

Supreme Court of New Jersey  
Disciplinary Review Board  
Docket No. DRB 18-413  
District Docket No. VC-2016-0011E

---

In the Matter of  
Harry J. Herz  
An Attorney at Law

---

:  
:  
:  
:  
:  
:  
:  
:  
:  
:  
:

Decision

Argued: April 18, 2019

Decided: July 31, 2019

Patricia A. Nichols appeared on behalf of the District VC Ethics Committee.

Michael P. Ambrosio 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 on a disciplinary recommendation for an indeterminate suspension filed by the District VC Ethics Committee (DEC). The formal ethics complaint charged respondent with violating RPC 1.7(a) (conflict of interest) (count one); RPC 1.2(a) (failure to abide by a client's

decisions concerning the scope and objectives of the representation) (count two); RPC 1.8(h)(2) (a lawyer shall not settle a claim or potential claim with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel) (count three); and RPC 1.4(b) (failure to communicate with a client) and RPC 1.4(c) (failure to explain a matter to a client to the extent reasonably necessary to permit the client to make informed decisions regarding the representation) (count four).

For the reasons detailed below, we determine to dismiss the charges against respondent.

Respondent earned admission to the New Jersey bar in 1975. During the relevant time frame, he maintained an office for the practice of law in Verona, New Jersey. He has no prior discipline.

Respondent and the grievant, Vincent Onorato Alfait, are cousins. The facts underlying this matter span a period of thirty-eight years, and revolve around the estates of respondent's and grievant's grandfather, John DiBella (John), and their uncle, Samuel DiBella (Sam), including real estate formerly owned by John and Sam. The real estate comprised two adjoining parcels located in Verona, New Jersey – 141 Bloomfield Avenue (the Bloomfield Parcel) and 33 Douglas Place (the Douglas Parcel). Respondent and the

grievant were both beneficiaries of the estates of John and Sam, to differing degrees.

Because it is relevant to an understanding of this matter, we provide the family background of respondent and grievant. John had four children – Sam, Louis DiBella, Josephine Herz (nee DiBella) (Josephine), and Ida Onorato (nee DiBella) (Ida). Louis had a son named Louis DiBella, Jr. (Louis Jr.). Respondent is one of Josephine’s children, and the grievant is one of Ida’s children.

John owned the Bloomfield Parcel, which was zoned as commercial property and, until it was sold in 2015, served as the site of a tavern and two residences. For approximately twenty years, a tenant named John MacEvoy (MacEvoy) leased the Bloomfield Parcel and operated that tavern, which was known as the Verona Inn. Sam owned the Douglas Parcel, a plot of unimproved land adjacent to the rear of the Bloomfield Parcel, which was zoned residential.

Shortly after respondent’s 1975 admission to the New Jersey bar, he began performing certain legal work for Sam. On December 11, 1976, John died testate. Per John’s will, which he had executed in 1974, Sam was the executor of John’s estate, and was granted a life estate in the Bloomfield Parcel. Also per John’s will, upon Sam’s death, Ida and Josephine were to

inherit the Bloomfield Parcel, as tenants-in-common with equal interests. John's will also purported to give Sam the power, arguably contrary to the limited legal scope of a life estate, to sell the Bloomfield Parcel, in his sole discretion, in which event the proceeds were to be divided among Sam, Ida, Josephine, and other relatives, pursuant to percentages set forth in John's will.

In 1978, approximately two years after John had died, respondent prepared and recorded a deed, which Sam signed, that purported to transfer fee simple title to the Bloomfield Parcel to Sam, as an individual (the 1978 Deed). The 1978 Deed stated that the consideration for the transfer was "\$0 dollars." According to respondent, he prepared and recorded the 1978 Deed "at Sam's request in order to satisfy Sam."

Issues of significance in this ethics matter are (1) whether the 1978 Deed was enforceable, or was void and without legal effect, given the competing life estate language in John's will; and (2) whether respondent leveraged that legal uncertainty against the competing interests of his relatives, in respect of the Bloomfield Parcel. In his verified answer to the formal ethics complaint, respondent asserted that

John's Will did not provide that Sam could not transfer title to [the Bloomfield Parcel] to himself. [I ultimately] waived and Louis, Jr. waived [our potential] position as to the validity of the 1978 Deed

in order that the cousins, other than Louis, Jr., would be co-owners of [the Bloomfield Parcel].

[A¶11.]<sup>1</sup>

On February 26, 2002, Sam died testate. In the disciplinary proceeding, respondent agreed that he was the executor of Sam's estate, but vehemently disputed that he was, or acted as, the attorney for either Sam's estate or John's estate.

Pursuant to Sam's 1998 will, only respondent and Louis Jr. inherited the Douglas Parcel; conversely, upon Sam's death, absent any argument regarding the effect of the 1978 Deed, respondent, the grievant, Ida, and respondent's sister, JoAnn Naklicki (JoAnn) inherited the Bloomfield Parcel, as tenants-in-common, with equal, twenty-five percent shares (together, the Bloomfield Parcel Owners). Respondent and Louis Jr. also received \$300,000 cash bequests from Sam. The grievant received a \$10,000 cash bequest from Sam's estate but inherited no interest in the Douglas Parcel.

In August 2002, respondent's mother, Josephine, filed two renunciation documents, in Essex County, disclaiming her right to inherit any interest in the Bloomfield Parcel or to receive a \$50,000 cash bequest from Sam, thus, leaving such interests to respondent and his sister, JoAnn, in equal shares. The

---

<sup>1</sup> "A" refers to respondent's verified answer to the formal ethics complaint, dated February 3, 2017.

grievant's mother, Ida, then died, and her interest in the Bloomfield Parcel passed to her daughter, also named Ida; prior to the conclusion of the events underlying this matter, her daughter died, and the daughter's husband, Rob Janssen, became the fourth member of the Bloomfield Parcel Owners, along with the grievant, respondent, and JoAnn.

After Sam's death, respondent continued to manage the Bloomfield Parcel and the Douglas Parcel, as he had while Sam was alive, collecting rents, distributing profits, negotiating leases and other matters with MacEvoy, collecting and paying property taxes, and making efforts to sell the property. Upon Sam's death, respondent asserted to the other heirs that he was "best suited" to perform these functions, based on his role as the executor of Sam's estate, and his education, training, and experience as an attorney. As early as June 2002, respondent began suggesting to the Bloomfield Parcel Owners, including via direct e-mail conversations with the grievant, that they jointly market and sell the Bloomfield Parcel and Douglas Parcel. Despite respondent's dogged promotion of the sale of the parcels, the Bloomfield Parcel Owners retained their real estate until it was sold, in 2015, thirteen years later.

During the ethics hearing, respondent claimed that, after Sam's death, the Bloomfield Parcel Owners, with the exception of the grievant, consistently

paid the annual property taxes and maintenance expenses for the Bloomfield Parcel, including using their own, personal funds, in order to avoid a tax sale of the property and to maintain hazard insurance. Janssen executed a certification confirming respondent's position, in connection with litigation against the grievant. As respondent described it, the grievant was the "owner [of the Bloomfield Parcel] . . . when it came time to . . . accept rent money, but he wasn't the owner when he had to pay the taxes."

In respect of the 1978 Deed, soon after Sam's 2002 death, the grievant and Ida's daughter began making demands that respondent formally transfer title in the Bloomfield Parcel to the Bloomfield Parcel Owners, via a recorded deed. Respondent refused to do so, maintaining that, despite the 1978 Deed, which he repeatedly claimed was of no force and effect, the fee interest in the Bloomfield Parcel had automatically transferred to the Bloomfield Parcel Owners following Sam's death, and, therefore, a formal transfer was unnecessary. Respondent testified that he reached that conclusion after consulting with his attorney and a title company. Indeed, the title company president wrote letters to the grievant, explaining that rationale and conclusion. During the ethics hearing, respondent claimed that the grievant was "set off" and "felt slighted" after learning that Sam's will did not provide much to him and his family, and that this perceived slight motivated the grievant's

continuing actions to disrupt and “sabotage” the management and sale of the Bloomfield Parcel.

Three primary disputes arose between two groups – respondent and Louis Jr., on the one hand, and the rest of the Bloomfield Parcel Owners, on the other hand. The first such dispute concerned whether the Bloomfield Parcel and the Douglas Parcel should be marketed and sold together, or via separate transactions. Respondent and Louis Jr. endorsed a joint sale, while the grievant opined that the Bloomfield Parcel was worth “significantly” more than the Douglas Parcel, and, thus, should be marketed and sold separately. The second dispute related to whether Sam had held a legitimate fee simple interest in the Bloomfield Parcel, via the 1978 Deed, which could have vested title solely in respondent and Louis Jr., and, thus, excluded the remainder of the Bloomfield Parcel Owners from ownership. In his verified answer to the formal ethics complaint, respondent claimed that he and Louis Jr. had informed the other Bloomfield Parcel Owners that they were willing to waive “their position as to the validity of the 1978 Deed,” so that the entire class of Bloomfield Parcel Owners could share ownership of the Bloomfield Parcel. The third dispute involved whether the owners of the Douglas Parcel had the right to travel over and through the Bloomfield Parcel to access the Douglas Parcel, and to park vehicles on a portion of the Bloomfield Parcel.



In 2003, the grievant sent an e-mail to a nonlawyer representative of Ida's daughter, claiming that respondent and Louis Jr. had unduly influenced Sam for "their benefit" in respect of Sam's will. The grievant stated that he wanted "an independent, professional property manager" to replace respondent as manager of the Bloomfield Parcel. In the same e-mail chain, the grievant also discussed retaining counsel to address the issues in dispute in respect of the Bloomfield Parcel, describing respondent as a "fiduciary" who was acting against the grievant's wishes.

In 2004, given the disputes between the respective parties, an attorney representing both respondent and Louis Jr. prepared and circulated to the Bloomfield Parcel Owners a proposed agreement intended to "settle all issues concerning their respective rights and the disposition of" the Bloomfield Parcel and the Douglas Parcel (the 2004 Agreement). In response, the grievant sent a letter to respondent's attorney, under his own signature, making multiple counterarguments regarding the draft proposal, and engaged in further, direct negotiations with respondent's attorney regarding the 2004 Agreement. Contemporaneously, the grievant coordinated his concerns with JoAnn, respondent's sister, who was represented by independent counsel, to ascertain the legal advice that her attorney provided in respect of the proposed terms of the 2004 Agreement. By June 2004, JoAnn would not discuss the proposed

agreement with the grievant any further, accusing him of “screw[ing] up this deal,” and repeatedly raising the “problem [du] jour.” In September 2005, JoAnn complained to the grievant that he had been acting as a free rider, using the services of her attorney for legal advice; that he had failed to pay his share of the legal fees for that representation; and that she had no plans to “foot the bill for the use of another attorney for the benefit of everyone else.” In that same e-mail to the grievant, JoAnn described respondent as “the executor” of Sam’s estate, who was doing his job in respect of the Bloomfield Parcel. Ultimately, the grievant refused to accept the terms of the proposed 2004 Agreement, especially, as previously mentioned, any plan to jointly market and sell the parcels.

In July and August 2004, the Bloomfield Parcel Owners, except for the grievant, accepted and executed the 2004 Agreement, which included, but was not limited to, the following provisions:

1. Respondent and Louis Jr. waived any claim that Sam had a fee simple interest in the Bloomfield Parcel, which respondent couched as a “major concession;” respondent and Louis Jr., however, reserved all rights, with respect to the grievant only, to assert the position that Sam had a valid, fee simple interest in the Bloomfield Parcel;

2. The parties would extend MacEvoy's lease of the Bloomfield Parcel for five more years;
3. At the expiration of MacEvoy's lease, the parcels would be marketed and sold together, in one transaction;
4. The parties "released each other from any and all possible claims, financial or otherwise, resulting from anything that occurred to date;"
5. The parties acknowledged that respondent "did not breach any fiduciary responsibilities to anyone in his capacity as Executor of [Sam's estate], **attorney for the Estate of [John], or as attorney for the Estate of [Sam]**" (emphasis added);
6. The Bloomfield Parcel would be subject to an implied easement benefiting the Douglas Parcel; and
7. Ida and JoAnn agreed to cooperate with respondent and Louis Jr. in the prosecution of any action to quiet title for the Bloomfield Parcel, as it would relate to the grievant's interests.

When cross-examined regarding the import of the waiver included in paragraph five, above, respondent claimed that his attorney had prepared the 2004 Agreement, that he had not read it carefully and had not noticed the incorrect reference to his role as attorney for John's and Sam's estates, and

that the waiver was meant as a “catch-all.” Respondent asserted that, despite the language of that waiver, he had not served as the attorney for either estate.

The 2004 Agreement did not disclose whether the parties had been advised to consult with independent counsel, or that only respondent and Louis Jr. were represented by counsel at that time in respect of the agreement. In his verified answer to the formal ethics complaint, respondent asserted that the grievant was “sophisticated in business matters . . . well-educated and holds a Ph.D. . . . [and] was aware of his right to have an attorney of his choice review the 2004 Agreement.” Respondent described Ida’s daughter as “a medical doctor . . . sophisticated in business matters . . . [who] knew that she could seek the advice of counsel.” As to JoAnn, respondent maintained that she “had an attorney review the 2004 Agreement . . . her attorney attended a meeting with counsel for [r]espondent and Louis, Jr. . . . [and] JoAnn had shared the advice she received from her attorney regarding the 2004 Agreement with Grievant.”

Moreover, there is evidence that, during the negotiation of the 2004 Agreement, the grievant had represented to both respondent’s and JoAnn’s attorneys that he was representing himself. Also, in 2008, via an e-mail among all of the Bloomfield Parcel Owners, respondent suggested that the grievant either accept the respondent’s representation as to the four-party ownership of

the Bloomfield Parcel and the nullity of the 1978 Deed, or seek “a knowledgeable real estate attorney” to advise him as to whether Sam’s death had truly caused, by operation of law, the grievant to inherit a twenty-five percent interest in the Bloomfield Parcel.

In the same e-mail, respondent asserted that he had properly managed the properties, generated revenue for the Bloomfield Parcel Owners’ benefit, and performed all the bookkeeping, with no expense to grievant; he made no mention of performing legal work. In support of respondent’s position that no formal, recorded deed was necessary to clear title to the Bloomfield Parcel, he further disclosed to the grievant that he had paid his sister, JoAnn, \$375,000 to purchase her twenty-five percent interest in the property, claiming he would not have done so if a newly recorded deed had been necessary to perfect her ownership interest.

In December 2005, after the execution of the 2004 Agreement, Ida’s daughter sent a letter to respondent, on behalf of herself, JoAnn, and the grievant. In that letter, the three Bloomfield Parcel Owners once again requested that respondent clear title to the Bloomfield Parcel to ensure that it reflected the ownership of the Bloomfield Parcel Owners as tenants-in-common with equal shares. In the letter, Ida’s daughter concluded that, “[i]f we have not heard from you by January 3, 2006, you leave us with no other

option than to ask our lawyer to take the appropriate steps to enforce the [2004 Agreement] and to correct the title in court.” Again, respondent refused to record such a deed, and there is no evidence that the remaining Bloomfield Parcel Owners took any legal action in that respect.

In December 2008, seven years prior to the sale of the Bloomfield Parcel, but after the execution of the 2004 Agreement, respondent filed a civil action against MacEvoy, in behalf of all of the Bloomfield Parcel Owners, for collection of approximately \$200,000 in past-due rent; ultimately, respondent retained an outside law firm to assume that litigation in behalf of all of the Bloomfield Parcel Owners, including respondent and the grievant. From 2007 through 2009, the grievant e-mailed respondent on multiple occasions, thanking him (1) for filing suit against MacEvoy and seeking to “recover funds owed to me and the other three owners of [the Bloomfield Parcel,” (2) for such a “very positive step forward,” and (3) for his “personal and professional efforts to resolve issues with MacEvoy’s lease.” Ultimately, however, the outside firm withdrew as counsel for the grievant, because he had refused to pay his share of the legal fees and had claimed to the firm, in writing, that he never consented to be a party to the lawsuit that respondent originally filed.

Before his death, Sam had negotiated an oral lease whereby a nearby Acura dealership paid rent to park cars on both the Douglas Parcel and the

Bloomfield Parcel; upon Sam's death, respondent assumed the management of that lease, and, initially, due to a belief that the cars were being parked only on the Douglas Parcel, he did not share any of the revenue from that arrangement with the other Bloomfield Parcel Owners. Eventually, however, after learning that the cars were being parked on both parcels, respondent began paying shares of the Acura monthly rental of \$2,500 to the other Bloomfield Parcel Owners, plus payments of arrears, with interest.

Respondent claimed that, in 2009, the grievant, exercising bad faith to "sabotage" and undermine the rest of the Bloomfield Parcel Owners, accused Acura of destroying a septic system in connection with parking cars, and, consequently, Acura terminated the lease, causing the Bloomfield Parcel Owners to lose \$30,000 per year in rental income. The record contains numerous e-mails supporting respondent's assertion that grievant had caused Acura to terminate the lease, by making claims of property and environmental damage, and threats of legal action directly to the Acura dealership's general counsel.

In 2011, in response to an offer to purchase the Bloomfield Parcel, forwarded to him by respondent, the grievant replied "I received the 'offer' for [the Bloomfield Parcel]. After a hearty laugh, the only thoughts that come [sic] to mind for you are jail time and disbarment. Aloha, Vince." In 2012, the

grievant sent multiple e-mails to the Bloomfield Parcel Owners and their respective attorneys; in at least one, he affirmatively stated that “I am representing myself.” In December 2014, more than ten years after the 2004 Agreement had been executed, the grievant learned that the other Bloomfield Parcel Owners had been making new efforts to jointly market and sell the parcels. The grievant objected. The entire class of Bloomfield Parcel Owners, including grievant, began mediation with an attorney. The mediation was unsuccessful, and, on March 17, 2015, respondent and Louis Jr., through counsel, filed a partition action against the grievant, seeking a court order authorizing the joint sale of the parcels, against the grievant’s wishes. After learning of the partition action, the grievant e-mailed respondent, threatening to file an ethics grievance against him, and requesting that they speak “before [grievant] begin[s] the complaint process.”

In support of the partition action against grievant, respondent submitted certifications which stated, in relevant part, that

Respondent, Janssen, and the grievant owned the Bloomfield Parcel, as tenants in common (by this time, respondent had purchased JoAnn’s interest, and, thus, held a fifty-percent interest in the Bloomfield Parcel);

Respondent has secured a buyer who was willing to pay \$1.95 million for both parcels to construct a condominium development which was ‘strongly supported by the Township of Verona;’



Grievant was unwilling to execute the purchase and sale agreement due to ‘his unhappiness in regard to the interest he received through inheritance’ from Sam, and ‘his complaints about [respondent’s] management of the property over the years;’ and

Grievant, in an attempt to coerce respondent and the other Bloomfield Parcel Owners into increasing his ownership share, had been threatening, for years, to file an ethics grievance against respondent; the grievant filed an ethics grievance against the listing agent for the parcels in an effort to stop or delay the joint sale.

[Ex.P-37.]<sup>2</sup>

At a May 2015 court hearing, which the grievant attended pro se, via telephone, the court considered the grievant’s written and oral submissions, including the claims made in the ethics grievance underlying this matter, and made a preliminary ruling in respondent’s and Louis Jr.’s favor.

On July 24, 2015, the court held a hearing for the final disposition of the case, and counsel for both sides appeared and made arguments. The grievant did not participate in the hearing, but had, by this point, engaged an attorney to represent his interests. The grievant’s attorney repeatedly described respondent as the property manager for the Bloomfield Parcel, and characterized all the

---

<sup>2</sup> “Ex.P-37” refers to respondent’s March 16, 2015 certification in the partition action.

grievant's claims against respondent as breaches of his fiduciary duties, rather than breaches of the legal representation of the grievant.

The court granted summary judgment in favor of respondent and Louis Jr., and further ordered that the grievant's share of the sales proceeds for the Bloomfield Parcel be subject to offsets for real estate taxes, insurance premiums, and other expenses that the other Bloomfield Parcel Owners had advanced, in the grievant's behalf, over the thirteen years following Sam's death. The court further ruled that the grievant's claims regarding the administration of John's and Sam's estates, and respondent's management of the parcels, were time-barred by applicable statutes of limitations, and, thus, were dismissed with prejudice. On August 20, 2015, the court memorialized these rulings via written order.

After losing the summary judgment motion, the grievant, once again operating in a pro se status, sent multiple e-mails to counsel for respondent and Louis Jr., accusing them of having committed perjury and other ethics violations in connection with the partition action and threatening to file ethics grievances against respondent's and Louis Jr.'s attorney.

In connection with the ethics hearing, Janssen, one of the Bloomfield Parcel Owners, submitted a certification, dated March 24, 2018, stating that respondent had managed the Bloomfield Parcel and the Douglas Parcel and

had never served as an attorney for the Bloomfield Parcel Owners, except for the initial filing of the lawsuit against MacEvoy.

The grievant, citing medical issues, did not appear at the ethics hearing.

In respect of the RPC 1.7(a) (conflict of interest) allegation, the presenter argued that, although respondent neither entered into retainer agreements with the other Bloomfield Parcel Owners, nor billed them for his services, he conducted himself in a manner that “could lead them to believe that” he was their lawyer. Given their respective interests, and the fact that respondent’s interests, as an owner of both parcels, were adverse to those of the other Bloomfield Parcel Owners, the presenter alleged that respondent had engaged in a conflict of interest. As specific examples of such a conflict, the presenter cited respondent’s advocacy of a joint sale of the parcels, and his efforts to advance that approach; his refusal to formally transfer title of the Bloomfield Parcel to the Bloomfield Parcel Owners; his role in preparing and circulating the 2004 Agreement; and his efforts to jointly sell the parcels, purportedly without notice to, or the consent of, the Bloomfield Parcel Owners.

Respondent denied that the Bloomfield Parcel Owners believed he was their lawyer, specifically stating that, given the circumstances of their ongoing disputes, the grievant “could not have reasonably concluded” that respondent

was acting as his attorney. Moreover, he denied that he had acted adversely to the rest of the Bloomfield Parcel Owners, or that he had violated RPC 1.7(a). Respondent conceded that he had sent the Bloomfield Parcel Owners correspondence on his law firm letterhead, but maintained that this was of no moment, and was just a matter of convenience for him, as his legal secretary prepared such correspondence.

In respect of the RPC 1.2(a) (failure to abide by a client's decisions concerning the scope and objectives of the representation) allegation, the presenter argued that respondent's refusal to prepare and record a deed to formally transfer title of the Bloomfield Parcel to the Bloomfield Parcel Owners was violative of his duties as the executor and attorney for Sam's estate, whereby he had a responsibility to abide by the decision of the Bloomfield Parcel Owners.

Respondent refuted this allegation, maintaining that he acted only as the executor of Sam's estate, and, therefore, the Bloomfield Parcel Owners were not his clients. Moreover, he restated his position that a formal deed transfer was not required, because title to the Bloomfield Parcel had "vested by operation of law" in the Bloomfield Parcel Owners, including the grievant.

In respect of the RPC 1.8(h)(2) (a lawyer shall not settle a claim or potential claim with an unrepresented client or former client unless that person

is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel) allegation, the presenter maintained that respondent, who was represented by counsel, induced the rest of the Bloomfield Parcel Owners, except grievant, to release “all claims,” which would include malpractice claims against him, without advising them to seek independent counsel, as required by the RPC.

Respondent denied this allegation, maintaining that the Bloomfield Parcel Owners were not his clients, or former clients, as he served merely as the executor of Sam’s estate. He, thus, asserted that he had not contemplated the release of “malpractice claims” in respect of the Bloomfield Parcel Owners. Respondent, thus, argued that he had no duty, pursuant to this RPC, to advise the other signatories to the 2004 Agreement to seek independent counsel, but that some did, and that the grievant received the benefit of JoAnn’s counsel’s advice.

In respect of the RPC 1.4(b) (failure to communicate with a client) and RPC 1.4(c) (failure to explain a matter to a client to the extent reasonably necessary to permit the client to make informed decisions regarding the representation) allegations, the presenter argued that respondent’s efforts to jointly sell the parcels, without notice to, or the consent of, the Bloomfield Parcel Owners, violated these RPCs.

Respondent argued that, because he never represented the Bloomfield Parcel Owners, he cannot be found to have violated any portion of RPC 1.4.

In his verified answer to the formal ethics complaint, respondent further asserted that he acted in good faith, with no intentional or willful misconduct, causing the disposition of the Bloomfield Parcel to be submitted to “the Superior Court for determination on notice to all interested parties.”

During the ethics hearing, respondent’s counsel conceded that respondent had acted as an attorney in behalf of the Bloomfield Parcel owners for the limited purpose of filing the landlord-tenant action against MacEvoy, but asserted that there was no clear and convincing evidence that respondent had served as counsel to the grievant or the Bloomfield Parcel Owners in any other respect. Respondent’s counsel pointed out that the ethics charges against respondent did not allege any misconduct in respect of his limited representation of the Bloomfield Parcel Owners against MacEvoy. Accordingly, following the conclusion of the presenter’s case-in-chief, which included no live witnesses, but, rather, consisted solely of the pleadings and the admission into evidence of documents that respondent agreed were

authentic, respondent's counsel moved to dismiss the ethics matter. Ultimately, respondent's motion was denied.<sup>3</sup>

The DEC found that respondent represented the Bloomfield Parcel Owners and had provided them with legal services. Moreover, the DEC rejected respondent's contention that the grievant had felt "slighted" by the bequests made by Sam, and, thus, had engaged in the disputes underlying this matter and had motive to lie about the salient facts of his relationship with respondent.

Under that context, the DEC found clear and convincing evidence that respondent violated RPC 1.2(a). Specifically, the DEC concluded that respondent, as attorney for the Bloomfield Parcel Owners, had refused to abide by their express instruction that he prepare and file a deed formally transferring fee title interest in the Bloomfield Parcel to them.

Next, the DEC found that respondent violated RPC 1.7(a), concluding that he had represented and provided legal services to the Bloomfield Parcel Owners, despite the significant risk that the representation would be materially limited by his own interests, which the DEC determined were adverse to their interests. In particular, the DEC found that respondent's ownership in the

---

<sup>3</sup> Respondent's counsel reserved the right to raise any constitutional challenges to the Court, including issues relating to the grievant's failure to testify during the hearing.

Douglas and Bloomfield Parcels, along with his duties as executors for the estates, created conflicts of interest for which he had neither sought nor obtained conflict waivers.

The DEC further determined that respondent violated RPC 1.4(b) and (c), concluding that he had failed to adequately communicate with the grievant and other members of the Bloomfield Parcel Owners regarding (1) his efforts to sell the Bloomfield Parcel and Douglas Parcel; (2) other offers to purchase the Bloomfield Parcel over the years; (3) leases and rental income; and (4) insurance coverage and costs for the Bloomfield Parcel. The DEC, thus, determined that the lack of adequate communication stripped the grievant of his ability to make informed decisions about his interest in the Bloomfield Parcel.

Finally, the DEC determined that respondent violated RPC 1.8(h)(2), because his advocacy for execution of the 2004 Agreement by the Bloomfield Parcel Owners was improper and constituted an attempt “to settle claims with Grievant and the other cousins without having notified them of their right to independent counsel.”

In aggravation, the DEC characterized respondent’s ethics violations as “egregious and ongoing,” finding that he “engaged in a continuing course of dishonesty and misrepresentation.” The DEC also found that respondent lacked



remorse and was not truthful in respect of his relationship with the grievant. Consequently, the hearing panel allocated little weight to mitigating factors, including respondent's lack of prior discipline and his cooperation with ethics authorities, which they correctly noted was mandatory.

The DEC determined that “[r]espondent’s conflict of his personal interests, and motivated by pecuniary benefit [sic], are sufficiently egregious to the panel to recommend suspension.” The DEC recommended an indeterminate suspension and a referral to the Office of Attorney Ethics for investigation into whether respondent’s conduct violated additional RPCs and potentially warranted disbarment.

In his brief submitted to us, and during oral argument before us, respondent maintained that no attorney-client relationship existed between himself and grievant, or any of the Bloomfield Parcel Owners, apart from the limited scope associated with the initiation of the suit against MacEvoy. Alternatively, he argued that, if such an attorney-client relationship existed, grievant’s remedies would be rooted in a malpractice action, not an ethics grievance.

Respondent further asserted that the DEC’s findings are not supported by clear and convincing evidence and are fatally based on uncorroborated statements made in the underlying ethics grievance, given the grievant’s

failure to testify at the ethics hearing. Respondent argued that the DEC ignored the grievant's animus toward respondent, and grievant's motive to lie. Moreover, respondent cited Janssen's certification, which corroborated key aspects of respondent's defenses.

Respondent reasoned that, if no attorney-client relationship existed between him and the grievant, there can be no finding that he violated any of the charged RPCs. Respondent, thus, requests dismissal of the charges against him.

Upon a de novo review of the record, we determine that none of the charges of unethical conduct against respondent are supported by clear and convincing evidence.

The crux of this case is whether an attorney-client relationship existed between respondent and the grievant, since such a relationship is a predicate element for every one of the charged RPCs. If an attorney-client relationship existed, we must then determine the scope of that relationship, and whether the allegations of the complaint are supported, by clear and convincing evidence, in the context of that scope.

“At its most basic, [the attorney-client relationship] begins with the reliance by a nonlawyer on the professional skills of a lawyer who is conscious of that reliance and, in some fashion, manifests an acceptance of responsibility

for it.” Kevin H. Michels, New Jersey Attorney Ethics: The Law of New Jersey Lawyering, 257 (2018), citing In re Palmieri, 76 N.J. 51, 58, 60 (1978). The relationship can begin absent an express agreement, a bill for services rendered, and the actual provision of legal services. Ibid. The relationship may be inferred from the conduct of the attorney and “client,” or by surrounding circumstances. Id. at 58-59.

Stated differently, when “the prospective client requests the lawyer to undertake the representation, the lawyer agrees to do so and preliminary conversations are held between the attorney and client regarding the case, then an attorney-client relationship is created.” Herbert v. Haytaian, 292 N.J. Super. 426, 436 (App. Div. 1996). It must, nonetheless, be “an aware, consensual relationship.” Palmieri, 76 N.J. at 58. On the attorney’s side, there must be a sign that the attorney is “affirmatively accepting a professional responsibility.” Id. at 58, 60. See also Procanik By Procanik v. Cillo, 226 N.J. Super. 132, 146 (App. Div. 1988), certif. den. 113 N.J. 357 (1988) (a lawyer “must affirmatively accept a professional undertaking before the attorney-client relationship can attach.”)

Based on the record, we find no clear and convincing evidence that an attorney-client relationship existed between respondent and the grievant, or, for that matter, between respondent and the other Bloomfield Parcel Owners,

except for the initiation of the lawsuit against MacEvoy, which ultimately was handled by an independent law firm. To the contrary, the contentious facts set forth in the record cut squarely against any notion of “an aware, consensual relationship” between the grievant and respondent, as described by the Court in Palmieri. In our view, no ethics violations flowed from that limited representation, in which all the Bloomfield Parcel Owners shared a common interest and goal.

We do note that, in the 2004 Agreement, respondent affirmatively stated that he was the attorney for John’s and Sam’s estates. We, find, however, that the language in the 2004 Agreement was drafted by his third-party counsel, and was intended to protect him from any potential liability in respect of the other Bloomfield Parcel Owners. Although the grievant never joined the 2004 Agreement, respondent intended that all members of the class would execute that agreement. In return for what he perceived as consideration and compromises offered by him and Louis, Jr., he sought corresponding consideration from the rest of the Bloomfield Parcel Owners – a waiver of all claims from the rest of the owners in respect of the duties he had performed for John’s and Sam’s estates. That waiver did not constitute, for purposes of these ethics proceedings, an affirmative admission of any attorney-client relationship between himself and the grievant or the other Bloomfield Parcel Owners.

We emphasize that the following facts further erode and vitiate the conclusions of the DEC regarding the Bloomfield Parcel Owners' supposed reliance on the attorney-client relationship that existed with respondent.

In respect of the 1978 Deed, respondent repeatedly refused to formally transfer title in the Bloomfield Parcel to the Bloomfield Parcel Owners, via a recorded deed. Respondent had cemented his position on this issue after consulting with his attorney and a title company, and had even arranged for the title company president to write letters to the grievant, explaining the rationale and conclusion that title had passed to the Bloomfield Parcel Owners by operation of law.

Moreover, prior to the date of the filing of the ethics grievance, the record is bereft of a single statement or accusation by the grievant claiming he had relied on respondent as his attorney. Indeed, in 2003, the grievant sent an e-mail to a nonlawyer representative of Ida's daughter, suggesting that, "an independent, professional property manager" should manage the Bloomfield Parcel in respondent's place. In the same e-mail chain, the grievant also discussed retaining counsel to address the issues in dispute in respect of the Bloomfield Parcel, describing respondent as a "fiduciary" who was acting against the grievant's wishes.

The 2004 Agreement, which was intended to “settle all issues concerning their respective rights and the disposition of” the Bloomfield Parcel and the Douglas Parcel, was prepared by an attorney who represented respondent and Louis, Jr. In connection with that proposed settlement, the grievant sent a letter to respondent’s attorney, under his own signature, making counterarguments regarding the draft proposal, and engaged in direct negotiations with respondent’s attorney. Contemporaneously, the grievant coordinated his concerns with JoAnn, who was represented by independent counsel, inquiring as to the legal advice she was being given in respect of the proposed terms of the 2004 Agreement.

In September of 2005, JoAnn complained to the grievant that he had been acting as a free rider, who had failed to pay his share of the legal fees for that representation, and asserted that she had no plans to “foot the bill for the use of another attorney for the benefit of everyone else.” In that same e-mail to the grievant, JoAnn described respondent as “the executor” of Sam’s estate, who was doing his job in respect of the Bloomfield Parcel.

In 2005, Ida’s daughter sent a letter, on behalf of herself, JoAnn, and the grievant, demanding that respondent formally transfer title to the Bloomfield Parcels to the Bloomfield Parcel Owners, and threatening that, if he failed to

do so, the three Bloomfield Parcel Owners would ask their attorney to clear title through appropriate court action.

Also, in 2008, via an e-mail among all the Bloomfield Parcel Owners, respondent suggested that the grievant seek “a knowledgeable real estate attorney” to advise him as to whether Sam’s death had truly caused, by operation of law, the grievant to inherit a twenty-five percent interest in the Bloomfield Parcel.

In the same e-mail, when respondent pointed out the services he had provided as property manager and bookkeeper, at no expense to grievant, he made no mention of performing legal work. In 2012, the grievant sent multiple e-mails to the Bloomfield Parcel Owners and their respective attorneys; in at least one, he affirmatively stated that “I am representing myself.”

On March 17, 2015, respondent and Louis Jr., through counsel, filed a partition action against the grievant. After learning of the litigation, the grievant e-mailed respondent, threatening to file an ethics grievance against him, and requesting that they speak “before [grievant] begin[s] the complaint process.” In May 2015, a court hearing was held, and the grievant appeared pro se, via telephone. On July 24, 2015, the court held a hearing for the final disposition of the case, and counsel for respondent and Louis Jr., and newly-hired counsel for the grievant made arguments, including as to claims made in

the ethics grievance underlying this matter; the grievant did not participate in the hearing. The grievant's attorney repeatedly described respondent as the property manager for the Bloomfield Parcel, and all the grievant's claims against respondent were characterized as breaches of his fiduciary duties, rather than breaches of the legal representation of the grievant.

In connection with the ethics hearing, Janssen, one of the Bloomfield Parcel Owners, submitted a certification, stating that respondent managed the Bloomfield Parcel and the Douglas Parcel, and never served as an attorney for the Bloomfield Parcel Owners, except for the initial filing of the lawsuit against MacEvoy.

The above facts illustrate the complexity of assessing the alleged ethics violations in respect of such long-ranging interactions between respondent and the grievant. Further clouding that task was the grievant's failure to appear at the ethics hearing, and, thus, his failure to testify as to his state of mind regarding key issues. What is clear from the record, however, is that neither the grievant nor the other Bloomfield Parcel Owners relied on respondent as their legal counsel. To the contrary, over the course of three-plus decades, all parties involved, including both the grievant and respondent, at times relied on the advice of outside counsel for legal advice in connection with their waxing and waning disputes.



Further, the record contains no evidence that the grievant or the other Bloomfield Parcel Owners suffered harm, or that respondent acted in his own self-interest, at any time, in any capacity, to the detriment of the rest of the Bloomfield Parcel Owners. Rather, the record is replete with evidence that respondent sought to properly maintain the Bloomfield Parcel; kept it from being sold for back taxes, including through the payment of personal funds in behalf of the grievant; and sought to capture its highest and best use in respect of the 2015 sale, whereby each of the Bloomfield Parcel Owners received hundreds of thousands of dollars in profit at settlement.

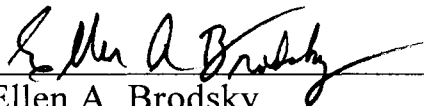
Accordingly, given the absence of an attorney-client relationship between respondent and the grievant, we determine to dismiss all the charges, as they are not supported by clear and convincing evidence.

We were concerned that the DEC's findings seemed to go to great lengths to place respondent's conduct in the light least favorable to him and most favorable to the grievant, while ignoring the conduct of the grievant, as criticized by not just respondent, but by other members of the Bloomfield Parcel Owners and by the findings and rulings of the Superior Court. Although respondent was not completely above reproach in this case, the DEC's findings of fact and recommended quantum of discipline widely miss the mark. Quite troubling is the DEC's complete reliance on documentary evidence in respect

of the grievant's allegations against respondent, despite the grievant's failure to testify, juxtaposed against the panel's utter dismissal of the exculpatory certification of Janssen as mere unreliable hearsay. Although we appreciate the voluntary service of the DEC members, in this case, we are not able to agree with their findings.

Vice-Chair Gallipoli and Member Zmirich voted to impose a reprimand, finding that respondent did, at times, serve as attorney for the estates and, thus, violated RPC 1.7(a) (conflict of interest), given his status as an heir to both estates.

Disciplinary Review Board  
Bruce W. Clark, Chair

By:   
Ellen A. Brodsky  
Chief Counsel

SUPREME COURT OF NEW JERSEY  
DISCIPLINARY REVIEW BOARD  
VOTING RECORD

In the Matter of Harry John Herz  
Docket No. DRB 18-413

---

---

Argued: April 18, 2019

Decided: July 31, 2019

Disposition: Dismiss

<i>Members</i>	Dismiss	Reprimand	Recused	Did Not Participate
Clark	X			
Gallipoli		X		
Boyer	X			
Hoberman	X			
Joseph	X			
Petrou	X			
Rivera	X			
Singer	X			
Zmirich		X		
Total:	7	2	0	0

---

Ellen A. Brodsky  
Chief Counsel