Book

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 91-127

IN THE MATTER OF :
MICHAEL H. GOTTESMAN, :
AN ATTORNEY AT LAW :

Decision and Recommendation
of the
Disciplinary Review Board

Argued: July 17, 1991

Decided: October 3, 1991

Dana C. Argeris appeared on behalf of the District IX Ethics Committee.

Allan J. Shechet appeared on behalf of respondent.

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

This matter is before the Board based upon a recommendation for public discipline filed by the District IX Ethics Committee ("DEC"). The formal complaint charged respondent with violations of DR 3-101 (aiding the unauthorized practice of law), DR 3-102 (dividing legal fees with a non-lawyer) and DR 3-103 (forming a partnership or other association with a non-lawyer).

By way of procedural background, this matter arose from a complaint by Anthony Infante to the DEC in a letter dated November 7, 1983. In January 1984, the DEC docketed the grievance. No action was taken until July 1985, when the case was administratively dismissed because of Infante's subsequent filing of a civil complaint against respondent on May 14, 1985. After the

civil suit was concluded at the trial court level, the grievance was refiled in June 1988. Thereafter, the case was once again administratively dismissed because of Infante's filing of an appeal from the trial court's decision. In May 1989, the Appellate Division handed down its opinion, whereupon the grievance was once again filed with the DEC.

The facts are as follows:

Respondent maintains a sole practice of law in Asbury Park, Monmouth County. Following his admission to the New Jersey bar in 1974 and a brief stint with the Army's Judge Advocate General's Office, he became associated with the law firm of Klitzman, Klitzman and Gallagher, in early 1975. It was there that he met Infante, the grievant herein, who was employed as the firm's full-time investigator for personal injury cases. Respondent and Infante developed a close working and personal relationship.

According to respondent, he quickly became dissatisfied with his employment at the Klitzman office. He began to entertain the idea of starting his own law practice. It was then that he proposed an arrangement to Infante, whereby the latter, who had a large family and a large circle of friends, would refer personal injury and workers' compensation cases to respondent and render certain services thereon, in return for a percentage of respondent's legal fees. Infante agreed. According to respondent, this remuneration on a percentage basis was dictated by his inability to pay Infante a salary.

In late August 1975, respondent opened his own law practice.

Prior thereto, on August 5, 1975, respondent prepared, signed and presented to Infante the following handwritten document:

> Dear Tony,
>
> I will give you 50% of everything you bring in. If you go into business with me we will draw the same money. I consider us full and equal partners.
>
> [Exhibit A to the formal complaint]

At the DEC hearing, respondent contended that the August 5, 1975 writing was a mere offer for Infante to be his law partner when Infante became a lawyer. Infante had expressed to respondent his desire to enroll in law school, which enrollment, respondent believed, was to take place in January 1976. Still according to respondent, the document had been prepared at Infante's insistence, in order to show respondent's good faith about their future association as law partners.

Infante, in turn, denied that the agreement was an offer for a future law partnership. He testified that the equality of compensation contemplated in the agreement was ". . . strictly because of the work involved, of cases I was able to work and able to bring in and start him in business" T24.[1] Infante's understanding of his responsibilities under the agreement was as follows:

> Basically if someone called me, a relative or whoever it was that had an accident, I was going to go up and sign them up and I was going to handle the case from scratch from day

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[1] T denotes the transcript of the DEC hearing of March 27, 1990.

> one; get the retainer; signed medical [sic]; go to the doctor, whatever doctor they were going to go to; attempt to settle the case; when the medical was finished in my hands, send it on to the insurance company and negotiate a settlement.
>
> If the company would not negotiate, I would recommend Mr. Gottesman draw up a suit and I would handle it during the procedure and after suit also. The same thing with worker's [sic] compensation. I would actually write up the petitions, formal petitions to be filed. If it was an informal hearing, I went to some of the hearings myself and handled it myself.
>
> All of this I was going to do on a part-time basis because I was still going to be working at Infante Investigation. I started my own firm. As Infante Investigation I was able to work for any attorney who needed my services. I would go to Mr. Gottesman's office two or three times a week and I would go through any files that were left in my particular file drawer. I had my name on it.
>
> At the time he also set me up with an office in my home. We went out and bought filing cabinets and he bought my wife an electronic typewriter and, in fact, my wife went to work for him in his home on Sunset Avenue in Asbury Park for a time and she drove into Asbury Park from Toms River everyday and that was the agreement we had back whenever we first talked about this.

[T25,26]

Infante began to work for respondent while still employed by the Klitzman firm, where he remained until March 1977. Thereafter, he started his own investigation business.

According to Infante, he performed all the foregoing services to respondent, including the preparation of letters to the insurance companies demanding settlement of a specified amount. Queried, at the DEC hearing, whether respondent had a standard

formula for making settlement demands, Infante replied that it "was left up to me to settle a case directly" (T39) and that

> "[respondent] never specifically spelled out what I put in a demand letter. I wrote a demand letter out and dictated it. He signed it. If he wanted to change it after, that's totally up to him but I know that they were never changed. My demand letter, he believed in what I was doing for him at that time.
>
> [T85]
>
> . . .
>
> Q. When that letter was prepared, did you make the determination of the figure that was placed on that letter?
>
> A. Yes.
>
> Q. Did you discuss that with Mr. Gottesman prior to the letter being mailed?
>
> A. Not necessarily, no. Most of the time, no.
>
> [T79]

Infante denied respondent's contention that respondent had instructed him to demand a settlement figure equal to "ten times the specials." He also denied that respondent had a set policy for accepting settlement offers:

> Q. Isn't it also a fact that you and Mr. Gottesman discussed and agreed that the range for settlement should generally be 30 to 40 percent of the demand?
>
> A. No.
>
> Q. Never had that discussion with Mr. Gottesman?
>
> A. No. I settled cases depending on who I was speaking to in the insurance company. I had experienced adjustors and sometimes I had inexperienced adjustors where I could get more money in.
>
> [T86]

As to the percentage of his compensation, it was Infante's testimony that the equal fee-splitting provision set forth in the initial agreement was soon modified to reflect respondent's and Infante's receipt of one-third of the fee each, the remaining one-third to be assigned to respondent's office expenses. Infante testified that his one-third percentage applied to all cases handled at respondent's office and not only to those cases referred by Infante. He also testified that he worked on all cases that he brought into respondent's office, even while he was working for the Klitzman firm on a full-time basis. T57. Ultimately, respondent reduced Infante's percentage to one-fourth of respondent's fee, limited only to those cases obtained through Infante's referral.

Respondent's testimony corroborated Infante's. He admitted that Infante's renumeration consisted of one-third of the legal fees generated on personal injury and workers' compensation cases. He conceded that, in so doing, he divided legal fees with non-lawyer. See Response of Respondent to Hearing Panel Report. He explained, however, that he was laboring under the false notion that it was permissible to pay a percentage fee to a non-lawyer employee, instead of a salary, so long as that employee had rendered substantial paralegal services on the relevant files. He added that he was aware that the Klitzman office had such an arrangement with Infante and that he, respondent, had never questioned its propriety. See Answer to the Complaint.

At the conclusion of the DEC hearing, the panel found that

respondent had violated DR 3-101[2], by allowing Infante to "operate in his office and to make decisions and give advice as though he were a lawyer . . . [and to] engage in the practice of law by managing the conduct of personal injury cases from the beginning down through settlement of cases which did not go to suit." Hearing panel report at 3. The panel also found that respondent had violated DR 3-102, inasmuch as "[a]ll compensation which was paid to grievant resulted from a division of the fees received in cases upon which the grievant performed services." Hearing Panel Report at 4. The panel concluded, however, that respondent had not violated DR 3-103. The panel found that the "proofs [were] insufficient to conclude that in fact a partnership had been formed between grievant and respondent". Hearing Panel Report at 4.

CONCLUSION AND RECOMMENDATION

Upon a de novo review of the record, the Board is satisfied that the conclusions of the DEC that respondent was guilty of unethical conduct are fully supported by clear and convincing evidence. The Board also agrees with the DEC that the record does not establish, to a clear and convincing standard, that respondent formed a partnership with Infante. As pointed out by the panel, although respondent and Infante did share legal fees, there were no

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[2] The Disciplinary Rules replaced the Canons of Professional Ethics on September 13, 1971. Respondent's conduct occurred between 1975 and 1980, prior to the enactment of the Rules of Professional Conduct, in 1984. The Disciplinary Rules, therefore, apply.

corresponding obligations and responsibilities on Infante's part to support a conclusion that they had entered into a partnership for the practice of law.

It is undeniable, however, that respondent shared legal fees with Infante, a non-attorney, and aided the unauthorized practice of law by allowing Infante to advise clients on the merits of the claims, to exercise sole discretion in formulating offers of settlement and in accepting or rejecting them, and to make decisions concerning the institution of suit. Respondent's conduct was, hence, unethical and violative of DR 3-101 and DR 3-102.

Having concluded that respondent's actions were improper, the Board must recommend a quantum of discipline that reflects the gravity of the ethics transgressions, as counterbalanced by any relevant mitigating circumstances.

No recent cases address the repetitive and substantial sharing of legal fees with a non-lawyer, unaccompanied by other wrongdoing. In In re Frankel, 20 N.J. 588 (1956), an attorney was suspended for two years for sharing a percentage of his net legal fees with an agent who solicited clients for the attorney. The Court rejected the attorney's contention that the compensation to the agent was for bona fide, substantial and valuable investigative services rendered, at a rate of twenty-five percent of the attorney's net fee, and not a division of legal fees with a non-lawyer. The Court concluded that it was clear that the payments had not been for investigative services but, rather, as a payment or reward for the successful solicitation of cases for the attorney. The Court found

nothing in the record to show that the agent had performed investigative services. The Court reasoned that the payment of twenty-five percent of the net fee to the agent, irrespective of the quantum of the services provided in each case, with no compensation at all in cases where no recovery was had, was conclusory proof that the attorney had shared legal fees with the agent.

In In re Introcaso, 26 N.J. 352 (1958), an attorney received a three-year suspension for employing a runner or touter to produce criminal cases for the attorney and for sharing legal fees with the runner in approximately seventy cases, in violation of Canon 34 of the Canons of Professional Ethics, which prohibited fee-splitting with a non-lawyer. Similarly, in In re Bregg, 61 N.J. 476 (1972), the Court imposed a three-month suspension on an attorney who, on thirty occasions, shared legal fees with an attorney admitted in Cuba, but not in New Jersey. The Cuban attorney would place advertisements in Spanish, announcing that he was a lawyer and then refer the cases to the attorney.

More recently, the Court publicly reprimanded an attorney who agreed to return to a client a portion of his legal fee, knowing that the monies would be paid to the lay person who recommended the client to the attorney. In re Weinroth, 100 N.J. 343 (1985). See also In re Wall ____ N.J. ____ (1990), where the Court publicly reprimanded an attorney who did not act diligently and failed to communicate with his clients in three matters and, further, shared a seven percent legal fee with a non-lawyer in another matter.

As to discipline for aiding the unauthorized practice of law, in 1985 the Court ordered that an attorney be publicly reprimanded for failing to inform the Court that his law clerk had made an ultra vires appearance. The attorney had instructed the law clerk to appear at a court proceeding with a client for the purpose of answering the calendar call. Contrary to the attorney's directions and unbeknownst to him, the law clerk took it upon herself to represent the client at the hearing. After the attorney discovered the law clerk's impropriety, he properly chastised her. He failed, however, to inform the court of the law clerk's proscribed conduct. Furthermore, when he received the proposed form of order showing the law clerk as an unauthorized attorney, he failed to contact the court to correct that misrepresentation. In re Silber, 100 N.J. 517 (1985).

Here, for a period of approximately five years, respondent overtly permitted Infante to render services equivalent to those allowed to be performed by attorneys only. It is true that respondent had seen Infante conduct settlement negotiations at the Klitzman office as well and, consequently, might have mistakenly believed that Infante's actions were proper. Nevertheless, his ignorance does not serve to condone his unethical conduct. Additionally, he improperly divided his legal fees with Infante in hundreds of cases. By respondent's own account, Infante received a percentage of respondent's legal fees in "[o]ver a hundred [cases] a year, I would say. Now, in '76 it was over a hundred. In 1977 it was over 150, '78 it started going down and '79 it went

down. And '80 was gone [sic] . . . . If you want to balance it out over five years, it was approximately $20,000 a year." T134.

What distinguishes this matter from the above cited cases dealing with the sharing of legal fees with a non-attorney, however, is that, in the cases that resulted in a lengthy suspension, the attorneys had also employed the use of a paid solicitor to obtain clients. Here, there is no evidence that Infante solicited cases in respondent's behalf. Accordingly, absent from this matter is the practice commonly called "ambulance chasing," a practice that brings the entire profession into disrepute and is prohibited by statute. See Peraino v. De Mayo, 13 N.J. Misc. 233, 239 (C.P. 1935). In addition, although respondent's improprieties were repetitive and spanned a five-year period, they first began sixteen years ago and ended eleven years ago. "The public interest in proper and prompt discipline is necessarily and irretrievably diluted by the passage of time." In re Verdiramo, 96 N.J. 183, 187 (1984). Furthermore, after the parties terminated their professional relationship, respondent refused to accede to Infante's demands for payment on a percentage basis in those cases where Infante did little or no work. As respondent explained in his response to the hearing panel report, he considered it impermissible to pay Infante where insubstantial or no services had been rendered. The Board also accorded weight to respondent's asserted lack of knowledge of the impermissibility of the fee arrangement with Infante, an arrangement that respondent first witnessed at the Klitzman office and believed proper.

Although it is true that the lack of familiarity with the disciplinary rules is no excuse, it may temper the appropriate discipline to be imposed in this matter. See In re Eisenberg, 75 N.J. 454 (1978). The Board also noted that this is respondent's first encounter with the disciplinary system in seventeen years of practice.

In view of the foregoing mitigating factors, the Board is of the view that a public reprimand is sufficient discipline for respondent's derelictions. The Board unanimously so recommends. Two members did not participate.

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

Dated: 10/3/1991

By: Raymond R. Trombadore
Raymond R. Trombadore
Chair
Disciplinary Review Board