Book

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket Nos. DRB 96-258 and
DRB 96-265

IN THE MATTER OF	:
JACK N. FROST,	:
AN ATTORNEY AT LAW	:

Decision

Argued: September 18, 1996

Decided: March 10, 1997

Andrew Baron appeared on behalf of the District XII Ethics Committee.

Kirk D. Rhodes appeared on behalf of respondent.

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

This matter was before the Board based on a recommendation for discipline filed by the District XII Ethics Committee (DEC). In DRB 96-265, respondent was charged in three separate complaints with the following violations: Docket No. XII-93-55E - RPC 1.1(a)(gross neglect), RPC 1.3 (lack of diligence), RPC 1.4(a) (failure to communicate); Docket No. XII-94-10E - RPC 1.8(a)(conflict of interest), RPC 3.2 (failure to expedite litigation) and RPC 3.4 (failure to act with fairness to opposing party and counsel); and Docket No. XII-94-32E - RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence) and RPC 1.4(a) (failure to

communicate). Docket No. XII-94-32E was dismissed because of the grievant's lack of cooperation.

In DRB 96-258, the record was certified to the Board as a default, pursuant to R. 1:20-4(f)(1). The four-count complaint charged respondent with violations of RPC 1.5(a)(1), (3), (6), (7) and (8) (reasonableness of fees), RPC 3.1 (meritorious claim), RPC 3.3(a)(1) and (4) (candor towards a tribunal), RPC 5.5(b) (assisting in unauthorized practice of law) and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) (count one); RPC 3.1, RPC 3.3 (a) and (b), RPC 3.4 (fairness to opposing party and counsel) and RPC 8.4(c) and (d) (conduct prejudicial to the administration of justice) (count two); RPC 1.5(a) (1), (3), (6), (7) and (8), RPC 3.1, RPC 3.3(a)(1), (2), (3), (4) and (5), RPC 5.5 (b) and RPC 8.4 (c) and (d) (count three); and RPC 1.7(a)(1), (b)(1) and (c)(2) (conflict of interest), RPC 3.1, RPC 3.3(a)(1), (2), (4) and (5), RPC 4.1 (a)(1) and (2) (truthfulness in statements to others) and RPC 8.4 (c) and (d) (count four).

Respondent was admitted to the New Jersey bar in 1971. He maintains an office in Plainfield, New Jersey.

Respondent received a private reprimand in 1992 for improperly endorsing his client's name on a settlement check. In 1988, respondent received two private reprimands: one for representing his client's co-defendant in a different criminal matter and the other for improperly making disbursements of trust monies without first securing his client's written consent.

I. DRB 96-265

A. The Seale Matter - Docket No. XII-93-55E

The hearing panel report set forth at length the problems encountered in concluding the hearings in this case. The initial complaint in the Seale matter was transmitted to the hearing panel in April 1994. Because of scheduling conflicts, among other problems, the hearings began in July 1995 and were not concluded until March 1996.

The facts are as follows:

In January 1989, Howard Seale retained respondent to represent him in two matters, a commercial real estate transaction and a personal injury case. The ethics grievance arose out of the real estate transaction.

When Seale retained respondent, he was in the process of purchasing a gas station where he had been employed for thirty years. During the initial stages of that transaction, Seale had been represented by another attorney, Ralph Pocaro, Esq. Pocaro was involved in negotiations in Seale's behalf and drafted several contracts for sale. Because of problems and significant delays in finalizing the contract of sale, the seller, Roger Brown, received other higher offers for the station. Brown was, therefore, able to exact from Seale $90,000 more than the original price.

Prior to closing, Seale terminated Pocaro's services. At the time, Seale's son-in-law was working as a law clerk for respondent.

Seale, therefore, retained respondent to finalize the transaction. Although respondent attempted to renegotiate the sale price for the gas station, he was unable to obtain a more favorable result for Seale. The closing went through in August 1989. Respondent thereafter filed suit against Brown for breach of contract and against Pocaro for legal malpractice.

According to Seale, respondent did not explain to him the burden of proof in a legal malpractice action. Seale testified that respondent had told him only that he had a very good case, that Pocaro had neglected his duty and that Seale's best course of action was to file suit against Pocaro. Respondent, in turn, testified that he believed that the claim against Brown was stronger than the legal malpractice claim against Pocaro.

Seale explained that he and respondent had discussed early on the need for an expert witness for the legal malpractice aspect of his suit; respondent did not mention, at that time, that a fee would be required for the expert. Seale assumed that respondent had hired the expert shortly thereafter. According to Seale, respondent did not advise him that, without expert testimony, legal malpractice could not be proved. In fact, Seale claimed that respondent told him at some point that expert testimony was not necessary because of the admissions made by Pocaro during his depositions. Respondent denied making such a statement to Seale.

Seale understood that Brown's attorney, Gerald Eak, Esq., needed to be deposed and that Eak's testimony was critical to the case against Pocaro. Eak had negotiated with Pocaro for the sale

of the gas station and was, therefore, familiar with his conduct in the transaction. It was also Seale's belief that, before an expert report could be obtained, Eak had to be deposed. Initially, Eak asserted an attorney/client privilege to avoid depositions. After the case against Brown was dismissed, in late 1991 or early 1992, Eak apparently agreed to be deposed. Subsequently, however, each time respondent scheduled depositions, they were adjourned because of conflicts with Eak's schedule. Seale became increasingly concerned about the numerous adjournments. Despite all of the adjournments, respondent failed to obtain a court order to compel Eak's deposition. As a result, Eak was never deposed.

Prior to the dismissal of the case against Brown, on June 11, 1990 the court had entered an order (Exhibit C-7) compelling Seale to produce any and all expert reports within ninety days. Seale claimed that he was not aware of the court's order until he obtained his file from respondent in 1993. Respondent testified, however, that he had orally agreed with opposing counsel that he did not need to get an expert report until ninety days after Pocaro's depositions were concluded. Pocaro was deposed on January 17, 1991. Based on this alleged agreement, the expert's report would have been due in April 1991.

On December 18, 1992, the case against Pocaro was also dismissed for failure to supply an expert's report. Seale did not learn of the dismissal until sometime between February and May 1993. On July 9, 1992, more than two years after the court order, respondent filed a certification in connection with a motion to

vacate the prior order and to allow Seale to produce an expert report. In that certification, respondent stated as follows:

> 2. Back in May of 1990, when defendant, Pocaro, initially made his motion to compel an experts [sic] report, the discovery in this matter was incomplete at that time. There was a number of depositions outstanding and answers to interrogatories that were outstanding at that time and my opposition to that motion was based upon the fact that there were insufficient materials obtained in discovery to send to an expert for a report.
>
> 3. On June 11,1990, the Court granted the defendant's motion to compel plaintiffs to produce an experts [sic] report within ninety (90) days of that date. (See attached Exhibit A).
>
> 4. Subsequent to that period of time a number of depositions in this matter were taken and I had assumed that a subsequent experts [sic] report was obtained. Exhibit B attached, is a letter dated November 6, 1991, to Steven Caputo, Esq., with regard to forwarding him the various materials in this matter so that an experts [sic] report could be furnished to defense counsel. As can be seen from the next to the last sentence of the letter, I was under the impression that there was no time limit set regarding the supplying of the experts [sic] report. Obviously from Exhibit B, it is clear that I had honestly forgotten about the previously entered Order of the Court (Exhibit A) which required that an experts [sic] report be furnished within ninety (90) days of June 11, 1990. (Emphasis supplied).
>
> [Exhibit C-6]

As can be seen from the above certification, respondent's statement that he had forgotten about the court order contradicted his testimony at the DEC hearing that he had an agreement with opposing counsel to furnish an expert's report within ninety days after Pocaro's deposition.

It was not until November 1991 that respondent finally contacted a real estate expert, Steven Caputo, Esq. At that time,

respondent forwarded several documents to Caputo for his review and requested that Caputo inform him whether he could be of assistance in the matter. It appears from the record that respondent had no further contact with Caputo until June 30, 1992, when he forwarded additional documents for Caputo's review. Exhibit R-3. Respondent enclosed, among other items, a copy of the plaintiff's response to "Defendant Pocaro's Motion for summary judgment." The record does not indicate when the summary judgment motion was filed. Respondent noted in his letter that he needed Caputo's report "as soon as possible." Prior thereto, respondent's associate, Frank DeVito, had contacted Seale and requested that he give the firm $2,500 for Caputo's fee. Seale insisted on a written explanation for the fee before forwarding more money to respondent. In reply, by letter dated June 19, 1992, respondent notified Seale that the firm "wish[ed] to hire a legal expert for his report on this case." Moreover, the letter noted that everyone in the case had been deposed, except Eak, and that he was trying to schedule Eak's deposition for July 1992. Seale forwarded him a check for $2,500 on June 25, 1992. Exhibit C-10. Seale expected that, soon after submitting payment for the expert, Eak would be deposed. After several months elapsed without hearing from respondent, Seale became nervous and wondered why the case had not yet settled. He had not heard anything about either Eak's deposition, or the expert or the status of the expert's report.

Finally, after Seale made numerous unanswered telephone calls, DeVito returned his calls in or about February 1993 to inform him

that the case had been dismissed. (The case was dismissed with prejudice in December 1992. Exhibit C-21.) According to Seale, DeVito sounded "uptight" when he called. DeVito informed Seale that the firm intended to file an appeal. Seale, however, never received a copy of any documents relating to the appeal or the order dismissing the appeal. Similarly, he never received an expert's report. Seale asked for, but never received, an accounting of how his $2,500 had been spent and, as of the date of the DEC hearing, the $2,500 expert's fee had not been returned to him. Seale complained that respondent "lied to me. He misled me. He took my money." 2T19[1]

* * *

For his part, respondent claimed that he believed that the breach-of-contract cause of action was "stronger" than the malpractice claim. He was hoping to prove that the series of letters that had been exchanged between the parties created a contract. Respondent explained that he delayed obtaining an expert witness because the malpractice claim did not become the primary focus of the case until the claims against the seller were dismissed. However, the claims against Brown were dismissed in June 1990 and respondent did not even contact Caputo until November 1991. In fact, the balance of the information was not sent to Caputo until June 1992.

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[1] 2T denotes the transcript of the August 4, 1994 DEC hearing.

After receiving the information from respondent, Caputo opined that there was no malpractice involved. Respondent claimed that he did not have Caputo's opinion memorialized because there would have been a charge to Seale.

Seale testified that respondent never informed him that they would have trouble obtaining an expert. Respondent confirmed that he never talked to Seale about Caputo's belief that there was no case against Pocaro. Seale believed that there were other expert witnesses that respondent could have hired in Caputo's place.

* * *

Steven Caputo testified that he believed that Pocaro had not breached the applicable standard of care:

> I did remember having the discussion with regard to Novations and with regard to the effect of the contract, because that was one of the key stumbling blocks I had when I read through this. Not only couldn't I figure out how you would try and get Pocaro, I really couldn't figure out how the lawsuit against Brown was going to fly because, to me, that was slightly incrementally more absurd than the one against Pocaro.
>
> [3T18[2]]

Caputo further explained that he was not the type of attorney to submit an expert's report where there was no malpractice just to obtain a fee.

Until the case against Brown was dismissed, respondent's office, through either respondent, Seale's son-in-law, or other attorneys, kept Seale reasonably informed about the progress of his

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[2] 3T denotes the transcript of the September 18, 1995 DEC hearing.

case. Thereafter, Seale received little information about the status of the suit against Pocaro.

On August 11, 1992, the court denied Seale's motion to vacate the order precluding the submission of an expert's report. Exhibit C-17. Respondent filed a motion for leave to file an interlocutory appeal on August 28, 1992, which was denied on October 1, 1992. Thereafter, Pocaro's motion for summary judgment was granted on December 18, 1992. Exhibit C-20. Seale was not kept apprised of the actions taken in his behalf and was not informed that the case against Pocaro had been dismissed until early 1993.

It is worthy of note that respondent had instructed Seale to make the expert fee payable to the firm's trust account. Respondent, however, deposited the check into his business account. Seale's money was thereafter used to pay Caputo for other cases Caputo was handling for respondent. Respondent explained that later, in November 1992, he transferred $2,500 from his business account to his trust account to the credit of Seale. According to respondent, Seale had not been reimbursed because Seale sued him for malpractice and respondent's malpractice insurer advised him to retain the $2,500, pending the outcome of the suit.

As of the date of the DEC hearing, Seale's malpractice case against respondent had not yet been resolved.

B. The Mayes Matter - Docket No. XII-94-10E

In 1990, respondent represented Arthur Mayes in connection with a divorce action and a personal injury claim filed by Mr. Mayes' wife, Robin Mayes. Mrs. Mayes was represented by Jane Castner, Esq.

On March 6, 1990, at a hearing before the Honorable John Pisansky, the outstanding issues between the parties were resolved and placed on the record. Mr. Mayes agreed to convey his interest in the marital home to his wife, subject only to the then existing balance of a first mortgage. At that time, there was also a second mortgage held by respondent to secure payment of his fee. At the DEC hearing, the following exchanged occurred about the second mortgage:

> MS. KASTNER[sic]: [O]ne other thing comes to mind with regard to Mr. Mayes' transfer of the real estate to Mrs. Mayes. We're assuming that the only lean [sic] that that real estate is going to be subject to is the first mortgage that we're aware of.
>
> MR. FROST: I understand, Judge, that my office has a mortgage on the house.
>
> THE COURT: Well, not too much you can do with that mortgage, right?
>
> MR. FROST: I would have to make another deal, obviously to my client.
>
> THE COURT: All right. All right. Because she didn't sign the mortgage, did she?
>
> MR. FROST: Well, it doesn't really matter whether she signs it, Judge, because he did own half of the house. If he died, then my mortgage would be worthless because it would go under the rights of joint survivorship to her but with him, I --
>
> THE COURT: Well, the agreement here is that your

[sic] agreeing that your mortgage is now worthless.

MR. FROST: --I think because of the conflict of interest situation, that I probably have no choice in this particular situation.

THE COURT: Yes, you're seeing it just the way I see it. You don't have any choice.

MR. FROST: I don't really think I have a choice, otherwise, I'm in a conflict of interest situation, so I will sign the papers and void the mortgage rights. (Emphasis supplied.)

[Exhibit P-2]

On March 23, 1990, an order was entered (Exhibit CC-1) directing Mr. Mayes to "sign a Deed and an Affidavit of Title signing over any and all interest" in the marital property "free and clear of any mortgages other than the first mortgage." The order also required Mr. Mayes to submit, within the same thirty days, "releases from any and all mortgages or liens given by him against the property." Thereafter, Ms. Castner prepared the deed transferring the property and an affidavit of title indicating that there were no liens on the property. Mr. Mayes executed the affidavit of title (Exhibit P-4) as well as an affidavit of consideration stating as follows:

> The Grantor promises that the Grantor has done no act to encumber the property. . . . The promise means that the Grantor has not allowed anyone else to obtain any legal rights which affect the property (such as by making a mortgage or allowing a judgment to be entered against the Grantor).
>
> [Exhibit P-1]

Respondent acknowledged Mr. Mayes' signature.

It was not until 1993, when Mrs. Mayes attempted to refinance the mortgage loan that she discovered that respondent had not discharged his mortgage, as he had represented to the court that he

would do. Mrs. Mayes contacted Ms. Castner, who called and wrote to respondent requesting that he execute a discharge of the mortgage. By letter dated November 2, 1993, respondent informed Ms. Castner that he would discharge the mortgage only after his fee had been paid in full. Exhibit P-6. Thereafter, Ms. Castner made a motion to compel Arthur Mayes to obtain and deliver an executed discharge of mortgage. Exhibit P-7.

On the return date of the motion, December 21, 1993, respondent asserted that, pursuant to Freda v. Commercial Trust Co., 118 N.J. 36 (1990), he was not required to discharge the mortgage. Respondent claimed that he was unaware of the Freda case at the first hearing, when he had agreed to discharge his lien.

While the court determined that it had no jurisdiction to order respondent to discharge his mortgage, it held Mr. Mayes in violation of litigant's rights and awarded counsel fees to Mrs. Mayes.

Subsequent to the hearing, respondent agreed to discharge his mortgage if Ms. Castner consented to waiving counsel fees. Ms. Castner agreed and the matter was resolved.

Respondent alleged that he may have contacted Castner, after learning about the Freda case, to inform her that he was not required to discharge the mortgage. However, Castner categorically denied that respondent informed her, before his letter of November 1993, that he was changing his position.

* * *

In the Seale matter, the DEC found Seale's testimony to be truthful. The DEC did not find clear and convincing evidence of gross negligence or lack of diligence on respondent's part. The DEC found that the "ultimate dismissal of the final aspects of the complaint appeared to rest on the inability to support the legal theories upon which they were premised and not upon any delay by respondent." The DEC also concluded that, while other attorneys might have attempted to secure a favorable expert's report sooner, respondent's failure to do so did not constitute gross negligence.

The DEC also found that Seale was kept reasonably informed about the status of his case until the case against Brown was dismissed. The DEC noted that thereafter Seale was not kept reasonably informed about the "expert issue and the danger that the case would be dismissed." The DEC, thus, found a violation of RPC 1.4(a).

The DEC voiced its concern about respondent's handling of the $2,500 witness fee paid by Seale. As noted earlier, although the check was made payable to respondent's trust account, it was deposited into respondent's business account. Thereafter, respondent forwarded a $2,500 check to Caputo to cover matters unrelated to Seale. The check bore no indication of the matter for which it was issued. Thereafter, on November 30, 1992, respondent transferred $2,500 from his business account to his trust account to Seale's credit. The DEC declined to make a finding on whether respondent's conduct in this regard violated RPC 1.15, reasoning that the complaint had not charged respondent with this violation.

The DEC concluded that the issue should be investigated by the Office of Attorney Ethics (OAE). In the Mayes matter, the DEC found that respondent had a mortgage lien on Mr. Mayes' interest in the matrimonial residence to secure payment of his fees and that the settlement between the Mayeses would not have occurred if respondent had not agreed to discharge his mortgage. The DEC found that the "continued existence of the mortgage was a real and substantial conflict of interest given the factual setting." The DEC also found that respondent expressly represented to the court that the mortgage would be discharged and then unilaterally — and without disclosure to the court or counsel — did not go through with his assurance to the court. The DEC found violations of RPC 1.8 and RPC 3.4. The DEC concluded that RPC 3.2 was not applicable.

The DEC recommended an admonition in the Seale matter and a suspension in the Mayes matter.

II - DRB 96-258 (Default)

The complaint in this matter was forwarded to respondent on April 11, 1996. On May 2, 1996, Brian D. Gillet, Esq., Deputy Ethics Counsel, OAE, spoke with respondent's secretary, who confirmed that the complaint had been received in respondent's office by both certified and regular mail (the green return receipt card had not been received by the OAE as of the date of Mr. Gillet's certification). By letter dated May 28, 1996, Mr. Gillet informed respondent that he had five days to file an answer.

Respondent did not file an answer. Thereafter, on June 11, 1996, Mr. Gillet spoke to respondent's law partner, Kirk D. Rhodes, Esq., who assured Mr. Gillet that an answer would be filed by the end of the week.

By letter received by the OAE on June 17, 1996 (incorrectly dated June 6, 1996), respondent informed Mr. Gillet that an answer would be forwarded, as promised. When an answer was not submitted, Special Master Miles S. Winder, III certified the record to the Board on June 17, 1996, pursuant to R. 1:20-4(f)(1). Thereafter, respondent submitted an answer to the OAE on June 24, 1996, seventy-four days after the complaint was served. Respondent failed to file an answer with the Secretary of the District XIII Ethics Committee or the Special Master, as required by R 1:20-4(e) and as Mr. Gillet had directed in his letter of April 11, 1996.

A - The Decibus matter - Docket No. XIV-95-41E

Respondent filed in federal court a ten-count complaint in behalf of Eric Decibus, alleging various civil rights violations. The jury found a violation of one count of the complaint and awarded Mr. Decibus only $1 in nominal damages. Thereafter, respondent filed a claim for attorney's fees in the amount of $148,473.12. In an unpublished decision, the Honorable Alfred M. Wolin, U.S.D.J., awarded respondent fees in the amount of $32,812.07. According to the ethics complaint, in reducing the award the judge found the following deficiencies in respondent's certification submitted in support of his application for fees and

costs:

A. Respondent claimed an hourly rate of four hundred dollars ($400.00) per hour for trial work and two hundred seventy five dollars ($275.00) per hour for out-of-court work without providing a basis of reasonableness for same;

B. Respondent claimed that his non-legal staff was capable and relied upon to handle complex files from beginning to end;

C. Respondent claimed entitlement for fees incurred on unsuccessful claims;

D. Respondent claimed entitlement to expert fees not recoverable under 42 U.S.C. 1988;

E. Respondent claimed entitlement for fees for work not performed and/or billed for hours 'in review of file' with no further explanation;

F. Respondent claimed entitlement for reimbursement of the performance of non-legal work at associate and/or paralegal rates (See, Exhibit A at n.5);

G. Respondent claimed entitlement for fees on work billed for exorbitant hours;

H. Respondent submitted a signed certification of services in support of an award of counsel fees containing numerous errors and duplicate entries, in an unorganized, confusing and non-reviewed state for the review of the Court and adverse counsel.

More specifically, the judge found that respondent's fee application was characterized by duplication, misstatement and inaccuracy. For example, the judge pointed to instances where respondent "apparently held a conference with himself for 1.6 hours" and "spent 2.5 hours at the scene where the shooting incident occurred, waited to meet with his client," who never

appeared. The same meeting actually occurred the next day.

The judge also found that respondent exaggerated other entries, such as, claiming 3.3 hours to review documents with defendants' attorneys, while the defendants' attorneys billed 2.3 hours for the same event, and also billing 0.6 hours for a conference with the court that did not take place. Similarly, the judge found that respondent's photocopying charges were excessive.

Finally, the judge was concerned that respondent permitted his paralegals to engage in the unauthorized practice of law, in violation of RPC 5.5(b). The judge stated, in a footnote to the Decibus decision:

> In his certification in support of his application for attorneys' fees, in an attempt to justify high billing rates for paralegals, Frost asserts that his head paralegal has seven years of experience and is capable of handling a complex file from beginning to end. According to Frost, '[h]er work is much more valuable then [sic] most of the associates I have hired which is why I have decided to use paralegals rather than associates to handle files.' Cert. of Plaintiff's Counsel. Frost also states that he employs paralegals who are competent to handle legal and medical malpractice cases from start to finish except for the trial and that the only person in my office handling auto/slip and fall/insurance coverage cases are paralegals except in special cases as these types of cases do not require law school educations. Plaintiffs Reply to Def. Supp. Brief, P8.

B - The Oxfurth Matter - Docket No. XIV-95-42E

Respondent represented the Oxfurths as plaintiffs in the United States District Court, District of New Jersey. Respondent made a motion to amend the complaint to include a count against one of the individual defendants for perjury and/or false swearing and

to compel additional discovery.

After the Oxfurths' motion was denied, the defendant made a cross-motion for Rule 11 sanctions. A hearing was scheduled, at which respondent himself was ordered to appear. When respondent's office was unsuccessful in obtaining an adjournment in respondent's behalf and when the court denied respondent's partner's request to appear in respondent's stead, respondent unsuccessfully attempted to enlist the assistance of another judge to adjourn the matter.

Respondent did not appear for the court-ordered hearing. The matter was then rescheduled to consider the original motion and respondent's failure to appear on the original hearing date. At oral argument, respondent misrepresented to the judge that he had personally telephoned the judge's chambers to request the adjournment. He admitted that he had failed to strictly adhere to the Rule 11 requirements and claimed that he was unaware that New Jersey did not recognize a civil cause of action for perjury. Respondent made this claim, despite the fact that the defendant's attorney had advised him in writing of the relevant law and had given him citations of the applicable cases.

In a published opinion, the court ordered respondent to pay fees and costs to the defendant's attorney and required him to attend continuing legal education seminars.

C. - The Carter matter - Docket No. XIV-95-43E

Respondent filed an eleven-count civil rights complaint in

behalf of his client, Jimmy Lee Carter. A jury awarded Carter $30,000 in damages. Respondent thereafter made a motion for fees and costs in the amount of $64,858.52. Respondent did not file a brief, but relied on a certification and computerized time sheets. The judge awarded respondent $16,889.77. According to the ethics complaint, the judge's decision to reduce respondent's fees was based upon the following problems in respondent's certification:

A. Respondent's [sic] requested that the Court not 'feel' compelled to award counsel fees proportionate to a jury award. Both the United States Supreme Court plurality in City of Riverside v. Rivera, 477 U.S. 561. [sic] 574 (1986) and the Third Circuit Court of Appeals in Cunningham v. City of McKeesport, 807 F. 2d 49 (3d Circ. 1986), cert. denied, 481 U.S. 1049 (1987) instruct that the District Court is to refrain from undertaking a proportionality review in such a case, making respondent's remark to the Court improper.

B. Respondent's computer generated sheets were insufficiently detailed and did not provide the Court with an adequate description of the legal tasks undertaken nor the purpose for which the tasks were performed as required under 42 U.S.C. 1988 and Rules of Professional Conduct 1.5(a)(1) through and including (8).

C. Respondent's signed affidavit stated that he 'expected a verdict of between $2,500.00 and $5,000.00 tops in this case'. However, in the Complaint signed by Respondent at the time of its filing, Respondent stated that the amount in controversy exceeded $10,000.00.

D. Respondent claimed that his hourly rate was three hundred and fifty dollars ($350.00) per hour for out of Court work and four hundred and fifty dollars ($450.00) per hour for trial time. Plaintiff's complaint was filed on or about August 16, 1988. At the same time Respondent was representing plaintiff Eric Decibus, whose complaint was filed in or about July of 1988, wherein respondent claimed fees

of two hundred and seventy five dollars ($275.00) per hour for out of Court work and four hundred dollars ($400.00) per hour for trial work. (See, Count One)

E. Respondent's certification was not specific enough to permit the District Court to determine the hours necessary on the successful claims in this matter nor the reasonableness and justification of the work performed.

Based on the foregoing, the judge reduced respondent's fee to $16,889.77, less a sanction of $5,000 for failure to disclose his fee in the Decibus case and the court's reduction of respondent's fee in that matter. The court remarked that respondent's failure to cite the Decibus case in his certification was unfortunate. The court stated that Decibus had been decided less than a year before and that respondent's increase in fees was incongruous with the "recent economic downturn . . . affecting the legal profession in New Jersey." The court noted that respondent failed to present a basis for his hourly rate in both cases and reduced respondent's hourly fees in Carter. The court determined that respondent's failure to bring to its attention the Decibus case was a "violation of the spirit of RPC 3(a)(iii)."

Finally, the court noted that, in respondent's signed affidavit, he claimed that he "expected a verdict of between $2,500 and $5,000 tops in this case." Yet, in his signed complaint, he had asserted that the amount in controversy in the case exceeded $10,000. The court stated: "This inconsistency reeks of bad faith. [Respondent] is reminded that the plaintiff must plead the amount in controversy in good faith." The court cautioned

respondent to "refrain from affixing his hand to statements that are even remotely inconsistent."

The court was also deeply troubled by respondent's certification in support of his fees for his paralegals' work. In light of respondent's statements in Decibus, the court felt that there may have been non-compliance with RPC 5.5(b) in this matter as well. (Respondent, however, did not make the same certified statements in support of his paralegals' fees in this matter.)

D - The Whitman matter - Docket No. XIV-95-44E

Respondent filed a negligence action in Union County in behalf of Lillian Whitman against the estate of her late husband and various insurance companies for injuries Mrs. Whitman sustained in a boating accident in which her husband was killed. Respondent also filed an action in federal court in New York in behalf of Mrs. Whitman and the estate, seeking tort damages from various third parties. The defendant insurance companies filed a motion to disqualify respondent, relying on RPC 1.7(a) (conflict of interest). Respondent failed to submit a reply until the return date of the motion. The matter was then adjourned to afford respondent the opportunity to testify, if he so desired.

In opposition to the motion, respondent testified that he only "technically" represented the estate in the federal suit and that, at the time that he filed the federal action, he believed that the claim was barred by the New York statute of limitations. Respondent stated: "I didn't believe even when we filed the law

suit in New York that [the decedent's estate] had an actual damage claim." Respondent also testified at the Union County proceeding that the decedent had left a will that had not been probated as of the date of the hearing. Respondent claimed that Mrs. Whitman was the sole beneficiary when, in fact, the decedent's children were also beneficiaries under the will.

In a published opinion, Whitman v. Estate of Whitman, 259 N.J. Super 256 (Law Division 1992), the court found that respondent's assertions did not equate to a reasonable belief that there was no conflict in the two matters and that RPC 1.7(a) had been violated. The court also stated that, even if there was no actual conflict, the appearance of impropriety was so evident that RPC 1.7(c)(2) required respondent's disqualification.

* * *

Upon a de novo review of the record, the Board is satisfied that the conclusion of the DEC that respondent was guilty of unethical conduct is supported by clear and convincing evidence. R. 1:20-4(f)(1) states, in relevant part:

> The failure of a respondent to file an answer within the prescribed time shall be deemed an admission that the allegations of the complaint are true and that they provide a sufficient basis for the imposition of discipline.

The facts as set forth in the complaint under Docket No. DRB 96-258 are, therefore, deemed admitted, inasmuch as respondent filed an answer that was seventy-four days late. In addition, respondent

did not file the answer with the DEC secretary and Special Master, as required by R 1:20-4(e).

As to the Seale matter, there was no clear and convincing evidence in the record to sustain a finding of a lack of communication, tantamount to a violation of RPC 1.4. It is true that respondent did not immediately inform Seale that his case was dismissed. However, within several months of the dismissal, one of respondent's associates advised Seale of the status of the case and of the steps the firm intended to take in his behalf. Accordingly, the charge of a violation of RPC 1.4(a) is dismissed. Similarly, the evidence presented does not sustain of finding of gross negligence on respondent's part. The charge of a violation of RPC 1.1(a), too, is dismissed. The Board, therefore, dismissed the Seale matter.

In the Mayes matter, respondent was given a mortgage on the marital home to secure his fees, by obtaining only Mr. Mayes' consent. Respondent realized that, in the event of Mr. Mayes' death, his own interest would be defeated by Mrs. Mayes' right of survivorship. Although the Board has serious misgivings about the ethical propriety of an attorney's obtaining a mortgage on the marital house to secure fees in a matrimonial matter, the Board is aware that this issue has not yet been settled.[3] Here, there is nothing in the record about the circumstances surrounding the

[3] The Advisory Committee on Professional Ethics, in response to an inquiry from the OAE, declined to issue a formal opinion in this regard, reasoning that, absent a prohibition of such conduct, RPC 1.8 (business transaction with client) was controlling.

granting of the mortgage to allow the conclusion that respondent violated RPC 1.8. Similarly, because the record does not disclose when the Mayes tenancy by the entirety was created, the Board could not find that respondent violated N.J.S.A. 46:3-17.4. That statute provides that "[n]either spouse may sever, alienate, or otherwise affect their interest in the tenancy by the entirety during the marriage or upon separation without the written consent of both spouses." The statute was approved on January 5, 1988, with the express proviso that it should take effect 90 days after enactment and that it was to be applied to all tenancies created on or after its effective date. Accordingly, because the date upon which the Mayes' tenancy was created is not known, the Board was unable to find that respondent's conduct violated N.J.S.A. 46:3-17.4.

Respondent's more serious conduct in the Mayes matter was his misrepresentation to the court. Respondent stated to Judge Pisansky, "I don't really think I have a choice, otherwise, I'm in a conflict of interest situation, so I will sign the papers and void the mortgage rights." Exhibit P-2. More than three years passed before it came to light that respondent had not acted in accordance with his assurances to the judge. That representation to the court was material, as it affected Mrs. Mayes' interest in property that she believed she would be obtaining free and clear of any liens, with the exception of the first mortgage. It was only when Mrs. Mayes sought to obtain a more favorable rate on her mortgage that she discovered that respondent had not discharged his lien. Here, respondent's misconduct was an intentional act, not

the product of omission or mistake. He did not forget to discharge the mortgage; he intended to maintain his lien on the property until Mr. Mayes paid respondent's fee in full. Respondent made that clear in his November 1993 letter to Jane Castner. Exhibit P-6.

Moreover, since the marital house was at issue, in reaching a property settlement agreement the parties may have relied on respondent's representation that he would discharge his mortgage. Yet, without any notice to the judge, to respondent's adversary or to the parties, respondent renounced his agreement to discharge the lien.

After the parties believed that the matter had been resolved, they again found themselves in court. As a result, respondent's client was adjudged to be in violation of litigant's rights, with counsel fees assessed against him. In addition to the foregoing, respondent executed two jurats attesting to the fact that there were no other liens on the property, when respondent knew that the information was false. Respondent's conduct in this matter violated RPC 3.2, RPC 3.4 and, although not charged, RPC 3.3(a) (candor towards a tribunal) and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation). There is sufficient evidence in the record to support these findings as the issues were freely litigated at the DEC hearing without any objections. See In re Miller, 135 N.J. 342 (1994) and In re Frunzi, 131 N.J. 571 (1993).

In another matter involving misrepresentations to the court,

the attorney received a three-month suspension. In re Johnson, 102 N.J. 504 (1986). In that matter, during the course of a trial, the attorney made misrepresentations to the trial court as to his associate's purported illness for the purpose of securing an adjournment of the case being tried. Respondent's conduct in this matter deserves similar treatment.

The Board, therefore, voted unanimously to impose a three-month suspension. Subsumed in this term of suspension is also the discipline required (a reprimand) for respondent's ethics infractions in the default cases (Docket No. DRB 96-258).

The Board also determined to condition respondent's reinstatement on the resolution of all disciplinary matters currently pending against respondent before the DEC, which matters are to be expedited.

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

Dated: 3/10/97

LEE M. HYMERLING
Chair
Disciplinary Review Board