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OPINIONS THAT CHANGED NEW JERSEY LAW FOREVER: CHAPTER 1 – IN RE SEELIG [180 NJ 234 (2004)]

With

**Jack L. Seelig, Esq.
Certified Criminal Trial Attorney**

And featuring

**Robert Ramsey, Esq.
Author, NJ Attorney Discipline, 2012-2013 ed.**

Program description

In the opening chapter of our “Opinions that Changed New Jersey Law Forever” series, we talk to attorney Jack L. Seelig about In re Seelig [180, N.J. 234 (2004)], and the duty of a lawyer to reveal material facts to tribunal.

I. Introduction

- **Jack Seelig, Esq., Certified Criminal trial Attorney**

II. Facts and Procedural History of Underlying Case

- **January 1, 1998 – unspeakable tragedy**
- **Client (Jeffrey Poje) was employed at a restaurant in the Somerville area and probably had something to drink that night – New Year’s Eve**
- **Jeff drove down 206 toward Trenton and landed on Pennington Road and came down the hill and around a curve and ran into the back of a car that was disabled and was being pushed by an individual and driven by the individual’s girlfriend**
- **After midnight, on their way home, their car was disabled, he was pushing it and she was behind the wheel and the client ran into the back of the car**
- **The man who was pushing was killed immediately and woman behind the wheel died a few days later**
- **Double homicide**
- **Client fled the scene on foot after the accident and was located the next day and was arrested**
- **Client made no statements to the police, he was arrested and charged with vehicular homicide but not traffic tickets at the time – homicide and aggravated assault were initial charges – before arraignment charged with second homicide by way of aggravated manslaughter**
- **Aggravated manslaughter was a crime of the first degree; crime of the first degree “plus” – looking at 30 years in prison as max on each count and no prohibition for consecutive sentencing, and up to ½ without parole eligibility [pre NERA offense (No Early Release Act NJSA 2C:43-7.2)]**
- **Approximately one week later, the family contacted Seelig and retained him**
- **Bail was already set and made contact with prosecutor assigned to the case**
- **Approximately 2 weeks later traffic tickets were issued and mailed to defendant’s house – leaving the scene of an accident (NJSA 39:4-129), failure to report, reckless or careless driving**
- **Letter of representation sent to municipal court**

- **State v. Dively, 92 NJ 573, 586 (1983) – vehicular homicide case and underlying DWI or reckless driving charges; defendant plead guilty to motor vehicle offenses and filed a motion to dismiss criminal charges under double jeopardy; Supreme Court held that it was double jeopardy and felony charges were dismissed; recklessness as common element in both criminal and motor vehicle charges and is resolved on its merits then double jeopardy (reckless driving and criminal offense with recklessness (manslaughter))**
 - **As a result, a memo went to all municipal courts called the “Dively Memo” – how to handle all cases in the future where there were criminal charges and underlying traffic charges – cases were to be held or transferred to superior court so that everything would be handled in one venue**
- **Certified Criminal Trial Attorney at that time**
- **The Dively issue was in the back of Seelig’s mind but did not expect for municipal court to proceed with the case**
- **Aware of what could and would happen if municipal court proceeded with charges and had to represent client to the best of his ability**

III. Municipal Court Proceedings

- **Sent letter of representation to municipal court and the case was scheduled before municipal court but client was not produced for hearing**
- **Municipal court judge conducted initial arraignment and set bail**
- **Case was rescheduled for the following week – substitute municipal prosecutor discussed case and possibility of plea bargaining – attorney indicated that client was going to plead guilty to all charges – judge called the case and prosecutor was not present in court room – counsel told judge pleading guilty to all 3 charges – advised judge that bodily injury section was the applicable section of the leaving the scene statute for the purpose of sentencing**
- **Judge never took a factual basis from client, judge did not demonstrate concern for victims, no concern for victim’s rights – judge only commented whether client who was incarcerated was going to be in jail for a period of time – concerned about monetary fines - judge did not involve defendant in any way, shape, or form**

- **Attorney said client was pleading guilty and judge imposed fines – fines were paid that day**
- **The situation was mostly based on luck because it never should have been before municipal court – subsequently found out that municipal court did not have a Dively procedure in place – no communication between court clerks (one doing criminal and one doing motor vehicle) which would have alerted to the Dively issue**
- **Attorney never made false representation to the court – issue of omission, as opposed to affirmative misrepresentation**
- **Judge did not remember arraigning client, no prosecutor in the courtroom, and no interest by the judge to follow Rules of Court to inquire about injuries, etc.**
- **Fines were imposed and paid that day**

IV. The Realization of a Dively Issue – Motions regarding the plea

- **The next day the judge called the prosecutor's office and spoke to 1st assistant and stated that he had made a mistake**
- **A great deal of publicity with this case**
- **Prosecutor's office filed a motion to vacate the plea on basis that defendant's rights were violated!?!?! – filed with municipal court**
- **Prosecutor raised 2 issues: State of NJ deprived of due process of law; and defendant's constitutional rights were violated by proceedings because defendant never effectively plead guilty because no factual basis, etc.**
- **Counsel made application that municipal court judge would not hear the case because JMC has a problem**
- **Counsel realized consequences to reputation by taking this position – responsibility to client trumped attorney's reputation – did not believe doing anything dishonest or immoral – if didn't represent defendant to the fullest extent then his credibility as an attorney would suffer**
- **Presiding JMC heard state's motion to vacate the plea arguing plea was ineffective because rules of court require that there be a factual basis for the plea with defendant being directly addressed by the judge to insure that plea is voluntary and knowing; state's brief also addressed attorney ethics**
- **PJMC vacated guilty plea in 30 page written opinion; PJMC did not address ethics issue**
- **Filed appeal to law division – law division upheld PJMC opinion**

- **Filed interlocutory appeal to appellate division who refused to grant interlocutory relief**
- **Motion to be relieved as counsel because an ethics complaint was filed against counsel**

V. Resolution of Underlying Criminal Charges

- **With new attorney plea was entered for 7 flat for the criminal charges**
- **State had problems with case: 2 lane road with no shoulder, question whether lights of vehicle that was hit had lights on; no proof of whether defendant was speeding – State did not want to go before the appellate division with the Dively issue as part of the defense case**

VI. The Ethics Complaints

- **The formal ethics complaint came from someone who was not even involved in the case – a superior court judge who had the criminal matter but Seelig had never appeared before that particular judge on the criminal charges; at least 2 years later**
- **Seelig had filed an ethics complaint against another superior court judge on a completely separate matter**
- **No statute of limitations on attorney disciplinary matters**
- **When received ethics complaint, retained counsel and filed a response**
- **Ethics charges were moved from Mercer to Burlington County for investigation – then decided to file formal charges**
- **Ethics charges were in the paper and they spoke to an ethics professor at Seton Hall and Rutgers and they added new counts to the complaint for Candor to the Tribunal**
 - **RPC 3.3(a)(5) – A lawyer shall not knowingly fail to disclose to the tribunal a material fact knowing that the omission is reasonably certain to mislead the tribunal, except that it shall not be a breach of this rule if the disclosure is protected by a recognized privilege or is otherwise prohibited by law**
- **Original charges did not include Candor count**
- **Counsel's position was that he did not do anything wrong, and that this was his responsibility to his client**
- **Before the county ethics board he called an expert to testify; expert said that attorney's obligation was to his client and this**

- **was a constitutional issue – 6th amendment would compel you not to disclose in order to protect your client**
- **Other witnesses testified as well as character witnesses**

VII. The Ethics Decisions

- **District Ethics Board was comprised of 2 attorneys who were not criminal attorneys and one nurse – the attorneys found in favor of counsel and the nurse indicated that he did not do anything wrong but if there were ever a committee that dealt with this that counsel should sit on the committee**
- **DRB – did not have a quorum and lost 5-4; opinion listed 10 items that they found lead to this situation; still had an obligation to the court to prevent the court from messing up – notwithstanding the 6th amendment rights of the client**
- **Supreme Court then issued an order to show cause to counsel as to why he should not be disbarred or further disciplined**
- **Supreme Court did not come to a decision until a year later**
- **The issue of what would happen was always on his mind**
- **Initially this effected his relationships with other attorneys and judges; but ultimately there were no long lasting effects**
- **Supreme Court decision – published (very unusual); issue was of national importance; this could have been a continuing problem in other cases; written by Chief Justice Poritz; majority was convinced that counsel was acting in good faith; RPC had never been construed by court previously led them to rule that any discipline would be unfair because the rule was not clear – case of first impression**

VIII. The Consequences of the Seelig Ethics Decision – Moving Forward

- **This issue has made it more difficult to represent clients because cannot represent clients the way that is best for the client**
- **No affirmative obligation to reveal information provided by client that is protected under rules of evidence and privileges**
- **Issues come up in drug cases and there is a DP marijuana charge and that case gets called in municipal court – and based on this opinion must go to municipal court and reveal Superior Court matters**
- **In DWI context – consider if had information from client regarding other prior offenses which may or may not be**

considered “priors” under NJ law; these are matters of public record; is the attorney required to reveal this to the court or is this a confidence?

- **No ultimate guidance from the ethics decision**
- **Mitchell v. United States, 526 US 314 (1999) – makes it clear that defendants have an affirmative right to remain silent at sentencing; defendants do not have an obligation to disclose facts relating to the crime;**
- **Kingsdorf v. Kingsdorf, 351 NJS 144, 158 (App. Div. 2002) – minor assault case in a nursing home and person plead guilty in municipal court; however at the time of the plea the person had already died and no homicide charges were brought and case in municipal court was already resolved; prosecutor tried to bring homicide charges but court said that prosecutor could have called to check on victim before going through with the plea and therefore double jeopardy would apply if homicide charges were brought**
- **Does a NJ defense attorney have obligation to disclose driving history of client to municipal court judge and prosecutor?**
 - **Directives regarding what court must do if inaccurate information is relied on for sentence – must resentence**
 - **No duty on defense attorney at all – all incumbent about actions by judge and prosecutor**
 - **Defense attorney just cannot lie**
- **Attorneys should rely on Mitchell decision and state that client has a right to remain silent at sentencing and that the state is the moving party at sentencing and it is incumbent upon the state to provide information**
- **Drunk driving is a hybrid area of its own with less rights to the defendant**
- **Is prior conviction “facts related to the crime” – relative to Mitchell decision?? – if it is determined that prior crimes are not “facts related to the crime” then defense attorneys are obligated to disclose – but no caselaw on this issue**

IX. The Legacy of In re Seelig

- **The legacy will continue for a very long time**
- **Angry because felt that he did right when he has been told he did wrong**

- **JMC's career was ruined – did not go to Superior Court as expected**
- **Prosecutor's office had responsibility and took no blame or involvement in the issue that was created**
- **Prosecutor's office submitted an affidavit to ethics board as opposed to appearing in person for cross examination**
- **Prosecutor's office ducked their responsibility in this case and just sat back and let things happen as a result**

X. Advice to new attorneys

- **Hard to give advice because the Seelig opinion did not provide much insight on this issue**
- **Dual responsibility of representing your client but paramount responsibility to administration of justice – act in good faith**