SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 88-200

IN THE MATTER OF

ANTHONY L. MEZZACCA

AN ATTORNEY-AT-LAW

Decision and Recommendation
of the
Disciplinary Review Board

Argued: December 21, 1988

Decided: December 8, 1989

Richard Engelhardt appeared on behalf of the Office of Attorney Ethics.

Anthony L. Mezzacca appeared pro se.

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 private reprimand, filed by the District VIII Ethics Committee, which the Board determined to hear as a presentment.

Respondent was admitted to the practice of law in New Jersey in 1962 and has been engaged in private practice in Middlesex County.

THE GERO MATTER (VIII-87-12E)

Respondent commenced representation of grievant in a personal injury case in 1982. As the date of the trial approached, respondent advised grievant to settle because of proof problems

resulting from an unfavorable medical report that did not link grievant's medical problem to the alleged food poisoning injury. Before grievant signed the settlement release, on his own initiative he took the file to an attorney who previously represented him on other matters, to seek his advice (1T136).[1] That attorney advised grievant to settle the case (1T137-1T138).

On December 17, 1986, grievant signed a settlement release (J-1 in evidence). On December 23, 1986, a check, along with a letter outlining the deductions of respondent's fee and other expenses from the $11,000 settlement, was prepared for grievant (P-4 in evidence). Respondent testified that this was the last time he saw grievant, and that grievant did not express any dissatisfaction with respondent's legal fees at that time (1T161).

Grievant's testimony differed substantially from respondent's. He testified that, on January 6, 1987, he went to respondent's office to pick up his check and to discuss his dissatisfaction with the fee charged (T64). He was dissatisfied both with respondent's large fee and with the fact that he, rather than respondent, was charged for the consultation with his prior attorney. Grievant testified that respondent threatened him with violence if he did not leave his office at once (P-5 in evidence).

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[1]IT denotes the transcript of the District Ethics Committee hearing on October 26, 1987.

Aron Van Duyne, a certified public accountant retained by the Office of Attorney Ethics, testified that his demand audit, which included review of the Gero account, indicated respondent had charged an excessive fee. The committee found that respondent had calculated his fee based upon the gross settlement amount, rather than first deducting his expenses and taking his fee on the net amount, as required by R. 1:21-7(d).

The committee found a violation of the contingency fee requirements as set out in R. 1:21-7, and a further violation of RPC 1.5 (DR 2-106).[2] The committee did not find clear and convincing proof that respondent threatened grievant with violence in violation of RPC 8.4(b) and (d) ((DR 1-102(A)(3) and (6)), and therefore dismissed that aspect of the case.

THE ADAMENTZ MATTER (VIII-87-39E)

On March 7, 1985, respondent was retained to represent grievant's interest in a personal injury action. On February 10, 1986, respondent disbursed a final settlement check in the amount of $4,578.12 to grievant (PA-1 in evidence). Respondent had received a total settlement of $10,000 from which he had paid himself $3,333, covered several other costs totalling approximately

[2]The Rules of Professional Conduct replaced the Disciplinary Rules effective September 1984. Respondent's conduct occurred before and after that date. Hence, both the Disciplinary Rules and the Rules of Professional conduct apply.

$448, and retained $1,650 in trust to pay for dental services provided to grievant.

The $1,650 was held to cover the outstanding dental bill, should subsequent action against grievant's own insurance company for PIP benefits be unsuccessful. In addition, respondent advised grievant that he would try to secure a reduction in the bill.

The Office of Attorney Ethics' accountant testified that the demand audit of respondent's trust account related to the Adamentz matter indicated that respondent took a straight one-third contingency fee. Such a fee was not in accordance with the requirements of R. 1:21-7. Furthermore, the audit indicated that, in May 1986, respondent removed the $1,650 held in trust through a check drafted to himself (PA-9 in evidence). Mr. VanDuyne further testified that he ascertained that respondent held that cash personally in his office, and still had the money at the time of the investigation (2T73-2T74).[3]

Six months after the settlement, grievant received a check from Liberty Mutual, under her own carrier PIP benefits, for $500 in settlement of the dentist's bill (2T13). Grievant testified that respondent advised her to cash this check for $500 and that it was his intention to settle with the dentist out of the $1,650 that he was still holding in trust. He would then return to her

[3]2T denotes the transcript of the hearing before the District Ethics Committee on December 17, 1987.

any money remaining from the $1,650 (2T15). Between February 1986 and August 1986, when respondent received the Liberty Mutual check, grievant never gave respondent permission to withdraw the $1,650 from the trust account (2T15). On April 20, 1987, grievant sent a $500 check directly to the dentist in settlement of his bill (2T16; PA-4 in evidence; PA-5 in evidence).

On May 12, 1987, grievant wrote respondent requesting the return of the $1,650, indicating that she had settled directly with the dentist for $500. In that letter, she gave respondent three working days to return her funds (PA-6 in evidence; PA-7 in evidence; PA-8 in evidence). In a letter postmarked June 24, 1987, respondent replied to grievant's request by stating he would not return her money unless she followed his suggestion of paying $500 to the dentist (although grievant had already indicated she had done so in her earlier letter to respondent) (PA-8A and PA-8B in evidence).

At the time of the hearing, respondent testified he did not release grievant's money to her because he was concerned that she was getting a double payment through her car insurance and her medical insurance, and that if she had received additional funds, the dentist was not getting a fair settlement (2T91). It was respondent's recollection that grievant agreed to attempt to get her own Blue Cross insurance to cover the dentist's bill beyond the $500 already received from her PIP coverage. Until the day of

the hearing, respondent was not sure that grievant had received the money from Blue Cross, and therefore had not released the funds. Following grievant's testimony at hearing that she never received any Blue Cross funds, respondent returned to grievant the $1,650 plus interest (BT3-BT4).[4]

The committee found that respondent failed to comply with the requirement of maintaining trust funds in a trust account, in violation of R. 1:21-6 and RPC 1.15. The committee did not find any evidence of misappropriation of funds. The committee recommended a strong private reprimand for this particular ethics violation.

DEMAND AUDIT

The Office of Attorney Ethics instituted a demand audit of respondent's trust account on July 9, 1987. Mr. VanDuyne, the certified public accountant, determined that respondent improperly calculated his legal fees in nine personal injury cases. The accountant also determined that in none of the audited cases did respondent execute a written contingent fee agreement, as required by R. 1:21-7(g). Fifteen cases, five each from 1985, 1986, and 1987, were randomly selected to be reviewed for compliance with the

[4]BT denotes the transcript of the hearing before the Disciplinary Review Board on December 21, 1988.

contingency fee rule. Of these fifteen cases, two cases reflected proper fees. Respondent's representation in these two cases commenced after the filing of the Adametz and Gero grievances, when respondent testified that he had changed his practices to accord with the contingency fee rule. In four other cases, respondent's counsel fee was less than that allowed by rule. However, in nine cases, respondent took improper fees (1T22-1T23). Respondent admitted to Mr. VanDuyne that he had always taken his fee from the gross recovery, rather than the net recovery, and that he had not provided clients with fee agreements (1T26).

The committee found respondent engaged in a pattern of unethical conduct by his improper calculation of legal fees, contrary to R. 1:21-7, and had violated RPC 1.5. The committee found it appalling that respondent, a licensed practitioner for the last twenty-five years, had never read the court rules governing legal fees. However, the committee did not find his ignorance a disguised attempt to steal money from his clients. They recommended a strong private reprimand, further demand audits of the trust account, and reimbursement of fees with interest to the nine audited individuals who were overcharged by respondent.

CONCLUSION AND RECOMMENDATION

Upon a de novo review of the full record, the Board is satisfied that the conclusions of the committee in finding respondent guilty of unethical conduct are supported by clear and convincing evidence.

Respondent admits that he applied a straight one-third fee against the gross recovery in all contingency cases. The improper taking of fees in the Adamentz matter, as well as in the nine matters discovered in the demand audit, occurred between 1985 and 1987, when R. 1:21-7 clearly stated that one-third could be deducted for legal fees only after expenses had been deducted from the gross recovery.

Respondent argued that an ethics violation could not be found in the Gero matter because he was retained in 1982, before the 1984 limit of thirty percent came into effect. In 1982, the pertinent limits on contingency fees were: 50% on the first $1,000 recovered; 40% on the next $2,000 recovered; and 33 1/3% on the next $47,000 recovered. Respondent contended that these limits should apply to the Gero settlement, which occurred in 1986. Under the calculations of the 1982 rule, respondent would be allowed to recover $3,832.58 on the net settlement. Under the 1986 rule, he would be allowed to recover $3,532.83 on the net recovery. Respondent was paid $3,666.66, which is $133.83 more than that allowed under the 1986 rule.

The Court addressed the issue of the impact of changes in the contingency fee rule in 1975. McMullen v. Conforti & Eisele, 67 N.J. 416 (1975). In McMullen, an attorney was retained in 1969, prior to enactment of the contingency fee rule. The case settled four months after the effective date of the contingent fee rule. The Court held that the new rule nonetheless applied, quoting the language of R. 1:21-7, which states that an attorney shall not "contract for, charge or collect" (emphasis added) a contingent fee in excess of the rule. The Court found that limiting the attorney's fee according to the new rule was not a frustration of the right of contract under the Constitution, but rather a proper exercise of its police power.

To collect more than the maximum amount fixed by the rule is a violation of the court rule as written; however, to collect a fee less than the maximum amount violates no rule. See Anderson v. Conley 206 N.J. Super. 132 (Law. Div. 1985); Kingman v. Finnerty 198 N.J. Super. 14 (App. Div. 1984). In at least ten cases, respondent collected more than that allowed under R. 1:21-7, as in effect in 1986. Therefore, he is guilty of the unethical conduct in violation of RPC 1.5.

In addition to these excessive fees, in Adamentz respondent removed from his trust account $1,650 of his client's funds that were held to pay a dental bill of his client. The client independently negotiated a final settlement of the bill, and then

requested a refund of her $1,650 trust money from respondent. Respondent never returned the funds until after the committee hearing in December 1987, almost two years after the funds were initially collected. This serious mishandling of trust monies in Adamentz demonstrates a cavalier attitude towards the handling of client funds. Although the committee recommended a private reprimand, the Board feels a recommendation of public discipline is required when the excess fee violations are combined with this trust fund violation.

In an analogous case, an attorney was publicly reprimanded for failing to maintain proper trust account records, where no evidence existed of any misappropriation of client funds. Matter of Fucetola, 104 N.J. 5 (1985). In that case, the Court confirmed that inadequate recordkeeping is a serious act of misconduct; not only does it reflect adversely upon the profession, but the potential for injury to a client is great.

In another case, an attorney withdrew $750 in cash from his trust account because the client refused to accept a check. In re Stern, 92 N.J. 611 (1983). The attorney ultimately held the cash for seven months because he could not reach the client. Further violations included the lack of separate trust and business accounts, no ledger cards, and the use of two retainers without performing legal services. These violations resulted in a one-year suspension.

In this case, respondent's unethical conduct consists of charging excessive fees to clients, and the conversion of trust account monies to cash without an appropriate accounting to the client. These actions injured the clients involved. Public discipline, as opposed to the private discipline suggested by the committee, is warranted.

The quantum of discipline must accord with the seriousness of the misconduct in light of all relevant circumstances. In re Nigohosian, 88 N.J. 308, 315 (1982). Aggravating and mitigating factors are part of the circumstances surrounding a violation and are, therefore, relevant and may be considered. In re Hughes, 90 N.J. 36 (1982).

At the ethics hearing, it was revealed that respondent had a random audit of his trust account in July 1986, one year before the 1987 demand audit. While contingency fees were not examined during that initial audit, six other deficiencies were uncovered concerning the proper maintenance of trust accounts. Mr. VanDuyne testified that three of the original 1986 deficiencies were still occurring as of the audit in 1987. These deficiencies, such as the disbursement of checks against uncollected funds, have great potential for injury to the public. The Board considers the unresolved deficiencies from the earlier audit an aggravating factor in deciding the appropriate discipline to be imposed.

The Board also notes that respondent has previously been publicly disciplined. In re Mezzacca, 67 N.J. 387 (1975). In that case, respondent was publicly reprimanded for his overzealous representation of his client before an administrative review board. Although it is appropriate to consider prior discipline in imposing sanctions, In re McAlevy, 94 N.J. 201, 208 (1983), the Board is cognizant that this prior behavior occurred over fifteen years ago. The prior discipline, therefore, is not a strong factor in the Board's recommendation.

In mitigation, the Board was impressed with respondent's extreme candor and admission of wrongdoing, which are mitigating factors in respondent's favor. Matter of Robinowitz, 102 N.J. 57, 62 (1986); In re Rosenthal, 90 N.J. 12, 17 (1982).

The Board unanimously recommends that respondent be publicly reprimanded. Two members did not participate.

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

DATED: 12/8/1989

Raymond R. Trombadore
Chair
Disciplinary Review Board