SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 93-198

IN THE MATTER OF	:
HOWARD C. TRUEGER,	:
AN ATTORNEY AT LAW	:

Decision and Recommendation
of the
Disciplinary Review Board

Argued: September 8, 1993

Decided: June 8, 1994

Albert E. Cruz appeared on behalf of the District X Ethics Committee.

Roy E. Kurnos appeared on behalf of respondent.

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

This matter was before the Board on a recommendation for public discipline filed by the District X Ethics Committee ("DEC"). The three formal complaints collectively charged respondent with violations of RPC 1.1(a) (gross neglect), RPC 1.1(b) (pattern of neglect), RPC 1.3 (lack of diligence), RPC 1.4(a) and (b) (failure to keep a client reasonably informed, failure to promptly comply with reasonable requests for information and failure to explain a matter to the extent necessary to permit a client to make informed decisions), RPC 4.1(a)(1) (knowingly making a false statement of material fact to a third person), RPC 8.1(b) (failure to cooperate with a disciplinary authority), 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 1971. He received a letter of private reprimand, on August 31, 1978, for failure to apprise his client of the status of a matter. In addition, respondent was publicly reprimanded in 1983 for neglect in two separate matters, failure to keep his clients advised of the status of their matters, and misrepresentation to a client and to that client's new attorney. The conduct for which respondent was publicly reprimanded in 1983 is almost identical to that now under review.

Respondent was charged with misconduct in three separate matters.

The Sackner Matter (X-91-034E)

In or about April 1988, respondent was retained by Dr. Stanley Sackner to bring suit to enforce a Florida judgment and to recover damages from defendants in a case pending in the Superior Court of New Jersey. At the time he was retained, respondent already had been representing several other plaintiffs to enforce similar claims against the same defendants. Dr. Sackner paid respondent a $5,000 retainer. Respondent filed an amended complaint naming Dr. Sackner as an additional plaintiff. At some point during 1988 or 1989, Dr. Sackner met with some other plaintiffs at respondent's office to discuss recovery strategy. Thereafter, in December 1989, Dr. Sackner spoke with respondent regarding the progress of his

case and learned that respondent's father had passed away. Apparently, respondent's father had fallen ill in January 1989, and ultimately died in July of that year. During their December 1989 conversation, respondent expressed remorse to Dr. Sackner over his father's death and told Dr. Sackner of the effect his father had on his life.

Dr. Sackner testified that, after that conversation, "things weren't progressing well with the case." He was not able to get much information on the case and had difficulty getting in touch with respondent. In addition, on one occasion when he was able to speak with respondent, the information obtained was false. Specifically, Dr. Sackner spoke with respondent in March 1990 and learned from respondent that the judge assigned to hear his matter had ordered the deposition of one of the defendants. He again telephoned respondent in late April, but was unable to speak with him. He, therefore, spoke to a secretary in respondent's office and asked her whether the defendant's deposition had occurred. The secretary advised him that there was no record of the defendant's deposition having ever been scheduled. Dr. Sackner then called an attorney friend of his, James Gardner, who, on several prior occasions, had contacted respondent in Dr. Sackner's behalf to inquire about the status of his matter. He had done this at Dr. Sackner's specific requests because respondent had not returned many of Dr. Sackner's telephone calls. On one of the occasions that Gardner spoke with respondent, respondent advised him that he had filed a summary judgment motion to set aside an alleged

fraudulent transfer made by one of the defendants to the other. Incident thereto, according to respondent, the judge had ordered the defendant's deposition in order to resolve certain factual issues. Respondent further advised Gardner that the deposition was about to be scheduled or had been scheduled.

At some point after Dr. Sackner learned that the deposition of the defendant had never been scheduled, Gardner himself investigated the status of Dr. Sackner's case. Since respondent did not return any of Gardner's telephone calls to him, Gardner called the Morris County Clerk's Office on May 17, 1990 and learned that the last docket entry on the matter was an order of dismissal. Gardner immediately drove to the clerk's office to personally review the file. He found that orders of summary judgment had been entered in behalf of both defendants on April 3, 1989 and May 16, 1989. He further found that the orders contained language indicating that they were entered without opposition. The file contained no evidence of any motion for summary judgment to set aside the allegedly fraudulent transfer ever having been filed by respondent in Dr. Sackner's behalf. In fact, there was no activity reflected on the court file since the entry of the orders granting summary judgment in favor of the defendants.

After discovering the true status of Dr. Sackner's claim, Gardner immediately telephoned Dr. Sackner, who asked him to assume the handling of the matter in his behalf. Gardner then telephoned respondent and advised him of his discovery. Respondent expressed surprise and denied ever having received notice of the motions for

summary judgment. Gardner, therefore, advised respondent that he would be filing a motion to set aside the judgments and that respondent should send him both a substitution of attorney and an affidavit about the lack of notice of the motions for summary judgment. Though respondent promised to both call Gardner the following Monday and to send the above documents, he did neither. Gardner subsequently called the defendants' attorney and learned that he had in his possession proof of respondent's receipt in the form of signed certified receipt cards.

Ultimately, Dr. Sackner's case was re-opened and resulted in a small settlement ($30,000) in his behalf. While Dr. Sackner's original claim for relief was substantially higher ($275,000) than the amount for which the claim was settled, Gardner testified that respondent's failure to file a motion to set aside the allegedly fraudulent transfer between the defendants had not adversely affected or prejudiced that settlement.

At some point, Dr. Sackner filed a malpractice suit against respondent. Respondent subsequently entered into a settlement agreement, requiring him to pay Dr. Sackner's legal fees for Gardner's efforts to set aside the judgments entered in favor of the defendants. However, at the time of the DEC hearing, respondent had fallen behind on his payments to Gardner.

Finally, the complaint charged respondent with a violation of RPC 8.1(b), for his failure to cooperate with the DEC for over one year. Specifically, the complaint charged that respondent failed to reply to the DEC investigator's multiple requests for

information on at least six occasions between September 1991 and July 1992. Thereafter, on or about August 18, 1992, the Court entered an Order to Show Cause why respondent should not be temporarily suspended. Ultimately, on October 5, 1992, the Court entered an order sanctioning respondent for his failure to cooperate.

Respondent essentially admitted all of the factual allegations of the ethics complaint, though he denied their legal effect pointing to several mitigating circumstances. Specifically, respondent testified that he failed to respond to the summary judgment motions filed in behalf of the defendants because, at the time he received them, he was experiencing some psychiatric problems, which were exacerbated by his discovery of his father's terminal illness. Respondent added that, when he received the motions, he intended to object to them and even began to formulate a response in his mind. However, respondent continued, he was unable to file any opposition because of the time he was spending with his father every day and the support he was providing to both his mother and his younger sister. He did, however, admit that he represented other clients diligently during that same period of time. Respondent testified that he lied to Dr. Sackner and Mr. Gardner because he was embarrassed by his initial failure and because he always intended to file a motion to vacate the judgments. Similarly, respondent explained, he did not ask any of his three associates to handle the matter because he was too embarrassed and ashamed of his failure. Respondent also attributed

his failure to respond to any of the DEC's numerous requests for information to embarrassment (See Exhibits C-1A through C-1K). (It should be noted that there are two packages of exhibits pertaining to respondent's alleged failure to cooperate with the DEC. Both are almost identically marked. The package containing exhibits C1-A through C1-K pertains to the Sackner matter. The package marked C1-A through C1-F, however, deals with a totally different matter (Sprich) and should not be confused with the Sackner exhibits.)

To support his claim of psychological impairment, respondent submitted the report of his treating psychiatrist, Philip M. Werner. While respondent testified that he had been "under Dr. Werner's care" since 1985, the record is unclear as to whether respondent was actively being treated by Dr. Werner during the period in question. In any event, Dr. Werner's April 5, 1993 report — J-1 in evidence (there are two exhibits marked as J-1. The other J-1 — a set of draft answers to interrogatories — pertains to the (Sprich) matter), indicated that, during the period of 1989-1990, respondent "was under severe emotional stress that clearly was causally related to his difficulties responding to all of his responsibilities". J-1 at 2. Dr. Werner, nevertheless, found that respondent had recovered "to more than a sufficient degree to allow him to perform in a professional and timely manner." Ibid.

As of the date of the DEC hearing, March 29, 1993, respondent was taking Prozac, an antidepressant, and Valium. Respondent testified that the "right combination" of dosage and frequency of

these medications have changed his level of depression and anger, thereby enabling him to "grapple with not winning every case." T1 57.[1] In addition, respondent testified that he has hired a senior associate to ensure that the type of problem that arose in Dr. Sackner's case does not reoccur and that he has become more comfortable with delegating responsibility to others.

* * *

The DEC concluded that respondent's emotional problems did not excuse the intentional lies to his client and to Gardner. Similarly, it found that Dr. Werner's report did not overcome the clear testimony that respondent was able to diligently handle the affairs of other clients during the period that he claimed to be emotionally incapacitated.

The DEC, therefore, found respondent guilty of a violation of RPC 1.4(a), for his failure to truthfully inform his client of the status of his case. In addition, the DEC found respondent guilty of violations of both RPC 4.1(a)(1) and RPC 8.4(c), for his misrepresentations to both his client and Gardner. Finally, the DEC found respondent guilty of a violation of RPC 8.1(b), for his failure to reply to the investigator's several requests for information. The DEC made no determination as to whether respondent's failure to oppose the defendants' motions for summary judgment constituted gross neglect.

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[1] T1 denotes the hearing transcript of 3/29/93.

The DEC recommended that respondent receive public discipline for his misconduct.

The Sprich Matter (X-91-029E)

Respondent was retained by Edward and Carrie Sprich, on June 10, 1985, to defend them and to file a counterclaim in their behalf in a matter then pending in the Law Division, in Morris County. Respondent filed an answer and a counterclaim on July 2, 1985. Thereafter, on August 5, 1985, the attorney for the plaintiff (defendant on the counterclaim) propounded interrogatories on respondent. Respondent acknowledged receipt of the interrogatories on August 6, 1985. Pursuant to the Rules of Court, answers to those interrogatories would have been due within sixty days. On November 12, 1985, plaintiff's counsel wrote to respondent to remind him that the interrogatory answers were overdue and to find out when the answers would be forthcoming. Respondent wrote to plaintiff's counsel, on November 18, 1985, to advise that he expected to have the answers within the next two weeks. On January 17, 1989, when plaintiff's counsel did not receive the long-overdue interrogatory answers, he again wrote to respondent. That letter followed two previous telephone conversations with respondent, on January 2 and January 14, 1986, during which respondent promised to forward the interrogatory answers.

Thereafter, on or about February 5, 1986, plaintiff's counsel served respondent with a motion to strike the Spriches' answer and counterclaim for failure to serve answers to interrogatories. That

motion was returnable on February 28, 1986. Respondent neither served answers to interrogatories nor opposed or otherwise replied to plaintiff's motion. On April 11, 1986, an order was entered striking the Spriches' answer and counterclaim for failure to serve answers to interrogatories. Thereafter, on June 23, 1986, plaintiff's attorney filed a motion, returnable on July 3, 1986, requesting entry of final judgment by default against the Spriches. Although that motion was addressed to and served upon respondent, he did not reply to the motion. On July 30, 1986, final judgment by default was entered against the Spriches, in the amount of $61,694.32 plus costs.

Approximately eighteen months later, on January 22, 1988, respondent filed a motion to vacate the default judgment and to dismiss the complaint. In support of that motion, respondent asserted that the indebtedness, which formed the basis of plaintiff's complaint, was void and unenforceable under the provisions of the Secondary Mortgage Law Act. In his brief, respondent acknowledged that his clients had failed to answer interrogatories. Respondent's motion, which was opposed by plaintiff's counsel, was denied on March 29, 1988. Subsequently, plaintiff's counsel made routine collection efforts, which included taking an assets deposition of the Spriches on March 8, 1989. Respondent attended that deposition as the Spriches' counsel. Ultimately, respondent was discharged as counsel, after his firm assisted the Spriches in entering into a settlement agreement with the plaintiffs.

The complaint also charged respondent with a failure to cooperate with the DEC, as previously noted.

Respondent essentially admitted all of the allegations of the complaint. He maintained, however, that he did not oppose the motion to strike his clients' answer, defenses and counterclaim, and the motion for entry of judgment by default for several reasons. First, respondent testified, he really had no defense to the motion to strike the Spriches' pleadings because they never fully cooperated in providing answers to interrogatories. According to respondent, although Mr. Sprich answered some of the interrogatories, he left respondent to answer the remainder by retrieving information from some files, checks and bills that respondent described as disorganized. Respondent maintained that he had several conversations with Mr. Sprich about the necessity of completing the answers and that Mr. Sprich always promised to "get him the information;" nevertheless, he never received anything else from the Spriches, aside from the draft interrogatory answers. J-1 in evidence.

In support of the assertion that his clients did not cooperate with him to complete the answers to interrogatories, respondent produced a letter from him to Edward Sprich, dated September 30, 1985. In that letter, respondent reminded his client that he had failed to appear at respondent's office two weeks earlier to complete interrogatory answers and to make additional payments towards his retainer. The letter also stated that respondent had "withheld actively being involved in this case based upon [the

client's] failure to meet [his] financial obligations to [this] office." The letter appears to have been written approximately five months before plaintiff's counsel made the motion to strike the answer and counterclaim.

In addition, respondent testified, he did not oppose the motion to strike the pleadings because Edward Sprich essentially lost interest in the matter. He learned this during a face-to-face conversation with Mr. Sprich in his office. During that meeting, respondent advised Mr. Sprich of the pending motion and urged him to make further payments towards respondent's retainer from the proceeds of settlement of another case respondent was handling for him. According to respondent, Mr. Sprich was reluctant to make any further payments at that time because he was financially strapped. He, therefore, told respondent to just "buy him some time" and to "put the case off." Respondent contended that he did, indeed, have the motion adjourned, though he had no documentation to support that contention.

Finally, it was respondent's testimony that he did not oppose the motion for entry of judgment by default because the Spriches basically had no defense to the plaintiff's suit. This was so, he asserted, because he had learned from plaintiff's attorney that, years before, in 1980, the Spriches had executed a release in favor of the plaintiff.

In any event, while respondent and Mr. Sprich disagreed as to whether respondent advised him that a motion to strike the pleadings had been filed, both agreed that respondent notified

Mr. Sprich that a judgment by default had been entered. When the Appellate Division later issued an opinion in an unrelated matter that supported the Spriches' original defense and counterclaim, respondent filed the motion to set aside the default judgment, which, as noted earlier, was denied.

While the original ethics complaint contained no allegations with respect to the appeal of that denial, the complaint was amended at the DEC hearing to allege that respondent failed to file an appeal of the denial of the motion to set aside default. The answer was similarly amended to deny that respondent was retained to do so. Essentially, Mr. Sprich testified that he did, indeed, retain respondent to appeal the denial of that motion. In support of that, he produced a canceled check, dated May 2, 1988, payable to respondent, in the amount of $325.00. Exhibit C-3. The memo portion of that check reads "D.P.T. & J. Appeal," indicating Mr. Sprich's intention to make a down payment for the appeal. Mr. Sprich testified that he personally handed that check to respondent in his office. Respondent maintained that, although the check was endorsed by someone in respondent's name and deposited into his account, he did not endorse it and, in fact, could not recall seeing the check. Respondent believed that his bookkeeper may have endorsed it. According to respondent, had he received or seen that check, he would not have accepted it, given the fact that the amount would not even cover the costs associated with filing the notice of appeal, much less any fee, and that it was apparently tendered only ten days before the time to appeal would expire. It

should be noted that, in the subsequent assets deposition of the Spriches, Mr. Sprich did not deny or otherwise react to plaintiff's attorney's statement to him that no appeal of denial of the motion to set aside default had been filed and that the time to do so had expired. Furthermore, despite Mr. Sprich's claim that respondent had failed to file an appeal in his behalf, he continued to employ respondent's services, or those of respondent's firm, throughout the post-judgment proceedings, which included not only the assets deposition but also a motion for a wage execution and, ultimately, a settlement agreement.

* * *

The DEC found respondent guilty of a violation of RPC 1.4(a) and (b), for his failure to notify his clients of the pendency of either the motion to strike or the motion for entry of judgment by default at any time prior to the entry of the orders granting their respective relief. The DEC further found that the evidence did not clearly and convincingly establish that respondent's conduct in failing to oppose the motions and to provide answers to interrogatories constituted gross neglect. The DEC's conclusion was based on credibility problems with both respondent's and Mr. Sprich's testimony. Finally, the DEC found that the record did not clearly and convincingly establish that respondent was retained by Mr. Sprich to pursue an appeal of the denial of the motion to set aside the default judgment. In support of this finding, the

DEC considered the fact that respondent wrote to Mr. Sprich offering to handle such an appeal only upon receipt of a retainer of $1,000 — not $325.00. See Exhibit R-11. In addition, the DEC found significant the fact that Mr. Sprich continued to use respondent's services during post-judgment proceedings and the ultimate settlement of the judgment on the original action. The DEC considered this course to be inconsistent with Mr. Sprich's claim that he had not lost interest in pursuing the appeal and that respondent had simply failed to act.

Finally, the DEC found respondent guilty of a violation of RPC 8.1(b), for his failure to cooperate with the DEC investigator for over one year, and then, only after the Court imposed a monetary sanction upon him for his uncooperativeness. See Exhibits C-1A - C-1F. The DEC recommended public discipline for respondent's misconduct.

The Inter-Tel Matter (X-92-042E)

Sometime in 1989 or 1990, respondent was retained by Barry Wichansky, Vice President of Inter-Tel, Inc., to perform collection services. No written retainer agreement was executed or prepared, despite the fact that respondent agreed to provide services on a contingency basis. Specifically, respondent would work on a contingency fee of twenty-five percent of the amount collected. While the presenter took the position that respondent's failure to enter into a written fee agreement certainly caused the client some confusion as to its responsibilities (for example, respondent and

Mr. Wichansky disagreed on the nature and extent of Inter-Tel's obligation to reimburse respondent for costs), the presenter specifically excluded from the complaint any allegation of a violation of RPC 1.5(c), because he believed that the issue should more properly be presented to a fee arbitration committee.

In any event, in connection with his representation, respondent prepared and forwarded to Inter-Tel monthly status reports that essentially summarized the status of collection efforts on specific accounts. Respondent's services were apparently satisfactory to Inter-Tel until August 1991, when Mr. Wichansky's assistant, Nancy Bialos, complained to respondent of discrepancies in the status reports, as well as the apparent inactivity of several accounts for several months. Ms. Bialos wrote to respondent on several occasions, between August and November 1991, and raised specific questions on several accounts. Ms. Bialos received no response to any of those letters until January 30, 1992. On that date, respondent's associate wrote to Ms. Bialos and advised her of certain cases that had been closed and the reason therefor. Ms. Bialos apparently did not consider that letter to be completely responsive to her earlier inquiries. She, therefore, wrote to respondent's associate on March 19, 1992, again asking for responses to her earlier letters to respondent. Thereafter, additional correspondence ensued from Ms. Bialos and Mr. Wichansky to respondent, requesting essentially the same information as that previously requested by Ms. Bialos on several prior occasions.

While it is not clear whether Mr. Wichansky discharged respondent or whether respondent asked Mr. Wichansky to seek other counsel, the relationship between respondent and Inter-Tel was terminated by May or June 1992. Thereafter, Inter-Tel's new attorney, Philip Levitan, wrote to respondent on June 22, 1992, requesting that respondent forward to him the Inter-Tel files, along with substitutions of attorney and an accounting of amounts due to or collected in behalf of Inter-Tel. When respondent did not reply to that letter, Levitan followed up with another letter, dated July 1, 1992. By letter dated July 16, 1992, respondent advised Levitan that he expected to have all of the "ninety-seven some-odd" files together and ready for transmittal to him shortly. By August 24, 1992, five weeks later, respondent still had not forwarded anything to Levitan. Finally, on October 20, 1992, respondent forwarded to Levitan a copy of his ledger sheets and bills to Inter-Tel. In that letter, he asserted that Inter-Tel owed him $300.00 and inquired of Levitan how his fee would be protected. He further advised Levitan that he would send substitutions of attorney on each of the cases under separate cover.

On November 10, 1992, Levitan again wrote to respondent, agreeing to protect his fee and requesting that respondent forward the files to him, particularly the Concord Courier and Ellman files. Levitan testified that he had requested those two more substantial files back in June 1992. It was not until December 4,

1992 that respondent forwarded to Levitan those two files. The remainder of the files were never forthcoming.

Levitan testified that respondent seemed to have invested a substantial amount of work in both the Concord and Ellman files. In fact, one of those files was completely worked up by respondent for trial.

Respondent testified that he ceased sending monthly reports to Inter-Tel after August 1991 because the associate who had been handling the Inter-Tel files left the firm, as did other administrative personnel assigned to those files. Furthermore, in February 1992, the associate to whom respondent subsequently assigned the Inter-Tel matters advised respondent that he would no longer handle them. Respondent, therefore, advised Mr. Wichansky that his firm could no longer handle Inter-Tel's collection matters.

Respondent gave several reasons to explain the delay in forwarding the files to Inter-Tel's new attorney. Essentially, respondent testified that he was busy running a business, that his bookkeeper needed time to calculate the costs due him, that many of the files to be forwarded were, in reality, closed and, finally, that he was asserting a retaining lien on the files and that no one pressed him for copies of any of the files, with the exception of Concord and Ellman. Respondent testified that he still had the remaining files in his office and that they were available to be released to anyone who would pick them up, if he were instructed to return them, in the face of his retaining lien. Finally, while

respondent asserted that he advised Inter-Tel of the status of many of these remaining cases, he was unable to produce any documentation to that effect.

* * *

The DEC found respondent guilty of a violation of RPC 1.4(a), for his failure to keep his client reasonably informed about the status of its cases and to comply with its reasonable requests for information. The DEC further found respondent guilty of a violation of RPC 1.3, for his failure to respond to Levitan's request for an accounting and for the delivery of files, upon termination of respondent's relationship with Inter-Tel. The DEC also found that the alleged violations of RPC 8.4(d) and RPC 1.1(a) were not proved by clear and convincing evidence. It recommended public discipline for respondent's misconduct.

CONCLUSION AND RECOMMENDATION

Upon a de novo review of the record, the Board is satisfied that the DEC's conclusion that respondent acted unethically is fully supported by clear and convincing evidence. The Board is unable to agree, however, with some of the DEC's specific findings of ethics violations, as seen below.

The Board considers respondent's conduct in the Sackner matter to be particularly egregious. Not only did respondent fail to keep his client advised of the status of his matter and to promptly comply with his reasonable requests for information, in violation of RPC 1.4(a), but he also engaged in a pattern of misrepresentation to his client and to his new attorney, in violation of RPC 8.4(c).

Respondent's attempt to justify his multiple misrepresentations as the product of embarrassment should not be considered. There can be no justification for such repeated violations of the high moral standards set by the Court for all attorneys. As aptly stated by the DEC, "a duty of truthfulness in relations with one's client is of the highest order. A failure to realize and adhere to this duty demonstrates a character inconsistent with the honorable practice of law" (Hearing Panel Report at 4). Moreover, respondent failed to cooperate with the DEC for over one year, in violation of RPC 8.1(b). In fact, it was not until the Court sanctioned respondent for his lack of cooperation that he finally filed an answer in this matter. See Exhibit C1 - K. Such indifference toward the ethics process cannot be countenanced.

Finally, while the DEC made no such specific finding, respondent clearly grossly neglected the Sackner matter by his failure to initially reply to the summary judgment motions, as well as his failure to move to set aside the orders granting summary judgment at any time after their entry, in violation of RPC 1.1(a).

In this regard, the DEC's rejection of respondent's affirmative psychiatric defense was proper. By respondent's own admission, his alleged problems did not prevent him from effectively attending to the matters of other clients. It should be further noted that, while Dr. Werner made a diagnosis of moderate to significant depression, it was not until November 1991 that any kind of an anti-depressant was prescribed. This is at least eighteen months after the occurrence of the misconduct. In addition, the record is noticeably devoid of any indication, such as a record of treatment dates, that respondent was actively treating with Dr. Werner at the time of the misconduct. In the Board's view, these considerations cast substantial doubt on respondent's defense.

In the Inter-Tel matter, the DEC's finding that respondent failed to keep his client informed and to respond to his client's reasonable requests for information, in violation of RPC 1.4(a), is fully supported by the record. However, the Board is unable to agree that the record clearly and convincingly supports the DEC's finding that respondent violated both RPC 1.3 and RPC 1.4(a), for his alleged failure to forward the client files to the new attorney and to provide an accounting to the attorney upon termination of his representation.

First, it should be noted that respondent's alleged failure to forward the client files would more appropriately fall within the purview of RPC 1.16(d), which requires an attorney to return client property upon the termination of representation. However, that section specifically allows an attorney to retain client papers "to

the extent permitted by other law." There is, in New Jersey, a common law retaining lien, which allows an attorney to retain client papers until his bill has been satisfied. See Brauer v. Hotel Associates, Inc., 40 N.J. 415 (1963). The retaining lien is a passive lien, that is, its effectiveness is totally dependent upon the inconvenience experienced by the client. It cannot be actively enforced through legal proceedings. Id. at 420. The mere existence of the right to assert such a lien, however, does not absolutely entitle a lawyer to do so. For example, if assertion of the lien would prejudice a client's ability to prosecute or defend a matter, then the attorney must provide to the client or his representative a copy of the file. Opinion 554, 115 N.J.L.J. 565 (1985).

In this matter, it appears that respondent was asserting a retaining lien over his client's files. The record is totally devoid of any indication that anyone suffered any prejudice by virtue of respondent's failure to return the files. In fact, respondent testified that most of those files were closed. In addition, respondent forwarded to Levitan the two original files about which the client was primarily concerned, albeit several months later. He appears to have asserted the lien properly — at least in the technical sense. On a more equitable note, the Board is disturbed that respondent chose to assert any lien in this matter, given the fact that the dispute may have been caused, in part, by respondent's own failure to reduce to writing his contingent fee arrangement, as required by RPC 1.5(c).

Nevertheless, respondent's decision to do so, in the Board's view, does not rise to the level of an ethics violation, under the relevant circumstances. The Board, therefore, recommends the dismissal of the charge of improper retention of client files. Even if the Board were to find that respondent improperly retained his client's files, it would agree with the DEC that respondent's conduct did not result in any prejudice to the client, to the prosecution of the various matters and, finally, to the administration of justice, in violation of RPC 8.4(d). The Board therefore, recommends the dismissal of that charge as well.

In addition, the Board cannot agree with the DEC's finding that respondent failed to provide an accounting to Levitan. Respondent did furnish an accounting, albeit four months after Levitan's original request. Though Levitan testified that it was not the type of accounting he would have submitted to his clients, he declined to term it inadequate. Moreover, given the volume of Inter-Tel files that respondent was required to prepare for transfer to Levitan, the Board does not find his four-month delay in submitting the accounting to be significant. Consequently, the Board recommends the dismissal of that charge.

Similarly, because there was no evidence presented to indicate that respondent neglected any of the collection files entrusted to him, the DEC's dismissal of respondent's alleged violation of RPC 1.1(a) is fully supported by the record.

Finally, the Board is unable to agree with the DEC's findings of unethical conduct in the Sprich matter, with the exception of a

failure to cooperate with the DEC, in violation of RPC 8.1(b). While respondent did eventually cooperate with the DEC, he did so over one year after the DEC's initial request and then only under forced circumstances in the form of a Court-imposed sanction.

In the Board's view, however, the record does not clearly and convincingly establish that respondent failed to advise Mr. Sprich of the pending motions to strike the pleadings and for entry of judgment by default at any time prior to the entry of the orders granting that relief. While both respondent and Mr. Sprich agreed that respondent advised Mr. Sprich, after the fact, that the motion for entry of judgment of default had been granted, there was no such agreement in their testimony with respect to similar advice before the entry of any orders, each taking opposite positions. Simply stated, the Board could not make a fair credibility assessment of the witnesses' testimony via-a-vis both one another and the balance of the evidence. The Board, therefore, recommends the dismissal of all charges relating to the Sprich matter, with the exception of the charge of a violation of RPC 8.1(b).

There remains, thus, the issue of the appropriate discipline for respondent's acts of gross neglect, failure to keep his clients advised and to reply to their reasonable requests for information, failure to cooperate with the DEC and, most egregiously, his multiple misrepresentations to his client and his client's new attorney over a prolonged period of time.

In In re Grabler, 114 N.J. 1 (1989), the Court suspended an attorney for one year for gross neglect in four matters, failure to

communicate and misrepresentation in two matters and gross neglect of his trust and business accounting system. There were no mitigating factors presented in that case, aside from an unblemished ethics history.

In In re Foley, the Court suspended an attorney for two years for gross neglect in three matters, misrepresentation to his client in one matter, a pattern of neglect, lack of diligence, failure to communicate, failure to expedite litigation and lack of cooperation with the disciplinary authorities. The attorney's prior disciplinary history in that matter was considered an aggravating factor. He had previously been both privately and publicly reprimanded for similar misconduct. The Court further ordered that the attorney be required to practice under the supervision of a proctor for two years, upon readmission.

Finally, in In re Rosenthal, 118 N.J. 454 (1990), an attorney was suspended for one year for gross neglect in three matters, pattern of neglect, misrepresentations to clients, failure to refund a retainer and failure to cooperate in the disciplinary proceedings. While the attorney had been previously publicly reprimanded for similar but less serious misconduct, his psychological difficulties were considered in mitigation.

While respondent has not been found guilty of multiple instances of gross neglect, the Board is, nevertheless, deeply troubled by respondent's apparent disregard for the truth. Respondent misrepresented to Dr. Sackner and to Gardner the status of the matter on at least three separate occasions. Moreover, when

Gardner confronted him with information regarding the true status of the matter, respondent continued to steadfastly deny the truth.

The Board finds no mitigating circumstances in these matters. Although respondent offered, in mitigation, a history of psychiatric problems, it is clear that his alleged problems did not prevent him from acting competently in the Sprich and in the Inter-Tel matters. Like the DEC, the Board rejects that defense as incredible. In aggravation, the Board took into account that respondent cooperated with the DEC only after the Office of Attorney Ethics made a motion to the Court for respondent's temporary suspension for his lack of cooperation and only after the Court sanctioned him for his failure. In addition, respondent has twice been the subject of prior discipline (a private reprimand in 1978 and a public reprimand in 1983) for virtually identical misconduct. It should be noted that, in the latest of these two proceedings, as in this case, respondent represented to the Board that he had sought professional help for his personal problems and that he had instituted numerous office safeguards to avoid similar situations. See In re Trueger, 92 N.J. 605 (1983). Respondent either abandoned those safeguards or did not adhere to them to a sufficient degree in order to remedy his shortcomings. It is clear that he has not learned from his prior experiences.

For all of these reasons, the Board is of the unanimous opinion that respondent should be suspended for one year. The Board so recommends. In addition, the Board recommends that respondent be required to submit proof of fitness to practice law,

before his reinstatement. Finally, the Board recommends that respondent be required to practice under the supervision of a proctor for a period of two years, upon readmission. One member did not participate.

The Board further recommends that respondent be required to reimburse the Ethics Financial Committee for administrative costs.

Dated: 6/5/1994 By: _____
Raymond R. Trombadore
Chair
Disciplinary Review Board