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SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket Nos. DRB 95-173 and
DRB 95-260

IN THE MATTER OF

GARY LESSER

AN ATTORNEY AT LAW

Decision of the
Disciplinary Review Board

Argued: September 20, 1995

Decided: December 4, 1995

Walton W. Kingsbery, III appeared on behalf of the Office of Attorney Ethics in the matter under Docket No. DRB 95-173.

Harry J. Riskin appeared on behalf of the District X Ethics Committee in the matter under Docket No. DRB 95-260.

George T. Daggett appeared on behalf of respondent.

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

This matter was before the Board on two separate recommendations for discipline filed by the District X Ethics Committee ("DEC").

Respondent has been a member of the New Jersey bar since 1969. He was engaged in the practice of law in Budd Lake, Morris County, until October 26, 1993, when he was temporarily suspended by a consent order, pending the conclusion of all ethics proceedings against him.

Respondent's disciplinary record is extensive. On February 27, 1989, he was privately reprimanded for not discussing the amount of legal fees with a client and thereafter removing his fee and disbursements from closing proceeds without prior authorization from the client. As noted earlier, respondent was temporarily suspended by order of October 26, 1993, pending the completion of disciplinary matters against him. In re Lesser, 134 N.J. 220 (1993). On February 7, 1995, respondent was suspended for three months for commingling trust and personal funds, for failure to notify his client of the receipt of funds, for failure to disburse funds promptly and for failure to comply with the recordkeeping provisions of R. 1:21-6. In re Lesser, 139 N.J. 233 (1995). Finally, on May 5, 1995, respondent was suspended for one year for gross neglect of an appeal that resulted in its dismissal, misrepresentation of the status of the appeal to his client and failure to cooperate with the disciplinary authorities. In re Lesser, 140 N.J. 41 (1995).

Docket No. DRB 95-173 (District Docket No. XIV-93-117)

This matter arose when the Morris County Prosecutor's Office notified the Office of Attorney Ethics (OAE) that respondent had withdrawn more than $200,000 from his trust account to pay a contractor for work on respondent's residence and office. The formal ethics complaint charged respondent with commingling of

personal and client funds (count one), failure to safeguard client property (count two) and willful disregard of recordkeeping responsibilities (count three).

Specifically, the complaint stated that, after the OAE received notification from the prosecutor's office of an alleged impropriety with respondent's trust account, the OAE conducted a demand audit of respondent's trust and business records on July 16, 1993. The audit showed that respondent had paid more than $256,000 to Russ Dawson, a contractor, from May 1987 to October 1989. Those payments appeared on more than a dozen different client cards as disbursements from the funds of different clients. The audit also disclosed negative client balances that occurred when respondent had disbursed more funds on behalf of a client than funds on deposit for that client. According to the OAE, that happened in at least six client matters, leading to an inference that client trust funds had been invaded on at least twenty-five occasions. Respondent, however, denied that the disbursements evidenced misappropriation of client funds. He explained that the client ledger cards were inaccurate and that the disbursements to Dawson had not necessarily been made in behalf of the clients indicated. Respondent added that he did not now how much he had paid to Dawson, that there was no written contract between him and Dawson and that he had no records showing the work undertaken on his home and/or office. Respondent claimed that he knew, however, that the renovation and repair work on his house and office had been paid

out of personal funds, that is, legal fees left in his trust account as well as other "investments."

Because, as corroborated by the OAE investigative auditor, respondent's recordkeeping was horrendous, he admittedly was unable to tell, at any time, how much he had in his trust account and to whom the funds belonged. Respondent "believed," however, that all the funds in the trust account were his because no client had asked for them. Asked by the OAE to attempt to reconstruct his records, respondent found that task impossible. There was not enough information on the checks issued or on the disbursement journals in order to allocate the funds to specific clients.

Thereafter, the OAE tried to reconstruct respondent's records by requesting information from the bank where he had his trust account. The OAE auditor testified that, although the trust account as a whole showed no shortage of funds, there were negative balances in at least six client accounts, raising a suspicion that respondent had made certain disbursements by using other clients' funds (or his own). The OAE concluded that, because respondent's recordkeeping was so shoddy, it could not prove knowing misappropriation by clear and convincing evidence. In fact, the OAE sent letters to respondent's clients about possible missing funds; no client complained of misappropriated monies. Therefore, instead of charging respondent with knowing misappropriation, the OAE charged him with failure to safeguard client funds by placing them in constant risk of being misappropriated.

Respondent admitted the allegations contained in twenty-two of the twenty-three paragraphs of the complaint. The only charge denied was that his conduct constituted gross and willful disregard of his recordkeeping responsibilities. Respondent also denied that the OAE's reconstruction of his records accurately reflected the activity for the relevant periods of time. Respondent pointed to the fact that the audit disclosed many instances of negative balances in behalf of clients and that, in fact, no client was owed any money. Respondent's explanation for the result of the OAE's audit was that there were insufficient records available to reflect all the activities that had taken place at that time, presumably referring to deposits.

Asked at the DEC hearing why he used his trust account as his personal account, respondent replied that "* * * * the funds were in there and it was used that way. Albeit, it was not to be done that way." T1/26/1995 58.

* * *

At the conclusion of the ethics hearing, the DEC found that respondent had commingled personal and client trust funds, in violation of RPC 1.15(a); had failed to safeguard client property, in violation of RPC 1.15(a); and had willfully disregarded his recordkeeping responsibilities, in violation of R. 1:21-6 and RPC 1.15(d). The DEC recommended a three-year suspension. The DEC

also recommended that, prior to reinstatement, respondent attend a seminar on proper accounting practices for New Jersey attorneys.

Docket No. DRB 95-260 (District Docket No. X-94-7E)

In November 1987, Eugene J. Grabowski retained respondent to represent him in a matter arising out of an automobile accident. Although Mr. Grabowski did not sign a retainer agreement and paid no retainer or costs of suit to respondent, it is undeniable that respondent was hired to represent him in that case. Thereafter, for a period of six years, Mr. Grabowski stopped by respondent's office every couple of weeks to request information about the status of the matter. Respondent invariably informed him that he was waiting for certain information or documentation.

In 1993, Mr. Grabowski read in the newspapers that respondent had been suspended from the practice of law. Mr. Grabowski called respondent's attorney, who, in turn, gave Mr. Grabowski respondent's telephone number. During a telephone conversation with respondent, Mr. Grabowski asked him to return his documents. Respondent assured Mr. Grabowski that he would meet him on the following Saturday. Respondent, however, did not show up.

At the DEC hearing, at which respondent did not appear, Mr. Grabowski furnished the hearing panel with a copy of a letter on respondent's letterhead addressed to the Somerset County Sheriff's Office, dated November 21, 1989. In that letter, respondent referred to an enclosed summons and complaint in the Grabowski

matter and requested that service be made on the defendant. After the DEC hearing, the presenter and a member of the hearing panel contacted several offices, including the Morris County Clerk's Office, Somerset County Clerk's Office and the Records Information Center of the New Jersey Superior Court. None of those offices found any record of the filing of a summons and complaint. However, in a letter to the Somerset County Sheriff's Office from the presenter, there is a handwritten notation from the sheriff's office that reads as follows: "Summons and complaint were returned unable to serve" (Exhibit A to Exhibit C-6), thereby leading to an inference that respondent had filed the summons and complaint, although service had not been made on the defendant. Indeed, before the Board hearing, respondent submitted a copy of the complaint showing that it had been filed on November 17, 1989.

Respondent did not file an answer to the formal ethics complaint and did not appear at the DEC hearing. At the conclusion of the ethics hearing, the DEC found that respondent had violated RPC 1.1(a)(gross negligence), RPC 1.3 (lack of diligence), RPC 1.4(a)(failure to communicate with his client) and RPC 8.1(b)(failure to cooperate with disciplinary authorities). The DEC also found that respondent had violated RPC 8.4(c)(misrepresentation to client), a charge not contained in the complaint, in that respondent "provided Grievant with correspondence suggesting that a Summons and Complaint had been duly filed within the statutory period and had been forwarded for service." Hearing panel report at 5. This finding was based on

information supplied by the aforementioned offices that a complaint had not been filed. As noted above, however, after the DEC hearing respondent forwarded documentation to the DEC showing that the complaint had, in fact, been filed.

The DEC recommended disbarment.

* * *

After the DEC issued its report but before the Board hearing, respondent wrote to the DEC objecting to its conclusion that the Grabowski complaint had not been filed and requesting that the DEC report "be held in abeyance" pending the reopening of the record to reflect the filing of that complaint. Respondent also requested that the DEC issue a "revised" recommendation. The DEC forwarded respondent's letter to the Board, who determined to treat it as a motion to remand the matter to the DEC and to expand the record. At the Board hearing, the Board denied the motion but allowed responded to supplement the record by presenting a copy of the complaint showing its filing date.

Following a de novo review of the record, the Board is satisfied that the DEC's findings that respondent's conduct was unethical are fully supported by clear and convincing evidence.

In the matter under Docket No. DRB 95-173, respondent used his trust account as a personal account, from which he disbursed in excess of $250,000 to a contractor for work performed on his house

and his office. He also recklessly, if not wilfully, disregarded his accounting responsibilities.

In the matter under Docket No. 95-260, respondent displayed lack of diligence, gross neglect, failure to communicate and failure to cooperate with the disciplinary authorities. In light of the information that respondent supplied to the DEC and to the Board following the hearing, however, it cannot be found that respondent misrepresented to his client that the summons and complaint had been filed, in violation of RPC 8.4(c).

As noted above, this is respondent's fifth encounter with the disciplinary system in six years, not counting the OAE's application for his temporary suspension in 1993. He was privately reprimanded on February 27, 1989, for conduct that occurred in July 1987; he was suspended for three months by order dated February 7, 1995, for conduct that took place in 1992; on May 5, 1995, he was again suspended for one year for conduct that occurred between January 1991 and April 1993; the matter before the Board under docket no. DRB 95-173 deals with conduct that spanned from May 1987 through October 1989; and the fifth matter, docket no. DRB 95-260, also before the Board, deals with ethics improprieties that took place between November 1987 and November 1993. It is clear then that this respondent is in need of serious discipline. Viewed in isolation, each matter does not present egregious conduct; in the aggregate, however, respondent's actions demonstrate extreme insensitivity to his obligations as an attorney.

Recidivist attorneys who are found guilty of serious misconduct are either suspended or disbarred. See In re Van Rye, 128 N.J. 108 (1992) (two-year suspension for entering into a business transaction with clients without advising them to obtain independent counsel; improperly executing a jurat; improperly altering a deed; signing closing documents without the benefit of a power-of-attorney; and disbursing mortgage proceeds without first obtaining a signature or a power-of-attorney. The attorney had been previously suspended for three months for, among other things, improperly notarizing a false signature on a mortgage; making false certifications to a mortgage company and misrepresentations to a credit union; failing to keep proper trust and business account records; and failing to submit a written, formal accounting of rents collected in behalf of a client); In re Grabler, 127 N.J. 38 (1992) (two-year suspension for neglecting two real estate matters; misrepresenting the status of a case to a client; practicing law while suspended; and failing to cooperate with the disciplinary authorities. The attorney had been previously suspended for one year on two other occasions); In re Giles, 139 N.J. 468 (1995)(three-year suspension for gross neglect; pattern of neglect; lack of diligence; failure to communicate with his clients; failure to cooperate with the ethics authorities; charging an unreasonable fee; conduct prejudicial to the administration of justice; and failure to maintain a bona fide office. The attorney had received a prior private reprimand and a one-year suspension. All in all, the attorney had been found guilty of misconduct in nine matters);

In re Hollis, 134 N.J. 124 (1993) (three-year suspension for grossly neglecting a criminal case by not filing an appellate brief, not having the case reinstated and making misrepresentations to his client. The attorney had been previously suspended for three years for failing to prosecute numerous client matters; failing to record mortgages; failing to supply inventory of all pending cases to his proctor; and failing to promptly pay a client's mortgage from trust funds); In re Kasdan, 132 N.J. 99 (1993) (three-year suspension for practicing during the period of suspension and misrepresenting her status as an attorney to adversaries and to courts. The attorney had been previously suspended for three months); In re Esposito, 118 N.J. 432 (1990) (three-year suspension for grossly neglecting five matters; misrepresenting the status of those matters; and engaging in impermissible dual representation of buyer and seller of real estate in a sixth matter. The attorney had been previously suspended for six months following his guilty plea for failure to pay federal income and social security taxes in behalf of his employees); In re Cohen, 120 N.J. 304 (1990) (attorney disbarred for pattern of neglect; lack of communication with his clients; altering the filing date on a complaint in an attempt to deceive the court, his clients and his adversaries; and failing to comply with Guideline No. 23 dealing with suspended attorneys. The attorney had received a prior private reprimand and a one-year suspension for misconduct in five separate matters).

Ordinarily, three factors are taken into consideration in reviewing cases dealing with recidivist attorneys: how many times the attorney has been disciplined, the extent of the discipline and the seriousness of each infraction. Here, respondent has been disciplined three times. The one-year suspension, however, was predicated not on the seriousness of the underlying transgressions (failure to follow through on an appeal and misrepresentation to client about its status) but, instead, on the prior two instances of discipline. However, each instance of misconduct by respondent was not necessarily very serious. There were no allegations of abandonment of clients, practicing law while suspended or mishandling an inordinate number of matters, as in the above-cited cases. Respondent's overall misconduct encompassed four client matters, in addition to recordkeeping violations. Accordingly, a period of suspension is appropriate, rather than disbarment. In Giles, for instance, the misconduct related to nine matters, was much more serious than respondent's and the attorney had received a prior private reprimand and a one-year suspension. That attorney was suspended for three years. See also In re Martin, 122 N.J. 198 (1991) (three-month suspension for mishandling four matters for two years; the attorney had been previously suspended for six months the year before for a pattern of neglect in seven matters during a five-year period).

In light of the foregoing, the Board unanimously determined to suspend respondent for a period of one year with no credit for his prior suspensions. Before his reinstatement, respondent must

demonstrate that he satisfactorily completed eight hours of accounting-for-attorneys courses and eight hours of professional responsibility courses. After reinstatement, respondent's attorney records must be annually audited for a period of two years by an accountant approved by the OAE.

The Board further required respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Date: 12/4/95

LEE M. HYMERLING, ESQ.
Chair
Disciplinary Review Board