SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 09-243
District Docket No. XIV-2008-396E

IN THE MATTER OF

MARTIN BURGER

AN ATTORNEY AT LAW

Decision

Argued: October 15, 2009

Decided: December 3, 2009

Michael J. Sweeney appeared on behalf of the Office of Attorney Ethics.

Aaron E. Albert appeared on behalf of respondent.

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

This matter came before us on a disciplinary stipulation between respondent and the Office of Attorney Ethics ("OAE"). The OAE recommends the imposition of either a censure or a three-month suspension for respondent's stipulated violations of

RPC 5.4(a) (sharing legal fees with nonlawyer employee) and RPC 7.3(d) (compensating or giving 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 seeks the imposition of no more than a reprimand. For the reasons expressed below, we agree with respondent that a reprimand is appropriate.

Respondent was admitted to the New Jersey bar in 1953. At the relevant times, he maintained an office for the practice of law in Palisades Park. He has no disciplinary history.

The stipulated facts are brief. Between January 2000 and December 2006, respondent employed Lita Biederman as a paralegal. During this time, she "referred imigration [sic] cases from her Filipino contacts and associations to respondent, did client intake, and prepared documents related to the immigration cases including forms, briefs and pleadings, and translated during office interviews with Tagalog-speaking clients." Respondent's "primary involvement" with these matters was attending immigration hearings.

Respondent paid Biederman fifty percent of the fees generated by her referrals, as compensation for her work on the immigration cases, plus $200 per week for "general secretarial

services unrelated to the immigration cases." The payments were not made to Biederman directly. Rather, they were made to an entity created and controlled by Biederman, the Darius Group ("Darius").

Between January 2000 and December 2006, respondent paid Darius $230,000 for Biederman's referrals. This sum represented fifty percent of the total fees received by respondent from the cases referred to him by Biederman.

Based on these facts, the parties stipulated that respondent had improperly shared legal fees with a nonlawyer employee and that he had compensated a person to recommend or secure his employment by a client, or as a reward for having made a recommendation resulting in his employment by a client.

Following a de novo review of the record, we find that the facts recited in the stipulation clearly and convincingly establish that respondent's conduct was unethical.

RPC 5.4(a) prohibits a lawyer from sharing legal fees with a nonlawyer employee, except in limited circumstances, which are inapplicable here. RPC 7.3(d) prohibits a lawyer from compensating or giving "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." Unquestionably, respondent's arrangement with Biederman, whereby she received fifty percent of the legal fees generated by the immigration cases that she referred to him, violated these rules.

The disciplinary stipulation in this matter presents one of the classic scenarios of an attorney's impermissible fee-sharing arrangement with a nonlawyer employee: the employee is paid a percentage of the fee earned by the attorney on a case referred to the attorney by the employee. See, e.g., In re Fusco, 197 N.J. 428 (2009), and In re Macaluso, 197 N.J. 427 (2009) (companion cases); In re Tomar, Simonoff, Adourian, O'Brien, Kaplan, Jacoby & Graziano, P.C., 196 N.J. 352 (2008); In re Agrapidis, 188 N.J. 248 (2006); and In re Gottesman, 126 N.J. 376 (1991).

In Fusco and Macaluso, Fusco hired a nonlawyer, who had worked in the insurance industry, as his law firm's claims manager. The claims manager received a salary, plus a percentage of the firm's net fee recovered in personal injury matters that were resolved with the manager's "substantial involvement." In addition, the claims manager received a larger percentage of the firm's fees in cases that he had referred to the firm.

In Tomar, the firm paid its nonlawyer employees a percentage of the fee earned in matters that they had referred to the law firm. The payments were characterized as "bonuses." One particular employee, the firm's claims manager, received "bonuses" totaling hundreds of thousands of dollars in a six-year period.

In Agrapidis, the lawyer paid twelve referral fees to his nonlawyer employees, totaling $20,000, during a four-year period. The amount of the fee share was based upon a percentage of the total fee received by the firm. Agrapidis did not know that the payment of fee shares, which he considered to be bonuses, was improper. He discontinued the practice prior to the OAE's investigation, when he "read about a somewhat similar practice in a legal periodical and recognized that sharing fees with his office staff was questionable."

In Gottesman, the lawyer entered into an agreement with an employee, who had a large family and circle of friends. The employee referred personal injury and workers' compensation cases to him and rendered certain services thereon, in return for a portion of Gottesman's legal fees from those cases. Gottesman claimed that the agreement was necessitated by his inability to pay the employee a salary. Gottesman believed that

it was permissible to share fees with his employee, as long as that employee had rendered substantial paralegal services.

This is the scenario here. Biederman was paid fifty percent of respondent's legal fee in all immigration cases that she referred to him. In addition, as respondent's employee, Biederman performed substantial paralegal services and acted as interpreter on all of those cases.

When an attorney shares legal fees with nonlawyer employees, the question arises as to whether the employees were acting as "runners." A "runner" is an individual who, in exchange for compensation, solicits business for a lawyer. In New Jersey, it is a third degree crime for a person to knowingly act as a runner or to use a runner. N.J.S.A. 2C:21-22.1. The question is sometimes a tricky one because, while a runner may be compensated in the form of a fee share, not all who receive fee shares are runners.

The factual assertions in the stipulation are minimal. Therefore, we cannot exclude the possibility that Biederman may have been a "runner." Nevertheless, we need not delve into what is a fact-sensitive determination, inasmuch as the stipulation does not provide clear and convincing evidence that Biederman

was a runner, and the OAE did not charge respondent with using and compensating her as such.

We find, thus, that respondent violated RPC 5.4(a) and RPC 7.3(d) when he shared with Biederman fifty percent of the legal fees received in immigration matters that she referred to his firm.

The appropriate measure of discipline in fee-sharing cases is determined on a case-by-case basis and ranges from a reprimand to a long-term suspension, depending on the egregiousness of the conduct. See, e.g., Gottesman, supra, 126 N.J. 376 (reprimand), and Agrapidis, supra, 188 N.J. 248 (reprimand); In re Macaluso, supra, 197 N.J. 427 (censure for nominal partner's participation in prohibited compensation arrangement with employee and his failure to report the controlling partner's misconduct); In re Fusco, supra, 197 N.J. 428 (three-month suspension for attorney who established a fee sharing arrangement with employee that spanned eight years, generated more than 700 cases for the firm and more than $780,000 for the employee, and that the attorney attempted to conceal by issuing payment checks to "AFG Enterprises," rather than to the employee directly; in addition, the attorney failed to report his nominal partner's misconduct); In re Pease, 167 N.J. at 597 (2001) (three-month suspension

where, during a three-month period, a runner brought in at least twelve cases for which he was paid $15,000); In re Bregg, 61 N.J. at 476 (1972) (three-month suspension where attorney paid a total of $1000 to a runner); In re Chilewich, 192 N.J. 221 (2007), and In re Sorkin, 192 N.J. 76 (2007) (companion cases) (on motions for reciprocal discipline, attorneys who pleaded guilty in New York to offering a false instrument for filing were each suspended for one year; attorneys each participated in a runner scheme operated by a husband and wife team; Chilewich admitted to having accepted twenty cases from the runners, and Sorkin admitted to having accepted fifty); In re Berglas, 190 N.J. 357 (2007) (on motion for reciprocal discipline, one-year suspension imposed on attorney who shared legal fees with a nonlawyer and improperly paid third parties for referring legal cases to him; the conduct took place over three years and involved two hundred immigration and personal injury matters); In re Birman, 185 N.J. 342 (2005) (on motion for reciprocal discipline, one-year suspension imposed on attorney who agreed to compensate an existing employee for bringing new cases into the office, after she offered to solicit clients for him); In re Berger, 185 N.J. 269 (2005) (on motion for reciprocal

discipline, one-year suspension imposed on attorney who paid two runners nearly $42,000 between January 1995 and December 1996; although the New York court determined that the attorney had also filed 350 inaccurate, incomplete and/or misleading statements, the record did not reveal the number of cases in which the attorney used misleading information to conceal his use of a runner); and In re Silverman, 185 N.J. 133 (2005) (one-year suspension for attorney who paid a chiropractor a $400 fee for each case that the chiropractor referred to him). But see In re Tomar et al., supra, 196 N.J. 352 (three partners given long-term suspensions for participation in pervasive, long-term fee-sharing arrangement with employees; given the delay in the resolution of the disciplinary matters instituted against them, the suspensions were suspended and the attorneys were placed on probation instead).

In determining the measure of discipline to be imposed on respondent for his arrangement with Biederman, we took into account several factors. First, we considered respondent's statement about his payment arrangement with Biederman:

> There is no question that I violated RPC 5.4(a) and RPC 7.3(d). I was mistaken in believing that it was proper to compensate Lita Biederman for her work on the immigration cases she brought into the office

> by paying her half the fees earned on those cases. The amounts paid to Ms. Biederman were commensurate with her work, and I simply did not realize that basing her compensation on a percentage of the fees was expressly prohibited by the Rules.
>
> The cases Ms. Biderman brought in were mainly immigration matters generated through her activities and associations in the Filipino community. Many of the clients were native Tagalog speakers who were not fluent in English. Ms. Biederman translated during client interviews and assisted with the preparation of immigration forms and trial materials, preparation of clients for trial and translation during trials and hearings. Ms. Biederman was well-versed in immigration work when I hired her, and I supervised and reviewed all her work.
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> [Certification of Martin Burger, Esq., ¶3-¶4.]

Second, we considered the extent of the arrangement. Respondent's fee shares to Biederman took place during an eight-year period. He paid her a total of more than $230,000 in fee shares during this time. This averages out to $28,750 per year. This limited information precludes us from determining the extent of the arrangement, inasmuch as it is not known how many cases Biederman referred or the fee share, per case, that she received. Nevertheless, as shown below, there is other information

available that permits us to decide the appropriate measure of discipline to be imposed on respondent under the circumstances.

Third, Biederman's annual income from her referrals to respondent's firm was as low as $16,000, in 2000, and as high as $46,000, in 2006. Her total income (including fee shares and $200 salary payments) was as low as $23,000, in 2001, and as high as $48,000, in 1999. None of these amounts seem excessive for one who functions as a paralegal and secretary. Thus, it does not appear that Biederman received a windfall in fee share payments.

Fourth, we are concerned that, as in the Fusco case, respondent's fee share and salary payments were made to Darius, rather than to Biederman. Indeed, in Fusco, we found that the attorney's payment of the fee shares to a third-party entity controlled by the nonlawyer employee undercut his claim that he did not know that fee shares were prohibited.

While it may appear that this case is more like Agrapidis and Gottesman, it is factually more similar to Fusco. The arrangement in Agrapidis was of a shorter duration and resulted in a payout of only $20,000. In Gottesman, the conduct had

ceased more than eleven years prior to our review of the disciplinary matter. Here, the facts are closer to those in the Fusco matter, particularly given respondent's decision to institute the fee share arrangement, the length of time that respondent and Biederman participated in it, and the issuance of payments for both Biederman's secretarial services and her fee shares to an entity controlled by her, rather than to Biederman directly.

Although the attorney in Fusco received a three-month suspension, we believe that, a reprimand is the appropriate measure of discipline for respondent's misdeeds. Unlike Fusco, respondent has acknowledged his wrongdoing. He has submitted letters by other attorneys and a CPA, attesting to his good character. Moreover, and most important, unlike Fusco, prior to the misconduct in this case, respondent had an unblemished disciplinary record of nearly fifty years. Based on these mitigating factors, it is our view that a reprimand is in order.

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: Julianne K. DeCore
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Martin Burger
Docket No. DRB 09-243

Argued: October 15, 2009

Decided: December 3, 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
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Chief Counsel