COLUMBUS BAR ASSOCIATION *v.* ZAUDERER.

[Cite as *Columbus Bar Assn. v. Zauderer* (1997), 80 Ohio St.3d 435.]

Attorneys at law — Misconduct — One-year suspension with sanction stayed on conditions — Failing to maintain complete records of all funds coming into attorney's possession and to account to client regarding them.

(No. 97-867 — Submitted September 10, 1997 — Decided December 31, 1997.)

ON CERTIFIED REPORT by the Board of Commissioners on Grievances and Discipline of the Supreme Court, No. 93-05.

In 1981, respondent, Philip Q. Zauderer of Columbus, Ohio, Attorney Registration No. 0002474, began to represent clients in personal injury actions against A.H. Robins Co., the manufacturer of a device known as the "Dalkon Shield" that was later determined to have caused injury to thousands of women. Eventually, respondent represented more than three hundred clients in such actions. In 1983, respondent entered into a contingent fee agreement to represent Leslie M. Smith in an action against A.H. Robins Co. and also her then-husband, Gary A. Smith, with respect to his derivative claim.

Paragraph III of the standard contingent fee agreement entered into between respondent and the Smiths, and between respondent and his other clients, gave respondent "full power and authority to file, commence, maintain and prosecute my suit * * *." In paragraph V of the agreement, the client consented to reimburse respondent for any out-of-pocket costs or expenses advanced by respondent, and in paragraph VI of the agreement, the client agreed to reimburse respondent for the fees and expenses of medical experts and investigators employed by respondent after consultation with the client.

Because more than 100,000 persons with claims similar to those of respondent's clients had filed suit, A.H. Robins Co. filed Chapter 11 bankruptcy

proceedings in August 1985 in the United States Bankruptcy Court for the Eastern District of Virginia. Cf. *In re A.H. Robins Co. (Briggs v. Dalkon Shield Claimants Trust)* (E.D.Va.1997), 211 B.R. 199. While representing his clients, respondent traveled several times to the bankruptcy court in Richmond, Virginia, and incurred expenses for nurses, expert witnesses, depositions, court costs, reporters' fees, transcripts, subscriptions to periodicals related to the progress of the case, seminars, and postage. Respondent estimated that these expenses, which benefited all his clients and could not, unlike specific expenses, be attributed to any particular client, totaled over $300,000. Respondent did not itemize these "general" expenses as they occurred. Instead, he attempted to reconstruct them from his federal tax returns for the relevant years on the basis of the percentage that Dalkon Shield cases represented of his entire caseload.

During the Chapter 11 case, a $2.4 billion trust fund was established to compensate the A.H. Robins Co. claimants. The trust provided four forms of immediate settlement and residual rights in the year 2001 for each claimant should any money remain in the trust. In 1991 and 1992, respondent settled 174 cases for his clients for a total amount from the trust fund of $3,000,007. He had incurred approximately $226,000 in expenses for these cases, no portion of which could be attributed to any specific case. Rather than attempting to bring three hundred people together to attempt to devise a method to share expenses, respondent established what he believed was a fair and equitable formula to allocate these general expenses among his clients. Under the formula a client who received $50,000 or less as a settlement would be charged ten percent of her settlement amount as a general expense, a client whose settlement was $50,000 to $120,000 would be charged $5,000, and a client whose settlement was over $120,000 would be charged $7,500 for such expenses.

Respondent applied the formula by having a member of his staff contact the clients just prior to distribution, explain that the formula was not in their contracts, and ask if each would consent to the allocation of general expenses. If a client did not agree to the formula, and five or six did not, it could be waived or compromised.

Respondent applied this formula to the Smiths' settlements. Leslie Smith was entitled to a distribution of $91,652.57 from the trust. Although respondent could document only $400.79 in expenses specific to the Leslie Smith case, he sent her a settlement sheet which indicated that expenses would be $5,000 under the formula he devised. Similarly, he charged Gary Smith, whose settlement was $4,582.63, the sum of $458.26 in general expenses. Leslie Smith and Gary Smith signed the settlement sheets, and respondent remitted to them the balance of their trust fund distribution less his fees and the expenses.

After Leslie Smith and Gary Smith filed a grievance with relator, Columbus Bar Association, respondent returned to them the expense amounts which had been subtracted from their settlements. Relator then filed a complaint charging respondent with violating several Disciplinary Rules in his accounting for and charging expenses. At the hearing before a panel of the Board of Commissioners on Grievances and Discipline of the Supreme Court ("board") in July 1994, the parties submitted testimony and stipulations of fact. The respondent agreed that he had violated DR 9-102(B)(3) (a lawyer shall maintain complete records of all funds coming into his possession and account to his client regarding them) and further agreed to establish an escrow fund to repay any client who wished to obtain a refund of the general expenses charged to him or her. Both parties agreed that under the circumstances a public reprimand would be an appropriate sanction.

Upon receipt of the panel's report, the board remanded it for additional evidence. The panel then received a report of a special master commissioner and adopted the same findings of facts. The panel readopted its conclusions of law that respondent had violated DR 9-102(B)(3). The panel once again recommended that respondent be suspended for one year with the year stayed on condition that respondent remit to all his Dalkon Shield clients the expenses he had overcharged them and had deducted from their settlement amounts, that any further general expenses be allocated only after review by the relator, and that respondent be subject to monitoring with respect to the repayment. The board adopted the findings, conclusions, and recommendation of the panel.

James K. Hunter III, K. Wallace Neidenthal, Max Kravitz and *Bruce A. Campbell,* for relator.

Mark H. Aultman and *Charles W. Kettlewell,* for respondent.

Per Curiam. Respondent entered into contingent fee agreements with his clients which required them to reimburse him for expenses advanced by him in the course of their cases. Such a commitment required that respondent keep an accurate record of such expenses. Respondent not only failed to keep such records, but he also failed to inform his clients that extraordinary general expenses were being incurred for them and similarly situated clients and that a portion of those expenses would eventually be charged to their accounts.

As early as 1982, respondent knew that he would be handling more than one Dalkon Shield case. Indeed, in that year he placed newspaper advertisements stating that he was "presently representing women on such cases" and was available to handle others on a contingent fee basis. *Disciplinary Counsel v.*

Zauderer (1984), 10 Ohio St.3d 44, 45, 10 OBR 308, 461 N.E.2d 883, 884, fn. 1, modified in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio* (1985), 471 U.S. 626, 105 S.Ct. 2265, 85 L.Ed.2d 652. Certainly, by 1985, when A.H. Robins filed its Chapter 11 case, respondent knew he was incurring fees that would have to be spread among many clients. Respondent knew, better than any one of his clients, that upon taking on additional cases after 1981 he was incurring expenses which would benefit all clients. Yet respondent neither took action to categorize these expenses, nor attempted to isolate them from his other overhead expenses.

Until their cases were settled, respondent did not inform either his existing clients or the new clients who entered into his standard contingent fee contract about the general expenses which would eventually be charged against their cases. At that time, with the settlement figure in hand, he sent to the Smiths, and presumably to other clients whose cases were ready for settlement, "settlement sheets" which allocated a portion of the general expenses to their cases. Although testimony at the hearing indicates that respondent or his staff would explain the expense allocation to his clients at settlement time, ask them if they had any objections, and give them the opportunity to have the allocation of general exposes waived, there is no such evidence that such an explanation or option was given to the Smiths. The stipulations indicate merely that respondent mailed the settlement sheets to the Smiths, and after they signed them, the net funds were disbursed to them.

It appears that respondent, while in a position of dominance because he was in control of the settlement funds, attempted a unilateral alteration of the contingent fee contracts with his clients. He allocated to their cases a portion of extraordinary expenses which the clients might not have anticipated, and allocated

as well the costs of medical and expert witnesses who, under his contracts, could be employed by respondent only after consultation with the clients. He then put his clients in a "take it or leave it" position unless they questioned the allocation. We doubt that many clients with the opportunity for an immediate payment would challenge their attorney's discretion.

We find that respondent both failed to keep appropriate records and unilaterally altered contracts with his clients. Respondent's rationalization of his actions on the ground that it would have been inconvenient to call three hundred clients together to discuss an allocation formula, does not excuse either his failure to keep appropriate records of general expenses specifically incurred for his Dalkon Shield cases, or his failure to inform his clients of the extraordinary general expenses which he was and would be incurring and give them an opportunity, at that time, to exercise the option to seek other counsel.

We conclude, as did the board, that respondent's actions violated DR 9-102(B)(3). Respondent is hereby suspended from the practice of law in Ohio for one year with the entire year stayed on the following conditions:

1. Respondent shall not violate any provision of the Code of Professional Responsibility for a period of two years.

2. The allocation of expenses in any class action or multi-district litigation in which the respondent is counsel within the two years shall be preapproved by relator.

3. The respondent shall refund all amounts overcharged to clients as set forth on the list stipulated into evidence before the panel.

4. The respondent shall maintain the escrow account which he has established to be applied to these refunds.

5. The list of clients entitled to a refund shall remain open for one year for any additional claims by clients and such claims shall, after verification by relator, be paid by respondent.

6. Notice of the potential for such refund shall be given to respondent's clients in a reasonable manner to be approved by relator.

7. The names and addresses of the clients to whom reimbursement is made, other than the Smiths, shall remain under seal to be released only to those representatives of respondent, relator, the board and the Ohio Supreme Court as may be necessary and otherwise identified through a numerical system which does not specifically disclose the identity of any client.

8. The costs of monitoring the disbursement of funds and supervision of that process shall be borne by respondent.

Costs taxed to respondent.

Judgment accordingly.

MOYER, C.J., DOUGLAS, RESNICK, PFEIFER, COOK and LUNDBERG STRATTON, JJ., concur.

F.E. SWEENEY, J., dissents and would publicly reprimand respondent.