Supreme Court of New Jersey
Disciplinary Review Board
Docket No. DRB 19-143
District Docket No. XIV-2015-0139E

In the Matter of	:	
Wayne A. Schultz,	:	Dissent
An Attorney at Law	:	

Decided: December 5, 2019

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

Respondent has been an attorney in this State for nearly forty-five years, with only one minor ethics infraction, equivalent to an admonition, occurring in 1995, over twenty years ago. His current entanglement with the ethics system grows out of his long-time relationship with a client, whom he represented successfully in twenty different legal matters over a period of sixteen years, with no complaint ever voiced by her, and who made loans to him before and during the time when he served as her attorney.

As our opinions often state, it is not the primary role of our ethics system to punish lawyers but to protect the public. The facts of this case do not suggest that the public needs protection by suspending this respondent from the practice of law for any period of time. The final pages of the majority opinion itself show why this is so, the highlights of which are summarized here:

As the majority opinion says, respondent's client, JoAnn Mesyna, was in her late fifties and early sixties when she engaged respondent to represent her and when she lent him money. There was "no evidence" that she was a vulnerable person or was "wholly dependent and reliant on respondent," (slip op. at 34) or was not competent at any time prior to her death at age 73. Even the grievant, Mesyna's grandson and executor of her estate, testified that Mesyna was of sound mind and understood her financial and business matters.

Other significant facts are unrebutted: (1) Mesyna agreed to let respondent "work off" loans she made to him by providing legal services to her; (2) she began loaning him money before he began representing her; (3) he represented her in twenty matters over many years and, as the majority opinion acknowledges, "with two small exceptions, there is no evidence that she had paid him any fees" over all those years; (slip op. at 34); and (4) as the majority recognizes, "the record lacks evidence that the barter arrangement ... caused [Mesyna] financial harm" (slip op. at 33).

Despite the lack of harm to respondent's client, he did breach a number of ethics rules, as laid out in the majority opinion, but those ethics infractions would normally not result in a suspension. He violated RPC 1.15(d) (recordkeeping violations), RPC 1.7(a)(2) (concurrent conflict of interest), and RPC 1.8(a)(2) (entering into a loan transaction with a client without advising her in writing of the desirability of seeking independent legal advice). It should be noted that although the majority refers to "multiple conflicts of interest" (Opinion at 29; 38) in justifying a six-month suspension, it finds only two conflicts, namely, (1) working off the loans could cause respondent to overbill for his work (although no such overbilling was found or charged); and (2) representing his client's estate when he had a claim against it for fees.

The majority also finds that respondent violated RPC 8.1(a) (making a false statement in a disciplinary matter) and RPC 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation), both charges based, says the majority (Opinion, at 30), on (1) respondent's failure to determine the amount of his outstanding fees before making a claim for them against his client's estate; and (2) his statements to the Office of Attorney Ethics (OAE) that the loans were advanced retainers for prospective legal work. However, we do not find clear and convincing evidence that he made knowing misrepresentations about fees owed to him. His "Claim Against Estate" sought only $57,704.92 in total fees for the work he did in

twenty matters over a sixteen-year period, including $3,761.57 for work he did for the estate itself and, in submitting this claim, he produced his billing statements for this exact amount. (OAE Exh. 10). Nor do we find that simply calling the loans a retainer during an OAE interview, when done in conjunction with producing the actual promissory notes, as respondent did, shows an intent to mislead.

As the majority says, an admonition is normally imposed for recordkeeping violations, and a reprimand for making a false statement of material fact to a client, third person, or disciplinary authority, as it is for engaging in a conflict of interest. The majority then asserts that, given all of respondent's infractions, "at a minimum a censure is in order." (Opinion, at 32). While it then cites cases that would support a censure here, e.g., In re Lauletta, 228 N.J. 155 (2017) and In re Schwartz, 216 N.J. 167 (2013), and various factors that normally would serve as mitigation, such as respondent's nearly spotless legal career of almost 45 years, it jumps to the conclusion that a six-month suspension is warranted based solely on one case dating from 1995, In re Shelly, 140 N.J. 501 (1995) (discussed in Opinion at 36-37).

Although the Shelly case, in which a six-month suspension was imposed, bears some similarities to the instant one, it is actually more different than similar to it in significant ways. In that case, too, an attorney represented a client in many matters over a significant period (nine years), recovering significant money for her. Unlike respondent, Shelly took his fees from funds as he recovered them and,

although he had his client's approval to do so, unlike here, there was no written fee agreement or invoices, and Shelly kept no time records so that the client never had any way to review the basis for the fees he took from her recoveries. Moreover, unlike the client in this case, who was knowledgeable and not financially insecure, the client in Shelly was penniless and on the verge of foreclosure on her house when he began representing her and, despite his monetary recoveries for her, she remained financially unstable. Thus, she was dependent on Shelly in a way and to an extent that Mesyna was not dependent on respondent. Additionally, Shelly was reported to the ethics authorities because, in addition to taking his fees out of money he recovered for his client, he borrowed $40,000 from her, but did not pay it back, despite her demand for it, forcing her to hire another attorney to obtain repayment. Indeed, at the time of Shelly's ethics hearing, he had not repaid that loan. The Court strongly stated its disapproval of Shelly's "informal and careless professional practices," especially chastising him for billing his client "without documentation regarding the amount of time spent" and without providing written billing statements. Id. at 516. These are not things this respondent did.

While respondent here engaged in some careless practices in dealing with Mesyna and surely should be disciplined for his ethics lapses, there are significant differences in the two cases. Here, respondent did have written fee agreements with his client as to some of his representations, albeit, not a complete record of them

after so many years (e.g., Exhibits R6; OAE 21) and did provide written billing statements (Exhibits OAE 10, 24; R4) and written promissory notes for the loans and regular statements of those loan accounts (Exhibits R1 to R-3; OAE 2-4, 1-17). And there is no serious question that he performed substantial legal services over many years in various types of cases ranging from simple to complex for which he had received *no fees* for sixteen years.

Although the Shelly case is an old case and its result is based on its unique facts, it serves as a warning to attorneys not to treat clients informally or carelessly. But it is distinguishable from the facts of this case and does not, standing alone, justify imposing a six-month suspension on respondent, as the majority would do. We believe a censure is the appropriate level of discipline for this respondent.

Disciplinary Review Board
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