SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 10-412
District Docket No. IV-2008-045

IN THE MATTER OF	
WAYNE POWELL	
AN ATTORNEY AT LAW	

Decision

Argued: February 17, 2011

Decided: May 11, 2011

Christine O'Hearn appeared on behalf of the District IV Ethics Committee.

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 came before us on a recommendation for a reprimand filed by the District IV Ethics Committee (DEC). The complaint charged respondent with having violated RPC 1.3 (lack of diligence), RPC 1.4 (b) (failure to keep the client reasonably informed about the status of a matter and to promptly comply with reasonable requests for information), RPC 1.4(c)

(failure to explain the matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation), RPC 3.2 (failure to expedite litigation), RPC 1.5, presumably (c) (failure to execute a retainer agreement), RPC 4.1 (truthfulness in statements to others), RPC 5.3 (failure to supervise nonlawyer assistants), and failure to maintain professional liability insurance (no rule cited). At the beginning of the DEC hearing, the parties informed the hearing panel that many of the facts were not in dispute and agreed to offer to the panel the grievance, the reply to the grievance, the complaint, and the answer. The RPC 1.5 charge was dismissed prior to the hearing.

For the reasons detailed below, we determine that respondent should be suspended for three months.

Respondent was admitted to the New Jersey bar in 1985. In 1995, he was reprimanded for improperly advancing personal funds to eight personal injury clients and for negligently misappropriating client funds. In re Powell, 142 N.J. 416 (1995). In 1997, he was reprimanded again, this time for lack of diligence, failure to communicate with a client, and misrepresentation to disciplinary authorities. In re Powell, 148 N.J. 391 (1997). In 2010, he received a third reprimand. Specifically, he failed to provide the clients with a written

contingent fee agreement, engaged in a conflict of interest when he simultaneously represented a driver and two passengers of a car involved in accident, and failed to promptly release the clients' files to a new attorney. In re Powell, 203 N.J. 442 (2010).

The facts of this disciplinary matter are as follows:

In November 1997, Janica Woodhouse, then seventeen years old, was involved in a car accident. She executed a retainer agreement with respondent, whose practice consisted mostly of auto negligence. At that time, respondent's office, which consisted of three attorneys, a paralegal, three legal secretaries, two PIP secretaries, a part-time secretary, an investigator, and a receptionist, had anywhere from five to eight hundred personal injury files.[1]

Unable to settle Woodhouse's claim, respondent filed suit in October 1998. His office notified Woodhouse of that development.

Thereafter and until November 2006, when Woodhouse consulted with another lawyer, her efforts to ascertain the progress of her case proved fruitless. She was unable to reach

[1] The focus of respondent's practice has shifted over the years. Since the mid-2000s, ninety percent of his practice encompasses criminal cases and ten percent civil. He is currently a sole practitioner.

respondent, despite her numerous messages for him to call her back.

On November 1, 2006, Woodhouse wrote a letter to respondent complaining about his lack of response to her and her mother's numerous requests for a return phone call, in order to schedule an appointment with him:

> I'm writing this letter as yet another way of trying to get into contact with you regarding my November 1997 case. My mother and I have left numerous messages requesting return phone calls to schedule appointments and receive some type of an update pertaining to this case. To date, I or my mother has [sic] not received any type of response from you. We are only requesting information on this case, since we both continue to be affected by this incident due to another's negligence. I am now approaching my ninth year anniversary of this accident, and still have not been informed on the progress or resolution of this case. Since you do not seem to feel the need to give a return phone call, I am once again trying to contact you through another means to have an evening appointment scheduled and to discuss, I hope, to be the final steps towards this case's resolution. At your earliest convenience, my mother, and I, am [sic] requesting an evening appointment to discuss my case. This is a very time sensitive matter.
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> [Ex.P-5.]

Not having heard from respondent, Woodhouse sent him a letter, on November 28, 2006, discharging him as her lawyer. She

wrote:

> I'm writing this letter to inform you that your services are no longer needed. This letter authorizes your office to release my entire file to me. I have contacted you on numerous occasions, and to date, I've heard nothing back from you about the progress of my case. I will be contacting you within the next day to the appropriate time [sic] when I can come to your office to pick up my file.
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> [Ex.P-6.]

Unbeknownst to Woodhouse, her complaint had been dismissed since May 1999. Allegedly, respondent was unaware of the dismissal as well. He testified that he had no recollection of having seen a notice of intent to dismiss generated by the court. In fact, the attorney for the defendant, too, must have been unaware of the dismissal. He filed an answer and propounded interrogatories on Woodhouse in November 1999, six months after the dismissal of the complaint. The court rejected the answer.

In January 2000, eight months after the complaint was dismissed, respondent's office, through his secretary, Marisa Vitiello, propounded interrogatories on the defendant. Vitiello testified that she would not have done so if she had known about the dismissal.

According to respondent, he did not find out about the dismissal of the complaint until his office began searching for

the file, after he received Woodhouse's November 1, 2006 letter, asking for an appointment. Only then did he think about reviewing the file. He testified:

> I didn't know at that time that [the case] was dismissed. What I did know was that when the [November 1, 2006] letter came to my desk, what I did know was that it was 2006 and this was an old file, and anecdotally I knew something has to not be as it should be because we shouldn't have a file . . . in the office that's that old.
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> [T134-7 to 14.][2]

At that juncture, respondent instructed his staff to give him the file for his review. His staff was unable to locate the file.

Andrew Rossetti, an attorney with whom Woodhouse consulted, testified that he had been contacted by Woodhouse in November 2006. Woodhouse complained to Rossetti that she had been unable to obtain any information from respondent about her case, which, at that time, was nine years old. According to Rossetti, a case like Woodhouse's would typically take two years to resolve in Camden County.

In Woodhouse's presence, Rossetti called the courthouse and was told that its computer system showed nothing about Woodhouse's case. Sometime later, Rossetti received a written

[2] "T" denotes the transcript of the DEC hearing on September 13, 2010.

confirmation that the case had been dismissed in May 1999. He communicated that development to Woodhouse, who, until then, had been unaware of the dismissal.

In December 2006, Rossetti wrote a letter to respondent inquiring about the status of the case. Respondent did not reply to Rossetti's inquiry. Rossetti then asked for a copy of the file. Again, he received nothing from respondent. At that time, respondent still had not found the file. Asked if he had contacted Rossetti, respondent replied: "No, I didn't talk to him. The last thing I wanted to do was to call him up and say, look, the file that you are asking me for I can't find."

Faced with respondent's lack of cooperation, Rossetti was forced to file an order to show cause for the return of the file. The day before the February 2007 return date of the order to show cause, the file was hand-delivered to Rossetti's office. According to respondent, the file was ultimately found among closed files stored in an off-site facility.

Respondent claimed that, after the file was found, he saw no evidence in it consistent with the procedure employed by his office for handling notices of intent to dismiss. Respondent provided the following description of that procedure:

Because such notices arose typically from a failure to serve the complaint on a defendant and because one of his legal

secretaries was in charge of serving the complaint, such notices were directed to that legal secretary. The attorney assigned to the file would then prepare either an affidavit or a letter explaining to the court why service had not been made. The court would be asked to remove the case from the intended dismissal list and to allow the office thirty to sixty days to attempt service again. Respondent testified that such requests were generally granted. Asked whether there was such a letter in this instance, respondent replied, "Not that I'm aware of." [3]

Respondent also described the procedure for handling answers to complaints and interrogatories received from adversaries. Specifically, the secretary would docket the above documents "on the sheet," send out reciprocal discovery demands, and ask the client to come to the office to answer interrogatories.

Respondent testified that his office did not have a computerized system to track or manage the status of a case. Instead, the office relied on the secretaries' "experience in knowing that things have to get done by a certain date and docketing things for themselves." In his answer, respondent admitted that office systems that were in place for

[3] No notice to dismiss was found in the file, when it was finally located in February 2007.

"maintain[ing] appropriate client contact and file responses" had failed in this instance.

Respondent conceded that, from 2000 to 2006, he performed no work on the file:

> I don't dispute for one second that it looks like from 2000 until 2006 I never did anything on the file, never called, never picked it up, never looked at it. I'm not here to make an excuse about that. It's just what happened.
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> [T152-3 to 7.]

After Woodhouse discharged respondent of the representation, he filed a motion to reinstate her complaint, in February 2007. He explained the reason for the motion: "I didn't want to turn over to Mr. Rossetti a dismissed file because I knew what would come on the heels of it . . . . A malpractice action, of course." Respondent did not notify either Rossetti or Woodhouse of the filing of his motion because he

> didn't think it was appropriate to have any contact with Ms. Woodhouse at all at that time once the file was turned over to Mr. Rossetti. And I was, quite frankly, just hopeful that I could get an Order reinstating the case to send over to Mr. Rossetti so that he'd have an old case that he might have to litigate but he wouldn't have a malpractice action against me and my office.
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> [T139-23 to T140-6.]

Respondent's motion was denied in March 2007.

In September 2007, Rossetti filed a malpractice suit against respondent. When respondent did not file an answer to the complaint, a default was entered against him. The next step would have been a proof hearing. Prior to that hearing, however, the malpractice case was settled. Respondent agreed to pay $17,500 to Woodhouse within sixty days, or May 7, 2008.

When respondent did not make a payment by that date, Rossetti wrote him a letter asking for the status of the settlement check and advising him that, if he did not hear from respondent within seven days, he would be forced to seek court intervention. Respondent did not reply to that letter. Rossetti then filed a motion to enforce litigant's rights.

By order dated July 18, 2008, the court confirmed the settlement and entered judgment against respondent in the amount of $17,500, plus fees and costs of $180. The court also ordered respondent to complete an information subpoena within seven days.

On July 25, 2008, Rossetti served an information subpoena on respondent and sent him a copy of the judgment. Respondent did not comply with the subpoena, prompting Rossetti to file yet another motion to enforce litigant's rights, in September 2008. Among other forms of relief, the motion sought respondent's

arrest. Respondent was served with the motion on September 10, 2008. On that same day, Rossetti received a phone call from respondent's office, stating that "the check had just been cut."

The complaint charged respondent with lack of diligence, failure to adequately communicate with Woodhouse, failure to expedite litigation, and failure to properly supervise nonlawyer assistants, violations of RPC 1.3, RPC 1.4(b) and (c), RPC 3.2, and RPC 5.3, respectively. In particular, the RPC 5.3 charge was based on what was viewed as inadequate office procedures for monitoring the status of a case. Vitiello testified about those procedures:

In the late 1990s, Vitiello did not become involved in personal injury cases until they went into litigation. Prior to that, the two PIP secretaries and the paralegal, Debora Wellings, worked on the cases. Although Vitiello made an entry in the Woodhouse file when interrogatories were propounded on both Woodhouse and on the defendant, it was the paralegal's responsibility to follow up on the progress of the case. Respondent supervised the paralegal.

According to Vitiello, "up to a certain point in the 90's [the office] had a database where all the files were logged in by the secretary who initially opened the files." Essentially, it listed "the client's name, the date of the accident, the statute of

limitations and so forth." It was not meant to track the status of a case. Sometime in 2000, the computerized database was replaced by a new computer system, but that system, also, did not monitor the progress of a case. That function, according to Vitiello, was performed through "[f]ile reviews. Physically going into the cabinets and reviewing files . . . .

Vitiello testified that newly hired staff was instructed on the procedure for reporting the status of the case to the attorney in charge of the file and the office held periodic meetings about "procedures and how things were handled." In Vitiello's view, the paralegal, Wellings, who left the office in 2000, was "fairly efficient" and "communicated with the attorneys on a regular basis."

Vitiello was unable to say what or who had caused the Woodhouse file, which was not marked "closed," to be erroneously placed with the closed files.

The complaint charged respondent with two additional violations: failure to maintain professional liability insurance and truthfulness in statements to others, violations of R. 1:21-1A and RPC 4.1, respectively.

The first charge was grounded on respondent's obligation to maintain malpractice insurance, when practicing law in a corporate form. Through his attorney, respondent stipulated that there was a

"gap of insurance" from November 1997 through June 2004.

The RPC 4.1 charge stemmed from a letter that respondent wrote, on August 29, 2006. According to respondent, one of the secretaries in his office had told him that either Woodhouse or her mother needed a letter informing an organization called American Students Assistance about the status of her case. Respondent instructed the secretary to prepare the letter, which he approved and signed. The letter, dated August 29, 2006, stated the following:

> Please be advised that this office represents Ms. Janica Woodhouse, daughter of Deborah Woodhouse. Ms. Woodhouse was the occupant of Deborah Woodhouse's vehicle at the time of a motor vehicle accident in which Janica Woodhouse was injured.
>
> The matter is currently in litigation and we are unable at this time to provide a tentative date of disposition.
>
> If you require any additional information please contact this office.
>
> Thank you for your attention.
>
> [Ex.P-7.]

Respondent admitted that he took no steps to find out the status of the case or to review the file, prior to writing the letter to the American Students Association. He surmised that the "urgency of having a letter caused me to do it right then and there." He acknowledged that he should have asked for the file:

> The truth is, even if the letter was done, it's 2006, I should have picked up the file. I didn't do it even then. I don't have an explanation. I don't know if I was putting out fires, I don't know what the story was of not picking it up between then and November when [Woodhouse's] letter came in.
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> [T163-23 to T164-4.]

Respondent was referring to the November 1, 2006 letter from Woodhouse, complaining about his lack of communication with her and about the age of her case -- nine years at that point.

At the conclusion of the ethics hearing, the DEC found that, although respondent was not aware, in 1999, that Woodhouse's case had been dismissed, his failure to review the file at all from 1999 through 2006 constituted a lack of diligence, a violation of RPC 1.3:

> We find that the failure to review the file was a result of the fact that Mr. Powell agreed to accept too many cases; more than he and his office staff could reasonably be expected to handle. In the alternative, insufficient office procedures and safeguards were in effect to ensure that files received the attention from Mr. Powell that they required. While there were procedures safeguards in place, they were insufficient for the volume of cases in the office. This failure to have adequate procedures for oversight and attention to the files constituted a lack of reasonable diligence by Mr. Powell.
>
> In addition, upon receiving the August 2006 request from his client's mother for a letter to American Students Assistance, and

> being cognizant of the age of the case and the question that the age raised in his mind, his failure to review the file and determine the status of the case prior to sending the August 29, 2006 letter constituted a lack of reasonable diligence. The fact that it was not until his client's November 1, 2006 letter that he started to investigate the status of the case was unreasonable and demonstrated a lack of diligence and promptness in representing his client.
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> [HPR¶1.][4]

The DEC also found that, between 1999 and 2006, respondent either did not reply to Woodhouse's repeated inquiries about her case or answered them inadequately, a violation of RPC 1.4(b).

As to the charged violation of RPC 1.4(c), the DEC reasoned that

> [i]f Mr. Powell had diligently responded to inquiries about the status of the case over the years from 2000-2006 he would have learned about the dismissal of the case and could have informed the client about how to vacate the dismissal. He did not adequately explain the status of the case to the client or to the third party he incorrectly advised about the status of the case and therefore informed decisions were not made.
>
> [HPR¶2.]

On the other hand, the DEC did not find a violation of RPC

[4] HPR denotes the hearing panel report.

3.2:

> Although the litigation was not expedited, we find that the failure to litigate the case was not a knowing failure to litigate; it was the result of a mistake by an employee who placed the file in the closed files. Mr. Powell did make reasonable efforts to expedite litigation initially upon not being able to settle the case, and upon learning of the dismissal he filed a motion to vacate the dismissal. We find that he did not know of the dismissal in 1999 or at any time before August of 2006. That was due to his lack of diligence and in part, the basis for the violation found in the First Count of the Complaint [lack of diligence]. His failure to expedite the litigation would be viable if he delayed in correcting the mistake once it was discovered or failing to take any steps to prosecute the case once it was filed. That is not the case here.
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> [HPR¶3.]

As to respondent's letter to the American Students Assistance, the DEC found that, although the letter contained a false statement, respondent did not know that it was false when he signed the letter. The DEC remarked that "[w]hether [respondent] should have done more to determine the correct status of the case before the letter was sent is the basis for a separate violation, but here we find that the intent element of [RPC 4.1] has not been proven . . . ."

Likewise, the DEC found no violation of RPC 5.3, noting that

[i]n this case, the conduct of Mr. Powell's nonlawyer assistant that was inconsistent with his professional obligations was the failure to continue the prosecution of the case after the original assistant left the office, and the placing of Ms. Woodhouse's file in the office's closed file storage before actions could be taken to prevent or vacate the dismissal.

There was no evidence presented that would prove that the office received notice of the pending dismissal before the file was closed. The evidence suggests that work was progressing on the file up until the point when interrogatories were propounded, and then Mr. Powell's assistant resigned from her position, and no steps were taken by anyone in Mr. Powell's office to ensure that the file was not neglected. The file was at some point then placed in storage.

Testimony was presented with respect to the office's procedures and efforts to ensure cases were followed and deadlines were not missed. At one point there was a computer program that tracked deadlines, and each personal injury file contained a procedural checklist for the paralegal to follow as the case progressed. We find that the problem was not that any particular nonlawyer assistant violated the rules of professional conduct, but that Mr. Powell himself violated the rules by undertaking to represent too many clients without the means to ensure that the cases would be effectively handled. This is part of the basis for our finding that he was not diligent as required by *RPC* 1.3. His office was simply not equipped to handle the volume of cases that he accepted. This decision to take on too many files was not the conduct of his nonlawyer assistants, but Mr. Powell himself.

[HPR¶6.]

Finally, the DEC concluded -- and respondent admitted -- that his failure to maintain professional liability insurance "for the time period in the late 1990's and/or early 2000's that he practiced as a corporation" violated R. 1:21-1A.

The DEC recommended that respondent be reprimanded and that, "in addition to the mandatory CLE requirements, he be required at his own expense to attend the NJSBA Diversionary Continuing Legal Education Program (despite the fact that this matter was not diverted)." Aware that respondent has been reprimanded three times, the DEC noted that, although the March 1997 reprimand involved the same violations as here,

> the conduct in the present case took place from the years 1999-2006 and may have been the result of the same problematic office conditions Mr. Powell had during the time period involved in the 1997 matter. The two other cases in 1995 and 2010 involved different violations. Despite the fact that Mr. Powell has three prior reprimands, his office has significantly changed in more recent years in that he does not have the high volume of cases that he had at the time of these violations. We think this should be taken into consideration prior to ordering discipline.
>
> [HPR¶IV.]

Following a de novo review of the record, we find that the DEC's finding that respondent's conduct was unethical was fully supported by clear and convincing evidence.

Specifically, the DEC properly concluded that respondent lacked diligence in handling Woodhouse's case, a violation of RPC 1.3. After the filing of the complaint, in October 1998, the case was not prosecuted at all, resulting in the dismissal of the complaint in May 1999. Although interrogatories were exchanged by both sides, by that time the complaint had already been dismissed. From at least 1999 through 2006, when respondent was discharged of the representation, he did nothing to pursue the case. Respondent admitted that, from 2000 through 2006, he "never did anything on the file, never called, never picked it up, never looked at it."

In fact, respondent's mishandling of the case was so serious as to have warranted a charge of gross neglect. We are precluded from making such a finding only because respondent was not charged with gross neglect. R. 1:20-4(b) requires that the complaint "set forth sufficient facts to constitute fair notice of the nature of the alleged unethical conduct, specifying the ethical rules alleged to have been violated." We find, however, that the length of respondent's inaction in this case -- seven years -- is an aggravating factor.

Moreover, during the entire seven-year period, respondent's communication with Woodhouse was not only inadequate, but virtually nil, a violation of RPC 1.4(b). Woodhouse testified that her numerous attempts to reach respondent failed. Her messages to him were not returned. Only after receiving a November 1, 2006 letter from Woodhouse, complaining about his inattention to her requests for information about the case, did respondent react. He asked his staff to look for the file, which could not be found. During this initial search, respondent stood silent to Woodhouse's request for a return phone call. Finally, discouraged with the lack of response to her pleas for information, Woodhouse terminated respondent's services on November 28, 2006.

Thereafter, respondent paid no heed to the new lawyer's requests for an update and, later, for the file. It necessitated an order to show cause for the file to be finally located. These factors further aggravated respondent's conduct.

Respondent's office practices, also, were woefully inadequate. The record shows that not only did he delegate the responsibility for case management to his non-lawyer staff, with no supervision on his part, but also that the systems that he put in place for handling the volume of his law practice were deficient. There was no computerized or other effective system

to track the progress of cases. Instead, the office relied on the secretaries' "experience in knowing that things have to get done by a certain date and docketing things for themselves" and on physical inspections, that is, "physically going into the cabinets and reviewing files." Not surprisingly, Woodhouse's case "fell through the cracks" and wound up with the closed files, which were stored in an off-site facility.

The DEC did not find that respondent violated RPC 5.3, reasoning that there was no proof that respondent's office received notice of the intended dismissal of the complaint and that, although no one in the office took steps to ensure that the file was not neglected after the paralegal left, mistakes made by an attorney's assistants may not "automatically result in an ethical violation by the attorney."

We are unable to agree with the DEC's dismissal of that charge. RPC 5.3(a) provides: "With regard to a nonlawyer employed . . . with a lawyer: (a) every lawyer, law firm or organization shall adopt and maintain reasonable efforts to ensure that the conduct of nonlawyers . . . employed by the lawyer, law firm or organization is compatible with the professional obligations of the lawyer." Paragraph (b) states: "A lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's

conduct is compatible with the professional obligations of the lawyer."

Here, respondent delegated the monitoring of the cases to his nonlawyer staff and then did not implement adequate systems to ensure that his nonlawyer staff, particularly his paralegal, would effectively handle the hundreds of personal injury cases that he had accepted. His secretary, Vitiello, testified that the paralegal was responsible for following up on the progress of the cases and that respondent was in charge of supervising the paralegal. It is true that the paralegal left in 2000, when the case was only about two years old. But by then the complaint had already been dismissed (May 1999). Obviously, then, the paralegal did not follow up on the case. Moreover, after she left the firm, the case lay dormant for another six years, with, apparently, no other arrangements for the monitoring of the file. We, therefore, find that respondent's conduct violated RPC 5.3(a) and (b).

We determine to dismiss the remainder of the allegations for the following reasons: (1) there was no clear and convincing evidence that, at the time that respondent wrote the letter to the American Students Assistance, he knew that the complaint had been dismissed; (2) respondent's failure to maintain professional liability insurance while practicing in a corporate

form violated R. 1:21-1A (3), but not any RPC; (3) RPC 1.4(c) is inapplicable to the facts of this case; the dismissal of the complaint, which was caused by respondent's lack of diligence in prosecuting the case, should have been disclosed to the client, but was not the sort of event that had to be explained to the client, in detail, to allow the client to make an informed decision about the next course of action; and (4) RPC 3.2 is equally inapplicable here, given that there was no litigation to expedite; the complaint was dismissed early in the case.

In short, respondent lacked diligence in pursuing Woodhouse's case; failed to adequately communicate with her; and failed to institute proper office procedures to ensure that his staff would follow up on the steps for which they had responsibility, such as serving the complaint and serving interrogatories on the defendant, and also failed to supervise the paralegal. Altogether, respondent violated RPC 1.3, RPC 1.4(b), and RPC 5.3(a) and (b). The duration of respondent's conduct (seven years), his failure to comply with the requests for the turnover of the file, and his disciplinary history constitute aggravating factors.

Before we turn to the issue of discipline, we will address two points raised in respondent's counsel's brief to us.

First, counsel argued that respondent's infractions in the

Woodhouse matter (which spanned seven years, from 1999 through 2006) "predated [respondent's] last appearance before this Disciplinary Review Board [in 2010] and could and should have been included within that matter." Counsel suggested that the inclusion of the Woodhouse charges in the disciplinary matter that led to respondent's 2010 reprimand "would not have altered [that] result."

The response to that argument is that, if the two matters had been consolidated, discipline greater than a reprimand would have been warranted because a reprimand would have been insufficient for the combination of respondent's conduct in the 2010 matter (no fee agreement, conflict of interest for simultaneous representation of driver and passenger, and failure to promptly release the clients' files to their new attorney) and his conduct in the current matter (lack of diligence, serious failure to communicate with Woodhouse (seven years), failure to institute proper office procedures for staff to monitor the caseload, and failure to supervise his paralegal). In our view, at least a censure would have been appropriate, if not more, particularly when respondent's 1995 and 1997 reprimands were considered.

Counsel's second point appears to be that, although, concededly, progressive discipline is in order when the same

behavior occurs (and this is so because of failure to learn from the same or similar mistakes), progressive discipline is not required here because "the conduct in this case substantially in time predated the . . . conduct that was brought before the Disciplinary Review Board in the last matter [the 2010 matter]."

Does counsel mean that the 2010 reprimand should not be considered as "prior discipline" because the conduct here took place before the conduct there and, as a result, the conduct here should not be viewed as a failure to learn from "prior mistakes"? Or does counsel mean that progressive discipline should not be imposed because progressive discipline is invoked when a respondent does not learn from the same mistakes and, out of the three reprimands, only the 1997 one involved the same conduct? It is not entirely clear. Either way, however, we find not only that respondent failed to learn from prior mistakes, but also that some of his prior mistakes were similar to the ones found in the instant case.

Specifically, respondent's conduct in the 1995 matter took place sometime prior to 1992; the conduct there was unrelated to the conduct here. His conduct in the 1997 matter occurred in 1990 and 1994; there, at least some of the conduct was the same as here (lack of diligence and failure to communicate with the client). His conduct in the 2010 matter occurred from 2006 to

2008; it was also unrelated to the present charges. Finally, the conduct in the present matter started in 1999 and continued up to 2006. That being the case, it is proper to find that respondent not only failed to learn from prior mistakes (he acted unethically in Woodhouse after his 1995 and his 1997 reprimands), but also failed to learn from prior similar mistakes (his conduct in Woodhouse postdated his 1997 reprimand for similar violations). It is true that his conduct in the 2010 matter, which occurred from 2006 to 2008, postdated his conduct in the Woodhouse case. But the 2010 reprimand should still be considered as an aggravating factor, in that it shows respondent's propensity to behave unethically.

With those considerations in mind, we now address the issue of appropriate discipline.

Attorneys who fail to supervise their non-lawyer staff are typically admonished or reprimanded. See, e.g., In re Mariconda, 195 N.J. 11 (2008) (admonition for attorney who delegated his recordkeeping responsibilities to his brother, a paralegal, who then forged the attorney's signature on trust account checks and stole $272,000 in client funds); In the Matter of Brian C. Freeman, DRB 04-257 (September 24, 2004) (attorney admonished for failing to supervise his paralegal; the paralegal forged a client's name on a retainer agreement, a release, and two

settlement checks; the funds were never returned to the client; mitigating factors included the attorney's clean disciplinary record and the steps that he took to prevent a reoccurrence); In the Matter of Lionel A. Kaplan, DRB 02-259 (November 4, 2002) (attorney admonished for failure to supervise his bookkeeper, which resulted in recordkeeping deficiencies and the commingling of personal and trust funds; mitigating factors were the attorney's cooperation with the OAE, including entering into a disciplinary stipulation, his unblemished thirty-year career, the lack of harm to clients, and the immediate corrective action that he took); In the Matter of William H. Oliver, Jr., DRB 98-475 (February 22, 1999) (admonition for failure to supervise a non-lawyer employee; specifically, whenever emergent circumstances would arise, the attorney would allow an office subordinate to execute certain portions of bankruptcy petitions if the attorney had already obtained preliminary information from the respective client and the client had signed the second page of the petition attesting to the accuracy and truthfulness of the entire petition); In re Murray, 185 N.J. 340 (2005) (attorney reprimanded for failure to supervise non-attorney employees, which led to the unexplained misuse of client trust funds and to negligent misappropriation; the attorney also committed recordkeeping violations); In re Riedl, 172 N.J. 646

(2002) (attorney reprimanded for failing to supervise his paralegal, allowing the paralegal to sign trust account checks; the attorney also displayed gross neglect in a real estate matter by failing to secure a discharge of mortgage for eighteen months after it was satisfied); In re Bergman, 165 N.J. 560 (2000) and In re Barrett, 165 N.J. 562 (2000) (companion cases; attorneys reprimanded for failure to supervise secretary/bookkeeper/office manager who embezzled almost $360,000 from the firm's business and trust accounts and from a guardianship account; the attorneys cooperated with the OAE, hired a CPA to reconstruct the account, and brought their firm into full compliance with the recordkeeping rules; a bonding company reimbursed the losses caused by the embezzlement); In re Moras, 151 N.J. 500 (1997) (lawyer reprimanded for failure to adequately supervise his secretary, who stole $650 in client funds; the attorney also failed to maintain required records; the attorney made restitution); and In re Hofing, 139 N.J. 444 (1995) (reprimand for failure to supervise bookkeeper, who embezzled almost half a million dollars in client funds; although unaware of the bookkeeper's theft, the attorney was found at fault because he had assigned all bookkeeping functions to one person, had signed blank trust account checks, and had not reviewed any trust account bank statements for years; mitigating factors

included the attorney's lack of knowledge of the theft, his unblemished disciplinary record, his reputation for honesty among his peers, his cooperation with the OAE and the prosecutor's office, his quick action in identifying the funds stolen, his prompt restitution to the clients, and the financial injury that he sustained). But see In re Stransky, 130 N.J. 38 (1992) (one-year suspension for lawyer who completely delegated the management of his attorney accounts to his wife/secretary/bookkeeper and improperly authorized her to sign trust account checks; no mitigating factors noted).

Here, respondent's violation of RPC 5.3 was not as serious as that of the attorneys whose non-lawyer employees converted client or trust funds to their own use because of the attorney's failure to supervise their activities. It is true that Woodhouse's case lingered for seven years in respondent's office and that nothing was done to advance her interests. But she suffered no financial injury. Respondent agreed to compensate her for her loss and he did so, although not promptly. It seems, thus, that an admonition would have been sufficient for this violation of RPC 5.3 alone.

But respondent has committed other infractions. He lacked diligence in handling Woodhouse's case and failed to respond to her numerous attempts to obtain information about her case. Such

infractions ordinarily lead to an admonition. See, e.g., In the Matter of James C. Richardson, DRB 06-010 (February 23, 2006) (attorney lacked diligence in an estate matter and did not reply to the beneficiaries' requests for information about the estate); In the Matter of Anthony R. Atwell, DRB 05-023 (February 22, 2005) (attorney did not disclose to the client that the file had been lost, canceled several appointments with the client for allegedly being unavailable or in court, when the reason for the cancellations was his inability to find the file, and then took more than two years to attempt to reconstruct the lost file); and In the Matter of John F. Coffey, DRB 04-419 (January 21, 2005) (attorney did not file a bankruptcy petition until nine months after being retained and did not keep the client informed of the status of the case; only after the client contacted the court did the client learn that the petition had not been filed).

Several aggravating factors here are (1) respondent's inaction for a period of seven years; (2) his failure to promptly turn over the file to Woodhouse's new lawyer, coupled with his failure to be candid with the new lawyer by informing him that the file could not be located; (3) his failure to apprise the new attorney that he could not meet the deadline for the payment of the settlement funds because he lacked the

financial means to do so;[5] and, more significantly, (4) the fact this matter marks respondent's fourth brush with the disciplinary system. He was reprimanded three times: in 1995, 1997, and 2010. One would hope that he would have learned from his prior mistakes, particularly because the 1997 reprimand also stemmed from lack of diligence and failure to communicate with the client.

We noted counsel's statement that respondent's office practices have improved. That, however, does not mitigate the misconduct already committed; it only helps future clients.

For respondent's ethics infractions -- lack of diligence, failure to communicate with Woodhouse, and failure to supervise his non-lawyer staff -- together with the aggravating factors present in this case, that is, respondent's ethics history, the seven years that his misconduct spanned, his failure to disclose to Rossetti that the file could not be found and that he did not have the funds to pay the settlement when due, and, significantly, his failure to learn from the prior misdeeds that netted him three reprimands, we determine that the suitable level of discipline is a three-month suspension.

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[5] Respondent's silence toward the new lawyer forced the lawyer to file an order to show cause and a motion to enforce litigant's rights. Respondent seems to react only when problems have intensified to a degree that requires court intervention.

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
Louis Pashman, Chair

By: Julianne K. DeCore
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Wayne Powell
Docket No. DRB 10-412

Argued: February 17, 2011

Decided: May 11, 2011

Disposition: Three-month suspension

Members	Disbar	Three-month Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Pashman		X				
Frost		X				
Baugh		X				
Clark		X				
Doremus		X				
Stanton		X				
Wissinger		X				
Yamner		X				
Zmirich		X				
Total:		9				

Julianne K. DeCore
Julianne K. DeCore
Chief Counsel