

DAVID S. CRAMP
Special Standing Master
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OFFICE OF ATTORNEY ETHICS,	:	SUPREME COURT OF NEW JERSEY
	:	DISTRICT XIV ETHICS COMMITTEE
Complainant,	:	DOCKET NO. XIV-06-67E
v.	:	
	:	Civil Action
DAVID R. GROSS, ESQ.,	:	
	:	
Respondent.	:	DECISION
	:	

Respondent's attorney devotes time in his Brief to the proposition that the Keene Trust money was a "gift" to David Gross. The Special Master is not convinced that the Keene Trust money was a gift to Mr. Gross. While the Complaint does indeed refer to the \$50,000 as a gift, (Complaint, 33), Respondent denied the allegation in his Answer. Although there was reason for a denial, Respondent could have been more selective; he could have denied those aspects which he should have denied, and admitted those which he could have admitted; he was not selective; the fact that he was not selective indicates that at the time of the answer, there was no thought of the concept of "gift." The fact that it is in the Complaint and is not included as a Stipulation of Fact is indicative that the Office of Attorney Ethics did not intend to characterize the money as a gift.

In a portion of the Hearing, a Keene Trustee, Richard Lippe, when asked about the payment by Mr. Joseph Schiavone, a Budd Lerner shareholder, stated to Mr. Schiavone that a

"gift" was intended. The statement was hearsay. Rule 801 of the New Jersey Rules of Evidence defines hearsay as follows:

. . . a statement other than one made by declarant while testifying at the trial of hearing, offered in evidence to prove the truth of the matter asserted.

Underlying the exclusion of hearsay is the basic principle that unless a specific hearsay exception recognizing the trustworthiness of some otherwise inadmissible out-of-court statement applies, such "untrustworthy and unreliable" evidence should not be admitted in a judicial proceeding. See *State v. Williams*, 169 N.J. 349, 358-360 (2001) (holding that a declarant's statement against interest would make the statement admissible). *Fitzgerald v. Stanley Roberts, Inc.*, 186 N.J. 286, 316 (2006). (Evidence not admitted for truth of the fact that T.S. had sexual relations, but might be admissible on other issues.)

Rule 803 set forth numerous exceptions to the Hearsay Rule, including prior statements of a witness at a trial or hearing, excited utterances, statements in public records, and statements by deceased declarants. None of the exceptions to the Hearsay Rule apply to the instant case. The Special Master holds that the statement by Lippe that the money was a "gift" was hearsay, and not admissible in evidence.

On the other issue that vexes the Deciders of Ethics matters – whether it has been shown that the Respondent has acted out of wrong principles – the Special Master has concluded that in the Keene Trust matter, the OAE has satisfied its burden to provide by a standard of clear and convincing evidence that Mr. Gross acted wrongly against his old firm (his firm at the time of the events herein). There is no doubt at all that Mr. Gross took a fee from the Keene Trust in return for settling the *Employers Mutual* lawsuit. The Complaint is a very simple one: it charges that the monies from the Keene Trust should have been turned over to the firm. Mr. Gross, as President of the Firm of Budd, Lerner, had to know that such a fee was to be shared by the

Shareholders. He signed the Partnership Agreement that contained the language set forth in Finding of Fact No. 5. below. He knew that there were no changes in the Partnership Agreement, at least to the portions that controlled the fruits of the labor as attorneys. This was an opportunity for a fee for settling a case – he knew that the controlling document said the monies belonged to the Firm, and he knew he was acting wrongly to the Firm. In this regard, there was testimony that the Firm became a corporation in 1983; after the Firm became a corporation, there was not a general practice of Shareholders signing the Partnership Agreement. Respondent signed an amendment to the Certificate of Incorporation containing the language of Finding of Fact No. 9. As President of the corporation he knew that the money from the Keene Trust should have been turned over to the Firm. Indeed, he should have turned over the \$100,000. It was not his choice to select Levy as the recipient of the fee earned for the Trust.

The fact that the monies were over and above the fees for the separate action that the Keene Trust was prosecuting for itself – the fraudulent conveyance action and the insurance claim it was prosecuting in the D.C. courts – proves little as to the motivations of the parties. Also, the same thing can be said that the intent of the Keene Trust was that the money was for Mr. Gross personally – it proves little of the motivations of the parties.

The position of the Respondent is belied by the fact that the attorney for the Respondent wrote a letter to an investigator in the Office of Attorney Ethics on December 16, 2002 in which the concept of "gift" is not mentioned. While Respondent testified at the Hearing in terms of "gift", pre-hearing, he sat down with investigators for the Office of Attorney Ethics and did not use the word "gift" to characterize the money he had received from the Keene Trust. It is probably better to use Respondent's own invoice to the Keene Trust when he characterized the money as "special consideration" for the settlement of the D.C. lawsuit. Indeed, the settlement of

the lawsuit in the D.C. Court was the stated reason by Mr. George A. Davidson (the attorney for the Keene Trust) in his letter on December 23, 2002 to Gerald J. Smith. The letter did not use the term "gift." Mr. Davidson's letter also raised the question of the payment to Mr. Gross of \$100,000 and his sharing it with Mr. Levy (co-counsel in the fraudulent conveyance action and the one who introduced Mr. Gross to the Keene Trust). The Special Master does not feel that Mr. Gross had the ability to enter into such a sharing agreement (because it believes the money was earned by the Firm, and should have been turned over to the Firm). It is difficult to understand Mr. Gross's apparent understanding that monies earned in settling a case for the Keene Trust does not have to be turned over to the Firm. Mr. Gross was President of the Firm of Budd, Lerner, Gross, Rosenbaum, Greenberg and Sade. Mr. Gross signed a Partnership Agreement in 1980 that clearly stated "all gains from the work of the partnership shall be assets of the partnership;" and that "all receipts from the work of the partnership shall be deposited in the Midlantic Bank," and that defined "work of the partnership" as "all services directly or indirectly related to the practice of law." As President of the firm, he should have been familiar with the fact that this provision was never changed from the day he signed it until 2002. The fact that Budd Lerner became a corporation and there was little proof after the change-over that partners actually signed the partnership agreements, all does not dispute the fact that Mr. Gross did in fact sign a partnership agreement, and the partnership agreement was not changed in that it contained the language above quoted. The Special Master believes that the work on the settlement of the insurance case was the reason for the money being given to Respondent, and he knew that it should have been turned over to the Firm.

In this regard, the Special Master relies upon the testimony of the secretary of Mr. Gross, Claudette McCarthy, when she testified that Mr. Gross asked her to delete all reference to a letter

to a representative of the Keene Trust (Finding of Fact No. 14), from the computer system being used by the Firm. Mrs. McCarthy stated that she complied with his request. Her testimony has proven to be true as there was indeed a letter to a representative of the Keene Trust (from another source – the Keene Trust). There was not a trace of the letter on the computer system. Mr. Gross could have made an application to search the computer system to find whether there remained in the system a copy of the letter – he did not. The evidence that Mr. Gross asked Mrs. McCarthy to delete the letter from the computer system was strong evidence of intent; it proved to be true.

THE LEXICON CHECK

Since Respondent has asserted that the Lexicon Check was cashed inadvertently, and there seems to be some plausible possibility that the check was cashed inadvertently, the Special Master believes it was inadvertent and finds clearly and convincingly that there was no violation of the P.R.C.s in the handling of the check. There was evidence addressed at the Hearing that, on the day the check was cashed, Respondent may have been en route to Atlanta, Georgia (with Mr. Schiavone) for pleasure and business. It would have been impossible to cash the check if the Respondent was en route to Atlanta.

The Findings of fact are as follows:

1. Since 1960, David R. Gross has been an attorney licensed to practice law in New Jersey. (Stipulation of Facts – 1).
2. Mr. Gross has no prior Ethics Complaints filed against him, and has, at all times, cooperated with the Office of Attorney Ethics (Stipulation of Facts – 2).

3. From 1960 to August, 2002, Respondent was employed by the law firm Budd, Lerner, Gross, Rosenbaum, Greenberg and Sade at 150 John F. Kennedy Parkway, Short Hills, New Jersey. (Stipulation of Facts – 3).

4. In 1965, Respondent became a partner in Budd, Lerner and was named "managing partner" in 1970, remaining in that position or similar positions until 2002. In 1980, Respondent became President of the firm and remained President of the firm until 2002. (Stipulation of Facts/Keene Trust – 2; Office of Attorney Ethics – 12, 13).

5. On August 1, 1980, Respondent signed a partnership agreement that contained the following provision: "All gains from the work of the partnership shall be the assets of the partnership; and that all receipts from the work of the partnership shall be deposited in the Midlantic Bank, or such other bank as the partners may agree upon, in the name of the partnership;" and that defined "Work of the Partnership" as "all services directly or indirectly related to the practice of law including, unless otherwise agreed to in writing by the Partners, acting in a fiduciary capacity (except for members of the said partners family), teaching, honorariums." (Stipulations of Fact – Keene Trust – 3).

6. As of September 30, 1983, Budd, Lerner became a Professional Corporation. (Stipulations of Fact/ Keene Trust – 4).

7. Drafts of the Employment Agreements were circulated during the period 1980 to 1995 (Office of Attorney Ethics – F of Facts – No. 20). Each of the Employment Agreements contained the language in No. 5 (above). In fact, when they were circulated, there was no question about the language in No. 5 (above).

8. On June 19, 1990, an amendment to Budd Lerner's Certificate of Incorporation was filed. The amendment was signed by Respondent. Paragraph 12 provided that "No director

shall have any personal liability to the Corporation or its Shareholders for damages for breach of any duty owed to the corporation or its shareholders, except that this Article TWELFTH shall not eliminate or limit the Liability of each Director for any breach of duty based on an act or omission, (a) in breach of such person's duty of loyalty to the Corporation or its Shareholders; (b) not in good faith or involving knowing violation of the law; or (c) resulting in the receipt by such person of an improper personal benefit." (Office of Attorney Ethics – Findings of Fact – 22).

9. Respondent, on behalf of Budd, Lerner, represented the Keene Creditors Trust. ("Keene Trust"). Stanley Levy, a well-known asbestos litigator from a New York law firm had asked Respondent to serve as co-counsel with him on the Trust's fraudulent conveyance litigation matter. (Stipulations of Fact/Keene Trust – 5).

10. During Mr. Gross and Mr. Levy's meetings with representatives of the Keene Trust on the fraudulent conveyance matter, the Trustees discussed a long-pending insurance coverage lawsuit in Washington, D.C. that the Trust had against Employers Mutual Casualty Company in which the Trust had received an unacceptable offer of \$1 Million. (Stipulations of Fact/ Keene Trust – 6).

11. Ultimately, the Keene Trustees requested that Respondent assist in bringing about an expeditious resolution of the matter, and Mr. Gross agreed to do so. No separate retention agreement was entered into between the Keene Trust and Budd, Lerner, P.C. or Respondent relating to the Employer's Mutual Matter. (Stipulations of Fact/ Keene Trust – 7).

12. Within a few months, Mr. Gross successfully resolved the Trust's insurance litigation, obtaining a settlement of \$7,500,000 for the Keene Trust. (Stipulation of Fact/Keene Trust – 9).

13. In recognition of his work in achieving the settlement, the Trustees of the Keene Trust decided to give Respondent \$100,000 over and above the fees paid to Budd, Lerner. The Trustees intended the payment for Respondent, personally. (Stipulations of Fact/Keene Trust No. 10).

14. Upon being informed of the decision of the Trustees, Respondent asked that the \$100,000 be divided equally between him and Levy, and forwarded an invoice to a representative of the Trust on Budd, Lerner stationary. (Stipulations of Fact/Keene Trust – 11). The invoice described the payment as "the special consideration given to us by the Trustees." (Complaint – Paragraph 12, Exhibit 4).

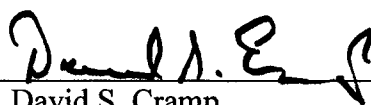
15. Budd Lerner, the Professional Corporation, had for several years, circulated proposed Employment Agreements – that were never executed – that contained the language in No. 5 (above).

16. The Special Master is aware that former members of the Firm, if called as witnesses, would testify that they were unaware of a Firm policy requiring approval of the Shareholders for, or prohibiting the receipt and retention of, gifts or things of value from clients, teaching stipends, or honorariums. Thus, the Special Master is aware of the Stipulations Of Fact with respect to Mr. Novak, Mr. Apfel, Mr. Matthews and Ms. Matheke.

RECOMMENDATION

Since the Special Master has made findings clearly and convincingly that there was intent to do harm to the Firm, and there was a disregard of standards of ethics, the only recommendation is disbarment.

DATED: April 16, 2009

BY: 
David S. Cramp
Special Hearing Master