SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 13-404
District Docket Nos. XIV-2011-0530E and XIV-2011-0593E

IN THE MATTER OF

WAYNE POWELL

AN ATTORNEY AT LAW

Decision

Argued: March 20, 2014

Decided: May 9, 2014

Maureen G. Bauman appeared on behalf of the Office of Attorney Ethics.

Carl D. Poplar 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 recommendation for discipline filed by the District IV Ethics Committee (DEC). The complaint charged respondent with conduct prejudicial to the administration of justice, a violation of RPC 8.4(d), for

failure to comply with the requirements of R. 1:20-20 regarding suspended attorneys.[1]

The DEC recommended a reprimand. We determine to impose a censure on respondent.

Respondent was admitted to the New Jersey bar in 1985. He maintains an office for the practice of law in Cherry Hill, Camden County, New Jersey.

In 1995, respondent received a reprimand for improperly advancing personal funds to eight clients in personal injury matters and negligently misappropriating client funds. In re Powell, 142 N.J. 426 (1995).

In 1997, respondent received a second reprimand for failing to communicate with a client, failing to act diligently, and misrepresenting to ethics authorities that an appeal had been filed in a particular matter. In re Powell, 148 N.J. 393 (1997).

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[1] Although the complaint did not charge a violation of RPC 8.1(b), R. 1:20-20(c) provides, in pertinent part, that the failure of a suspended attorney to comply with the obligations of R. 1:20-20 shall constitute a violation of RPC 8.1(b) (failure to cooperate with ethics authorities) and RPC 8.4(d). Therefore, respondent had ample notice that RPC 8.1(b) was also implicated.

In 2010, respondent was reprimanded a third time. There, the misconduct encompassed two personal injury matters and included a conflict of interest by representing the passengers and driver of a vehicle involved in an accident, failure to provide clients with written contingent fee agreements, and failure to turn over clients' files to the new attorney. In re Powell, 203 N.J. 441 (2010).

On June 29, 2011, the Court suspended respondent from the practice of law for three months, effective July 29, 2011, for failure to act diligently in a client's personal injury matter. Specifically, respondent allowed the complaint to be dismissed for failure to prosecute and took no action thereafter to have it reinstated. Additionally, he failed to communicate with his client for seven years and failed to adequately supervise his staff. In re Powell, 206 N.J. 555 (2011).

Most recently, on January 23, 2013, respondent was censured for failing to obey a Court order to provide proof of malpractice insurance; failure to comply with discovery requests; and failure to remove the name of a former partner from his letterhead, after that partner was appointed as a municipal judge. In re Powell, 212 N.J. 557 (2013).

The facts of this matter are as follows:

Following respondent's July 29, 2011 suspension from the practice of law, he submitted to the Office of Attorney Ethics (OAE) an affidavit of compliance with R. 1:20-20. In the affidavit, respondent averred that he would not use any stationery, sign, or advertisement suggesting that either alone, or with any other person, he owned or maintained a law office. He also asserted that all of his clients were notified of his suspension, but did not indicate whether or how he notified assignment judges in the vicinages where he had active cases. In or about early October 2011, respondent served a copy of his petition for reinstatement on the OAE. The petition was filed on his attorney letterhead.

At the DEC hearing, respondent testified that, under his reading of R. 1:20-20, "it appeared clear to [me] that you can continue your practice under certain circumstances." In fact, to that end he hired Wallace E. Wade, Esq., his brother-in-law, a few weeks before the effective date of his suspension, so that the office could continue to run during that period. Respondent believed that the rules allowed a law practice to continue to operate, so long as the suspended attorney did not perform any work. Respondent considered Wade a full-time employee and, therefore, a "member" of the firm, although not a partner or

shareholder, a situation that, in his view, satisfied the rules and allowed the continuation of his law practice.

Wade testified that, when he first started working for respondent, in the middle of 2011, his employment was akin to part-time. He also noted that he was performing document review in Philadelphia at the time, five days a week.

As of the date of the DEC hearing, Wade was still working with respondent, although on a per diem basis.

Respondent acknowledged that Wade was not required to be at his office five days a week. Aware that Wade had other obligations, respondent was comfortable with Wade's schedule, as long as the clients were serviced and the court had a member of the bar to contact, should an emergent matter arise.

At the outset of the DEC hearing, the OAE disciplinary auditor admitted that respondent had complied with the rules governing suspended attorneys, at least in some respects. She conceded that respondent had sent letters notifying federal district courts in New Jersey and Pennsylvania of his suspension. However, she stated, respondent produced no letters notifying New Jersey assignment judges.

For his part, respondent testified that, before the effective date of his suspension, he had personally communicated

with judges about all of his pending matters before them. He asserted that he had also informed the appropriate prosecutors of his suspension, as soon as he had found out about it. Respondent admitted that he had not notified assignment judges directly, asserting that the rule does not require a writing for the notification of assignment judges. According to respondent, he had complied with R. 1:20-20(e), which provides as follows:

> (e) Responsibility of Partners and Shareholders. An attorney who is affiliated with the disciplined or former attorney as a partner, shareholder, or member shall take reasonable actions to ensure that the attorney complies with this rule. In lieu of compliance by the attorney with the requirement of paragraph (b)(10) and (b)(11), the firm, corporation, or limited liability entity may promptly notify all clients represented by the disciplined or former attorney of the attorney's inability to act due to the disbarment, suspension, or disability-inactive status and that the firm will continue to represent the client unless the client requests in writing that the firm withdraw from the matter and substitute a new attorney.[2]

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[2] Respondent never wavered from his position that he could operate under the guidelines set forth in R. 1:20-20(e). Reference to that paragraph of the rule appears in his affidavit of compliance, his answer to the complaint, and several other

(footnote cont'd on next page)

Respondent argued that an attorney may make an election as to which section of the rule to follow. Thus, he claimed, sole practitioners must comply with section (b)(10) and (11), but attorneys who practice in law firms where other lawyers may cover their court schedules are not required to notify assignment judges, since the firm will continue the case without interruption. In respondent's view, he had a choice, because the rule does not indicate that one would have to "do both things" (presumably, comply with sections (b)(10) and (b)(11), as well as section (e)). He conceded, however, that the rule does not specify that a suspended attorney may choose one section or the other.

Wade signed the letters sent to clients notifying them of respondent's suspension. The letters indicated that the firm would continue to represent the client, unless notified, in writing, of the client's desire to seek another attorney. The letters did not advise the clients to seek legal representation

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(footnote cont'd)

pieces of correspondence generated throughout the investigation and prosecution of this disciplinary matter.

elsewhere to complete their pending matters. Those letters were sent on the letterhead "Law Office of Wayne Powell, LLC," with respondent's name crossed out on the list of the firm's attorneys.

Respondent asserted that every client had received written notice of his suspension, by regular and certified mail, in compliance with R. 1:20-20(a). He added that the language contained in those letters had been taken verbatim from an appendix to R. 1:20-20 and that no client had responded to the letter or opted to leave the firm. Respondent explained that Wade had signed the letters to the clients because respondent believed that R. 1:20-20(e) required a partner, shareholder, or member to sign the letter and, because he was suspended, he was none of those things.

Respondent did not deny that the firm letterhead had remained in use during his suspension. Instead, he argued that he had modified the letterhead to be consistent with what the OAE allegedly had said was acceptable. According to respondent, the OAE had informed his attorney that, so long as the name of the suspended attorney was stricken from the list of counsel, it would be appropriate to continue to use the letterhead because the firm was a corporate entity.

Under questioning by the DEC, respondent conceded that the use of "The Law Offices of Wayne Powell, LLC" letterhead might suggest that he owned the law office, but he asserted a belief that its use was permissible. According to respondent, his attorney was informed by two women, at the OAE, that the firm's letterhead could be used, as long as the suspended attorney's name was stricken from it. Respondent could not recall the names of the OAE personnel with whom his attorney had spoken. Respondent, thus, denied that his affidavit was inaccurate, when it asserted that he would not use stationery suggesting that he owned a law firm, because it complied with the OAE's advice.

The OAE investigation revealed that respondent did not change the signs at and around his office, as required by R. 1:20-20. During interviews conducted by the OAE investigator, both respondent's office manager and Wade stated that they believed that the office signs had not been changed, during the period of respondent's suspension. Although respondent asserted that the plastic nametag insert, outside his office door, had been turned over so as not to display the firm's name, he admitted that he had forgotten about the directory outside of the office complex, which listed all of the businesses within the building.

The DEC followed up on this topic by asking respondent why he had thought it permissible to use letterhead with his office name on it, but had felt compelled to turn over the nameplate, in front of his office, with the same name. Respondent replied that his intent had been to avoid any action that could later be construed as an attempt to circumvent the Court's order. Moreover, he explained, although the OAE had deemed the letterhead acceptable, it had offered no opinion about the sign. Respondent stated that, because the rule prohibits a sign with the suspended attorney's name on it, he had removed the sign as best he could.

The DEC recommended that respondent receive a reprimand for his violation of RPC 8.4(d). It noted that respondent had admitted that the letterhead of the "Law Office of Wayne Powell, LLC" had been used throughout his period of suspension, notwithstanding the fact that respondent's name had been stricken from the list of attorneys associated with the firm, leaving only Wade's name. The DEC remarked that, with one possible exception (respondent's submission of his petition for reinstatement), there was no evidence that he had ever signed any letters, or participated in any way in preparing or sending any letters on his firm's letterhead, during the period of his

suspension. Rather, the DEC believed respondent's testimony that he had avoided any activity that might be considered the practice of law, while he was suspended.

The DEC determined that respondent's authorization of the use of the letterhead of the "Law Office of Wayne Powell, LLC" during the period of his suspension had violated R. 1:20-20(b)(4), because respondent was using "stationery" suggesting that he, "either alone or with any other person, has, owns, conducts or maintains a law office or an office of any kind for the practice of law". The DEC believed that the very presence of respondent's name at the top of the letterhead and, indeed, as the only name in the law firm's title, could clearly suggest to the public that respondent "owned, conducted or maintained" the law office.

The DEC added that the letterhead's suggestion that respondent continued to "own" or "maintain" a law practice, during the period of his suspension, was reinforced by the application of RPC 7.5(a) and (c) (R. 1:21-1B(c) imposes the requirements of RPC 7.5 on limited liability companies). RPC 7.5(a) provides, in part, that "the name under which a lawyer or law firm practices shall include the full or last names of one or more of the lawyers in the firm or office or the names of a

person or persons who have ceased to be associated with the firm through death or retirement." Similarly, RPC 7.5(c) provides that "(a) firm name shall not contain the name of any person not actively associated with the firm as an attorney, other than that of a person or persons who have ceased to be associated with the firm through death or retirement."

The DEC reasoned that, because the "death or retirement" exceptions to the rule did not apply during the period of respondent's suspension, the continued use of respondent's firm's letterhead necessarily suggested that respondent continued to be "actively associated" with the firm.

Further, the DEC remarked that, during the period of respondent's suspension, he had not removed or covered up his law firm name from the building directory where his law office was located, contrary to the requirements of R. 1:20-20(b)(4). The DEC also found that respondent's form letter to clients, on the firm's letterhead and signed by Wade, had not complied with the client notification requirements of R. 1:20-20(b)(10) and (11). In particular, the letters had neither advised the "clients to seek legal advice elsewhere and to obtain another attorney to complete their pending matters," as required by R. 1:20-20(b)(10), nor advised them "to obtain another attorney and

promptly to substitute that attorney for the disciplined or former attorney," as required by R. 1:20-20(b)(11).

The DEC noted respondent's argument that he was not obligated to comply with those provisions because he had availed himself of the "exception" afforded under R. 1:20-20(e). In the DEC's view, the determination of whether respondent failed to comply with R. 1:20-20(b)(10) and (11) hinged on whether R. 1:20-20(e) applied to respondent and, if so, whether he had complied with that provision. In that regard, the DEC determined that respondent was the sole owner of his LLC, at the time that the client notification letters had been sent, as well as throughout the period of his suspension. The only other lawyer employed by the firm during this period was Wade, who was employed on a part-time basis. The DEC found that Wade was not "affiliated with" respondent as a "partner, shareholder or member," as required under R. 1:20-20(e). The DEC remarked that the rule refers to affiliates as "partners, shareholders, or members" in parallel with the terms "firm, corporation, or limited liability entity," which suggested to them that the "affiliate" shares an ownership interest in the organization with the disciplined attorney.

In the DEC's opinion, respondent's arrangement with Wade failed to comply not only with the express language of R. 1:20-20(e), but also with the clear intent of that rule. Although no evidence was presented that clients were harmed due to Wade's daily operation of the firm, it was obvious that Wade was not nearly as skilled an attorney as respondent nor capable of managing the practice on his own.

Moreover, the DEC challenged respondent's characterization of Wade as a "member" of his firm since, at the time of the hearing, Wade was paid only on a per diem basis, when his assistance was needed. Therefore, the DEC concluded that respondent was not entitled to avail himself of the provisions R. 1:20-20(e), and, instead, was required to comply fully with R. 1:20-20(b)(10) and (11), which he clearly had failed to do.

As to the issue of notification to assignment judges, the DEC found that respondent testified, credibly, that he had informed the presiding judges in all of his pending matters that the Court had ordered him suspended, although he had not notified the assignment judges, in writing, as required by R. 1:20-20(b)(11).

In mitigation, the DEC considered the testimony of two character witnesses, respondent's good-faith, albeit misguided,

effort to comply with his obligations as a suspended attorney, and his mistaken reliance on R. 1:20-20(e) and on vague, second-hand advice that he purportedly believed had come from the OAE.

In aggravation, the DEC considered respondent's ethics history (three reprimands and a three-month suspension).[3] As indicated earlier, the DEC recommended that respondent receive a reprimand.

Following a de novo review of the record, we are satisfied that the DEC's finding that respondent's conduct was unethical is fully supported by clear and convincing evidence. Respondent's actions, while suspended from the practice of law, constituted violations of RPC 8.1 (b) and RPC 8.4(d).

Typically, R. 1:20-20 violations involve a failure to file the required affidavit of compliance. Although respondent filed the affidavit, he did not fully comply with the requirements of the rule.

Specifically, respondent failed to properly notify clients and assignment judges that the Court had ordered him to be

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[3] At the time of the hearing, the DEC was unaware of the 2013 censure imposed on respondent.

suspended. Indeed, respondent admittedly failed to notify the assignment judges, in writing, and failed to use proper language to notify his clients of how they should pursue their legal matters without him.

Respondent also failed to remove signs at his office and continued to use his letterhead. He was not permitted to use his letterhead for communication with anyone, during his suspension, whether he or someone else signed the letter. Even the most strained reading of R. 1:20-20(e) could not lead to the conclusion that it is controlling in this case. First, respondent is the sole member of his LLC. In his own words, he has no partner and no other shareholders. Second, the rule on its face is clear as to whom it applies. Under the plain reading of R. 1:20-20(e), and in conjunction with the LLC statute, respondent is not exempt from the requirements of R. 1:20-20(b)(10) and (11).

We find, thus, that respondent violated RPC 8.1(b) and RPC 8.4(d) by failing to fully observe the requirements of R. 1:20-20.

The threshold measure of discipline to be imposed for a suspended attorney's failure to comply with R. 1:20-20 is a reprimand. In re Girdler, 179 N.J. 227 (2004). The actual

discipline imposed may be different, however, if the record demonstrates mitigating or aggravating circumstances. In the Matter of Richard B. Girdler, DRB 03-278 (November 20, 2003) (slip op. at 6).

Discipline greater than a reprimand was imposed in the following cases: In re Sirkin, 208 N.J. 432 (2011) (in a default, censure imposed on attorney who failed to file an affidavit of compliance with R. 1:20-20 after he received a three-month suspension; an aggravating circumstance was the fact that the attorney ignored the OAE's reminder that the affidavit was due and request that he file it immediately); In re Garcia, 205 N.J. 314 (2011) (in a default matter, three-month suspension for attorney's failure to comply with the OAE's specific request that she file the affidavit following a fifteen-month suspension); In re Berkman, 205 N.J. 313 (2011) (in a default matter, three-month suspension imposed on attorney who failed to file the R. 1:20-20 affidavit following a nine-month suspension); In re Raines, 181 N.J. 537 (2004) (three-month suspension for failure to file the affidavit of compliance following a three-month suspension; the attorney's ethics history also included a private reprimand, a six-month suspension, and a temporary suspension for failure to comply

with a previous Court order); In re Wargo, 196 N.J. 542 (2009) (in a default matter, one-year suspension for failure to file the R. 1:20-20 affidavit; the attorney's ethics history included a temporary suspension for failure to cooperate with the OAE, a censure, and a combined one-year suspension for misconduct in two separate matters; all disciplinary proceedings proceeded on a default basis); and In re Brekus, 208 N.J. 341 (2011) (in a default matter, two-year suspension imposed on attorney with significant ethics history: a 2000 admonition, a 2006 reprimand, a 2009 one-year suspension, a 2009 censure, and a 2010 one-year suspension, (a default)).

Almost every case involving violations of R. 1:20-20 proceeded on a default basis. Raines was an exception. There, the attorney stipulated not having filed the required affidavit of compliance, but denied that his conduct had violated either RPC 8.1(b) or RPC 8.4(d). We rejected the attorney's contention in this regard. In the Matter of Richard W. Raines, DRB 04-203 (August 18, 2004) (slip op. at 5). We determined to impose a three-month suspension on the attorney based on his extensive disciplinary history and his long record of refusing to comply with conditions imposed by the Court. Ibid at 8.

Respondent, too, participated in the disciplinary process, rather than defaulting. Like Raines, he admitted most of the allegations, but denied having violated any rule, a contention that we rejected. Like Raines, he has a significant disciplinary record.

Unlike Raines, however, respondent complied with at least some of the requirements of R. 1:20-20. Besides, the DEC found his testimony about his ultimate misunderstanding of the rules to be credible, for the most part. Typically, when the trier of fact determines a witness to be credible, we defer to that finding. Because the trier of fact "hears the case, sees and observes the witnesses, and [hears] them testify, it has a better perspective than a reviewing [tribunal] in evaluating the veracity of witnesses." Pascale v. Pascale, 113 N.J. 20, 33 (1988) (quoting Gallo v. Gallo, 66 N.J. Super. 1, 5 (App. Div. 1961)). 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).

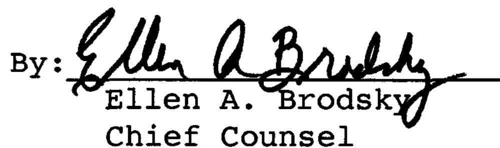
Comparing respondent's misconduct to that of Raines, we find that Raines' was far more serious. We, therefore, determine

that to suspend respondent for three months, as in Raines, would be too severe.

A five-member majority of the Board determined to censure respondent. Members Clark, Zmirich, Hoberman, and Singer voted for a reprimand.

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
Bonnie C. Frost, Chair

By: 
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Wayne Powell
Docket No. DRB 13-404

Argued: March 20, 2014

Decided: May 9, 2014

Disposition: Censure

| *Members* | Disbar | Suspension | Censure | Reprimand | Disqualified | Did not participate |
|---|---|---|---|---|---|---|
| Frost | | | X | | | |
| Baugh | | | X | | | |
| Clark | | | | X | | |
| Doremus | | | X | | | |
| Gallipoli | | | X | | | |
| Hoberman | | | | X | | |
| Singer | | | | X | | |
| Yamner | | | X | | | |
| Zmirich | | | | X | | |
| Total: | | | 5 | 4 | | |

Ellen A. Brodsky
Chief Counsel