SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 04-408
District Docket No. XIV-01-267E

IN THE MATTER OF	
DAVID S. SILVERMAN	
AN ATTORNEY AT LAW	

CORRECTED
Decision

Argued: January 20, 2005

Decided: March 8, 2005

Lee A. Gronikowski appeared on behalf of the Office of Attorney Ethics.

Robert E. Margulies 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 recommendation for discipline (two-year suspension) filed by Special Master Arthur Minuskin, J.S.C. (Ret.). The complaint charged respondent with having violated RPC 7.2(c) (a lawyer shall not give anything of value to a person for recommending the lawyer's services) and RPC 7.3(d) (a lawyer shall not compensate or give anything of

value to a person 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).

Respondent was admitted to the New Jersey bar in 1971. He maintains a law office in Clifton, New Jersey. He has no history of discipline.

The facts in this matter, for the most part, are not in dispute. At the time of the alleged misconduct respondent was a sole practitioner, who primarily handled personal injury matters.

Office of Attorney Ethics ("OAE") investigator Alan Beck testified that he had interviewed respondent pursuant to a demand audit request concerning his indictment in Hudson County. Respondent had been indicted pursuant to N.J.S.A. 2C:21-22.1b,[1] as a result of his involvement with Glen S. Poller, a Passaic, New Jersey chiropractor,[2] for employing a runner to obtain clients. Ultimately, however, the indictment against respondent was dismissed.

Respondent had met Poller in 1994. Early on in their relationship, respondent and Poller referred cases to each

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[1] N.J.S.A. 2C:21-22.1b. states that "[a] person is guilty of a crime of the third degree if that person knowingly acts as a runner or uses, solicits, directs, hires or employs another to act as a runner."

[2] Poller was prosecuted for over-billing insurance companies, for which he entered a guilty plea.

other. Sometime in 1996 or 1997, Poller retained respondent to do collection work for him.

In 1997 or 1998, Poller opened a second chiropractic office in West New York, New Jersey. As a result, his business increased and he started referring many more clients to respondent. According to respondent, Poller became concerned that respondent was not providing him with an equivalent number of referrals. Poller also felt that he was not being adequately compensated for the work he performed on respondent's behalf, particularly since he charged only $150 for each medical report he prepared. According to respondent, Poller also provided him with other services, including hand-delivering the medical reports, finding missing clients for respondent, thereby saving him the expense of hiring a private investigator and, on occasion, driving clients to depositions or to respondent's office. In addition, Poller was available for consultation purposes, "day or night," at no additional charge to respondent.

Respondent claimed that, as a result of this inequity, Poller proposed a plan to "fix the imbalance" in their business relationship. According to respondent, Poller suggested that they keep track of all referrals made to each other and meet every three to four months to determine who referred more clients; if Poller made more referrals, respondent would pay him $400 for each "excess" client. Because respondent agreed that

Poller was not adequately compensated for his services, he consented to Poller's proposal. At Poller's request, respondent paid him in cash. Respondent claimed that the money was "absolutely for the services [Poller] was rendering, both the low medical report fees and all of the other things he was doing." Respondent denied taking any money for referrals to Poller, claiming that he knew that such practice was unethical.

Respondent asserted that he never charged his clients for the additional fees he paid Poller, nor did he reflect it as an office expense, or deduct it from his taxes because it was too difficult to fairly allocate the amount among his clients; the extra fees were "a subsidy toward the whole pool of services" Poller provided, not for the individual referrals. According to respondent, he did not list the payments to Poller as a business expense on his taxes because he had no "paper trail." Respondent's records consisted only of a yellow sheet of paper listing the names of the referred clients. Respondent discarded the sheet after his meetings with Poller. Respondent did not retain the yellow sheets of paper because he did not believe that the Internal Revenue Service would accept that as evidence, notwithstanding the fact that he deducted his mileage with as little supporting documentation. Respondent, therefore, did not want to risk deducting the fees without having canceled checks

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to support the deduction, because it would have been difficult to prove the expenses.

Respondent conceded that it would have been simple to list the amounts he paid Poller on the named clients' ledger cards, but it would have been unfair to the clients because the amounts were not meant for those individuals. Respondent stated that he absorbed the amounts because he could not determine how to fairly break it down among his clients. Respondent believed that, even with the extra payments to Poller, Poller was still paid less for his services than other doctors.

Respondent was sorry that he participated in the arrangement because of the way it was "set up" and because of the ambiguities of the agreement.

At the DEC hearing, Beck stated that respondent cooperated with the OAE investigation. Beck conceded that, according to respondent, Poller had come up with the arrangement, which was devised to compensate him for his modest medical report charges.

Respondent offered character letters from eight attorneys. Two of the attorneys also testified at the DEC hearing. The letters stated that respondent had a good character and reputation, and that he put his clients' interests above his own financial interests. Louis Santore, Esq. testified that he had known respondent for thirty years, that respondent had a good reputation and character, was fit to be an attorney, was good to

his clients, and had a fairly large practice. Lee Graham Karosen, Esq. testified that respondent had an excellent reputation in the defense community, and did well for his clients.

The special master determined that the payments respondent made to Poller were to obtain clients, and that, therefore, respondent used Poller as a runner. The special master also found that the dismissal of the criminal charges against respondent had no bearing on respondent's "professional" conduct.

The special master found that respondent's testimony that the payments to Poller were to compensate him for his services, not referrals, was not credible. The special master based his conclusion on the fact that none of Poller's services were documented in respondent's files. The special master further concluded that, had the payments been made for legitimate services, respondent would have had no problem using the payments as legitimate income tax deductions on his tax returns. In addition, the special master noted that respondent would not have made secret cash payments to Poller.

The special master concluded that, because of respondent's thirty-three years of experience as a personal injury trial lawyer, and because he made payments to Poller secretly and in cash, he knew or should have known that his agreement with

Poller was improper. The special master, therefore, found clear and convincing evidence that respondent used Poller as a "runner" to obtain clients for him in exchange for money, and that the $400 for each case referral constituted Poller's employment for the purposes of recommending respondent's services and paying him value for that purpose. The special master determined that respondent's conduct violated RPC 7.2(c) and RPC 7.3(d).

The special master considered respondent's full cooperation with OAE, his acknowledgement that the arrangement was improper, his commission of a single, rather than multiple, ethics offenses, his expressed remorse for his actions, his promise to refrain from engaging in similar conduct, the character letters and testimony from other attorneys, and his prior unblemished record of thirty-three years.

Notwithstanding the above mitigating factors, the special master concluded that respondent's acts were intentional, serious, and in disregard of the Rules of Professional Conduct. He also concluded that respondent's conduct could have "the effect in this case of exaggerated claims of [respondent's] personal injury clients," and that the secret cash payments and failure to claim the amounts as deductible costs of litigation suggested that he assisted Poller in a plan to avoid the payment of income taxes.

The special master recommended a two-year suspension.

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

We are unable to agree, however, with the special master's remarks that respondent's arrangement with Poller could have resulted in exaggerated claims of respondent's personal injury clients, or that it could have helped Poller to avoid paying income taxes. There were no related allegations in the complaint, nor was there any evidence in the record to support these assertions.

The special master properly concluded, however, that respondent's testimony about his reasons for paying Poller $400 for specific clients was not credible. The total lack of a paper trail of the payments; the cash payments to Poller; respondent's failure to record the payments either on the client ledger sheets or on his taxes, as a business expense; and the quarterly meetings where they compared referral statistics, after which respondent destroyed the yellow sheet of paper listing his referred clients, they are all compelling in substantiating the special master's assessment of respondent's credibility on that issue.

Respondent claimed that he was merely reimbursing Poller for all of the services provided over and above the costs of the

medical reports and for the inadequate fees for those reports. Yet, respondent did not reveal why the two had agreed on such a minimal rate, why the rate was not increased to at least the average rate shown on respondent's exhibit depicting a comparison of northern New Jersey medical report fees - $437 (Exhibit R-2), why Poller provided non-medical related services to respondent, and why Poller was not compensated for those additional services as they occurred.

The inescapable conclusion is that the two were involved in an improper scheme, and knew it to be so. RPC 7.2(c) states that "[a] lawyer shall not give anything of value to a person for recommending the lawyer's services." By paying Poller $400 for each referral "over and above" the referrals he made to Poller, respondent violated this rule. His conduct also violated RPC 7.3(d), which provides that "[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 . . . ."

The policy served by the prohibition against fee sharing with a nonlawyer was set forth in In re Weinroth, 100 N.J. 343, 350 (1985):

> To ensure that any recommendation made by a non-attorney to a potential client to seek the services of a particular lawyer is made in the client's interest, and not to serve the business impulses of either the lawyer or the person making the referral; it also eliminates any monetary incentive for

> transfer of control over the handling of legal matters from the attorney to the lay person who is responsible for referring in the client.

The only issue left for determination is the proper quantum of discipline. In the past, fee sharing with nonlawyers has resulted in discipline ranging from a suspension to disbarment. In In re Frankel, 20 N.J. 588 (1956), the attorney paid a runner twenty-five percent of his net fee to solicit personal injury clients. He was charged with violating the Canons of Professional Ethics that prohibited soliciting clients (Canon 28) and dividing fees with a non-attorney (Canon 34). Frankel contended that the fees paid to the runner were in the nature of compensation for investigatory services. Frankel paid the runner $6,303.53 in 1953, which constituted the runner's primary source of income. In imposing discipline, the Court noted that, while Canon 28 itself provided that the offender may be disbarred, Frankel was the first attorney prosecuted for this type of violation. The Court also cited Frankel's previously unblemished professional reputation. In imposing only a two-year suspension, the Court cautioned the bar that in the future more drastic measures could be expected for similar infractions. Id. at 599.

Two years later, in In re Introcaso, 26 N.J. 353 (1958), the Court addressed the issue of the use of a runner to solicit criminal cases. There, three clients testified that a runner

solicited them to retain Introcaso. The Court found overwhelming evidence that Introcaso employed a runner to solicit clients in all three matters, improperly divided legal fees, and lacked candor in his testimony. Id. at 360. The Court imposed a three-year suspension. The Court considered that Introcaso's behavior had occurred prior to its decision in Frankel, and that Introcaso had enjoyed an unblemished reputation. Id. at 361.

In In re Bregg, 61 N.J. 476 (1972), the Court imposed a three-month suspension where the attorney, for approximately two and one-half years paid part of his fees to a runner from whom he accepted referrals. Bregg kept no records of the transactions and payments were made in cash. Id. at 476. From memory, he was able to reconstruct a list of some thirty referrals made by the runner. Ibid. The Court commented that the attorney in Bregg lacked the "studied and hardened disregard for ethical standards, accompanied by a total lack of candor" present in both Frankel and Introcaso. Ibid.

In In re Shaw, 88 N.J. 433 (1982), the attorney was disbarred for representing a passenger in a lawsuit against the driver of the same automobile and representing both the passenger and driver in litigation filed against another driver, using a runner to solicit a client in a personal injury matter, purchasing the client's cause of action for $30,000, and subsequently settling the claim for $97,500. Id. at 438. Instead

of depositing the settlement check into his trust account, the attorney gave it to the runner, who forged the client's name on the settlement check, and deposited it into his own bank account. Ibid.

More recently, the Court disbarred an attorney who, for a period of almost four years, used a runner to solicit personal injury clients. In re Pajerowski, 156 N.J. 509 (1998). In Pajerowski, the attorney stipulated to numerous ethics violations. He used a runner to solicit clients, split fees with the runner, and compensated him for referrals in eight matters involving eleven clients. Id. at 515. While claiming that the runner was his "office manager," in 1994 the attorney compensated the runner at the rate of $3,500 per week ($182,000) for the referrals. Ibid. In each case, the runner visited the prospective clients (all of whom had been involved in motor vehicle accidents), either at their homes or in hospitals on the day of the accident or very shortly thereafter. He brought retainer agreements with him and tried to persuade the individuals to retain Pajerowski to represent them in connection with claims arising out of the accident. Ibid. In some cases, the runner instructed the prospective clients to obtain treatment from specific medical providers, despite the clients' protestations that they had not been injured. Thus, the Court found that the attorney knew about and condoned the runner's

conduct in assisting his clients' filing of false medical claims. Id. at 522.

By splitting fees with the runner, the attorney also assisted in the unauthorized practice of law. In addition, he advanced sums of money to clients in ten instances and engaged in a conflict of interest situation. In ordering the attorney's disbarment, the Court advised that

> [a]lthough the public needs to be protected from the solicitation of legal business by runners, we do not find that disbarment is called for in every 'runner' case. In determining the appropriate discipline to be imposed in prior 'runner' cases . . . we have considered the circumstances surrounding each case. We intend to adhere to that approach in such cases.
>
> [Id. at 521-22.]

The Court disbarred Pajerowski, finding that he acted out of economic greed, took advantage of vulnerable individuals, condoned his runner's conduct in assisting clients to file false medical claims and committed other less serious acts of misconduct. Id. at 522.

In In re Pease, 167 N.J. 597 (2001), a three-month suspension was imposed where the attorney paid a runner for referring fifteen prospective clients to him and for loaning funds to one of those clients. The attorney's misconduct was limited to a four-month period more than ten years prior to the ethics proceeding, when the attorney was a relatively young,

newly admitted attorney. He had not been previously disciplined, and had performed a significant amount of community service. In re Pease, Docket No. DRB 99-457 (September 18, 2000) (slip. op. at 20).

See also In re Maran, 80 N.J. 160 (1979) (six-month suspension where the attorney misused trust funds (the clients did not suffer any losses and overdrafts were covered by large sums of legal fees left in the attorney's trust account), compensated a doctor for the referral of patients to the law firm, the full extent of which is not known, and violated the terms and purpose of the contingent fee rule) and In re Moeller, 177 N.J. 511 (2003) (one-year suspension for a myriad of ethics infractions including assisting in the unauthorized practice of law by rendering legal services to a corporation involved in providing living trusts to clients, engaging in conflicts of interest, accepting compensation from one other than the client, failing to reasonably explain matters to his clients, compensating others for securing clients for him, making misrepresentations to the Committee on Attorney Advertising, and publishing false and misleading ads in connection with the living trusts). But see In re Gottesman, 126 N.J. 376 (1991) (public reprimand where the attorney divided his legal fees with a nonlawyer paralegal and aided in the unauthorized practice of law by allowing the paralegal to advise clients on the merits of

claims and by permitting the paralegal to exercise sole discretion in formulating settlement offers) and In re Weinroth, 100 N.J. 343 (1985) (public reprimand where the attorney agreed to return a portion of legal fees to his client, knowing that the funds would be paid to a lay person for his recommendation of the firm).

In assessing discipline, we have considered that this is respondent's first ethics transgression in his thirty-three years at the bar, that he cooperated with the OAE investigation, and that he has a good reputation in the legal community. Nevertheless, respondent's transgressions were serious and willful, and were undertaken in a manner to escape detection. A term of suspension is, therefore, warranted.

This case does not involve conduct as blatant as that in Frankel (two-year suspension) where the attorney paid a runner twenty-five percent of his net fee, which was the runner's primary source of income. Also, respondent's misconduct was limited to paying for referrals from Poller and did not involve the additional, multiple ethics infractions present in Moeller (one-year suspension). Respondent's conduct, however, was more serious than the cases where reprimands were imposed. For example, in Weinroth, only one referral was involved. In Gottesman, the Court considered the great amount of time that had elapsed between the start of the attorney's conduct (sixteen

years earlier) and its end (eleven years before the ethics proceedings), the attorney's refusal to accede to the non-attorney's demand for payment on a percentage basis after they terminated their professional relationship, and the attorney's belief that the practice was permissible because he had first observed it at another law firm.

Respondent's conduct is more akin to that in Bregg (three-month suspension for paying a portion of his legal fees to a runner for approximately two and one-half years), Pease (three-month suspension for paying a runner for referring fifteen prospective clients and loaning funds to one of the clients), and Maran (six-month suspension for misuse of trust funds, compensating a doctor for referrals, and violating the contingent fee rule; the number of referrals or span of time during which the doctor referred clients to Maran is unknown).

Because respondent's conduct spanned a significant period, from either 1997 or 1998 until uncovered in a video intercept in May 2001, we find that a six-month suspension is warranted. Member Ruth Lolla did not participate.

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Disciplinary Review Board
Mary J. Maudsley, Chair

By: Julianne K. DeCore
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of David S. Silverman
Docket No. DRB 04-408

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Decided: March 8, 2005

Disposition: Six-month suspension

Members	Six-month Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Maudsley	X				
O'Shaughnessy	X				
Boylan	X				
Holmes	X				
Lolla					X
Pashman	X				
Schwartz	X				
Stanton	X				
Wissinger	X				
Total:	8				1

Julianne K. DeCore
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Chief Counsel