SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 96-315

IN THE MATTER OF	:
WAYNE POWELL	:
AN ATTORNEY AT LAW	:

Decision

Argued: October 17, 1996

Decided: December 18, 1996

Thomas McCay, III appeared on behalf of the District IV Ethics Committee.

Carl 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 the Board based on a recommendation for discipline filed by the District IV Ethics Committee ("DEC"). The twelve-count complaint charged respondent with misconduct in three matters.

Respondent was admitted to the New Jersey bar in 1985. He is engaged in private practice in Cherry Hill, Camden County.

Respondent was reprimanded on September 11, 1995 for improperly advancing personal funds to eight clients in personal injury matters and for negligently misappropriating client funds. In re Powell, 142 N.J. 426 (1995).

The facts in these matters are as follows:

The Forte Matter (District Docket No. IV-90-004E)

In May 1988, while employed by the firm of Hockfield, Hasner and Weiss, respondent undertook the representation of Roy White in a personal injury matter arising out of a May 20, 1988 automobile accident. In December 1988, respondent filed a complaint against Selective Insurance Company ("Selective"), seeking PIP benefits in White's behalf. The complaint recited that White "was employed at the time of the aforementioned accident, but as a result of the injuries sustained by him, he was unable to return to his employment." The complaint also alleged that White "was unable to care for himself and his everyday duties." Exhibit P-20.

In May 1989, respondent left his employment with the law firm to open his own office. He continued to represent White. On July 1, 1989, respondent entered into an agreement with Roy L. White Incorporated, whereby, among other things, White agreed to supply investigation and claims adjusting services for respondent's law firm. White was to be paid on a case-by-case basis. Exhibit P-27. The crux of the charges against respondent is the discrepancy between his statement in the civil complaint that White was unable to work and his knowledge that White, in fact, was able to work, as witnessed by their professional association.

The DEC heard the testimony of Marisa Vitiello, respondent's secretary of ten years. Vitiello testified that the office carried business cards identifying White as its "Claims Manager." It was

her recollection that the cards may have been situated on her desk, available to all office visitors. Vitiello also testified that, periodically since 1988, she had a pager number for White and on occasion, had paged White at respondent's request. Vitiello testified that White was not employed by respondent and did not have an office. She acknowledged, however, that White performed investigative services for respondent.

The DEC also heard the testimony of David L. Kraus, an investigator employed by Selective. Kraus visited respondent's office on October 2, 1989 to determine if White was employed there. Kraus spoke with a female employee, presumably a secretary. Kraus was unable to confirm that Vitiello was the individual with whom he had spoken. The secretary gave Kraus a business card for White and a card for respondent. Exhibit P-11. The two cards were similar in appearance, having the same stock, font and format. White's cards had the designation "Claims Manager" and listed a pager number. According to Kraus, the secretary identified White as the claims manager and also identified a room as his office.

Another Selective investigator, Neil Forte, the grievant here, conducted a private surveillance of respondent's office on September 25 and 26, 1989. On both dates, Forte observed White bringing what appeared to be clients to respondent's office. Forte also interviewed the manager of the apartment complex in which White allegedly lived. Forte testified that, according to the manager, White had made it clear that he was working with and conducting investigations for respondent. White gave the manager

business cards for himself and for respondent and referred to respondent as his partner.

In evidence is respondent's office ledger for 1990. Exhibit P-14. Vitiello testified that to the best of her knowledge only respondent made entries in the ledger. The ledger had numerous entries evidencing payments to Roy White, Inc. The DEC also examined invoices for services rendered by R. L. White, Inc. for the period of July 1989 through December 1990. Exhibit P-12. On each invoice was respondent's name as the attorney for whom the services had been performed. The check numbers and amounts paid corresponded with the entries in the ledger.

During the course of his investigation, Forte reviewed several receipts for payment to a Eunice Canty for provision of essential services to White during the months of May through August 1989. (The DEC noted that there were additional receipts for February through April 1989). Forte and Kraus interviewed Canty. The information they collected led Forte to believe that Canty's receipts were fraudulent, as seen below. Forte testified that, in November 1992, Canty held herself out as White's wife.[1]

Forte also reviewed receipts for payment to Sonjia Weidman for essential services to White. Some receipts covered the period from

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[1] Testimony was offered by Roderick Baltimore, Esq., an associate in respondent's firm. Baltimore, whose wife is Canty's cousin, confirmed that Canty and White are married. He did not know when they were married. It was respondent's belief that they were married in 1992 or 1993. That would have been four or five years after respondent filed the civil complaint alleging that White was unable to care for himself and his everyday duties.

May through August 1988 and January 1989. Others were undated. Forte attempted to speak with Weidman on several occasions, to no avail, leaving business cards and forwarding a letter to her. On January 5, 1990, respondent called Forte to warn him that he could face legal action if he did not stop trying to contact Weidman.

With regard to this call to Forte, respondent testified that he knew that Weidman was supplying services to White. Weidman had called respondent complaining about an investigator. Respondent then contacted Forte and, upon being informed that Forte was conducting a confidential investigation, told Forte that he was harassing Weidman. Respondent added that Weidman had certain rights that she could enforce against Forte. At the time that respondent contacted Forte, he had no knowledge that Forte was investigating White. With regard to the essential services provided by Canty and Weidman, respondent claimed that he had no way of knowing if the information in their documents was inaccurate.

Respondent testified that it was his understanding that White had not worked under their July 1, 1989 agreement. Rather, White employed other individuals to perform various tasks. With respect to White's business cards, respondent testified that they had been made for distribution by White's employees, so they would have "some sort of a legitimacy." Respondent explained that his office information was on the card so that his office could be contacted if White could not be reached. Respondent vigorously asserted that White was never his claims manager or employee and never had an

office, although he acknowledged that White's employees could use a desk and a phone in the office.

* * *

On March 2, 1990, during the course of the White v. Selective litigation, Selective's attorney, Leonid Mishkovsky, conducted a deposition of White. Early in the proceeding, Mishkovsky informed respondent that Selective had requested White's tax returns. Respondent replied that he probably would sign an authorization to enable Selective to get the tax records. Thereafter, during the course of the deposition, respondent objected to questions from Mishkovsky to White about White's holding himself out as a paralegal or claims manager. (Mishkovsky did not specifically ask about respondent's firm). Respondent refused to state the basis for his objections for the record. At one point, Mishkovsky ended the deposition, after respondent announced that he would object to all further questions. Just prior to ending the deposition, Mishkovsky stated that "[respondent] has indicated that there was a likelihood that the case is going to be dismissed." Indeed, on or about March 6, 1990, respondent withdrew White's complaint against Selective.

As to this, respondent testified that he had told Mishkovsky, off the record, that he thought White had "fifth amendment concerns." Hence, his objections during the deposition. Respondent was concerned that, since Mishkovsky was asking about

employment matters, his subsequent questions would have related to White's income tax records. Respondent was concerned about White's potential criminal exposure. (The DEC, referring to respondent's earlier agreement to authorize Selective to get tax records, "found this apparent vacillation on Respondent's part to be rather peculiar"). Respondent went on to say that, after he explained his concerns to White, the latter agreed not to pursue the case against Selective. Respondent denied that the reason for withdrawing the lawsuit had anything to do with issues regarding his professional association with White.

In September 1990, Selective filed a complaint against White and John Doe I through X to recover monies paid to White. A default was entered against White on October 11, 1991. Subsequently, after a proof hearing on August 31, 1993, Selective obtained a judgment against White in the amount of $13,874 and costs of suit, as restitution for fraudulently procured PIP benefits. Selective did not file a suit against respondent.[2] Mishkovsky explained that he wanted to take White's deposition again to get more information, before naming other people in the suit. Because White did not answer the complaint, Mishkovsky did not get further information.

* * *

[2] At an undisclosed time, respondent received a letter from the insurance commission, asking him to sign a consent agreement. Although respondent did not sign the agreement, no action was taken against him.

In May 1990, after dismissing the claim against Selective, respondent filed a suit in district court against the defendant in the underlying personal injury matter. During an evidentiary hearing on March 11, 1991 to determine whether respondent had made proper service of the complaint, White was called as a witness. White testified that he was not employed in 1988 until April, when he started working in an automobile repair shop. He stated that he stopped working there in May 1988 after his accident. During that hearing, White also stated that his corporation had performed services for respondent's office through employees that White had hired. White further testified that he had not taken any money from the corporation for his personal use.

At the court's suggestion, respondent settled the case for $1,000. Respondent attempted to have the transcript and "anything that derived from the hearing sealed including the settlement." The court did not grant his request.

Respondent testified before the DEC that he had made this request because he did not want other insurance companies to think he was "a pushover lawyer."

* * *

The formal ethics complaint charged respondent with a violation of RPC 3.1 (meritorious claims and contentions), RPC 3.3(a) (candor toward the tribunal), RPC 3.4 (fairness to opposing party and counsel), RPC 4.1 (truthfulness in statements to others)

and RPC 8.4(a), (b), (c) and (d) (violation of the Rules of Professional Conduct, criminal act, conduct involving dishonesty, fraud, deceit or misrepresentation and conduct prejudicial to the administration of justice).

As noted above, respondent contended that White did not work under their contract but, rather, hired other individuals to do the work. The DEC rejected respondent's explanation:

> The mere fact that Respondent testified that White was the **employer** satisfies the Panel that Respondent knew, or certainly should have known, that White was probably receiving some pecuniary benefit in his capacity as president of Roy White Incorporated; which, at a minimum, should have triggered further inquiry from Respondent with respect to White's employment status. [Original emphasis].

Similarly, the DEC rejected respondent's explanation for White's business cards and determined that respondent allowed White to print and distribute his business cards in connection with his work for and in behalf of respondent.

Furthermore, the DEC found that, during the course of White v. Selective, respondent knew that White was employed by his office. The DEC concluded that respondent knew that

> Roy White was able-bodied, and not 'unable to return to employment' or 'unable to care for himself and his everyday duties' as Respondent had averred in the Complaint . . . . Respondent knew, therefore, that the allegations set forth in the **Roy White v. Selective Insurance Company** Complaint (Exhibit 20), specifically Paragraph 2 of the Second Count and Paragraph 2 of the Third Count were false and fraudulent regarding White's physical condition and employment status, and that they were made in an attempt to obtain PIP benefits from Selective Insurance.

The DEC determined that respondent had violated RPC 3.1 and RPC 3.3(a).

The DEC considered the alleged violations of RPC 3.4 and RPC 4.4 in connection with respondent's conduct during White's deposition on March 2, 1990. Although the DEC found it "coincidental" that respondent terminated the deposition when Mishkovsky began to question White about his employment as a paralegal, the DEC was "inclined to give any benefit of the doubt to Respondent with respect to this issue." Accordingly, the DEC did not find a violation of RPC 3.4 or RPC 4.1(a).

The DEC found that respondent violated RPC 8.4(a), based on his violation of RPC 3.1 and RPC 3.3(a). The DEC did not refer to the alleged violation of RPC 8.4(b), (c) or (d).

The Trolio Matter (District Docket No. IV-93-086E)

On June 9, 1992, Dennis Trolio was injured in a slip-and-fall accident on city-owned property in the City of Camden. Trolio did not testify before the DEC. On October 14, 1992, Trolio and respondent entered into a contingent fee agreement. Thereafter, respondent had two meetings and several conversations with Trolio. In addition, respondent's office conducted an investigation of Trolio's claims, including on-site examination of the location of the accident and contact with the hospital where Trolio allegedly had been treated. That investigation, together with Trolio's failure to retain respondent within the ninety-day statutory period to file a tort claims notice, gave respondent reason to question Trolio's likelihood of success in the matter.

Respondent was reluctant to advance costs in Trolio's case, given his doubts about prevailing in the case. By letter dated June 29, 1993, respondent advised Trolio that he, Trolio, would have to pay $225 for a report from his treating physician, if he wanted to pursue the claim. Respondent's letter further asked that Trolio find other counsel if he was unwilling or unable to pay for the report.

According to respondent, Trolio was unwilling to advance the $225. Thereafter, by letter dated July 21, 1993, respondent advised Trolio that his office was unable to pursue his case and was closing the file. Respondent's letter also warned Trolio about the date that the statute of limitations would expire.

By letter dated July 22, 1993, Edward J. Carr, a paralegal at the firm of Marks, Feiner, Fridkin and Bross ("Marks, Feiner"), notified respondent that Trolio had asked that Marks, Feiner take over the representation of his case. Carr asked that respondent forward Trolio's file to the firm. Respondent replied by letter to Carr dated September 28, 1993, in which he conditioned the transfer of the file on the receipt of a letter from Marks, Feiner guaranteeing his fee in the amount of one-third of the net recovery, plus costs. Respondent testified that this was a standard form letter generated by his office and used upon receipt of another attorney's request for a file. The letter was stamped with a reproduction of respondent's signature. Respondent, however, had knowledge of the contents of the letter.

By letter dated November 8, 1993, respondent again advised Marks, Feigner that he would not forward the file until he received an assurance that his fee and costs would be protected. The letter was stamped with a reproduction of respondent's signature. This was not a form letter; respondent was "just about certain" he had composed it. Respondent stated that he was "almost as certain" that he did not look at Trolio's file before he drafted the letter. Respondent added that the letter might have been prepared by a paralegal after consultation with him.

Trolio filed a grievance with the DEC on or about November 11, 1993. Respondent received the grievance from the DEC secretary on or about November 12, 1993. Thereafter, by letter dated November 23, 1993, David S. Bross, Esq., an attorney at Marks, Feigner, requested Trolio's file. Bross advised that, since respondent had "dropped" Trolio's case, Marks, Feigner would not agree to pay any legal fees to respondent, but would protect his costs. Bross followed up his letter with a call to respondent on November 24, 1993. Respondent testified that his first recollection of examining the file was upon receipt of Bross' call. Respondent explained that, after examining the file and discussing it with Bross, he concluded that he was not entitled to a fee.

According to Bross, during their November 24, 1993 conversation, respondent stated that his letters of September 28 and November 8, 1993 were form letters. Bross recalled that respondent did not want a fee and promised to forward the file forthwith. By letter dated December 1, 1993, Bross again requested

the file. By cover letter dated December 21, 1993, respondent forwarded the file to Bross.[3] Respondent maintained that his receipt of Trolio's grievance had nothing to do with his changing his position with regard to the fee.

At some point, either Bross suggested to Trolio that he withdraw his grievance or Trolio indicated that he was so inclined and Bross agreed. Trolio attempted to withdraw the grievance. (Bross was unaware that a grievance cannot be withdrawn by the grievant).

* * *

The formal ethics complaint charged respondent with a violation of RPC 1.5(e) and RPC 1.16(d).

The DEC's report stated:

> If the Respondent knowingly sent, or approved the sending of the September 28, 1993 and November 8, 1993 letters, this Panel would have no hesitation in finding that Respondent violated the Rules of Professional Conduct at issue. The Panel is not convinced, however, by clear and convincing evidence, that it was the Respondent's intent to forward the letters, or otherwise have the letters forwarded, in this particular matter.

The DEC placed a great deal of weight on Bross' testimony, deeming him to have been "in a unique position to determine the precise nature of demands made by the Respondent." Bross was clear in his testimony that respondent did not want a fee for

[3] The record contains subsequent communication between Bross and respondent because Bross was concerned that respondent had not forwarded the complete file. It appears that the issue was resolved.

representing Trolio. Also important was Bross' suggestion to Trolio that he withdraw the grievance. (Trolio's desire to withdraw the grievance was not a factor considered by the DEC in its determination).

With regard to respondent's failure to turn over the file until after he had received Trolio's grievance, the DEC concluded that "[a]lthough Respondent's knowledge of the grievance could have been a factor in his seeming change of position, the Panel was not convinced by clear and convincing evidence that there was, in fact, a nexus between receipt of the grievance and Respondent's repudiation of a fee." With regard to the violation of RPC 1.16(d), the DEC found that, although respondent delayed the delivery of the file, he did surrender it on December 21, 1993, less than one month after his November 24, 1993 conversation with Bross. The DEC did not deem this time period to be unreasonably lengthy and, therefore, found no violation of RPC 1.16(d). The DEC recommended that this matter be dismissed.

The Johnson Matter (District Docket No. IV-94-026E)

The Appeal

Respondent represented Freddie Johnson in a trial arising out of a number of criminal charges. Respondent's fee in that matter was $10,000. Johnson was convicted of a number of the charges and was sentenced in December 1989. According to respondent, on the day of sentencing he spoke with Johnson's family members about an appeal. Approximately one week after the sentencing, Johnson's

brother, Patrick Johnson, ("Grievant"),[4] paid respondent $5,000 to appeal Johnson's sentence. If the appeal was successful, Johnson would serve a five-year, rather than a ten-year, sentence before he was eligible for parole. Respondent considered the $5,000 to be a non-refundable retainer. Respondent did not have a written agreement with grievant or Johnson. However, because he had represented Johnson in the trial, it is not clear that a writing was required.

Respondent filed a timely notice of appeal on January 18, 1990. By notice dated March 5, 1990, the Clerk of the Appellate Division informed respondent that the appeal was deficient. Specifically, respondent had failed to submit a copy of the transcript request form. Respondent testified that he knew that, if he did not cure the deficiency, the appeal would be subject to dismissal. On June 1, 1990, respondent filed a motion for leave to file an appeal nunc pro tunc. By notice dated June 25, 1990, the Clerk of the Appellate Division informed respondent that certain deficiencies in the papers had to be corrected within seven days. Among the deficiencies was the absence of an affidavit that all trial transcripts had been ordered.[5] Thereafter, by letter dated July 5, 1990 to the Appellate Division case manager, respondent

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[4] Although two subpoenas were issued for grievant's appearance before the DEC, he did not appear. The Board noted in connection with the Forte matter that the grievant in Johnson referred to White as respondent's paralegal and stated that he was present at Johnson's sentencing. Respondent explained that White knew Johnson and the grievant and had come to the courthouse.

[5] There was apparently some uncertainty as to whether all transcripts were required to be supplied to the Appellate Division, if only the sentence was being appealed. Johnson's trial was lengthy and respondent was trying to avoid the expense to Johnson's family of obtaining all transcripts.

confirmed a July 3, 1990 conversation with that individual and forwarded additional documents. Respondent, however, did not remedy the deficiencies. By order dated August 2, 1990, Johnson's appeal was dismissed with prejudice. Respondent explained that he did not tell Johnson about the dismissal because he did not know where Johnson was serving a prison term. Respondent testified that he told Johnson's mother of the dismissal, however. Respondent did not supply a copy of the dismissal to Johnson until "long after the grievance was filed." Respondent testified that, from August 1990 to February 1994, the only action he took in this matter was one phone call to the Appellate Division shortly after he received the notice of dismissal, during which he was told that he still needed to supply the transcripts. Respondent took no further action in the matter.

The grievance, filed on February 2, 1994, was forwarded to respondent on February 10, 1994. By letter to the DEC secretary dated February 25, 1994, respondent acknowledged receipt of the grievance.

Respondent testified that, as soon as he received the grievance, he spoke about the appeal with Roderick Baltimore, Esq., an associate in his office with experience in appellate practice. Respondent was "almost certain" that he had previously mentioned the case to Baltimore, but receipt of the grievance prompted "sitting down with him and doing something." (Baltimore testified before the DEC that he was given Johnson's file in early 1994). On March 14, 1994, Baltimore and respondent visited Johnson. It was

Baltimore's recollection that Johnson wanted respondent's office to continue to pursue the appeal of his sentence. The appeal was Baltimore's responsibility. He did not file a motion to vacate the dismissal and reinstate the appeal until June 29, 1994. Just prior to that time, by letter dated June 17, 1994, the DEC investigator informed respondent that the grievance was being investigated. By way of explanation for the delay in filing the motion until three months after meeting with Johnson, Baltimore testified that he had been busy on other matters and that he had filed appeals later than this one. The Appellate Division denied the motion on July 27, 1994. Thereafter, Baltimore filed a motion for leave to file a petition for certification nunc pro tunc and a petition for certification with the Supreme Court. By order dated October 18, 1994, Baltimore's motion was denied and the petition was dismissed as moot. After receipt of the order, respondent's office filed a motion for post-conviction relief. That motion was still pending as of the date of the DEC hearing.

With regard to communication with his client, respondent was asked if, between August 2, 1990 and October 18, 1994, he had sent any written communication to any member of Johnson's family about the appeal. Respondent pointed to one letter sent to Johnson's mother in the summer or early fall of 1994 about a civil case respondent was handling for her, wherein he also mentioned the appeal. He also contended that they discussed the appeal when she came to talk about her own case.

The Fee

Respondent did not return any of the $5,000 he was paid to pursue the appeal. After the filing of the grievance, respondent met with grievant. Respondent's uncontroverted testimony was that he explained the posture of the case to grievant, supplied copies of the documents in the case and asked grievant if he wanted any portion of the fee returned. Grievant replied that he did not want a refund of the fee and wanted respondent to continue the representation. In evidence is a letter from the DEC secretary to the DEC chair, forwarding a letter from grievant. Grievant's letter states that both he and Johnson had met with respondent, were aware that the appeal had been dismissed, were satisfied with respondent's efforts in Johnson's behalf and wanted respondent to continue to pursue the appeal. Grievant asked that his grievance be withdrawn. Exhibit P-9. Respondent maintained that he did not suggest to grievant that he withdraw the grievance.

The Misrepresentation to the DEC

In respondent's February 25, 1994 letter to the DEC secretary, respondent stated that his office had "made an application to re-instate the appeal Nunc Pro Tunc." In fact, respondent's associate filed the appeal four months later, on June 29, 1994.

Respondent denied any intent to misrepresent the facts to the DEC secretary. He contended that, at the time he wrote his letter to the DEC, he knew Baltimore had already prepared an application to reinstate the complaint. Respondent saw an audio cassette in a

secretary's typing bin with a note stating either "Johnson" or "Johnson appeal." Respondent thought that the tape was related to the appeal Baltimore had prepared. Respondent did not discuss the status of the appeal with Baltimore before his February 25, 1994 letter. Respondent added that, at the time of his letter, he knew that the filing date of the motion could be easily verified by the DEC. It is unclear what was on the tape respondent saw on the secretary's desk. It is possible that the tape contained Baltimore's notes on the case.

* * *

The complaint charged respondent with a violation of RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), RPC 1.4 (failure to communicate), RPC 1.5(a) (fees), RPC 1.16(d) (declining or terminating representation), RPC 8.4 (a) (violation of the Rules of Professional Conduct), RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation), RPC 8.4(d)(conduct prejudicial to the administration of justice) and R. 1:20-3(f)(failure to cooperate with the DEC).

The DEC determined that respondent violated RPC 1.3 based on his failure to take any action with respect to the appeal from August 1990 to February 1994, a span of approximately three and one-half years, except for one phone call. The DEC also found respondent guilty of a violation of RPC 1.4 based on his failure to inform Johnson that the appeal had been dismissed in August 1990 or

to give him a copy of the dismissal with prejudice until "a considerable period of time" after the grievance was filed. The DEC concluded that there was sufficient evidence to find that "Grievant" was not kept reasonably informed by respondent. Presumably, this reference was meant to include respondent's client, Johnson, as well as grievant.

The DEC did not find respondent guilty of a violation of RPC 1.1(a). The DEC pointed out that, in January 1990, when respondent initially filed the appeal, the only deficiency was the failure to provide a transcript, an easily curable problem. The DEC deemed that respondent's services up to that point had been reasonably competent. The DEC found, however, that respondent exhibited gross neglect when he failed to act in Johnson's behalf from August 1990 to February 1994. That misconduct had already been addressed in the DEC's finding of a violation of RPC 1.3. Apparently misunderstanding the rules, the DEC concluded that it thus could not find respondent guilty of gross neglect.

With regard to the $5,000 fee, the DEC did not find a violation of RPC 1.5(a) or RPC 1.16(d). The DEC determined that respondent earned some portion of the fee for the work he did on the appeal during the first half of 1990. The DEC also gave weight to the uncontroverted testimony of respondent and Baltimore that grievant wanted respondent to keep the $5,000 and to pursue the appeal, as well as to grievant's above-mentioned September 16, 1994 letter to the DEC secretary. The DEC was satisfied that it was grievant's intention that respondent keep the $5,000 and pursue the

appeal.

As authority for the finding of a violation of RPC 1.5(a) or RPC 1.16(d), the presenter referred to the case of DeGraaff v. Fusco, 282 N.J. Super. 315 (App. Div. 1995), which held that "the unused portion of even a nonrefundable retainer should be returned if contravening events should render it unconscionable for the attorney to keep it." The DEC did not find the case controlling based on grievant's instructions to respondent to keep the fee and pursue the appeal. The DEC reasoned that, "therefore, in this case, events certainly did not render it *unconscionable* [original emphasis] for Respondent to keep the monies."

In connection with respondent's February 25, 1994 letter to the DEC, the DEC rejected respondent's explanation for his misrepresentation and deemed him guilty of a violation of RPC 8.4. [presumably, subsection (c)].

The DEC recommended that respondent be reprimanded.

* * *

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

In Trolio, the Board accepted respondent's contentions that there was an error in his two letters to Marks, Feiner and that he did not review the file prior to its release and, thus, agreed with

the DEC's dismissal of the matter. True, respondent's conduct was not entirely proper. He should have reviewed the file before his office sent out the first letter to Marks, Feiner and even more so before his second letter to that firm demanding protection of his fee. Furthermore, under RPC 1.16(d) and A.C.P.E. Opinion 554, 115 N.J.L.J. 565 (1985), an attorney must give copies of the file to the client upon request, even if the fee has not yet been paid. In reality, however, respondent's request for a letter protecting his fee and costs appears to be a common practice among attorneys. Although that by no means excuses unethical conduct, the Board determined that respondent's actions did not rise to a level requiring discipline.

In Johnson, there is no doubt that respondent was guilty of lack of diligence, failure to communicate and, contrary to the DEC's finding, gross neglect. With regard to the communication issue, it is clear that respondent did not inform his client of the status of the appeal, but, rather, had no contact with him for a period of years. Presumably, Johnson thought that his appeal was ongoing during this time. "In some situations, silence can be no less a misrepresentation than words." Crispin v. Volkswagenwerk, A.G., 96 N.J. 336, 347 (1984). Respondent's alleged occasional communication with his client's mother about the appeal was clearly inadequate.

With regard to the alleged misrepresentation to the DEC, respondent contended that he saw a tape with what he believed to be a note on the appeal Baltimore was handling. Respondent should

have confirmed the accuracy of his belief prior to his statements to the DEC, however. Moreover, the letter was still inaccurate as it stated that the appeal had already been filed, instead of that it would soon be filed. The Board agrees with the DEC's rejection of respondent's explanation in this regard, concluding that respondent was guilty of misrepresentation to the DEC, in violation of RPC 8.1(b) and RPC 8.4(c).

The most complex matter herein is the Forte matter. Here, the Board parts company with the DEC. This record is replete with strange coincidences and circumstances, the details of which need not all be rehashed, raising a suspicion that there is more going on here than meets the eye. Strong suspicions aside, however, the ultimate conclusion is that there is no clear and convincing evidence that respondent did anything wrong. The fact that White had a corporation performing services for respondent may not be inconsistent with the statement in the complaint that he did not have other employment to which he was able to return after his accident. Even assuming that, contrary to respondent's testimony, White was personally working for him, White may not have been able to return to his employment in the auto repair shop. Although we have Forte's testimony that he saw White delivering clients to respondent's office, we know nothing about White's medical condition. Here, the suspicions of impropriety are not supported by sufficient proof. Accordingly, the Board determined to dismiss Forte.

As noted above, respondent was reprimanded in 1995. Although that is after the time of his misconduct in Johnson, the formal complaint was filed on February 18, 1994, approximately the time that respondent began to take action in Johnson again. It is, thus, difficult to say that this is a case of an attorney who did not learn from his prior mistakes.

Respondent's misconduct was confined to failure to communicate with Johnson, failure to pursue the Johnson appeal diligently and misrepresentation to the DEC that the appeal had already been filed. Recently, an attorney received an admonition for refusing to comply with discovery requests and offering false testimony during a disciplinary proceeding in violation of RPC 8.1(b) and RPC 8.4(c). In the Matter of Lester T. Vincenti, Docket No. DRB 94-303. "[I]ntentionally misrepresenting the status of lawsuits warrants public reprimand." In re Kasdan, 115 N.J. 472, 488 (1989).

Based on the totality of respondent's misconduct, which also included respondent's lack of diligence and failure to communicate in Johnson, see In re Gaffney, 133 N.J. 65 (1993), the Board was persuaded that a reprimand is sufficient discipline for respondent's ethics infractions. The Board unanimously so voted. One member concurred with the measure of discipline, finding, however, that the proofs did not sufficiently establish that respondent made an intentional misrepresentation to the DEC.

In that member's view, respondent's conduct was merely careless. One member did not participate.

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

Dated: 12/18/96

By: _____
Lee M. Hymerling
Chair
Disciplinary Review Board

Supreme Court of New Jersey
Disciplinary Review Board

Voting Sheet

IN THE MATTER OF WAYNE POWELL

DOCKET NO. DRB 96-315

HEARING HELD: October 17, 1996

DECIDED: December 18, 1996

	Disbar	Suspension	Reprimand	Concurrence	Dismiss	Dis qualified	Did Not Participate
HYMERLING			X				
COLE			X				
HUOT			X				
MAUDSLEY				X			
PETERSON			X				
SCHWARTZ			X				
THOMPSON			X				
ZAZZALI			X				
LOLLA							X

Robyn M. Hill 12/24/96
ROBYN M. HILL
CHIEF COUNSEL