SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 07-395
District Docket Nos. XIII-05-008E
and XIII-05-340E

IN THE MATTER OF	:
JAMES E. SACKS-WILNER	:
AN ATTORNEY AT LAW	:

Decision

Argued: February 21, 2008

Decided: May 8, 2008

Jerry S. D'Anniello appeared on behalf of the District XIII Ethics Committee.

Edward Hunter appeared on behalf of respondent.

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

These matters came before us on a recommendation for discipline (censure) filed by the District XIII Ethics Committee ("DEC"). In three collection matters, respondent sent the debtors a letter threatening criminal action. In three other collection matters, respondent engaged in a pattern of neglect and failed to communicate with the client. We voted to impose a censure.

Respondent was admitted to the New Jersey bar in 1981. In 1991, he received a private reprimand for gross neglect and lack of diligence. In the Matter of James E. Sacks-Wilner, DRB 91-184 (October 2, 1991).

I. The K-Mart Matters – District Docket No. XIII-05-008E

Counts one through three of the complaint alleged that respondent threatened three K-Mart customers with criminal action, in order to gain an unfair advantage in a civil matter, thereby violating RPC 3.4(g).

The essential facts are not in dispute. Between April and June 2004, respondent sent collection letters to a number of K-Mart customers, on behalf of K-Mart and a collection agency. Three of the letters are in the record. All of the letters relate to "bounced" checks written by the customers, in payment for items purchased at a K-Mart store.

The letters, sent to Harmon McNeil (April 21, 2004), Shaketta Vincent (April 21, 2004), and Gwendolyn Valentine (June 4, 2004), sought to collect amounts ranging from $285 to $302 and contain virtually the same language:

> Enclosed please find copies of the bad check[s] that you wrote to K-Mart. Please be advised that if you do not make a payment on this bad debt within the next seven (7) days, I will be forced to take criminal action against you.

> If I do not receive a payment within seven (7) days of this letter, I will assume that you would rather appear in front of a Criminal Court Judge. If you decide to avoid criminal prosecution, please send a certified check or money order made payable to the trust account of James E. Sacks-Wilner. **WE DO NOT ACCEPT PERSONAL CHECKS.**
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> [Ex.EC-13.]

Thereafter, respondent issued summonses and complaints, in the Lawrence Township Municipal Court, for all three matters. Respondent testified that, upon receipt of the complaints, the municipal court judge advised him that the letters might have violated RPC 3.4(g). Respondent was alarmed at the judge's reaction because he had sent out approximately 2,400 similar letters to other K-Mart customers. According to respondent, he had filed complaints in approximately seven of those matters.

Respondent claimed that, when he wrote the letters, he thought they were proper because K-Mart had every right to file criminal charges under New Jersey's bad check statute, N.J.S.A. 2C:21-5 (c)(1). That statute states, in relevant part: "a person who issues or passes a check . . . commits . . . a crime of the fourth degree if the check or money order is $200.00 or more but less than $1,000.00."

Respondent explained that he could have sent a "one-liner" type letter to the K-Mart customers, but thought that they deserved a last chance to make good on their checks, before K-Mart brought a criminal action. He added that the letters were designed to give them that opportunity.

Based on the judge's concerns about possible improprieties, respondent made the immediate decision not to pursue the complaints and so advised the judge. Thereafter, he contacted K-Mart and the collection agency about the matters and ceased his representation in all of them. In essence, he stated, "[I] stopped everything cold, period."

II. The Rawls Matters – District Docket No. XIII-05-340E

Count four of the complaint alleged that respondent engaged in a pattern of neglect (RPC 1.1(b)), lacked diligence (RPC 1.3), and failed to adequately communicate with the client (RPC 1.4(a)), in three collection cases.

In June 2003, Clifford Rawls retained respondent to collect outstanding balances against three customers of his roofing company. According to the complaint, respondent was to file suit against one of the customers, Earl Graham, and execute upon judgments that Rawls had previously obtained against the other two customers, Mary Seay and Gwendolyn Reed.

Rawls testified that he paid respondent $100 for expenses. He did not recall discussing a contingency fee for respondent's representation, but he understood that respondent would be paid some percentage of any funds collected. He also did not recall signing a fee agreement with respondent.

According to Rawls, respondent did nothing to collect funds in any of the matters, for the next ten months after their meeting. Therefore, in March 2004, he filed an ethics grievance against respondent.

In a lengthy April 5, 2004 reply to the grievance, respondent denied allegations of inaction. He acknowledged being retained by Rawls to collect the debts and receiving $100 against costs, which he claimed remain in his trust account. He referred to the matters as contingency fee matters, for which he was to earn a fee only if funds were collected.[1]

Respondent's reply to the grievance detailed his attempts to obtain information about the Reed matter, in particular Gwendolyn Reed's whereabouts. He recounted having made calls to four previous employers, in an attempt to locate her.

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[1] At the DEC hearing, respondent introduced an undated one-third contingency fee agreement signed by Rawls. Rawls was not questioned about it.

By letter to the DEC, dated April 22, 2004, Rawls took issue with respondent's assertions, claiming that he had given him a docket number for the complaint in the Reed matter, as well as a docket number for a $600 judgment that he had obtained against Seay.

Respondent followed Rawls' letter with a flurry of correspondence activity, including an April 27, 2004 letter to Rawls, enclosing copies of fresh postal searches and information subpoenas in the Reed and Seay matters, as well as a demand letter and a postal search in the Graham matter.

Based on the new information from respondent, Rawls thought that he had placed the matters back on track. Therefore, on April 29, 2004, Rawls withdrew the grievance as to all three matters.

Just ten months later, in January 2005, Rawls filed a second grievance, this time claiming that respondent had done nothing since the withdrawal of his grievance, and alleging that respondent had performed legal services for only a brief time, when the DEC was actively watching over him during the previous year.

Immediately after Rawls filed his second grievance, respondent engaged in another short flurry of activity in the Reed matter, requesting the entry of judgment and, on March 3,

2005, sending interrogatories to Reed. He also prepared a complaint for filing in the Graham matter and then replied to the new grievance. Once again, respondent claimed that the matters were back on track and that Rawls' interests in the cases were fully protected.

Rawls immediately sent a March 8, 2005 letter to the DEC, challenging respondent's statements:

> I still have not had satisfaction from from [sic] [respondent] and would like to continue with the grievance. I retained [respondent's] services in June of 2003 for judgment granted by the court against Gwendolyn Reed and also Mary Seay. I also asked [respondent] to filed [sic] in civil court for Earl Graham, which was never done. I in turn filed against Earl Graham in January 2005 and received payment. [Respondent] states he is unable to find Gwendolyn Reed. Paperwork was sent to his office with her address as 109 Spring Street Trenton NJ 08618, which can also be found in the telephone directory. The judgments against Gwendolyn Reed and Mary Seay are not resolved, I will keep the grievance until they are resolved.
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> [Ex.EC-8.]

For his part, respondent recalled having filed a special civil part complaint in the Graham matter, but could not produce a copy for the DEC. He provided, however, an answer filed by Graham on August 26, 2004, in which Graham countered that Rawls

had performed substandard work on his house. Respondent recalled advising Rawls, at the time, that Graham might have had a viable consumer fraud claim for "double damages and attorney fees," based on the allegations of shoddy work. He also claimed to have advised Rawls not to pursue the matter any further. Respondent provided no support for the assertion that he advised his client to drop the case against Graham.

In fact, Rawls had no such recollection that respondent had recommended that he discontinue the matter, stating that it was his own January 2005 pro se complaint against Graham that had spurred Graham to pay him directly, with no help from respondent.

Rawls also drew similar conclusions about the Reed and Seay matters, stating that, as of the May 4, 2007 DEC hearing, respondent had not executed upon the judgments that he had obtained years earlier.

The documentation from respondent in support of his actions in these matters is minimal. In the Graham matter, respondent furnished a copy of Graham's August 26, 2004 answer to the special civil part, but not the complaint he claims to have filed. In the Seay matter, he supplied two documents: an April 26, 2004 information subpoena and a one-page Experian search, dated May 6, 2004. In the Reed matter, respondent provided four

documents: an April 26, 2004 information subpoena; a one-page Experian search, dated May 6, 2004; a May 3, 2004 postal service address request; and a February 8, 2005 judgment record for Rawls' June 20, 1997 judgment.

With regard to the RPC 1.4(a) (now (b)) charge, respondent conceded, at the hearing, that he had not communicated, in writing, with Rawls. However, he claimed that Rawls had been a frequent visitor to the office and that, "whatever legal document was pending, I'd hand it to him and he and I would talk about it, and then he would leave."

The DEC dismissed the charge that respondent violated RPC 3.4(g), when he sent collection letters threatening criminal action. The DEC reasoned that the rule addresses conduct intended to obtain an undue advantage in a civil matter and that respondent had not filed, and had no intention of filing, civil actions in any of the matters.

In the Rawls matter, the DEC found a pattern of neglect, a lack of diligence, and failure to communicate with the client.

In recommending a censure, the DEC considered, as aggravating factors, respondent's prior discipline and discrepancies in his testimony that, while not misrepresentations, were "not forthcoming and lacked credibility."

Following a de novo review of the record, we are satisfied that the evidence clearly and convincingly establishes that respondent is guilty of the violations charged in the complaint.

With regard to the K-Mart matters and the allegation of a violation of RPC 3.4(g), the letters speak for themselves. They clearly stated respondent's intention to file criminal complaints under the bad check statute, if the debtors failed to remit their payments. Respondent's defense to this charge was that the term "threat" did not apply to his actions because K-Mart had a right to file a criminal complaint under the bad check statute. Moreover, he argued, there were no civil matters pending in which he could gain an unfair advantage over the debtors.

In a fairly recent case, the Supreme Court found that similar conduct violated RPC 3.4(g). In In re Hutchins, 177 N.J. 520 (2003), the Court found that the attorney violated RPC 3.4(g) by sending two letters that threatened criminal action. The letters notified the debtors that the attorney had no alternative but to recommend to his client that criminal and civil remedies be pursued. One letter stated, "This is a serious matter involving possible violation of state law and will be your last opportunity for amicable resolution. THE CHOICE IS YOURS. You can avoid the possibility of the aforementioned

criminal and/or civil action only by paying the total amount due within 10 days." The other letter contained similar language. Hutchins had not yet filed civil actions against the debtors.

Hutchins raised the same argument as this respondent did, namely, that warnings to debtors concerning possible criminal charges are not always unethical. Hutchins contended that a person who issues a bad check and ignores subsequent requests that the check be made good violates a criminal statute, which allows the client to seek redress. Notwithstanding this argument, the Court found Hutchins guilty of violating RPC 3.4(g). Hutchins was reprimanded.

Here, too, respondent violated RPC 3.4(g). His letters, like Hutchins', threatened a criminal complaint, if the K-Mart customer did not clear a debt. Like Hutchins, respondent had no pending civil actions and argued that it was impossible to seek an advantage without pending civil matters. As in Hutchins, the lack of pending civil actions here is inconsequential. The matters still contain a civil matter component as civil claims against the debtors. By sending letters to K-Mart customers that threatened criminal action, respondent violated RPC 3.4(g).

Discipline for violations of RPC 3.4(g) has ranged from an admonition to varying levels of suspension. An admonition was imposed in In re Levow, 176 N.J. 505 (2003), where the Court

departed from our determination to reprimand an attorney who threatened to present criminal charges to gain an improper advantage in a civil matter. An admonition was also the result in In the Matter of Mitchell J. Kassoff, DRB 96-182 (December 30, 1996). There, following the attorney's own car accident, he sent a letter to the other driver indicating his intent to file a criminal complaint against him for assault. The attorney sent the letter on the same day that he received a letter from the other driver's insurance company, denying his damage claim. An admonition was also issued against an attorney who represented one shareholder of a corporation in a dispute with another shareholder and sent a letter to the adversary shareholder, threatening to file a criminal complaint for unlawful conversion, if he did not return the client's personal property. In the Matter of Christopher M. Howard, DRB 95-214 (August 1, 1995).

At the other end of the discipline spectrum, suspension has resulted in two previous, much older cases, involving more serious conduct by attorneys who leveraged criminal actions to obtain an advantage in civil matters. See, e.g., In re Krieger, 48 N.J. 186 (1966) (three-month suspension for attorney who filed a criminal process against a witness in a civil action in the hope that an indictment would make it difficult for the

court to rely on the witness' testimony in deciding the case) and In re Cohn, 46 N.J. 202 (1966) (attorney suspended for one year for assisting a client in pursuing criminal bigamy charges in the hope that the "defendant" would drop her civil suit against the attorney's client).

Here, respondent's actions were not venal or so serious as to warrant a suspension. Unlike Krieger and Cohn, he did not "work the system." His conduct was similar to the attorney's conduct in Hutchins, wherein a reprimand was imposed. In aggravation, respondent sent violative letters to 2,400 K-Mart customers. In mitigation, however, he immediately ceased action on all of the K-Mart matters, as soon as he learned from a municipal judge that they could be seen as improper.

With regard to the Rawls matters, respondent denied the charges and pointed to several documents that he had generated in each of them, as proof of his innocence. Yet, the few documents presented clarify that he expended little effort for his client, and then only enough to make a showing in his replies to the ethics grievances. In both the Seay and Reed matters, respondent had little standing in the way of executing on the judgments previously obtained by his client. Yet he did not do so.

In the Graham matter, respondent claimed to have filed a complaint, but provided no proof of that filing.[2] Respondent also claimed to have told Rawls to drop the claim against Graham, because Graham had raised workmanship issues in his answer to the complaint. Rawls had no such recollection. The DEC believed Rawls, stating that respondent's testimony lacked credibility in many respects. Because the DEC had the opportunity to observe the demeanor of the witnesses, the DEC is in a better position to assess their credibility. We, therefore, defer to the DEC with respect to "those intangible aspects of the case not transmitted by the written record, such as, witness credibility . . . ." Dolson v. Anastasia, 55 N.J. 2, 7 (1969).

Weary of respondent's inaction, Rawls filed a pro se complaint, after which Graham paid the outstanding bill. It is logical to conclude that he did so because he wished to proceed against Graham. It may also be logically inferred that he informed respondent that he wanted to press ahead. Otherwise, Rawls would not have filed the complaint on his own and would not have complained to ethics authorities that respondent did nothing on his behalf. In light of the foregoing, we determine

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[2] The record shows that an answer was filed, but by whom is not revealed.

that respondent's argument that he acted diligently is simply not supported by the record.

The record also demonstrates that, in the ten months prior to Rawls' March 2004 ethics grievance, respondent performed no legal services for Rawls. After a flurry of activity in April 2004, Rawls withdrew that grievance. Respondent squandered his second chance, promptly dropping the ball again, for almost a year this time. In January 2005, Rawls filed a second grievance against him.

For respondent's repeated failure to prosecute his client's claims in all three matters, we find that he engaged in a pattern of neglect and lack of diligence, violations of RPC 1.1(b) and RPC 1.3, respectively. Although a single instance of simple neglect, as here, does not constitute an ethics violation, when an attorney repeatedly demonstrates incompetence, that attorney violates RPC 1.1(b). See, e.g., In re Rohan, 184 N.J. 287 (2005) (three-month suspension for, among other improprieties, a pattern of simple neglect).

With regard to the charge that respondent failed to communicate with Rawls, respondent contended that he explained the matters to Rawls on his frequent visits to respondent's office, a contention that Rawls denied. Rawls testified that respondent did not inform him about important aspects of the

cases, causing him to file two ethics grievances against him. Respondent conceded that he had not corresponded with Rawls, in writing, in any of the matters. The DEC concluded that the evidence, including Rawls' testimony and the absence of any documented communications, clearly and convincingly established that respondent violated RPC 1.4(a) (now RPC 1.4(b)). We agree with the DEC.

Reprimands have been imposed for a pattern of neglect, lack of diligence, and failure to communicate with clients. See, e.g., In re Weiss, 173 N.J. 323 (2002) (lack of diligence, gross neglect, and pattern of neglect); In re Balint, 170 N.J. 198 (2001) (in three client matters, the attorney engaged in lack of diligence, gross neglect, pattern of neglect, failure to communicate with clients, and failure to expedite litigation); and In re Bennett, 164 N.J. 340 (2000) (lack of diligence, failure to communicate in a number of cases handled on behalf of an insurance company, gross neglect, and pattern of neglect).

In mitigation, we considered that respondent immediately ceased action on the K-Mart letters, as soon as he learned that they could be improper. In aggravation, respondent has a prior private reprimand that also included lack of diligence and neglect. Taking into account the totality of respondent's

conduct and his prior discipline, we determine that a censure is the appropriate penalty in this instance.

Members Lolla, Baugh, and Neuwirth did not participate.

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
William O'Shaughnessy, Chair

By: Julianne K. DeCore
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of James E. Sacks-Wilner
Docket No. DRB 07-395

Argued: February 21, 2008

Decided: May 8, 2008

Disposition: Censure

Members	Disbar	Suspension	Censure	Reprimand	Admonition	Did not participate
O'Shaughnessy			X			
Pashman			X			
Baugh						X
Boylan			X			
Frost			X			
Lolla						X
Neuwirth						X
Stanton			X			
Wissinger			X			
Total:			6			3

Julianne K. DeCore
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