PREME COURT OF NEW JERSEY
sciplinary Review Board
Docket Nos. DRB 09-075 and 09-134
District Docket Nos. I-2008-002E and
I-2007-006E

IN THE MATTERS OF

GARY S. TRACHTMAN

AN ATTORNEY AT LAW

Decision

Argued: June 18, 2009 (DRB 09-134) and July 16, 2009 (DRB 09-075).

Decided: September 30, 2009

Jeffrey L. Gold appeared on behalf of the District I Ethics Committee (DRB 09-075).

Alfred J. Verderose appeared on behalf of the District I Ethics Committee (DRB 09-134).

Respondent, through counsel, waived appearance for oral argument.

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

These matters were before us on a recommendation for discipline filed by the District I Ethics Committee ("DEC"). When transferring active client files to another attorney,

respondent entered into an improper fee-sharing agreement with that attorney and failed to obtain his clients' approval for the transfer of their cases. The DEC recommended a separate reprimand for each of the two complaints. We determine to impose a reprimand for respondent's combined conduct in these matters.

Respondent was admitted to the New Jersey bar in 1990. He has no prior discipline.

I. **<u>The Pelosy and Other Matters – Docket No. DRB 09-075 District Docket No. I-2008-002E</u>**

A. <u>The Pelosy Matter</u>

Count One of the amended complaint alleged that, in July 2001, Angela Pelosy retained respondent to represent her for injuries sustained in a slip-and-fall accident. In July 2003, Trachtman filed a complaint in Superior Court.

On May 4, 2004, pursuant to a fee-sharing agreement, respondent and another attorney, Keith Smith, executed a substitution of attorney under which Smith became the attorney of record in the case.

Respondent entered into a November 5, 2008 stipulation with ethics authorities, in which he admitted that he had failed to seek Pelosy's consent to the transfer of the file to Smith.

Respondent stipulated violations of RPC 1.4, presumably (c) (failure to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation), RPC 1.5, presumably (e)(1) (improper fee-sharing agreement with another attorney), RPC 1.5(e)(2), and RPC 1.5 (e)(3) (failure to disclose to client fee-sharing arrangement with another attorney). Respondent also stipulated that he failed to cooperate with ethics authorities in the investigation of the matter until finally retaining counsel, a violation of RPC 8.1(b).

B. The Other Matters

Count two of the complaint alleged similar misconduct arising out of fee-sharing with Smith in five additional matters: Polkrass, Maurer, Nellom, Preston, and Wilson. The facts in the complaint are scanty with regard to these matters.

According to the complaint, in the Polkrass matter, respondent allowed the statute of limitations to expire without filing a complaint, a violation of RPC 1.1, presumably (a) (gross neglect), RPC 1.3 (lack of diligence), RPC 1.16 (no subsection cited), and RPC 8.1, presumably (b) (failure to cooperate with an ethics investigation).

Respondent denied the allegations in count two, stating in his answer that the two-year statute of limitations fell on a Saturday and that, as allowed by court rule, he filed the complaint on the following Monday.

Regarding the Crosby matter, the complaint alleged that respondent allowed the statute of limitations to expire without filing a complaint, a violation of RPC 1.1, presumably (a) (gross neglect), RPC 1.3 (lack of diligence), RPC 1.16 (no subsection cited), and RPC 8.1, presumably (b) (failure to cooperate with an ethics investigation).

In his answer, respondent denied the allegations, but provided no other information about the matter. The presenter did not otherwise develop a case against respondent with regard to the Crosby matter. In fact, the matter was never addressed at the DEC hearing.

In the remaining matters, Maurer, Nellom, Preston, and Wilson, respondent admitted having executed fee-sharing agreements with Smith, under which Smith took over the representations. Respondent stipulated that he had not obtained his clients' written consent to the fee arrangements, in violation of RPC 1.4, presumably (c), and RPC 1.5, presumably (e)(2) and (3).

Although the amended complaint omitted charges of RPC 1.4 and RPC 1.5 for the Polkrass and Crosby matters, respondent stipulated having violated those RPCs in all of the matters cited in the complaint, presumably to include Polkrass and Crosby.

In addition, respondent stipulated that he had executed fee-sharing agreements with attorneys other than Smith in about 110 other matters, as explained below. Respondent stipulated that, in all of those matters, he had failed to obtain their consent to the transfer of their files, in violation of RPC 1.4, presumably (c), and RPC 1.5, presumably (e).

Respondent testified that, in mid-2004, he was experiencing emotional problems, for which he took prescribed antidepressants. He was irritable and had more cases than he could comfortably handle. Therefore, he approached several attorneys about transferring excess cases to them. According to respondent, attorney Smith was the only attorney with whom he entered into a fee-sharing agreement, in 2004, who was not a certified trial attorney.

Then, on August 20, 2004, respondent's vehicle was "rear-ended" by a dual-axle farm truck. He sustained numerous injuries, the most serious of which were to his spine, including

several disc herniations in his neck and lower back, carpal damage to his wrists, and injuries to his shoulders. He was placed on pain medications and became so debilitated that he could not handle his workload. Thus, he decided to shut down his law practice. Of the approximately 120 open cases in the office, he transferred 110 of them to four law firms with certified civil trial attorneys.

The remaining cases, those rejected by the certified attorneys, were transferred to Smith. Shortly after turning them over and substituting out of the cases, respondent began to get complaints about Smith from those clients. Respondent then suggested that his former clients file an ethics grievance against Smith, if he failed to adequately represent them.

According to respondent, he was trying to do the right thing by protecting his clients, once he knew that he could no longer physically or mentally handle their matters. He did not review the Rules of Professional Conduct or contact anyone about the proper way to handle such file transfers. Thus, he used the same flawed method for all of the matters and ran afoul of the rules. Respondent stated:

> I just want you to understand that I really wasn't myself after the accident. I was on

various pain medications beginning in August 2004.

I stopped taking on clients and practicing. I shut down my practice. I went through numerous surgeries over the next few years. My wife left me with our young daughter, and she filed for divorce.

In 2007, when the Ethics Committee was investigating this, I didn't understand why they were investigating me. I now understand why they were investigating me.

In the spring of 2008, my behavior got more uncharacteristic for me. At that point, I was admitted to the hospital where I was taken off current pain medication and treated for a psychiatric condition. I was sent to an outpatient program when I left the hospital, and I continued to get therapy to help me with my coping skills.

I feel that I am making progress every week and that my life is getting better.

[T92-6 to T93-3.][1]

In addition to voluminous medical records evidencing his accident injuries and the attendant care required, respondent offered the testimony of his psychiatrist, Indra K. Cidambi, M.D., of the Carrier Clinic. According to Dr. Cidambi, respondent was admitted to Carrier, on February 25, 2008, for depression and suicidal ideation. Respondent had indicated his desire to slit his wrists and place them under warm water or to

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[1] "T" refers to the transcript of the November 18, 2008 DEC hearing.

take an overdose of pain pills. Dr. Cidambi diagnosed respondent as suffering from hypomanic bipolar disorder II.

Dr. Cidambi testified that respondent's bipolar disorder affected his judgment, as did the pain medications (Oxycontin and Percocet) and antidepressant (Elavil) that he had been taking prior to his hospitalization. Dr. Cidambi also found, through a review of respondent's medical records, that he had suffered a traumatic brain injury in the automobile accident. His cognitive function was impaired and he had substantial memory loss. Later, his motor skills were adversely affected, as is evident from two very poorly handwritten letters to ethics authorities, attached to the original ethics complaint.

Dr. Cidambi also testified that respondent had likely been suffering from an undiagnosed bipolar disorder since his college days. Respondent was pre-disposed to bipolar behavior, which had been triggered by both stress and the automobile accident. The doctor also surmised that respondent's poor handling of the file transfers to Smith fit the profile of a person in a hypomanic (a "little bit below" manic) phase. Although he completed the task of transferring the files, "the way it was handled was totally not the way it should have been, which is very much like a hypomanic episode."

Dr. Cidambi also noted that, after respondent's in-patient treatment, he successfully completed an out-patient treatment regimen and continues to take medication for his condition. She opined that respondent needed at least six months of further treatment and a re-evaluation of his progress, presumably before he would be ready to re-open his law office.

Respondent also offered the testimony of his close family friend, Douglas Levin, who has known him since before college. According to Levin, respondent had always been a very responsible person, of high moral character. He also recalled that respondent was a good attorney, having represented him satisfactorily in a personal injury matter.

Levin lost touch with respondent for sometime thereafter. In early 2007, respondent called to tell him that his wife had left him. Levin visited his old friend and found him "very much overweight, very lethargic, which you know I just – I didn't understand because he had been very active prior, and very very distraught, and the house was very dark, and I mean it was like he was in a cave."

Levin recalled that he was so concerned about respondent that he committed to extended stays at respondent's house to look after him. During one of those stays, respondent "was

thinking about harming himself." A month later, respondent's mother called Levin to tell him that respondent was suicidal. He immediately went to respondent's house and took him to the emergency room. It was this episode that resulted in respondent's hospitalization and Carrier Clinic stay in February 2008.

The DEC found respondent guilty of having violated RPC 1.4, presumably (c), RPC 1.5 presumably (e), and RPC 8.1, presumably (b) with regard to all of the matters, including the approximately 110 additional matters transferred to other attorneys.

Based on respondent's explanation in Polkrass, the DEC dismissed the RPC 1.1, RPC 1.3, and RPC 1.16 charges for lack of clear and convincing evidence. The DEC did not address the Crosby matter.

The DEC recommended a reprimand.

II. The Rintchen Matter – Docket No. DRB 09-134 District Docket No. I-2007-006E

On February 9, 2009, respondent and the DEC entered into a disciplinary stipulation wherein respondent admitted essentially all of the charges contained in a November 21, 2007 ethics complaint. The complaint charged respondent with having violated

RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), RPC 1.4(a) and (b) (failure to communicate with the client), RPC 1.5(e)(1) through (3) (improper fee-sharing with another attorney), and RPC 8.1(b) (failure to cooperate with an ethics investigation).

On July 18, 2002, Adam Rintchen retained respondent to represent him in a personal injury action against Goodwill Industries. On November 7, 2003, respondent filed a complaint in Camden County Superior Court, but took no action to serve the defendant. Respondent conceded that he lacked diligence in that regard.

On May 4, 2004, respondent and Smith entered into a fee-sharing agreement, under which Smith took over the litigation and respondent would receive an admittedly disproportionate fee of forty percent for his legal services. Respondent stipulated that the agreement violated RPC 1.5(e)(1). Respondent also stipulated that he had not obtained his client's consent to the arrangement prior to the transfer, in violation of RPC 1.5(e)(2) and (3).

Finally, as in Pelosy and the others matters above, respondent stipulated his failure to cooperate with the ethics

investigation until he retained counsel to represent him, a violation of RPC 8.1(b).

The DEC found respondent guilty of having violated RPC 1.3, RPC 1.4(a) and (b), RPC 1.5(e)(1) through (3), and RPC 8.1(b).

The DEC apparently dismissed the RPC 1.1(a) charge (gross neglect). Respondent did not stipulate a violation of that rule and the DEC made no finding in that regard.

The DEC also considered the testimony of Dr. Cidambi and Mr. Levin, incorporating into this record the transcript of their testimony and the exhibits from the Pelosy matter.

After considering the mitigating medical evidence and noting that some of the misconduct took place before respondent's automobile accident, the DEC recommended the imposition of a reprimand.

Upon a de novo review of the record, we are satisfied that the DEC's conclusion that respondent's conduct was unethical was fully supported by clear and convincing evidence.

As to DRB 09-075, in Pelosy, Polkrass, Maurer, Nellom, Preston, Wilson, and about 110 other unidentified matters, respondent stipulated that he entered into a fee-sharing agreement with Smith and other attorneys, when he concluded that he could not handle all of their matters. RPC 1.5(e) states:

> Except as otherwise provided by the Court Rules, a division of fee between lawyers who are not in the same firm may be made only if:
>
> (1) the division is in proportion to the services performed by each lawyer, or, by written agreement with the client, each lawyer assumes joint responsibility for the representation; and
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> (2) the client is notified of the fee division; and
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> (3) the client consents to the participation of all the lawyers involved; and
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> (4) the total fee is reasonable.

Respondent conceded that he had not obtained his clients' authorizations prior to transferring their files, a violation of RPC 1.5(e)(2) and (3). He also acknowledged that his fee-sharing agreement in Rintchen called for a disproportionately large fee for his work performed, a violation of RPC 1.5(e)(1).

In all of the matters, respondent also failed to obtain his clients' consent to the transfer of their files to other attorneys, a violation of RPC 1.4 (c).

Respondent also acknowledged that he initially failed to cooperate with ethics authorities in the investigation of all of the nearly 120 matters in question, a violation of RPC 8.1(b). To his credit, respondent ultimately retained counsel and cooperated fully thereafter.

The DEC correctly dismissed the additional charges in the Polkrass matter, dealing with respondent's alleged failure to timely file the complaint. Respondent's explanation made it clear to the DEC that he had, in fact, filed a timely complaint in that matter. So, too, in the Crosby matter, equivalent charges were properly dismissed.

In sum, in the approximate 120 matters under DRB 09-074, during the winding down of his law practice, respondent violated RPC 1.5(e)(1), RPC 1.4(c) and RPC 8.1(b).

In DRB 09-134 (Rintchen), respondent stipulated to having violated RPC 1.3, RPC 1.4(c), RPC 1.5(e)(1) through (3), and RPC 8.1(b).

By far, respondent's most pervasive misconduct had to do with the nearly 120 improper fee-sharing agreements. Two attorneys who have failed to observe the requirements of RPC 1.5(e) have received admonitions. In the Matter of Keith T. Smith, DRB 08-187 (October 1, 2008) (attorney entered into disproportionate fee-sharing agreement with another attorney and failed to obtain the client's consent to the representation; the attorney also allowed the client's complaint to be dismissed, failed to take steps to have it reinstated, and failed to contact the client about the status of the case, violations of

RPC 1.1(a), RPC 1.3, RPC 1.4(b), and (c)) and In the Matter of Ellan A. Heit, DRB 04-138 (May 24, 2004) (attorney accepted case referred by out-of-state attorney without notifying the client that the other attorney would be handling the case; the attorney also shared the fee disproportionately with the other attorney, who performed no work nor shared responsibility for the representation).

Here, the sheer number of cases involved (about 120) compels us to impose a sanction greater than an admonition.

In mitigation, respondent's ability to handle his workload was very clearly compromised by serious physical and mental health issues. In addition, it appears that respondent was attempting to protect his clients' interests when he recognized that he could no longer function effectively as an attorney and sought to close his office. Unfortunately, he ran afoul of the rules in his fee-sharing agreements with Smith, who then dropped the ball.

In further mitigation, respondent admitted his wrongdoing and has no prior discipline in almost twenty years at the bar.

We determine that a combined reprimand is the appropriate sanction for the totality of respondent's misconduct, which

occurred at approximately the same time, that is, during the winding down of respondent's law practice.

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
Louis Pashman, Chair

By: [signature]
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

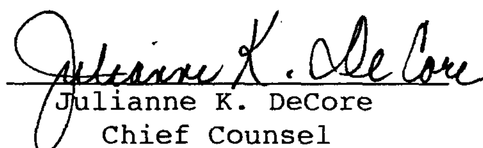
In the Matter of Gary S. Trachtman
Docket Nos. DRB 09-075 and DRB 09-134

Argued: June 18, 2009 and July 16, 2009

Decided: September 30, 2009

Disposition: Reprimand

Members	Disbar	Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Pashman			X			
Frost			X			
Baugh			X			
Clark			X			
Doremus			X			
Stanton			X			
Wissinger			X			
Yamner			X			
Zmirich			X			
Total:			9			



Julianne K. DeCore
Chief Counsel