SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 13-212
District Docket No. XIV-2008-0464E

IN THE MATTER OF	
DAVID GRUEN	
AN ATTORNEY AT LAW	

Decision

Argued: November 21, 2013

Decided: December 19, 2013

Hillary Horton appeared on behalf of the Office of Attorney Ethics.

David H. Dugan III appeared on behalf of respondent.

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

This matter was before us on a motion for reciprocal discipline filed by the Office of Attorney Ethics (OAE), following New York's imposition of a censure on respondent. The petition filed in New York charged respondent with violating the equivalent of New Jersey RPC 7.3(d) (a lawyer shall not

compensate or give anything of value to a person or organization to recommend or secure the lawyer's employment by a client, or as a reward for having made a recommendation resulting in the lawyer's employment by a client) (charge one); RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) and RPC 8.4(d) (conduct prejudicial to the administration of justice) (charge two); RPC 1.15(a) (failure to safeguard funds) and RPC 8.4(c) (charge three); RPC 8.4(d) (charge four); RPC 1.15(d) (recordkeeping) (charge five); RPC 1.15(a) (charge six); and RPC 1.15(d) and RPC 8.4(d) (charge seven)[1].

In his answer, respondent admitted the allegations of charges four through seven.

We determine to impose a retroactive one-year suspension.

Respondent was admitted to the New Jersey and New York bars in 1999 and 2000, respectively. He has no history of discipline.

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[1] Each charge, except charge five, also alleged that respondent had violated DR 1-102(A)(7) (a lawyer or law firm shall not engage in any other conduct that adversely reflects on the lawyer's fitness as a lawyer), which has no counterpart in the New Jersey RPCs.

The following facts gave rise to this matter.

Beginning in 2000, approximately the time that respondent was admitted to the New York bar, he worked in the same building as Nelson Bloom, an insurance broker and self-proclaimed certified paralegal. Although Bloom purported to be respondent's landlord, there was no formal rental agreement between them. Bloom was a friend of respondent's parents.

Bloom referred individuals to respondent for representation in personal injury cases. According to Bloom, he and respondent had an agreement whereby respondent would pay Bloom a percentage of his recovery on any referred cases. Respondent denied entering into this agreement with Bloom, maintaining that he paid Bloom monthly to cover rent and any other services that Bloom's staff provided for his law practice. Respondent was unable to specify the amount of the rent or how it was calculated.

Respondent left Bloom's building toward the end of 2004. He claimed that Bloom had accused him of owing him money, made threatening phone calls to him, tried to get a religious court to intervene, and threatened to report respondent to the New York grievance committee. Respondent admitted that his personal injury business "dried up," after he left Bloom's building.

Respondent claimed that, as a newly admitted attorney, he was not sufficiently familiar with the rules of practice and recordkeeping requirements. However, he admitted that he had a background in finance and accounting.

Following the hearing and post-hearing submissions from the parties, New York Special Referee John P. Clarke issued a report, finding respondent guilty of all of the charges.

Charge one alleged that respondent violated the equivalent of New Jersey RPC 7.3(d) by improperly paying Bloom for the referral of clients. The special referee found, by a fair preponderance of the evidence, that the petitioner had proven that respondent was engaged in an improper fee-sharing/referral arrangement with a non-lawyer. The special referee noted that respondent had been retained in over 600 personal injury matters during his association with Bloom, but had been retained in only "a couple of dozen" personal injury claims since his "disassociation" with Bloom. The special referee believed Bloom's testimony that he had received fees from respondent from the personal injury matters. The special referee found that the documentary evidence also supported the fee-sharing arrangement and that respondent's testimony on this point was not credible.

Charge two alleged that respondent violated the equivalent of New Jersey RPC 8.4(c) and (d) by filing improper retainer and closing statements with the Office of Court Administration ("OCA"). Local filing rules required respondent to report the "name, address, occupation and relationship of the person referring the client" on the forms. From February 2001 to October 2004, respondent filed 600 retainer statements. On 593 of them, he wrote "former client" on the form. He admitted that his description of the source of the referral was not always accurate.

In addition, local filing rules required that respondent report, on the closing statement, disbursements paid to others for charges "such as expert testimony, investigative or other services, that were 'properly chargeable to the recovery of damages.'" Respondent was charged with failing to report all of the required information and failing to report his "actual disbursements" on the closing statements in 600 matters. Further, the petition alleged that respondent failed to personally sign the retainer and closing statements, in contradiction of the rules, and that he filed closing statements on behalf of four clients, indicating that he had paid those

clients their settlement funds, when he knew or should have known that he had not.

The special referee noted that implicit in the petition, but not charged, was the possibility that Bloom was running the law practice and that the information on the statements was intended to misrepresent the source of the referrals. The special referee found that, at the very least, respondent was derelict in his duty to make sure that the information reported to the OCA was accurate. The special referee found that respondent had violated RPC 8.4(c) and RPC 8.4(d).

Charge three alleged that respondent violated the equivalent of New Jersey RPC 1.15(a) and RPC 8.4(c), by engaging "in a pattern and practice of misappropriating funds from his clients' personal injury settlements." Specifically, in at least 93 of 600 matters, respondent was charged with calculating his contingent fee on the gross settlement, instead of the net sum recovered, as required by New York rules. As a result, respondent took "over $12,000 from his clients to which he was not entitled."

Respondent admitted that his calculations were performed incorrectly, but blamed them on his inexperience and on the poor instructions that he had received from other attorneys. He also

contended that, in many instances, he had undercharged his clients for expenses. According to the special referee, he provided no records to support that contention and, in addition, "there was a serious question as to whether or not the expenses to which he referred as having been absorbed were proper disbursements or office overhead."

The special referee sustained the charge, noting that whether respondent's calculations were intentionally meant to shortchange the client could be "discussed in mitigation." Notwithstanding this remark, the special referee concluded that respondent's actions were intentional, inasmuch as he found a violation of DR 1-102(A)(4), the equivalent of New Jersey RPC 8.4(c).

Charge four alleged that respondent violated the equivalent of New Jersey RPC 8.4(d) by routinely failing to "timely file retainer and closing statements" with the OCA. The special referee sustained the charge, after he examined the available statements and considered respondent's admission of the allegation.

Charge five alleged that respondent violated the equivalent of New Jersey RPC 1.15(d) by failing to "maintain a ledger book

or similar record of deposits into and withdrawals from his attorney escrow account." Respondent admitted the allegation.

Charge six charged respondent with violating the equivalent of New Jersey RPC 1.15(a) by improperly commingling personal and/or business funds with "funds entrusted to him as a fiduciary." Specifically, respondent failed to withdraw his earned legal fees from his escrow account. The special referee sustained the charge, after respondent's admission and after his own review of the evidence supporting the charge.

Finally, charge seven alleged that respondent violated the equivalent of New Jersey RPC 1.15(d) and RPC 8.4(d) by failing "to maintain records and receipts evidencing his disbursements in personal injury actions for a period of seven years." The special referee sustained charge seven, finding that the evidence supported respondent's admission in his amended answer.

As to the mitigating factors that respondent asserted, the special referee acknowledged the character witness and letters on respondent's behalf. The special referee noted further:

> The respondent's attempt at mitigation as to Charges Three, Four, Five, Six and Seven are based primarily on his inexperience and naivete having come into a new area directly from law school without the benefit of any meaningful guidance.

Moreover, the influence which he did have was from the dishonest Nelson Bloom. Specifically relative to Charge Three, it is suggested that he naively relied on other attorneys in computing his fee from the gross proceeds of settlements. He also stated that he in fact absorbed expenses which could have been charged in many cases (T.166). Counsel also notes that none of the clients ever complained.

A failure to read the rules relative to the closing statement and its requirements relative to the computation of a fee might be better understood if it weren't for the fact that the closing statement itself under item 13 requires detailed information about disbursements including the name and address of the person paid and the reason for the payment. That item is the next to last on the page just above where the respondent signed his name. It is not unreasonable to believe that one would at least pause and note that item before signing almost 600 statements where all (but one filed in 2005) failed to list the required information. Although the respondent claimed that he absorbed expenses in many cases, no closing statements showing that absorption were brought to my attention.

. . . .

Finally on the issues raised by Charge Three, the argument that no client complained does not affect the propriety of the conduct in any event.

The overall impression made by the respondent to me is that he didn't actually prepare the statements of retainer or closing statements or supervise their preparation or in many cases even personally sign them. Virtually all of his statements

> of retainer were filed late (usually at the time of the filing of the closing statement) with the request that they be accepted nunc pro tunc due to "inadvertent secretarial error." Such errors do occur but I found no retainer statement where that error was not claimed.
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> As for the other charges wherein the respondent admitted the allegations, his explanations of not knowing the rules and his inexperience would have merit if it were not part of a bigger picture involving the substance of the overall charges.
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> Relative to the principal matters alleged in Charge One and Two, mitigation is difficult to consider because the respondent admits to no wrongdoing. He may have been inexperienced and taken advantage of by Nelson Bloom who may be lacking in character, greedy and otherwise unreliable, but his explanation of the arrangement with Bloom is not credible. Bloom's testimony that he was sharing in the legal fees is more believable when all of the admitted facts and circumstances are considered. The filing of retainer statements claiming that the clients were all "former clients" is consistent with an attempt to hide the source of the business which apparently was Bloom and his insurance/translation/immigration business.
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> [Ex.F at 10 to 12.]

From the testimony of respondent and Bloom, the special referee concluded that Bloom had been running a law practice for some time and that, from 2000 to 2004, respondent was the "front man" attorney. The special referee found that, although

respondent may have been drawn into the situation by Bloom, he had participated in and facilitated the improper conduct.

On September 9, 2008, the Supreme Court of New York, Appellate Division, granted the Grievance Committee's motion to confirm the special referee's report. The Appellate Division granted respondent's cross-motion only to the extent that he sought to limit the discipline imposed. In determining the proper measure of discipline, the Court considered that respondent had no disciplinary history as well as the following mitigating factors:

> The respondent has since moved to a new office and extricated himself from his relationship with Mr. Bloom; the respondent has cooperated with the Grievance Committee's investigation; the respondent does not constitute a threat to clients or the public; the respondent denies any willful or intentional wrongdoing; the respondent is remorseful; and the respondent has rectified his billing practices.
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> [Ex.I.]

The Court publicly censured respondent for his misconduct.[2]

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[2] A censure in New York is the equivalent of a reprimand in New Jersey.

Following a review of the full record, we determine to grant the OAE's motion.

In his brief to us, respondent's counsel noted that the special referee's findings were made by "a fair preponderance of the evidence," a lower standard of proof than that employed in New Jersey. However, in reciprocal discipline proceedings, "a final adjudication in another court, agency or tribunal, that an attorney admitted to practice in this state . . . is guilty of unethical conduct in another jurisdiction . . . shall conclusively establish the facts on which it rests for purposes of a disciplinary proceeding in this state." R. 1:20-14(a)(5). Thus, we adopted the findings of the New York court.[3] Respondent was found guilty of improper fee-sharing, overcharging his

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[3] Counsel also argued that, as to charge one, the wrong disciplinary rule had been cited and that, therefore, the wrong RPC is at issue. The misconduct at issue, however, was clear from the New York proceedings. If respondent was prejudiced by the improper charges, his then-counsel should have argued the point in New York. In addition, as to charge three, respondent's miscalculation of his fee, a violation of RPC 1.15(a), counsel asserted that the OAE cited the wrong RPC. According to counsel, respondent should have been charged with violating RPC 1.5(a) (unreasonable fee). Regardless of the specific RPC charged, the special referee determined that respondent's conduct was dishonest. We are bound by those findings.

clients, recordkeeping violations, commingling personal and trust funds, and filing inaccurate forms with the OCA, all in violation of RPC 1.15(a), RPC 1.15(d), RPC 7.3(d), RPC 8.4(c), and RPC 8.4(d).

Reciprocal disciplinary proceedings in New Jersey are governed by R. 1:20-14(a)(4), which provides:

> The Board shall recommend imposition of the identical action or discipline unless the Respondent demonstrates, or the Board finds on the face of the record upon which the discipline in another jurisdiction was predicated that it clearly appears that:
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> (A) the disciplinary or disability order of the foreign jurisdiction was not entered;
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> (B) the disciplinary or disability order of the foreign jurisdiction does not apply to the Respondent;
>
> (C) the disciplinary or disability order of the foreign jurisdiction does not remain in full force and effect as the result of appellate proceedings;
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> (D) the procedure followed in the foreign matter was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or
>
> (E) the unethical conduct established warrants substantially different discipline.

A review of the record does not reveal any conditions that would fall within the ambit of subparagraphs (A) through (D).

The New York special referee found that charge one of the grievance against respondent had been sustained, that is, that Bloom referred clients to respondent and that, incident to those referrals, respondent paid sums of money to Bloom.

In a case that is strikingly similar to the one at hand, and involved Bloom as well, the attorney received a one-year suspension. In In re Berglas, 190 N.J. 357 (2007), the attorney shared office space with Bloom and engaged in an arrangement whereby Bloom referred clients to Berglas, who then shared his legal fee equally with Bloom. In the Matter of Chaim Berglas, DRB 06-265 (December 21, 2006) (slip op. at 3). Berglas paid Bloom nothing for rent, for the use of telephone and secretarial services, or for other typical law office expenses provided to him. Id. Berglas was aware, at the time of his misconduct, that his actions violated the ethics rules. Id. Two hundred referrals were at issue, over a three-year period. Id. at 9.

Like respondent, Berglas had been censured by New York disciplinary authorities.[4]

Also instructive are In re Birman, 185 N.J. 342 (2005) (reciprocal discipline imposed on attorney who agreed to compensate an existing employee for bringing new cases into the office after she offered to solicit clients for him; one-year retroactive suspension imposed) and In re Silverman, 185 N.J. 133 (2005) (attorney who paid a chiropractor a $400 fee for each case that the chiropractor referred to him received a one-year suspension).

The OAE pointed out that respondent, like Berglas, was disciplined in New York for paying Bloom for referring clients. Like Silverman, respondent paid a non-lawyer to refer clients to him. Both respondent and Berglas engaged in their improper activity for approximately four years.

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[4] We considered a second matter against Berglas, simultaneously. In that matter, he was guilty of lack of candor to a tribunal, specifically, encouraging clients to file INS affidavits containing false addresses in nine matters. We imposed a reprimand for that misconduct, along with the one-year suspension. The Court imposed a one-year suspension.

By way of aggravation, the OAE asserted that respondent failed to inform New Jersey disciplinary authorities of his New York discipline and that over 600 matters were involved in the referral scheme. Moreover, respondent miscalculated his fee in at least 93 matters, resulting in $12,000 in unjust enrichment. The OAE recommended that we impose a one-year suspension.

Respondent's counsel sought to distinguish Berglas from the case at bar. Counsel argued that, in addition to the different RPCs involved, Berglas had been practicing law for nine years, before his misconduct occurred. In the current matter, the misconduct took place within the first years that respondent had been practicing law.

Counsel also set forth a number of mitigating factors that, he asserted, were considered by the New York Court. Specifically, respondent extricated himself from his arrangement with Bloom; he cooperated with New York disciplinary authorities; he did not pose a threat to the public; he denied any willful or intentional wrongdoing; he was remorseful; he had no disciplinary history; the misconduct occurred a long time ago (2000-2004); and respondent's New York discipline took place five years ago.

As to the aggravating factors cited by the OAE, counsel stated that respondent's failure to notify New Jersey disciplinary authorities of his New York discipline was a "technical" violation, given that the OAE learned of the matter almost immediately. With respect to the number of cases involved and the improperly calculated fees ($12,000), counsel noted that the 600 cases were handled over a five-year period and that $12,000 divided by 93 cases equates to approximately $130 per case. Respondent's counsel urged us to impose a reprimand.

In our view, this matter is clearly akin to Berglas, in which the attorney was found guilty of compensating Bloom for referring cases to him and was guilty of lack of candor to a tribunal. Respondent, too, is guilty of other violations, in addition to his payment of referral fees, specifically, misrepresentation, conduct prejudicial to the administration of justice, failure to safeguard client funds, and recordkeeping violations.

We considered, however, other mitigation. Respondent was a novice attorney when he committed the violations. Also, although the record does not explain the delay in this matter,

respondent should not be penalized for it.[5] The passage of time is a mitigating factor. In re Verdiramo, 96 N.J. 183, 187 (1984). We thus, determine to impose a one-year suspension, retroactive to September 9, 2008, the date of the New York Appellate Division's decision imposing respondent's censure.

Member Gallipoli did not participate. Members Hoberman and Singer abstained.

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs and actual expenses incurred in the prosecution of this matter, as provided in R. 1:20-17.

Disciplinary Review Board
Bonnie C. Frost, Chair

By: Isabel Frank
Isabel Frank
Acting Chief Counsel

[5] As previously noted, although respondent failed to notify the OAE of his discipline in New York, the OAE learned of it almost immediately. The delay, thus, was not attributable to respondent.

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of David Gruen
Docket No. DRB 13-212

Argued: November 21, 2013

Decided: December 19, 2013

Disposition: One-year retroactive suspension

Members	Disbar	One-year Retroactive Suspension	Reprimand	Abstained	Disqualified	Did not participate
Frost		X				
Baugh		X				
Clark		X				
Doremus		X				
Gallipoli						X
Hoberman				X		
Singer				X		
Yamner		X				
Zmirich		X				
Total:		6		2		1

Isabel Frank
Acting Chief Counsel