IP

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 97-046

IN THE MATTER OF

SEYMOUR WASSERSTRUM,

AN ATTORNEY AT LAW

Decision

Argued: April 17, 1997

Decided: June 30, 1997

Daniel A. Zehner appeared on behalf of the District I Ethics Committee.

Anthony J. Zarillo, Jr., 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 based on a recommendation for discipline filed by the District I Ethics Committee ("DEC"). The four-count complaint charged respondent with violations of RPC 1.15(failure to safekeep property) and R.1:21-7(contingent fees)(count one); RPC 1.5(c)(failure to provide client with a written retainer agreement) and R.1:21-7(g)(failure to prepare and furnish client with a signed closing statement)(count two); RPC

1.15(a)(failure to safekeep property), R.1:21-6(b)and (h) (failure to maintain required bookkeeping records for a period of seven years) (count three); and finally RPC 1.8(a)(conflict of interest – business transaction with a client) and RPC 1.8(j)(conflict of interest – acquiring a proprietary interest in the cause of action)(count four).

Respondent was admitted to the New Jersey bar in 1973. He maintains a law office in Vineland, New Jersey. Respondent has no history of discipline.

* * *

The heart of this matter revolves around the claim by the grievant, James E. Moore, that respondent failed to turn over to him settlement proceeds from two personal injury matters in which Moore was involved. The complaint alleges that respondent improperly misappropriated and converted to his own use the net proceeds of the settlements.

The essential facts of this matter are in dispute. This matter, thus, boils down to a question of credibility of the witnesses.

At the time of the DEC hearing, Moore was forty years old and a recipient of social security insurance benefits ("SSI") since 1984 because of a disability, ostensibly a history of seizures. Moore received $450 a month in SSI. Moore testified that, although he had a ninth grade education, he could not read or write.

Moore has a criminal record for, among other things, sexual harassment, possession of heroin, violation of a restraining order and theft. Moore testified that respondent had represented him in a number of matters, including several DWI charges and other motor vehicle violations. Moore admitted that respondent never charged him a fee. During one of the interviews with the DEC investigator, Moore informed him that he had been referred to respondent by an acquaintance, Saul Harris. Moore met Harris while the two were in jail. At the DEC hearing, however, Moore denied that he had been referred by Harris, alleging that he had merely walked into respondent's office off the street. Moore claimed that he was not "thinking" at the time he had been interviewed by the presenter, but asserted "now I can think."

Moore claimed that over time he had also been represented by a number of other attorneys, who had made him plead guilty to charges for which he was innocent. Moore added that, for example, he had entered a guilty plea to possession of heroin and to rape.

He had been represented by the Public Defender's Office in those matters. Moore also alleged that another attorney had stolen money from him. However, it can be gleaned from his testimony that he merely failed to recover the amounts to which he believed he was entitled. Despite his belief, Moore nonetheless used the same attorney for subsequent matters.

On the date of the second hearing, June 3, 1996, Moore failed to appear because he had been arrested and jailed on a child support warrant. On the third scheduled day of hearing, June 28, 1996, Moore again failed to appear. Apparently he had no transportation to the hearing site and wanted the presenter to drive him to the location, which the presenter refused to do.

The undisputed facts in this matter are brief: Respondent represented Moore in two personal injury matters, Oster and McCarthy, from 1987 through 1989, when the cases were settled for $2,500 and $7,500, respectively. Respondent took the cases on a contingent fee basis and did not reduce the fee agreements to writing in either matter.

During the pendency of the above two matters, respondent gave Moore financial assistance in excess of $10,000. He was initially unaware that Moore was receiving SSI. Respondent alleged that the money was a loan to Moore pending Moore's ability to repay him

either from the settlement proceeds in Oster and McCarthy or earlier, if Moore obtained a job. Respondent believed that respondent had no money and loaned him money for food, rent and various expenses relating to Moore's transportation, such as car rentals, car purchases, insurance, car repairs and car registration fees. Moore claimed, however, that any monies received from respondent were payments for services he had rendered to respondent.

Approximately 150 checks were submitted in evidence during the DEC hearing to prove the disbursements to Moore. Respondent acknowledged that at times he paid Moore to do odd jobs for him, including cleaning the office refrigerator, emptying the cat litter box in respondent's office, hanging a sign and occasionally driving respondent's clients to obtain independent medical examinations. Respondent also testified that Moore used to wash his car, an activity that was ultimately discontinued after Moore disappeared with the car for several hours. Moore was paid for the odd jobs with funds from respondent's business account. The loans to Moore were drawn either on respondent's personal account or on his business account.

The client ledger card maintained in Moore's behalf, Exhibit R-152, shows approximately 180 disbursements made to Moore or in

Moore's behalf. Many of the disbursements entered on the client ledger card had the notation "loan" on them. Other entries indicate payments for rent, car repairs, motor vehicle registration fees, motor vehicle insurance and the like. The loans to Moore started as early as December 11, 1987 and continued beyond the date of the settlement in 1989. Respondent and his office manager, Terrie Mangiaracina, testified unequivocally that Moore understood that the advances were loans against the settlement.

Insisting that the monies he received were salary checks, Moore claimed that, even though he had only a ninth grade education and could not read, respondent had hired him as his office manager; he had no set salary, though, and did not pay taxes on the monies received. Although Moore maintained he was illiterate, he testified that respondent would show him all of the letters that came into the office, because he was the office manager. Moore also contended that respondent hired him as office manager less than eight months after he became respondent's client, even though he had never worked in a law office before and had only a ninth grade education.

The alleged salary checks that Moore obtained from respondent had the word "loan" written on them. Moore contended that, because he could not read, he did not know what the word was and had to ask

the bank tellers what the word was when he cashed his checks. He claimed that he only figured out the meaning of the word at the DEC hearing, from the context of his cross-examination.

Moore explained that his responsibilities as office manager included firing secretaries, making bank deposits of never less than $800 in cash, "advising" respondent on a lot of matters, delivering papers to different attorneys and the prosecutor's office, and transporting respondent's clients.

The McCarthy matter was settled on May 11, 1989 for $7,500; the Oster matter was settled on June 9, 1989 for $2,500. Respondent claimed that Moore was present during the settlement discussions, overheard them over respondent's speaker-phone and consented to the settlements. Moore countered that the discussions were just preliminary and that he believed that he would recover $25,000 in the Oster matter instead of $2,500.

Moore admitted that, once the cases were settled, he signed the releases. He claimed, however, that he had signed blank documents. Mangiaracina, the office manager, testified, however, that she reviewed at length with Moore the releases in both the Oster and McCarthy matters. She also testified that, during that meeting, she informed Moore that he owed respondent more than $7,500; she presented Moore with a copy of his client ledger card

as well as copies of all the checks that had been written either to Moore or in his behalf. Mangiaracina claimed that "he made me go through two if not three times, the checks adding them up on a calculator and showing him each check individually." 5T119[1]. Mangiaracina further stated unequivocally that Moore absolutely understood that he would not be receiving any proceeds from the settlements because the loans exceeded the amount of the settlement. She asserted that Moore did not seem to have a problem with that. She added that, after Moore signed the releases, he gave her his verbal authorization to sign his name on the settlement checks when they were received. Mangiaracina thereafter relayed that information to respondent. She was surprised to hear Moore testify at he DEC hearing that he could not read.

Mangiaracina testified that she had prepared the settlement disbursement sheets in both the Oster and McCarthy matters. She explained that, rather than itemize each check that had been written to Moore or in his behalf, she totaled the amount of the checks and included them on the settlement disbursement sheets; Moore signed both disbursement sheets and Mangiaracina put them in Moore's file. Mangiaracina also gave Moore copies of the

[1] 5T denotes the transcript of the August 21, 1996 DEC hearing.

disbursement sheets and checks. Once respondent received the settlement checks, Mangiaracina signed Moore's name on each check and the checks were deposited in respondent's trust account. Some time later, respondent disbursed the funds to himself.

For his part, respondent testified that he was a sole practitioner involved in the general practice of law since 1973. His clientele included low income or no income clients. The majority of his clients belonged to minority groups. He estimated that half of his clients were referrals.

Respondent met Moore in December 1987. One of his clients, Saul Harris, had brought Moore in after Moore's release from the hospital. Respondent asserted that, although he had not given Moore a written retainer agreement, he had explained the contingent fee agreement to Moore several times. There is no dispute that Moore knew that he was required to pay respondent a contingent fee.

Respondent indicated that, on December 7, 1987, at Harris' request, respondent loaned Moore $12 for food. According to respondent, Moore informed him that he had no food and was being "kicked out" of his house. Respondent explained to Moore that he would loan him money and keep track of the loan amount; once Moore's case settled, he would be required to repay respondent.

However, if Moore were to obtain employment in the interim, he would be required to reimburse respondent before the settlement. Respondent had no doubt that Moore understood the concept of borrowing and lending money and testified that Moore agreed to repay him from the settlement proceeds. This understanding, however, was never memorialized. Respondent kept track of the money that was either loaned to respondent or paid to others in Moore's behalf. Periodically, respondent discussed with Moore the amount of money he owed respondent, so Moore would not be surprised at the time of settlement. Respondent explained that he never anticipated that this situation (the loans to Moore) would get so far out of hand.

Moore's client ledger sheet indicates that loans were made to him frequently. In accordance with the testimony of respondent, Moore and even one of respondent's character witnesses, it appears that Moore was in respondent's office almost every day. Respondent claimed that, after a while, Moore began bothering his staff. Thus, he no longer wanted Moore in the office during business hours and instructed Moore, if necessary, to see him after his staff had left. So as not to disturb his staff, respondent loaned money to Moore from his personal accounts. Respondent kept photocopies of the checks and gave them to Mangiaracina so she could enter the

loans on Moore's client ledger card. It was not unusual for respondent to hold on to the photocopies and give several of them at a time to Mangiaracina at a later date, causing some of the checks to be entered on the ledger card out of order. Some checks were not entered at all.

Respondent explained that Moore would come to him begging for money:

> He was in your face. He was relentless. He couldn't take no for an answer. It was so time consuming, I would just let him have the check just to get rid of him after a while. [5T224]

According to respondent, Moore made a "pest" of himself badgering respondent for money. Asked why he had started loaning money to Moore, respondent replied as follows:

> Well, he came to me in December 1987. He was introduced by another client that I had had for a long time. He was brought in as an individual who had just been hurt in an accident, who didn't have a place to live, didn't have a job and basically didn't know where his next meal was coming from. Saul Harris asked if I would help the man . . . when we settled his case he would agree to pay whatever money I loaned him at the time his case was settled. This is something that I have always done since I was a little child. I mean, I think it goes back to the way I was raised, the way my parents raised me. They sent me to Jewish Day School when I was five years old. I studied the Jewish Bible and teaching of the Rabbis and one of the things

> that impressed me most at the beginning was that it's one of the reasons we're put on this earth is to help people, especially those less fortunate than us. I've really had a pretty easy life compared to other people. I've always done well in school. My practice has always flourished. I've never had any problems worrying about where my next dollar was coming from and, you know, I like to try to help people that I can, especially ones less fortunate than me. I'm an only child, never been married. I don't have any children. I never supported anyone else. I've got a lot of money and one thing I try to do is help people.
>
> [6T115-116[2]]

Respondent explained that, in December 1988, at about the time a settlement offer had been made, Moore requested some money to purchase a car. Respondent then wrote a check directly to the dealer in the amount of $3,259.50 as a loan, hoping that, if Moore had a dependable car, he would get a job and leave respondent alone. Respondent also hoped that once Moore's case was settled, he would be "finished with Moore." He was wrong, however, as Moore continued to badger him for more money.

At one point, when Moore had no place to stay, respondent allowed him to live in an empty room in his office for approximately one year or more. When respondent's landlord learned

[2] 6T denotes the transcript of the September 4, 1996 DEC hearing.

of the arrangement, he insisted that Moore move out. Moore then moved to a location more than twenty-five minutes away from respondent's office and continued to call respondent to ask for money. Moore would also periodically go to respondent's office, interrupt respondent while he was meeting with clients and "pester" him until respondent would relent and give him money. Respondent explained that, after seven years of being harassed by Moore, he could take no more. One day, Moore came to his office and respondent "snuck out" of the back door. When Moore realized what had happened, he was angry and threatened to call the bar association if respondent refused to talk to him. Afterwards, Moore filed a grievance against respondent.

A number of character witnesses testified in respondent's behalf: attorneys, clients and a rabbi. They all testified to respondent's honesty, integrity and his heart of gold.

One of respondent's clients, Madeline Swelto, testified that she was frequently in respondent's office during the pendency of her personal injury case. Every time she had an appointment with respondent, Moore was there too. During one of her appointments, Moore barged in on her meeting with respondent and asked respondent to lend him money. Swelto explained that Moore would follow respondent all over the office, always trying to borrow money .

Swelto testified that she, too, borrowed money from respondent. She was a single mother with two children. After her disability checks ran out, she borrowed more than $3,000 from respondent. The agreement between the two was that she would repay respondent once her case settled. While there was no written agreement to memorialize their understanding, respondent and Swelto's parents kept records of the amounts loaned. No problems resulted from that arrangement.

Swelto explained that once, while at respondent's office, Moore told her that he was sick and tired of the way respondent was treating him because respondent did not want to keep giving him money. According to Swelto, Moore told her that "one of these days he was going to get this motherfucker for everything he has." 6T15. When questioned as to what he expected to receive from "his case" (the DEC matter) Moore replied:

> Answer: Over ten thousand dollars was involved in this case, right? It's almost been eight and a half years since I seen it.
>
> Question: So you expect this case to result in your being paid $10,000?
>
> Answer: Eight times that.
>
> Question: Eight times $10,000?

Answer: Yea.

[4T81-82[3]]

At some point after Moore's cases were settled, he wanted to file a workers' compensation claim against an individual whom respondent had known personally and had previously represented. Although respondent declined to take the case, he gave Moore the name of several workers' compensation attorneys. Eventually Moore retained the law firm of Basil, Testa and Testa. The firm needed to review Moore's medical history and apparently directed Moore to obtain copies of his file from respondent. Respondent allowed Moore to remove the original file and requested that his new attorney copy the necessary documents and return the original file because respondent did not have the time to do it himself. Respondent claimed that, when the file was returned, some information was missing, including the settlement disbursement sheets.

Respondent never recovered a fee in the Oster and McCarthy matters. As stated earlier, respondent had "loaned" Moore more money than the settlement amounts. Respondent, therefore, lost money representing Moore and also represented Moore in several

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[3] 4T denotes the transcript of the July 26, 1996 DEC hearing.

other matters for which he did not charge a fee. Respondent acknowledged the loss, but noted that he had not been hurt financially.

* * *

The DEC noted that the principal issue in this case was whether respondent's payments to Moore were advances against settlement, in the form of loans, as part of an oral agreement between Moore and respondent, or as Moore claimed, payments for services rendered and work performed. If the latter, then respondent's retention of the settlement would constitute an improper conversion of Moore's property. The DEC found that the answer depended on an assessment of credibility. After carefully considering the testimony and the evidence, the DEC concluded that Moore's testimony was entirely "incredible." The DEC found that his testimony was "inconsistent in the extreme, often fanciful, and would require the panel to believe that someone who testified to his own illiteracy was acting as [respondent's] office manager." The DEC also considered that Moore had a history of alcohol and drug abuse and minor legal problems. The DEC remarked that the services that Moore allegedly performed for respondent did not

correspond in value to the amount of money respondent advanced to him.

The DEC, therefore, found that respondent's testimony, corroborated by his office manager and by the introduction of approximately 150 checks and ledger sheets, showed that respondent had entered into a verbal agreement with Moore to advance him money during the pendency of his case, with the understanding that the loans would be repaid out of any settlement proceeds. The DEC found that respondent entered into the agreement to help Moore because of his "distressed personal circumstances." The DEC found that the loans or advances from 1987 through 1989 exceeded the net proceeds of the personal injury settlements. As a result, the DEC did not find that respondent misappropriated any funds, in violation of RPC 1.15 or R.1:21-7. The DEC, therefore, dismissed count one of the complaint.

The DEC found, however, that a conflict of interest arose as a result of respondent's advancing or loaning money to Moore against the potential settlement proceeds. The DEC found that a lawyer's interest in recovering loans directly conflicted with the client's interest in obtaining the maximum possible recovery for the client's claim. The DEC found that such a conflict was "especially pointed when the client is someone like Mr. Moore - -

by his own admission marginally literate, sometimes homeless, and generally living in distressed and uncertain circumstances." The DEC concluded that the conflict created by this situation was of such a magnitude that even with disclosure and waiver the representation would have been impermissible. The DEC found that respondent's conduct in this regard violated RPC 1.8(a)(financial transactions with clients) and RPC 1.8(j)(acquiring a proprietary interest in a client's cause of action). The DEC also found that respondent's failure to reduce his contingent fee agreement to writing was a violation of RPC 1.5(c) and R.1:21-7(g). Finally, the DEC stated:

> Even if the panel accepts respondent's testimony that settlement disbursement sheets and appropriate books and records were kept, a finding it is inclined to make, the evidence clearly establishes that respondent did not maintain these documents and records for the required period of seven years, but rather turned the file over wholesale to Moore, without making or keeping copies of these documents and records.

The DEC found that respondent's above conduct violated RPC 1.15(a) and R. 1:21-6(b) and (h).

The DEC noted that a number of attorneys and other witnesses testified about respondent's reputation for truthfulness and honesty and found their testimony to be credible. Thus, the DEC

was satisfied that respondent's dealings with Moore were motivated by "impulses of charity and compassion." It nevertheless found that respondent's ethics violations warranted the imposition of a reprimand.

* * *

Upon a de novo review of the record, the Board is satisfied that the conclusion of the DEC that respondent is guilty of unethical conduct is supported by clear and convincing evidence.

As to the missing records, respondent and his office manager testified with specificity about the existence of the settlement disbursement sheets. There was no evidence presented to rebut this testimony, just that the documents disappeared. Thus, there is nothing in the record from which to conclude to a clear and convincing standard that respondent did not maintain the proper books and records in this matter. While respondent himself should have made copies of the relevant portions of Moore's file, the fact that he turned over the entire file and expected its return intact does not give rise to more than a technical violation of R. 1:21-6(b) and (h).

The most significant charges relate to the disbursal of the settlement proceeds. The record establishes that respondent made loans to Moore in anticipation of a settlement in the Oster and McCarthy matters. The record also shows that Moore was made aware that he was to repay the loans from the settlement proceeds. However, by the time Moore's cases were settled, he had borrowed more money from respondent than his cases were worth. Therefore, it cannot be concluded that respondent misappropriated any funds from his client. Relying on the testimony of respondent, his character witnesses and fact witnesses, one must concur with the DEC's conclusion that respondent's actions, by loaning Moore money, were the result of charitable motives. Clearly, however, respondent took on more than he bargained for in this matter and Moore took advantage of respondent's charity and good-hearted nature. The DEC, thus, properly dismissed the charges of misappropriation and conversion of funds.

Respondent admitted that he did not give Moore a written retainer agreement. He admitted that he also failed to present other clients with written retainer agreements. This, too, is merely a technical violation of the rules, particularly since respondent's clients – and specifically Moore – were made aware of

the required fees. Indeed, because the loans exceeded the total settlement, Moore did not pay any fee.

The DEC found that respondent's conduct in extending loans to Moore was a violation of RPC 1.8(a) and 1.8(j). RPC 1.8(j) prohibits a lawyer from acquiring a proprietary interest in the cause of action or subject matter of litigation that the lawyer is conducting for a client. The facts do not establish that respondent attempted to obtain a proprietary interest in Moore's cause of action or that respondent was attempting to control the litigation for his own purposes or benefit.

As to RPC 1.8(a), the rule provides that a lawyer shall not enter into a business transaction with a client or knowingly acquire other pecuniary interests adverse to a client unless

> (1) the transaction and terms in which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in manner and terms that should have reasonably been understood by the client,
> (2) the client is advised of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent counsel of the client's choice on the transaction, and
> (3) the client consents in writing thereto.

While it clearly would have been in respondent's best interest to memorialize the terms of the loan agreement between himself and

Moore, the Board cannot conclude, by clear and convincing evidence, that what transpired between the two falls squarely within this rule. Respondent did not obtain any benefit from the transaction with his client, nor was it his intent to do so. He did not charge Moore any interest for the loan nor did he intend to benefit therefrom. In fact, the transaction benefited Moore, while causing a net loss to respondent.

Based on respondent's technical violations of R. 1:21-6(b) and (h) and RPC 1.5(c), a majority of the Board voted to impose an admonition. Three members vote to impose a reprimand.

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

Dated: 6/30/97

LEE M. HYMERLING
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY

DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Seymour Wasserstrum
Docket No. 97-047

Hearing Held: April 17, 1997

Decided: June 30, 1997

Disposition: Admonition

Members	Disbar	Suspension	Reprimand	Admonition	Dismiss	Disqualified	Did not Participate
Hymerling				x			
Zazzali				x			
Cole			x				
Lolla				x			
Maudsley				x			
Peterson			x				
Schwartz				x			
Thompson			x				
Total:			3	5			

Robyn M. Hill
Chief Counsel