SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 00-082

IN THE MATTER OF
MICHAEL F. CHAZKEL
AN ATTORNEY AT LAW

Decision

Argued: July 20, 2000

Decided: February 6, 2001

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

Arnold C. Lakind 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 upon a disciplinary stipulation between respondent and the Office of Attorney Ethics ("OAE"). According to the stipulation, after an ethics hearing was scheduled for September 21, 1999, the OAE and respondent's counsel agreed that this matter could proceed directly to us, in accordance with R. 1:20-6(c)(1) and R. 1:20-15(f), since there were no genuine disputes of material fact. In essence, respondent admitted

the allegations of the amended complaint, with the exception of the charge of a violation of RPC 8.4(c) (conduct involving dishonesty, deceit, fraud or misrepresentation). As to this issue, the stipulation provides as follows:

> E. The OAE and the respondent agree that in accordance with R. 1:20-6(c)(1) and R. 1:20-15(f) the matter should proceed directly to the Board to determine the following issue[]:
>
> 1) Whether in addition to the RPC's admitted in the amended complaint, respondent's conduct also violated RPC 8.4(c) as alleged in the amended complaint.
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> * * *
>
> The parties further stipulate that . . . the Board may consider the stipulated record in Section III-B below in determining . . . whether respondent's conduct as alleged in the complaint violated RPC 8.4(c).
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> Section III-B is a list of the exhibits that comprise the stipulated record.

* * *

Respondent was admitted to the New Jersey bar in 1972 and maintains an office for the practice of law in East Brunswick, Middlesex County. He has no ethics history.

In or about 1991, Mamie Harris, the grievant, was injured in an automobile accident while riding in a taxicab. Her then-attorney, Philip Linder, filed suit, leading to a recovery of $324,095 on April 28, 1995. On June 26, 1995 Linder referred the case to respondent to pursue the collection of the judgment against the defendant, Apple Transportation, and to

proceed against its insurance carrier, New Hampshire Insurance Company ("NHI"), who had not been joined as a party. Harris and respondent signed a standard contingency fee agreement.

On July 3, 1996 respondent filed an action — in which he joined NHI — seeking judgment in the amount of $324,095 plus interest and, under the Consumer Fraud Act, treble damages. Soon thereafter, NHI agreed to settle the matter for $273,513, a sum that included pre-judgment interest of $83,000. In order to protect itself against any fee claims made by Linder, Apple Transportation required respondent to sign an agreement obligating him and Harris to be responsible for any fees claimed by Linder. The agreement provided as follows, in part:

> Plaintiff, MAMIE HARRIS, and plaintiff's counsel, MICHAEL CHAZKEL of CHAZKEL & ASSOCIATES, agree to hold in escrow, out of the proceeds of the funds, sufficient sums to cover any monies due to plaintiff's prior attorney, Philip B. Linder, for any claims he prosecuted on behalf of Mamie Harris against any of the defendants. After any dispute with regard to Mr. Linder's fee has been resolved, the escrow funds may be released.
> [Exhibit 8 to the amended complaint]

On or about November 1, 1996, respondent disbursed to himself $90,760 as legal fees (one-third of $273,513, the settlement amount). That sum represented the maximum allowed by rule for the total recovery of legal fees incurred in Harris' case, including Linder's fees. Otherwise stated, respondent collected one hundred percent of the maximum allowable fee for the case, without regard for the percentage of Linder's work in the case. Instead of calculating his and Linder's percent share of the work, disbursing to himself only the percentage to which he was entitled and escrowing the balance for Linder, respondent

set aside $38,000 for Linder's fee out of Harris' portion of the settlement proceeds. The $38,000 sum represented twenty percent of $190,000 (the $273,000 settlement minus $83,000 for pre-judgment interest). In a letter to Linder, respondent notified him that, for the moment, he was setting aside twenty percent of the settlement, a percentage preliminarily quoted by Linder as applicable.

Respondent stipulated that (1) he knew that the Linder firm claimed a portion of the legal fees; (2) despite this knowledge, he withdrew the entire amount allowed by the rules; and (3) as a certified civil trial attorney, he should have known that, absent a court order, any fees due the Linder firm would have to come from his share of the settlement. He claimed, however, that he viewed the insurance coverage action as a separate matter from the tort case and that, therefore, he did not realize that the Linder firm could have a viable claim against him for a portion of his fee.

Respondent admitted that his conduct violated RPC 1.15(c) (failure to set aside and safeguard funds in which another person claims an interest). He denied, however, that it violated RPC 8.4(c), as alleged in the complaint.[1]

On discovering that the $38,000 had been set aside from her share of the settlement, Harris filed for fee arbitration against Linder, who named respondent as a third party to the

[1]The complaint does not specifically cite what conduct under RPC 8.4(c) — dishonesty, fraud, deceit or misrepresentation — respondent displayed. In its brief, however, the OAE argues that, by failing to explain to Harris that the $38,000 was not coming out of his share of the settlement, respondent misrepresented to her, by silence, Crispin v. Volkswagenwerk, A.G, 96 N.J. 336, 347 (1984), that the appropriate course of action was to escrow her funds, rather than his own.

fee arbitration proceedings. These proceedings lasted more than one year, during which time the $38,000 remained in escrow.

On December 3, 1997, without the approval of Linder and NHI, and while the fee arbitration matter was still pending, respondent released the $38,000 escrow to Harris. On December 9, 1997, the fee arbitration panel chair directed respondent to redeposit the improperly released escrow funds. Respondent did not do so. On January 5, 1998, the panel chair again directed respondent to provide proof that the funds had been replaced. When respondent failed to do so, Harris filed an ethics grievance against him on January 28, 1998.

Respondent stipulated that he violated RPC 1.15(a) (failure to safekeep property) by releasing the $38,000 escrow to Harris without obtaining the consent of either counsel for NHI or the Linder firm. In his defense, respondent alleged that he did not believe that Linder's authorization was required because he believed (based on what is not clear) that Linder had abandoned his claim for a fee. He conceded, however, that his failure to obtain NHI's consent was the product of neglect.

The third count of the complaint alleges — and respondent admitted — that his conduct in connection with the insertion of a clause in the settlement statement violated RPC 1.7(b) (conflict of interest), RPC 1.8(a) (knowingly acquiring a pecuniary interest adverse to the client), RPC 1.16(a)(1) (failure to withdraw from representation) and RPC 1.4(b)(failure to provide the client with an explanation of the matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation).

Specifically, at the bottom of the settlement statement that respondent prepared for Harris' signature, he added the following clause:

> We understand that there is a dispute with regard to the legal fees which may be due Phillip Linder, Esq. and/or Robert Linder, Esq.[2] over and above the amount held in escrow. In the event any additional legal fees become due to either Phillip Linder, Esq. or Robert Linder, Esq., we agree to indemnify and hold harmless Michael F. Chazkel, Esq. and Chazkel Associates, P.C. for any and all said additional fees.
>
> ____________________
> James Harris[3]
>
> ____________________
> Mamie Harris

[Exhibit 11 to the amended complaint]

Both Harrises signed the bottom part of the statement.

As noted above, respondent stipulated that (1) he did not explain to Harris that the $38,000 should have been set aside from his legal fees, rather than from her portion of the settlement; (2) the above clause placed his and his client's interests in conflict and caused him to acquire a pecuniary interest adverse to the client; and (3) he should have withdrawn from the representation after the conflict of interest arose. Respondent admitted violations of RPC 1.4(b), RPC 1.7(b), RPC 1.8(a) and RPC 1.16(a)(1). Respondent denied that his

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[2] The record refers to Robert Linder's possible claim for a referral fee.

[3] James Harris is Mamie Harris' son.

conduct constituted misrepresentation, in violation of RPC 8.4(c),as alleged in the complaint.[4]

The fourth count of the complaint alleges that the retainer agreement between respondent and Harris was a standard form contingency fee agreement under R. 1:21-7, which precludes the recovery of a contingent fee on pre-judgment interest. As mentioned earlier, respondent calculated his one-third fee over the entire $273,000 settlement figure, which included $83,000 in pre-judgment interest.

R. 1:21-7(c) states as follows:

> (c) In any matter where a client's claim for damages is based upon the alleged tortious conduct of another . . . . an attorney shall not . . . collect a contingency fee in excess of the following limits:
>
> (1) 33 1/3 % on the first $500,000 recovered;
>
> * * *
>
> (d) The permissible fee provided for in paragraph (c) shall be computed on the net sum after deducting . . . any interest included in a judgment pursuant to R. 4:42.11(b) . . . . [Emphasis added].

R. 4:42-11(b) provides that, in tort actions, the court shall include pre-judgment interest in the judgement.

According to the complaint, before entering into the retainer agreement with Harris, respondent did not communicate to her his alleged understanding that R. 1:21-7 did not govern his representation because the suit that he filed was not a tort action, but an insurance

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[4]The specific basis for the charge of misrepresentation is not clear from the language of the complaint.

coverage action and that, therefore, he considered his fee to be separate and apart from any fees claimed by the Linder firm. The complaint charges that, since respondent knew that R. 1:21-7 prohibits the collection of a contingent fee on pre-judgment interest in tort actions and if he, in fact, believed that the suit he filed for Harris was not a tort action, he should have sought court approval before collecting $27,000 in fees calculated on pre-judgment interest. According to the complaint, respondent's conduct in this regard violated R. 1:21-7 and RPC 8.4(c). (The complaint cited conduct involving deceit, dishonesty and misrepresentation). Respondent admitted a violation of the former rule, but not the latter.

Finally, the fifth count of the complaint alleges that, in collecting without court approval a fee in excess of one-third of the net recovery, that is, in including $83,000 in pre-judgment interest in the computation of his one-third fee, respondent overreached his client, in violation of RPC 1.5(fees should be reasonable) and RPC 8.4(c). As to the latter, although the complaint does not specifically state whether respondent's actions constituted dishonesty, fraud, deceit or misrepresentation, the OAE's brief urges a finding that (1) by depriving Harris of any opportunity to challenge or even discuss his collection of one-third of the entire settlement amount and (2) by not seeking court approval therefore, respondent's conduct was deceitful and misleading. Respondent stipulated a violation of RPC 1.5, but not RPC 8.4(c).

* * *

In sum, respondent stipulated the following: (1) a violation of RPC 1.15(c) for his failure to set aside from his own share of the settlement sufficient funds for the Linder firm's claim for legal fees; (2) a violation of RPC 1.15(a) for his release of the escrowed $38,000 escrow to Harris, without the consent of the Linder firm or NHI; (3) a violation of RPC 1.7(b), RPC 1.8 (a), RPC 1.16(a)(1) and RPC 1.4(b) for his involvement in a conflict of interest situation with the client and his failure to explain to her that the $38,000 was coming from her share of the settlement proceeds; (4) a violation of R. 1:21-7 for the calculation of his fee over pre-judgment interest, without first obtaining court approval; and (5) a violation of RPC 1.5 for collecting an excessive fee.

* * *

The OAE urged the imposition of a reprimand (even though in its brief it characterized respondent's conduct as "outrageous" and "unconscionable"), while respondent argued that discipline no greater than an admonition is warranted. The OAE also recommended that respondent be required to return to Harris the sum of $27,837.66 (together with interest from November 1, 1996), the portion of the fee that relates to pre-judgment interest. According to the OAE, respondent is currently challenging, in a pending civil suit that he filed in Middlesex County, his legal obligation to refund the $27,000 to Harris. The OAE argued that "[i]t is unconscionable for [respondent] to continue to contend in this civil proceeding that he is entitled to any portion of this prejudgment interest when

he now admits in this disciplinary proceeding that there is clear and convincing evidence that he improperly obtained these funds from his client." OAE's brief at 9.

* * *

Upon a de novo review of the record, we were satisfied that the DEC's conclusion that respondent was guilty of unethical conduct is supported by clear and convincing evidence.

It should be first pointed out that this record, as submitted by respondent and the OAE, makes it difficult to unravel precisely the nature and extent of all of respondent's ethics infractions. Indeed, the stipulation covers only a portion of respondent's ethics improprieties, leaving to our determination the issue of whether respondent's conduct was also deceitful and dishonest. To that end, the parties incorporated into the stipulated record a pile of documents half a foot high, in essence directing us to carefully review every page — not on a de novo basis, but as the original trier of fact — to determine if anything in those documents reveals deceitful or dishonest conduct on respondent's part. More appropriately, the parties should have stipulated undisputed facts, as they did, and then hold a hearing on the contested part of the charged violations. The net result is that our task of deciding whether respondent's conduct violated RPC 8.4(c) has been rendered extremely difficult and laborious because of the absence of a record developed through a hearing process below and the absence of findings by a trier of fact. Fortunately, as will be discussed below, we do not

need to go outside of the joint stipulation and amended complaint to make findings in this regard.

With respect to the stipulated violations, respondent admitted the following: (1) a violation of RPC 1.15 (c) by collecting one hundred percent of the total allowable fees for the case without escrowing Linder's fee from that share of the settlement; (2) a violation of RPC 1.15 (a) for improperly releasing the $38,000 to Harris without the consent of the Linder firm or NHI; (3) violations of RPC 1.7 (b), RPC 1.8, RPC 1.16 (a)(1) and RPC 1.4 (b) for his involvement in a conflict of interest situation with the client and his failure to explain to her that the $38,000 came from her share of the settlement proceeds; (4) a violation of R. 1:21-7 for including pre-judgment interest in the calculation of his fee; and (5) a violation of RPC 1.5 for collecting an excessive fee.

We must now turn to the troubling issue of the RPC 8.4 (c) violations. First, we concluded, for several reasons, that the stipulation and amended complaint contain by themselves clear and convincing evidence of RPC 8.4 (c) violations:

(1) Respondent is no newcomer to the profession. He is a seasoned attorney with over twenty years of experience in complex insurance litigation. He is a certified civil trial attorney as well;

(2) R. 1:21-7 (requiring the deduction of prejudgment interest prior to calculation of attorney fees) leaves no room for the interpretation (as respondent would have it) that it is appropriate to collect a fee on pre-judgment interest;

(3) There is no question (and respondent admitted) that the suit he filed was a derivative of the original tort action. Indeed, respondent admitted that Dillon v. Allstate Ins. Co., 196 N.J. Super 195 (1984), unambiguously states that a subsequent action for the collection of judgment and the tort action on which it is based are "obviously intertwined and are 'based upon the alleged tortious conduct of another.' R. 1:21-7 (C)." Dillon v. Allstate Ins. Co., supra, 196 N.J. Super. at 199.

(4) Respondent had to know that pre-judgment interest could not be included in the calculation of the fee because, when he escrowed the $38,000 for Linder, he did not include pre-judgment interest — yet he did so for himself;

(5) Even though respondent stipulated, in the disciplinary proceedings, that he now recognizes that what he did was wrong, that is, that he could not include pre-judgment interest in calculating his fee, he is currently challenging that issue in a suit that he filed in Middlesex County, in which he asks the court to declare that he is entitled to that portion of the fee;

(6) It is abundantly clear from this record that Mamie Harris was an unsophisticated woman, entirely at respondent's mercy with regard to the complexities of the case. One wonders if respondent would have been so quick to help himself with excessive fees, had Harris been a bit more sophisticated.

In light of the foregoing, the conclusion that respondent acted with knowledge and deliberation, in violation of RPC 8.4(c) is inescapable.

There remains the issue of discipline. For respondent's release of the escrow, alone, an admonition or a reprimand would normally be the appropriate level of discipline. See, e.g., In re Spizz, 140 N.J. 38(1995) (admonition for releasing to client escrow for former attorney's fees, against court order, and misrepresenting to court and former attorney that escrow was still in place); In the Matter of Joel Albert, Docket No. DRB 97-092 (February 23, 1998) (admonition for releasing a portion of escrow funds to pay college tuition of daughter of a party to escrow agreement, without first obtaining consent of other party; reasonable belief that consent had been given); In re Flayer, 130 N.J. 21(1992) (reprimand for making unauthorized disbursements against escrow funds); and In re Power, 91 N.J. 408(1982)(reprimand for improperly disbursing escrow funds to a third party, in satisfaction of that party's bill).

For respondent's involvement in a conflict of interest situation with his client, likewise a reprimand would normally be imposed. "In cases involving conflict of interest, absent egregious circumstances or serious economic injury to the clients involved, a public reprimand constitutes appropriate discipline." In re Berkowitz, 136 N.J. 134, 148 (1994).

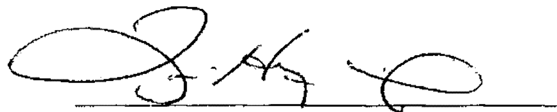
In contrast, cases dealing with fee overreaching have ranged from a reprimand to disbarment. In re Hinnant, 121 N.J. 395(1990) (reprimand for attempt to collect a $21,000 fee in a real estate transaction, including a commission on the purchase price; conflict of interest also found); In re Mezzacca, 120 N.J. 162 (1990) (reprimand for, among other

things, taking contingent fees based on gross recovery amounts and failing to provide written fee agreements); In re Thompson, 135 N.J. 125(1994) (three-month suspension for charging client $2,250 to file two identical motions necessitated by attorney's own neglect and to file pre-trial motion never prepared; misrepresentations considered in aggravation and illness considered in mitigation); In re Ort, 134 N.J. 146 (1993) (disbarment for withdrawing fees from estate account without client's knowledge and consent, obtaining a home equity loan on estate property against client's instructions, misrepresenting the value of his services and charging $32,000 in fees on a $300,000 estate).

Clearly, respondent's fee overreaching and his violation of RPC 8.4(c) were the most serious of his numerous ethics infractions in this case. After consideration of the relevant circumstances, a five-member majority determined to impose a three-month suspension. Two members would have imposed a reprimand, while one member would have suspended respondent for six months. One member recused herself.

In addition, we required respondent to reimburse the Disciplinary Oversight Committee for administrative expenses.

Dated: 2/6/2004



LEE M. HYMERLING
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY

DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Michael F. Chazkel
Docket No. DRB 00-082

Argued: **July 20, 2000**

Decided: **February 6, 2001**

Disposition: Three-month suspension

Members	Disbar	Three-month Suspension	Reprimand	Six-month Suspension	Dismiss	Disqualified	Did not Participate
Hymerling			X				
Peterson		X					
Boylan		X					
Brody		X					
Lolla		X					
Maudsley						X	
O'Shaughnessy			X				
Schwartz				X			
Wissinger		X					
Total:		5	2	1		1	

Robyn M. Hill 6/6/01

Robyn M. Hill
Chief Counsel