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STATE OF MINNESOTA

IN SUPREME COURT

CX-86-343

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JUL 31 1986

Lawyers Prof. Resp. Board

Supreme Court

Per Curiam
Dissenting, Kelley & Wahl, JJ.
Took no part, Coyne, J.

In the Matter of the Application for the
Discipline of Norman Perl, an Attorney
at Law of the State of Minnesota.

Filed August 1, 1986
Wayne Tschimperle
Clerk of Appellate Courts

SYLLABUS

Acting on respondent attorney's conditional admission, the court imposes a discipline of 1 year's suspension, 3 years' probation, and certain financial repayments.

Heard, considered, and decided by the court en banc.

OPINION

PER CURIAM.

This matter involves disciplinary sanctions to be imposed on the respondent attorney. For the reasons hereinafter set out, we impose 1 year's suspension, 3 years' probation, and certain financial repayments.

It is necessary first to state the somewhat unusual procedural posture of this proceeding. On January 31, 1986, the Director of the Board of Lawyers Professional Responsibility filed a petition with the court for disciplinary action against respondent Norman Perl. On February 27, 1986, Perl filed his answer to the petition denying the allegations of misconduct and alleging various affirmative defenses. The answer contained a "conditional admission" pursuant to Rules 10(b) and 13(b) of the Rules on

Lawyers Professional Responsibility,¹ under which the Director's charges, with some qualification, were admitted, conditioned on a disciplinary disposition of a public reprimand and probation. Thereafter, on April 10, 1986, this court made its order appointing Judge Carroll Larson as referee. The hearing was scheduled to begin July 15, 1986.

On July 9, 1986, by letter to this court and on file, respondent submitted a new, amended conditional admission. He withdrew his answer in its entirety, conditioned on a discipline to be imposed of not more than 1 year's suspension and certain other terms, including refund of certain interest on trust accounts and payment towards the expenses incurred by the Director. The Director responded that while the terms of the conditional admission were not "wholly unreasonable," he could not recommend the tendered disposition. The Director stated, "My view is that if the facts as alleged are found by the referee or admitted, conditionally or otherwise, the appropriate discipline would be substantially more severe than a one year suspension." The Director stated he was ready to proceed with the hearing "or in whatever other fashion the Court may find appropriate."

¹ Rule 10(b) of the Rules on Lawyers Professional Responsibility provides:

(b) Admission or tender of conditional admission. If the lawyer admits some or all charges, or tenders an admission of some or all charges conditioned upon a stated disposition, the Director may dispense with some or all procedures under Rule 9 and file a petition for disciplinary action together with the lawyer's admission or tender of conditional admission. This Court may act thereon with or without any of the procedures under Rules 12, 13, or 14. If this Court rejects a tender of conditional admission, the matter may be remanded for proceedings under Rule 9.

Rule 13(b) provides:

(b) Conditional admission. The answer may tender an admission of some or all accusations conditioned upon a stated disposition.

The Rules of Lawyers Professional Responsibility expressly provide for a conditional admission and tender of proposed disposition. See footnote 1. The rules are less clear on how an admission is to be handled procedurally. It appears the rules contemplate the court may act thereon "with or without any of the procedures under Rules 12, 13, or 14." See Rule 10(b). In other words, the court may act on the conditional admission without the necessity of a hearing before the referee. We deem respondent's letter of July 9, 1986, asking for the court's consideration of his conditional admission, to be a motion directed to this court asking the court to consider respondent's proposal at this time.

If the Director agrees with a conditional admission, ordinarily the Director and the respondent attorney enter into a stipulation, which is then presented to this court for acceptance or rejection. See, e.g., In re Appert, 363 N.W.2d 301 (Minn. 1985). But here we do not have a stipulation. The Director disagrees with the tendered disposition. In the absence of a stipulation, we believe the matter, ordinarily, should go to the referee. The referee will treat the conditional admission the same as any pleading. The referee may determine to recommend to this court the tendered disciplinary disposition on the basis of the conditional admission, thus obviating the need for an evidentiary hearing. Or the referee may simply take the conditional admission under advisement and proceed with the hearing, deferring any recommendation until the matter has been fully heard. This procedure preserves the referee's role as this court's factfinder and also enables us to have the benefit of the referee's recommendation. The conditional admission was not designed to afford a means to bypass the referee.

Ordinarily, in keeping with this procedure, we would simply remand respondent Perl's motion to the referee. Because of unique circumstances, however, we have had the matter fully argued before us, and we have concluded to act on the motion here. This proceeding is unique because this court is already quite conversant with the facts and circumstances, more so than a referee would be at this juncture. Respondent Perl's

involvement in the Dalkon Shield matters has been the subject of protracted litigation for about seven years, and his involvement has been before us, in various aspects, some five times in the last four years. See Rice v. Perl, 320 N.W.2d 407 (Minn. 1982); Perl v. St. Paul Fire & Marine Insurance Co., 345 N.W.2d 209 (Minn. 1984); In re N.P., 361 N.W.2d 386 (Minn. 1985); and Gilchrist v. Perl and Klein v. Perl, 387 N.W.2d 412 (Minn. 1986) (consolidated on appeal); see also Browne v. Aetna Casualty & Surety Co., 377 N.W.2d 74 (Minn. Ct. App. 1985). A referee's hearing would be long and costly, and, at oral argument, the Director agreed the hearing would not materially add to our understanding of the case. As a result of the highly publicized litigation including also respondent's criminal trial in federal district court, the bar and the public generally are not unaware of at least the broad outline of the nature and extent of the misconduct involved. Moreover, the ultimate responsibility for attorney discipline rests with this court. In re Daly, 291 Minn 488, 490, 189 N.W.2d 176, 179 (1971). We conclude, therefore, under these peculiar circumstances, we should deal with the motion now before us without a remand to the referee. (We have stayed the referee's hearing pending disposition of this motion.)

I.

Attached to this opinion as an appendix is the Director's petition for discipline. Respondent having withdrawn his answer, the allegations in the petition are deemed admitted. See Rule 13(c).

Under Count I, respondent admits to a practice of having the nonlawyer employees of his law firm recommend clients to him and paying the employees for such referrals and, indeed, sharing his legal fees with the employees. Employee Robert Olson was paid at least \$47,393.98 in referral fees in 1978-79, and Olson obtained another \$35,000 to \$40,000 from the law firm in 1984 in settlement of his claim for additional referral fees. Under Count II, respondent encouraged, ratified, and paid for solicitation of clients by three other persons, Margaret Hartman, Richard M. Theno, and Jerome R. Johnson.

Under Count III, respondent admits that between 1976 and 1980 he settled approximately 174 Dalkon Shield claims against Aetna Insurance Company. These settlements were negotiated with Willard F. Browne, an Aetna claims representative, who also was being employed by respondent's law firm. Respondent's law firm paid Browne \$42,616 during this same period of time and falsely made these payments appear on the law firm books as payment for consultant work on non-Dalkon Shield cases. Respondent breached his duty to his Dalkon Shield clients by not disclosing to them his working relationship with Browne. See Rice v. Perl, 320 N.W.2d 407, 411 (Minn. 1982). Pending at this time is a class action brought on behalf of approximately 100 of respondent's Dalkon Shield clients against respondent to recover their attorney fees. See Klein v. Perl and Gilchrist v. Perl, 387 N.W.2d 412 (Minn. 1986).

Under Count IV, respondent admits that from 1975 to 1980, his firm, at his direction, earned substantial sums of interest on client funds held in the law firm's trust accounts, retaining this income for the firm. Under Count V, respondent admits to commingling client and law firm funds and failure to maintain proper books and records. Under Count VI, respondent admits that upon receiving an investigative inquiry from the Hennepin County Ethics Committee about a complaint of solicitation made by Dr. Robert L. Sellers, respondent falsely denied the solicitation and took active measures to cover up the solicitation activities.

II.

These are serious offenses. They sadly illustrate, as the Director observes, the corrosive effect of rampant commercialism on professional standards. The Director takes the position that suspension is an appropriate sanction, but argues the suspension should be for more than 1 year. Respondent, admitting his misconduct and its seriousness, contends there are extenuating circumstances warranting suspension for not more than 1 year.

Respondent was admitted to the bar in 1949 and is now 61 years old. Until his current problems, he had enjoyed an excellent reputation as a prominent member of the trial bar and had contributed his services generously in numerous civic, professional, religious, and charitable projects. He cites his acquittal on the federal criminal charges for mail fraud, which included some of the same charges involved here, and while he concedes the acquittal is not res judicata in these disciplinary proceedings, he urges it as an ameliorating factor. In particular, he suggests that some 7 years of protracted litigation — highly publicized, humiliating, and embarrassing — has been a form of punishment. His personal and professional reputation has suffered grievously. His health has been adversely affected. Substantial sums received in fees in the Dalkon Shield cases have been or will be forfeited. Heavy legal fees for his defense have been incurred, and his inability to practice on any sustained and undistracted basis during these past years has resulted in a substantial loss of income.

We have said before that no two disciplinary cases are exactly alike. In re Serstock, 316 N.W.2d 559, 561 (Minn. 1982). Each case has its unique circumstances. In two prior cases dealing with solicitation of Dalkon Shield clients by nonlawyer employees, for example, we approved stipulations for a 2-year suspension in one case and a 6-month suspension in the other. See In re Pyle, 363 N.W.2d 303 (Minn. 1985) (2 years); In re Appert, 363 N.W.2d 301 (Minn. 1985) (6 months). Neither case, however, involved fee forfeitures nor a criminal acquittal nor attorneys approaching the end of their legal careers. In administering discipline, the court weighs the nature of the misconduct, the cumulative weight of the disciplinary rule violations, the harm to the public, and the harm to the legal profession. In re Pearson, 352 N.W.2d 415, 419 (Minn. 1984). Also weighed in the balance are any extenuating circumstances. In re Olkon, 324 N.W.2d 192 (Minn. 1982).

While ordinarily we would agree with the Director that a longer suspension should be imposed, we believe in this instance a 1-year suspension is justifiable. While the Dalkon Shield settlements were tainted by respondent's failure to disclose to his clients Browne's dual role, no claim is made the settlements themselves were not reasonable. Respondent is being subjected to a substantial forfeiture of fees earned on these settlements, a forfeiture which is both "reparational and admonitory." Gilchrist v. Perl, 387 N.W.2d 412, 416 (Minn. 1986) (the potential forfeiture exposure is in excess of \$500,000). While respondent's use of client funds to earn interest may be characterized as misappropriation, we have no charge here of conversion or embezzlement in the classic sense. Although the IOLTA program was not established until July 1, 1983, under the tendered disposition respondent will have to refund interest earned on the settlements and will have to reimburse the Director in some substantial degree for the Director's considerable expenses incurred in this disciplinary proceeding. Respondent's argument that the notoriety attending his problems is itself punishment is double edged. Notoriety is often a function of prominence, and the latter cannot be accepted without the former. In In re Franke, 345 N.W.2d 224, 229 (Minn. 1984), we observed that negative media attention reflects adversely on all members of the profession and may discourage those needing legal assistance from seeking it. On the other hand, the public is aware here of respondent's acquittal on the criminal charges, and, undeniably, the overall publicity has been punishment. But more importantly, respondent is not indifferent to the harm he has caused. We are persuaded there will be no reoccurrence of this misconduct by respondent. His otherwise good record over many years and his contriteness so vouch. Taking all these factors into consideration and having in mind respondent's age, together with the other conditions we here impose, we believe a 1-year suspension is appropriate.

It is, therefore, ordered that respondent Norman Perl is hereby suspended from the practice of law for a period of 1 year, commencing August 4, 1986. He can be reinstated

upon petition on August 4, 1987, if the following terms and conditions are met:

1. Respondent shall pay a reasonable sum toward reimbursement of the Director's expenses, costs, and disbursements in this proceeding. Within 15 days from the date of this opinion, the parties shall submit to this court the sum agreed upon and the terms of payment. If they are unable to agree, within the same 15 days each party shall submit in affidavit form their position on this issue for the court's decision.

2. Respondent and his law firm shall, under the Director's supervision, promptly refund the interest earned on any funds belonging to clients as set out in Count IV of the Director's petition. This money shall be paid to the clients to whom it is owed, to the extent practically ascertainable and feasible, otherwise to the Interest on Lawyers Trust Account Board (IOLTA). The Director may designate an accountant to implement this accounting and refund procedure, the cost thereof to be paid by respondent.

3. Respondent shall proceed promptly with efforts towards settlement of the pending claims of the Dalkon Shield clients in Gilchrist and the Klein class action.

4. Respondent and his law firm shall demonstrate compliance with all requirements for the keeping of law office books and records, including but not limited to trust accounts.

5. At or before the end of the 1-year suspension, and prior to reinstatement:

- a) Respondent shall satisfy the Director that the Gilchrist and Klein cases have either been settled or that good-faith efforts to do so are being diligently pursued. As this court has previously noted, a disciplinary proceeding is not primarily a collection action. In re Peters, 332 N.W.2d 10 (Minn. 1983). We would expect, however, these claims to be resolved as promptly as possible, and failure to have done so prior to reinstatement, particularly in view of assurances given by respondent's counsel, will be carefully scrutinized.
- b) Respondent shall take and pass the Professional Responsibility Examination.
- c) Respondent shall meet the requirements of the Minnesota Board of Continuing Legal Education for reinstatement.

6. Upon reinstatement, respondent shall be placed on 3 years' supervised probation and shall perform a reasonable number of hours of pro bono legal service as the Director specifies for such persons or through such agencies as the Director designates.

KELLEY, Justice, dissents in opinion to follow, in which WAHL, Justice, joins.

COYNE, Justice, took no part in the consideration or decision of this case.