SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 94-440

IN THE MATTER OF

STUART M. WHITEFIELD,

AN ATTORNEY AT LAW

Decision of the
Disciplinary Review Board

Argued: March 15, 1995

Decided: July 7, 1995

Evan L. Goldman appeared on behalf of the District VIII Ethics Committee.

Respondent appeared pro se.

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

This matter was before the Board based upon a recommendation for public discipline filed by the District VIII Ethics Committee (DEC). The formal complaint charged respondent with misconduct in three matters. Respondent was charged with a violation of RPC 1.1(a) (gross neglect), RPC 1.4(a) (failure to communicate) (mistakenly cited as RPC 1.1(a)) and RPC 3.3 (lack of candor toward a tribunal) in the Cooper matter; RPC 1.3 (lack of diligence), RPC 1.4 (failure to communicate), RPC 1.5 (fees), RPC 1.15 (safekeeping property), RPC 3.2 (expediting litigation) and RPC 4.1 (truthfulness in statements to others) in the Glover matter and RPC 1.3, RPC 1.4 and RPC 1.5 in the Holler matter. Respondent was

also charged with a violation of <u>RPC</u> 1.1(b) when these matters were considered in concert.

The complaint further alleged misconduct in two additional matters. The record does not reveal the disposition of those cases.

Respondent was admitted to the New Jersey bar in 1979. He has been in private practice in Metuchen, Middlesex County. He has no history of discipline.

<u>The Holler Matters</u> (District Docket No. VIII-93-31E)

<u>I-The DWI Case</u>

Daniel Holler was convicted of drunk-driving in August 1983 in Woodbridge Township. This was Mr. Holler's third offense. He lost his driving privileges for ten years as a result of this conviction. His privileges were scheduled to be restored on August 29, 1993. In June 1987, he retained respondent to investigate whether reversal of that conviction was possible. There was no written retainer agreement. Mr. Holler paid respondent $200 on June 18, 1987.

Respondent told Mr. Holler that he could not personally pursue the reversal of the 1983 conviction because of a conflict of interest (respondent was, at that time, a municipal prosecutor in Woodbridge), but he would review the case and another attorney could later represent Mr. Holler. According to Mr. Holler, respondent also told him that he would look into the second conviction, which, in his view, had a better chance of being

reversed. (Mr. Holler had pled guilty on his first and second offenses and went to trial on the third.)

Mr. Holler and respondent communicated via telephone between June 1987 and early 1989, and discussed the progress of Mr. Holler's matter. Although Mr. Holler wanted respondent to work on the 1983 Woodbridge conviction, respondent was looking into the second conviction. The record does not reveal what occurred in that regard; Mr. Holler stated that "things just never seemed to materialize on that" (1T12).[1]

In 1989, respondent opened a private law practice and, on March 3, 1989, Mr. Holler gave him $500 to begin the appeal of the Woodbridge conviction. (Respondent had actually left the prosecutor's office at the end of 1987.) Mr. Holler thereafter sought respondent out for information on the status of his case. Respondent told him it was progressing slowly because there was a great deal of opposition. On July 28, 1989, Mr. Holler gave respondent another $1,350 to continue work on the reversal of the Woodbridge conviction. (Mr. Holler did not recall how they arrived at that sum.) Mr. Holler testified that he never questioned these payments because he assumed that it would cost him money to have the conviction overturned; because so much time had passed, he also thought respondent was entitled to the money.

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[1] 1T refers to the transcript of the hearing before the DEC on December 15, 1993. 2T refers to the transcript of the hearing on January 13, 1994. 3T refers to the transcript of the hearing on April 19, 1994. 4T refers to the transcript of the hearing on July 14, 1994.

At some point in time, respondent advised Mr. Holler that the 1983 Woodbridge conviction had been overturned and that he was waiting for a court order memorializing the reversal and instructing the Division of Motor Vehicles (DMV) to restore Mr. Holler's driving privileges. Mr. Holler understood from respondent that the matter was "a hot potato, no one wanted to put their name on it" (1T21). Mr. Holler continued to call for information, at times, according to his testimony, as often as ten times a week. Respondent continued to tell him that it was "politically hot and [they] would just have to wait it out" (1T22). The conversations continued for three years, until the end of 1992. At that time, Mr. Holler suggested to respondent that they initiate a civil rights action against the DMV for the restoration of his driver's license and for damages. On December 3, 1992, Mr. Holler gave respondent $2,500 toward that proceeding. According to respondent, Mr. Holler also expressed interest in a suit against his former attorney.

In the Spring of 1993, Mr. Holler began asking respondent to turn over his files to him. Respondent repeatedly indicated that he would deliver them to Mr. Holler. On or about April 22, 1993, after respondent again failed to turn over the files to Mr. Holler, the latter went to respondent's office to get them. At that time, respondent indicated to Mr. Holler that the files had been delivered by messenger the previous evening. Mr. Holler had not received them. Respondent also stated that he would be meeting

with the judge that afternoon in Woodbridge to obtain the signed order.

Later that afternoon, Mr. Holler telephoned respondent's office. Respondent's secretary indicated that he was in Freehold for the afternoon. Thereupon, Mr. Holler called the Superior Court to speak with the judge who, according to respondent, was handling his matter. The court had no record of a proceeding on Mr. Holler's behalf. Furthermore, on August 29, 1993, when Mr. Holler sought the restoration of his license, the DMV had no record of any pending matters.

According to respondent he, in fact, kept Mr. Holler apprised of the developments in this matter. Respondent produced his Lawyer's Diaries, reflecting nine meetings in 1992 and three in 1993. Respondent further contended that he never advised Mr. Holler that he would necessarily be able to assist him in reversing the DWI conviction, but merely agreed to look into the matter, and see if it could be pursued. Respondent added that he also agreed only to look into suing Mr. Holler's former attorney, because the statute of limitations could have passed. According to respondent, after he filed the motion and appeared on Mr. Holler's behalf, he was unable to make any progress on it, despite numerous attempts. Respondent termed the events a "run around" (2T 26).

In connection with the suit against DMV mentioned by Mr. Holler, respondent explained that this was actually a suit against Woodbridge Township, based on its failure to act on the DWI. Respondent explained that Mr. Holler also wanted to sue DMV to

allow him to begin to take necessary steps to restore his license, prior to the actual expiration of the suspension; also, Mr. Holler wanted to sue his former attorney.

With regard to the $1,350 and $2,500 fees Mr. Holler paid, respondent was unable in either instance to explain exactly for what they were intended. Rather, he indicated that they might have been for the case in question as well as other matters he was handling on Mr. Holler's behalf. Respondent admitted that he did not earn the fee he was paid in this regard and yet did not return any of the funds.

Respondent produced letters to the court, a notice of motion and a proposed order, purportedly filed in August 1989 with the Woodbridge municipal court. Respondent was unable, however, to provide any proof that the motion had actually been filed. He contended that he could not obtain any copies of documents in the file without making an application to the municipal judge. Respondent failed to obtain a statement from the court confirming that the documents had indeed been filed.

In its report, the DEC stated:

> In terms of the drunk driving matters, this panel is extremely disturbed at [respondent's] apparent actions of obtaining money from a client under false pretenses. In particular, [respondent] clearly knew that Mr. Holler had had his license suspended for ten (10) years and that it was virtually impossible to overturn any previous drunk driving convictions that had not properly been presented to the lower court or to any Appellate court. Even though some paperwork was produced by [respondent], this panel was extremely troubled by the lack of any other document or any other statement from Woodbridge Township personnel indicating that this paperwork was ever filed and although this panel cannot go so far as stating it as a fact we do have serious reservations about whether this

paperwork was ever prepared and/or filed with Woodbridge Township Municipal Court.

[Panel report at 8-9]

The DEC determined that respondent violated RPC 1.1, RPC 1.3, RPC 1.4 and RPC 1.5.

II-The Patent Application

In July 1991, during the pendency of the DWI matter, Mr. Holler retained respondent to obtain a patent on his behalf. There was no written retainer agreement. Respondent informed Mr. Holler that he was not a patent attorney, but that he had a friend who would assist him. Respondent advised Mr. Holler that it would cost approximately $4000 for the patent. On July 25, 1991, Mr. Holler gave respondent 1,000 to cover the patent search. (Although the memo line on the check indicates that the money was for the search, respondent testified that the $1,000 was actually an initial retainer.) During a subsequent conversation with Mr. Holler, respondent advised him that the patent application was fairly simple and that he could handle it himself. Respondent requested the additional $3,000 to prepare the documents. On September 27, 1991, Mr. Holler gave respondent $3,000. Subsequently, when Mr. Holler requested information on the patent, respondent advised him that it was progressing, but that the paperwork was not yet available.

Mr. Holler never received a copy of the above mentioned patent search. Respondent was unable to provide a copy of the bill or of the search itself, claiming that he did not have a copy because the

search had been sent directly to Mr. Holler. Respondent did not recall receiving a bill, which might have also been sent directly to Mr. Holler. (Mr. Holler stated that he never saw a bill for the search.) Indeed, respondent was unable to provide proof that the search was ordered and/or received. He testified that he had, within the previous several weeks, asked the searcher to provide such proof. It had not yet been provided as of the date of the DEC hearing (2T 62-64). (The Board noted that the DEC hearings continued for six months past the date on which respondent made this statement.)

Although Mr. Holler agreed that respondent met with him and his two partners, he did not recall ever seeing the patent application. Respondent testified that he prepared the patent application and delivered it to Mr. Holler for his and his partners' signatures. Respondent claimed that Mr. Holler had difficulty in getting his partners to meet to sign the document; it was, therefore, never returned to him and never filed, despite two letters from respondent, dated September 11, 1991 and February 3, 1992, asking Mr. Holler to arrange a meeting to have the application signed. Respondent did not pursue the matter past that time. Respondent admitted that, since the application was never completed, Mr. Holler would be entitled to a refund of part of the $4,000. As of the DEC hearing, respondent had not returned any money to Mr. Holler.

As noted above in the DWI matter, despite his numerous requests Mr. Holler was unable to obtain his files from respondent.

Accordingly, Mr. Holler contacted Edward F. Clark, Esq., to assist him in obtaining the files. By certified letter dated May 3, 1993, Mr. Clark requested that respondent turn over the files in three matters: Holler Metal Fabricators v. Cuculo/Metropolitan Glass (a collection matter); JED Enterprises Patent and State v. Holler.[2] Respondent was able to produce telephone bills showing that he had contacted Mr. Clark's office. There is nothing in the record, however, to confirm with whom he spoke or the nature of the conversation. As of the date of the DEC hearing, none of the files had been turned over to Mr. Holler.

With regard to the return of the files, respondent testified that he employed a retired police officer to hand-deliver Mr. Holler's files prior to the receipt of Mr. Clark's letter. Respondent was unable, however, to produce a canceled check to evidence payment for this service. He did provide a purported copy of the receipt dated April 21, 1993 for the messenger (Exhibit R-8). The receipt, however, bears a notation that, the DEC believed, was added after the fact or by someone other than the messenger. Respondent added that there was nothing in the patent file to return to Mr. Holler because he already had everything. (Respondent mentioned that the plans had been stored in a separate

[2] During this time, respondent had apparently been handling another matter on behalf of Holler Metal Fabricators and Mr. Clark sought the delivery of a receipt for a $1,000 cash payment made to respondent that was to have been placed in escrow. Respondent had no recollection of that payment. The formal complaint refers to Mr. Holler's payment of $8,550 in fees to respondent (the total of the payments for the DWI and patent matters). There were, therefore, no allegations about this $1,000 payment and no findings were made on this issue.

location and he had forgotten to return them.) Respondent did not recall returning the collection matter file.

The DEC determined that respondent violated RPC 1.1, RPC 1.3, RPC 1.4 and RPC 1.5, noting that respondent was without proper expertise to handle the patent matter.

The Glover Matter (District Docket No. VIII-93-22E)

Ida Glover retained respondent following a December 22, 1988 slip-and-fall. The case was settled in February 1991 for $11,000 and Ms. Glover signed a release on June 28, 1991. According to Ms. Glover, respondent advised her of the possibility of a third-party lawsuit arising from this incident and that she should let the money remain in escrow while the other matter was pending. Respondent did not receive written authorization to hold the funds. According to Ms. Glover, during the following year respondent would call her and inform her of court dates in that third-party suit, telling her that she did not need to appear. When Ms. Glover inquired about the outcome, she was advised that the case was proceeding.

Ms. Glover's husband owed money to the Unsatisfied Claim and Judgment Fund. Ms. Glover asked respondent to use her settlement funds to pay that debt. Respondent, in fact, provided the Glovers with a check for $1,500 in June 1992, drafted against his business account, which the Glovers hand-delivered to DMV. (According to Ms. Glover's testimony, an earlier check had allegedly been sent out by respondent. The Fund never received that check.) Some

eight months later, by letter dated February 22, 1993 from the Unsatisfied Claim and Judgment Fund, Ms. Glover learned that the June 1992 check for $1,500 had been returned for insufficient funds. The letter stated that, in August 1992, respondent had been informed of the problem with the check and had never sent a replacement check. Respondent was copied on the February 22, 1993 letter. (In or about September 1992, Ms. Glover had been previously notified, via telephone, by the individual handling her husband's account that the $1,500 check had been returned for non-sufficient funds.)

According to Ms. Glover, when she confronted respondent, he had no explanation for the bounced check. To date, the funds have neither been paid to Ms. Glover nor to the DMV. The complaint, however, does not charge respondent with misappropriation of Ms. Glover's funds.

Respondent's testimony with regard to the $1,500 check differed greatly from Ms. Glover's. He explained that the check was drawn on his business account because, at an unspecified earlier time and with Ms. Glover's knowledge, he had taken that $1,500 as a fee for an earlier matrimonial matter he handled on behalf of Ms. Glover. Respondent went on to say that Ms. Glover subsequently asked him to send the $1,500 to DMV, assuring him that she would pay him the $1,500 outstanding fee at a later date. He had agreed. Because, however, he had already removed the $1,500 from his trust account for his fee, the $1,500 check to the DMV was drawn on his business account, instead of his trust account.

Respondent further contended that the "insufficient funds" designation on the check was a bank error. According to respondent, Ms. Glover later changed her mind and instructed him to stop payment on the $1,500 check to the DMV. Respondent never went to the bank personally to put the stop-payment request in writing but, instead, did it telephonically. He then used the $1,500 for his own purposes, allegedly believing that he could keep it again as his fee (3T 20).

On March 10, 1993, Ms. Glover attempted to confirm that her case was pending. She was told by court personnel that, in fact, she had no case pending. She met with respondent shortly thereafter, on March 16, 1993. He had no reasonable explanation for the absence of a record of the filing of the case. Ms. Glover, thereupon, asked for an accounting and receipt of the proceeds from the settlement. Respondent agreed to release the funds to her because there was no longer a need to hold them.

Although the DMV has never received the $1,500 payment from respondent, the settlement statement, dated March 22, 1993 (two years after the case was settled), reflected the $1,500 payment, undated, to the DMV, under the heading "Payments paid to or for client." The statement also reflected an earlier $2,000 real estate payment to Ms. Glover, a fee of $575 to respondent for an earlier matrimonial action (for which respondent testified he was owed over $2,000) and the balance due to Ms. Glover of $3,071.13, which was given to her at that time. The March statement contains the statement that Ms. Glover was to pay her medical bills and that

respondent's bill for a foreclosure action would be submitted. It was Ms. Glover's understanding that all funds owed by her to respondent had been deducted from the settlement. Between June 28, 1991, the day the release was signed and March 1993, respondent never sent a bill to Ms. Glover "because she didn't have the funds to pay [him]" (3T 41, Exhibit G-1).

According to respondent, despite the language on the settlement statement, his agreement with Ms. Glover was that, if a remaining dispute with the DMV was resolved, he would forward the $1,500 to the DMV. If it was not resolved, then the funds were his. In turn, Ms. Glover denied that respondent had told her that she owed him those funds. Her understanding was that they were designated solely for the DMV payment.

As to the reason for respondent's failure to send a replacement check to the DMV, although the record is silent in this regard, it may be assumed that he did not do so because there was nothing to replace. Respondent testified that the check did not bounce; instead, Ms. Glover had directed him to stop its payment.

Respondent testified that, contrary to Ms. Glover's recollection, he never told her that there was a third-party action. He explained that they had discussed an action against her insurance carrier, which had failed to pay her medical bills. That suit was never filed, although, according to Ms. Glover, those bills are still outstanding. Respondent explained that the reason for initially withholding the settlement proceeds in his account was that Ms. Glover owed him fees in connection with other matters.

Respondent also alluded to his concern over Ms. Glover's unpaid medical bills; later, however, Ms. Glover had instructed him to disburse the funds to her, assuring him that she would work out the payment of the medical bills directly with the doctor.

The DEC noted the approximately two-year delay between the settlement and the date respondent provided the closing statement to Ms. Glover and determined that, "during this two year period of time, the monies were disbursed from [respondent's] trust account, if they were ever there, to his own business account." (Hearing panel report at 12). Thus, the DEC determined that respondent violated RPC 1.1, RPC 1.3, RPC 1.4, RPC 1.5, RPC 1.15, RPC 3.2 and RPC 4.1.

The Cooper Matter (District Docket No. VIII-93-14E)

By letter dated July 1, 1992, the Honorable James M. Newman, Municipal Court Judge of the Borough of Englishtown, notified the DEC that he had been concerned with respondent's behavior during his representation of Frederick R. Cooper. Specifically, Judge Newman alleged that respondent had made misrepresentations to the court and failed to appear when requested by the court.

On January 15, 1992, respondent entered an appearance on behalf of Mr. Cooper, who had been charged with a DWI and other motor vehicle violations. Respondent had previously represented Mr. Cooper, a family friend. Respondent received discovery, which was incomplete, and communicated with the court to obtain missing items, in particular Mr. Cooper's abstract. Thereafter, respondent

received notice of a March 18, 1992 trial date. On March 17, 1992, respondent's secretary requested an adjournment. The request was denied, apparently based on the fact that a number of witnesses had been subpoenaed for that date. Mr. Cooper and the prosecutor appeared in court on March 18. Respondent did not appear. Respondent had discussed the matter with the municipal prosecutor and negotiated a plea, pending receipt of the abstract. The agreement was that Mr. Cooper would plead guilty to the DWI and that, although this was not his first offense, he would be sentenced as a first offender. This was so because the earlier matter was the subject of an appeal filed on February 25, 1987, which, according to respondent, was still pending before the court. Although the prosecutor placed this information on the record at the March 18 hearing, Mr. Cooper appeared to be unaware of any plea. The court, therefore, would not accept the plea. In evidence is a letter to respondent from the prosecutor dated March 20, 1992. The letter confirmed that Mr. Cooper would be treated as a second offender, but no jail time or additional license revocation would be sought (Exhibit R-2).

The matter was rescheduled for April 15, 1992. Mr. Cooper was informed by the court to instruct respondent to appear on that date. The court administrator telephoned respondent's office on March 19, 1992 to notify him of the date and to express the judge's displeasure at his failure to appear. Written notice of the date was also sent to respondent. Mr. Cooper appeared on April 15, 1992. Respondent again failed to appear. Judge Newman testified

that Mr. Cooper informed him that he had been told that afternoon that respondent was not coming. Respondent had, however, spoken with the prosecutor and, pursuant to their agreement, Judge Newman conditionally accepted the plea with the representation that, if the appeal was dismissed for lack of prosecution, he would bring Mr. Cooper back for resentencing.

On April 16, 1992, Judge Newman issued a subpoena for respondent to appear on May 20, 1992 to answer a contempt charge. Respondent was instructed to obtain counsel. Written notice was also sent on May 6, 1992. Mr. Cooper telephoned respondent and advised him of the court's displeasure. Mr. Cooper and respondent appeared on that date. Respondent did not have counsel. According to Judge Newman, respondent did not have a valid reason for his failure to appear on the two earlier dates. With regard to the appeal, respondent explained that, although he had filed the appeal in 1987, he had never heard from the court about a hearing date after an adjournment had been granted. In fact, Judge Newman had obtained a copy of a letter from the Superior Court, dated April 23, 1987, advising respondent that the April 24, 1987 hearing was rescheduled to May 8, 1987. Further, Judge Newman produced a copy of a determination letter from the municipal court of Bernards Township, dated May 12, 1987, dismissing the appeal for lack of prosecution. Respondent stated that he had never received those letters and had been unaware of the dismissal. Respondent testified before the DEC that he had become concerned about the lack of communication from the court on the appeal and wanted to

look into the matter; Mr. Cooper, however, did not want him to press the matter. The Bernards Township court was apparently unable to locate Mr. Cooper.

Judge Newman advised respondent that, although he would not hold him in contempt, he might file an ethics complaint against him. In Judge Newman's opinion, by 1992 respondent should have known that the 1987 appeal had not been heard and taken further steps to look into it. In the judge's opinion, respondent had misled the court into believing that the matter was pending so that Mr. Cooper would be sentenced as a first offender.

Respondent's version of the facts in this matter was quite different. With regard to the March 18, 1992 appearance, he explained that he had called the court administrator to request an adjournment at Mr. Cooper's request. He contended that he had not yet received the abstract and also had another matter scheduled for that date. Respondent maintained that he was told by the administrator that an adjournment could not be given over the phone, but that Mr. Cooper should appear alone and ask for the adjournment. Respondent had then spoken with the prosecutor about the adjournment and the plea and about obtaining discovery. Respondent also contended that Mr. Cooper was confused as to what was expected that evening, and disclaimed any intention of having the guilty plea entered at that time. He added that the prosecutor was supposed to request an adjournment.

With regard to the second missed appearance on April 15, 1992, respondent testified that he met with Mr. Cooper on April 14, 1992,

at which time they agreed that Mr. Cooper should plead guilty. There was allegedly some difficulty with Mr. Cooper's ability to pay respondent because of marital problems and a court fine he also owed. In fact, the transcript of May 20, 1992 before Judge Newman contains respondent's statement that he had not appeared on March 18, 1992 because Mr. Cooper's check had bounced. Indeed, the record contains a check from Mr. Cooper to respondent, dated March 26, 1992, and marked INS. Respondent testified to the DEC, however, that he suggested to Mr. Cooper that, since the plea had already been negotiated, Mr. Cooper should simply appear without him so as not to incur additional fees. Respondent contended that he informed the prosecutor's office of his intention not to appear. He conceded, however, that he should have filed a motion to withdraw from representation. Notwithstanding Mr. Cooper's statement to the court that he had notified respondent of his required appearance on April 15, 1992, respondent claimed that he was unaware of the court's direction. There was also some indication in the record that Mr. Cooper had experienced difficulty in contacting respondent. Respondent denied that that had been the case.

Interestingly, respondent testified that he consulted with Mr. Cooper, a family friend, regarding Mr. Cooper's testimony before the DEC. According to respondent, Mr. Cooper did not want to testify. Thus, respondent did not produce him as a witness.

The DEC determined that respondent violated RPC 1.1(b), by displaying a pattern of neglect in his representation of Mr.

Cooper, and RPC 3.3, by failing to disclose the dismissal of the appeal of the previous DWI to the court.

The DEC stated in its report:

> There is clearly a pattern of conduct here by [respondent] that this panel can only assume goes beyond these three cases and extends to his entire practice. Although this panel is not permitted by the rules to recommend specific sentences for attorneys, this panel is of the clear opinion that [respondent] should be publicly disciplined and at the very least he should be suspended from the practice of law for a considerable period of time and should only be permitted to resume practice under the guidelines of a proctor.
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> [Panel report at 18]

* * *

After an independent, de novo review of the record, the Board is satisfied that the DEC's finding that respondent's conduct was unethical is fully supported by clear and convincing evidence.

The DEC determined that respondent was guilty of violation of RPC 1.1, RPC 1.3, RPC 1.4 and RPC 1.5 in each of the two Holler matters; RPC 1.1, RPC 1.3, RPC 1.4, RPC 1.5, RPC 1.15, RPC 3.2 and RPC 4.1 in the Glover matter and RPC 1.1 and RPC 3.3 in the Cooper matter. The Board does not, however, find clear and convincing evidence of each of these violations.

Respondent's most serious misconduct occured in the Holler DWI matter. Respondent claimed that he pursued the reversal of the DWI conviction. Yet, when Mr. Holler called the court and the DMV, there was no record of such a proceeding. Respondent was never asked by the DEC to explain that discrepancy. He was unable to

provide any documentation from the court evidencing his pursuit of the matter. The most logical conclusion is that no case was ever filed. If there was no basis to file, then respondent had to make that clear to his client. That was never done. The Board, therefore, finds that respondent violated RPC 1.1(a), RPC 1.3 and RPC 1.4. Furthermore, the Board finds that the evidence clearly and convincingly established a violation of RPC 8.4(c), an allegation not contained in the complaint. Thus, the Board has deemed the complaint amended to conform to the proofs and found that respondent's conduct also violated RPC 8.4(c).

Similarly, in the Holler patent matter, respondent was, once again, unable to provide proof of what he had done on behalf of Mr. Holler. He had no evidence that he had ever ordered or paid for the search. Respondent's argument in this matter – that he turned the completed patent application over to Mr. Holler and the latter never had it signed – presents an unlikely scenario. Mr. Holler would not have paid $4,000 for a patent application and then allowed it to remain unfiled, rather than simply have his partners sign it. The Board found violations of RPC 1.1(a), RPC 1.3 and RPC 1.4.

Even if it is true that respondent pursued some work in the Holler matters – perhaps looking into whether a motion to reverse the conviction could even be filed or drafting a patent application – his fee was still unreasonable. Respondent was paid $8,550 by Mr. Holler for these matters. Respondent argued that, while he may owe some of this money back to Mr. Holler, a portion was for fees

in other matters. Respondent, however, produced no bills or time records to support this contention. His poor recordkeeping practices cannot now be made to serve his purpose. Accordingly, the Board found a violation of RPC 1.5.

In the Glover matter, the DEC found that respondent was guilty of, among other things, gross neglect, lack of diligence, failure to communicate and charging unreasonable fees. These violations, however, are not fully supported by the record. There is no indication that respondent neglected Ms. Glover's personal injury matter or that she was displeased with the settlement. There is insufficient evidence in this record to make a determination as to the alleged suit against the insurance company. Further, there is no clear and convincing evidence that respondent failed to adequately communicate with her. Whether his representations to her were truthful was not explored at the DEC hearing. Furthermore, there is insufficient evidence in this record to challenge respondent's fee or its basis as a violation of RPC 1.5.

The DEC also found that respondent failed to expedite litigation and was not truthful in statements to others. Again, it is unclear precisely to what the DEC was referring, although the most logical interpretation is that the insurance suit was at issue. The record is, however, insufficient to find such a violation in that matter.

The closest call in the Glover matter is whether respondent failed to safeguard his client's property. It is undisputed that he had Ms. Glover's authorization to hold her funds, although there

may have been a misunderstanding as to why respondent held them. A prudent attorney would have placed the basis for his retention of the funds in writing, particularly if he claimed that a portion of the money was owed to him in fees. The record, however, does not present clear and convincing evidence of misconduct in this regard.

With regard to the UCJF $1,500 check from respondent's business account, there is no allegation of misappropriation in this matter. This is not to say, however, that respondent's conduct was not improper. If, indeed, respondent took those funds (and more) because he believed they were owed to him, he had to make this clear to the client and obtain her consent. Had he done so, then there would be no violation in this regard. Ms. Glover, however, claimed total lack of knowledge of respondent's claim to those funds. In addition, the settlement agreement clearly states that $1,500 was to be earmarked for the DMV. Respondent's argument that he had discussed the situation with Ms. Glover, even though the arrangement was not placed on the settlement itself, is without merit. It was his responsibility to clearly designate the use of those funds. That he failed to do. Given the aggregate of the circumstances in this matter, the Board considered the weight of the evidence to be clearly and convincingly against respondent and found a violation of RPC 1.15(b) (unauthorized removal of fees).

In the Cooper matter, respondent did not fail to represent his client competently. Indeed, he negotiated a satisfactory plea on his client's behalf. His transgression, however, was his failure to appear in court. It would appear incredible that, had Judge

Newman's displeasure with his failure to appear been conveyed to respondent, he would still not have appeared. The Board, therefore, gave respondent the benefit of the doubt and assumed that respondent was unaware of Judge Newman's instruction to appear. According to the record, however, Mr. Cooper's check in payment of the fee to respondent had bounced. Likely, that is why respondent failed to appear before Judge Newman on the first scheduled date. At that point, respondent should have made a motion to withdraw from the representation, rather than continue as counsel of record.

Respondent's alleged misrepresentation to the court about the status of the appeal presents another serious problem. Respondent's version of the facts is not unreasonable. It is possible that Mr. Cooper did not want respondent to contact the court to learn the status of the appeal and that respondent, therefore, did not know that the appeal had been dismissed. If, however, respondent truly had not received the two letters from the Superior Court, then he made a negligent misrepresentation to the municipal court. He had a duty to confirm that the appeal was still pending before making such a representation to the judge. The Board, therefore, found respondent guilty of a violation of RPC 1.1(a).

The record leaves no doubt that respondent has a penchant for blaming other people and situations for his faults. For example, he blamed Mr. Holler's partners for never signing the patent application and for the resulting failure to have it filed; he

blamed Woodbridge court personnel for not providing him with copies of documents without an order from the judge; he blamed Ms. Glover for not paying his fees, although he never sent her a bill; and he blamed Mr. Cooper for failing to understand what was to take place on his first trial date.

Respondent produced no witnesses and little documentation on his own behalf to support his contention that none of the within difficulties was his fault. The logical conclusion, therefore, is that it was. Respondent also failed to take small, basic steps that would have prevented serious allegations of misconduct. For example, he failed to withdraw from representation in Cooper and, assuming that his testimony was truthful, to memorialize his agreement with Ms. Glover in connection with the $1,500.

The Board was concerned by the entirety of the circumstances before it in this matter and by the need to protect the public from further misconduct on the part of respondent. Accordingly, the Board unanimously determined that he be suspended for a period of one year. See In re Brantley, 123 N.J. 330 (1991) (one-year suspension imposed where, in a series of four cases, the attorney was guilty of gross neglect, a pattern of neglect, lack of diligence, failure to communicate, misrepresentations to a client regarding the status of a case and failure to cooperate with the disciplinary authorities. The attorney had previously received three private reprimands) and In re Malfitano, 121 N.J. 194 (1990) (one-year suspension imposed where the attorney engaged in a

pattern of neglect in three matters and failed to cooperate with the disciplinary authorities).

In addition, the Board determined that respondent should not be reinstated until all pending DEC matters against him have been resolved. The Board directed that those matters be expedited by the DEC. The Board also determined that, prior to reinstatement, respondent should undergo a psychiatric examination by a psychiatrist approved by the Office of Attorney Ethics to ensure his fitness to practice law. The Board also directed the Office of Attorney Ethics to conduct an audit of respondent's attorney accounts. Three members did not participate.

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

Dated: 2/7/95

By:
Raymond R. Trombadore
Chair
Disciplinary Review Board