SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 04-140
District Docket No. XIV-00-363E

IN THE MATTER OF	:
JOHN A. EVANS	:
AN ATTORNEY AT LAW	:

Decision

Argued: June 17, 2004

Decided: August 6, 2004

Richard S. Hyland appeared on behalf of respondent.

Nitza I. Blasini appeared on behalf of the Office of Attorney Ethics.

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

This matter was before us on a recommendation for discipline (three-month suspension) filed by Special Master Marvin N. Rimm, J.T.C. (Ret.)[1]. The six-count complaint charged

[1] This matter was tried before the Honorable Joseph M. Nardi, Jr., J.S.C., who passed away before rendering a decision. The matter was reassigned to Judge Rimm, who decided it based on the transcripts, documentary evidence and counsel's closing arguments.

respondent with violations of RPC 1.2(d) (counseling or assisting a client in conduct that the lawyer knows is fraudulent)[2]; RPC 1.6(b)(1) (failure to reveal information to the proper authorities to prevent the client from committing a fraudulent act that is likely to result in substantial injury to the financial interest of another) and (2) (failure to reveal information to the appropriate authorities to prevent the client from committing a fraudulent act that the lawyer believes is likely to perpetrate a fraud upon a tribunal); RPC 3.1 (a lawyer is precluded from bringing or defending a proceeding and from asserting or contraverting an issue unless the lawyer knows or reasonably believes that there is a basis for doing so that is not frivolous); RPC 3.3(a)(1) (false statement of material fact or law to a tribunal); RPC 3.3(a)(2) (failure to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a fraudulent act by the client); RPC 3.3(a)(4) (offering evidence that the lawyer knows to be false); RPC 3.3(a)(5) (failure to disclose to the tribunal a material fact with knowledge that the tribunal may tend to be misled by such failure); RPC 3.4(a) (unlawfully obstructing another party's access to evidence or unlawfully altering, destroying or concealing a document or other material having potential

---

[2] This charge was dismissed at the hearing before Special Master Rimm, with the consent of the presenter.

evidentiary value, or counseling or assisting another person to do such an act); RPC 3.4(b) (falsifying evidence or counseling or assisting a witness to testify falsely); RPC 4.1(a)(1) (making a false statement of material fact or law to a third person); RPC 4.1(a)(2) (failure to disclose a material fact to a third person when disclosure is necessary to avoid assisting a fraudulent act by a client); RPC 8.4(a) (violating or attempting to violate the Rules of Professional Conduct, knowingly assisting or inducing another to do so, or doing so through the acts of another); RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation); and RPC 8.4(d) (conduct prejudicial to the administration of justice).

Respondent was admitted to the New Jersey bar in 1984. He has no history of discipline. At the relevant times, he was general counsel to Holt Cargo Systems, Inc. ("Holt"), in Gloucester City, New Jersey.

At the hearing before Special Master Nardi, the parties stipulated that:

(1) Holt Hauling and Warehousing System, Inc. ("HWC") owned the marine terminal facility located in Gloucester City, New Jersey, which, among other things, consisted of refrigerated and non-refrigerated warehouses used to store customer goods.

Included in these warehouses were the Armstrong Building and Building 1A.

(2) HWC leased the facility to various tenants, including Holt and Gloucester Refrigerated Warehouse, Inc. ("GRW").

(3) Respondent began his employment with Holt in July 1973 as the assistant controller. He assumed the role of controller in 1976. In September 1979, respondent attended night school at Temple University School of Law, while continuing his employment with Holt.

(4) During 1995 and up until the late Spring of 1998, the executive offices of Holt and Holt Oversight and Logistical Technologies were located in a portion of the Armstrong Building located at the Gloucester facility.

Testimony at the ethics hearing established that respondent eventually assumed the role of general counsel for all of the Holt companies.[3] His duties included, among other things, representing the company in various types of contractual negotiations, managing outside counsel in litigation matters (which included contractual disputes, workers' compensation injuries, condemnation proceedings, property insurance claims, and sales and use tax audits), providing advice to risk

[3] The Holt companies included HWC, Holt, Gloucester Refrigeration Warehouse, Inc., and Holt Oversight and Logistical Technologies.

management regarding the adequacy of insurance and types of coverage required, handling certain types of claims, providing legal and financial advice to senior management, supervising the legal department at Holt and participating in the formulation and implementation of business and financial planning.

The Holt companies filed for Chapter 11 reorganization in March 2001, but subsequently converted the proceeding to a Chapter 7 bankruptcy. As a result of the bankruptcy, respondent's services "were no longer needed" after February 2002, and he was "let go."

This matter was referred to the Office of Attorney Ethics ("OAE") by the Honorable William J. Cook, J.S.C., shortly after October 13, 2000, the date he issued a decision on a motion to compel the production of documents. The motion was filed in the midst of a lawsuit by Ocean Spray Cranberries, Inc. ("Ocean Spray") against Holt. As a defense to the motion, Holt asserted the attorney-client and work-client privileges. Judge Cook's decision set forth a brief overview of the lawsuit from which the motion emanated:

> Ocean Spray sue[d] Holt for damages for the spoilage of 6,500,000 pounds of Ocean Spray cranberries while they were stored in Holt's warehouse facilities in Gloucester City, New Jersey in 1995. Holt was to store the cranberries in a frozen condition. Ocean Spray did not discover that the cranberries had been damaged and spoiled, until they

> were shipped back to Ocean Spray from Holt's warehouse several months later. Holt did not inform Ocean Spray of the spoilage, and in response to Ocean Spray's inquiry, Holt steadfastly denied that any spoilage occurred in its facility.
>
> [Ex.OAE21.]

Ocean Spray was a client of Holt. In the fall of 1995, Ocean Spray delivered approximately eight million pounds of fresh cranberries for storage in Holt's storage facilities located in Gloucester, New Jersey. Ocean Spray contracted with Holt to have the cranberries maintained in a frozen condition at temperatures not higher than five degrees Fahrenheit. At some point, when some of the berries were shipped to Ocean Spray, Ocean Spray discovered that the cranberries had spoiled.

Thereafter, in January 1996, Ocean Spray sent one of its employees, Christopher Gordon, an environmental health and safety specialist, to the Holt warehouses to investigate the cause of the spoilage. His investigation continued through July 1996.

Gordon observed that the cranberries had shriveled and had turned black, hard, and sticky. Holt employees, however, informed Gordon that the cranberries had been received in that condition. Gordon found pieces of clips, fan blades (which he concluded came from the compressor fans), wires, electrical tape, and wooden panels mixed in with the berries. He also found

evidence of frozen fruit flies in all stages of development, as well as spider webs, which are not normally found in freezers. The bins were stained. Footprints and bucket marks were embedded in the frozen fruit. The odor of the cranberries was atrocious.

Gordon concluded that "juicing" had occurred. The juice from the cranberries had eaten away at the floor. As a result, Gordon was able to see that bins had been moved. He determined that the bins had come from storage box #12. Although Gordon did not observe any juice, he found cranberry skins throughout the courtyard area between the buildings where the cranberries were stored. He, therefore, suspected that drainage had occurred.

According to Gordon, only certain employees were permitted to come in contact with him; they were all very secretive about what had occurred. Late in his investigation, Gordon stumbled upon transfer slips showing that the cranberries had been moved. Holt employees had withheld this information from him.

Following his investigation, Gordon determined that a freezer failure had occurred at the facility and that the cranberries had been frozen, thawed, and then refrozen.

Based on its investigation, on September 12, 1996, Ocean Spray notified Holt that it intended to file a claim for damages to the cranberries stored at Holt's warehouse in Gloucester City, New Jersey. The letter requested that Holt immediately

place its primary and excess insurance carriers on notice of the claim. A copy of the letter was forwarded to respondent by memorandum of one of Holt's employees, Mark Goldman, dated September 25, 1996. Respondent claimed that, before his receipt of the memorandum, he did not know that Ocean Spray was storing cranberries at the Holt warehouse and that they had spoiled. Respondent's office, however, was located in the Armstrong Building in close proximity to where the massive spoilage occurred.

As a result of Ocean Spray's notice of its intent to file a claim, respondent directed Paul F. Dice, Holt's Director of Risk Insurance Management, to gather information about the matter. Dice prepared a memorandum to respondent, dated October 18, 1996, memorializing the outcome of his investigation. The memorandum stated, in relevant part:

> As you are aware, Ocean Spray has indicated that they intend to file a claim against [Holt] for damage to 6.4 million pounds of cranberries. In response to your request, we have gathered the following information.
>
> Between mid September 199[5] and mid October 199[5] Ocean Spray delivered 8,110,646 lbs. to [Holt] and 4,720,000 lbs. to [Gloucester Refrigerated Warehouse]. . . .
>
> . . . .
>
> During a five (5) week period from mid September to late October, the largest of the three compressors that freeze the Armstrong

building was out of service. With only two units operating, there was only adequate freezing capacity for the lower rooms. For this reason the temperatures of the #20 and #30 boxes, located on the second and third floors, only reached the mid teens before berries were stored. Due to a lack of available storage space, bins continued to be placed in the #20 and #30 boxes. The lack of freezing capacity in those rooms combined with an increasing number of bins caused the ambient air temperature to rapidly rise. Temperatures as high as 64 degrees were noted in #20 and #30 boxes.

By the time the repaired compressor was back on line in late October, it was too late. It was not until December that the air temperature in #20 and #30 boxes reached the single digit levels that are considered acceptable. Due to the inordinate time it took to freeze the product in those rooms, the berries became dehydrated. The affected berries now have a raisin-like appearance.

Ocean Spray was never made aware of the problem. They have no knowledge that any product was stored in #20 and #30 boxes. . . . It was not until January 1996 that [Ocean Spray] began noticing quality problems with the berries that had been shipped to their processing facility. By February, Ocean Spray and their insurance carrier's representatives visited Armstrong and 1A as part of their investigation. . . .

Ocean Spray asked for and [was] given, a copy of the temperature records for Armstrong and 1A. . . . The original temperature log . . . does evidence the problem. The copy given to Ocean Spray was false information.

The insurance carriers for HCS and GRW were placed on notice in February 1996. The Boiler & Machinery carrier has already denied coverage because we have not reported that any

> incident took place involving the refrigeration equipment. The Warehouse Legal Liability carrier has assigned Grand Marine to investigate the loss. . . .
>
> . . . However, if [the liability carrier] were to gain knowledge of the events that took place during September 1995 it is likely that they will deny coverage based on untimely notice.
>
> [Emphasis added; Ex.OAE1.]

Respondent claimed that he had no independent recollection of seeing this memorandum, even though it had been drafted in reply to his request. According to respondent, he recalled seeing the memorandum only after the hearing before Judge Cook.

Respondent testified, however, that he had discussed the claim with Dice. Dice had informed him that Ocean Spray was claiming that the cranberries had become damaged while in Holt's care; that Holt had sent false temperature readings indicating that the temperatures were always below zero in the warehouse where the cranberries were stored, but had failed to disclose all of the rooms in which the cranberries were stored; that Captain Kenneth Graham of Graham Marine Associates, Inc. ("Graham") had been hired by the insurance carrier, Ocean Transport Intermediary Mutual ("OTIM"), to investigate the claim (determine the cause and extent of the damages), and that Holt would be sending him documents; and that refrigeration equipment problems had caused temperatures to rise in the warehouse.

According to respondent, he never contacted Ocean Spray to inform it that it had received fabricated temperature records. He testified that, at that time, he considered that information to be confidential. He claimed, however, that, once he became aware that the temperature records had been fabricated, he took affirmative steps to insure that, from that point on, only accurate information would be disseminated.

Dice prepared another memorandum addressed to respondent, dated October 23, 1996. That memorandum stated, in relevant part:

> The following is per your request of today.
>
> [It appears that information was redacted from this portion.]
>
> . . . In reviewing [the available documentation], I noted certain areas of concern. The issues are as follows:
>
> (1) The outbounds show room numbers we did not disclose to Ocean Spray (OS). Operations told OS that the cargo was not stored in any rooms other than 1A, box 12 and the Pallet Room. The outbounds show room #'s 10 and 11.
>
> (2) The temperature records for #'s 10 and 11 are arguably higher than they should have been.
>
> (3) Marc Goldman released certain temperature records to OS. The records we have encompass a larger period than what he released.
>
> [Emphasis added; Ex.OAE2.]

Respondent again claimed that he had no independent recollection of having received the memorandum of October 23, 1996 until the hearing before Judge Cook.

According to respondent, once he concluded that Holt would be sued, he instructed Dice to gather documents and to put together a chronology of events. When Dice initially delivered the memorandum to respondent, respondent instructed him to insert the phrase "ATTORNEY/CLIENT PRIVILEGE" on it. Dice did so and resubmitted the memorandum to respondent, dated May 1, 1997 ("the Dice memo"). Holt's attempted suppression of this document, during the Ocean Spray litigation, ultimately led to Judge Cook's referral of respondent's conduct to disciplinary authorities. The memorandum stated, in relevant part:

> This will serve as response to your recent request for documentation and information in this case. It is a follow-up to the 4/19/97 memorandum draft that I previously forwarded to you.
>
> The following is an outline of the documentation collected in this case to date:
>
> A. Handwritten temperature records sent to Ocean Spray from Helena Shea at HCS.
>
> . . . They span the period 9/13/95 to 2/6/96. . . . The records reflect product temperatures in 12 Box, the Rack Room and 1A. Two problematic issues are immediately noted:

a. The temperatures are not the real readings. The list was fabricated to present a best case scenario.

b. The temperature readings do not reflect the fact that product was stored in rooms other than 12 box, the rack room and 1A. . . .

. . . .

B. Fabricated daily temperature log book entries for Building 1A. These are supposed to represent the actual daily temperature readings taken by maintenance personnel. They were created by Shea as support for the Building 1A readings. . . .

C. . . . These readings were forwarded to Ken Graham at Graham Marine. . . . The actual Building 1A Engine Room log book contains more information than was sent to Graham.

. . . .

D. Inter-warehouse transfer tallies indicating cargo movement from Armstrong to Building 1A.

. . . .

These are actual moves from Armstrong to Building 1A. The March records indicate that the product moved from Armstrong Box #20 to Building 1A. However, no other tallies denote from which Armstrong box cargo was moved.

E. Intra- and Inter-warehouse tally sheets:

[reflecting movement of the cranberries]

. . . .

J. Armstrong daily temperature log book entries 9/1/95 to 7/31/96. These are fabricated records prepared by Helena Shea. Not all rooms where product was stored are reflected – most notably Armstrong boxes 20 and 30. The temperature readings of the rooms that are acknowledged are lower than the actual readings. The actual temperature readings can be found in "M" below.

These records are fabricated support for the handwritten temperature records (see "A" above) in so far as Armstrong boxes 12 and Rack Room (see box 8B entries for this section "J") are concerned.

. . . .

Armstrong Box 20 – "New Cranberries" were put into the box on 9/27/95. Room temperatures begin at 30 degrees. From 9/28/95 to 11/29/95 temperature readings are above 32 degrees with a high of 64 noted.

Two months had passed wherein temperatures at or below 32 degrees were not achieved.

. . . .

This is the box that gave rise to the "sea of red." It is called the "sea of red" as a considerable quantity of cranberry juice had to be pumped out of this room and into the parking area south of the Armstrong Building.

. . . .

From 10/6/95 to 11/18/95 temperatures spiked upward to a high of 58 degrees (noted on 10/30/95).

Recap: 2 weeks at or below 32 degrees
6 weeks above 32 degrees

. . . .

N. Actual Building 1A temperatures sent to Ken Graham mailed by John Burleigh on 11/20/96. The readings (see "C" above) span the period 9/13/95 to 10/26/96. I confirmed these readings against the Building 1A engine room log book. Not all information from this book was sent to Graham. All temperature information, however, was sent.

O. Actual Armstrong temperature readings sent to Ken Graham. All rooms were reflected. Not all comments from actual logs were restated. This was mailed by you on 11/14/96.

. . . .

VARIOUS NOTES COMPILED FROM DISCUSSIONS WITH OPERATIONS

HCS started receiving bins of cranberries via truck from Ocean Spray in September of 1995. . . . Verbal indications from operations are that no exceptions of significance, indeed if any, were noted by HCS personnel on the inbound to the warehouse. . . .

. . . .

At an as yet unidentified point in time, but while cargo was still in storage in boxes 20 and 30, 1500 lbs. of freon had to be added to the refrigeration system. The impact of

the loss of refrigerant has not been determined.

. . . .

CHRONOLOGY

Sept. 1995 – Began receiving cranberries from Ocean Spray.

Sept. 1995 – Largest of three refrigeration motors burns out in the Armstrong Warehouse. This is believed to be a major factor contributing to high temperatures noted in various rooms during the 1995 cranberry season.

Sept. 1995 – Motor sent out to Willier Electric Company for repair.

Late Oct. 1995 – Repaired motor put back on line.

Late Oct./Nov. 1995 – Excessive cranberry juice pumped out of box 20 in the Armstrong Warehouse. Referred to in-house as the "sea of red" as the cranberry juice was pumped from the room into the south parking area, forming a pool in front of the warehouse.

Late January 1996 – Verbal notice of claim from Ocean Spray.

Feb. 1996 – Ocean Spray on site inspection. Ocean Spray not shown cranberries stored in 20 or 30 box.

Feb. 13, 1996 [insurers put on notice of claim]

. . . .

Sept. 30, 1996 – Memo J. Evans to P. Dice asks for information surrounding the claim.

. . . .

Nov. 12, 1996 – Memo to Evans from Dice. Requesting authorization to release temp records to Graham.

. . . .

Mar. 6, 1997 – Kroll & Trac as representatives of Ocean Spray insurance carrier sends letter to Dice stating that $3.5 million was paid to Ocean Spray for property damage with $4.5 million still outstanding for business income loss. Advises that anonymous information was received from a warehouse employee regarding breakdown in refrigeration equipment. Arbitration is continuing over who will ultimately pay damages. K & T requests Dice's voluntary cooperation with information production.

Mar. 14, 1997 – J. Evans to Dice. J. Evans places Cozen & O'Connor on case. . . . Requests Dice to collect all information regarding this incident.

Mar. 26, 1997 – Subpoena issued to Paul Dice by K & T.

GENERAL INSURANCE OVERVIEW

Ocean Transport Intermediary Mutual – 1,000,000/occ. – 50,000 deductible

Royal – 9,000,000 umbrella over OTIM

Coverage period for both of the above coverages is 2/8/95 to 2/8/96

We used the Late January 1996 verbal notice of claim from OS as the occurrence date. Underwriters may question coverage if HCS knew that a given occurrence was likely to give rise to a claim and did not report it. The timeliness of reporting is an issue of concern in light of three issues. One is

what has been referred to as the "sea of red." The "sea of red" refers to the large volume of red cranberry juice that was discharged from the Armstrong building in October or November 1995. Whether the liquid was caused by thawing or because of wet berries being brought into storage directly from the bogs has not been determined. Some people have opined that the occurrence was brought about by high temperatures. Most of the juice came from 20 box. HCS personnel pumped juice out of that location. . . .

. . . .

More compelling than the "sea of red" is the issue of motor failure. In September of 1995 the largest of the three refrigeration motors at the Armstrong building burned out. The motor needed to be re-wound. . . . The engine was sent . . . for repairs in September of 1995. In October of 1995 the repaired engine was put back on line. It is believed by certain maintenance personnel that without that engine, boxes 20 and 30 would never have achieved the temperatures necessary to handle the incoming cranberries.

The third issue is a potentially low freon level. Approximately 1,500 lbs. of freon is said to have leaked from the Armstrong refrigeration system at an unidentified point in time. The full impact of the loss is not yet known.

The concern over the occurrence and reporting dates stem [sic] from policy provision – Rule 17 Section (A)I '. . . In the event of an accident or occurrence likely to give rise to a claim under insurance with the Association, the Member shall as soon as possible, but in any case ***no later than three months after the event, give notice*** (Emphasis in original.) thereof to the Managers, or their named

> claims representative shown in the Certificate of Entry, together with all known details. Every letter, notice, writ, summons and process relating thereto shall be notified or forwarded to the Managers or their claims representative immediately on receipt. . . .'
>
> . . . .
>
> . . . Our first notice of the reservation was through Graham Marine Associates, Inc. . . .
>
> John:
>
> All of the documentation in this case is in the second floor lock-up area.
>
> There are two 3.5" floppy diskettes containing back-up files of this memorandum. It is not stored on any of our hard drives.
>
> [Emphasis added; Ex.OAE4.]

Respondent believed that he had received this document around May 1, 1997, and that he had flipped through it at that time. He testified that he felt comfortable with the job Dice had done and had put the "memo" aside. He explained that his intention had been to gather all the necessary information, in anticipation of litigation.

At the ethics hearing, Dice testified that he had been concerned that the "sea of red" might have caused a denial of insurance coverage. According to Dice, if there was an event likely to cause a claim, Holt was required to provide timely notice to the insurer. Dice opined that the "sea of red" was

indicative of a problem of which Holt had not timely advised the underwriters. As a result, Dice's intent had been to alert respondent that they could "have a problem."

Dice stated that respondent had asked him to investigate the situation, but had never asked him to cover up anything, to falsify records, or to provide false information to anyone.

In early 1997, respondent retained Thomas McKay, from the law firm of Cozen & O'Connor, to represent Holt's employees in connection with subpoenas that were served relating to an arbitration proceeding between the first party insurance carriers for Ocean Spray. McCay testified that the two carriers were in a dispute over which carrier would indemnify Ocean Spray for its loss and business-interruption loss. Ocean Spray's insurer had paid for the loss (approximately $4,000,000) and, by way of subrogation, had brought an action against Holt.

After Ocean Spray filed a subrogation claim against Holt, OTIM, Holt's primary liability insurer, appointed Richard Reisert, of the law firm of Clark, Atcheson & Reisert, to determine whether to provide or deny coverage to Holt. After the subrogation action was filed in Superior Court, OTIM appointed Reisert to represent Holt's interests.

During the course of his representation, Reisert requested information from respondent regarding Ocean Spray's "potential

claim." Respondent forwarded a reply on September 11, 1997, which included various documents and information. Respondent wrote:

> With respect to your request number 5(d) dates and times of loss of temperature and dates reported, I have enclosed the room temperatures taken for the Armstrong Building operated by Holt Cargo Systems, Inc. and the room temperatures for room 1a operated by Gloucester Refrigerated Warehouse, Inc. . . .
>
> With respect to your request number 5(e) please be advised that at no time during the storage of the product with either Holt Cargo System, Inc. or Gloucester Refrigerated Warehouse, Inc. was any condition noted of the cranberries.
>
> . . . .
>
> Furthermore, I am told that there are no records of maintenance and repairs to the refrigeration equipment at either warehouse.
>
> [Ex.OAE14.]

The formal ethics complaint charged that respondent falsely represented to Reisert that the condition of the cranberries was not noted while stored at Holt, and that there were no records of maintenance and repairs to the refrigeration equipment at either warehouse.

In reply to this charge, respondent stated in his answer:

> This allegation ignores the specific request contained in Mr. Reisert's letter dated June 6, 1997. Respondent was asked to reply to a 'schedule of requested information.'. . . Reisert's request set forth in ¶5 stated

'for the period up to March, 1996' and specifically under ¶5(e):

> 'dates and times of condition noted, and dates reported to Broker,'
>
> It can be clearly discerned that the request was limited to the time interval when the product was stored and during which Holt personnel made no record of the condition of the cranberries. This response by Respondent was true and not false as alleged.
>
> In addition, Respondent was told by Holt personnel that there were no records of maintenance and repairs to the refrigeration equipment at either warehouse and that is what he believed to be true when he wrote to Reisert on September 11, 1997.
>
> [A16.[4]]

At the ethics hearing, respondent testified that he believed his assertions to be true at the time they were made, based on the information he had obtained from conversations with Marc Goldman and Paul Dice; he had not conducted an independent investigation into the matter.

As to the repairs to the equipment, respondent interpreted Reisert's request for records of maintenance and repairs to mean entries made in a maintenance log. He was informed that such a log did not exist. Until the question was posed differently, he

[4] A refers to respondent's answer to the formal ethics complaint.

did not interpret the inquiry to include invoices for actual repairs made to the equipment.

In addition to the foregoing, respondent never informed Reisert about the creation of temperature records that had been fabricated by Holt employees for Ocean Spray. Reisert first learned of the fabricated records in October 1997, during depositions taken in connection with the arbitration proceedings. Respondent also admitted that he had not informed Reisert about the Dice memo, prior to Dice's deposition, and did not recall discussing the refrigeration problems with Reisert.

The complaint further charged that, "[o]n November 14, 1996, respondent wrote to Graham Marine Associates, Inc. falsely representing that 'Holt did not make note of any conditions of the cranberries. To Holt's knowledge, the first time any condition of the cranberries had been noted was when Ocean Spray verbally notified Holt in February of 1996.'"

Respondent's answer to the complaint stated:

> As to the allegations of ¶10 regarding the Respondent's memorandum to Graham Marine Associates (who had been employed by Holt's carrier to investigate the claim), Respondent's statement in regard to the condition of the cranberries was correct as more fully set forth in respondent's reply to ¶9 above. Based on the information given to him by Holt personnel the statement was true to the best of his knowledge.
>
> Moreover, once respondent became aware that the temperature records had been

> fabricated Respondent took affirmative steps to make sure that from that time forward, only accurate information would be provided. In furtherance of Respondent's intent, he directed Paul Dice and his assistant John Burleigh to prepare a chart listing the correct daily temperatures for all of the rooms where the cranberries were stored at the Holt and Gloucester warehouse facilities.
>
> [A17.]

According to respondent, he attached the temperature records to his letter to Graham Marine Associates, Inc., but did not inform it about the false temperature records that had been supplied to Ocean Spray.

On March 16, 1999, Ocean Spray filed suit against Holt in the Superior Court of New Jersey, Law Division, Camden County. Discovery proceeded thereafter.[5]

As to discovery requests, respondent claimed that he relied on the expertise of Reisert and Faustino Mattioni,[6] as the litigation attorneys in the Ocean Spray matter. Reisert and Mattioni had access to Holt personnel to assist in the production of documents and the preparation of responses to interrogatories. The attorneys prepared Holt employees for

---

[5] The claim was eventually settled but, according to respondent, is subject to a confidentiality agreement.

[6] Mattioni was appointed by Holt's excess carrier, Royal Sun Alliance Insurance Company, to represent that insurer's interest in the Ocean Spray litigation and to participate in Holt's defense.

depositions. The discovery process was extensive. There were at least twenty-three depositions of Holt personnel. Hundreds of documents were produced. Respondent's participation in the discovery process consisted chiefly of directing legal and risk management staff to comply with discovery requests.

Respondent claimed that he had a reasonable and non-frivolous basis to defend the litigation: there were questions raised about the condition of the cranberries on their arrival at the storage facility, as no inspection was conducted on their arrival[7]; there was a lengthy delay between Ocean Spray's notice of a potential claim in 1996 and its suit, filed in March 1999; and there were questions raised as to whether Ocean Spray engaged in good faith mitigation of damages.

On August 27, 1999, Reisert submitted answers to a first set of interrogatories propounded by Ocean Spray's counsel. Respondent was identified as the person answering the interrogatories. He and ten other Holt employees were listed as individuals who provided information in the preparation of the answers to the interrogatories.

Although the formal ethics complaint charged that respondent signed the certification for the answers to

---

[7] Respondent raised this as a defense, despite a statement in the Dice memo to the contrary - that no "exceptions" to the condition of the cranberries were noted by Holt personnel on arrival at the warehouse.

interrogatories, the certification page was never found. Respondent claimed that he was requested to sign a blank certification, nunc pro tunc, five months after the answers had been served on Ocean Spray.

Respondent admitted that he signed the certification. He maintained that he never reviewed the answers to interrogatories, but relied on Reisert's expertise in drafting the responses. To bolster this contention, respondent produced a copy of his August 9, 1999 letter to Holt's counsel, stating: "I have not had, nor will I get, a chance to review your answers. I trust that you and Rich [Reisert] have gone over these responses very carefully and, therefore, for this one particular time I am going to have to rely upon you solely."

Following Holt's filing of the answers to interrogatories, Ocean Spray demanded more specific answers. On January 14, 2000, Reisert forwarded to respondent proposed responses to Ocean Spray's demand for more specific answers to interrogatories. According to Reisert, sometime after January 14, 2000, he and respondent reviewed the responses at respondent's office. On March 13, 2000, Reisert submitted more specific answers to Ocean Spray. One of the responses was re-drafted to reflect changes proposed by respondent:

> During the period of time that the product was stored at Holt Cargo's facility, Holt

> Cargo never independently determined or observed that the product was damaged, spoiled, deteriorated or otherwise unfit, and no one from Holt ever saw any signs or indications of mold, juicing, shrinkage, off or bad colors, or any other indications that the product may have spoiled or deteriorated. Holt Cargo's first understanding that there may have been a problem with the product was when it was contacted by Ocean Spray.
>
> [Emphasis added; Ex.OAE18.]

Respondent recommended that Reisert eliminate the term "juicing" from the above response. Reisert complied with this and other suggestions made by respondent. Respondent admitted that, at the time Reisert was preparing the answers to interrogatories, he had not disclosed to Reisert the existence of the Dice memo. Respondent reasoned that Reisert already had all of the information that was contained in that memorandum. Respondent believed it significant that, on October 29, 1997, Reisert wrote to OTIM to update it on developments in the arbitration case. In the letter, Reisert stated that Ocean Spray's underwriter believed that the temperature records had been falsified. Respondent, therefore, deduced that the carrier had this knowledge years before litigation commenced.

The Dice memo was first mentioned during Dice's deposition on March 16, 2000, after which Ocean Spray requested its production. Reisert had not seen the document. In a July 5, 2000

memorandum to respondent, Reisert indicated that it might be privileged if prepared in anticipation of litigation. He also noted therein that he had reviewed the "legal file" received from respondent's office which did not contain the memorandum, and that, before he was placed in the position "of telling opposing counsel that a potentially significant document" was unavailable, respondent should attempt to locate it. Respondent claimed that, despite further searches, the document had not been located until October 2000, "by happenstance," when he was looking for other documents in "the middle drawer of a three-draw credenza." Respondent immediately turned it over to Mattioni. The first time Reisert saw the Dice memo was in the fall of 2000, after Ocean Spray filed a motion to compel its production.

According to the formal ethics complaint, respondent executed a certification in opposition to the motion. Respondent's certification stated that the Dice memo was "prepared at my direction and in anticipation of litigation that we expected Ocean Spray to file against Holt." Respondent further certified that he was "aware of the discovery conducted" in the case and that the "equivalent of the Dice memorandum and more [had] been disclosed in the multiple proceedings and discovery;" that "[i]t is our position that we have diligently

complied with all discovery requests by producing documents and virtually all of our warehouse and refrigeration personnel for depositions;" and, finally, that the statements made by him were true and that, if they were willfully false, he was subject to punishment. Dice also filed a certification in opposition to the motion. According to Dice, on September 30, 1996, respondent "asked Risk Management for information concerning the claim being made by Ocean Spray. From that point the investigation proceeded at the request of and in liaison with [respondent] and was in anticipation of litigation."

Respondent's assertions that the equivalent and more had been disclosed through depositions and discovery were borne out by Ocean Spray's September 13, 2000 settlement letter demanding $11,000,000 or the total limits of insurance coverage available to Holt. The letter set forth that Holt's employees breached their contractual obligations to Ocean Spray to keep the cranberries in frozen storage. It highlighted that Ocean Spray was not alerted to the problems with the refrigeration or to Holt's decision to repair, rather than replace, a motor in a refrigeration compressor, a decision that saved Holt several thousand dollars but caused further damage to the cranberries. The letter also underscored Holt's failure to take remedial action by moving the cranberries to a different freezer

facility. Holt also failed to inform Ocean Spray that, as temperatures in the storage freezers rose, the juice that flowed freely from the cranberries was several inches deep in various locations, and that pumps had to be used to remove effluent and dispose of it in the parking lot. According to the letter, "the stench from the rotting, liquefied berries was so bad that Holt brought in extra equipment to hose down the parking lot and wash away the spoiled juice." The letter also noted that, from Ocean Spray's inspection of the site, Ocean Spray learned that respondent's office was close to where the cranberries were stored.

The letter went on to state that Ocean Spray had learned of Holt's attempts to deceive it by covering up evidence of the cranberry spoilage after the fact. The letter charged that Holt "blatantly and falsely" denied the spoilage when questioned by Ocean Spray and tried to hide the evidence of the spoilage by moving spoiled cranberries to another freezer. Finally, the letter stated that, when Ocean Spray employees were finally permitted to inspect the Armstrong freezers where the cranberries were originally stored, "one witness" described the conditions in storage box 20 as "cranberry death."

Notwithstanding the information obtained through discovery by Ocean Spray, on October 13, 2000, the trial judge found that

the "crime-fraud" exception to the attorney-client and work product privileges applied to the Dice memorandum, and that fraud was "conclusively established" by the court's in camera review of the contents of the Dice memorandum and other documents that Holt asserted were privileged. The court stated:

> A review demonstrates that the 'Dice' memo (and others) is a 'smoking gun' that shows intentional coverup, concealment, deceit, deception and stonewalling of the truth by Holt. The 'Dice' memo, for example, uses the term, 'fabricated,' no less than a dozen times.
>
> [Ex.OAE21.]

At the DEC hearing, Mattioni testified that he and Reisert were to oppose the motion before Judge Cook. It was Mattioni's belief that the Dice memo was protected under the attorney-client and work product privileges. He also felt that Ocean Spray had all of the relevant information as a result of the depositions from the insurance arbitration: both the correct and fabricated temperature readings, information about refrigeration equipment failures, invoices indicating that work had been performed on the refrigeration equipment, and information that the cranberries had emitted large volumes of juice during storage.

Mattioni stated that he had consulted with an ethics expert prior to objecting to the motion, who concurred with him that

the memorandum was a privileged document. Although Mattioni disagreed with Judge Cook's opinion, he claimed that an appeal in the matter became moot, because the judge turned over the documents to Ocean Spray.

Shortly after Judge Cook's decision was rendered, the Ocean Spray matter was settled.

As to mitigating circumstances, the parties stipulated that, if respondent's neighbor of twenty-five years, Thomas M. Cooper, had been available to testify, he would have stated that he was aware of respondent's reputation in the community for honesty and integrity. Linda Handy, a paralegal at Holt Oversight and Logistical Technology, Inc., Faustino Mattioni, Esq., Lisa Kline, Esq., Edward Shay, Esq., and Walter Curran all testified about respondent's honesty, integrity, and good reputation.

The special master found that respondent was extensively involved in the Ocean Spray matter. The special master concluded that the size of the claim and the concern about insurance coverage, expressed early on, necessarily involved respondent as Holt's general counsel. Respondent's own testimony, as well as that of Dice, indicated that "respondent was in control of the handling of the litigation." Moreover, the special master highlighted the fact that thirteen of the OAE's exhibits in

evidence, covering the period from October 18, 1996 to December 27, 2000, and fourteen of respondent's exhibits, covering the period from September 25, 1996 to July 25, 2000, directly involved respondent.

According to the special master, Dice's testimony and his relationship with respondent proved by "clear and convincing evidence that respondent received in the regular course of his responsibilities, all of the Dice memoranda. Accordingly, [respondent] knew of the condition of the stored cranberries from the time of the initial Dice memorandum, dated October 18, 1996." The special master further found that the Dice memorandum of October 18, 1996 set in motion respondent's unethical conduct and that, from that time on, respondent knew of the fraud being perpetrated by Holt employees, which he perpetuated by suppressing the truth and forwarding information he knew to be false. According to the special master:

> As indicated, in the respondent's own words, the 'equivalent of the Dice memorandum and more has been disclosed in the multiple proceedings and discovery.' If so, there would be nothing privileged in the memorandum. The importance of the 20-page memorandum, however, is in its impact on legitimate discovery, in gathering together in one document much of what Holt knew and when it was known. The Respondent's claim of privilege was calculated to further deny to the plaintiff, and hence to the court,

> essential information relating to Holt's fraud.
>
> [SMD19-SMD20.][8]

The special master concurred with the presenter's position that respondent's claim that he had not read the Dice memorandum was not credible. The special master underscored that respondent was concerned about the possible size of Ocean Spray's claim, a concern that led him to request that Dice prepare the memorandum. The special master reasoned that respondent's responsibilities as general counsel, the size of Ocean Spray's loss, his assertion that he was too busy with other matters, and his reliance on outside counsel did not lend credibility to his contention that he had not read the "memo."

The special master did not find any evidence that respondent participated in Holt's fraudulent conduct to cover up the cause of the cranberry spoilage. The special master, therefore, dismissed the charged violation of RPC 1.2(d), with the presenter's consent.

Similarly, the special master dismissed the charge of a violation of RPC 1.6(b)(1), finding that respondent had not participated in the fraud. Instead, the special master found that respondent violated RPC 1.6(b)(2), in that he perpetrated a fraud on the court through the use of false and misleading

---

[8] SMD refers to the decision of the special master.

information that he knew would be used in the litigation and would be presented to the court. The special master found that the attorney-client relationship did not justify respondent's actions.

The special master also found that respondent violated RPC 3.1 because, as of the first Dice memorandum, respondent knew about the Holt employees' fraudulent behavior and, therefore, knew there was no good defense to the Ocean Spray claim. Moreover, the special master found that respondent's position that the document did not have to be turned over to Ocean Spray because Ocean Spray already had nearly all of the information, tended to show that his claim of attorney-client privilege was frivolous. According to the special master, the frivolous nature of Holt's defense caused unnecessary expenditures of time and money, which RPC 3.1 seeks to avoid.

The special master did not find that respondent violated RPC 3.3(a)(1), dismissing the charge that respondent had made false statements to a court. The special master found, however, that respondent violated RPC 3.3(a)(2), when he failed to disclose material facts to the plaintiff in the litigation — and, therefore, to the court — which disclosure was necessary to avoid assisting a fraudulent act by his client; RPC 3.3(a)(4), when he offered evidence he knew to be false; and RPC 3.3(a)(5),

when he failed to disclose accurate information in the litigation that would tend to mislead the court.

The special master emphasized that respondent's failure to disclose all of the relevant information relating to the Holt fraud resulted in extensive discovery, including approximately thirty-six depositions and the production of many documents. The special master noted that, as Holt's general counsel, respondent had to know that, during the normal course of the litigation, the court would be misled by the information he supplied.

The special master did not find a violation of RPC 3.4(b) because there was no proof that respondent falsified evidence, counseled false testimony, or offered a prohibited inducement. The special master did, however, find a violation of RPC 3.4(a), in that respondent obstructed Ocean Spray's access to evidence when he suppressed the Dice memoranda and provided responses to discovery that he knew were false.

The special master also found that respondent violated RPC 4.1(a)(2) (failure to disclose a material fact to a third person when disclosure is necessary to avoid assisting a fraudulent act by a client), by suppressing the fraudulent statements made by Holt employees. He dismissed, however, the charge of a violation of RPC 4.1(a)(1) (making a false statement of material fact or law to a third person).

Finally, the special master found that respondent violated RPC 8.4(a), (c), and (d), because he attempted to perpetuate a fraud committed by others.

In assessing the appropriate discipline to impose, the special master considered the mitigating factors presented – respondent's good reputation and character, and the lack of injury to a client – counterbalanced by the aggravating factors – the extent of the damages involved, the direct impact on the court, and the significant ethics violations involved. The special master recommended the imposition of a three-month suspension.

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

This controversy rests on when respondent learned of the problems with Ocean Spray's cranberries and his role in the following months. Respondent would have us believe that, once Ocean Spray alerted Holt about its potential claim, he did not become actively involved in the matter, leaving its handling to outside counsel. We find respondent's position unworthy of belief. As general counsel for the Holt companies, respondent was in charge of, among other things, managing outside counsel

in litigation matters, providing direction and legal advice to risk management, and supervising the legal department. Moreover, the sheer number of exhibits in this matter demonstrates the extent of respondent's involvement. Twenty-seven exhibits were either letters or memoranda to or from respondent, or certifications or answers to interrogatories in which he was involved. Clearly, respondent was not a passive participant in the matter.

The incident giving rise to the chain of events that precipitated respondent's ethics dilemma was his receipt of Ocean Spray's September 1996 letter putting Holt on notice of its potential liability for the damaged cranberries. As the result of this information, and based on discussions with Paul Dice, respondent commissioned an investigation by Dice, which resulted, in part, in Dice's preparation and submission of three memoranda to respondent.

Although respondent tried to demonstrate that he did not recall receiving the memoranda when drafted, or being aware of their contents, both his and Dice's testimony, as well as the memoranda themselves, established otherwise. Dice's three memoranda detailed what had occurred, why it occurred, and how Holt employees tried to cover up their role in the cranberry spoilage. Respondent and Dice conferred about the situation

contemporaneously with Dice's October 1996 memoranda. Respondent conceded as much in his brief. The brief erroneously stated, however, that neither of the October 1996 memoranda mentioned the conditions of the cranberries. In fact, Dice's first memorandum, dated October 18, 1996, established that Ocean Spray began noticing problems with the quality of the cranberries as early as January 1996, and that the cranberries "became dehydrated" and had a "raisin-like" appearance.

Respondent's receipt of this memorandum and his further discussions with Dice prompted him to request yet more information. This is clear from the start of Dice's October 23, 1996 memorandum: "The following is per your request of today." Finally, we find that respondent's contention that he did not read Dice's third memorandum is neither believable nor particularly relevant. Respondent conceded that he recalled receiving the Dice memo, but claimed that he did not "fully" review it because he was confident that Dice had done a thorough job compiling the relevant documents and information for safekeeping in the future defense of Ocean Spray's claim. By this time, respondent knew about the spoiled cranberries, the refrigeration problems, and the false temperature readings. Thus, even though he claimed that he may have only "flipped"

through the document, he was already fully familiar with its contents and the looming problem with Holt's insurance carriers.

A review of Ocean Spray's September 13, 2000 settlement letter to Holt lends support to the conclusion that respondent was aware of the situation early on. The letter referred to "recent" depositions of former Holt employees from whom damaging information was obtained. It stated, in relevant part:

> Temperatures continued to rise . . . and finally reached and exceeded 60° Fahrenheit, such that cranberry juice flowed freely out of the bins and on to the floors of the boxes. Witnesses have reported the juice to be several inches deep in various locations throughout the boxes. There was so much juice that pumps had to be used to remove the effluent and dispose of it in the parking lot. Indeed, the stench from the rotting, liquefied berries was so bad that Holt brought in extra equipment to hose down the parking lot and wash away the spoiled juice.[2]
>
> [2] From our recent inspection of the Armstrong building and parking lot, we know that it is mere steps away from the Holt administrative offices.
>
> Management at Holt Cargo Systems and Holt Oversight knew of all these problems . . . .
>
> [Ex.R27.]

The footnote from respondent's own exhibit showed that his office was merely "steps away" from where the cranberries were stored. It is, therefore, inconceivable that respondent neither saw, nor smelled the rotting berries. The logical inference is

that respondent was aware of the problem even before receiving Ocean Spray's September 1996 letter.

The evidence clearly and convincingly establishes that respondent knew about the Holt "cover-up" and knew that Holt's position with its insurers was tenuous because of its failure to provide timely notice of the problems with the refrigeration. See Dice's October 18, 1996 memorandum (stating that, if the insurers "were to gain knowledge of the events that took place during September 1995, it is likely that they will deny coverage based on untimely notice"). While there is no evidence that respondent actively engaged in the cover-up of the cranberry spoilage, his silence about what truly transpired misled not only Ocean Spray, but also Reisert and Graham. Respondent's likely motive for withholding the information was his fear that Holt's insurer would not cover the loss.

Although the record does not clearly and convincingly establish that respondent was involved in the original fraud, it is unquestionable that he did little to bring it to light, once he learned about it. Respondent instructed Dice and another employee to compile the correct temperature records, which were then forwarded to Graham and to Ocean Spray. The fact that respondent ordered the dissemination of the true temperature readings is a "red-herring" of sorts. As respondent noted, Ocean

Spray had already concluded that the cranberries had been subjected to temperature abuse. Thus, turning over the correct temperature records only reinforced what Ocean Spray had already deduced: that Holt was liable for the damaged cranberries. Respondent did not inform Graham, Ocean Spray or Reisert that Holt employees had previously submitted false temperature readings to Ocean Spray.

Respondent also failed to divulge the existence of the Dice memo to Reisert prior to Dice's deposition, and did not apprise Reisert of the refrigeration failure. Also, respondent claimed, in a September 11, 1997 letter to Reisert, that Holt employees had not noted the condition of the cranberries. This claim was patently false, and respondent knew of its falsity. The dehydration of and "raisin-like" appearance of the cranberries, as well as the refrigeration problems at the warehouse, were mentioned in Dice's October 18, 1996 memorandum. In fact, the memorandum specifically noted that Holt employees had not noted any problems with the cranberries upon their arrival at the Holt facility. Respondent made these same misrepresentations to Graham on November 14, 1996.

Once Reisert was appointed to represent Holt in the litigation, he prepared documents for the litigation relying on the misinformation supplied by respondent. Again, we find that

respondent's motive for withholding information was undertaken to mislead the insurers about when Holt became aware of the cranberry problems.

As is underscored in respondent's brief, Reisert was retained by OTIM in the summer of 1996 as its "coverage counsel" on Ocean Spray's potential claim. He was, therefore, not representing Holt at that time. It was only after the insurance arbitration concluded, and Ocean Spray filed a subrogation lawsuit against Holt in March 1999, that OTIM appointed Reisert to represent Holt's interests in the litigation.

As of August 1999, when Reisert prepared interrogatory answers and then later, when he prepared more specific answers to interrogatories, he was unaware of the existence of the Dice memo. Nevertheless, respondent alleged in his answer that he relied on Mattioni's and Reisert's expertise in the defense of the Ocean Spray litigation. Notwithstanding this claim, respondent failed to turn over to Reisert all of the information he needed to properly reply to discovery requests. Reisert first learned about Dice's memo at Dice's deposition in March 2000. In July 2000, Reisert wrote to both respondent and Dice asking them to conduct a search for the "memo" because Reisert did not want to represent to opposing counsel that a "potentially significant document was unavailable." Without benefit of the memo, Reisert

opined that it could be privileged, but cautioned that he needed to "examine the document" before determining whether Holt could successfully assert that it was privileged.

We view with suspicion that neither respondent nor Dice was able to locate the Dice memo until September 2000, just prior to the October 6, 2000 motion before Judge Cook.[9] Up until that time, Holt claimed that the Dice memo was lost.

In connection with the motion before Judge Cook, the judge conducted an in camera review of the "claimed" confidential material and determined that neither the Dice memo nor several other Holt documents were attorney-client or work-product "privileged." The judge determined that the documents fell within the crime-fraud exception. The judge stated that, where an "'attorney-client privileged' memo contains evidence or suggestions of false information, the crime/fraud exception applies." The judge cited Nat. Utility Services, Inc. v. Sunshine Biscuits, Inc., 301 N.J. Super 610, 618 (App. Div. 1997). The judge noted that the "'fraud' exception is interpreted broadly to include, e.g., [c]onfederating with clients to allow court and [opposing] counsel to labor under a misapprehension as to the true state of affairs. . . ."

---

[9] Dice turned over the entire risk management file (which contained, among other things, the Dice memo) to Holt paralegal, Linda Handy, when he left Holt's employ, in September 2000.

(Citations omitted). Holt did not take an interlocutory appeal from the judge's decision.

Shortly after Judge Cook rendered his decision and the allegedly privileged documents were disclosed, the Ocean Spray matter was settled.

Respondent disputed the special master's finding of a violation of RPC 1.6(b)(2), pointing out that the special master failed to identify the privileged information that respondent should have disclosed to avoid perpetrating a fraud on the court. To exonerate himself, respondent argued that he "took affirmative steps to ensure that his client's past fraud would not be perpetuated" by having his staff prepare charts depicting the actual daily temperatures and "forwarding them to Graham and, by extension, OTIM, Richard Reisert and then to Ocean Spray through the discovery process." Respondent also claimed that Ocean Spray's September 13, 2000 settlement letter included references to, among other things, "rising temperatures" where the cranberries were stored, refrigeration equipment failures, and movement of berries, thereby establishing that Ocean Spray had knowledge of these circumstances before the release of the Dice memo.

RPC 1.6(b)(2) states that "[a] lawyer shall reveal . . . information [relating to representation of a client] to the

proper authorities, as soon as, and to the extent the lawyer reasonably believes necessary, to prevent the client . . . from committing a . . . fraudulent act that the lawyer reasonably believes is likely to perpetrate a fraud upon a tribunal." We determine that RPC 1.6(b)(2) is inapplicable here because Holt had committed the fraud prior to respondent's involvement in the matter.

We find, however, that respondent's conduct, viewed in the context of the entire situation, was unethical. That he released the proper temperature records does not save him from a finding of unethical conduct. Because his office was "steps away" from the cranberry carnage, a finding that he knew about it all along is inevitable. In addition, it was he who initially instructed Dice to investigate the situation, to draft the memoranda, and then to insert the phrase "attorney/client privilege" on the Dice memo; it was he who failed to alert Holt's counsel (Reisert) of the Dice memo; it was he who "misplaced" or made the Dice memo unavailable; it was he who failed to alert the insurer (Graham and Reisert), that false temperature readings had been disseminated; it was he who failed to inform Reisert when Holt became aware that the cranberries had spoiled; it was he who failed to inform Reisert of the true conditions of the cranberries and that, if the cranberries were not already

spoiled on arrival, the answers to the interrogatories were untrue; it was he who failed to alert Reisert of the equipment failures; and it was he who failed to provide proper information to Reisert so that the initial interrogatory answers were not fully responsive.

While it is true that there is no evidence that respondent engaged in the initial "cover up," his subsequent conduct served to perpetuate the fraud. Moreover, that Ocean Spray was able to glean the "damning" evidence it needed, during depositions, does not absolve respondent from the responsibility of turning over evidence that was properly requested during discovery.

Respondent cannot shield himself from responsibility by claiming that he did not "knowingly" fail to disclose material facts because he had relied on information given to him by others. The overwhelming evidence is that respondent knew what was going on early on. Although it is probable that he was put in an untenable position by the insurance companies, his desire to help his client clouded his professional judgment, causing him to breach his ethics responsibilities.

The basis for our finding that respondent acted unethically is not his failure to produce the Dice memoranda, which he allegedly deemed to be privileged under the attorney-client and work-product doctrines. What was unethical was his knowingly

withholding critical information from Ocean Spray, Graham, and also Reisert, who was charged with defending the suit. Simply stated, even if respondent had a good faith belief that the Dice memoranda themselves were protected by privilege, he had a duty to disclose the information contained in those memoranda, that is, his own knowledge of the condition of the cranberries, the problems with the refrigeration equipment, and Holt's fabrication of records to cover up the damages. We find, thus, that respondent violated RPC 4.1(a)(2) (failure to disclose a material fact to a third party when disclosure is necessary to avoid assisting a fraudulent act by a client), RPC 8.4(a) (violation of the Rules of Professional Conduct), RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation), and RPC 8.4(d) (conduct prejudicial to the administration of justice). We dismiss the balance of the charged RPCs either because they are inapplicable or because the evidence falls short of the clear and convincing standard.

The only issue left for determination is the quantum of discipline. In fashioning the appropriate measure of discipline for respondent's conduct, we find the following cases instructive. In re Whitmore, 117 N.J. 472 (1990) (reprimand where a municipal prosecutor failed to disclose to the court that a police officer, whose testimony was critical to the prosecution of a charge of

driving while intoxicated, intentionally left the courtroom before the case was called, resulting in the dismissal of the charge); In re Vella, N.J. (2004) (three-month suspension where, in a divorce proceeding, the attorney assisted her client to conceal the death of his father – for whom he was acting as guardian – from the court, opposing counsel, and the decedent's spouse); In re Paul, 167 N.J. 6 (2001) (three-month suspension where the attorney made oral misrepresentations to his adversary and written misrepresentations in, among other things, a deposition and several certifications to a court); In re Forrest, 158 N.J. 429 (1999) (in connection with a personal injury action involving injured spouses, the attorney was suspended for six months for failing to disclose the death of one of his clients to the court, to his adversary, and to an arbitrator, and for advising the surviving spouse not to voluntarily reveal the death; the attorney's motive was to obtain a personal injury settlement); In re Cillo, 155 N.J. 599 (1998) (one-year suspension where, after misrepresenting to a judge that a case had been settled and that no other attorney would be appearing for a conference, the attorney obtained a judge's signature on an order dismissing the action and disbursing all escrow funds to his client; the attorney knew that at least one other lawyer would be appearing at the conference and that a trust agreement required that at least

$500,000 of the escrow funds remain in reserve); and In re Kornreich, 149 N.J. 346 (1997) (three-year suspension where the attorney, who had been in an automobile accident, misrepresented to the police, her lawyer, and a municipal court judge that her babysitter had been operating her vehicle; the attorney also presented false evidence in an attempt to falsely accuse another of her own wrongdoing).

Respondent's conduct is most similar to that in the Paul and the Forrest cases. In Paul (three-month suspension), the attorney made oral and written misrepresentations to his adversary, in a deposition, and in certifications to the court. In Forrest (six-month suspension), the attorney withheld a critical fact – the death of his client – from the court, his adversary, and an arbitrator, in order to obtain a personal injury settlement. Two distinguishing factors are that, unlike in Forrest, respondent did not advise his client to commit fraud and he does not have prior discipline (a private reprimand in Forrest).

Here, respondent withheld crucial information from Ocean Spray, Holt's insurer, and Holt's attorney in the litigation. While his misguided efforts may have been undertaken to prevent Holt from suffering serious financial consequences, his actions were improper and also resulted in the excessive expenditure of

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of John A. Evans
Docket No. DRB 04-140

Argued: June 17, 2004

Decided: August 6, 2004

Disposition: Three-month suspension

Members	*Disbar*	*Three-month Suspension*	*Censure*	*Admonition*	*Dismiss*	*Disqualified*	*Did not participate*
Maudsley		X					
O'Shaughnessy							X
Boylan			X				
Holmes		X					
Lolla		X					
Pashman		X					
Schwartz			X				
Stanton		X					
Wissinger		X					
Total:		6	2				1

Julianne K. DeCore
Chief Counsel