SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. 96-039

IN THE MATTER OF

MARIA P. FORNARO,

AN ATTORNEY AT LAW

Decision

Argued: April 17, 1996

Decided: March 10, 1997

Clifford W. Starrett and M. Carole Duffy appeared on behalf of the District X Ethics Committee.

Benjamin E. Haglund appeared on behalf of respondent.

This matter was before the Board based on a recommendation for discipline filed by the District X Ethics Committee (DEC).

The complaints in the four matters, which arose out of five grievances, charged respondent with numerous instances of misconduct.[1] For the sake of clarity, the specific charges are set forth within the recitation of the facts of each matter.

Respondent and the DEC presenter entered into a stipulation of facts in each of the four matters. The stipulations, however, were supplemented by testimony from the grievants and from respondent.

Respondent was admitted to the New Jersey bar in 1989. Since then she has been a sole practitioner in Morristown, Morris County. She has no history of discipline.

[1] In the Schutte matter, a grievance was filed by the client and also by substituted counsel. Thus, there are two docket numbers assigned to that matter.

I. THE SCHUTTE/ARBURUA MATTER (District Docket Nos. X-94-22E and X-94-28E)

In May 1992, Harm Schutte retained respondent in connection with an immigration matter. Schutte, a South African citizen, is a professional polo player who at that time was residing in Far Hills, New Jersey. Schutte is also an attorney admitted to practice in South Africa. Respondent and Schutte executed a retainer agreement, dated May 14, 1992, whereby respondent agreed to represent Schutte in connection with an application to the Immigration and Naturalization Service ("INS") for a non-immigrant H-1 visa ("the application"). Schutte agreed to pay respondent a non-refundable fee of $3,000 and to be responsible for all costs and disbursements. Schutte also agreed to pay respondent an hourly rate of $175, in the event that respondent's services exceeded $3,000. Schutte paid respondent $50 for their initial consultation.

During their first meeting, Schutte gave respondent a letter dated May 12, 1992, verifying his employment and supporting his proposed application.

On September 18, 1992, Schutte paid respondent $1,200 toward the $3,000 retainer fee.[2] According to respondent, she told

[2] The DEC was greatly troubled by respondent's practice of accepting funds received as a retainer and/or costs and depositing them in her business account. Respondent's counsel submitted a letter-brief citing In re Stern, 92 N.J. 611 (1983) (retainer fees can be deposited in the attorney's business account absent an explicit agreement with the client to place them in the attorney's trust account). The DEC mistakenly determined that the retainer fees and costs should have been deposited in respondent's trust account. During the hearing, the DEC was quite critical of respondent's behavior in this regard.

Schutte that she would not file the application until the entire retainer was paid. 1T69.[3]

Respondent had not previously handled immigration matters. She testified, however, that she consulted with her father, who had been employed by the government as an immigration investigator. Respondent added that, after Schutte retained her, she attended two immigration law seminars offered by the Morris County Bar Association and the New York Practicing Law Institute.

Respondent believed that she could obtain a higher priority immigration preference for Schutte based on his status as an attorney in South Africa. During the course of the representation, she contacted Rutgers University and obtained and reviewed materials in connection with a one-year program of study for Schutte to become licensed to practice law in the United States. Respondent testified that she also asked Schutte to give her documents about his law degree from South Africa, which he failed to do.

Respondent made no reference to Schutte's preferred status on his application. She testified, however, that she had been told by colleagues that Schutte's status would come up later when he met with an INS examiner.

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[3] 1T refers to the transcript of the DEC hearing on December 8, 1994 at 9:00 A.M. 2T refers to the transcript of the DEC hearing on December 8, 1994 at 2:15 P.M. 3T refers to the transcript of the DEC hearing on March 23, 1995 at 9:00 A.M. 4T refers to the transcript of the DEC hearing on March 23, 1995 at 11:30 A.M. 5T refers to the transcript of the DEC hearing on March 23, 1995 at 2:45 P.M. 6T refers to the transcript of the DEC hearing on March 24, 1995.

A. The INS Application

Schutte traveled extensively as a professional polo player. He was, thus, difficult to reach by telephone. Respondent claimed that she made numerous attempts to contact Schutte by phone during the course of the representation. The number he had given her, however, was a barn where, according to the stipulation, neither he nor anyone else was present to answer. There was no answering machine or answering service. (Contrarily, Schutte testified that the barn was attended twenty-four hours a day. 3T19). According to respondent, Schutte would not contact respondent for months at a time. When he would talk to her, he was usually unavailable to meet with her because of his travels and often did not leave a number where he could be reached. Respondent testified, however, that she had four or five conversations with him.

By letter dated October 23, 1992, respondent told Schutte that she had been unable to reach him by phone and asked him to contact her immediately to schedule a meeting to get information for his visa application. Schutte did not reply. Respondent sent a second letter, dated December 23, 1992, enclosing a copy of her October 23, 1992 letter and again stating that she had been trying to contact Schutte by telephone. She requested that he contact her to arrange a meeting. The letter was sent by certified mail and was received in behalf of Schutte on December 26, 1992. (The record does not reveal who signed the green return receipt card; the signature does not appear to be Schutte's.) Schutte did not answer

this letter either. It is not known if Schutte actually received either of respondent's letters.

During the course of the representation, respondent and Schutte had a series of meetings. In late September 1993, Schutte met with respondent to complete and sign his application. He gave her the balance of the $3,000 retainer at that time.

Respondent's and Schutte's testimony about this meeting was at variance. According to respondent, she prepared the application using information gathered from earlier meetings with Schutte. 1T148-149. However, various entries were left blank, including biographical information and critical questions about when and where Schutte had entered the United States. In addition, the application was not accompanied by a visa petition, even though the INS form so required. As to this, the DEC stated as follows:

> Based on equivocal and less-than-credible testimony by respondent on December 8, 1994 regarding the actual process for filling out the application, the hearing panel had serious concerns as to whether some or all of the application had been presented 'blank' to Mr. Schutte by respondent with the request that he sign the blank (or partially blank) application, which then would be filled in by respondent. If the evidence substantiated that possibility, respondent would have violated RPC 8.4(d), at least. The hearing panel therefore requested that the presenter arrange for Mr. Schutte to answer questions under oath by telephone, which was arranged on March 23, 1995. In part Mr. Schutte testified:
>
> > I never reviewed it, sir. She read it to me, but not all the information on that she filled out. I never saw the form. She had the form on the other side of her desk, and I was sitting on this side of her desk and she was going over the form, but not all of the marks or all -- I mean, it's a long form and I was in the office for like five minutes.

MR. MacDONALD: Did you ever get the opportunity to see the completed form?

THE WITNESS: No, sir, never. . . .

MR. MacDONALD: When you signed the form, was it blank?

THE WITNESS: The form was blank, yes. [Citation omitted].

MR.BARTKUS: ...Before [the presenter] sent you this form, did you ever see it with the section B information filled in, typed in, your name, address, date of birth, etc.?

THE WITNESS: No, sir. [Citations omitted].

He also testified that he was not presented with the first pages of the form, 3/23 Tr. 41, so he could not verify whether there was anything typed on the first page or whether the information was correct. Respondent testified that she had her staff fill out the form in advance of the September 25th meeting, with as much information as respondent then had about Mr. Schutte (12/8 Tr. 149, 169-72) -- apparently from earlier discussions, although the possibility remained that she simply assumed some answers.

The testimony also was alarming regarding whether respondent had even asked Mr. Schutte the full range of questions required by the form. Mr. Schutte testified that she did not. (3/23 Tr. 32-36.) Respondent, however, testified that she went over each question, step by step, with her client. (12/8 Tr. 163-65.)

[Panel report at 12-13]

The stipulation states that respondent gave Schutte a copy of the application on the day it was signed. Schutte testified otherwise. 3T14.

With regard to the missing information on the petition, respondent contended that she intended to file an amended petition or supply the missing information when the INS requested it. Respondent, however, had much of the information available to her and it is unclear why she did not include it on the application and

confirm its accuracy when Schutte met with her. Respondent denied that she intended to fill in the information after Schutte had signed the application. 1T178. Respondent was unable to explain why she did not wait until she had all the necessary information available and on the application before Schutte signed it, rather than file an amended application. 1T179-180.

The DEC concluded that respondent had Schutte sign the form with important information omitted and without having him read the form carefully before signing it. Furthermore, the DEC concluded that "respondent at least intended to fill in various information after Mr. Schutte signed the form." (Original emphasis). The DEC disbelieved respondent's testimony that she intended to file an amended petition.

* * *

Respondent believed that Schutte gave her a money order for the $180 filing fee. Schutte denied having done so. 3T20. It was respondent's recollection that she had mailed the application to the INS on the day Schutte signed it. 1T181. (According to the stipulation, respondent claimed that she had filed the application in October 1993). Respondent forwarded the application without a transmittal letter or a request for a "filed" copy. She took no subsequent steps to get the missing information for the application or to follow up and see that it had been processed. She also failed to designate herself as the preparing attorney on the

application, although the application contained an instruction that the preparer, if not the applicant, should sign the form. Respondent testified that "[a]t the time [she] didn't feel like [she] had to." 1T121. She later admitted that she had been in error and should have signed the application. 1T191-192. The INS had no way to contact respondent or know of her involvement in the matter. Respondent testified that she did not follow up on the application because, in February 1994, Schutte got a new attorney and four months was not a long period of time to wait when dealing with the federal government. 1T29-30. Respondent also contended that she thought that the INS would contact Schutte, who would, in turn, contact her. The DEC did not find this statement credible, noting that Schutte had retained respondent to represent him through the entire process and also noting respondent's awareness of the difficulty the INS would have in contacting Schutte.

There was no documentary evidence in the record that respondent had filed the application. Furthermore, the INS did not contact Schutte, although his address on the application was correct.

The DEC inferred that respondent had not filed the application.

B. The Substitution of Attorney

Schutte testified that, after signing the application, he called respondent on a number of occasions to get information on its status, leaving messages with her secretary and on her answering machine. Respondent did not return his calls. Schutte

became concerned about his immigration status. On February 17, 1994, Schutte signed a substitution of attorney in favor of Martin J. Arburua, Esq.[4] By letter dated February 17, 1994, Arburua informed respondent that Schutte had retained him and requested Schutte's file and an itemized statement of the work done. Arburua enclosed a letter from Schutte informing respondent of the substitution and directing her to forward the items Arburua had requested. Respondent received the letter on February 28, 1994. She did not forward the requested items. The stipulation states that, thereafter, between March 4 and April 19, 1994, Arburua, who was afraid to proceed with the application without having seen what respondent had filed, called respondent no fewer than ten times. He was unable to reach respondent. On March 18, 1994, after business hours, respondent called Arburua and left a message stating that she would forward the file. She did not, however. Arburua testified that respondent called on one other occasion, at which time she told a receptionist that she would send the file within one week. She did not.

Respondent contended that she spoke with Arburua and proposed that Schutte come to her office to pick up his file and return certain materials he had borrowed from her. She added that she had left a message on his machine prior to that conversation. She contended that Arburua agreed, but Schutte never appeared. Respondent acknowledged that the matter was left "up in the air."

[4] Arburua, who has practiced immigration law for over ten years, pointed out a number of errors in respondent's preparation of the application and explained proper procedures before the INS.

1T93. Respondent added that she did not want to send Schutte's original birth and baptismal certificates by mail. 1T109-110.

C. The Accounting

Despite a statement in respondent's retainer agreement that she would send periodic billings and accountings to Schutte and despite Arburua's requests for them, respondent did not supply an accounting until March 21, 1995, after the DEC hearings started. At the hearing of March 23, 1995, respondent's counsel stated that respondent would refund $1,422.71 to Schutte.

The DEC noted that, although respondent gave an accounting for her time, "there [was] no evidence that the balance has been returned to the client (and respondent's counsel confirmed in November 1995) that the money might, even now, not have been paid."

D. Failure to Cooperate with the DEC

On April 25, 1994, Arburua filed a grievance with the DEC. By letter dated May 9, 1994, the DEC investigator asked respondent to submit a written reply to the grievance within two weeks. Respondent did not comply with the investigator's request. By letter dated May 23, 1994, the investigator asked respondent to reply to a grievance that had been filed by Schutte on May 2, 1994. Again, respondent did not reply. She also failed to appear for a meeting with the DEC investigator scheduled for May 20, 1994.

The investigator called respondent on four occasions. It is unclear if they communicated with each other on any of these

occasions. In turn, respondent left at least one message for the investigator. See Exhibit P-1. At some point between May and July 1994, the two had a discussion, at which time respondent promised the investigator that she would return Schutte's file. Respondent stated that, thereafter, she received the formal complaint. She did not return the file because she "froze." 1T187.

On July 27, 1994, the formal complaint was served on respondent and an answer requested within ten days. By letters dated August 4 and 10, 1994, respondent requested an extension of time to answer. By letter dated August 26, 1994, she was given until September 12, 1994 to file an answer. No answer was forthcoming, despite a "five-day letter" in October, warning her that she could be temporarily suspended for failure to answer.[5]

By letter dated October 25, 1994, the panel chair informed respondent of the hearing date in this matter. Respondent thereafter requested and was assigned counsel, on November 15, 1994. Respondent filed an answer on November 18, 1994. On that same date, she forwarded Schutte's file to Arburua.

* * *

The complaint charged respondent with a violation of RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), RPC 1.4(a)

[5] Exhibit P-15 is a letter dated September 20, 1994 from respondent to the investigator, apparently intended as a reply to the grievance or as an answer to the complaint. It is marked "DRAFT." It is not referenced in the stipulation or testimony and appears that it was not mailed.

(failure to communicate), RPC 1.5(a) (unreasonable fees), RPC 1.16(a)(3) and (d) (failure to return client property) and RPC 8.1(b) (failure to cooperate with the DEC).

Respondent stipulated that she violated RPC 1.3 (for her failure to turn over Schutte's file), RPC 1.4(a), RPC 1.16(a)(3) and (d).[6] The DEC agreed and also found that she had violated RPC 1.15(b) by failing to turn over Schutte's documents. Respondent also stipulated that she had violated RPC 8.1(b).

The DEC — apparently assuming, for argument's sake, that respondent had actually filed the application — was concerned that the delay in processing the application from Schutte's initial meeting with respondent in May 1992 until September 1993 harmed Schutte because he was left "without proper 'papers.'" The DEC was troubled that respondent was less than diligent during that time. The DEC, however, noting the difficulty in contacting Schutte, concluded that respondent's failure to file the application between May 1992 and September 1993 was not unethical, citing her two above-mentioned letters and several meetings in both 1992 and 1993, as well as at least two appointments for which Schutte failed to appear.[7] In this context, the DEC also noted respondent's attendance at two immigration seminars and her review of the Rutgers and immigration materials. The DEC determined, however,

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[6] The DEC mistakenly stated that respondent had stipulated to a violation of RPC 1.1(a).

[7] As noted above, Schutte paid the balance of the retainer in September 1993. In her answer, respondent stated that, under the terms of the retainer agreement, she was not required to perform any work until the retainer was paid in full. Exhibit P-2, paragraph 17.

that respondent's ultimate failure to file the INS application violated RPC 1.1(a) and that her false testimony on that aspect violated RPC 3.3(a) and RPC 8.4 [presumably (c)].

Furthermore, the DEC determined that respondent's failure to reply to Arburua's request for an accounting and to return unearned fees violated RPC 1.4(a), RPC 1.5(b) and RPC 1.16(d). Finally, the DEC found, mistakenly, that respondent had violated RPC 1.15(a), by failing to deposit the $3,000 retainer in her trust account.

II. THE PENNAMACOOR MATTER (District Docket No. X-94-06E)

On April 14, 1993, Karen Pennamacoor (formerly Krucky) retained respondent to pursue a lawsuit against her stepfather, William C. Phelps, for sexual abuse. At respondent's suggestion, Pennamacoor also determined to proceed against her mother, Wanning White (formerly Phelps), on a negligence theory. Respondent agreed to accept the matter on a contingent fee basis. Respondent and Pennamacoor signed a retainer agreement on April 14, 1993. For reasons not clear from the record, the retainer agreement refers only to a proceeding against Phelps.

Pursuant to the retainer, Pennamacoor was to pay respondent a $500 non-refundable deposit for initial costs. Pennamacoor made four payments of $50 each to respondent between June and October 1993. She never paid the $300 balance because she believed that she was not getting adequate services from respondent. Respondent deposited the $200 for costs into her business account, an action with which the DEC erroneously found fault. Funds advanced for

costs may be deposited in either an attorney's trust or business account. In re Stern, supra, 92 N.J. 611, 619 n.2 (1983). The DEC correctly noted, however, that an advance for costs cannot be made non-refundable.

After meeting with respondent, Pennamacoor consulted with Dr. Jane B. Sofair, M.D., a psychiatrist. By letter dated June 17, 1993, Dr. Sofair advised respondent that she would forward her report to respondent upon payment of $250. According to the stipulation, Dr. Sofair forwarded the report after Pennamacoor paid $250 for the examination, on or about July 26, 1993. (The DEC noted that the doctor's fee should have been paid from the sum Pennamacoor had advanced for costs). Respondent "faxed" the report to Pennamacoor on the day that she had received it and discussed it with her. 2T68.

Pennamacoor gave all of her medical bills to respondent. She also gave her an audio cassette recording of a conversation between her stepfather and herself, which she believed supported her case, as well as a February 3, 1993 offer from Phelps to settle the matter for $2,000. In addition, she gave respondent current addresses for Phelps and White.

Pennamacoor was anxious to have this matter resolved. She wanted to settle the case before a lawsuit was filed. She was of the opinion that time was of the essence because her stepfather was planning to re-marry and build a house and she feared that would expend all his financial resources. She was also apprehensive about his new wife and her four daughters' safety. By letter dated

April 20, 1993, respondent advised Pennamacoor that she had begun the investigation of her case.

Respondent, however, did not file a complaint against Phelps and/or White. Respondent testified that, given the serious nature of the charges involved, she was concerned about filing a "frivolous lawsuit." She instructed Pennamacoor "to do her homework" and give certain information to respondent to support her allegations. Respondent stated that "[Pennamacoor] didn't have anything, no divorce complaint, no DYFS, no nothing." 2T110. Furthermore, respondent stated in her answer to the complaint that she had told Pennamacoor that she would not start the litigation until the "retainer" had been paid in full.

A. The Division of Youth and Family Services Records

Pennamacoor told respondent that the Division of Youth and Family Services ("DYFS") had records confirming her claim of abuse. In December 1993, respondent issued two subpoenas to DYFS in an attempt to get Pennamacoor's records.[8] Exhibit J-2. Respondent stipulated that "[n]ot only was the issuance of a subpoena where no case was pending improper, but she failed to file a complaint in a timely manner, and obtain the records by court order." Exhibit J-1, paragraph 6. The DEC went further in its criticism of respondent's issuance of the subpoenas:

[8] When asked to explain the delay in issuing the subpoenas, respondent testified that she wanted to wait until Pennamacoor had been evaluated by a physician. 2T107.

> In an effort to obtain information from DYFS to substantiate the client's allegations of sexual abuse, respondent issued two subpoenas (J-2) even though a litigation had not been commenced. She signed the subpoenas in the name of the Clerk of the Court and mailed them to the witnesses.
>
> This is in violation of the Court Rules. No petition for the subpoenas was filed; no order was obtained; and service of the subpoenas was not made on any potential adversaries. [citation omitted].
>
> Issuing these subpoenas also evidenced either a lack of awareness of the Rules of Practice, or a total disregard of them, that might well rise to the level of gross neglect. Putting aside the unauthorized issuance of the subpoenas, they had several procedural errors: they were addressed to individuals rather than to them as custodians of records for DYFS; they did not contain a date for the deposition and production of documents; they were 'served' by mail, return receipt requested, rather than in person; DYFS records may be sealed and can only be obtained by court order.
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> [Hearing panel report at 25-26]

In response to the issuance of the subpoenas, a deputy attorney general contacted respondent by phone and informed her that there were no records in the name of Karen Krucky. (Respondent did not "subpoena" records in the name Phelps, the stepfather's name that Pennamacoor may have used at one time). The deputy attorney general also stated that DYFS records were sealed and discoverable only by court order. 2T56.

Respondent told Pennamacoor that there were no DYFS records in her name, at which the latter became "quite angry." 2T80. Respondent made no other attempt to get the records, noting that her representation of Pennamacoor ended shortly thereafter. Respondent also contended in her answer that she was "seriously concerned about filing the Complaint, which might have permitted her to obtain DYFS documents, without adequate factual basis."

Exhibit P-2, paragraph 14. Respondent ultimately recognized that she did not utilize the correct procedure to get the DYFS records.

B. The Divorce Complaint

Pennamacoor advised respondent that one of the allegations in White's complaint for divorce against Phelps was that he had sexually abused Pennamacoor. Pennamacoor was unable, however, to get a copy of the divorce complaint from White.[9] Pennamacoor advised respondent that the divorce proceeding had been filed in Sussex County. According to the stipulation, respondent called the Sussex County Clerk's office "and inquired whether such a divorce action was filed in Sussex County." Similarly, in her answer, respondent stated that she contacted the Sussex County courthouse and "was informed that there was no record of any such divorce in Sussex County." Exhibit P-2, paragraph 15.

Respondent's testimony was somewhat different. According to respondent, she requested that a computer search be done for records of the divorce proceeding using the names White and Phelps. It was respondent's belief that the Sussex County computer system had the records of all New Jersey counties and that she, therefore, did not need to contact the central clerk's office in Trenton for a further search. Respondent also believed that the computer records went back to 1991, the year Pennamacoor thought the divorce took place. The court clerk informed respondent that there were no

[9] Pennamacoor stated that she gave respondent the name of White's attorney in the divorce proceeding, a contention that respondent denied. 2T14, 48-49.

records of a divorce proceeding in either name. Respondent so informed Pennamacoor. Respondent undertook no other search for the divorce records. (The record does not reveal whether respondent's beliefs about the court's computer records were accurate). Respondent acknowledged that there were other ways to obtain the divorce complaint. 2T50, 87.

C. Communication With Opposing Counsel

On or about September 11, 1993, respondent sent demand letters to Phelps and White. By letter dated October 20, 1993, Donald L. Berlin, Esq., counsel for White, confirmed a telephone conversation with respondent on that date and asked that respondent forward the DYFS file, the divorce complaint and other documents supporting Pennamacoor's claim against White.

In a November 3, 1993 letter to Berlin, respondent stated that she would forward a copy of the divorce complaint and other documents "as soon as I am finished compiling same and photocopying same." Exhibit P-8. Respondent had not yet obtained copies of the documents. (In fact, she did not issue the subpoenas until the following month). Respondent testified that she used the word "compile" to mean "gathering," which the DEC deemed "disingenuous and not credible." The DEC determined that respondent was attempting, in her November 3, 1993 letter to Berlin, to bolster her case and that her statement "was disingenuous and illustrative of a tendency to avoid the truth, embellish the facts and, often, act in a less-than-candid and truthful fashion."

By letter dated November 17, 1993, Pennamacoor asked respondent to negotiate a settlement with Berlin, including medical bills and attorney fees. Respondent contacted Berlin and told him that it was her understanding that the matter had been settled between Pennamacoor and White. On November 28, 1993, respondent informed Pennamacoor that she had contacted Berlin to settle the matter. Her letter stated, "I was told that there was no agreement to settle the case as you indicated to me which you indicated that Ms. White was to pay all of your medical bills and attorney fees to date." Exhibit P-10. It is not clear what information respondent was attempting to convey in this letter. Thereafter, Pennamacoor told respondent that she was dissatisfied with the lack of progress in the case. The two mutually agreed to terminate the representation.[10]

D. The Statute of Limitations

Pennamacoor originally met with respondent on February 11, 1993. She turned twenty-three on February 22, 1993. Pennamacoor did not retain respondent until April 14, 1993. There is no allegation in the complaint stemming from respondent's failure to advise Pennamacoor at their initial meeting that the statute of limitations on her claim was about to expire or that it expired

[10] Respondent stated, in her reply to Pennamacoor's grievance, that she had advised Pennamacoor in writing and verbally not to discuss the case with White and that Pennamacoor had disregarded those instructions. Exhibit P-14. Pennamacoor denied having discussed the case with White. Pennamacoor did, however, agree in February 1994 not to pursue the case against White. Exhibit R-1.

during respondent's investigation. Thus, no finding was made in that regard. Furthermore, according to respondent's counsel, Pennamacoor had previously consulted with at least one other attorney and knew about the statute of limitations. Exhibit C-12.

The DEC was concerned, however, about respondent's lack of understanding of the law regarding the viability of Pennamacoor's claim. Respondent was of the opinion that the statute of limitations ran for two years from the date of discovery of the cause of action. In respondent's view, it was the creation of Dr. Sofair's report that signaled the discovery. 2T61-62. (Arguably, had Pennamacoor repressed the memory of the abuse, the statute of limitations would not have begun to run until it had been brought to light. There is no indication that that was the case here). The DEC was concerned that respondent's misunderstanding prejudiced Pennamacoor or caused her to enter into a "pointless retainer." There were no facts presented to enable the DEC to determine whether a proper investigation would have revealed facts warranting the filing of a claim after Pennamacoor's twenty-third birthday.[11]

Pennamacoor ultimately abandoned her claim against Phelps at least in part because she was unable to find another attorney to represent her. She had similarly abandoned her claim against White in February 1994.

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[11] The hearing panel asked respondent's counsel to analyze the statute of limitations issue. Counsel acknowledged that the claim had to be filed by Pennamacoor's twenty-third birthday. Pennamacoor had, however, begun to suffer from nightmares, which arguably might have constituted a separate cause of action with a distinct accrual date for statute of limitations purposes. Exhibit C-12.

E. The Accounting

As noted above, Pennamacoor gave respondent $200 for costs. By letter dated December 20, 1993, Pennamacoor requested copies of respondent's itemized bills. The $200 was not accounted for until March 3, 1995, when respondent refunded $170.08 to Pennamacoor. Exhibit C-5. Respondent explained that various costs, including postage, "fax" and reproduction costs had been deducted. The retainer agreement, however, stated that a client was not responsible for "usual and customary law office overhead expenses." Exhibit P-3.

F. Failure to Cooperate With the DEC

By letter dated March 10, 1994, the DEC investigator requested that respondent forward a written reply to Pennamacoor's grievance within two weeks. On April 8, 1994, this period was extended for two weeks. On May 1, 1994, respondent forwarded a written reply to the grievance, after an April 19, 1994 letter from the investigator warned her of a potential finding of failure to cooperate with the disciplinary system.

The formal complaint was served on respondent on July 27, 1994. Despite a "five-day letter" and a notice scheduling the hearing, respondent did not file an answer. Respondent's counsel ultimately filed an answer on November 18, 1994.

* * *

The complaint charged respondent with a violation of RPC 1.1(a), RPC 1.3 and RPC 1.4(a). Respondent stipulated only that she violated RPC 8.1(b). The DEC agreed that respondent had violated that RPC.

With regard to respondent's November 3, 1993 letter to Berlin stating that she was "compiling" documents, the DEC deemed this conduct to be a violation of RPC 3.4 (fairness to opposing counsel) and RPC 8.4(c) and (d).

Respondent was charged with a violation of RPC 1.1(a) in connection with the subpoenas issued for the DYFS records. The DEC found instead that such conduct was a violation of RPC 8.4(d). The DEC also found that respondent's failure to expeditiously move the matter forward violated RPC 1.3. Furthermore, the DEC concluded that respondent's failure to give copies of various letters to Pennamacoor and to account for her work and disbursements was part of a pattern of violations of RPC 1.3. and RPC 1.4.

The DEC also found that respondent's mishandling of client funds and her failure to return the $200 upon termination of the representation violated RPC 1.5(a), RPC 1.15(a) and RPC 1.16(d).

III. THE McCARTER MATTER (District Docket No. X-94-040E)

On two occasions in March 1993, Harriet McCarter met with respondent to discuss a possible divorce proceeding. McCarter's husband had allegedly gone on a business trip. McCarter suspected, however, that he was guilty of infidelity. McCarter and respondent had met briefly in December 1991 for a fifteen-minute consultation

about "the legalities of a separation." The testimony of McCarter and respondent as to what ensued during the two March 1993 meetings differed dramatically.

A. The March 18 and 19, 1993 Meetings - McCarter's Version

McCarter testified that she met with respondent on March 18, 1993 for general advice about her options in a possible matrimonial action. The two discussed McCarter's suspicions about her husband. McCarter stated that, if her suspicions were correct, she "might be inclined to pursue divorce proceedings." 5T11. Respondent told McCarter that she would need a $5,000 retainer. McCarter denied that she had decided on March 18 to pursue a divorce action. According to McCarter, she told respondent that she wanted twenty-four hours to investigate and to think things over. McCarter made an appointment to see respondent the following day. Respondent gave her a Case Information Statement ("CIS") to take home with her and fill out. Later that evening, McCarter confirmed her suspicions about her husband's behavior.

At a meeting with respondent on March 19, 1993, McCarter told her that the suspected circumstances had been confirmed. At this second meeting, McCarter was still uncertain as to how she wanted to proceed. She was not prepared to retain respondent to file a complaint for divorce at that time. Indeed, McCarter called respondent that day, prior to her meeting, and left a message stating that she had not completed the CIS and that "[e]verything is going too fast." Exhibit P-11. At the end of their March 19,

1993 meeting, McCarter gave respondent a check for $1,000 as a retainer, to be "able to pick up where we left off so to speak, should [she] decide to proceed with a divorce." 5T14. (The words "partial retainer" appear on the memo line of the check). McCarter also understood that a portion of the $1,000 was to compensate respondent for the March 18 and 19, 1993 meetings. McCarter contended that she had not requested respondent to do anything other than meet with her.

B. The March 18 and 19, 1993 Meetings – Respondent's Version

Respondent, in turn, testified that at their first meeting she and McCarter discussed, among other things, procedures, grounds for the divorce and finances. According to respondent, McCarter was agitated and exclaimed that "she wanted the bum out of the house right away." 5T73. Respondent believed that time was of the essence and understood that McCarter wanted the documents prepared by the next day. Therefore, they made an appointment for the following day, March 19, 1993, to review the documents that respondent would draft that night "and to finish everything up." 5T115. Respondent told McCarter that she would be drafting divorce papers "immediately" and gave her the CIS. That evening, respondent researched and drafted a divorce complaint and notice of lis pendens as well as a retainer and certain letters.

Respondent went on to say that, when McCarter returned on March 19, 1993, she was not ready to proceed with the divorce. McCarter told respondent that she had been unable to get the $5,000

retainer. When respondent showed McCarter the draft documents she had already prepared, explaining that she had put other work aside to prepare them, McCarter agreed to pay respondent $1,000 for the work she had already done. Respondent deposited the check for services rendered in her business account.

By letter dated March 19, 1993, respondent sent McCarter a retainer agreement asking her to sign and return it.[12] Exhibits P-1 and P-2. The agreement asked for the $5,000 retainer, making no reference to the $1,000 already received. According to respondent, McCarter wanted to retain her, but needed more time to get the funds. Respondent, therefore, sent the retainer agreement and "kept the door open."[13]

C. The $1,000 Retainer and Accounting

As noted earlier, according to McCarter the $1,000 was to compensate respondent for her two meetings with McCarter and to keep the door open in case McCarter needed further assistance. According to respondent, however, the $1,000 was for work already completed. McCarter and respondent had no communications between March and July 1993.

By letter dated July 13, 1993, McCarter informed respondent that she would not need her services. She asked respondent to

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[12] There is a second letter in respondent's file, also dated March 19, 1993. The two letters are inconsistent. Respondent's explanation for the second letter is unclear. 5T114.

[13] McCarter testified that she did not sign the retainer, which she thought was the product of a "mix-up" between her and respondent.

forward an accounting and to return the balance of the $1,000 retainer.

On July 22, 1993, respondent told McCarter that the monies paid had been for services already rendered and not for future services. Respondent listed the work she had completed in McCarter's behalf and the time expended. She stated that the total amount due was $1,050, of which McCarter had paid $1,000.[14] Respondent reminded McCarter that she had wanted the papers drafted immediately and that respondent had put aside other work in order to comply with her request. Respondent added that McCarter "changed [her] mind about wanting a divorce and paid me work [sic] I already did." Exhibit J-1, Exhibit B.

The DEC pointed out the "logical inconsistencies" in McCarter's and respondent's versions of the facts. The DEC went on to state as follows:

> Based on these facts, it cannot be said that there was clear and convincing evidence that respondent understood that some of the $1,000 was for services yet to be earned, such that a portion of the $1,000 remained the property of the client and should have been deposited in the trust account. Nevertheless, the panel does find fault with respondent's loose understanding of 'retainers' and how to handle funds of any sort received from a client. [Footnote omitted].
>
> There was clear and convincing evidence, however, that respondent acted improperly with respect to the $1,000 payment in other respects. First, the billing was untimely and rendered only after demanded by the client. Second, the billing was neither credible nor reasonable. Based on the demeanor of the witnesses, the panel concluded that the meetings did not take as long as respondent indicated in her billing or meeting notes;

[14] Respondent testified that her use of the term "amount due" when she had already been paid in full, except for $50, over which she would not "quibble," was "poor wording on [her] part." 5T117.

indeed, because it was not clear from the color of the pen and handwriting that the notes were generated contemporaneously, they would be particularly susceptible to error and after-the-fact rationalization. We did not believe that respondent spent the time that she 'recorded.' She made numerous statements in her testimony that were not credible; and her rationalization in the July 19th letter that she 'put aside other work' was not supported by any evidence (where, in fact, it appeared from her calendar that she was not particularly busy at the time). Moreover, the amount would not have been reasonable even if respondent had spent the time 'recorded.' The draft complaint was not professionally done; it may have been based on the wrong grounds; and at $175 per hour an attorney would be expected to have sufficient experience and expertise to have completed the draft in far less time than the two hours recorded. The lis pendens (which was of questionable relevance to this matter) was a simple form that could have been typed by a secretary either from a photocopy or after being dictated from a form book; in either situation, the lawyer's time should have been no more than two or three minutes (as verified by going to Skoloff & Wolf and the New Jersey Practice Series and looking for the file in the index of each). In that regard, we have taken into account that the Fee Arbitration Committee required respondent to return $650 of the $1,000. (See Exhibit J-1 Ex. D.) However, we did not consider that we were bound by that determination.

[Hearing panel report at 36-38]

D. Failure to Turn Over the File

McCarter testified that, after receiving respondent's July 22, 1993 letter, she made a number of telephone calls to respondent's office in an attempt to schedule a meeting and to retrieve her file. McCarter was always told by either a "live" or a recorded voice that respondent was unavailable. McCarter testified that the voice belonged to respondent but that, after McCarter identified herself, "[respondent] would become the secretary." 5T37. Ultimately, McCarter used an alias and scheduled an appointment with respondent for October 5, 1993.

On that date, McCarter went to respondent's office to get a copy of her file. Respondent told her that the file was closed and was not stored in the office. McCarter and respondent both recounted the ensuing discussion, which may have been somewhat heated. McCarter testified that she had a subsequent conversation with respondent, during which the latter stated that she was mailing the file. When the file was not forthcoming, McCarter filed for a fee arbitration proceeding. See infra. With regard to the October 5, 1993 meeting, respondent testified that McCarter was one and one-half hours late for the appointment. She also stated that "she came into my office with such a nasty tone, she turned me off completely." 5T102.

Despite McCarter's subsequent requests and the intervention of the DEC, respondent did not return the file until after she obtained appointed counsel in November 1994.

E. The Fee Arbitration Proceeding

On October 26, 1993, McCarter filed a fee arbitration request form. On December 21, 1993, the District X Fee Arbitration Committee determined that the total reasonable fee for respondent's services was $350, allowing for two one-hour meetings at respondent's hourly rate of $175. The committee directed that respondent refund $650 to McCarter, which respondent failed to do. By letter dated February 28, 1994, the Office of Attorney Ethics directed respondent to return the $650 by March 14, 1994, lest she face disciplinary proceedings. Respondent ultimately refunded the

money by letter postmarked March 14, 1994. Respondent contended that she had been unable to timely comply because she did not have the money.

Respondent testified that she did not file any submissions with the fee arbitration committee because she had been having personal problems. Although she appeared at the fee arbitration proceeding, she was late and not allowed to participate.

* * *

According to the hearing panel report, the complaint, which is not a part of the record, charged respondent with a violation of RPC 1.15(a) [unreasonable fee, more properly RPC 1.5(a)], RPC 1.15(b), RPC 8.1(b) and RPC 8.4(a). Respondent did not admit any misconduct in the stipulation.

The complaint alleged that respondent had undertaken services not requested by McCarter, i.e., that respondent had drafted a divorce complaint and lis pendens without the client's authorization, in violation of RPC 1.5(a). The DEC found that respondent may have reasonably believed that McCarter either requested or required that a divorce complaint be drafted on an emergency basis. The DEC remarked that that was not to say, however, that the amount of the billing was reasonable. In fact, the DEC concluded that it was not, although it found no violation in that regard. The DEC found, however, that respondent's failure

to forward a billing violated RPC 1.15.[15] The DEC also found that respondent violated RPC 1.4(a) by failing to reply to McCarter's calls about getting her file. In addition, the DEC concluded that respondent's failure to furnish McCarter with access to the file was a violation of RPC 1.15(b) and/or RPC 1.16(d). (The latter was not charged in the complaint). The DEC noted that respondent violated these same rules by failing to timely remit the funds, as ordered by the fee arbitration committee.

Respondent was also charged, in connection with her billing practices, with conduct involving dishonesty, fraud, deceit or misrepresentation, in violation of RPC 8.4(c), mistakenly charged as a violation of RPC 8.4(a). The DEC's report stated:

> Although the panel does not believe that respondent spent the time 'billed,' there was not clear and convincing evidence that respondent acted with fraudulent intent. We simply cannot say with necessary certainty that respondent did not in fact spend two hours working on a complaint that any other lawyer might have completed within half an hour.[16] We therefore cannot find a violation in this respect.
>
> [Hearing Panel report at 42]

Citing a number of examples, however, the DEC expressed its concern that "there appears to be a pattern of exaggeration and misrepresentation that envelops all that respondent does." Hearing panel report at 42.

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[15] Presumably, the DEC intended to refer to RPC 1.5.

[16] Indeed, respondent testified about her procedures for drafting the complaint, explaining that each one was "tailor-made for each client." 5T68.

The DEC determined that respondent violated RPC 8.1(b).[17] In the DEC's view, respondent's failure to cooperate with the DEC was consistent with a pattern of failing to act promptly and diligently with respect to clients, the fee arbitration committee and the Office of Attorney Ethics. (Evidence of the DEC's efforts to communicate with respondent in this matter was not made a part of the record).

IV. THE PERRY MATTER (District Docket No. X-93-30E)

In or about May 1993, Betty and Johnny Perry retained respondent in connection with a refinancing of the mortgage on their house. The events that followed are best understood by using the following chronology, set forth in the hearing panel report:

> b. The closing of the refinancings took place on May 6, 1993, at which time Ms. Perry brought with her checks for $5,000 and $86.60.[18]
>
> c. The closing package instructed respondent to make disbursements on May 11, 1993.
>
> d. On May 10, 1993 a cashier's check from Citibank was drawn on grievant's Prudential home mortgage account and sent to respondent.
>
> e. Respondent received the Citibank check [but does not admit that she received it on May 11, 1993]. She deposited grievant's checks on May 11, 1993.

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[17] In its report, the DEC stated that respondent admitted in her answer that she failed to reply timely to the DEC investigator's requests for information, "but she denied that the error was 'knowing.'" Thus, the DEC did not consider her concession as a formal admission of a violation of RPC 8.1(b). Subsequently, however, the DEC stated that respondent had failed to cooperate with the DEC and had "admitted this breach of the RPC."

[18] The check is actually drawn in the amount of $89.60, although respondent's deposit ticket shows a total deposit of $5,086.60.

f. Respondent deposited the Citibank check on May 12, 1993.

g. Respondent sent the payoffs to Prudential and AT&T on May 17, 1993 by Federal Express overnight delivery.
[Hearing panel report at 44]

Perry's grievance stemmed from respondent's failure to timely deliver the payoff funds, causing the Perrys to incur additional interest charges (ultimately refunded by the mortgage company) in the amount of $231.27. Perry was also charged $10.85 interest on her home equity loan. In addition, the Perrys did not timely receive their file or closing documents.

A. Delivery of the Payoff Funds

At the closing, Perry noticed that the payoff figure from the mortgage company did not reflect her May payment, which she had made. At respondent's instance, Perry contacted the mortgage company, at which time she was informed that, if she had overpaid, she would receive a refund check. Four to five weeks later, Perry received a check from the mortgage company for $231.27 less than she believed she had been owed. The difference was the additional interest charges accrued because of respondent's delay in disbursing the payoff funds.

As summarized by the DEC:

> Respondent's explanation for the delay in the exchange of funds was that she could not disburse funds earlier: (1) because this was a refinancing, for which there is a 3-day waiting/refusal period, she could not release funds until the third day; and (2) the out-of-state bank checks that she received, she says, took three business days to clear; until they cleared, she was not able to draw checks on them from her trust account.
> [Hearing Panel report at 45]

As to respondent's first assertion, in the DEC's opinion respondent should have taken the three-day period into account in calculating the interest due. Because the closing occurred on Friday, May 6, respondent could have disbursed the funds on Monday, May 11, the third business day.[19] She did not disburse them until Monday, May 17. The DEC concluded that, although respondent's conduct might have been negligent and she might have been responsible for the additional interest charged, she was not guilty of gross neglect [RPC 1.1(a)] or of failure to properly maintain or forward client funds [RPC 1.15(b)], as charged in the complaint.

With regard to respondent's second contention, the DEC again did not find unethical conduct. The DEC heard the testimony of Vincent Celli, Esq., an experienced practitioner, who assisted respondent by completing the Perry closing at respondent's request, in late December 1993 or early January 1994. Celli testified that there is inconsistency in the practice of depositing and drawing on checks in real estate transactions: "large firms are able to draw on a check immediately, but small firms cannot draw on the check because they do not have sufficient funds in their trust account to cover during the clearance period."

The DEC correctly noted that there is no difference in the requirements for large and small firms. In fact,

> the rule permits all firms to drawn [sic] on a bank check the same day that it is deposited in the trust account. If the funds were received on May 11th, they should have

[19] Respondent deposited the funds on May 12, 1993. It is unclear if she received them on May 11 or May 12.

been deposited on that date; depositing them one day later may have been negligent, but not more.
[Hearing Panel report at 46]

The DEC did not fault respondent for waiting for the bank's three-day clearance period to pass, even though not required by the rules. (There was an unresolved question in the record about different treatment for in-state bank checks and out-of-state bank checks).

The DEC noted, however, that respondent failed to properly calculate the interest due, given the days she thought she had to wait, and failed to discuss the delay and additional interest with her clients. The DEC also remarked that a more experienced attorney could possibly have arranged the closing schedule better. (Respondent testified that this was the first refinancing transaction she handled alone). The DEC, however, did not find respondent guilty of unethical conduct in this regard with respect to safekeeping [RPC 1.15] or communication [RPC 1.4].

B. Failure to Complete Closing Documents

The documents for this May 1993 closing were not completed and delivered to the Perrys, among others, until January 1994, after the grievance had been filed. Celli assisted respondent and the Perrys in completing the closing documentation. When Celli reviewed the file, a number of "routine documents" had not been completed, including the title insurance, survey affidavit, mortgage cancellation, re-recordation of the mortgage and materials

from Prudential that had to be 'cleaned up.' Celli completed and forwarded the documents in a matter of days.

Respondent presented two excuses for her misconduct. She alleged that she had a severe personal problem that caused her to 'freeze' and not complete this and other matters. She also pointed to a signed/notarized "Affidavit and Agreement" required by Prudential that the Perrys never signed, despite her instructions by phone and by letter for them to come to her office for that purpose.

Although the record is unclear, it appears that the problem with the affidavit arose because Prudential returned it when it failed to understand that a New Jersey attorney is empowered to "notarize" a signature. (The record does not reveal why respondent failed to explain this to the individual handling this case for Prudential).[20]

The DEC found that respondent's failure to complete the other closing documents was unrelated to the affidavit, citing three reasons for that conclusion: (1) the other documents to be completed were not dependent on the affidavit and agreement; (2) the confusion arose because of Prudential's above-mentioned lack of understanding that a New Jersey attorney can "notarize" a signature; and (3) respondent put the matter aside and refused to

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[20] The DEC heard the testimony of Karla Luetzow, the Prudential mortgage counselor responsible for the Perry transaction. Luetzow testified about general procedures in a refinancing. She further testified that she did not know that a New Jersey attorney can notarize a document without affixing a seal. With regard to the affidavit in question, Luetzow testified that she was unaware that it had been sent back to respondent to be executed.

deal with it. The DEC determined that respondent's explanation that she had 'frozen' was not acceptable, in light of the lack of evidence of any recognized disability.

C. Improper Accounting/The HUD-1 Statement

During the hearing, the DEC questioned a number of items on the HUD-1 statement (Exhibit P-8), for which respondent charged the Perrys. These included:

> (1) flood hazard certificate ($7.00); (2) processing fee ($100); (3) recording fees ($200); (4) mortgage assignment ($100); (5) Notice of Settlement ($50); (6) affidavit of no change ($100); and (7) Federal Express charges ($131).

The DEC was not satisfied that respondent had incurred the expenses or that, if she had, the amounts indicated were accurate.[21] Respondent had no recollection in this regard. The DEC requested evidence of the charges, but respondent gave none.

Respondent had never before prepared a HUD-1 statement. She testified that she "tried to follow what the ICLE book said." 4T136. She also relied on the closing instructions she received. Respondent could not recall where she obtained the information to make specific entries.

Some questions also arose, when the DEC reviewed the HUD-1, as to whether respondent had collected tax and insurance escrows that were required for the transaction, according to the closing instructions, but do not appear to have been collected.

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[21] The DEC accepted that the $100 processing fee was called for in Prudential's closing instructions. See Exhibit P-6. Respondent's file also contained a flood hazard certificate.

Furthermore, a check to Prudential was drawn on respondent's trust account, dated June 17, 1993. Respondent did not recall if the check could have represented escrow funds that had been collected at the closing, over a month earlier. The record is unclear on those points.

D. Communication With the Perrys/Falsifying Documents

Respondent admitted that she did not comply with Perry's requests for an explanation of the additional interest charge and demands for the file. Indeed, Perry testified that, beginning in mid-June, she made a number of calls to respondent to get her documents, leaving a number of messages. Between the May 1993 closing and August 1993, Perry spoke with respondent about three times. Perry testified that, each time, respondent told her that she had mailed her documents. That was not true. (Respondent was not charged with a violation in this regard). When she did not receive her documents, Perry sent respondent a certified letter dated July 16, 1993, requesting them. Respondent did not forward Perry's documents.

Respondent's file contained two letters to the Perrys dated June 16 and August 15, 1993 (Exhibits R-5 and R-6). Respondent testified that both letters were mailed to the Perrys and that, in fact, the August 15, 1993 letter had been sent via certified mail. Perry, however, testified that she received neither letter. The DEC asked Perry to look for the letters after the hearing. She did not locate them. Respondent was asked to present evidence that the

letters had been received, such as a signed return receipt card. Respondent failed to submit such proof.

The DEC concluded that

> [t]he letters were suspect, to say the least. They appear to have been created after the fact to defeat Ms. Perry's claim that she had attempted unsuccessfully to contact respondent and to substantiate respondent's defense that Ms. Perry had failed to respond to respondent's entreaties for information and a visit to sign the Assignment [sic] and Agreement form. First, R-5 appears to refer to a conversation that did not take place; it also references including documents 'that [Ms. Perry] signed that simply did not exist.' Second, R-6 ostensibly was mailed after Ms. Perry admittedly had attempted to contact respondent, see Tr. 154, but made no reference to those calls. Instead, it refers to a conversation 'immediately after the refinance.' R-6 also repeats the mysterious language referring to other documents being enclosed, when it is clear that there were no such documents available to be enclosed. Third, R-5 and R-6 both are ribbon copies on letterhead bond, when it is highly unlikely that an attorney would use letterhead rather than photocopies. Respondent's explanation -- that she often placed a second sheet of letterhead in the printer to create her file copy -- was not believable, either based on logic, experience or the demeanor of the respondent. Exhibit R-7, for example, was a photocopy (as was every other 'original' file copy of correspondence we had seen in this and other matters.) Fourth, R-5 is signed in ink. Again, the respondent's explanation that she often signed her copies like this was not credible (and was inconsistent with R-6, R-7 and with all other files we have received in this and in other matters).
>
> [Hearing panel report at 52-53]

A third letter from respondent to Perry dated November 19, 1993 was, in fact, received by Perry. Exhibit R-7. That letter "urgently requested" that the Perrys make an appointment to meet with respondent. Perry testified that, upon receipt of the letter, she called respondent on November 20th and also on or about November 22nd to set up an appointment. Unable to contact

respondent, Perry sent her another letter. It is unknown if respondent replied to that letter.

E. Failure to Cooperate with the DEC

By letters dated September 28 and October 27, 1993, the DEC investigator requested that respondent reply to the Perrys' grievance. She did not. Her explanation was that she believed that Celli's communication with the DEC investigator was sufficient. However, Celli, the attorney who completed the closing documents, did not become involved in this matter until several months later after the DEC's initial letter to respondent. Respondent also pointed out that a copy of her November 19, 1993 letter to the Perrys had been sent to the investigator, with whom she had spoken in the interim, after the September 28, 1993 letter. Respondent contended that her November 19, 1993 letter served as a written reply to the grievance.

* * *

According to the hearing panel report, the complaint, which is not included in the Board's file, charged respondent with a violation of RPC 1.1(a) (gross neglect) [mistakenly cited as RPC 1.1(b)], RPC 1.4(a)(failure to communicate), RPC 1.15(b)(failure to safeguard client property), RPC 8.1(b)(failure to cooperate with the DEC) and RPC 8.4(a)(violation of the Rules of Professional

Conduct). Respondent did not admit any misconduct in the stipulation.

The DEC reasoned that the failure to complete the documentation for one closing for several months, assuming that the client was not prejudiced, might be "only negligent under other circumstances." However, "respondent's actions here were compounded by a stark refusal to deal with the problem." Accordingly, the DEC found that respondent was guilty of gross neglect and "a pattern of unprofessional conduct," in violation of RPC 1.1(a) and (b) and RPC 1.3, as well as RPC 1.4(a), for her failure to return Perry's calls.

In connection with the costs listed on the HUD-1, the DEC concluded that

> [a]bsent proof that the amounts were incurred, the panel concludes that respondent acted improperly and in violation of one or more ethical rules, including RPC 8.4(b),(c) and (d). Her testimony and demeanor indicated that she may have realized that she was acting improperly -- and used these fees as a means of inflating her fee -- but we cannot say that the evidence clearly and convincingly supported that view. In mitigation, we considered whether respondent was simply following an ICLE form for 'normal' charges and followed it by rote, without having an intent to misrepresent the disbursements being incurred. The panel concluded, based on the testimony and respondent's demeanor, that she did not inflate these items in a conscious effort to overbill her client; instead, we truly believed (and find that there was clear and convincing evidence) that respondent acted recklessly (rather than intentionally). That does not excuse respondent's behavior, however. We are appalled that an attorney, even a new attorney, might not understand that including these unearned items in a HUD-1 constituted taking money from a client under false pretense.
>
> [Hearing Panel report at 50-51]

The DEC determined that respondent's overbilling violated RPC 1.5(a) and RPC 8.4 (no subsection was specified).

As to respondent's two suspect letters to Perry, the DEC found that respondent had "falsified the letters, inserted them in the file to create a false record for [the DEC] hearing and testified falsely to the panel regarding the mailing of the letters," in violation of RPC 3.3(a)(1), RPC 8.1(a), and RPC 8.4(b),(c) and (d). (The criminal act essential to the violation of RPC 8.4(b) was perjury). Furthermore, the DEC concluded that respondent's letter to Perry of November 19, 1993, "although mailed on or about that date, contains misstatements and half-truths in order to create a false 'record' for this proceeding," in violation of RPC 3.3(a)(1), RPC 8.1(a) and RPC 8.4(c) and (d).

The DEC also found that respondent failed to cooperate with its requests for information, in violation of RPC 8.1(b).

* * *

Upon a de novo review of the record, the Board is satisfied that the conclusion of the DEC that respondent was guilty of unethical conduct is fully supported by clear and convincing evidence. Although the Board agrees with the DEC's factual findings, it is unable to agree that respondent's conduct violated each of the cited Rules of Professional Conduct.

In the Schutte/Arburua matter, the Board cannot find from this record that respondent was guilty of a violation of RPC 1.16(a)(3)

(failure to withdraw after termination of the representation) or of a violation of RPC 1.15(a) (failure to safeguard client funds). The Board cannot endorse the DEC's criticism of respondent's handling of retainer funds. The DEC was unduly exacting on respondent for placing retainer fees in her business account. In fact, as noted above, such action is appropriate. See In re Stern, supra, 92 N.J. 611 (1993). Furthermore, the DEC's finding of a violation of RPC 1.15(b) based on respondent's failure to turn over Schutte's file is more properly, as also found by the DEC, a violation of RPC 1.16(d).

Similarly, in Pennamacoor, the Board did not find respondent's conduct in connection with the issuance of the subpoenas to be a violation of RPC 8.4(d). Rather, respondent's improper execution of the subpoenas was a part of her continuing neglect in this matter and, thus, more properly a violation of RPC 1.1(a). The Board also disagreed with the DEC's finding that respondent's use of the word "compiling" in her communication with opposing counsel constituted a violation of RPC 3.4 and RPC 8.4(c) and (d). Although that was not necessarily the most artful choice of language, respondent's letter did not rise to the level of unethical conduct. The Board also disagreed with the DEC's finding that respondent's mishandling of client funds and failure to return Pennamacoor's $200 constituted a violation of RPC 1.5(a) and RPC 1.15(a). Only the DEC's finding of a violation of RPC 1.16(d) in this regard is appropriate.

In the McCarter matter, the Board was unable to concur with the DEC's conclusion that respondent violated RPC 1.5(b) (cited by the DEC as RPC 1.15) for failure to supply a bill to McCarter. As stated above, respondent did, in fact, supply an accounting within a reasonable time after the request in McCarter's letter. Furthermore, the Board could not agree with the DEC's determination that respondent violated RPC 1.15 by failing to supply McCarter's file. That violation was more properly, as also found by the DEC, a violation of RPC 1.16(d).

In the Perry matter, the Board could not find, like the DEC, that respondent was guilty of misconduct in connection with the preparation of the HUD-1 form. In the Board's view, respondent's actions were not the result of venality. Respondent did not plan to overbill her clients. Rather, she negligently filled out a form without paying heed to the consequences of the information placed on it. Although such action was improper, given the lack of intent on respondent's part, the Board did not find that it rose to the level of a violation of the RPCs and disagreed with the DEC's finding that respondent violated RPC 1.5(a) and RPC 8.4.

In sum, respondent was guilty of violations of the following RPCs:

I. Schutte/Arburua: RPC 1.1(a), RPC 1.3, RPC 1.4(a), RPC 1.5(b), RPC 1.16(d), RPC 3.3(a), RPC 8.1(b) and RPC 8.4(c).

II. Pennamacoor: RPC 1.1(a), RPC 1.3, RPC 1.4, RPC 1.16(d) and RPC 8.1(b).

III. McCarter: RPC 1.4, RPC 1.16(d) and RPC 8.1(b).

IV. Perry: RPC 1.1(a), RPC 1.3, RPC 1.4(a), RPC 3.3(a)(1), RPC 8.1(a) and (b) and RPC 8.4(c).

Although a number of these violations were not charged in the complaint, as noted in the DEC's report the possible violations were pointed out to respondent and her counsel, who were given an opportunity to address them. See In re Logan, 70 N.J. 222 (1976).

Much of respondent's misconduct appears to be the result of inexperience in how to manage her practice and lack of familiarity with the law. However, that excuse goes only so far. There is always a first case, whether it be an immigration case, a real estate closing or a matrimonial proceeding. If respondent's errors stemmed from lack of experience, then although not excused they could be explained. Experience, however, is not required for an attorney to know that he or she must communicate with a client or return a file when requested. Indeed, forging a document will never be tolerated. It is unquestionable that respondent committed a number of violations that simply cannot be attributed solely to youth or inexperience.

Respondent contended by way of mitigation that, during the period relevant to the within misconduct, she was suffering from an unspecified personal problem. (According to the DEC's report, the problem involved the break-up of a long-term romantic relationship). Despite prodding from the DEC, respondent presented neither a medical nor a psychological report to support her claim. There is no proof, therefore, of a psychological disability.

Respondent belatedly attempted to educate herself by attending a January 10, 1995 ICLE seminar on "Opening Your Own Law Office." Respondent also tried to attend a program on attorney trust accounts, but none was being offered. According to respondent's counsel, she also attempted to find employment in a supervised environment.

This is not to say, however, that there are no mitigating factors. Respondent has revised her prior advertisements and no longer claims in local telephone and other directories that her areas of practice included immigration, matrimonial and real estate matters, among others. Exhibit C-4.

After balancing respondent's ethics offenses and the mitigating circumstances, the Board unanimously determined to suspend her for a period of three months. See In re Hodge, 130 N.J. 534 (1993) (three-month suspension imposed where the attorney was guilty of a pattern of neglect, failure to communicate and failure to turn over client property in three matters. The attorney was also guilty of gross neglect and lack of diligence in one of the three matters, as well as failure to maintain a bona fide office. Additionally, the attorney failed to cooperate with the disciplinary authorities in five matters); In re Mark, 132 N.J. 268 (1993) (three-month suspension imposed where the attorney fabricated two letters and submitted them to a trial court and his adversary in a litigated matter. A number of mitigating factors considered, such as respondent's confession of his improprieties to

his supervisor and to the assignment judge, contrition, youth and inexperience and lack of supervision).

The Board further determined to require respondent to attend the skills and methods core courses offered by ICLE and, upon reinstatement, to practice under the supervision of a proctor for two years.

One member recused himself. One member, although present, did not participate.

The Board further required respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: 3/10/99

By: _____
Lee M. Hymerling
Chair
Disciplinary Review Board