SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 94-075

IN THE MATTER OF

GEORGE J. WHITEHAIR,

AN ATTORNEY AT LAW

Decision and Recommendation
of the
Disciplinary Review Board

Argued: May 18, 1994

Decided: October 4, 1994

William R. Wood appeared on behalf of the Office of Attorney Ethics.

Carl D. Poplar appeared on behalf of respondent.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of New Jersey.

This matter was before the Board on a recommendation for public discipline filed by Special Master Bonnie Goldman. The formal complaints, consolidated for trial, charged respondent with misconduct in several matters. The complaints collectively charged respondent with multiple violations of RPC 1.15(a) (knowing misappropriation), RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation), RPC 1.3 (lack of diligence), RPC 1.4(a) and (b) (failure to keep client informed of the status of the matter and failure to comply with reasonable requests for information, and failure to explain a matter to the extent necessary to a client to make informed decisions), RPC 3.3 (false statement of material fact to a tribunal) and RPC 1.16(a)(2)

(failure to withdraw from representation of a client when the lawyer's physical or mental condition materially impairs his or her ability to represent his client). One of the complaints was amended at trial to allege a violation of RPC 1.8(a) (entering into a business transaction with a client without first advising the client to seek independent counsel).

Respondent was admitted to the New Jersey bar in 1983. He has no prior disciplinary history. However, in or about early 1990, respondent voluntarily withdrew from the practice of law due to an alleged disability. He returned in the beginning of 1993, initially on a part-time basis, under the supervision of attorney George J. Singley. He currently practices on a full-time basis and under Singley's supervision.

A summary of respondent's professional and personal background is necessary both to put his conduct into context and to fully understand his defenses.

Upon completion of law school, respondent was offered and accepted a position with the law firm of Tomar, Parks, Seliger, Simonoff and Adourian (hereinafter "Tomar firm"). He worked at that firm from January 1983 until approximately May 1986. During that period of time, he was assigned to work with Michael Kaplan, Esq., in the personal injury litigation department. He left the Tomar firm in 1986 to begin his own practice in Westmont, though it appears that he initially had a short-time association with a Philadelphia firm. His experience as a solo practitioner lasted for approximately six months, after which he formed a partnership

with Jeffrey Gans and moved his offices to Gibbsboro. That association lasted for approximately one year, until the spring of 1988, when respondent returned to work for the Tomar firm. He was assigned once again to work with Kaplan in the litigation department. He remained with the Tomar firm until early 1990, when he voluntarily ceased practicing law and went on disability. He remained on disability until the end of 1991, when he began to work part-time under the supervision of Singley. Currently, approximately ten percent of his full-time practice consists of doing consulting work for other attorneys.

From all accounts, while working as an associate at the Tomar firm, respondent was viewed as a successful and competent attorney. Respondent testified that he was advised that he was on the "fast track" for partnership. He further testified that he was treated specially and differently from the other associates in the firm and given a significant amount of responsibility. He worked extremely long hours in an attempt to keep pace with Kaplan, whom he admired and attempted to emulate. However, no matter how long and how hard he worked, he always viewed Kaplan as working harder. Respondent began to feel that he was "smother[ed]" and "trapped" and, therefore, decided to try solo practice. 4T34.[1]

It was respondent's testimony that he began to suffer from depression during the latter part of 1985 or early 1986. He believed that his depression began to materially affect his behavior at that time. But see Exhibit OAE 18, wherein respondent

[1] 4T denotes the hearing transcript of June 3, 1993.

states that his depression only began to materially affect his conduct towards the end of 1989. In any event, respondent maintained that he continued to practice in a depressed state until November 1989, when he entered a treatment program at Friends Hospital in Philadelphia, at the urging of both Kaplan and Alan Sklarsky, another attorney in the Tomar firm. Shortly after entering that program, respondent voluntarily ceased practicing law.

Thereafter, respondent was treated by different therapists and sometimes took prescribed anti-depressants. In or about May 1991, while on his way to the shore, respondent stopped to telephone a friend, Michael Berger, Esq., and advised him that he intended to commit suicide. Berger attempted to persuade respondent to drive himself to a crisis center, but respondent stated that he was physically unable to do so. Berger, therefore, called the State Police, who then picked respondent up on the Garden State Parkway and transported him to Burdette Tomlin Hospital in Cape May. He remained at Burdette Tomlin for several hours in a "quiet room," after which he was advised by the staff that he was being involuntarily committed to Ancora Psychiatric Hospital. Respondent was then transported to Ancora, where he remained for approximately twenty-four hours. Berger's wife, who was then the Director of Mental Health for the State of New Jersey, interceded in respondent's behalf. He was subsequently transferred to Burlington County Memorial Hospital, where he agreed to his commitment. Thereafter, he began a course of treatment with Dr. Kanther, which

was discontinued at some unidentified point in time. Apart from his evaluation by Dr. Robert Sadoff, his proposed medical expert, respondent apparently has not received any counseling or treatment since he stopped seeing Dr. Kanther. Dr. Sadoff, whose testimony will be discussed in more detail below, was of the opinion that respondent needed continued treatment and monitoring for a period of one to two years, in order to avoid a relapse into his "self-destructive" patterns.

With this background, the specific instances of alleged misconduct may be considered.

The Witmer-Fraser Matter (XIV-88-026E)

In or about July 1985, while still with the Tomar firm, respondent was retained by Sharon Witmer-Fraser ("grievant") to represent her for injuries sustained when she was a passenger in a car driven by Catherine Koski. At about the same time, respondent was also retained by Catherine Koski to represent her in an action against the driver of the other vehicle involved in the accident. Both grievant and Koski met with respondent at Koski's home. According to grievant, during that first meeting, respondent advised them that he would have to refer one of the matters to another attorney if a conflict of interest arose. Grievant was apparently satisfied with that somewhat limited explanation. No waivers or consents were executed by either grievant or Koski at any time. Respondent filed suit in behalf of Koski on April 7, 1986. He subsequently settled that suit in March 1987.

Within a few weeks of retaining respondent, grievant began to call him to determine the status of her matter. She testified that respondent initially told her that he had already filed suit in her behalf, but that the resolution of the matter would take some time. Grievant was not surprised by that statement because she was aware that there was the complication of a welfare lien on any settlement or judgment proceeds. After a few months, grievant began to telephone respondent on a fairly regular basis regarding the status of her case. In fact, she testified that she had begun to make a "pest" of herself at the insistence of both her husband and his aunt. Respondent always returned all of her telephone calls.

During their various telephone conversations, respondent informed grievant that the insurance company had made a settlement offer, which he had rejected. He further informed her that he had been in contact with the Gloucester County Board of Social Services regarding its position on, and the amount of, the lien. Grievant testified that, during one of their telephone conversations, respondent advised her that he had, indeed, settled her case and that he would contact the welfare board to satisfy the lien.

Grievant telephoned respondent approximately one month later because she had received a letter from the welfare board indicating that respondent still had not forwarded any sums in satisfaction of the lien. Respondent, at that point, advised her that "the check was in" and that she could pick it up and take it down to the welfare board. 1T58.[2] Grievant did, indeed, travel to

[2] 1T denotes the hearing transcript of April 1, 1993.

respondent's office (by that time, respondent had formed a partnership with Jeffrey Gams) and picked up a trust account check, dated January 30, 1988, in the amount of $5,465.20, payable to the Gloucester County Board of Social Services. She then delivered the check to that agency. Exhibit OAE-4.

Grievant testified that, on several other occasions before she received that check, respondent had given her additional sums as an "advancement" on her case. On one of those occasions, respondent explained that, if she signed a certain document, he would be able to deposit the settlement draft directly into the trust account. Grievant always believed that the sums she was receiving were being paid by the insurance company as advances on her settlement. Respondent had told her that insurance companies sometimes allowed such advances. In reality, all sums advanced to grievant (approximately $7,400) had come from respondent himself. Grievant testified that she learned this fact from respondent after she filed a grievance against him, at her husband's and his aunt's insistence.

At some point before she filed her grievance, grievant requested a copy of the complaint filed in her behalf. She testified that she made this request at her family members' urging because they believed that no complaint had ever been filed. Respondent, therefore, personally accompanied her to the courthouse and obtained a copy of the complaint. That complaint showed a filing date of July 10, 1987, three days before the applicable statute of limitations was to expire.

Further examination of the complaint disclosed grievant as the plaintiff and Catherine Koski, the driver of the vehicle in which she was a passenger and respondent's client as well, as the first-named defendant. Exhibit OAE-3. Furthermore, the complaint was ostensibly signed and filed by attorney Rosemary R. Burgo. Grievant, however, testified that she did not notice that fact until she returned home and showed the complaint to her husband and his aunt. She then surmised that respondent must have, at some point, referred her case to Burgo, as he had initially indicated might become necessary. She, therefore, telephoned Burgo in order to ascertain the status of her matter. Burgo, however, was ill and out of the office. Grievant, therefore, wrote to Burgo on March 2, 1988, requesting information about her case. Exhibit OAE-3.

At some point after her initial letter to Burgo, grievant did, indeed, speak with her. Burgo, however, denied any knowledge of grievant or of her matter. In total frustration, grievant filed a grievance against respondent. Thereafter, she retained the services of another attorney, who ultimately settled the case in her behalf. She has not, however, received any of those proceeds. (While it is not entirely clear from the record, it appears that respondent is asserting a claim against those proceeds, which remain in the trust account of grievant's new attorney).

Burgo also testified before the Special Master. Burgo recounted how she first became aware of the Witmer-Fraser matter, sometime in July 1987, after she received by mail a copy of the complaint, sent by respondent's office. She became angry at the

fact that someone had apparently signed her name to the complaint without her knowledge or authorization. She subsequently discussed this fact with respondent by telephone and asked him why her name appeared on the complaint. Respondent answered something to the effect of "didn't you sign it?" 1T14. Burgo denied to respondent that she had ever signed the complaint or had any knowledge of it. While Burgo could not recall their exact conversation, she remembered that respondent neither admitted nor denied having signed the complaint himself. He, nevertheless, assured Burgo that she needed not be concerned because he was handling the matter and it was essentially concluded.

When Burgo received grievant's March 2, 1988 letter addressed to her, she again spoke with respondent. He expressed some degree of surprise and told Burgo that he did not know why grievant was "bothering" her because the case was "finished." 1T15. Because she had not received an answer or any other documentation on the matter since receiving a copy of the complaint filed under her name, Burgo assumed that the matter had, indeed, been settled. Apparently, however, grievant continued to write to Burgo. When Burgo next attempted to reach respondent to again address the situation, she was advised to contact his attorney.

Prior to receiving a copy of the Witmer-Fraser complaint, respondent and Burgo had been working on a personal injury matter together (the Groh matter). Because respondent was more knowledgeable in the field of personal injury, Burgo had retained him on a consulting basis to prepare the file for litigation.

Respondent's office was in possession of some of Burgo's letterhead so that his paralegal could obtain all medical records without Burgo's involvement. Burgo, nevertheless, denied authorizing respondent's paralegal or anyone else to sign the complaint in her behalf. She did not recall whether she and respondent had any discussion regarding who might have signed her name, but she always assumed it to be someone in respondent's office. In that regard, she observed that the pre-printed pleading paper utilized was not the type she used.

Respondent testified that, while his office did, indeed, prepare the Witmer-Fraser complaint in Burgo's name, he had always assumed that she had signed it. He maintained that, before the preparation of the complaint, he advised Burgo that he needed to toll the statute of limitations in an automobile passenger case and that he wanted to file the complaint under her name, in the unlikely event that a conflict developed. In fact, as previously noted, respondent named his client, Koski, as a defendant in the Witmer-Fraser complaint, even though he testified that he perceived no liability on her part. That was so because the Koski vehicle was struck from behind while in the process of making a turn. He, nevertheless, named Koski as a defendant as a tactical matter, as he assumed her insurance carrier would immediately move for summary judgment in her behalf.

Respondent testified that, after the preparation of the complaint, he believed that it had been forwarded to Burgo's office for signature and filing. He denied signing her name to the

complaint or directing anyone in his office to do so; he had always assumed that Burgo herself had signed it. No records were produced during the hearing to indicate which office had actually transmitted the complaint to the court for filing.

With respect to his dealings with grievant, respondent denied that he ever represented to her that the insurance company had settled her case. Rather, respondent contended that grievant knew that he was advancing her all sums. He further maintained that he had advised her that, although a complaint had been filed, he had no intention of pursuing it because he had already advanced her more money than he could ever hope to obtain in settlement of her claim and because he had since rendered a substantial amount of legal services to her in several other unrelated matters, at no charge. Respondent testified that grievant agreed with this course, though he admitted that he did not advise her to seek independent advice from counsel. Hence, the amendment of the ethics complaint to include a violation of RPC 1.8(a). When asked, on cross-examination, why grievant had not admitted the existence of their agreement before the Special Master, respondent testified that grievant wanted to hide any settlement of the case from her husband's aunt, to whom she apparently owed money; she wanted her aunt to continue to believe that the matter was still pending. (It is not clear from the record whether grievant had admitted to her aunt that she had received funds from any source on her claim, although, by all accounts, it appears that grievant's aunt became substantially involved in the pursuit of grievant's claim.

Respondent maintained, however, that grievant did not disclose the receipt of any funds to her aunt). 4T121-122, 127-128. It was clear to respondent, therefore, that the complaint was ultimately filed only to appease grievant's husband's aunt. He admitted, nevertheless, that he did not diligently pursue grievant's case because of his illness — his depression. He volunteered, in retrospect and after the benefit of psychotherapy, that "it would be part of my illness not to work a file that would pay me money and instead pay money out and not work the file." 4T118-119.

* * *

The Special Master found that, while respondent may not have initially been involved in a conflict situation by virtue of his dual representation, a conflict certainly arose at some point before he filed suit in Witmer-Fraser's behalf. The Special Master, therefore, found respondent guilty of a violation of RPC 1.7. In addition, the Special Master found that respondent failed to diligently pursue his client's interests and that he grossly neglected her matter, both in violation of RPC 1.3 and RPC 1.1(a). She further found respondent guilty of a failure to keep his client informed, in violation of RPC 1.4(a) and (b). Finally, the Special Master found respondent guilty of violations of both RPC 8.4(c), for having misrepresented to his client that her matter had been settled, and RPC 3.3, for his conduct in connection with the filing of the complaint without Burgo's authorization. Specifically, the Special Master found inescapable the conclusion that, if respondent did not sign Burgo's name to the complaint, then he caused it to be

signed by someone else. In reaching that conclusion, the Special Master observed:

> I find that [Burgo] had absolutely no involvement in the preparation of this complaint, nor did she know anything about it until receiving a letter form Sharon Witmer-Fraser. Under the circumstances, it is unlikely that a check for a filing fee would have come from her office on a file that did not exist. In fact, Miss Burgo states in a letter dated November 10, 1988 (addressed to Mr. Poplar and contained in OAE-2 in evidence) that she never filed the complaint or paid monies for the filing of same. Mr. Whitehair was the one who was in the predicament, for the Statute of Limitations was about to run in a case where he had a clear conflict. So, although there is no evidence that he personally signed this complaint, I believe that he caused it to be signed or directed it to be signed; again, that conclusion seems inescapable.
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> [Report of Special Master at 22]

The Mervine Matter (XIV-88-026E)

On or about April 7, 1987, respondent deposited into his trust account a settlement draft in the amount of $25,000 in behalf of his client, Mervine. Of that sum, Mervine was entitled to receive $16,593.20, which respondent paid to her some two months later by check dated June 1, 1987. According to respondent, Mervine was out of the country at the time of the settlement — hence the delay in the distribution of proceeds.

Between April 13, 1987 and May 27, 1987, respondent drew a total of nine trust checks, payable to himself as fees, totalling $10,478. This amount exceeded by $2,145 his one-third contingency fee in the matter. The OAE alleged that respondent thereby invaded other client funds. As evidence of respondent's knowledge, the OAE auditor, Gerald Smith, noted that, while respondent's client ledger

card on Mervine showed a deposit of $29,400 on April 7, 1987, in fact, $4,400 of that amount was not deposited to the trust account until June 3 and June 8, 1987. Yet the ledger card, according to Smith, was designed to mislead one as to the amount actually deposited on April 7, 1987, in order to hide respondent's overdisbursement to himself.

Respondent, on the other hand, maintained that any overdisbursements to himself were the result of poor recordkeeping and not design. He stated that, once he went out on his own, he kept virtually none of the financial records required by R.1:21-6. The records that he ultimately provided to the OAE were, therefore, his reconstructions of client transactions. Respondent maintained that he and his attorney advised Smith of that fact during a meeting with him and then Deputy Ethics Counsel Robyn Hill. Smith could not recall whether respondent or his counsel had made that representation to him at any point. Respondent testified that, in order to perform his reconstruction, he consulted the individual client file as well as any little "stickee" notes he had affixed to his files, memorializing costs advanced and/or fees due. When he again reviewed his records with counsel, in preparation for the ethics hearing, he realized that he had misassigned a total of four checks to that ledger card, amounting to $2,778. He could not explain why he had done so initially, except to say that he did the best he could with the documentation he had and, further, that he was suffering from depression during the time of the disbursement to himself and during his reconstruction of his accounts.

On cross-examination, Smith admitted that four of the checks in question (numbers 241, 244, 245 and 246) did not reference the Mervine matter and that he had no way to determine to which client or case those checks related. The remaining five fee checks (numbers 236 through 240, inclusive), however, contained a Mervine reference.

* * *

The Special Master found that, although respondent had obviously overdisbursed fees to himself in the Mervine matter, she could not find clear and convincing evidence that he had done so knowingly, given the testimony concerning the misassignment of the four checks to this particular client ledger card.

The Joyce/Werner/McCullough Matters (XIV-88-026E)

The complaint charged that, on three occasions between November 3, 1986 and December 10, 1986, respondent withdrew legal fees from his trust account in connection with certain client matters at a time when no money was on deposit in the trust account to the credit of those clients. The complaint alleged that respondent invaded other client funds by virtue of his advance withdrawal of fees, in the total amount of $2,846.76. In each case, a settlement had apparently been reached, but the checks or drafts had not yet been deposited and/or received.

Specifically, in the McCullough and Joyce matters, on November 3, 1986, respondent drew a trust check (number 162)

payable to himself in the amount of $2.500, which represented partial fees attributable to both matters. The bank statement also shows that check as being paid on that date. However, it is undisputed that no deposit was made to the trust account in the McCullough matter until November 17, 1986. It is undisputed that no deposit was made to the trust account in the Joyce matter until November 10, 1986.

Finally, in the Werner matter, on December 12, 1986, respondent drew a trust check (number 183) payable to himself in the amount of $900. The bank statement also shows that check as being paid on that date. Once again, there is no question that no deposit was made to the trust account in that matter until December 17, 1986.

In its summation, the OAE urged a finding of knowing misappropriation in these three matters for several reasons. First, by all accounts, respondent was an intelligent, talented, experienced personal injury attorney by the time he left the Tomar firm in May 1986. Moreover, he had many years of experience working as a claims adjuster for Prudential, prior to attending law school. He testified that he had settled approximately 100 personal injury cases one year before leaving the Tomar firm and also testified about the procedures followed at that firm. Specifically, respondent acknowledged that, while at the Tomar firm, when settlement drafts arrived, he would ask his clients to come into the office to endorse the draft and would advise them that the funds would be disbursed when the bookkeeper notified him

that the check had cleared. In response to the question of whether it was his "understanding that the firm did not take its fee until after the carrier's draft cleared the banking process," respondent answered: "Well, that's what I assumed." 5T69.[3] He was further asked if he had ever disbursed the client's share of proceeds before the settlement draft cleared the banking process, to which he answered "no." In fact, respondent maintained, he had not disbursed monies to McCullough, Joyce or Werner until the settlement drafts had cleared. It is undisputed, however, that, in the McCullough and Joyce matters, respondent did not even have physical possession of the settlement draft when his fees were taken. (In the Werner matter, the settlement draft was dated before respondent actually withdrew his fees. There was, apparently, no way to determine when respondent actually received the draft. Nevertheless, it is unquestionable that respondent withdrew his fee on December 12, 1986 and that the settlement check was not deposited in his trust account until December 17, 1986).

In response to the allegations contained in this complaint, respondent testified that he had no intention to take funds that were not "earned" by him in any of these cases. (There is no allegation that respondent took more funds than he would have been entitled to take, had the monies been deposited in his account and had they cleared). Asked to explain how then the premature disbursement of fees had occurred, respondent replied:

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[3] 5T denotes the hearing transcript of June 17, 1993.

> After reviewing everything and looking at everything my recollection, Judge, is these were fees I earned and the cases were over. They were fees I was entitled to. And looking back in time, I was taking the fee because I believed that not only was I entitled to it, that it was available to me. Obviously I have reviewed Mr. Smith's analysis and that was an incorrect assumption. But the monies that were taken were fees, they were not clients [sic] monies and that was my best recollection looking back.
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> [4T62]

When the presenter attempted to elicit from respondent a specific basis for his belief that these funds were "available" to him, respondent could offer no further or more concrete explanation. Respondent claimed to have been suffering from the effects of depression during the period that he withdrew these advance fees.

The OAE maintained that respondent had knowingly and intentionally taken advance fees because he needed them — not because his judgment was clouded by his alleged depression. In support of that position, the OAE offered the testimony of Michael Greenberg, Esq., who was a member of the Philadelphia firm with which respondent was briefly associated between May 1986, when he left the Tomar firm for the first time, and early 1987, when he began the sole practice of law. Greenberg testified that respondent confided in him that he was having financial difficulties toward the beginning of his association with that firm, Harod & Snitow, in around May 1986. Moreover, after respondent ceased his association with that firm, he again confided in Greenberg that he continued to experience financial difficulties. The two apparently did not discuss the details of

those difficulties.

* * *

The Special Master found respondent guilty of a violation of RPC 1.15(a), by virtue of his admission that he maintained essentially none of the financial records required by R.1:21-6, while practicing on his own. Furthermore, with respect to the allegations of knowing misappropriation, the Special Master noted:

> After listening to the Respondent's testimony, which was lengthy, I do not believe that he had any specific intent to harm any particular clients and I believe that his mental condition, which will be discussed below, must have clouded his judgment in connection with the premature taking of these fees. Based on the record here, it is impossible to believe that this savvy personal injury attorney did not know that he could not take fees before any settlement check was even deposited.

[Report of Special Master at 14]

Nevertheless, the Special Master declined to characterize respondent's conduct as knowing misappropriation, leaving the resolution of that issue to the Board and the Court.

The Bechtold Matter (IV-90-087E)

On or about November 1986, respondent was retained by Joseph and Rhoda Bechtold to represent them and their minor children in a claim for personal injuries and property damage. On October 10, 1986, at approximately 4:30 a.m., a car entered the Bechtold residence, going through the living room and kitchen. In addition to property damage, Mr. Bechtold suffered neck injuries. The other family members suffered trauma. Rhoda Bechtold (grievant) testified at the hearing on April 2, 1993. She indicated that she

contacted respondent on numerous occasions regarding the progress of their case and that he assured her that "everything was going fine." 2T6-7.[4] According to grievant, respondent advised her that a lawsuit had been filed and that the case would be settled by Christmas of 1988. He also told her that the courts "wanted to clean house" before the end of the year and that, if the matter was not settled in December, the court would probably get to it in January 1989. She again contacted respondent in February 1989. At that time he advised her that "they hadn't quite gotten to it, it was on the top of the list . . . ." 2T9.

Grievant testified that, thereafter, she continued to contact respondent about the status of her case. In the Spring of 1989, respondent informed her that the case had been settled. He subsequently brought releases to her home in June 1989, but advised her that they had to be re-typed, because they had been improperly drafted, and that he would bring them back. Respondent returned in July with releases for grievant's and her husband's execution. Those releases were, in fact, signed by both. At that time, respondent advised grievant and her husband that they would receive a check in approximately five days. They never received any such check. Although grievant continued to call respondent about their money, she never received any explanation for the delay.

Thereafter, in August 1989, grievant received a telephone call from Kaplan, of the Tomar firm. Kaplan asked her to come in to discuss her case. At that time, she learned not only that the case

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[4] 2T denotes the hearing transcript of April 2, 1993.

had not been settled, but also that respondent had not filed suit until about October 7, 1988 — three days before the expiration of the statute of limitations on the personal injury claims, at least for the adults. In addition, Kaplan informed them that virtually no work had been done on their file until that August 1989 meeting. After the Bechtolds insisted on speaking with respondent, he joined them at some point during that meeting. Respondent admitted his misrepresentations, for which he apologized. He explained that the Bechtold file had been lost and that he had not told them so because he did not want to "hurt" them. 2T13.

It should be noted that, during their telephone conversations, the Bechtolds had made respondent well aware of the fact that, prior to incurring substantial debts of approximately $30,000, they relied on his representations about a settlement.

Respondent admitted, both in his answer to the complaint and in his testimony, that he misrepresented the status of the case to the Bechtolds. He could not, however, recall the details of his misrepresentations. He denied any contemporaneous knowledge that it was wrong for him to do so. That was so, he testified, because he believed that his judgment and conduct had been affected by his depression. He could offer no other explanation for not having settled the case because, contrary to what he apparently told the Bechtolds during the August 1989 meeting, all the necessary work had been completed and he could have easily settled the case with a single phone call. That was so because he viewed it as a clear liability case with damages exceeding the tortfeasor's $30,000

policy limit. Furthermore, since he could have received a "bonus" from the firm if he had settled the case, it would have been to his economic advantage to do so. Respondent could only conclude, therefore, that his failure to settle the case had been part of his pattern of self-destructive conduct caused by his illness. Although he admitted that he handled the vast majority of his heavy caseload satisfactorily during that same period, he maintained that he learned in psychotherapy that he chose to mishandle the Bechtold matter as a cry for help and that the Bechtolds were the type of clients who would complain to respondent's superior, if things did not progress well. Consequently, his problem would be brought out in the open. As emphasized by the OAE, however, it was not the Bechtolds who brought respondent's misconduct to the attention of respondent's superiors. It was respondent himself who went to Kaplan before the August 1989 meeting to confess his wrongdoing and to seek Kaplan's help and guidance.

After the Bechtolds retained other counsel to pursue the action, the matter was settled for the full policy limit.

* * *

The Special Master found respondent guilty of gross neglect, in violation of RPC 1.1(a). In addition, the Special Master found that respondent had violated both RPC 1.3 and RPC 1.4(a), for his failure to diligently pursue his clients' interest and for having misrepresented to them the status of their matter. Although the complaint charged misrepresentation on respondent's part, it did not specifically charge him with a violation of RPC 8.4(c).

Instead, it charged him with a violation of RPC 1.4(a), for his failure to tell his clients the truth about their case.

The Baten Matter (XIV-92-146E)

The complaint alleged that, in or about November 1986, respondent undertook the representation of Edgar Baten (grievant) to recover damages for a fire loss to rental property that grievant owned in Florence, New Jersey. The fire occurred on or about October 20, 1986. Grievant testified that, when he first met with respondent, respondent advised him that he had previously met with the tenant of the property, who also wanted to file a fire loss claim with his carrier and, further, that he could not represent both grievant and the tenant due to a conflict of interest. (Apparently, the fire originated as a result of the alleged negligence of that tenant or his relative.) According to grievant, respondent told him, however, that he had refused to handle the tenant's claim. Grievant also testified that, at their initial meeting, he and respondent discussed the economics of his claim, whereupon respondent agreed to represent him. Grievant added that respondent informed him that a written fee agreement was not required, as respondent had handled prior matters in grievant's behalf.

Thereafter, according to grievant, he and respondent met on five or six occasions, at various offices. Grievant maintained that respondent had advised him that he had, indeed, filed suit, but that the resolution of the matter would take several years

because the courts were overcrowded and his was a minor case. Subsequently, grievant attempted to contact respondent on several occasions at various times, but was never able to get in touch with him. When he began his own investigation about the progress of his case, he learned from the court clerk's office that the complaint had not been filed. Since his continued attempts to contact respondent were unsuccessful, grievant began to seek other counsel. After meeting with several attorneys, all of whom refused his case, ostensibly for economic reasons, grievant retained other counsel within the applicable statute of limitations period.

Respondent denied having ever agreed to represent grievant in this matter. He contended that he had informed grievant that he did not wish to pursue the matter in his behalf because it would not be profitable for him to do so. Respondent testified that he initially met with both grievant and the tenant and discussed with them how they should process their respective claims through the insurance companies. However, respondent maintained, while he may have had one or two subsequent conversations with grievant regarding grievant's pursuit of his own matter with his insurance carrier, he never "signed him up." 5T1[5]

At the ethics hearing, grievant produced his entire personal file on his fire claim. That file contained no correspondence from respondent, aside from a handwritten note in response to a letter from grievant, requesting information on the status of the matter. That handwritten note stated merely that respondent had been out on

[5] 5T denotes the hearing transcript of June 17, 1993.

disability as a result of severe depression and that respondent's attorney would contact him.

Given the dispute between respondent and grievant about whether respondent had actually agreed to represent grievant in this matter, it should be noted that grievant testified that he suffered a brain contusion either before or after 1986, which, as of the date of the hearing, continued to affect his memory. In fact, as of the ethics hearing date, grievant was still receiving medical treatment for that condition.

* * *

The Special Master found that respondent had agreed to represent grievant in this matter, that he had misrepresented the status of the matter to the grievant and had neglected the case, all in violation of RPC 1.1(a), RPC 1.3, RPC 1.4(a) and (b) and RPC 8.4(c). The Special Master based her findings upon her assessment of the witnesses' credibility:

> Mr. Baten struck me in his testimony as being very clear about these matters. He did not seem to be confused about the difference between pursuing the claim informally through the insurance company versus the filing of a formal suit in the Superior Court. Moreover, had he not believed that Mr. Whitehair was pursuing this matter on his behalf, he would not have made the substantial efforts that he made to locate Mr. Whitehair and to make inquiries of the Superior Court.
>
> [Report of Special Master at 10]

Mental Disability Defense

Respondent maintained that any misconduct on his part was the result of severe depression and not design or intent. To support

his claim, respondent offered the expert testimony of Dr. Robert Sadoff, his examining psychiatrist. In addition, several medical reports and records regarding respondent's disability defense were admitted into evidence.

After examining respondent, reviewing all records and referring respondent for psychological testing, Dr. Sadoff diagnosed respondent as suffering from chronic depression, which predated his treatment at Friends Hospital in 1989. That depression, in his opinion, became more severe after respondent left the Tomar firm. He described respondent's conduct as "self-destructive" and opined that his personality did not allow him to actually ask for help. He, therefore, engaged in "passive-aggressive" behavior designed to call attention to his need for help. 3T32-34.[6] According to Dr. Sadoff, throughout this time period, respondent had an "intellectual cognitive awareness of what he was doing at all times." 3T43. In Dr. Sadoff's opinion, respondent knew that what he was doing was wrong and that he had the ability to conform his conduct to the standards and requirements of the law, if he chose to do so. Dr. Sadoff added that respondent's ability to conform his conduct was, however, affected by his depression.

Dr. Sadoff made it clear, during cross-examination, that at no time did he consider respondent to be mentally incompetent or out of touch with reality. In his view, respondent had the ability to understand that taking money out of the trust account prematurely

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[6] 3T denotes the hearing transcript of May 14, 1993.

was unethical. Similarly, according to Dr. Sadoff, respondent knew that it was wrong to mislead the Bechtolds, as evidenced by the fact that respondent himself brought the matter to Kaplan's attention.

Dr. Sadoff also admitted, on cross-examination, that respondent's guilt over his misconduct in the Bechtold matter, as well as guilt over an extra-marital affair he apparently began at about the same time, probably aggravated respondent's depression; the same was true of respondent's guilty knowledge over his premature withdrawal of fees. Dr. Sadoff denied, however, that the guilt over the misconduct had been the cause for respondent's depression, as opposed to the depression being the cause for respondent's misconduct. Although Dr. Sadoff admitted that this might be possible, he did not believe it to be true in this case.

Finally, Dr. Sadoff opined that, based on his evaluation of respondent and his review of the other medical reports, respondent's level of depressive disorder could be treated by medication. He suggested that respondent work under minimal stress and agreed that monitoring would be appropriate for a period of at least one to two years:

> The therapy would have to go on in my opinion until he is reasonably on his own, developed his own level of practice that is comfortable for him and he is not making errors and records are up to date. And when that is done and he is comfortable and has his life stabilize with maybe a new major if there's going to be one, does his work, these are the areas of most importance. The relationship with others and occupation, then I think the therapy can taper off.

[3T74-75]

CONCLUSION AND RECOMMENDATION

Following a de novo review of the record, the Board is satisfied that the Special Master's conclusion that respondent acted unethically is fully supported by clear and convincing evidence.

I. The Witmer-Fraser Matter

Like the Special Master, the Board finds that respondent either signed Burgo's name to the complaint or directed someone to do so. The Board's finding is grounded on several factors. First, respondent was faced with the expiration of the statute of limitations in a matter where he had a conflict of interest. He had little choice but to file the complaint quickly. It is true that he could have filed the complaint in his own name simply to meet the statute deadline. But to do so clearly would have subjected him to justified criticism by any number of parties, including his client, Koski. In addition, respondent admitted that he at least directed the preparation of the complaint in Burgo's name. Finally, Burgo herself testified that respondent never discussed the matter with her until after the signed complaint had already been filed. As noted by the Special Master, Burgo clearly had no motive to deny the authenticity of her signature on the complaint, had she signed it, or to deny that she had authorized anyone else to do so in her behalf, had she in fact done so. The Board also agrees with the Special Master's conclusion that

respondent misrepresented to his client that her case had been settled and that the funds she was receiving were advancements against a settlement. Respondent's conduct in both instances violated RPC 8.4(c).

The Board is unable to agree, however, with the Special Master's finding that respondent violated RPC 1.4. Witmer-Fraser testified that respondent always answered her telephone calls and complied with other requests for information. Accordingly, the Board recommends that this charge be dismissed.

II. The Mervine Matter

For the same reasons set forth in the Special Master's report, the Board finds that the evidence does not clearly and convincingly support a finding of knowing misappropriation in this matter. Respondent's conduct, however, violated RPC 1.15 by virtue of his admitted failure to keep the attorney records required by R.1:21-6.

III. The Joyce/Werner/McCullough Matters

The Board concludes that the proofs establish, to a clear and convincing standard, that respondent knowingly misappropriated client funds in these matters. The Board rejects respondent's contention that his actions did not amount to knowing misappropriation because, at the time that he withdrew the advance fees from his trust account, he sincerely believed that he had earned them and that he was entitled to them. Respondent did not maintain that he mistakenly believed that he had already received

and deposited in his trust account the client funds corresponding to those withdrawals. (Indeed, such a position would have been untenable, given the documentation clearly showing the receipt of the funds after the withdrawal of the fees). Nor did respondent claim that he had other fees in his trust account against which to draw. He stated, instead, without any concrete basis or explanation, that he believed that he was entitled to the fees at that time and that he had earned them. That is tantamount to saying that he did not know that he could not take fees in advance of the receipt of the equivalent client funds. Not only is such a position totally unsupported by the evidence (respondent has extensive background and experience in personal injury litigation) but it is also not a defense to this sort of misconduct. All individuals — especially attorneys — are presumed to be familiar with the law. In short, ignorance of the law does not excuse misconduct. Nor does it negate a state of mind.

The Board was unable to find that respondent's mental difficulties were of such proportions so as to cause substantial cognitive impairment. See In re Goldberg, 109 N.J. 163 (1988) and In re Jacob, 95 N.J. 132 (1984). Respondent's expert, Dr. Sadoff, testified that, at all relevant times, respondent possessed the cognitive ability to appreciate the nature of his conduct and to conform his conduct to the requirements of the law, if he so desired. At no time did Dr. Sadoff consider respondent to be mentally incompetent. Furthermore, in Dr. Sadoff's opinion, respondent had the ability to understand that his premature

withdrawal of fees from the trust account was unethical. The evidence does not support, thus, a finding of significant diminished capacity to a degree sufficient to overcome respondent's will to conform to the requirements of the law. This is especially so when one considers the significant control respondent exercised over the majority of his cases and his professional life, in general. Specifically, as noted by Dr. Sadoff, had respondent been severely impaired at any particular point, he would not have been able to function or he would have had great difficulty in doing so. The fact that respondent was able to venture out on his own within the profession for a period of at least two years appears to be inconsistent with severe impairment or, at least, with impairment sufficient to excuse his misconduct.

The Board finds that respondent's conduct was knowing, volitional and purposeful and violative of RPC 1.15.

IV. The Bechtold Matter

The Board agrees with the Special Master's findings that respondent's conduct in the Bechtold matter was unethical. Indeed, respondent admitted that he misrepresented the status of their case to the Bechtolds. There is nothing in the record, other than respondent's own self-serving testimony, to suggest that, because of his illness, respondent did not know that he was making a misrepresentation to his clients at the time he told them their case had been settled. Indeed, even the testimony of respondent's

own expert, Dr. Sadoff, did not support respondent's position. In addition, when the Bechtolds confronted respondent at the August 1989 meeting, he did not tell them he was suffering from depression. Rather, he continued to mislead them by telling them that their file had been lost and that he had not advised them truthfully because he did not want to hurt them. Respondent's conduct in this regard violated RPC 8.4(c).

V. The Baten Matter

The Board is unable to agree with the Special Master's finding of unethical conduct in this matter. In the Board's view, the proofs fall short of the requisite standard of clear and convincing. There is no documentation, such as a written fee agreement, or any other evidence to support the conclusion that respondent agreed to represent Baten in his fire loss claim. Inasmuch as Baten himself testified that he continued to suffer from some memory loss due to a brain contusion for which he was still being treated, to rest a finding of unethical conduct solely upon that witness' memory of the events is both inappropriate and unfair. The Board recommends that the allegations in connection with the Baten matter be dismissed.

* * *

In light of the Board's finding that respondent was guilty of knowing misappropriation in the Joyce/Werner/McCullough matters, the only appropriate sanction is disbarment. In re Houston, 130

N.J. 382 (1992); In re Warhaftig, 106 N.J. 529 (1987); In re Wilson, 81 N.J. 451 (1979). The Board unanimously so recommends. One member disqualified himself. Three members did not participate.

The Board further recommends that respondent be required to reimburse the Ethics Financial Committee for administrative costs.

Dated: 10/4/94 By: Elizabeth L. Buff
Elizabeth L. Buff
Vice-Chair
Disciplinary Review Board