SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
DOCKET NO. DRB 98-302

IN THE MATTER OF

SAMUEL MANDEL,

AN ATTORNEY AT LAW

Decision

Argued: September 17, 1998

Decided: April 15, 1999

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

Respondent appeared pro se.

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

This matter was before the Board based on a recommendation for discipline filed by the District IIIB Ethics Committee (DEC). Several months prior to the hearing, the three-count complaint was amended, by letter dated January 23, 1998, to include additional charges. The combined charges against respondent were as follows: RPC 1.1(a) and (b) (gross neglect and pattern of neglect), RPC 1.3 (lack of diligence), RPC 1.4(a) (failure to communicate), RPC 3.2 (failure to expedite litigation) and RPC 8.1(b) (failure to cooperate with the DEC) (Chrisp); RPC 1.1(a) and (b), RPC 1.3, RPC 1.4(a) and RPC 8.1(b) (Krell) and RPC 1.1(a) and (b), RPC 1.3, RPC 1.4(a), RPC 1.8(g) (conflict of interest/making an aggregate settlement of the claims of two or more clients), RPC 3.2 and RPC 8.1(b) (Seiler/Good).

Respondent was admitted to the New Jersey bar in 1968. He is engaged in the practice of

law in Moorestown, Burlington County. Respondent has no history of discipline.

The Chrisp Matter

Gwendolyn Chrisp, the grievant herein, was the owner of property insured by Cumberland Mutual Fire Insurance Company ("Cumberland"). In the winter of 1993, at the time that Chrisp contacted respondent, she had already settled a claim with Cumberland arising out of fire damage to her property. In accordance with the terms of Chrisp's policy, Cumberland retained the difference between the actual cash value and the replacement cost of the dwelling and its contents. Chrisp asked respondent to file suit to recover the difference. According to Chrisp, respondent told her that the case would be problematic, but that he would be filing suit to protect the statute of limitations, which was about to run.

Respondent filed a complaint in Chrisp's behalf and the matter proceeded apace. In August 1995, the defendant filed a motion to dismiss the complaint, returnable on August 25, 1995. Respondent sent a copy of the motion to Chrisp. With the consent of his adversary, respondent had the motion continued twice. On September 6, 1995, prior to the continued date, the court entered an order granting the defendant's motion. It is unclear if the court had been advised of the parties' decision to continue the motion. Respondent learned of the court's action through a call from the defendant's counsel.

In August 1995, while the motion to dismiss was pending, Chrisp moved to South Carolina. Thereafter, through a series of letters, Chrisp attempted to contact respondent to learn the status of her matter. Respondent did not reply to the letters. Respondent and Chrisp had, however, at least two conversations during which respondent explained the court's action. He advised Chrisp that he

was searching for legal support for her position and would attempt to have the court's order vacated. Although Chrisp recalled respondent's opinion that their position in the underlying suit was difficult to maintain, she did not remember a statement that he would be unable to pursue the case for her. In fact, at some point respondent reached the conclusion that he could not file a motion in Chrisp's behalf because the law did not support her position.

Respondent testified about his unsuccessful attempts to contact Chrisp, who moved several times during the pendency of this matter. It is not clear if respondent at all times had a correct address for her. It is clear, however, that, when they finally reached each other, respondent did not definitively inform Chrisp that he would not be filing a motion to vacate the order of dismissal. At an undisclosed time, Chrisp contacted the court and learned that her complaint remained dismissed.

In July 1996 Chrisp filed a grievance against respondent. Even after that respondent apparently told Chrisp that he was looking for law to support her position. During a subsequent conversation with Chrisp, respondent advised her that the matter was "hanging over [his] head" and offered her $2,500 as a compromise. By letter dated August 19, 1997, Chrisp demanded $17,249.76, the amount she believed she had lost through respondent's inaction. The current status of her claim against respondent is unknown.

The Krell Matter

Respondent represented Robert D. Krell and members of his family in approximately twenty matters. At some point, Krell became dissatisfied with respondent's representation and requested that respondent return his files. It appears that there was some delay in the return of the files due to questions as to whether Krell wanted all of his files, which were voluminous, or only those which were then pending. In or about October 1996, Krell obtained the services of another attorney to pursue one of the open matters. Respondent communicated with that attorney and turned over the requested documents to her.

According to respondent, he and Krell had a number of conversations during this period. Ultimately it was agreed that respondent would continue to represent Krell on various remaining matters.

Respondent was charged with neglect, lack of diligence, failure to communicate with the client, failure to turn over Krell's files and failure to cooperate with the disciplinary system.[1] In light of the lack of testimony from Krell, of respondent's testimony and of the exhibits introduced, the DEC dismissed the allegations against respondent, with the exception of the alleged violation of RPC 8.1(b), discussed below.

[1]Although the complaint cites a violation of RPC 1.4(a) in connection with respondent's alleged failure to return Krell's files, the correct rule is RPC 1.16(d).

The Seiler/Good Matter

Gregg Seiler, Jr., by his guardian ad litem, Patricia Seiler, Patricia Seiler in her own right, Diane Good and other family members were the plaintiffs in a personal injury action arising out of an automobile accident. All of the plaintiffs were represented by respondent, who was retained in late 1998.[2] A "friendly" hearing was conducted in March 1995 to approve a settlement between the parties. The hearing was necessary because some of the plaintiffs were minors.

The problems in this case were twofold: lack of communication and lack of diligence on respondent's part. Patricia Seiler and Diane Good testified before the DEC. Although both understood that the settlement in this matter was a limited dollar amount to be shared by the plaintiffs, they clearly did not fully understand the proceedings. Both testified that they had been unaware of prior settlement offers and that they had learned of the settlement amount on the day of the "friendly" hearing. Respondent testified that he explained to both Seiler and Good the potential conflict of interest in reaching an aggregate settlement of their claims, and that Seiler and Good understood that respondent was representing all of the plaintiffs. Their understanding of the workings of the relationship was, however, deficient, as seen in this exchange between Seiler and respondent:

> Q: Okay. Do you recall my discussing with you the fact we needed physicians' certifications in order to go to court?
>
> A: For my son. But I thought my son - his doctors did all that.
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> Q: They did. But do you recall that I told you that we needed them and I was having difficulty with some of the doctors, even though it wasn't your son's doctor?

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[2]The driver of the car was not one of the parties respondent represented. Accordingly, there was no allegation of a conflict-of-interest situation.

A: See, I wasn't aware of that, I thought, you know, it was - see, I felt I know you represent my sister too but I was mainly concerned about my son, not them.

Q: I understand that. But did you realize that we were going to court all on the same case?

A: Yeah, but I wasn't under that impression, I thought you were strictly my lawyer for him even though my sister - to me I felt - she felt the same way I did, you should have been for her, like not together even though it was the same accident.

Q: Well, you realized -

A: Like you're supposed to discuss just my son, not her son and her daughter.

Q: Well, do you recall - you knew that I was representing everybody?

A: Oh, yeah, yeah.

Q: There wasn't any question?

A: There's no question about that. That's when we were having discussions, it should be about my son and if my son's doctors did all the things why couldn't it go on his half? I didn't understand that.

Q: Well, did you understand that there was a limited pool of money that had to be divided among the plaintiffs?

A: Yes, but I didn't understand that, you know, that until later on down the road.
[T4/28/98 110-112]

In addition, although the record reveals that respondent sent Seiler and Good copies of correspondence, it appears that in some cases the letters caused more confusion. Also, it is unclear if Seiler and Good understood the JUA deferral period.

The other problem in this case arose out of respondent's failure to bring this matter to a close. As respondent stated in his answer, the first settlement check was received on November 27, 1996.[3]

[3]On October 29, 1996, respondent advanced Greg Seiler, Jr. $500 from his business account. Because this action did not amount to acquiring an interest in the subject matter of the litigation, which had been already settled, there was no violation of RPC 1.8(j).

Respondent disbursed the funds as they arrived, but the lengthy delay in receiving the funds caused concern. Respondent testified at length about his difficulty in obtaining physician certifications from the doctors, as well as some delay caused by the defendants' attorneys. He introduced into evidence a number of documents about his attempts to obtain the necessary certifications. The record, however, also contains a number of letters from counsel for one of the defendants attempting to prod respondent along and asking "[w]hen is this case going to die?." OAE exhibit 36. Indeed, the record reveals that counsel for that defendant filed a motion to dismiss for failure to prosecute in October 1995. The motion was apparently withdrawn after respondent spoke with the attorney. As of the DEC hearing in April 1998, certain funds had not yet been released by the insurance company and other funds remained in respondent's trust account awaiting distribution to the surrogate.

Of concern in this matter was the monetary loss to the plaintiffs because of the delay in bringing the matter to an end. Indeed, a change in the JUA law meant that the plaintiffs would no longer be receiving interest on the settlement funds that had previously been available to them. To compensate the plaintiffs, respondent reduced his fee and stated that he would pay the parties an additional sum, if necessary.

Failure to Cooperate With the DEC

The record contains numerous letters from the DEC to respondent attempting to gather information in these three matters. Respondent was unresponsive both as to communications from the DEC secretary and from the investigator assigned to these cases. It appears that in each of these matters, after the grievances were filed, respondent continued to communicate with his clients. Respondent testified that his attempts to handle the matters directly with his clients was "a mistake

in judgment."

With the exception of a letter to the DEC secretary in April 1996 in the Seiler/Good matter, it was not until December 1996 that respondent replied to the DEC, after the OAE called respondent and advised him that that office intended to seek his suspension. The formal complaint, dated May 15, 1997, was ignored until early August 1997, after the OAE's July 30, 1997 motion for respondent's temporary suspension.

By way of explanation for his failure to answer the complaint, respondent testified that he "kind of mentally buried it."[4]

* * *

In Chrisp, the DEC determined that respondent violated RPC 1.3, RPC 1.4(a) and RPC 8.1(b). The alleged violations of RPC 1.1(a) and (b) and RPC 3.2 were dismissed. In Krell, as noted above, the DEC dismissed the allegations of a violation of RPC 1.1(a) and (b), RPC 1.3 and RPC 1.4(a), and found only a violation of RPC 8.1(b). In Seiler/Good, the DEC determined that respondent violated RPC 1.1(a), RPC 1.3, RPC 1.4(a), RPC 3.2 and RPC 8.1(b). The DEC did not find a violation of RPC 1.1(b) and RPC 1.8(g).

[4]The record gives rise to an allegation that respondent refused certified mail from the DEC. Respondent testified that he did not do so. The evidence is insufficient to make a finding in this connection.

* * *

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

In Chrisp, it is clear that respondent did not advise his client, until it was far too late, that her position could not be supported and that he would not be filing a motion to vacate the court's order. There are no allegations that respondent was attempting to mislead his client. Rather, it appears that he continued to research the topic, instead of telling Chrisp that he would not be filing a motion in her behalf. This he failed to do until far too much time had passed. Respondent offered testimony and documentary evidence relating to Chrisp's bankruptcy and foreclosure proceedings on the property that was the subject of the underlying proceeding. It is plain to see, however, that respondent's inaction was the result of his reluctance to give Chrisp bad news about her case.

The complaint charged respondent with a violation of RPC 1.1(a), RPC 1.3, RPC 1.4(a) and RPC 3.2 in this matter. That RPC 1.4(a) was violated is obvious. Chrisp was unable to obtain information about the status of her claim, despite her letters to respondent. When she did receive information, it was neither clear nor definitive.

With regard to the other charges, the DEC found a violation of RPC 1.3, but not RPC 1.1(a). The Board agrees. Although respondent told Chrisp that he would file a motion to vacate the order dismissing the complaint, he never filed the motion.[5]

One additional point warrants mention. At the DEC hearing and the Board hearing the presenter argued that respondent may have made a misrepresentation to the DEC when, in a letter

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[5]The Board was unable to find that respondent was guilty of failure to expedite litigation because, after the complaint was dismissed, there was no litigation to be expedited.

to the DEC he stated that he was "seeking vacation of the order to have the motion heard on the merits." In fact, respondent never filed the motion. In his defense, however, respondent explained that, at the time that he wrote the letter, he intended to file the motion. Because the record does not show clearly and convincingly that respondent intended to deceive the DEC, the Board made no finding of misconduct in this regard.

With regard to the second count of the complaint, the Krell matter, the DEC properly dismissed that count. Although there was some delay in determining which files respondent had to return, the matter was ultimately resolved. In addition, it is clear that there was communication between respondent and Krell, although the record reflects only respondent's version on this issue. The fact that respondent continued to represent Krell, although not a definitive factor, seems to indicate that Krell was satisfied with respondent's resolution of the situation.

In the Seiler/Good matter respondent was charged with a violation of RPC 1.1(a), RPC 1.3, RPC 1.4(a), RPC 1.8(g) and RPC 3.2. As to the conflict-of-interest charge, the DEC correctly found no violation. The OAE argued that Greg Seiler, whose injuries exceeded the limited amount of funds available, should not have been forced to wait until the other plaintiffs' claims were resolved to obtain his funds. However, although there was nothing in writing, Seiler and Good testified that respondent explained the potential conflict of interest to them. The fact that his explanation was apparently insufficient does not cause respondent's actions to rise to a level requiring discipline. On the other hand, respondent's violations of RPC 1.1(a) and RPC 1.3 are clear. Although he took some action in this matter, he did not zealously pursue it to a close. While the difficulty in obtaining the doctors' certifications is understandable, respondent should have taken more expeditious action to obtain the needed documentation. As a result of respondent's failure to act swiftly, the Seilers and

the Goods suffered financial harm. Here, respondent's conduct amounted to gross neglect and failure to expedite litigation. Five years after the "friendly" hearing, this matter was still not completed.

With regard to the alleged violation of RPC 1.4(a), although respondent apparently did communicate with his clients, he did not communicate with them in a manner that made them understand the proceedings and the settlement. Communication must be more than mailing copies of correspondence; a lawyer has a duty to explain to the clients the details and consequences of every important aspect of their matters. The Board finds a violation in this regard.

As noted above, respondent was charged with a pattern of neglect. The Board has frequently found that three cases are needed to form a pattern. Accordingly, because the Board dismissed the Krell matter, no violation of RPC 1.1(b) is found.

Respondent was charged with failure to cooperate with the DEC in each of these three matters. As noted above, he failed to reply to numerous letters from both the DEC secretary and the investigator, seeking information in these three matters. Furthermore, he failed to timely answer the formal complaint. Accordingly, the Board found a violation of RPC 8.1(b).

The remaining issue is the appropriate quantum of discipline. The Board is of the opinion that a suspension is not warranted, particularly because this is an attorney with thirty years of practice and no prior discipline. Accordingly, the Board unanimously determined that a reprimand is sufficient discipline for respondent's ethics infractions. See In re Gordon, 139 N.J. 606 (1995) (lack of diligence and failure to communicate in two matters, gross neglect and failure to return a file in one of the two matters; prior public reprimand) and In re Wildstein, 138 N.J. 48 (1994) (reprimand imposed where the attorney showed gross neglect and lack of diligence in two matters

and failure to communicate in a third matter). The Board offers a reminder to the bar that even a well-intentioned attorney may make mistakes. A wise attorney, however, admits them.

The Board further determined to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: 4/15/99

By: _____
LEE M. HYMERLING
CHAIR
DISCIPLINARY REVIEW BOARD