SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 12-180
District Docket No. IV-2009-0015E

IN THE MATTER OF	
WAYNE POWELL	
AN ATTORNEY AT LAW	

Decision

Argued: September 20, 2012

Decided: November 27, 2012

Christine P. 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 was before us on a recommendation for discipline (reprimand) filed by the District IV Ethics Committee (DEC). The complaint charged respondent with having violated RPC 3.4 (no subsections cited, but the hearing panel interpreted them to be (c) (a lawyer shall not knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists), and (d) (in pre-trial procedure a lawyer shall not fail to make reasonably diligent efforts to comply with legally proper

discovery requests by an opposing party)) (count one); RPC 8.4 (no subsection cited), presumably (a) (violate or attempt to violate the RPCs, knowingly assist or induce another to do so, or do so through the acts of another) and (d) (conduct prejudicial to the administration of justice) (count two); and R. 1:21-1A ("failing to have adequate insurance coverage for professional malpractice and use of person's [sic] in his firm's name on his letterhead who are no longer associated with his practice" (count three).[1] The grievant, Judson Brown, did not appear at the DEC hearing.

We determine to impose a censure on respondent.

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.

[1] At the beginning of the DEC hearing, the presenter withdrew the charge relating to respondent's failure to maintain professional liability insurance, but proceeded with the allegations of letterhead impropriety, a violation of RPC 7.5. Because the complaint did not cite RPC 7.5, respondent's counsel made an initial objection on the basis that the complaint did not contain sufficient factual notice of a potential violation of that RPC. Later, however, in a June 29, 2012 letter to us, counsel conceded that violation.

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).

Effective July 20, 2011, respondent was suspended for three months for lack of diligence in a personal injury case, "virtually nil" communication with the client during a seven-year period, and failure to supervise his non-lawyer staff by delegating the monitoring of cases to non-lawyer staff and then not implementing adequate systems to ensure that staff effectively performed the work assigned to them. Respondent's inaction in the case that gave rise to the ethics complaint -- seven years -- was so serious as to be considered an aggravating factor. Another aggravating factor was respondent's failure to comply with the client's new lawyer's requests for the file, which was returned only after the new lawyer filed an order to show cause. In re Powell, 206 N.J. 555 (2011). Respondent was reinstated to the practice of law on November 10, 2011. In re Powell, 208 N.J. 374 (2011).

The charges in this disciplinary matter stem from the following conduct:

On April 12, 2006, Stephen Altamuro, Esq., filed a malpractice complaint against respondent, who had represented

the plaintiff, Judson Brown, in a personal injury action arising out of a 1999 automobile accident. The alleged malpractice took place in 1999.

In the course of the litigation, Altamuro requested that respondent provide proof of malpractice insurance. Specifically, on December 12, 2007, Altamuro sent a letter to respondent requesting "a copy of [his] current malpractice insurance policy or any policy that would provide [him] coverage in this matter." Altamuro's efforts were unavailing, even though, during a December 11, 2007 deposition, respondent had agreed to do so. Altamuro then filed a motion to compel the production of malpractice insurance information, which respondent did not oppose. According to Altamuro, on March 14, 2008, the Honorable Gwendolyn Blue, J.S.C., ordered respondent to provide the information to Altamuro within fourteen days.[2]

By letter dated March 18, 2008, Altamuro served a copy of Judge Blue's order on respondent. When respondent did not comply with the order, Altamuro filed a motion to dismiss respondent's

[2] The copy of the order contained in the record appears to be missing the court's ruling that respondent is to provide the information to Altamuro within fourteen days. When Altamuro testified about that ruling, however, respondent's counsel did not object by pointing out its absence from the copy of the order introduced into evidence. It may be logically inferred, then, that the court did rule as testified by Altamuro. And even assuming, for the sake of argument, that this was not the court's ruling, it is unquestionable that respondent understood it to be.

answer. On April 23, 2008, two days before the return date of the motion, respondent sent Altamuro a copy of a Certificate of Liability Insurance, showing coverage from July 12, 2005 through July 12, 2006. Respondent did not disclose to Altamuro that he did not have coverage for 1999, when the alleged malpractice had occurred.[3] He told the hearing panel that he did not do so because Altamuro had not asked for 1999 information: "2006 is when he alleged there was malpractice. . . . When he asked me for the coverage for this incident for which he filed suit in 2006, I gave him what he asked for. He never asked me for anything else . . . . He didn't say, what did you have for 1999?"

Altamuro received no further information from respondent. On May 28, 2008, the court granted Altamuro's application for counsel fees incurred in connection with his two motions.[4]

Ultimately, the malpractice action was settled by respondent's agreeing to pay $5,000 to Brown, within sixty days of September 22, 2008.

Parenthetically, the question of when payment was due was the

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[3] In respondent's last disciplinary proceeding (three-month suspension), he stipulated that he did not have malpractice insurance from 1997 through 2004. In the Matter of Wayne Powell, DRB 10-412 (May 11, 2011) (slip op. at 12-13).

[4] In Altamuro's certification to the court in connection with a subsequent motion, he told the court that he had to file a motion to compel the satisfaction of the fee award. He withdrew the motion, when respondent paid the fees.

subject of considerable discussion at the ethics hearing. There is no court order in the record directing respondent to satisfy the settlement within a certain period. According to respondent, the settlement was not placed on the record. Nor was the sixty-day provision memorialized anywhere, including in a court order. Indeed, Altamuro's certification in support of his motion to enforce the settlement does not refer to a court order, but to the judge's "request[] that settlement proceeds be forwarded to plaintiff's counsel on or before sixty (60) days from September 22, 2008."

Respondent acknowledged that he had told the judge that he "probably [could] take care [of the payment] within [sixty days]" and conceded that, even though there was no "time limitation" in a court order, he "had an obligation to pay the guy." Respondent's counsel characterized it as "a gentleman's agreement." The presenter, in turn, took the position that, because respondent did not oppose Altamuro's motions by raising a financial hardship issue or asking for additional time to satisfy the settlement, "it was an immediate enforcement."

In any event, on October 14, 2008, Brown signed a release, which Altamuro sent to respondent, on October 15, 2008, along with a stipulation of dismissal. When respondent did not pay the $5,000 within sixty days, Altamuro sent him a letter, on November 21, 2008, informing him that, if payment were not received by November

24, 2008, he would file a motion and ask for attorney's fees and costs.

When payment was not forthcoming, Altamuro filed yet another motion, which respondent did not oppose. On December 19, 2008, the court entered an order enforcing the settlement and entering judgment against respondent in the amount of $5,000. On April 10, 2009, seven months after the date of the settlement, respondent sent Altamuro a check for the $5,000.[5] According to Altamuro, at no time from October 15, 2008, the date on which he sent the signed release to respondent, to April 10, 2009, when respondent paid the $5,000, did respondent provide any reason or explanation for not having remitted the settlement monies previously.

For his part, respondent testified that, when he was served with the malpractice complaint, he decided that he was going to "defend it" himself, rather than submit it to his malpractice carrier, because he "was concerned about [his] premiums going up on what [he] perceived to be a frivolous complaint." He testified that he had informed Altamuro, during his deposition, that whether he had malpractice insurance was irrelevant because

[5] At the DEC hearing, the presenter, through Altamuro's testimony, attempted to show that respondent had satisfied the settlement only after the filing of the ethics grievance against him. The grievance was filed on March 6, 2009. Respondent testified, however, that he did not become aware of the grievance until "the next year."

it was his intention to defend the claim himself.[6]

Altamuro, in turn, testified that, up to the point that he had asked respondent for the insurance information, he knew that respondent was defending himself. He added, however: "When we got to the point where he said that he would provide it to me, then I assumed that the insurance company at that point may step in, and then maybe the case would move forward and I would get some cooperation." Altamuro told the hearing panel that, at no time, had respondent alleged that the malpractice insurance information that he was seeking was irrelevant.

At the DEC hearing, the presenter took the position that respondent's testimony about defending himself was disingenuous. In truth, the presenter argued, the insurance company had denied respondent's claim, on the basis that he did not have insurance coverage for 1999, when the alleged malpractice occurred. Respondent admitted that his claim had been denied because the incident had not taken place within a covered period.

Count one of the formal ethics complaint charged that respondent's "conduct in failing to pay the agreed upon settlement monies for four months after Order of the Court and failure to provide discovery related to his professional

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[6] On cross-examination, respondent agreed that he had not raised a relevancy issue, when Altamuro had filed a motion to compel the production of malpractice insurance information.

malpractice insurance and/or lack thereof constitutes a violation of R.P.C. 3.4." Count two charged that respondent's "conduct in failing to pay the agreed upon settlement monies for four months after Order of the Court constitutes a violation of R.P.C. 8.4."

The third count charged that, during the course of the malpractice action, respondent used letterhead containing the name of a law partner, Roderick Baltimore, who was no longer affiliated with the firm. In September 2007, Baltimore became a municipal court judge and, since then, has not been affiliated with respondent's office. Nevertheless, from that date and until at least April 2009, respondent used letterhead indicating that Baltimore was an attorney with the firm.

At the close of the ethics hearing, respondent's counsel offered a document that he labeled as a "timeline" to be marked for identification. Counsel explained that it was "a timeline of the grievance that led to a discipline that was ongoing at the time that the Judson Brown grievance was filed, at the time that it was transmitted to Mr. Powell, and the fact that there were ongoing proceedings in other matters." Instead of accepting it, the hearing panel gave counsel fourteen days to submit a brief on the issue. The panel chair ruled as follows:

> [PANEL CHAIR] [W]e can all agree, I think, from what we are hearing today, that

Mr. Powell apparently was the subject of at least an investigation where there is an overlap in time with these allegations here. That's all the Committee needs to know at this point. I don't want to know how many grievances there were, or what the nature of the allegations are [sic]. We can agree that there is some overlapping, the substance of which we are not interested in. If we determine, after giving you 14 days from today to submit a brief, and [the presenter] 10 days, if those timelines are sufficient for you, we are going to make a ruling as a matter of law as to whether allegations that could have been brought from outside of this proceeding have to be brought inside of this proceeding under what we can maybe loosely call an entire controversy doctrine. If we determine -- depending on how we rule, that will determine whether we want your timeline and any supporting documents.

. . . .

All we want from you in 14 days is some sort of authority that says, if a district ethics committee, or anyone responsible for an ethics enforcement, if they have an obligation to bring, all in one proceeding, every ethics violation that is alleged to be out there.

[RESPONDENT'S COUNSEL] And I can make that easier but I can put it in writing. I concede that you don't. If there is [sic] ethics violations, you can deal with them or not deal with them. But the question is, when you had notice. It is an equitable principle, not a statutory rule or regulatory principle.

[PANEL CHAIR] All I'm suggesting to you is this. Without getting into the facts, give us some authority, if you have it, for an equitable principle being invoked. And there may be none out there, but we want to afford you that opportunity . . . . Whether

> it is a matter of equity or a matter of law, if there is a basis, a basis for us to consider your timeline and other evidence, if there is a basis for it, we are going to come to you, Mr. Poplar, and say, produce to us your evidence . . . . We want to know whether based in law, or equity, or elsewhere there is a basis for your argument.
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> [T129-7 to T131-14.]

Also at the conclusion of the ethics hearing, the presenter clarified for the panel that

> there are really only three issues, whether the failure to provide the malpractice insurance was a violation of 3.4(d), which is what's alleged in count one. And the rule is clear that a party, an attorney, whether they are – I would say particularly in the case where they are a party, not just acting as counsel, but where they are a party, has an obligation to respond to any fair request for discovery, and I think the most elementary thing that anyone would ask for in any case would be a malpractice policy in a malpractice case. That's the 3.4 violation. It's very simple. With respect to the issue to provide it, the fact that there were two court orders that were entered that were unopposed is, again, undisputed. With respect to the 8.4 violation, I would just bring to the hearing panel's attention that there is a case directly on point. That's the In Re: Harris case . . . which specifically talks about disobeying a court order to pay monies, constitutes [sic] a violation of 8.4. That's In Re: Harris, 182 NJ 594 at pages 603 and 605, which is a 2005 Supreme Court case which involves an attorney who refused to provide monies in response to a court order.
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> [PANEL CHAIR] Are you arguing that the

> 8.4 allegation in this case is not violated -- is violated on an independent basis as opposed to being a violation of another rule?
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> [PRESENTER] I'm sorry? Yes. It is an independent violation . . . .
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> . . . .
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> I just wanted to, in closing, say that that is how we see the violations. The failure to provide the malpractice is 3.4, and the 8.4 is the issue related to the failure to pay the settlement from October all the way through April of 2009. In addition, with respect to paragraph 7 of the complaint which alleges the issue regarding the letterhead, I know you reserved ruling on whether or not there was fair notice. It is alleged in paragraph seven in the complaint, although I will concede I neglected to cite RPC 7.5. However, it was answered in the answer filed by Mr. Powell. It was acknowledged in the answer that that occurred. And, again, here today was acknowledged that, at least since September 2007, Mr. Baltimore has not been involved in or related to the practice whatsoever.
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> [T132-15 to T136-4.][7]

On December 12, 2011, counsel for respondent filed a post-hearing submission "regarding the admissibility and relevance of the Wayne Powell Timeline." In addition to arguing that this matter had no merit substantively, counsel essentially argued that the present disciplinary matter and respondent's two prior matters, DRB 09-401 and DRB 10-412, which led to a reprimand and

[7] "T" refers to the transcript of the DEC hearing on November 21, 2011.

a three-month suspension, respectively, should have been consolidated before the DEC. Counsel's argument appears to be that, had this matter been heard in conjunction with DRB 09-401 (the 2010 reprimand case), the reprimand that ensued would have been sufficient for the conduct in both of the matters.[8] Counsel urged the DEC to dismiss the complaint "on procedural and substantive grounds." The DEC denied counsel's motion, noting counsel's acknowledgement, at the ethics hearing, that there is no rule, law, or doctrine to support his position and that R. 1:20-7(c) states that "there are no limitations with respect to the initiation of any discipline or disability matter." The DEC concluded that "[t]o hold as respondent suggests is to force every potential grievant and every ethics committee to be subjected to a statute of limitations our courts have said does not exist and to be bound by an entire controversy doctrine no court or rule has ever applied."

Counsel's argument that no discipline should be imposed is addressed below.

At the conclusion of the ethic hearing, the DEC found no clear and convincing evidence that respondent failed to respond to a reasonable pre-trial discovery request for proof of malpractice insurance. The DEC noted that "interpretive cases

[8] This is the same argument that counsel made in the course of DRB 10-412 and that we rejected.

consistently show RPC 3.4[d] violations where lawyers *deliberately* abused discovery process, as opposed to exercising diligence in complying with pretrial discovery obligations." The DEC reasoned that "[t]his makes sense; otherwise lawyers would violate RPC 3.4[d] if they were merely late in answering discovery or provided less than full detail in answer to a discovery request."

Furthermore, the DEC noted, because the presenter acknowledged, at the ethics hearing, that respondent had no obligation to maintain malpractice insurance and withdrew that portion of the complaint, "there can be no violation [of RPC 3.4(d)] for failure to turn over proof of insurance respondent was not required to carry."[9]

As to the charge that respondent's failure to comply with a court order directing him to provide proof of malpractice insurance violated RPC 3.4(c), the DEC found that "the literal language of RPC 3.4(c) and relevant case law makes clear that a violation occurs only when a lawyer, by clear and convincing evidence, knowingly and deliberately disobeys the order of a

[9] We are unable to agree with the DEC's interpretation of the presenter's statement at the ethics hearing. The presenter did not say that respondent was not obligated, by court rule, to maintain professional liability insurance. R.1:21-1A(a)(3) does impose such an obligation. All the presenter said is that, in respondent's last disciplinary matter, there had been a finding that a violation of R. 1:21-1A was not necessarily a violation of an RPC.

tribunal." Here, the DEC noted, the March 14, 2008 court order

> *does not* order respondent to turn over proof of malpractice insurance. Instead, the order merely references attorney Altamuro applied for such relief . . . . On a plain reading, the order requires nothing at all of respondent. Instead, only attorney Altamuro is obligated to do anything — to serve respondent with a copy of the order within seven (7) days. (P4). While we can reasonably assume that attorney Altamuro sought to order respondent to provide proof of insurance, the Committee's claim that respondent was ordered to do so is simply not supported by the literal language of the Court's order. For example, the order is not entitled "order compelling proof of insurance", nor does the order use the word "granted" when referring to the movant's request. Indeed, there is no clear proof at all that the Court was directing respondent to provide proof of insurance. While we can speculate that the Court was doing so, that does nothing to aid the Committee in carrying its clear and convincing burden of proof that respondent deliberately violated a court order.
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> [HPR14-HPR15.][10]

The DEC added that if, however, it were established that the court did order respondent to provide proof of malpractice insurance to Altamuro, then respondent did so by facsimile of April 23, 2008. The DEC believed that "a delay of little more than thirty (30) days is hardly clear and convincing evidence of a flagrant discovery abuse or the kind of knowing and deliberate conduct" contemplated by RPC 3.4(c). The DEC, thus, dismissed that charge.

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[10] "HPR" denotes the hearing panel report.

The DEC also dismissed the charge that respondent's failure to satisfy the settlement agreement within sixty days violated RPC 3.4(c) and RPC 8.4(a) and (d). Although the DEC concluded that a lawyer has an obligation to comply with orders that are "open-ended in [their] deadline[s]" or impose no deadline at all, the DEC found no clear and convincing "*direct* evidence of a knowing, intentional refusal to comply with any court order," in addition to no clear and convincing

> *circumstantial* evidence on why respondent delayed his payment. For example, did the matter fall off respondent's diary system? Did he dictate a letter for payment that his staff failed to type? Did he instruct a bookkeeper to make payment and he/she forgot? The panel cannot be forced to guess on why respondent delayed his payment for four months, which means the Committee has failed to carry its burden that, by clear and convincing evidence, respondent "knowingly" disobeyed the court's order.
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> To the contrary, it appears clear that while respondent knew he owed the money, he was not reminded even once by attorney Altamuro of the obligation to pay after entry of the December 19, 2008 order [enforcing the settlement and entering judgment against him]. For example, the Committee produced no document and elicited no testimony from attorney Altamuro or respondent that, between entry of the court's December 19, 2008 order compelling payment and respondent's payment on April 10, 2009, Altamuro ever sent respondent a reminder letter or placed a reminder phone call again to bring the matter to respondent's attention. By all accounts, both respondent and attorney Altamuro failed to follow up on payment. These undisputed facts do not allow

> us to conclude that respondent clearly and convincingly disregarded a court order with the requisite intent required by the rule. Rather, we are just as likely to conclude that both attorneys, for whatever reason, lost sight for a few months of respondent's obligation to pay this relatively small settlement amount. Indeed, it was respondent who initiated payment four months later, as opposed to being prompted by attorney Altamuro to pay after entry of the Court's order.
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> [HPR16-HPR17.]

Furthermore, the DEC found, the four-month delay in payment was not clearly and convincingly persuasive that it rose to the level that interfered with the administration of justice (R. (RPC 8.4(d)), and its finding that the delay did not violate any RPC precluded a finding of a violation of RPC 8.4(a), which "is purely derivative," with "no independent substantive strictures," and not permitted to be the basis for disciplinary sanctions if there are no separate ethical infractions" [quoting In re Rachmiel, 90 N.J. 646, 662 (1982)].

The only violation that the DEC found was that of RPC 7.5(c), in that, for a period of eighteen months, respondent used letterhead containing the name of a partner who had left the firm.

The DEC took into account one aggravating factor: respondent's disciplinary history, consisting of three reprimands and a three-month suspension, "spread over the course

of sixteen years and over the attorney's twenty-six year career." The DEC found several mitigating factors, namely, respondent's cooperation with the ethics investigator, his admission of improper use of letterhead, the little likelihood that the offense would be repeated, the absence of financial gain, the lack of harm to any client, and the absence of similar incidents in the nearly three years since the letterhead problem was corrected. In recommending a reprimand, the DEC relied on cases addressing violations of RPC 7.5, which resulted in either reprimands or censures: In re Carlin, 176 N.J. 266 (2003) (reprimand), In re Felsen, 172 N.J. 314 (2002) (reprimand), In re Bonanno, 135 N.J. 464 (1994) (reprimand), and In re Hediger, 192 N.J. 105 (2007) (censure).

Following an independent, de novo review of the record, we find that the DEC's conclusion that respondent violated RPC 7.5(c) was fully supported by clear and convincing evidence. We are unable to agree, however, with the DEC's dismissal of the RPC 3.4(c) and (d) and RPC 8.4(a) and (d) charges. We will start with the RPC 7.5(c) violation.

That subsection of the rule 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." Nothing in the record establishes that

Baltimore, respondent's former law partner, was retired. He left the firm, in September 2007, to become a municipal court judge. After his departure, and for a period of at least eighteen months -- from September 2007 through April 2009 -- respondent continued to use letterhead indicating that Baltimore was a lawyer in the firm. Respondent conceded -- and we find -- that his use of the letterhead was contrary to RPC 7.5(c).

The remaining charges relate to respondent's failure to comply with Altamuro's discovery requests for malpractice insurance information, alleged to be a violation of RPC 3.4, presumably (d); failure to comply with a court order directing him to supply such information, alleged to be a violation of RPC 3.4, presumably (c); and failure to pay the settlement amount for four months after entry of a court order enforcing the settlement, alleged to be a violation of RPC 3.4, presumably (c) and RPC 8.4, presumably (a) and (d).

To recap the events, on April 12, 2006, Altamuro filed a malpractice complaint against respondent arising out of his representation of Brown's personal injury case. On December 11, 2007, Altamuro took respondent's deposition. In the course of the deposition, respondent agreed to supply Altamuro with information relating to his malpractice insurance. The next day, December 12, 2007, Altamuro sent a letter to respondent asking for a copy of his "current malpractice insurance policy or any

policy that would provide [respondent] coverage in this matter [emphasis added]." The alleged malpractice occurred in 1999. When respondent did not comply with Altamuro's request, Altamuro filed a motion to compel respondent to produce the requested information. On March 14, 2008, Judge Blue ordered respondent to provide the information to Altamuro within fourteen days.

On March 18, 2008, Altamuro sent a copy of the order to respondent. Respondent did not comply with the order. Altamuro then filed a motion to dismiss respondent's answer, returnable on April 25, 2008. Two days before the return date of the motion, respondent sent to Altamuro a copy of Certificate of Liability Insurance for the period from July 2005 through July 2006. Respondent did not provide any insurance information for the time when the malpractice alleged occurred, 1999. In fact, respondent had not had malpractice insurance since 1997 and through at least 2004. He did not disclose to Altamuro that he did not have insurance in 1999 because "2006 is when he alleged there was malpractice . . . . When he asked me for the coverage for this incident for which he filed suit in 2006, I gave him what he asked for. He never asked me for anything else . . . . He didn't say, what did you have for 1999?"

The DEC found nothing wrong with (1) respondent's failure to fulfill his promise to Altamuro that he would give him his malpractice insurance information, necessitating the filing of

two motions, which respondent did not oppose and for which the court awarded Altamuro counsel fees (RPC 3.4(d) failure to make reasonably diligent efforts to comply with proper discovery requests by an opposing party)) and (2) respondent's failure to comply with the court's order that he provide the information to Altamuro within fourteen days (RPC 3.4(c) (knowingly disobeying an obligation under the rules of a tribunal) and RPC 8.4(d) (conduct prejudicial to the administration of justice), aggravated by his specious argument that he had not told Altamuro that he did not have malpractice insurance for the time of the alleged malpractice because Altamuro had only asked for 2006 information. In addition to being disingenuous, respondent was wrong and he had to know that he was wrong. Altamuro's letter was clear. He asked respondent to provide him with information on any policy that would provide respondent with "coverage in this matter."

Next, respondent agreed to pay Brown $5,000 to settle the malpractice suit. By respondent's own admission, he agreed to pay the $5,000 within sixty days of September 22, 2008, the settlement date. Although, on October 14, 2008, Altamuro sent respondent a release and a stipulation of dismissal, he did not satisfy the settlement within sixty days. On November 21, 2008, one day short of the expiration of the sixty-day period, Altamuro sent respondent a reminder letter and cautioned him

that, if payment were not made by November 24, 2008, he would have to file a motion to enforce the settlement. Respondent neither opposed the motion nor made the payment. Altamuro then filed a motion, which the court granted. The December 19, 2008 order enforced the settlement and entered a judgment against respondent in the amount of $5,000. It took respondent seven months from the settlement date and four months from the date of the order to pay the $5,000. He did so on April 10, 2010.

Here, too, the DEC found no fault with respondent's conduct regarding the satisfaction of the settlement. We cannot agree with that finding. Although, in this case, the settlement agreement was not placed on the record and there was no court order memorializing its terms and directing its satisfaction within a certain time, respondent violated the terms of the settlement that he reached with opposing counsel and which the court approved. In fact, when the judge asked respondent whether there was a need to place the settlement on the record, he replied "no." Formal order or not, there was a decision made by a court, a decision with which respondent was required to comply. It would be form over substance to conclude that the absence of a formal, written order would absolve respondent from complying with the terms of the settlement agreement reached in conference with the judge.

We find, thus, that respondent's failure to satisfy the

settlement agreement until April 10, 2009, or five months after the expiration of the sixty-day deadline, violated a de facto court order and, in turn, RPC 3.4(c) and RPC 8.4(d).

On the other hand, it is not so clear that respondent's failure to pay the $5,000 after the court enforced the settlement and entered a judgment against him was a violation of a court order. Arguably, once a judgment is entered, the judgment-debtor may choose to do nothing, the burden falling on the judgment-creditor to obtain a writ of execution. We, therefore, find no clear and convincing evidence that respondent violated RPC 3.4(c) and RPC 8.4(d), when he did not pay the $5,000 after the entry of the judgment against him.[11]

Violations of court orders typically result in a reprimand. See, e.g., In re Kersey, 170 N.J. 409 (2002) (reprimand imposed for failure to comply with court orders requiring attorney to provide financial records in his own matrimonial matter); In re Holland, 164 N.J. 246 (2000) (attorney who was required to hold in trust a fee in which she and another attorney had an interest took the fee, in violation of a court order); In re Milstead, 162 N.J. 96 (1999) (attorney disbursed escrow funds to his client, in violation of a court order); In re Skripek, 156 N.J. 399 (1998) (reprimand for attorney held in contempt for failure

[11] The reason for the DEC's dismissal of this charge is unsustainable, namely, that it was Altamuro's obligation to remind respondent that he had not satisfied the judgment.

to pay court-ordered spousal support and for failure to appear at the hearing); and In re Hartmann, 142 N.J. 587 (1995) (attorney intentionally and repeatedly ignored four court orders to pay opposing counsel a fee, resulting in a warrant for the attorney's arrest; the attorney also displayed discourteous and abusive conduct toward a judge with intent to intimidate her).

An attorney who did not produce his client for deposition for eighteen months was found to have violated RPC 3.4(d) (reprimand imposed). In re Malat, 174 N.J. 564 (2002). Similarly, an attorney who did not provide his adversary with fully responsive answers to interrogatories, despite two court orders directing him to so, was found in violation of RPC 3.4(d). In re Zotkow, 143 N.J. 299 (1996) (for this and other improprieties, the attorney received a three-month suspension; the attorney had received a three-month suspension for similar conduct). In In re Stephenson, 162 N.J. 111 (1999), the attorney was found guilty of violating RPC 3.4(d) after the court granted his adversary's two motions to compel discovery (one-year suspension for a host of violations in six matters; prior admonition).

An attorney who was found guilty of a letterhead impropriety received an admonition or reprimand. See, e.g., In the Matter of Carlos A. Rendo, DRB 08-040 (May 19, 2008) (admonition for attorney whose letterhead failed to disclose

that another attorney named therein was only admitted in New York). See also In re Katz, ___ N.J. ___ (2007) (attorney who used letterhead indicating that he and another attorney with whom he was not associated were members of a limited liability partnership for the practice of law was found guilty of violating RPC 7.5(a), which we found to be more appropriately RPC 7.5(c)).

Before turning to the issue of discipline, we will address counsel's position that no discipline should be imposed because this matter is "stale," in the sense that it should have been heard in conjunction with either the 2010 matter (reprimand) or the 2011 matter (three-month suspension). Counsel's argument appears to be that, had consolidation occurred, the discipline imposed in the two prior matters would have sufficient for the present violations as well.

As indicated previously, this is the same argument that counsel made in the three-month suspension matter (DRB 10-412) and that we rejected. There, too, counsel's position was that the inclusion of DRB 10-412 in the 2010 reprimand matter (DRB 09-401) would not have altered the 2010 result, a reprimand. In declining to accept counsel's argument, we remarked 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 combined infractions. In the Matter of Wayne

Powell, DRB 10-412 (May 11, 2011) (slip op. at 24).

The same reasoning applies in this instance. If the proven charges here had been brought with the charges in the prior matters,[12] greater discipline would have been required for the aggregate of the conduct. Otherwise stated, more than a reprimand would have been warranted, if this matter and DRB 09-401 had been heard together, and more than a three-month suspension would have been justified, if this matter and DRB 10-412 had been consolidated.

In addition, this is not a situation in which the new infractions are part and parcel of an overall pattern of conduct exhibited in the past. In other words, all of the ethics infractions committed by respondent did not take place within a "defined and limited period of time." In the Matter of John A. Tunney, DRB 05-290 (November 2, 2005) (slip op. at 24). They were not "a cluster of transgressions". Id. at 25. Indeed, in the case that resulted in respondent's three-month suspension, his misconduct occurred from 1999 through 2006; in the matter that led to his 2010 reprimand, the misconduct took place from at least December 2007 through March 2008; and, here, the

[12] Procedurally, this proposition was unworkable, at least in DRB 09-401. By the time the grievance in this matter was docketed (April 16, 2009), the complaint in DRB 09-401 had been served (November 19, 2008) and respondent had already filed an answer (December 14, 2008). In fact, the ethics hearing took place thirteen days later (April 29, 2009).

improprieties occurred from December 2007 through April 2009. In determining to suspend respondent for three months in DRB 10-419, we considered that he had demonstrated that he had not learned from his past mistakes.

As to the measure of discipline that is appropriate in this matter, standing alone, respondent's failure to comply with Altamuro's discovery requests, failure to obey a court order directing him to produce proof of malpractice insurance within fourteen days, and failure to remove Baltimore's name from his letterhead, after Baltimore left the firm, would probably merit a reprimand. Because, in DRB 10-412, we have already factored respondent's failure to mend his ways after his previous disciplinary sanctions (three reprimands), it would be unfair to revisit that same factor here. But there is one new circumstance that requires increase from the otherwise appropriate reprimand for the present ethics infractions to a censure: respondent's conduct in the 2010 case (reprimand) was already under scrutiny by ethics authorities, when he acted unethically in this matter (the grievance in the 2010 case was docketed in March 2008 and the formal ethics complaint was served on respondent in November 2008). Yet, he continued to act improperly in this matter. We, therefore, determine that respondent should be censured.

Member Yamner recused himself.

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 12-180

Argued: September 20, 2012

Decided: November 27, 2012

Disposition: Censure

Members	Disbar	Suspension	Censure	Reprimand	Admonition	Recused
Pashman			X			
Frost			X			
Baugh			X			
Clark			X			
Doremus			X			
Gallipoli			X			
Wissinger			X			
Yamner						X
Zmirich			X			
Total:			8			1

Julianne K. DeCore
Julianne K. DeCore
Chief Counsel