SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket Nos. DRB 93-162 and
DRB 94-094

IN THE MATTER OF	:
GREGORY H. WHEELER,	:
AN ATTORNEY AT LAW	:

Decision
of the
Disciplinary Review Board

Argued: July 21, 1993 (DRB 93-162)
May 18, 1994 (DRB 94-094)

Decided: April 12, 1995

John McGill appeared on behalf of the Office of Attorney Ethics in the matter under Docket No. DRB 93-162.

Justin T. Loughry appeared on behalf of respondent in the matter under Docket No. DRB 93-162.

Richard J. Engelhardt appeared on behalf of the Office of Attorney Ethics in the matter under Docket No. DRB 94-094.

Respondent waived appearance for oral argument in the matter under Docket No. DRB 94-094.

These matters were before the Board on a recommendation for discipline filed by Special Master David H. Dugan III (DRB 93-162)

and on a Motion for Reciprocal Discipline filed by the Office of Attorney Ethics (DRB 94-094).

In DRB 93-162, respondent was charged by way of a seven-count formal complaint with multiple violations of DR 5-104(A) (conflict of interest in a business transaction with a client), DR 1-102(A)(4) and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation), DR 1-102(A)(5) and RPC 8.4(d) (conduct prejudicial to the administration of justice), DR 1-102(A)(6) (conduct adversely reflecting on fitness to practice law), RPC 1.7(b)(2) (conflict of interest in taking on representation without full disclosure), RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), RPC 1.4(a) (failure to keep client reasonably informed and to comply with reasonable requests for information), RPC 5.5(a) (unauthorized practice of law), RPC 1.15(d) (failure to comply with the recordkeeping provisions of R. 1:21-6 by not maintaining proper trust and business accounts), RPC 1.15 (knowing misappropriation of trust funds), and RPC 1.1(b) (pattern of neglect). The complaint was amended by letter dated November 20, 1992 (Exhibit SM-2) to charge a violation of RPC 8.1(b) (failure to cooperate with a disciplinary authority).

Respondent was admitted to the New Jersey bar in 1980. He was temporarily suspended on November 9, 1990 for failure to pay a fee arbitration determination. While he subsequently paid the necessary amount and petitioned the Court for reinstatement, that petition was opposed by the OAE due to the multiple matters then

pending against respondent. The Court denied respondent's petition on February 5, 1991. He remains suspended to date.

DRB Docket No. 94-094 (The Pennsylvania Reciprocal Discipline Matter)

On July 8, 1993, respondent was suspended from the practice of law in Pennsylvania for a period of one year and one day. Thereafter, on March 1, 1994, while the matter under Docket No. DRB 93-162 was pending before the Board, the OAE filed a Motion for Reciprocal Discipline, which was heard by the Board on May 18, 1994. The Pennsylvania order of suspension and, thus, the Motion for Reciprocal Discipline were based on a series of matters in which respondent received retainers to represent clients, proceeded to do little or no work on behalf of the clients, failed to pursue their matters with diligence or advise them as to the status of the matters and then, in a number of cases, misrepresented the status of the case to the client. Compounding these derelictions was the fact that, in several of the cases, respondent failed to return unearned retainers to his clients, when requested to do so.

The OAE requested that the Board impose the same period of suspension as that ordered by the Supreme Court of Pennsylvania, that any such suspension run independently of any other discipline imposed as a result of the pending disciplinary matter and that respondent be given no credit in the reciprocal discipline matter for any period of suspension served as a result of the previously mentioned fee arbitration matter. On the other hand, respondent

maintained that, at a minimum, any reciprocal discipline imposed should be retroactive to the date of the Pennsylvania order, July 8, 1993.

* * *

DRB Docket No. 93-162

With the exception of the bracketed material in bold type, the facts in this matter are, substantially, as set forth in the Special Master's "Analysis of the Evidence," as follows:

First Count

> The first count relates to a high risk $75,000 loan Michael Narvaez made to for [sic] the benefit of Brazilian Imports of America, a New Jersey corporation formed by the respondent in July of 1984, in which the respondent was an officer, a director and the single largest shareholder (30%). At the time of the transaction, the respondent was also representing Mr. Narvaez in a substantial medical malpractice case.
>
> As Mr. Narvaez testified on this first count and as respondent later testified, it became clear that the two, who once had been rather close friends, now hold strong feelings of distrust and animosity toward each other. Their testimonies as to the first count were in sharp conflict.
>
> When Mr. Narvaez advanced the money in July of 1984, the corporation had no money and was indebted to First Peoples Bank in Westmont, New Jersey for $25,000. It had not yet begun its planned operation of importing motor vehicles and other products to the United States from Brazil. It seems clear that respondent introduced Mr. Narvaez to the venture, by bringing a prototype Brazilian sports car to Mr. Narvaez [sic] home and giving him promotional literature (T205:18-24). However, at this point the parties go in different directions in their depictions of the events.
>
> Respondent disputes the charge that he took advantage of Mr. Narvaez. He insists that Mr. Narvaez was not

pressured into participating, but aggressively sought the opportunity on his own. (T335:4-18). He claims that Mr. Narvaez knew full-well that he was investing in a high-risk venture. He points to the fact that Mr. Narvaez is well educated - in fact they met each other at Rutgers Law School in Camden, which Mr. Narvaez attended for one year. (T203:5-205:5). Respondent also contends that Mr. Narvaez had at least three meetings with other principals in the venture giving him ample opportunity to investigate before he contributed the $75,000. (T335:17-24). Finally, respondent insists that the $75,000 was not a loan but an investment, and that the [sic] gave the promissory note only because he considered Mr. Narvaez a friend and wanted to shoulder the potential risk with him (T338:2-24).

Mr. Narvaez disagrees. He claims that respondent took the initiative to get him involved (T205:1-4). Mr. Narvaez claims that he resisted the idea of an investment, and proposed a loan instead (T206:2-3). He further contends that there were no meetings before the loan was made. (T277:8-10).

Although the testimony about the circumstances leading up to the making of the investment/loan are [sic] in dispute, the evidence of the events following that is consistent. Mr. Narvaez had no money of his own for this purpose. He arranged with a cousin of his to place several certificates of deposit worth $75,000 in escrow with the Marine Midland Bank as collateral for a $75,000 90 day loan from the bank to Mr. Narvaez. Mr. Narvaez, at respondent's direction, wired $25,000 from his loan account to respondent's bank account to pay off that **[pre-existing]** corporate loan and then wired the balance of $50,000 to a designated bank in Brazil. (T209:23-25).

In exchange for these funds, Mr. Narvaez was given a 5% share of corporate stock in Brazilian Imports of America and he was also given a promissory note from respondent in which respondent personally agreed to repay the $75,000 to Mr. Narvaez with interest at 1% above prime. The interest payments were set at $875 per month. There was no collateral other than the note. Mr. Narvaez was not invited to become an officer or director of the corporation. **[Narvaez testified that the five shares of stock were intended as a fee to him for brokering the loan.]**

In the course of time, respondent managed to repay $25,000 of the loan and some of the interest. However, the Brazilian venture failed, respondent defaulted on the note to Mr. Narvaez and, in turn, Mr. Narvaez defaulted

on his obligation to Marine Midland. As a consequence of that default, part of his cousin's collateral was taken to cover the $50,000 principal balance, leaving Mr. Narvaez indebted to his cousin in that amount.

Mr. Narvaez kept pushing respondent to make payment of the $50,000. In the spring of 1987 respondent gave Mr. Narvaez a personal check for $50,000, premised on the respondent's expectation of receiving a loan through a brokerage firm in Glenside, Pennsylvania. **[Respondent testified that he specifically told Narvaez that he was expecting to receive loan proceeds to cover that check and that Narvaez should not attempt to negotiate the check until respondent contacted him. [T 384-385].** When the loan failed to materialize, respondent's check bounced and was never repaid. The balance owed now by respondent under the promissory note is approximately $50,000. **[Respondent indicated that the balance is substantially less, though he was not more specific].**

Second Count

The second count relates to a check respondent issued to International Trading Group for $6,390 in connection with the purchase of futures options in April of 1986. The check bounced. **[Respondent testified that he wrote this check expecting fees in on a settlement. These funds, however, did not come in, as expected. There is no evidence to suggest that that information was conveyed to Narvaez at the time respondent wrote the check. T 389-390].** International Trading Group then sued Mr. Narvaez in the New Jersey Superior Court, Somerset County, for that amount because the purchase had been made in Mr. Narvaez [sic] individual account. (Mr. Narvaez and the respondent had applied for a joint account in order to invest jointly but that account had not yet become operational when this particular purchase was made. The evidence is clear, however, that both parties had intended the purchase to be a joint investment.) **[It should be noted that, while respondent did, indeed, execute a joint partnership agreement [Exhibit C2-1], he denied that he intended this to be a joint venture. Rather, he maintained that he issued the check at Narvaez' request so that Narvaez could take advantage of a "hot tip." Respondent did not want to become involved in the futures market so he issued the check to ITG with Narvaez' agreement that the principal of the $75,000 loan would be reduced by that amount. However, a review of a copy of that check discloses no reference to that agreement in the memo portion. In addition, respondent**

gave no explanation why he executed the joint venture application and agreement if he truly did not intend to participate, as a partner, in that futures purchase].

Mr. Narvaez turned the law suit complaint over to the respondent to defend. He had been served with the summons and complaint on April 11, 1987. Respondent claims that he filed an answer in the first week of May (introduced into evidence was C2-5, purportedly a cover letter from the respondent to the Clerk of the Superior Court with the answer for filing in May of 1987) but the Superior Court docket shows that no answer was filed until July 16, 1987 (C2-11). Meantime, plaintiff obtained a default on June 24, 1987 and sent a copy to Mr. Narvaez (C2-6, C2-11). This came as a surprise to Mr. Narvaez, who testified that the respondent had assured him that an answer had been filed within proper time. (T253:2-256:18).

In frustration, Mr. Narvaez obtained other counsel who substituted for the respondent, reopened the case and then filed a third party complaint against the respondent (C2-8). Respondent admitted that he never advised Mr. Narvaez of his own possible liability to Mr. Narvaez and the fact that Mr. Narvaez could actually file a claim against him. (T512:17-21). **[Respondent testified that he did not so advise Narvaez because he did not believe he had any responsibility to Narvaez on that claim as he did not view himself as an investor in that transaction].**

Eventually on June 16, 1988, Mr. Narvaez obtained a judgment by default against the respondent on this third party complaint in the sum of $6,386.50 (C2-10). That judgment remains unpaid.

Third Count

The third count relates to a real estate settlement in Somerset County, New Jersey in which the respondent represented Mr. Narvaez as a buyer, on October 5, 1987. The respondent attended the settlement admittedly without realizing that it was his responsibility to handle the whole transaction, prepare the HUD settlement sheet, disburse the proceeds, and record the deed mortgage. **[Respondent attributed this lack of awareness to the difference in closing procedures between South Jersey and North Jersey, where he had never participated before in a real estate closing].** Respondent had no HUD form with him, no checkbook and no checks. As a result, the settlement was conducted 'dry'. Respondent agreed with counsel for the seller not to record the deed until he

could get back to his office and make distribution of the proceeds as required.

After settlement, because respondent had no trust account in New Jersey (or business account for that matter), he deposited the gross proceeds of sale into his 'escrow account' at the Provident National Bank in Philadelphia. He disbursed the funds but one of his checks, for $500 to the sellers attorney, bounced because of insufficient funds. After redeposit, the check eventually cleared. The check to the seller turned out to be short by $916.40. Seller's attorney objected and respondent finally sent that balance which was received October 21, 1987.

Then, for no reason that he could articulate, respondent delayed in recording the deed and mortgage until January of 1988, even in the face of complaints from both Mr. Narvaez and the title company (C3-1, C-3). **[Respondent's explanation for his delay in recording these documents was somewhat elusive. At one point, he appeared to suggest that the mortgage had to be re-drafted, although the mortgage proceeds were clearly received at the closing].** Respondent did not return Mr. Narvaez' telephone calls. Finally, Mr. Narvaez went to respondents [sic] office in October of 1987 and respondent promised to send him copies of the closing documents but never did.

Fourth and Fifth Counts

The fourth and fifth counts relate to the refinancing of two properties owned by respondent's client, Paul Harris, in Gloucester County, New Jersey, with mortgage money coming from Commonwealth Mortgage Company of America. Settlement on both new mortgages occurred on July 29, 1987. As in the case of Mr. Narvaez's settlement in October of 1987 (above), respondent had no New Jersey trust account at the time of the Harris settlements and made disbursement of the Commonwealth proceeds through his escrow account at Provident National Bank in Philadelphia (C4-6).

Although the settlements occurred on July 28, 1987, respondent failed to record the two mortgages for nearly 18 months (until January 11, 1989). His excuse was that he had delegated the recording task to a recording service which somehow lost track of the assignment. **[Respondent maintained, however, that he followed up with that service several times and that it took the service quite a long time to locate his file and return the**

documents to him. There was no documentation offered into evidence to support that claim]. During the long time between closing and recording, and being unaware of the existing unrecorded mortgages, two other lenders advanced second mortgage money to Mr. Harris and their mortgages were duly recorded as first mortgages.

In addition, after the settlement, respondent failed to pay title insurance premiums totaling $492 (C4-8). Respondent claims that he did not understand that this was his responsibility. **[Rather, he maintained that he believed that the two checks forwarded to him by the mortgage company for that purpose actually represented the payment of his fees. While Exhibits C4-2A and C4-3A clearly indicate otherwise, on an informational attachment to the checks, respondent claimed that he had not received those informational attachments at the time he took the checks as his fees].** Yet, even after he was given copies of the mortgage company checks itemizing the particular disbursements that he was to have made from the funds (C4-2A, C4-3A), he still refused to pay them and has not paid them even yet. **[In fact, an OAE auditor testified that, on several occasions during the six months following the closing, respondent's escrow account fell into negative balances and, at other times, fell below the amount needed to satisfy the title insurance fees. The auditor further testified that, as of August 14, 1987, which was the date of the last check identifiable by the auditor as related to the Harris closing, respondent's balance was approximately $250 below what it should have been in order to satisfy the title insurance fees. Respondent continues to dispute that he owes those sums. T203-306, 408-411].**

Naturally, everyone involved eventually began complaining to the respondent but it took him until mid 1988 before he finally started taking steps to resolve the problems he had created. Eventually, respondent obtained subordination agreements from the two secondary lenders and, finally by the end of 1988, was able to present Commonwealth with mortgages and subordination agreements for recording. Doubtless some of respondent's incentive came from the District IV Ethics Committee, to whom Commonwealth complained in August of 1988. Stewart Title Company issued the two policies in early 1989, but, as noted earlier, has yet to be paid the premiums.

Respondent admitted during the hearing that the Commonwealth Mortgage Company was his client in addition to Mr. Harris, with respect to the refinancing and that he handled the refinancing settlements on behalf of both parties. Not only did respondent serve Commonwealth

Mortgage poorly in taking so long to record the mortgages and in not paying the title insurance policies, but according to C4-1, in the one year following the closings, Commonwealth Mortgage personnel called respondent's office over 40 times in their efforts to get respondent to complete the task, but without success.

Both counts three and four charge respondent with failure to maintain a bona fide New Jersey office. R1:21-1(a) which is incorporated by reference into RPC 5.5(a) requires an attorney to have an office where the attorney or a responsible person acting on the attorney's behalf can be reached in person as well as by telephone during normal business hours. In his testimony, respondent described various offices that he had in sequence in Camden, one of which was heavily damaged by fire, all prior to his being suspended in November of 1990. During a visit by Office of Attorney Ethics personnel to what respondent claimed was his office in January of 1988, they observed no sign on any door to designate any office as a law office or as respondent's office. However, he did have his own individual office plus a common area with other tenants and a common secretary-receptionist. Respondent claimed that that particular office was new for him and that the signs had yet to be prepared.

Sixth Count

The sixth count relates to three matters of litigation brought to the respondent by Bruce Thorton *[sic]* which, Mr. Thornton claims, respondent failed to prosecute. In all three incidents, respondent's defense was that he performed all that was required of him.

The earliest of these matters was in June of 1985 when Mr. Thornton asked for respondent's help in pursuing a racial discrimination claim against Amtrack [sic] who was Mr. Thornton's employer. Respondent did assist Mr. Thornton in a preliminary way to the point where a right-to-sue letter was obtained from the EEOC. However, after that letter was obtained, the case died. Respondent claims that it was not financially feasible for him to proceed without a group of plaintiffs, all claiming discrimination, who could share the costs of the litigation. Respondent claims that he told Mr. Thornton and that Mr. Thornton said he would get a group of complainants together to join in such a suit. However, Mr. Thornton never accomplished that goal. A check was presented in evidence for $500 which appeared to have been given by Mr. Thornton to the respondent in connection with the Amtrak case (C6-2), but respondent

explained that this payment was not for the future litigation but for what he had already accomplished preliminarily.

The second Thornton case was for personal injuries suffered in a motor-vehicle accident in Mercer County, New Jersey, when Mr. Thornton's vehicle was struck from the rear by a Pepsi delivery truck in August of 1987 (C6-5). Respondent never filed suit in that case and the statute of limitations ran in August of 1989. Eventually Mr. Thornton obtained other counsel who brought a malpractice action against the respondent in Burlington County. Respondent failed to defend against that action and a final judgment in the amount of $30,000 was entered against the respondent June 19, 1992 (C6-9). No part of that judgment has been paid.

Respondent's response to this charge is that he never had any agreement to represent Mr. Thornton. (T454:1-9). Mr. Thornton testified that he signed a written retainer agreement with the respondent at respondent's office on Walnut Street (T110:9-112:1), in Philadelphia, that he gave respondent photographs of his automobile showing the damages (T112:22-113:4), that respondent accompanied him to municipal court in East Windsor Township when he testified in the motor vehicle case against the Pepsi driver (T114:18-25;119:4-19), and that when he spoke with the respondent thereafter from time to time respondent assured him that the case was going well and would be settled soon (C6-4). Mr. Thornton testified that he asked the respondent several times for a copy of the retainer agreement which he had signed but the respondent never sent one to him.

The respondent gave no satisfactory explanation for the fact that he did nothing to defend against the malpractice suit. **[Respondent testified that, when he received a copy of the malpractice complaint, he was in personal bankruptcy (reorganization). He, therefore, sent Thornton's attorney a copy of the "bankruptcy filing" and asked him to "observe the automatic stay and cease and desist this action." However, he testified, "I'm hearing now he kept pursuing it and he got a judgment against me." T454-55.]** Presumably, if he really had not been retained he would have defended on that ground. At the hearing, respondent testified in answer to a question from the special master that he was not sure whether he had malpractice insurance to cover the $30,000 judgment.

The third Thornton case was a complaint against him for child support arrears in Salem County, New Jersey in

March of 1990. The evidence indicates that respondent did make a telephone call for Mr. Thornton to the Probation Department in Salem County (C6-10), but it is unclear exactly what the respondent was retained to do beyond that and whether or not he performed anything else.

Seventh Count

The seventh count concerns a charge by the Office of Attorney Ethics that the respondent practiced law following his suspension on November 9, 1990 (C7-1). The evidence shows that the respondent provided counseling to Myrtle DeRamus in February and March of 1992 at the request of Paul Harris. Specifically, respondent met with Mrs. DeRamus at her church in Somerdale, New Jersey in late February of 1992. At that time he reviewed with her a claim being filed against her by her former husband, Norman, that he be given the right to purchase her home from her. The husband was represented by Irvin Shoemaker, an attorney in Berlin.

Following the meeting at the church, the respondent called Mr. Shoemaker on behalf of Mrs. DeRamus on four different occasions, including March 6 and March 10 of 1992. Mr. Shoemaker sent two letters to the respondent at his office at 4004 Westfield Avenue, Camden, New Jersey on March 3 and March 6, 1992 (C7-11, C7-13). Ultimately, respondent never entered any court appearance and declined to represent Mrs. DeRamus. At the hearing, respondent claims that he never did agree to represent her. Yet he did admit that he counseled Mrs. DeRamus at the church and then he dealt with Mr. Shoemaker on her behalf. (T473:9-474:9).

Eighth Count

The eighth count which was added at the pretrial conference, relates to respondent's failure to cooperate in the ethics proceedings following his being served with the complaint in July of 1992. The exhibits introduced by the special master relate to that history. As noted under the heading of preliminary matters at the beginning of this report, although he had notice and opportunity, the respondent failed to file an answer, failed to appear at the pre-trial conference and failed to obtain discovery or to supply discovery prior to the commencement of the hearing. In addition to that, respondent was substantially late for several of the hearing sessions. In general, he exhibited considerable

disdain for the whole process and for the personnel of the Office of Attorney Ethics, (See, for example, transcript pages 38-39, 287-290, 456-459, 665-668, 687-688.) [**See also T238-39.**]

[Special Master's Report at 3-15]

* * *

With respect to count one (Brazilian business venture), the Special Master found that, regardless of one's characterization of Narvaez' contribution as a loan or an investment, respondent entered into a business transaction with his client. He further found that their interests in the business transaction as debtor and creditor differed.

However, the Special Master found that the evidence did not clearly and convincingly establish that Narvaez relied on respondent's expertise as a lawyer to protect his interests, as required by DR 5-104(A). Rather, the Special Master found that the extent of Narvaez' reliance on respondent was confined to the repayment of the loan. The Special Master further found that Narvaez was intelligent and sufficiently educated to look out for himself, as evidenced by the fact that he resisted the idea of an investment and opted instead for a loan. However, the Special Master concluded that respondent's issuance of his personal check in the amount of $50,000, knowing that there were insufficient funds to cover it and failing to make good on it after it was returned, constituted an act of dishonesty, in violation of RPC 8.4(c).

With respect to count two (Beltz complaint), the Special Master found respondent guilty of an act of dishonesty, in violation of RPC 8.4(c), for having issued a $6,390 check without sufficient funds, failing to make good on that check and for having misrepresented to Narvaez that he had filed an answer to the Beltz complaint. The Special Master also found respondent guilty of a violation of RPC 1.7(b) for undertaking representation of Narvaez in that action without disclosing the possibility of a third-party action against himself and in favor of Narvaez. Finally, the Special Master found that respondent's failure to file an answer and allowing a default to be entered against Narvaez constituted a lack of diligence, in violation of RPC 1.3, and, when combined with other acts of negligence, a pattern of negligence, in violation of RPC 1.1(b). The Special Master made no specific finding as to whether respondent's conduct constituted gross neglect, in violation of RPC 1.1(a).

With respect to count three (Narvaez real estate closing), the Special Master found respondent guilty of a lack of diligence, in violation of RPC 1.3, for his failure to prepare properly for the closing and for his three-month delay in recording the appropriate closing documents (deed and mortgage). The Special Master also found respondent guilty of a pattern of neglect, in violation of RPC 1.1(b). In addition, the Special Master found respondent guilty of a violation of RPC 1.15(d) and R. 1:21-6, for his failure to maintain a New Jersey trust account during that period. Finally, the Special Master found that, since respondent's returned

check for $500 was paid after it was redeposited, he was not guilty of an act of dishonesty. (While this was not specifically addressed by the Special Master, the OAE's investigation revealed that the returned check may have resulted from the fact that respondent did not receive enough funds from the mortgage company to cover all closing disbursements. See Exhibits C3-2 and C3-5).

As to counts four and five (Harris refinancing), the Special Master found respondent guilty of a lack of diligence, in violation of RPC 1.3, and a pattern of neglect, in violation of RPC 1.1(b), for his eighteen-month delay in recording the mortgages. The Special Master further found respondent guilty of failure to reply to the mortgage company's reasonable requests for information (including over forty telephone calls to respondent), in violation of RPC 1.4(a). The Special Master determined that respondent's retention of the monies sent by the mortgage company for payment of title insurance premiums constituted misappropriation of client funds, in violation of RPC 1.15. The Special Master did not specify whether his finding was one of knowing misappropriation. Finally, the Special Master found respondent guilty of failure to maintain the proper New Jersey accounts. He dismissed, as unsubstantiated, the OAE's allegation that respondent did not maintain a bona fide office in New Jersey in July and October 1987.

As to count six (Thornton matters), the Special Master found that the evidence clearly and convincingly established that respondent was retained by Thornton to represent him in the Pepsi-Cola case and that respondent failed to file suit within the

applicable two-year statute of limitations, in violation of RPC 1.3 (lack of diligence) and RPC 1.1(b) (pattern of neglect). The Special Master did not make any finding with respect to the alleged violation of RPC 8.4(c), that is, respondent's alleged misrepresentation to Thornton that suit had been filed. The Special Master dismissed the OAE's allegations in the Amtrak and Salem County Probation Department matters for lack of clear and convincing evidence that respondent was retained in one (Amtrak) or that he failed to carry out his responsibilities in the other.

With regard to count seven (practicing law while suspended), the Special Master found that, during March and February 1992, respondent provided legal counselling to Myrtle DeRamus. Although respondent neither charged a fee for his services nor entered an appearance in Mrs. DeRamus' behalf in any court, he dealt with her former husband's attorney to attempt to resolve her problems. The Special Master, therefore, found respondent guilty of a violation of RPC 5.5(a) (unauthorized practice of law) and OAE Administrative Guideline No. 23.

Finally, with regard to count eight (failure to cooperate), the Special Master found that respondent violated RPC 8.1(b) for his failure to file an answer to the formal complaint, his failure to appear for the pre-trial conference, his failure to provide discovery prior to the commencement of the hearing and his substantial lateness for several of the ethics hearings.

The Special Master recommended the imposition of public discipline for respondent's infractions. Specifically, the Special

Master recommended disbarment as the appropriate sanction, based both on the number of ethics infractions and "the arrogant and disdainful attitude respondent displayed both toward the clients who suffered loss as a result of his misconduct and toward the whole legal system." Special Master's Report at 23. The Special Master further noted that, had respondent exhibited some concern for the clients involved and some respect for the Court and those conducting the disciplinary process, his recommendation would have been for a lengthy suspension.

* * *

Upon a review of the full record, the Board determined to grant the OAE's motion for reciprocal discipline.

Reciprocal disciplinary proceedings in New Jersey are governed by R. 1:20-7(d), which provides as follows:

> (d) The Board shall recommend the imposition of the identical action or discipline unless the respondent demonstrates, or the Board finds on the face of the record upon which the discipline in another jurisdiction was predicted that it clearly appears that:
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> (1) the disciplinary order of the foreign jurisdiction was not entered;
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> (2) the disciplinary order of the foreign jurisdiction does not apply to the respondent;
>
> (3) the disciplinary order of the foreign jurisdiction does not remain in full force and effect as the result of appellate proceedings;
>
> (4) the procedure followed in the foreign disciplinary matter was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or
>
> (5) the misconduct established warrants substantially different discipline.

A review of the record discloses no conditions that would fall within the ambit of subparagraphs one through five. Indeed, the

OAE did not seek to utilize the opportunity afforded by R. 1:20-7(d) to argue that the misconduct for which respondent was suspended in Pennsylvania justifies greater discipline in New Jersey. In fact, in New Jersey, matters involving similar misconduct have often resulted in the imposition of suspensions of a similar length as that imposed in Pennsylvania. See, e.g., In re Giles, 131 N.J. 111 (1993); In re Brantley, 123 N.J. 330 (1991); In re Malfitano, 121 N.J. 194 (1990); ; In re Kantor, 118 N.J. 434 (1990).

The Board, therefore, determined to suspend respondent for a period of one year, the suspension to run concurrently with the Pennsylvania suspension imposed on July 8, 1993. Two members did not participate.

* * *

In the matters under Docket No. DRB 93-162, the Board is satisfied that some, but not all, of the Special Master's findings of unethical conduct are fully supported by clear and convincing evidence.

Respondent's misconduct was indeed serious. In the various Narvaez matters, respondent engaged in a wide variety of misconduct, all of which adversely affected his client's interests. Specifically, in the Beltz complaint (joint futures venture), respondent misrepresented to his client, Narvaez, that he had filed an answer to the complaint, in violation of RPC 8.4(c). In addition, respondent violated RPC 1.7(b) by undertaking Narvaez'

representation in the Beltz matter without advising Narvaez of potential claim against respondent. The record overwhelmingly demonstrates that it was respondent's intention to take part in the futures purchase as Narvaez' partner. Respondent offered no other explanation for having executed a joint partnership agreement, if not for the purpose of entering into a joint venture. Additionally, respondent's conduct constituted gross neglect and lack of diligence, when he failed to discharge his obligations responsibly, after he improperly undertook Narvaez' representation, thereby causing a default to be entered against his client.

Respondent also committed an act of dishonesty, in violation of RPC 8.4(c), when he issued a $6,390 check to Beltz that ultimately bounced. Respondent admitted that Narvaez wanted him to issue a check quickly because he did not want to lose the opportunity to make this particular purchase. Respondent, therefore, knew that no one would be withholding this check, pending receipt of the funds he was expecting. Furthermore, there is no evidence to suggest that respondent actually advised Narvaez to withhold the check for any amount of time, until the receipt of the expected settlement funds. Respondent's issuance of the check under these circumstances, knowing that he did not possess the necessary funds to cover it, was a clear act of dishonesty.

In the Narvaez real estate closing, respondent's failure to properly prepare for the settlement and his delay in recording the deed and mortgage, even in the face of his client's repeated and

unanswered i4nquiries in that regard, supports findings of violations of RPC 1.3 (lack of diligence) and RPC 1.4 (failure to comply with client's requests for information). In addition, respondent's failure to maintain the required New Jersey bank accounts violated both RPC 1.15(d) and R. 1:21-6, as found by the Special Master.

The Board agrees with the Special Master's finding that respondent was not guilty of a violation of RPC 8.4(c), when he issued a $500 check to the seller's attorney, which was ultimately returned for insufficient funds. The focus more appropriately belongs on the act of issuing the check and on respondent's intent at that point in time. Here, as noted earlier, the OAE's own investigation disclosed that the check was returned because the mortgage company did not provide sufficient funds to close. There is nothing in the record to suggest that respondent knew of this shortage when he issued the check. That charge, therefore, should be dismissed.

The Board, however, is unable to agree with the Special Master's findings of unethical conduct in the Brazilian business venture matter. In the Board's view, the record does not clearly and convincingly establish that respondent was guilty of any unethical conduct. This is due largely to the disparity in testimony between the witnesses as well as concerns of credibility about both respondent and Narvaez. The two former friends developed a strong animosity towards one another over the years, as evidenced by respondent's allegation, among others, that Narvaez

caused him to become involved with a "loan shark" so that Narvaez could recoup his $50,000 loss. Credibility aside, however, there is full support in the record to substantiate respondent's claim that Narvaez knew that the check for $50,000 was contingent on respondent's receipt of a loan in that amount from a loan brokerage firm. It is undisputed that respondent believed that loan had already been approved, when he issued the check. However, respondent had not actually received the loan proceeds and he allegedly advised Narvaez of those circumstances. Narvaez, encouraged him to write the check anyway, apparently agreeing that respondent could notify him when he received the funds, at which point Narvaez would deposit the check. Respondent testified that Narvaez, however, did not wait to hear from respondent and, instead, deposited the check several days later. Respondent maintained that this delay on Narvaez' part to deposit long-awaited funds, over which he was clearly anxious, supported respondent's assertion that Narvaez knew about the contingent nature of the funds when the check was issued. The Board agrees. In addition, Narvaez admitted that he knew about the loan; however, he maintained that he learned of it from respondent after the check was returned. Narvaez then called the organization from which respondent expected to receive the loan to verify respondent's explanation of the dishonored check. Presumably, that organization did verify the loan approval, although the money was ultimately never made available to respondent. This suggests that, at the time respondent issued his $50,000 check to Narvaez, respondent

truly believed that the funds would become available shortly. That respondent was not ultimately able to make good on that check does not render him guilty of dishonest conduct for the initial issuance of the check under these circumstances.

Like the Special Master, the Board finds that the record does not clearly and convincingly establish that Narvaez relied upon respondent to exercise his professional judgment for Narvaez' protection, as required for a finding of a violation of DR 5-104(A). Clearly, the record discloses that Narvaez investigated the venture, met with its stockholders, visited the Brazilian manufacturers and even managed to negotiate a higher percentage of stock for himself as a broker's fee. Moreover, Narvaez admitted that respondent did, indeed, warn him against some of the potential pitfalls of the venture itself. T220. Under these circumstances, it would be unfair to say that Narvaez relied on respondent to exercise his judgment on his behalf and that Narvaez did not enter the transaction fully informed. The Board, therefore, dismissed all the allegations of count one.

In the Harris refinancings, the Special Master's finding is fully supported by the record. Respondent was guilty of a lack of diligence, in violation of RPC 1.3, when he failed to record the mortgages for a period of eighteen months following the closing. In this regard, a further finding of gross neglect, in violation of RPC 1.1(a), is also warranted. Respondent's proferred explanation — that he delegated the recording task to a filing service — does

not excuse his neglect. It was respondent who owed his client a non-delegable duty of care — not the recording service.

Similarly, the finding that respondent failed to reply to the mortgage company's reasonable requests for information (forty phone calls), in violation of RPC 1.4(a), is fully supported by the record, as is the finding that respondent did not maintain the appropriate New Jersey accounts (RPC 1.15(d)). However, as concluded by the Special Master, the record does not support a finding that respondent failed to maintain a bona fide office in New Jersey.

The more important issue, however, is whether respondent's failure to pay the title company fees out of funds entrusted to him for that purpose constituted knowing misappropriation. Clearly, on the existing record, respondent's actions did not amount to knowing misappropriation. Both respondent and his client testified that the closings were conducted by telephone and that respondent issued each and every check the title company directed him to issue. He received no instruction from the title company to issue a check for the payment of the title policy. In addition, a title company representative specifically advised respondent that the mortgage company would be issuing a check for the policy. T408. Accepting as true respondent's testimony that he did not receive the informational half of the two checks issued to him to cover both a portion of his fees and the title policy premiums (C4-2A and C4-3A), the evidence does not support a finding of knowing misappropriation to a clear and convincing standard. Even the

presenter conceded that conclusion, at oral argument before the Board. However, a review of those checks discloses that they were written for odd amounts ($536.50 and $555.50). In addition, a review of the RESPA statements for the two closings (C4-11BB and C4-13BB), both ostensibly prepared and signed by respondent, shows an attorney's fee of $300 for each closing. Furthermore, those RESPA statements themselves show payments (outside of closing) made or to be made to the title company. Thus, respondent certainly should have known, when he took the aggregate checks as fees, that he was only entitled to a total of $600, not $1,092.00. Yet, respondent's trust account showed insufficient balances and even negative balances on several occasions, when the money should have remained inviolate in his account. Thus, while respondent's retention of the checks did not constitute knowing misappropriation, it clearly amounted to negligent misappropriation of escrow funds.

Moreover, compounding the improprieties, once the mortgage company (Commonwealth) forwarded respondent a copy of the two checks complete with informational portions, showing that monies had been entrusted to him for payment of the title premiums, respondent unilaterally determined that Commonwealth was wrong and it was not his obligation to satisfy that debt. In cases such as this, where the attorney and a third-party claim an interest in property, RPC 1.15(c) requires that the amount in dispute be kept separate until the issue is resolved in Court or by other means.

Clearly, respondent did not keep the funds as required and, thus, violated RPC 1.15(c).

Finally, respondent violated RPC 1.15(d) by virtue of his failure to maintain the proper New Jersey accounts, as required by R. 1:21-6.

In the Thornton matters, the Special Master's dismissal of the allegations relating to the Amtrak and Salem County Probation claims was appropriate, for the reasons stated in the Special Master's report. The Special Master's conclusion that respondent was, indeed, retained by Thornton in the Pepsi-Cola matter is similarly appropriate. In this regard, reference should be made to Exhibit C6-3 in evidence, wherein Thornton described to the OAE investigator respondent's representations and misrepresentations to him in detail not readily available to the average layperson. Given the clarity and strength of the evidence in this regard, the Special Master's finding of a lack of diligence (RPC 1.3), for respondent's failure to file suit on his client's behalf within the applicable statute of limitations, is fully supported by the record. An additional finding of a violation of RPC 1.1(a) for respondent's gross neglect of his client's matter is also warranted. Moreover, while not specifically addressed in the Special Master's conclusions, respondent's misrepresentation to his client that he had filed suit in his behalf supports a finding of a violation of RPC 8.4(c). Finally, respondent's gross neglect in this matter, when combined with at least two other instances of gross neglect (in the Harris matters and the Narvaez joint venture

matter), amounted to a pattern of neglect, in violation of RPC 1.1(b).

In the DeRamus matter, the Special Master's finding that respondent rendered legal counsel while suspended is fully supported by the record. As noted by the Special Master, although respondent did not charge a fee for his services, he clearly rendered legal advice, dealt with Ms. DeRamus' ex-husband's attorney in her behalf and never even mentioned to anyone that he was then under suspension. Respondent's conduct in this regard clearly violated RPC 5.5(a).

Finally, the Special Master's determination that respondent was guilty of a violation of RPC 8.1(b), for failure to appear at the pretrial hearing, to file an answer to the formal complaint and to provide discovery prior to the hearing is fully supported by the record. Respondent did ultimately appear at the hearing, albeit late, following an earlier telephone conversation with the Special Master. By now an attorney's obligation to cooperate fully with the disciplinary authorities should be clear to every practicing attorney. An attorney's failure to do so evidences disrespect towards the ethics system, as well as to the Court itself, and cannot be countenanced.

In sum, respondent is guilty of: multiple and repeated misrepresentations to his clients; gross neglect of client matters in at least three instances, culminating in a pattern of neglect; failure to diligently pursue his clients' matters and to respond to their repeated requests for information; failure to maintain

required attorney accounts in New Jersey; negligent misappropriation of escrow funds; practicing law while suspended; representation of a client in a matter where he had a clear conflict of interest; issuance of a check knowing he had insufficient funds to cover it and, finally, failure to cooperate with the disciplinary authorities.

Respondent's practice of law while suspended is the most serious of his infractions. Similar misconduct has been met with a long-term suspension or disbarment. See In re Beltre, 130 N.J. 437 (1992) (attorney suspended for three years for both practicing law while suspended and for misrepresenting to the Board, during an earlier matter, that he had maintained a bona fide office) and In re Goldstein, 97 N.J. 545 (1984) (attorney disbarred for misconduct in eleven different matters and for practicing law while temporarily suspended by the Court. The temporary suspension stemmed from the attorney's violation of an agreement with the district ethics committee and the Disciplinary Review Board to confine his practice of law to criminal matters). The Board, however, does not view respondent's conduct in this matter to approach that of Goldstein. In this matter, respondent undertook, albeit wrongfully, to assist an individual in a single matter over a very limited period of time. Conversely, in one instance, Goldstein violated an agreement he had reached with the disciplinary authorities to limit his practice to criminal matters. As a result of that violation he was temporarily suspended by the Court. He, nevertheless, again continued to practice law, on a

regular basis, in willful disregard of the Court's order. The Board does not view respondent's conduct to rise to the level of such contemptuous and repeated disregard of Court orders.

The Board recognizes that the purpose of discipline is not the punishment of the offender, but "the protection of the public against an attorney who cannot or will not measure up to the high standard of responsibility required of every member of the profession." In re Getchius, 88 N.J. 269, 276 (1982), citing In re Stout, 76 N.J. 321, 325 (1978). The severity of the discipline to be imposed must comport with the seriousness of the ethics infraction in light of all the relevant circumstances. In re Nigohosian, 86 N.J. 308, 315 (1982). Mitigating factors as well as aggravating factors are, therefore, relevant and may be considered.

At the outset, the Board found no mitigating factors. To the contrary, and in substantial aggravation of his misconduct, respondent showed not one morsel of contrition for his wrongdoing and for the harmful consequences visited on his clients. In addition, respondent's conduct during the hearing before the Special Master was disdainful and disrespectful. Such conduct cannot reasonably be attributed to overzealousness on the part of a pro se respondent, as urged by respondent's counsel before the Board. To condone such outrageous conduct or to color it with the pen of "overzealousness" would be intolerable. Respondent's disrespect towards the system was further accentuated by his repeated failure to cooperate with the disciplinary officials.

After consideration of the totality of the circumstances, the Board unanimously determined to impose a consecutive two-year suspension for respondent's misconduct in the New Jersey disciplinary matters after July 8, 1994, the expiration date of the one-year suspension in the reciprocal discipline matters. Respondent must produce proof of fitness to practice prior to reinstatement and, upon reinstatement, must practice under the supervision of a proctor for a period of two years. Three members did not participate.

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

Dated: 4/12/95 By: Elizabeth L. Buff
Elizabeth L. Buff, Vice-Chair
Disciplinary Review Board