SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 03-112

IN THE MATTER OF

SAMUEL A. MALAT

AN ATTORNEY AT LAW

Decision

Argued: June 19, 2003

Decided: July 28, 2003

James Herman appeared on behalf of the District IV Ethics Committee.

Alan Dexter Bowman 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 based on a recommendation for discipline filed by the District IV Ethics Committee ("DEC"). The complaint charged respondent with violations of *RPC* 1.8(f) (accepting compensation from someone other than the client), *RPC* 5.4(a) (sharing legal fees with a nonlawyer), *RPC* 5.5(b) (assisting another in the unauthorized practice of law), *RPC* 7.3(d) (compensating 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), *RPC* 7.3(e) (assisting a person or organization that furnishes or pays for legal services to others to promote the use of the lawyer's services), and *RPC* 7.3(f) (accepting employment when the lawyer knows or it is obvious that the person who seeks the lawyer's services does so as a result of conduct prohibited under this Rule).

Respondent was admitted to the New Jersey bar in 1989. He was reprimanded on December 12, 2002 for his conduct in four matters. In one matter, he disobeyed two court orders directing him to turn over files to a client, resulting in a finding of contempt; in the second matter, he recommended that a client file a bankruptcy petition and then intentionally fail to file the required schedules, resulting in the dismissal of the bankruptcy, all for the purpose of avoiding a levy; in the third matter, he allowed a client's lawsuit to be dismissed twice, refused to return the file to the client, allowed a judgment to be entered against the client, failed to inform the client of the judgment, and

failed to cooperate with disciplinary authorities; in the fourth matter, he repeatedly failed to abide by court orders and scheduling deadlines, resulting in the dismissal of his client's lawsuit.

Respondent was suspended for three months, effective April 7, 2003, for knowingly making a false statement of material fact or law to a tribunal, knowingly failing to disclose to a tribunal a material fact, conduct involving dishonesty, fraud, deceit or misrepresentation, conduct prejudicial to the administration of justice, and failure to cooperate with disciplinary authorities. That matter proceeded on a default basis. Specifically, respondent, a party plaintiff, failed to oppose a motion to dismiss his complaint without prejudice. After his adversary filed a motion to dismiss the complaint with prejudice, respondent filed a motion to vacate the initial order, without disclosing that a second motion had been filed. In subsequent pleadings, respondent misrepresented that he had not received the first motion to dismiss. He also failed to reply to the grievance.

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This matter was originally before us in 2001 as a default. On October 2, 2001, we granted respondent's motion to vacate the default and remanded the matter to the DEC for hearing.

Most of the material facts are not in dispute. Respondent admitted that he had an arrangement with a Texas corporation to review various estate-planning documents on behalf of clients, for which the corporation paid him. Respondent claimed that, because of the absence of precedent, he could not have known that his conduct was improper.

In 1998, respondent was contacted by Sterling Estate Services ("Sterling"), an estate-planning company located in Plano, Texas. Sterling sold revocable living trusts and other trust and estate documents to individuals of retirement age. Sterling retained respondent to review these documents, to prepare deeds to convey real estate to the various trusts and to address any concerns expressed by Sterling's clients. Sterling charged its clients a fee of $1,895, from which it paid respondent a flat fee of $70 for preparing the deeds and $130 for reviewing the trust documents. The clients did not pay respondent directly. Respondent reviewed such documents for more than 200 of Sterling's clients.

Sterling sent respondent its trust document package for his use in New Jersey and Pennsylvania, where he was also admitted. Respondent revised the documents after determining that they did not comply with New Jersey and Pennsylvania laws. He then sent to Sterling a template that he created to be used for Sterling's clients in New Jersey and

Pennsylvania.[1] Sterling representatives contacted individuals of retirement age through mass mailings from lists obtained from groups such as AARP. After an individual replied to the mailing, a Sterling representative obtained relevant information that was inserted into the template. Customized forms were then generated. The client was given respondent's business card, was told that respondent was the review attorney and was directed to call respondent with any questions. Sterling then transmitted the customized documents to respondent. In addition, Sterling obtained the client's signature on a document titled "Contract for Services, Statement of Disclosure and Compliance." The contract provided:

> I/We understand that the Representative is not an attorney or certified tax authority and has not offered me/us any tax advice or any legal advice and that I/we should consult an attorney and/or tax accountant for legal and/or tax advice.

According to respondent, about one-half of the documents contained errors, such as misspelled names, transposed social security numbers and so on. Respondent telephoned clients only if the forms raised a concern, such as if the trust provided for an uneven distribution among the beneficiaries. He never met with the clients. A Sterling

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1 According to respondent, although he spent approximately 120 hours revising the documents and although Sterling offered to compensate him for these services, he did not charge a fee because Sterling was not his client.

representative arranged to meet with the clients to execute the documents. Respondent did not retain copies of the documents and did not store the originals.

Respondent claimed that, before he agreed to associate with Sterling, he insisted that he train the Sterling representatives to ensure that the individuals who responded to the mass mailings were appropriate candidates for trust and estate-planning services. He contended that he had trained between four and six Sterling employees about proper document execution and other procedure. Again, respondent stated that he did not charge Sterling for training the employees because Sterling was not a client.

Along with the documents, the clients received the following form letter from respondent:

> I have been requested to review the Living Trust documents prepared for you. I hereby acknowledge you have retained my Firm to conduct this review and your payment of my fee. . . .
>
> My review is limited to the documents seen and the information contained in your application. I have not analyzed your estate with regard to tax consequences and tax planning alternatives concerning income taxes, basic issues or individual transactions. For the purposes of my review, I have assumed that you have made an independent determination that a Revocable Living Trust will be suitable for your circumstances. I have specifically not reviewed or discussed with you any alternative estate planning techniques. I would be pleased to confer with you on additional tax estate planning measures which may be beneficial to you. For this service, there would be an additional charge based upon my regular professional rates.

Respondent conceded that one of the reasons, albeit a minor reason, that he became associated with Sterling was to obtain clients for future legal business.

Respondent contended that, before agreeing to do business with Sterling, he researched whether the arrangement was ethical. According to respondent, he found no cases regarding the preparation of trust documents or fee-splitting. He did not request an advisory opinion or contact the ethics hotline. Respondent denied that his loyalties were divided, contending that he felt no duty of loyalty to Sterling, only to the clients. In addition, despite the fact that Sterling did not employ staff attorneys, respondent did not believe that he assisted Sterling in the unauthorized practice of law because he drafted the trust documents that Sterling sold. He also pointed out that the conduct that gave rise to this matter involved a Pennsylvania resident, took place in Pennsylvania and was also reviewed by the Pennsylvania disciplinary authorities, who found no clear and convincing evidence of unethical conduct.

In 1998, Sterling sent mailings to Edith Protigal, an eighty-six year old Pennsylvania resident. Protigal had short-term memory problems. A Sterling representative convinced Protigal to establish a revocable living trust. Protigal paid Sterling $1,895 for its services, which included liquidating United States Treasury investments and executing several estate-planning documents, including a trust summary, a revocable living trust, a pour-over will, a directive to physician ("living will"), a durable and springing power-of-

attorney, a durable power-of-attorney for health care, transfer documents and trustee instructions. The trust was funded by an annuity purchased from the proceeds of the liquidation of the Treasury investments.

After reviewing the documents that Sterling prepared for Protigal, on October 6, 1998, respondent sent her the standard form letter described above. According to the Office of Attorney Ethics ("OAE") investigator, respondent told her that he had never spoken with Protigal. Although respondent later testified that he could not specifically recall talking to Protigal, he added that his practice would have been to contact her because the living trust did not distribute her estate to children, but to siblings and a niece. Respondent denied having told the OAE investigator that he had never spoken to Protigal, insisting that he had said that he did not know if he had talked to Protigal. He stated that he did not attend the execution of the documents in person because "[a]s part of the fee structure I was not willing to do certain things."

Respondent ended his business dealings with Sterling in early 1999. He stated that, between Thanksgiving and Christmas of 1998, Sterling had sent him many trust documents and was pressuring him to return them quickly. In his view, the quality of the documents had decreased, requiring him to correct and reprint many of them at his own expense.

Respondent claimed that, at about the same time, he read in a legal publication that another attorney, Cynthia Sharp, had been disciplined for marketing trust documents. Respondent discussed the matter with Sharp, whose office was near his office. As a result of his ethics concerns, he proposed to Sterling that he prepare the documents for each client and execute a separate retainer agreement with each client. Apparently, Sterling did not agree to respondent's proposal, and their relationship terminated. Respondent denied that he stopped dealing with Sterling for financial reasons, contending that he had received fair compensation from Sterling.

This matter came to light when Protigal's niece contacted an attorney in Pennsylvania, who had been representing Protigal on another matter. The attorney investigated the matter and discovered that Protigal had obtained an annuity of almost $400,000 from the sale of treasury notes. He believed that an annuity was not an appropriate investment for an eighty-six year old individual. The attorney was able to obtain the cancellation of the annuity and the return of the funds. The attorney charged a $2,600 fee for these services.

In September 1999, about a year after Protigal executed the trust documents, the attorney obtained from a Pennsylvania court a certificate declaring Protigal partially incapacitated. According to the attorney, Protigal did not object to having a guardian

appointed because she realized that she needed help. The attorney filed a grievance against respondent both in Pennsylvania and New Jersey.

According to the attorney, when he contacted respondent about this matter, respondent did not recall having represented Protigal. When the attorney reminded him that Protigal was a Sterling client, respondent replied that he had simply reviewed materials that Sterling had prepared; that the matter involved "just a fancy will to avoid probate;" that he was not familiar with the annuity that Protigal had purchased; and that he had stopped working for Sterling because the compensation was insufficient. The OAE investigator also testified that respondent told her that he had terminated his relationship with Sterling because he was not getting paid and because he had learned that a local attorney had been disciplined for similar conduct.

Both the attorney and the OAE investigator confirmed that no funds were missing from Protigal's holdings. In addition, the OAE investigator agreed that respondent did not have a financial interest in Sterling. The investigator found no record that Protigal had agreed that respondent receive payment from Sterling for services rendered on her behalf.

After the grievance was filed, respondent retained a private investigator, who interviewed Protigal. During the interview, Protigal stated that she did not know who respondent was, that she was satisfied with Sterling's services, and that she had no knowledge that a grievance had been filed against respondent by her attorney.

* * *

The DEC found that respondent violated *RPC* 1.8(f) (accepting compensation from someone other than the client), when he received fees from Sterling on behalf of clients. In addition, the DEC found that respondent violated *RPC* 5.5(b) (assisting another in the unauthorized practice of law), when he reviewed documents prepared by Sterling. The DEC found no violation of *RPC* 5.4(a) (sharing legal fees with a nonlawyer), *RPC* 7.3(d) (compensating 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), *RPC* 7.3(e) (assisting a person or organization that furnishes or pays for legal services to others to promote the use of the lawyer's services), and *RPC* 7.3(f) (accepting employment when the lawyer knows or it is obvious that the person who seeks the lawyer's services does so as a result of conduct prohibited under this Rule). The DEC recommended "a ninety day suspension followed by counseling to re-enter the practice of law."

* * *

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

RPC 1.8(f) prohibits an attorney from accepting compensation for representing a client from one other than the client unless (1) the client consents after consultation; (2) there is no interference with the lawyer's independence of professional judgment or with the lawyer-client relationship; and (3) information relating to the representation is protected. There is no doubt that respondent accepted compensation from someone other than the client. Respondent made it clear that he considered the individuals referred to him by Sterling to be his clients. His cover letter recited that he had been retained by the individual to conduct a review of their trust documents and acknowledged payment of his fee. Moreover, respondent adamantly rejected the notion that Sterling was his client, contending that he refused to bill Sterling for revising the documents or training its employees.

Here, although Protigal was respondent's client, respondent was paid by Sterling, not Protigal. Respondent did not obtain Protigal's consent before the representation because, according to his testimony, he either never spoke with her or did so only after he had already begun the representation and had arranged to be compensated by Sterling. Moreover, respondent's entire arrangement with Sterling vitiated any independence of judgment on his part. Respondent acknowledged that he exercised no judgment with

respect to whether the clients were appropriate candidates for the trust and estate-planning services that they purchased from Sterling and that he did not receive enough compensation from Sterling to attend the document execution to ensure that proper procedures were followed. In other words, respondent permitted his arrangement with Sterling to interfere with his duties to his clients. His conduct, therefore, violated *RPC* 1.8(f).

With respect to the charge that respondent violated *RPC* 5.4(a), this is not the typical case in which an attorney pays a nonlawyer to solicit business for the attorney, in return for a portion of the legal fee. Rather, Protigal paid Sterling for the services and Sterling, in turn, paid respondent to review the documents. Respondent, nevertheless, shared legal fees with Sterling, a nonlawyer. *N.J. Supreme Court Committee on the Unauthorized Practice of Law Opinion 25*, 130 *N.J.L.J.* 115 (1992) ("Opinion 25"), found that an attorney violated *RPC* 5.4(a) by entering into an arrangement with a tax consulting group, whereby the group would pay an attorney to appeal a tax assessment on behalf of the group's client. The group solicited professional employment from homeowners for property tax appeals, entered into a contingent fee arrangement with them, processed the appeals for them and engaged attorneys, as needed, for appearances before the county tax boards, at no additional cost to the client. The attorney received a

portion of the group's contingent fee. Here, too, respondent's similar arrangement with Sterling violated *RPC* 5.4(a).

Respondent also assisted Sterling in the unauthorized practice of law. Sterling's representatives solicited and interviewed clients, obtained personal and financial information from them, prepared trusts and other estate-planning documents, and supervised the execution of the documents. Sterling's representatives were not attorneys. Although respondent claimed that he prepared the documents, respondent drafted the template used by Sterling's representatives when they inserted the individual client's specific information. Sterling's representatives, thus, practiced law and respondent assisted them in that endeavor, in violation of *RPC* 5.5(b).

As to the charge that respondent violated *RPC* 7.3(d), the DEC correctly found no clear and convincing evidence that respondent compensated Sterling to secure respondent's employment by Protigal or any of the other Sterling clients for whom respondent reviewed documents. We determined, therefore, to dismiss that charge.

The complaint also charged that respondent's arrangement with Sterling violated *RPC* 7.3(e) (knowingly assisting an organization that furnished or paid for legal services to others to promote the use of the lawyer's services) and *RPC* 7.3(f) (accepting employment knowing that the person who sought his services did so as a result of conduct prohibited by *RPC* 7.3). Although it could be argued that Sterling "promoted"

respondent's services by distributing his business cards to clients, Sterling did so to provide the clients with information so that they could contact their "review attorney." Moreover, respondent did not assist Sterling so that it could promote his services; he assisted Sterling in providing document review services to their mutual clients. Therefore, we dismissed those charges as well.

In sum, respondent received compensation from someone other than a client, improperly shared fees with a nonlawyer, and assisted a nonlawyer in the unauthorized practice of law.

As stated above, respondent contended that, after learning of the discipline imposed on Cynthia Sharp, he discontinued his arrangement with Sterling. In *In re Sharp*, 157 *N.J.* 27 (1999), the attorney was reprimanded for publishing and circulating a flyer in several newspapers. The flyer, geared toward the elderly, contained misrepresentations and misleading statements about living trusts, probate and guardianships. The purpose of the advertisement was to attract readers to a seminar given by the attorney, who hoped to be retained by the attendants. Sharp's conduct, however, was not at all similar to respondent's. She circulated misleading advertisements designed to attract clients. Here, there is no evidence that respondent participated in any of the mailings sent by Sterling.

In cases involving a conflict of interest, absent egregious circumstances or serious economic injury to the client, a reprimand constitutes sufficient discipline. *In re*

Berkowitz, 136 *N.J.* 134, 148 (1994). Respondent involved himself in a conflict of interest by not disclosing to Protigal, his client, that he had been retained by Sterling and was being compensated by Sterling. Protigal sustained economic injury when she was required to pay another attorney $2,600 to cancel the annuity that she had purchased through Sterling.

In *In re Kiegel*, 174 *N.J.* 299 (2002), the attorney agreed to prepare deeds for an estate and financial-planning company. That company provided estate-planning services similar to those provided by Sterling. Kiegel prepared deeds for those clients who wished to transfer their real estate to a trust. He did not review any of the documents, such as the revocable living trusts, provided to the clients. Kiegel prepared eleven such deeds, for which the company paid him. He contacted each client before drafting the deed to verify the information that the company had given him. For violating *RPC* 1.8(f), Kiegel received an admonition.

In cases involving fee sharing with a nonlawyer or assisting a nonlawyer in the unauthorized practice of law, along with other violations, the discipline has ranged from a short suspension to a three-year suspension. *See, e.g., In re Pease*, 167 *N.J.* 597 (2001) (three-month suspension where the attorney entered into an arrangement with a tow-truck operator whereby the operator referred clients to the attorney in exchange for remuneration; the attorney also loaned funds to a client; compelling mitigating

circumstances were considered); *In re Chulak*, 152 *N.J.* 553 (1998) (three-month suspension where the attorney allowed a nonlawyer to prepare and sign pleadings in the attorney's name and to be designated as "Esq." on his attorney business account; the attorney then misrepresented to the court his knowledge of these facts); *In re Carracino*, 156 *N.J.* 477 (1998) (six-month suspension where the attorney entered into a law partnership agreement with a nonlawyer, agreed to share fees with the nonlawyer, engaged in a conflict of interest, displayed gross neglect, failed to communicate with a client, engaged in conduct involving misrepresentation and failed to cooperate with disciplinary authorities); *In re Rubin*, 150 *N.J.* 207 (1997) (one-year suspension in a default matter where the attorney assisted a nonlawyer in the unauthorized practice of law, improperly divided fees without the client's consent, engaged in fee overreaching, violated the terms of an escrow agreement and engaged in conduct involving dishonesty, fraud, deceit or misrepresentation); *In re Introcaso*, 26 *N.J.* 353 (1958) (three-year suspension where the attorney employed a runner to solicit criminal cases for the attorney and then shared the fee with the runner; the attorney also lacked candor in his testimony at the ethics hearing).

We recently determined to impose a one-year suspension on an attorney who entered into a similar arrangement with American Estate Services, Inc. ("AES"), a Texas corporation that marketed and sold living trusts to senior citizens. *In the Matter of G.*

Jeffrey Moeller, DRB 02-463 (2003). In that case, however, Moeller's conduct was more serious than respondent's. His involvement with the nonlawyer corporation was much greater than here. Moeller filed a certificate of incorporation in New Jersey for AES, was its registered agent, allowed his name to be used in its mailings and was an integral part of its marketing campaign, which contained many misrepresentations. Although Moeller was compensated by AES for reviewing the documents, he never consulted with the clients about his fee or obtained their consent to the arrangement. He also assisted AES in the unauthorized practice of law, misrepresented the amount of his fee and charged an excessive fee. All told, we found violations of *RPC* 1.4(b), *RPC* 1.5(a), *RPC* 1.7(b), *RPC* 1.8(f), *RPC* 5.4(a), *RPC* 5.4(c), *RPC* 5.5(b), *RPC* 7.1(a)(1), *RPC* 7.1(a)(2), *RPC* 7.1(a)(4)(ii), *RPC* 7.3(d), *RPC* 7.5(a), *RPC* 8.1(a), *RPC* 8.1(b), *RPC* 8.4(c), *R.*1:21:1A(c) and Attorney Advertising Guideline 1. That matter is pending with the Court.

We rejected respondent's claim that he had no notice that his conduct was improper. Respondent's review of the *Rules of Professional Conduct* alone would have alerted him to the impropriety of his arrangement with Sterling. In addition, Opinion 25, published in 1992, gave notice that it is unethical for attorneys to be compensated by nonlawyers who obtain clients. Although Opinion 25 addressed attorneys who represented clients in tax appeals, the concept is the same. Moreover, *In re Opinion 682 of the Adv. Comm. on Prof. Ethics*, 147 *N.J.* 360 (1997), addresses similar concerns. In

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

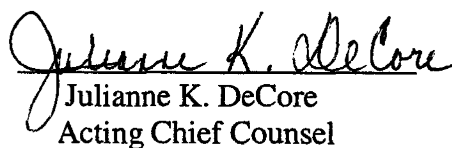
In the Matter of Samuel A. Malat
Docket No. DRB 03-112

Argued: June 19, 2003

Decided: July 28, 2003

Disposition: Three-month suspension

Members	***Disbar***	***Three-month Suspension***	***Reprimand***	***Admonition***	***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:		9					



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