SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 01-324

IN THE MATTER OF

BEVERLY G. GISCOMBE

AN ATTORNEY AT LAW

Decision

Argued: November 15, 2001

Decided: March 15, 2002

Stewart Leviss appeared on behalf of the District VB Ethics Committee.

Ernest Ianetti appeared on behalf of respondent.

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

This matter was before us based on a recommendation for discipline filed by Special Master Claudette L. St. Romain. The eight-count complaint alleged that respondent grossly neglected two personal injury matters, made false statements in certifications to a court in one of the matters and failed to supervise her non-attorney staff.

Respondent was admitted to the New Jersey bar in 1979. On February 6, 1990 she received a private reprimand for gross neglect and conflict of interest, arising out of her

representation of both a driver and a passenger in an automobile accident. In the Matter of Beverly G. Giscombe, Docket No. DRB 89-266. In July 1996 she received an admonition for failure to communicate with a client. In the Matter of Beverly G. Giscombe, Docket No. DRB 96-197 (July 24, 1996). In July 1999, she was reprimanded for engaging in a conflict-of-interest situation. In re Giscombe, 159 N.J. 517 (1999).

I. The Abreu Matter - District Docket No. VB-98-15E

The complaint alleged that respondent violated RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence) and RPC 1.4(a) (failure to communicate with the client) in a personal injury matter.

In July 1992 Fabio Abreu, the grievant, and three passengers in his automobile were stopped at a traffic light when another vehicle struck their car from behind. All four occupants of the second vehicle fled the scene.

On or about July 24, 1992 Abreu retained respondent to represent him in connection with injuries sustained in the accident. Because he could not speak English, Sophia Maldonato[1], the mother of his children, acted as his intermediary in communications with respondent and her staff. From then until about February 1994, Abreu, through Maldonato, communicated effectively with respondent on at least a monthly basis.

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[1]Maldonato is also spelled "Maldonado" at various places in the record.

In or about February 1994 Abreu was incarcerated for eleven months while awaiting trial in an unrelated criminal matter. Nevertheless, he was still able to communicate with respondent through Maldonato. In fact, Abreu spoke to respondent on at least two occasions, while in prison.

Respondent testified that, in March 1994, she determined that representing Abreu and his three passengers could lead to a conflict-of-interest situation. Therefore, she referred Abreu's matter to another attorney, Francis Obi.[2] Respondent asserted that she was permitted to transfer the file for several reasons: she told Maldonato to inform Abreu of the file transfers;[3] she sent a letter to Abreu notifying him that "Mr. Francis Obi, Esq. has agreed, with your permission to handle your claim and to file a complaint on your behalf" (exhibit G-3); and her standard retainer agreement gave her the authority to employ "associates." As to this last issue, neither respondent nor her office administrator, Michelle Gray, both of whom testified on this issue, were able to establish that Abreu had ever agreed to that arrangement. Moreover, respondent failed to produce a signed retainer agreement.

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[2]Obi had previously worked for respondent. By this time, however, he had established his own law practice.

[3]There is no indication that respondent consulted with Maldonato, prior to the file transfer to Obi. Rather, respondent repeatedly testified that she directed Maldonato to tell Abreu about the transfer.

Ultimately, respondent conceded that she never received Abreu's actual authorization to transfer the matter to Obi.[4]

Respondent testified that Obi's involvement was intended as a technical measure to shield her from a conflict-of-interest situation. She testified that, after the transfer to Obi, her office continued to communicate with Abreu about his claim. According to respondent, she welcomed that contact because Abreu was unfamiliar with Obi and because Abreu and Maldonato were more comfortable speaking to her office staff. Moreover, respondent asserted, she believed that Abreu's matter would somehow automatically revert back to her office, once Obi's involvement ceased.

Approximately one year after the file transfer, on April 7, 1995, Abreu apparently signed a power-of-attorney giving Maldonato authority to act in his behalf in connection with the matter. According to respondent, that document simply memorialized an oral power-of-attorney that Abreu allegedly had given Maldonato sometime earlier. Contrary to respondent's assertion, Abreu denied that he had given Maldonato a power-of-attorney prior to April 7, 1995.

It is undisputed that there were problems with the case from the beginning. Among them, Abreu's insurance carrier, Warner Insurance Systems/Hanover Amgro ("Hanover"), came to suspect that Abreu's accident had been staged and that Abreu was involved in

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[4] Abreu also testified that he was never asked to authorize such a transfer and that he was unaware that his file had been transferred to Obi.

insurance fraud. In order to acknowledge uninsured motorist coverage, Hanover required proof that the second vehicle had been stolen. However, it was not clear from the police report that the vehicle had been stolen, leaving respondent to deal with the owners, the Kleins. In addition, Hanover required respondent to secure a formal denial of coverage from the Kleins' insurance carrier, Erie Insurance ("Erie"). Lastly, Hanover required respondent to file suit against both the Kleins and Erie to protect its subrogation rights. Respondent filed that suit in October 1995.

In December 1995 respondent obtained an affidavit from the Kleins, stating that their automobile had been stolen and used in the accident. Not surprisingly, the Kleins' attorney demanded that respondent (and presumably Obi, on Abreu's behalf) withdraw the claims against them. Respondent did not do so, fearing that Hanover would refuse coverage completely if the Kleins were let out.

In January 1996 Obi withdrew Abreu's complaint against the Kleins. Respondent, however, did not withdraw the similar claims asserted by the passengers. Thereafter, the Kleins obtained summary judgment against the three passengers. Sometime later, respondent was ordered to pay $895 in attorney fees, as a sanction for pursuing a frivolous claim against the Kleins.[5]

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[5] Beyond the testimony surrounding its occurrence, there is no other evidence regarding the sanctions.

According to respondent, once Obi withdrew the complaint against the Kleins, the matter reverted to her office and she again became actively involved in Abreu's surviving claim against Hanover. It is unclear, however, if respondent took any action in Abreu's behalf over the next ten months.

On November 25, 1996 Hanover denied coverage for Abreu's claim and refused to proceed to arbitration. Hanover claimed that Abreu was part of a fraudulent insurance scheme, alleging that he had been involved in several similar accidents. Tired of the lack of progress in the matter, respondent then prepared an order to show cause and a status letter to her clients. Respondent admitted, however, that the order to show cause was never filed and the letter never sent out. Those documents are not part of the record.

One year later, on October 4, 1997, Abreu, who was still in prison, wrote to respondent about his case. Respondent did not reply to that request for information. On November 10, 1997 Hanover's attorney wrote to respondent, questioning the lack of activity in the matter. Respondent recalled telling Hanover's attorney, in February or March 1998, that the claim was still active. She had no documentation to support this assertion, however.

Finally, in late 1999 respondent sent Abreu an undated letter, announcing that she had settled his claim for $6,000. Exhibit G-5. On January 19, 2000 respondent again wrote to Abreu, informing him that Maldonato had signed the release, pursuant to the power-of-attorney, and that the funds were ready for disbursement. Exhibit G-6. Thereafter, Abreu changed his mind about his decision to authorize Maldonato to receive the $6,000 settlement

funds. Ultimately, the release of the settlement funds was delayed until May 2000. However, there are no allegations that respondent failed to discuss the terms of the settlement with Abreu and Maldonato, prior to accepting it. In fact, respondent testified that Maldonato had given her prior approval to the settlement.

II The Carter Matter - District Docket No. VB-99-16E

The complaint alleges that respondent violated RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence) and RPC 3.3(a) (false statement of material fact to a tribunal).

On or about May 21, 1992 Geraldine Carter, the grievant, was injured in a slip-and-fall accident on an uneven sidewalk in East Orange. She first met with respondent on or about June 3, 1992 to discuss the case. According to Carter, she signed a retainer agreement on that day.

Respondent recalled the initial meeting differently, claiming that, after Carter had discussed the matter, Carter wanted to consult with her husband before committing to respondent's representation. Respondent acknowledged, however, that she had been retained at the initial meeting, at least in a limited capacity, and that she had agreed to begin gathering information about the case in the meantime.[6]

[6]Michelle Gray, respondent's office manager, also testified that respondent told her, in 1993, that she had not yet been retained.

Both respondent and Carter also recalled discussing, on that day, the prospect of suing the City of East Orange. According to respondent, because there was virtually no likelihood of liability on the part of the city, she told Carter from the outset that a suit against the city was not viable. Based on her determination, respondent opted not to file a Tort Claims Act notice of claim with the city, which would have been required in order to join East Orange as a defendant.[7] Respondent also produced an expert in sidewalk liability, William H. Michelson, Esq., who testified at the ethics hearing. According to Michelson, there was no "reasonable likelihood" that the city would be liable for Carter's injuries. Indeed, he stated that, "only in some really unusual situation" would a municipality be held liable for such injuries.

In July and August 1992 respondent collected medical records, representing to the medical providers that she was Carter's attorney. Exhibits G-25A, B and C.

Respondent later changed her mind about the notice of claim issue and, out of "an abundance of caution," decided to file a late notice. On March 4, 1993, some nine months after her initial meeting with Carter, respondent brought a motion to file a late notice of claim against the city. In support of the motion, respondent produced her own affidavit, stating that Carter had "recently contacted" her office concerning the accident. Respondent also stated that Carter's injuries were so severe that "she was not able to retain counsel until

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[7]The allegations of neglect focus only on the East Orange defendant. The record supports the conclusion (and the special master found) that respondent did not neglect the lawsuit against the homeowners.

well after the time for filing a Notice of Claim." Exhibit G-23. Carter's own certification, prepared in concert with the motion, stated that "[o]n February 23, 1993, I went to the law office of Beverly G. Giscombe, Esquire regarding the possibility of retaining her to pursue my case." Exhibit G-22.[8] As noted earlier, that initial meeting took place in June 1992, not February 1993.

Respondent's motion was opposed by the city. Therefore, she prepared an "Attorney's Response to Defendant's Opposition to Plaintiff Filing a Late Notice of Claim." In it she stated the following:

> On February 24, 1993, plaintiff Geraldine Carter came to this office relative to retaining us for the purpose of pursuing a claim as a result of her slipping and falling at or near 85 Hollywood Avenue in the City of East Orange, County of Essex and State of New Jersey on May 21, 1992.
> [Exhibit G-24]

Exhibit G-24 also states that, as of February 24, 1993, "plaintiff was not knowledgeable of the filing of a Notice of Claim and that there is a time requirement." Yet, respondent admitted at the DEC hearing that she had told Carter about the ninety-day time period, during their initial discussion in 1992. Ultimately, respondent's motion was denied.[9]

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[8]Carter accused respondent of forging her signature on Exhibit G-22. That issue was apparently settled in respondent's favor in a subsequent malpractice action. Moreover, at this hearing, respondent's file clerk, Jacqueline Morgan, testified that she witnessed Carter sign the document. The special master did not make a finding in this regard.

[9]Respondent admitted in her answer to the ethics complaint and in her testimony before the special master that she had "submitted" all of those documents to the court. Later, however, she argued that, because the ethics authorities had not produced a copy stamped "filed" by the court, there was no clear and convincing evidence that she had filed the documents with her motion. Therefore, according to respondent, no violation of RPC 3.3(a)

In August 1995 Carter terminated respondent's representation and retained a new attorney.

* * *

In Abreu, the special master found violations of RPC 1.1(a) and RPC 1.3 for respondent's failure to take action in December 1996, when she prepared, but failed to file, an order to show cause.[10] The special master also noted that, without the November 7, 1997 letter from Hanover's attorney, the matter might have languished even longer. In addition, the special master found that respondent's failure to obtain either Abreu's or Maldonato's consent to transfer the file to Obi violated RPC 1.4(a), as follows:

> The communication requirement of RPC 1.4(a) does not authorize attorneys to make announcements to their clients without accounting for their client's responses. The communication requirement is designed to allow clients to actively participate in their cases and in the decisions relevant to those legal matters. See Comment to RPC 1.4. By mailing the letter soliciting [respondent's] permission to transfer the file, and then transferring it without that permission, [respondent] failed to adequately communicate with her client. I therefore find that she violated RPC 1.4. [Footnote omitted.]
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> [Special master report at 13][11]

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could be found.

[10]The special master's report stated that she "found no distinction in case law between lack of diligence and gross neglect. Therefore, I find that this behavior amounts to gross negligence as an alternative theory of misconduct."

[11]The special master also opined that respondent may have intended to retain control over Abreu's file and commented that, without the client's express consent, an attorney cannot transfer a client's case to another attorney, citing RPC 1.6 and RPC 1.16. However, the special master did not make any findings with respect to those uncharged RPCs.

In Carter, the special master found several violations of RPC 3.3(a). Specifically, she concluded that the combination of Carter's affidavit (exhibit G-22), respondent's own affidavit (exhibit G-23) and respondent's certification in response to the defendant's opposition (exhibit G-24) was designed to mislead the court that the February 23, 1993 meeting between respondent and Carter was an initial consultation. The special master also found that respondent's failure to disclose to the court that the initial consultation had taken place in June 1992 was intended to mislead the court that Carter did not seek out an attorney until February 1993. The special master found that respondent's failure to fully describe the legal relationship prior to the February 23, 1993 meeting was a misrepresentation by silence, also in violation of RPC 3.3(a).

The special master dismissed the allegations of violations of RPC 1.1(a) and RPC 1.3, finding no clear and convincing evidence that respondent failed to diligently pursue a claim against the city. The special master agreed with respondent's initial assessment, confirmed by the expert, that the city was not liable for Carter's injuries. Therefore, according to the special master, respondent's failure to timely file the notice of claim was not blameworthy.

With regard to the seventh and eighth counts of the complaint, which alleged violations of RPC 5.3(b) (failure to supervise) and RPC 1.1(b) (pattern of neglect) in both Abreu and Carter, the special master dismissed those allegations without further elaboration.

The special master recommended the imposition of a three-month suspension.

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Upon a de novo review of the record, we are satisfied that the special master's conclusion that respondent was guilty of unethical conduct is supported by clear and convincing evidence.

In Abreu, respondent was retained in 1992 to pursue an uninsured motorist claim. Apparently, the case proceeded apace until it was transferred to Obi in March 1994. Respondent acknowledged her renewed involvement in the case in early 1996. Over the next ten months, respondent took no action in the case.

In November 1996 Hanover denied coverage on Abreu's claim. Respondent then allegedly prepared an order to show cause, which she never filed. She also prepared a letter to Abreu, but never sent it. One year later, in October 1997, Abreu wrote to respondent, asking for a status update. There is no evidence that respondent replied to this request for information. One month later, in November 1997, Hanover's attorney wrote to respondent to find out if Abreu's claim was still active. According to respondent, she replied to that letter in early 1998. She produced no other evidence to corroborate this contention, however. Almost two years later, in late 1999, respondent sent Abreu an undated letter announcing that they had reached a settlement, which was completed in early 2000. We found that these lengthy periods of inactivity amounted to gross neglect and lack of diligence on respondent's part, in violation of RPC 1.1(a) and RPC 1.3, respectively.

As to a violation of RPC 1.4(a), the Special Master based her finding on respondent's failure to obtain Abreu's consent to the transfer of the file to Obi in 1994. That is more

properly a violation of RPC 1.4(b), as seen below. Respondent's violation of RPC 1.4(a) began shortly thereafter. Indeed, there is no correspondence or other evidence in the record to substantiate any communication with Abreu after respondent's May 17, 1994 letter, transferring the file to Obi. Abreu denied that respondent communicated the status of the case to him after 1995. Moreover, respondent could not recall any contact with Abreu between 1995 and her letter, in late 1999, about the settlement. In the aggregate, we concluded from these facts that respondent failed to communicate with Abreu, in violation of RPC 1.4(a).

As to the settlement, there is no allegation that respondent failed to discuss its terms with either Abreu or Maldonato, prior to accepting it. In fact, respondent testified that she had Maldonato's approval to the settlement.

We are still left with several unresolved issues in Abreu. First, Abreu testified that he did not authorize respondent to transfer his file to Obi in 1994. There is no evidence to contradict him in this regard. We rejected respondent's claim that she had Abreu's tacit authority to do so via Maldonato's power-of-attorney. That document postdated the transfer. Respondent's alternative argument that Maldonato had an implicit power-of-attorney, based on the couple's relationship, is without support. Moreover, even if Maldonato had enjoyed such authority, respondent never asked Maldonato for an authorization prior to the transfer.

Respondent also claimed that her letter to Abreu and retainer agreement placed him on notice that another attorney might become involved. However, respondent was unable

to produce the actual retainer agreement. Moreover, respondent's letter to Abreu can hardly be viewed as consent on his part. Attorneys have an obligation to consult with the clients before transferring their files to subsequent counsel. That decision is for the clients to make, not for the attorney. Respondent's post-facto announcement to Abreu cannot be considered a prior consultation on this issue, just as Abreu's initial lack of protestations cannot be deemed an acquiescence. Clearly then, respondent violated RPC 1.4(b) by failing to obtain Abreu's approval, before referring his case to Obi.

The special master suggested that respondent may have violated RPC 1.6 when she transferred the matter to Obi. That RPC requires that client information remain confidential with the attorney, unless the client consents to the dissemination of the information, after consultation with the attorney. Abreu was not consulted about the dissemination of information on his matter. Therefore, we found that the transfer was also a violation of RPC 1.6. Although respondent was not specifically charged with a violation of either RPC 1.4(b) or RPC 1.6, the facts alleged in the complaint and the record developed below provided respondent with sufficient notice of a potential finding of a violation of those rules. Furthermore, respondent did not object to the admission of such evidence in the record. In light of the foregoing, we deemed the complaint amended to conform to the proofs. R. 4:9-2; In re Logan, 70 N.J. 222, 232 (1976).

Another aspect of the transfer to Obi deserves scrutiny. Respondent viewed Obi's involvement as a technical measure to shield her from a conflict-of-interest situation. As

previously stated, for reasons that were not made clear, respondent believed that Abreu's matter would automatically return to her office, once Obi's involvement ceased. To Obi's credit, however, there is no indication that he acted at respondent's behest here. He handled the case independently. Therefore, even if respondent might have intended, initially, that Obi's involvement would be a ploy, as it turned out respondent kept no control over the file, which Obi handled on his own. Under these circumstances, we found no violation in this regard.

In Carter, it is unquestionable that respondent made false statements to the court in her motion, in violation of RPC 3.3(a)(1). Respondent's affidavit in support of the motion, exhibit G-20, stated that Carter had "recently contacted this office for legal representation regarding her slip and fall incident." The affidavit also stated that, "as a result of plaintiff's severe and permanent injuries, i.e., rendered unconscious with extensive injuries, having to be hospitalized and lost time from her employment, she was not able to retain counsel until well after the time for filing a Notice of Claim." Respondent knew that those statements were untrue. Carter initially met with respondent on June 3, 1992 and, by Carter's own account, retained respondent that day. In fact, respondent sent letters to medical providers in July 1992, indicating that she represented Carter. Based on these facts, we were persuaded that respondent represented Carter as of the first meeting date, in June 1992.

In respondent's certification in response to the defendant's opposition, exhibit G-24, she stated that Carter had come to her office on February 24, 1993 "relative to retaining us."

However, respondent again neglected to mention the prior June 3, 1992 meeting regarding the representation. The certification also stated that "plaintiff was not knowledgeable of the filing of a Notice of Claim and that there is a time requirement." Yet, respondent admitted the opposite at the hearing – that she had told Carter about the ninety-day time limit during their initial meeting in 1992.

Finally, exhibit G-22, Carter's affidavit in support of the motion, also contains a false statement. The affidavit, prepared by respondent, states that "[o]n February 24, 1993, I went to the law office of [respondent] regarding the possibility of retaining her to pursue my case." Because that was the affidavit's first mention of a meeting with respondent, one could reasonably conclude that it was, in fact, their first meeting. In addition, the phrase "possibility of retaining" could only mean that respondent had not yet been retained. In all three of these documents, respondent knowingly omitted the critical fact that Carter had met with her eight months earlier about the representation and that she had begun to work on Carter's behalf at that earlier time. Respondent had no reasonable explanation for her consistent failure to mention that critical meeting.

After the investigation of this disciplinary matter was completed, respondent argued that the presenter did not prove that she had ever filed those documents in support of her motion. Respondent noted that exhibits G-22, G-23 and G-24, genuine copies of the signed originals, did not bear the court's "filed"stamp. Therefore, according to respondent, there was no clear and convincing evidence that she made false statements "to a tribunal." We

were not persuaded by that argument. After all, respondent admitted in three separate instances – the verified answer, the amended answer and the second amended answer – that she had "submitted" those documents to the court. Moreover, her testimony before the special master complemented that admission; respondent reiterated her intention at the time to submit those documents to the court with the intent that the court rely on the statements contained in such documents. Under these circumstances, we concluded that there is ample evidence of respondent's intent to deceive the court, believing that, for the purpose of finding a violation of RPC 3.3(a)(1), there is no significant distinction between a "submission" to the court and a "filing" with the court.

As to the charges that respondent exhibited gross neglect and lack of diligence in Carter, we agreed with the special master that they should be dismissed. The matter was proceeding apace as to the homeowners-defendants at the time that Carter terminated the representation in 1995. Moreover, the testimony of respondent's expert, Michelson, was uncontroverted: Carter would not have prevailed against the city, had it been included in the suit.

We also dismissed the allegation of a violation of RPC 5.3 for lack of clear and convincing evidence that respondent failed to supervise her staff. Finally, we dismissed the allegation of a violation of RPC 1.1 (b) (pattern of neglect), as there was only one instance of gross neglect (in Abreu).

Discipline in cases involving lying to a court varies greatly, depending on the seriousness of the offenses, ranging from an admonition to a lengthy suspension. See In re Lewis, 138 N.J. 33 (1994) (admonition for attempting to deceive a court by introducing into evidence a document falsely showing that a heating problem in an apartment of which he was the owner/landlord had been corrected prior to the issuance of a summons); In re Mazeau, 122 N.J. 244 (1991) (public reprimand for making a false statement of material fact in a brief submitted to a trial judge); In re Johnson, 102 N.J. 504 (1986) (three-month suspension for misrepresenting to a trial judge that the attorney's associate was ill in order to obtain an adjournment of a trial); In re Kernan, 118 N.J. 361 (1990) (three-month suspension for filing a false certification in the attorney's own matrimonial matter); In re Labendz, 95 N.J. 273 (1984) (one-year suspension for submitting a false mortgage application to a bank to obtain a higher mortgage loan for his clients); and In re Kornreich, 149 N.J. 346 (1997) (three-year suspension for falsely accusing babysitter of being involved in an automobile accident, which actually involved the attorney). Although respondent's misconduct warrants more than a reprimand, it was not as serious as that of the attorneys in Labendz and Kornreich. In Abreu, respondent exhibited gross neglect, lack of diligence, failure to communicate with the client and failure to maintain the confidentiality of the client's information. The most serious offense occurred in Carter, where she lied to a court and also made her client sign a false affidavit. In aggravation, we considered that respondent has not learned from her three prior encounters with disciplinary authorities. The misconduct

in Carter occurred after respondent received a 1990 private reprimand. In Abreu, the misconduct began in 1994 and ended in late 2000, spanning both respondent's 1996 admonition and her 1999 reprimand. There are no mitigating factors to consider. Therefore, we unanimously determined to impose a three-month suspension. One member did not participate.

We also determined to require respondent to reimburse the Disciplinary Oversight Committee for administrative expenses.

ROCKY L. PETERSON
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Beverly G. Giscombe
Docket No. DRB 01-324

Argued: November 15, 2001

Decided: March 15, 2002

Disposition: Three-month suspension

Members	*Disbar*	*Three-month Suspension*	*Reprimand*	*Admonition*	*Dismiss*	*Disqualified*	*Did not participate*
Peterson		X					
Maudsley		X					
Boylan		X					
Brody		X					
Lolla		X					
O'Shaughnessy		X					
Pashman		X					
Schwartz							X
Wissinger		X					
Total:		8					1

Robyn M. Hill 4/1/02
Robyn M. Hill
Chief Counsel