thereafter, X demanded a twice-weekly or weekly verbal financial status report from respondent and regularly telephoned him, on average of once or twice each week, to review what respondent had accomplished for him, particularly including how much of his funds had been spent. According to X's records, as of March 27, 1995, his net worth was $343,095.

On February 20, 2010, X was transferred from HUMC to Inglemoor Nursing Home (Inglemoor) in Englewood. On February 28, 2010, respondent presented two POAs to X for his signature. The stipulation does not explain why respondent prepared the POAs, although, in respondent's written reply to the grievance, he asserted that, among other things, a POA would be necessary to carry out the eventual sale of X's condominium.

At the time, X, a single person, had no friends or relatives able or willing to serve as attorney-in-fact. Thus, the POAs named respondent's wife, Michelle, and their son, Matthew, as attorneys-in-fact. X had known Michelle, the daughter of X's long-time friend, for many years -- much longer than X had known respondent.

Under the terms of the POAs, Michelle and Matthew were given unlimited powers over X's finances. Neither Michelle nor Matthew were

entitled to compensation for the exercise of their authority, and received none.

Respondent discussed with X various risks inherent in granting someone power of attorney, including the risk that, because the POAs were unlimited in scope, the attorneys in-fact could "rob [X] blind." Yet, respondent did not discuss with X that the POA in favor of Michelle gave her the authority to pay respondent's bills. In respect of Matthew, who did not know that he had been given power of attorney, until after X had signed the document, respondent simply advised X that "it's a backup."

The Board found that, by directing X to grant Michelle power of attorney, which put her in charge of paying respondent's bills, respondent created a significant risk that his representation of X would be materially limited by his personal interest in having his bills paid without significant review or challenge, a violation of RPC 1.7(a). Indeed, when Michelle was presented with respondent's invoices to X, she simply paid the charges, at his direction. Consequently, no independent determination was made in respect of the reasonableness of respondent's invoices.

The parties stipulated that, between February 2010 and August 2012, respondent billed X a total of $92,122.50 in fees. Of this amount, $19,522.50 represented fees charged for non-legal services. In determining that the fees charged, as a whole, were unreasonable, the Board attributed significance to several billings and invoices. First, during the two-week period between February 15, 2010, when X was admitted to HUMC, and February 28, 2010, when X executed the POAs, respondent billed $4,150, representing 16.6 hours at $250 per hour. The bill included numerous charges for non-legal work relating to X's condominium, such as $1,375 (5.5 hours at $250 per hour) for a conference with a plumber, a neighbor, and a house cleaner at X's residence, in anticipation of listing the condominium for sale, in addition to the review of documents there.

Second, respondent charged an excessive amount of fees after X had made the decision to apply for Medicaid, which required X to "spend down" his assets. Specifically, on March 8, 2010, respondent introduced X to Jacqueline Saltzman, MSW, C-ASWCM, an elder care services provider. From that date until July 2010, Saltzman served as X's geriatric care manager. Saltzman was paid $1,800 from X's accounts for her services.

In July 2010, X was transferred to St. Ann's Home (St. Ann's), in Jersey City. That month, Saltzman and Lori Vernachio (St. Ann's head social worker) informed respondent that X needed to apply for Medicaid. Because respondent lacked the knowledge and experience necessary to complete a Medicaid application, he sought a referral from a colleague, Raymond J. Falcon, Jr., who recommended elder lawyer Jane B. Lurie.

On October 6, 2010, X retained Lurie, to assist X with Medicaid planning and preparation of a Medicaid application. On April 27, 2011, Lurie submitted X's Medicaid application to the Hudson County Department of Family Services (DFS). The application itemized $48,017.25 in combined legal expenses for the fourteen-month period between February 15, 2010, when X was admitted to HUMC, and April 27, 2011, the date of the application. Of this amount, $7,500 represented Lurie's fee for the "preparation of the Medicaid application." The remaining $40,517.25 represented respondent's fees for "other services" provided to X.

X's condominium was sold on December 20, 2011. Thus, on September 19, 2012, Lurie submitted a second Medicaid application to DFS, which identified $47,383.86 in additional legal fees incurred by X, for the period covering April 27, 2011 to September 19, 2012. Of this amount, $2,000 represented Lurie's fee for the preparation of the second Medicaid application; $2,800 represented attorney Joseph DiCorcia's charge for "[e]state preparation services;" and $42,583.86 represented respondent's fee for "other services" provided to X.

Respondent assisted Lurie in the preparation of X's Medicaid application, by selling and/or liquidating X's various personal property, securities, and certificates of deposits. He also provided Lurie with X's records, which respondent had either organized or obtained from outside sources. According to respondent, his total expenses for the legal work "related to Medicaid Application and Requirements" amounted to $20,167.50, as compared to Lurie's $9,500 charge to prepare the application. In the Board's view, these charges, on their face, were unreasonable and, thus, violated RPC 1.5(a).

Evidence of X's mental decline appeared in early spring 2012. Both respondent and members of St. Ann's staff noticed a change in X's mental acuity at that time, as X talked about circumstances that did not exist.

By May 2012, staff reported that, although X previously had been able to communicate in a clear and meaningful manner, at times, he was now "much worse," as X often did not understand simple commands. It was at that time, thus, that respondent arranged for Dr. Pantagis to examine X, in late April or early May 2012.

When Dr. Pantagis examined X, on May 3, 2012, X was awake and alert, but could not communicate in a goal-directed manner or discuss basic biographic information. Thus, Dr. Pantagis recommended hospice and palliative care. As stated above, X lived for another three years.

As of December 31, 2010, respondent estimated X's maximum net worth, or his total assets, to be "roughly" $163,000, representing the value of X's condominium, which later sold for $130,000 in December 2011, plus "roughly" $33,000. Respondent claimed that, by August 30, 2012, X's total assets had dropped to $3,150. His net worth, as of that date, was $1,900. At that point, his only income was a monthly Social Security check.

Respondent acknowledged that "most" of the work that he had done for X was for non-legal services, which he had billed at his hourly legal fee rate. Indeed, respondent was concerned that X was depleting his assets in ways that were not prudent or wise. Yet, respondent maintained, X felt that he had no control over his life and that no one was listening to him. Thus, X was willing to spend money to ensure that someone was "standing up and taking care of things . . . that [X] would normally do." Despite what may have been respondent's good intentions, the Board found that his fees, as a whole, were unreasonable, in violation of RPC 1.5(a).

The Board rejected the stipulated violations of RPC 1.7(b), RPC 1.15(a), and RPC 8.4(c). Although the parties stipulated that respondent violated RPC 1.15(a) by dissipating X's assets in the form of excessive fees, the Rule applies to funds already in the possession of an attorney, who, as a consequence, must see that the funds are safeguarded. Further, the Board did not view RPC 8.4(c) to apply, in light of the absence of any evidence that the bills submitted to X were fabricated or fraudulent. Finally, the Board considers RPC 1.7(b) as identifying the procedures with which an attorney must comply to avoid violation of RPC 1.7(a). The Board does not view subsection (b) to provide a separate basis of violation.

In determining that a censure is the appropriate measure of discipline for respondent's misconduct, the Board first observed that, at a minimum, the conflict of interest warrants a reprimand. See, e.g., In re Guidone, 139 N.J. 272, 277 (1994), and In re Berkowitz, 136 N.J. 134, 148 (1994). A reprimand still would be warranted, even in light of respondent's failure to reduce to writing the fee he charged over the years. See, e.g., In re Soto, 200 N.J. 216 (2009) (reprimand imposed on attorney who represented the driver and passenger in a personal injury action arising out of an automobile accident; the attorney also was guilty of other infractions, including failure to prepare a contingent fee agreement).

Finally, reprimands have been imposed on attorneys who charge excessive fees in an attempt to overreach their clients. In re Doria, ___ N.J. ___ (2017) (attorney charged $35,000 to represent the client in a post-judgment matrimonial motion filed against her; the attorney adjourned the motion on the ground that an appeal was pending, and filed two letter briefs; a fee arbitration panel determined that he was entitled to only $900; in violation of RPC 1.5(a)); In re Read, 170 N.J. 319 (2000) (attorney charged grossly excessive fees in two estate matters and presented inflated time records to justify the high fees; strong mitigating factors considered); and In re Hinnant, 121 N.J. 395 (1990) (in a real estate matter, attorney attempted to collect a $21,000 fee, including commissions on the purchase price; a conflict of interest also was found).

Respondent's conduct in this matter is most similar to that of the attorney in In re Halligan, D-44, September Term, 2003, http://njlaw.rutgers.edu, Supreme Court of New Jersey, August 5, 2004. In that case, over a period of fifteen years, the attorney represented Elsie Finninger, a wealthy, elderly widow, who suffered from "mild to moderate dementia, depression, and physical ailments, including vision and hearing problems." In the Matter of Francis X Halligan, DRB 03-144 (November 5, 2003) (slip op. at 2-4). As Finninger's health declined, she developed a strong trust in Halligan and relied on him not only to handle her legal affairs, but also to handle other, personal matters for her. Eventually, Finninger hired Halligan's wife as her bookkeeper and his sister as one of her home health care nurses.

Ultimately, pursuant to a will, power of attorney, and revocable living trust, prepared for Finninger by independent counsel, Halligan acted as her personal attorney, attorney-in-fact, trustee, and

attorney for the trust; he was also the executor and a beneficiary under the client's Last Will and Testament. Id. at 2-3.

Halligan received trustee commissions of $147,780 from 1996 to 2000. Id. at 7. Additionally, in his capacity as Finninger's personal attorney, he charged her $225,363.64 in legal fees over that same period. The legal fees included: between April 1996 and December 1999, $60,000 for "sending 840 identical letters to charities that had solicited contributions from Finninger;" from 1996 to 1998, a total of $4,600 to attend Heisman Trophy Award dinners, as Finninger's guest; $1,000 for buying Finninger a new couch, which cost $889; and $500 for purchasing a $29.95 electric fan. Id. at 7-9.

The OAE charged Halligan with violations of RPC 1.5(a) (fee overreaching), RPC 1.7(a) and (b) (conflict of interest), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation). Id. at 1-2.

The attorney asserted that he had committed no misconduct, noting that his legal fees had not been challenged by the client or her family, and that he had agreed to reimburse $50,000 to Finninger's estate in an acknowledgement of unintentionally charging excess legal fees in connection with the 840 identical charity letters. Id. at 26-27.

A five-member majority of the Board determined to dismiss the charges and impose no discipline, finding that a client has the right to employ and compensate an attorney for both legal and non-legal services, provided that there is no overreaching and no evidence that the attorney has unduly influenced or taken advantage of the client, or that he or she had become incompetent. Id. at 34.

Three Board members disagreed and filed a dissenting opinion, asserting that Halligan "abused his close relationship with [Finninger] and unfairly profited from her unconditional trust in him," thereby violating RPC 1.5(a) (fee overreaching).

The Supreme Court agreed with the Board majority and dismissed the charges. In its narrative Order, however, the Court announced that, in the future, it would apply an objective conduct standard to evaluate and determine whether the actions of attorneys who represent elderly and infirm clients have been consistent with the requirements and obligations of the Rules of Professional Conduct, including, but not limited to, RPC 1.5 (fees), RPCs 1.7 and 1.8 (conflict of interest), and RPC 8.4 (misconduct), and, further, that it would

subject attorneys to the imposition of significant discipline when, after application of the objective standard, they are found to have violated the Rules of Professional Conduct.

Applying an objective standard to this case, the Board concluded that respondent's fee was unreasonable, that he engaged in a conflict of interest, and that he failed to reduce the basis of his fee to a writing – all in the context of a client whose competency, over time, had become compromised, at best.

Although the Board considered, in aggravation, that respondent's conduct involved a vulnerable and elderly client, the extensive mitigation rendered the imposition of a term of suspension inappropriate. In this regard, the Board took into consideration respondent's unblemished disciplinary record of forty-three years; his cooperation in the disciplinary investigation; his ready admission of wrongdoing; his contrition and remorse; his good character and reputation; and the likelihood that he will not repeat the misconduct. Moreover, the Board considered that respondent has implemented several changes to his practice to guard against similar misconduct: (1) he no longer represents clients in elder law matters or drafts POAs for clients who have no family or friends to serve as attorney-in-fact; (2) he obtains signed retainer agreements from clients; and (3) he no longer bills clients for non-legal services, even at the client's request.

The Board further considered respondent's substantial service to the community, including his local athletic program, parish, and board of education, the Knights of Columbus, and the Archdiocese of Newark, in addition to his volunteer work with the Domestic Violence Crisis Response Team for several police departments and with Partners for Women and Justice, representing victims of domestic violence in final restraining order proceedings.

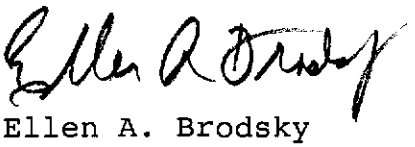
Finally, the Board considered, in mitigation, "other facts," identified in the stipulation, including Michelle's status as the daughter of X's life-long friend and former attorney; respondent's inability to locate any person other than Michelle to serve as X's attorney-in-fact; and the findings of the State of New Jersey Office of the Ombudsman for the Institutionalized Elderly.

Thus, for the totality of respondent's conduct, and, in light of the extensive mitigation, the Board imposed a censure on respondent for his violations of RPC 1.5(a) and (b) and RPC 1.7(a).

Enclosed are the following documents:

1. Notice of motion for discipline by consent, dated March 6, 2017.
2. Stipulation of discipline by consent, dated March 6, 2017 **(sealed)**.
3. Exhibits A1 through A333, with attached exhibit list **(sealed)**.
4. Exhibits R1 through R7, with attached exhibit list **(sealed)**.
5. Affidavit of consent, dated February 21, 2017.
6. Special Master's pre-trial order, including protective order **(sealed)**.
7. Ethics history, dated August 3, 2017.

Very truly yours,



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