Book

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 93-155

IN THE MATTER OF :
SAMUEL ASBELL, :
AN ATTORNEY AT LAW :

Decision and Recommendation
of the
Disciplinary Review Board

Argued: July 21, 1993

Decided: November 9, 1993

William R. Wood appeared on behalf of the Office of Attorney Ethics.

Carl D. Poplar and Philip B. Seaton appeared on behalf of respondent.

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

This disciplinary matter arose from an Accusation by the Attorney General's Office (Exhibit OAE 7) charging respondent with the fourth degree crime of filing a false police report, in violation of N.J.S.A. 2C:28-4a. On April 24, 1990, respondent admitted his guilt to that charge and agreed to make restitution of $12,000 to compensate the State, in part, for the cost of the police investigation and the damage to his County-owned automobile. Respondent also agreed to refrain from possessing and/or using operable firearms for a period of three years. In exchange for respondent's admission of guilt, the Attorney General's Office agreed not to make any objections to respondent's application for admission into the pre-trial intervention program ("PTI"). The

Attorney General's Office also agreed to take no position with regard to respondent's sentence, in the event that he was not accepted into PTI.

At the April 24, 1990 proceeding, respondent admitted that he had knowingly given or caused to be given false information to a law enforcement officer —— Lieutenant Robert Dunlop of the New Jersey State Police —— with purpose to implicate two fictitious individuals in an assassination attempt on his life. Specifically, respondent acknowledged that

> [d]uring the first few days of January [1990] I reported to the Camden City and New Jersey State Police that I was shot at by unknown individuals. This information was not accurate and led to my filing a false police report. I deeply regret that this happened and I am truly sorry for the anguish that these events have caused my family, friends and colleagues. Through medical help I now realize that my actions were as a result of a combination of many factors not known to me at the time. Through counseling and guidance I have come to understand the causes and reasons for my actions and believe that no such conduct will ever occur again.
>
> [Exhibit OAE 8 at 12]

When the judge asked respondent if he was entering a plea of guilty because he was guilty, respondent replied "[y]es sir." Exhibit OAE 8 at 17.

On September 17, 1990, respondent was admitted into PTI, with a three-year probationary period.

* * *

In late January 1990, respondent voluntarily agreed not to practice law pending a determination of his medical capacity to practice law. Following respondent's April 24, 1990 admission of

guilt and his examination by an OAE-selected psychiatrist, the latter concluded that respondent was mentally fit to practic law. When respondent advised the OAE that he intended to resume his practice, the OAE objected and filed a motion for respondent's temporary suspension on June 6, 1990. On July 11, 1990, after respondent consented to his continued withdrawal for a reasonable period of time to allow the OAE to complete its investigation of the ethics matter, the Court directed that the OAE's application for respondent's temporary suspension be deferred for ninety days, during which time the OAE was to finish its investigation and file a supplemental report with the Court on its pending application. By order dated December 20, 1990, the Court denied the OAE's application and allowed respondent to resume his practice of law under a proctorship. The order also contained a restriction against respondent's legal employment in the public sector. Since then, respondent has continuously practiced law with the firm of Asbell and Kushner, in Collingswood, Camden County.

* * *

The ethics complaint charged respondent with official misconduct, in violation of N.J.S.A. 2C:30-2a, RPC 8.4(b) (commission of a crime that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer), RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) and RPC 8.4(d) (conduct prejudicial to the administration of justice) (count one); possession of a weapon for unlawful purpose,

in violation of N.J.S.A. 2C:39-4a, RPC 8.4(b), RPC 8.4(c) and RPC 8.4(d) (count two); criminal mischief, in violation of N.J.S.A. 2C:17-3a(1), RPC 8.4(b), RPC 8.4(c) and RPC 8.4(d) (count three), and the filing of a false report to law enforcement authorities, in violation of N.J.S.A. 2C:28-4a, RPC 8.4(b), RPC 8.4(c) and RPC 8.4(d).

In his answer, orally amended on the first day of the ethics hearings before Special Master A. Jerome Moore, retired judge of the Superior Court, respondent admitted virtually all of the factual allegations contained in the complaint, with the exception of the allegation that he had hidden a .45 caliber semi-automatic pistol in the crawl space of the basement in his house; respondent conceded only that he had placed the pistol there. Additionally, respondent denied all allegations that the had knowingly staged an assassination attempt on his life, asserting insanity and/or diminished capacity as an affirmative defense. Respondent also contended that the OAE was estopped from alleging any violations of criminal or quasi-criminal laws, by virtue of the criminal disposition reached between the Attorney General's Office and respondent. Lastly, respondent raised a constitutional issue with regard to the burden of proving insanity or diminished capacity in the context of a disciplinary proceeding. Specifically, respondent claimed that, "constitutionally, once the affirmative defense of insanity and/or diminished responsibility is raised, and has been proven by preponderance of the evidence, the burden of proof then shifts to the Complainant to show that the Respondent was mentally

responsible for the acts alleged to warrant disciplinary action." Answer at 5.

* * *

The facts that gave rise to this disciplinary matter are as follows:

A- THE SHOOTING EPISODE AND THE APPREHENSION

Respondent was appointed as Camden County Prosecutor in 1984 for a five-year term. He quickly developed a reputation as a flamboyant but tough, gun-toting prosecutor who frequently accompanied the Narcotics Unit police officers on drug raids. He also basked in the media limelight. It is undeniable that respondent deeply enjoyed his job.

At the time of the relevant events, December 1989 and January 1990, respondent was a holdover prosecutor. A Republican, respondent harbored great hopes that he might be re-appointed by Governor-Elect Jim Florio, a Democrat. Presumably, however, respondent at the time placed undue weight and reliance on comments, action or statements by either friends or other individuals who might not have been in a position of influence with regard to his re-appointment. In the alternative, respondent hoped that, if he were not selected to serve a second term as prosecutor, a new statewide position might be created for him as a "drug czar," i.e., an official in charge of overseeing all narcotics operations in New Jersey. Respondent conceded, however, that he had never been told that he would be either re-appointed as prosecutor or appointed as drug czar.

During the December 1989 holidays, respondent and his family vacationed in Vail, Colorado, for one week. Throughout the vacation, respondent experienced considerable stress and anxiety for having absented himself from New Jersey at such a crucial time in his life. According to respondent, those feelings lasted "[f]rom the day I left until the day I got back." T1/15/1992 160. Respondent explained that he "was afraid to leave for fear somebody -- something would come up that would have something to do with my position and that I wanted to be there." Ibid. Asked, at the ethics hearing, how much he had thought about his future while in Vail ("what component, what period of day would you think about your future?") respondent replied: "I would -- I was calling the office, I was calling various people, I was calling the freeholders, I was constantly on the phone, whenever I would come to a place where there was a phone I was making telephone calls." T1/15/1992 160-161.

On December 30, 1989, respondent and his family returned to New Jersey. On December 31, 1989, New Year's Eve, he and his wife attended a party at a friend's house in Cherry Hill. Respondent knew that Governor-Elect Florio would be one of the guests. Respondent had met Governor Florio when both practiced law in Camden County. According to respondent, he "perceived that this would be an opportunity for the governor-elect and I to talk and get my future straightened out." T1/15/1992 163. Nevertheless, despite respondent's hopes and expectations, his contact with

Governor Florio on that night did not extend beyond salutations and congratulatory remarks on the Governor's election.

Governor Florio left the party shortly after midnight. Respondent stayed on until 3:00 a.m. He then went home, slept until 7:00 a.m. and went jogging with two of his friends at 8:00 a.m. Thereafter, respondent and his wife attended a brunch party at a friend's house. After the brunch, respondent dropped his wife off at home and drove to his Camden office, ostensibly to inspect his mail. Respondent explained that "[w]henever I was out of the office for any period of time I always wanted to go through my mail and I knew I had to be places that week so I planned to go to do my mail and then I wouldn't have to worry about it." T1/15/1992 166. Arriving at his office at 3:00 or 3:30 p.m., respondent opened his mail and dictated several letters to his secretary (the audio tape containing the ten-minute dictation is in evidence as OAE Exhibit 13).

Respondent left the office just as it was getting dark, at approximately 4:00 or 4:30 p.m. Either with him or in his car, respondent had two service weapons: a .380 caliber automatic pistol and a .12 gauge shotgun. In addition, he had placed in his briefcase an unregistered .45 caliber semi-automatic pistol, with two clips of six shots each (respondent kept another .45 caliber pistol, registered, at his office). Both pistols were part of respondent's extensive private collection of firearms. Respondent had removed the unregistered pistol from a cardboard box hidden in

the crawl space of the basement in his house, where he also kept eight other pistols, and had placed it in his briefcase.

Once in his automobile, respondent telephoned his wife to let her know that he would be home in ten or fifteen minutes. Respondent then drove to a deserted area on Front Street, South Camden, near the intersection of Kaighn Avenue. According to respondent, he had driven to that area impulsively, after having made a right turn on Route 676, instead of a left, as was his custom. Respondent explained that he had "just [driven] down there" and said "gee, this looks like a nice spot." Exhibit OAE 4 at 8. He then grabbed the .45 caliber pistol from his briefcase, got out of the car, walked across the street until he was standing fifteen or twenty feet from his car and fired seven rounds into the County-owned Lincoln Towncar, causing $6,500 in damages. After shooting his automobile, respondent got back into the car, grabbed his .380 caliber service pistol and fired it into the ground near the car. He then drove off for approximately one mile, stopped the car for a moment on a main street, took out the .12 gauge shotgun from the car trunk and fired it into the ground. He returned the shotgun to the trunk, drove to the Camden City Police Station and sat in the parking lot for an indeterminate period of time. Thereafter, he knocked on the back door of the police station, where he was recognized and ushered in. He was observed clutching a brown briefcase, in which he had placed his .45 caliber pistol.

He turned down requests by the police officers to hold the briefcase for him or to put it down.

For the next three days, respondent gave the police an inaccurate account of the shooting incident. In his statements, respondent recounted how, upon leaving the Parkade building, where his office was located, he noticed a green Toyota station wagon parked in the nearby area with two individuals inside. When respondent approached the intersection of Federal and Fifth Streets, the Toyota accelerated toward respondent's car and proceeded to chase it to the Camden waterfront at a high rate of speed. When respondent neared Second Street, the assailants shot out the rear window of his car, sending flying glass onto the dashboard. At this point, respondent entered onto Front Street and accelerated, but slid on the ice on the railroad tracks. It was then, respondent continued, that he

> heard the burst of the automatic weapon which just sounded like a burp and all hell broke loose in my car and glass was flying all over the place and the car pulled up along side and I saw the passenger raise his weapon; I just stuck the sawed off shotgun out the window and let go. I saw the passenger go forward and it appeared to me as if a mellon was exploding. I thought I saw glass shatter * * * but it was possible that there was no glass shattering it was just the charge of the 12 gauge shotgun hitting the passenger. I couldn't get my finger into my rear trigger to take another shot and the car was beginning to accelerate towards Kaighn Avenue. I pulled my 380, I remember hitting the door with my shoulder and glass coming on top of my arm and I shot through the window of my driver's door and then I opened the door and began and continued to fire as the car proceeded around Front and Kaighn and I must have gone back because I remember running up to the corner and firing a shot at the corner, pulling the trigger and my slide was back and I saw the car driving eastbound,

eastbound on Kaighn Avenue way up passed [sic] Second
* * * *
[Exhibit OAE 3 at 5-6]

Respondent also told the police that, in the course of the prior several years, he had received numerous death threats and that, a mere ten days before, on December 21, 1989, there had been an attempt on his life when he was driving out of the Parkade building and turning left on Fifth Street; the incident had left two bullet holes in his car.

Following the January 1 shooting incident, and based on respondent's version of the events, a massive investigation ensued, with the involvement of numerous officers from the New Jersey State Police and the Camden City Police, as well as investigators from the Camden County Prosecutor's Office. According to the testimony of several of those officers and investigators, however, respondent's tale rang false from the start. In addition to physical evidence uncovered by the police during the next few days through, among other things, the examination of the area that had been the scene of the incident, an eyewitness's statement to the police cast serious doubts about the veracity of respondent's account. That eyewitness, Ronald Moorer, had seen a large, dark automobile —— not two cars —— drive up at normal speed to Front Street, close to where he was standing. The driver of the automobile was a white male. When Moorer heard shots, he yelled, fearing for his safety. He then saw the vehicle speed away with the rear window shot out.

While the investigation was being conducted, respondent proceeded with his normal official functions, albeit with police protection. He also spoke about the incident at a press conference, despite urging to the contrary by Lieutenant Robert Dunlop of the New Jersey State Police and Dennis Wixted, Esq., the County's First Assistant Prosecutor (Exhibit OAE-11 is the video tape of the press conference).

By the third day of investigations, January 4, 1990, the police were convinced that respondent had staged a hoax. They asked respondent to come down to the Bellmawr Barracks, New Jersey State Police Intelligence Office. Present were Lieutenant Robert Dunlop, Major Crimes Unit, and Major Olindo Teza, Investigations Officer. When confronted with what the police deemed overwhelming evidence against him, respondent at first denied any wrongdoing. He continued to do so even when advised that the police had located an eyewitness, Ronald Moorer. When informed, however, that the police had prepared an application for, and intended to obtain, a warrant to search his house for the .45 caliber pistol, respondent caved in. He confessed that he had staged an assassination hoax. In his statement to the police that night, respondent gave the following account of the episode:

> That particular day, well let's step back. On December 21, 1989, there was an attempt on my life when I was operating my motor vehicle, when I was exiting the Parkade building and, making a left on Fifth Street. Subsequent to that situation, I went on vacation and when I came home, I just thought about doing this on New Year's day. So I took a 45 automatic, and loaded it, and proceeded to drive down to Front Street, and I got out of the car and I walked across the street, and I got back

into the car and I drove to the police station. It was as simple as that.

* * *

* * * If you were to ask me why, or what was the reason, I don't have any. I honestly don't have any.

* * *

* * * I'm tired. I'm looking you in the face and I'm telling you I'm tired. I don't know why I did this. I can't give you a reason, I don't know why. But, I've been battling the drugs, I've been battling the crime, and I'm tired. And nobody seems to give a good healthy shit * * * * I'm beat. I'm burned out. I don't know what else to say to you.

[Exhibit OAE 4 at 4-5]

Respondent was also asked about the location of the .45 caliber pistol. He replied that "it [was] in the basement. It would be * * * it's really hard to really say where, how you could get to it." Exhibit OAE 4 at 7. And again, asked if the pistol, was in the basement of his house at that time, respondent answered:

A. Yeah, but I'll tell Jack [Grady] [the Chief of Detective at the Prosecutor's Office] how to get in there and get it.

D. But you're certain it's there.

A. Oh yeah.

[Exhibit OAE 4 at 19-20]

The following exchange also took place with regard to respondent's possible wish to confess the hoax on the days immediately after the shooting incident:

D. At any point in time when we were interviewing, or any time during the course of this investigation, did you ever consider coming forth with the correct information?

A. Yes.

D. At what point in time did you think about that?

A. That evening. That same evening. And the next day. And the next. And the next day.

[Exhibit OAE 4 at 17]

Respondent also admitted to Lieutenant Colonel John Carney, who became involved in his questioning as well, that he wanted to come forward with the truth sooner, but that he did not know how to do it.

When respondent completed giving his statement to the police, he left the room, walked up to Investigator William Latham, from the Prosecutor's Office, whom respondent had known for twenty years and who had also been involved in the investigations, shook his hand and apologized to him and to everyone at the Prosecutor's Office for the embarrassment he had caused them. Asked, at the DEC hearing, whether respondent had said anything else, Latham answered:

A. Yes. He said that he just wanted his job so bad and then he said, I really fucked up.

Q. Did he make any other comments?

A. Yes. He said, it's not my fault, referring to me, if I didn't know how to investigate a case he wouldn't have hired me.

[T5/11/1992 113]

Directly from the Bellmawr Barracks, respondent was taken to the Carrier Clinic for treatment. In his progress notes, Michael L. Kropsky, M.D., a psychiatrist at the Carrier Clinic, wrote the following:

The patient indicated that on December 21st his car had apparently been shot at as he discovered what seemed to be a bullet in it. He said that he does not think he was in the car at the time and if he was he would have thought it was just a stone. He said that this gave him the idea which eventually led to the incident on January

1st. When he initially had the idea he said that he thought to himself how crazy it was. He then thought about it again when he was on a ski vacation in Colorado and said that the second time he thought about it it did not seem so crazy.

* * *

He says that he realizes that there was no chance that his story would be believed but at the time he did not think about that.

[Exhibit OAE 32]

Respondent spent nineteen days at the Carrier Clinic. He was released on January 24, 1990. Dr. Kropsky's final diagnosis was "adjustment disorder with mixed disturbance of emotions and conduct," and "mixed personality disorder with histrionic and narcissistic features." Dr. Kropsky's final diagnosis also included the following language: "[r]ule out brief reactive psychosis."

Upon his release, respondent was referred by Dr. Kropsky to H. Charles Fishman, M.D., a psychiatrist in Philadelphia, for individual, marital and family therapy. As of the date of the ethics hearing, Dr. Fishman had conducted approximately seventy sessions with respondent, some of which included respondent's family.

B. THE EXPERTS' OPINIONS

(1) ROBERT L. SADOFF, M.D.

At the request of respondent's counsel, Dr. Sadoff examined respondent and rendered a psychiatric report. The first examination took place on February 9, 1990 and lasted four hours.

In his initial report (Exhibit OAE R-2), dated March 21, 1990, Dr. Sadoff detailed, as relayed to him by respondent at the examination, respondent's deep attachment to his job as prosecutor; his personal involvement in drug raids; the inordinate time respondent devoted to his job; the consequent marital strife; respondent's drug-like "addiction" to the media spotlight; the threats on respondent's life; his hopes for re-appointment and belief that it would occur; respondent's disappointment on New Year's Eve when his expectations that Governor Florio would discuss his re-appointment failed to materialize; the shooting incident on January 1, 1990; respondent's thoughts in Colorado — and upon his return — about shooting the car up "really *good*;" respondent's alleged lack of recall of several events and situations on the days that followed the shooting, and respondent's visit to his parent's graves in the afternoon of January 4, 1990.

So much significance is attributed by Dr. Sadoff — and so much reliance is placed by respondent's counsel — on this cemetery visit that it deserves special mention.

According to the testimony of New Jersey State Police Detective John Sheeran — the officer assigned to provide security for respondent after the shooting incident — after spending most of the morning of January 4, 1990 in his office, respondent, at about 1:00 p.m., announced that he had to "get outta here." He told Detective Sheeran that he needed to "get some air." Observing a marked change in respondent's appearance, Detective Sheeran

became worried; he noticed that respondent was sweating and looked pale.

Respondent, Detective Sheeran and Sergeant Willard Graham — the officer assigned to the supervision of the security detail for respondent after the shooting — left in respondent's County-owned car, driven by respondent. Detective Sheeran observed that respondent's physical appearance had not improved during the ride; respondent then volunteered that he was "starting to doubt [himself];" respondent complained about the media and about not getting a "fair shake."

After a ten- to fifteen-minute ride, respondent expressed his wish to see his father at the cemetery. Respondent told the officers that his visit would take only a few minutes. Respondent then walked to a gravestone located forty feet from where the car was parked. Detective Sheeran saw respondent pace back and forth with his hands in his pockets. Respondent then returned to the car. He told the officers that something had been bothering him and that he wanted to talk it over with his father. On the way back to the Prosecutor's Office, respondent resumed his complaints about the media. He said nothing more about the graveyard visit.

Back at his office, respondent called for a staff meeting of all assistant prosecutors. Thirty to thirty-five people were present. The purpose of the meeting was to assure the assistant prosecutors of the truthfulness of respondent's account of the shooting incident, despite the ongoing speculation by the media that the story had been fabricated.

Respondent mentioned to no one any unusual occurrence while at his parent's graves.

Nevertheless, he confided in Dr. Sadoff that he had experienced a revelation during the graveyard visit of January 4, 1990. As stated in Dr. Sadoff's report, respondent

> said he had a feeling of relief and release [at the graveyard]. He spoke to his mother, asking rhetorically why he could have done this. At that point, at the cemetery, on January 4, he states, he had a clarity - a picture, for about five minutes - of what actually had happened. This is the recall that he had about his shooting the car. He said he became very upset, embarrassed and humiliated, and decided that he had to tell the police what he had now remembered, which was different from what he told them on January 1.
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> [Exhibit R-1 at 6-7]

Respondent told Dr. Sadoff that, prior to the graveyard "revelation," he truly believed that "what he told the police was true * * * * He believed the story that he told them, because that was what he saw as happening to him * * * *" Exhibit R-2 at 6. Respondent insisted to Dr. Sadoff that his January 1, 1990 story to the police had reflected his actual belief of what had occurred and, as such, had not been a conscious lie. Exhibit R-2 at 7.

Dr. Sadoff opined that respondent had

> experienced a brief psychotic disorder, manifested by the behavior which brought him to official attention. He was so fatigued, burned out and pressured during the past several months, that he became confused about his life, frightened about his future, and disturbed with his friends, acquaintances and family. His lack of sleep and his burning of excessive energy, and his irritability, with misperceptions of reality, all point to a pre-condition that is consistent with an acute psychotic episode.
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> [Exhibit R-2 at 9]

Simply stated, a psychotic episode is a short-lived break with reality. Exhibit R-6 at 1.

But what of respondent's admission to the police, on January 4, 1990, that he had considered coming forward with the truth the evening of January 1, 1990, and the next day, and the next, and the next?

Initially, Dr. Sadoff dealt only briefly with this significant topic. In his first report, Dr. Sadoff noted that

> [w]hat is disturbing in the statement [respondent] made to the police on January 4, is that he told the police that he had known the 'truth' since January 2, and wanted to tell them on January 2, and the next day, and the next day. That would not be consistent with the revelation he indicated he had at the cemetery, on January 4.
> [Exhibit R-2 at 10-11]

In his follow-up report, however, and at the ethics hearing, Dr. Sadoff addressed this contradiction in more detail. Dr. Sadoff explained that, after he met with respondent a second time — on October 12, 1990, for one and one-half hours — it was his opinion that an amended diagnosis was in order: at the time of the January 1, 1990 event, respondent had experienced an acute psychotic episode within an acute dissociative episode.

Dissociative disorder, explained Dr. Sadoff, is "an altered state of consciousness, it's where the individual splits off the present and lives in * * * a world that is not based on what he is doing currently * * * * It's an altered state in the sense that he has split off consciousness from present reality and so when he comes out of that he will have no memory for what happened in his

usual state." T12/18/1991 157. Dr. Sadoff concluded that the acute psychotic disorder occurred at the time of the shooting, on January 1, 1990, when respondent experienced the delusion that he was being chased by drug-dealers. The dissociative disorder, on the other hand, was responsible for respondent's conduct in telling a delusional story to the police and to the press and believing it consistently over the next three days. T12/18/1991 126-127. According to Dr. Sadoff, the psychotic episode lasted a brief period of time; the dissociation, on the other hand, lasted three or four days. T12/18/1991 81.

Dr. Sadoff explained further that respondent's statement to the police that he had known the truth since January 1, 1990 and wanted to come forward sooner would be inconsistent with the graveyard revelations, if the statement to the police was true. However, Dr. Sadoff continued, it was not true. In reality, respondent could not have told the police anything more because he had no recollection of anything more; as part of the dissociative disorder, respondent suffered from amnesia and, accordingly, could not have told police what had actually happened. Another explanation for respondent's statement to the police about coming forward with the truth sooner, Dr. Sadoff opined, was that, at that time, respondent was still refusing to accept that he was mentally ill; because respondent saw himself as a "hero, warrior, macho," he could not admit to his colleagues and friends on the police force — and to himself — that he was sick; accordingly, he lied to the police that he had known the truth all along to show that he was in

control, that he did not have any memory loss, that there was nothing wrong with him, that he could have told the police the true story on the day of the shooting incident and on the few days thereafter. Otherwise stated, according to Dr. Sadoff, respondent would rather admit to the police and to himself that he was a liar than a sick man. T12/18/1991 64. Dr. Sadoff suggested that the same rationale applied to respondent's statements made at the Carrier Clinic. T12/18/1991 99. Asked by the presenter why, if the graveyard revelation was true, respondent had not shared it with the two police officers who had accompanied him to the cemetery, Dr. Sadoff speculated that the two officers might not have been "the right people for him to tell until he sorted it out" and that respondent might still be confused at the time about what had actually happened. T12/18/1991 148-149, 91.

The presenter also asked Dr. Sadoff why, if respondent was suffering from a delusion that he was being chased, he had shot his own car and not what he believed to be the assailants' car. Admitting that it was a "bizarre, crazy thing," Dr. Sadoff nevertheless attempted to explain it by opining that respondent was psychotic and, as such, did not know what he was doing; the psychotic delusion about the drug dealers was not what had actually caused him to shoot the car but, rather, another delusion, "whatever crazy reason he had"; then, after the shooting, respondent believed that the assailants had shot the car. T12/18/1991 165-168. In his testimony, however, respondent claimed

that he believed that he was shooting at the attackers and that his own car was the Toyota. T2/5/1992 51-52.

Dr. Sadoff also opined that respondent's actions had not been premeditated. He explained that respondent's fleeting thoughts about shooting the car and the subsequent act of shooting it do not necessarily equate with planning the event; one can act impulsively, notwithstanding prior fleeting thoughts.

Dr. Sadoff was unable to explain, however, why respondent had retrieved the unregistered .45 caliber pistol from the basement on January 1, 1990 and brought it to the office, especially in light of his conclusion that the psychotic episode had not started until well after the removal of the pistol from its safekeeping location, i.e., either when respondent left his office building or when he shot his car. T12/18/1991 185-186, 160, 193-194.

Dr. Sadoff's final diagnosis was that "at the time of his behavior on January 1, 1990, Mr. Asbell experienced a brief psychotic episode, such that he fell within the purview of the McNaghten [sic] test of insanity." Exhibit R-5. Dr. Sadoff concluded that, at the time he saw respondent he was no longer psychotic and that the "chances of any repeat similar behavior are remote, especially if the treatment [with Dr. Fishman] continues and Mr. Asbell stays out of pressured situation similar to the one that he has had over the past several years." Exhibit R-2 at 12. See also Exhibit R-4.

(2) H. CHARLES FISHMAN, M.D.

Dr. Fishman, a clinical, rather than forensic, psychiatrist and respondent's treating physician, also testified at the ethics hearing. Although Dr. Fishman did not write a psychiatric report, the Special Master allowed him to give his opinion on respondent's mental condition at the time of the shooting and on the subsequent three days, over the presenter's objections. By letters dated April 2 and November 8, 1990 (Exhibits R-9 and R-10), Dr. Fishman advised respondent's counsel that he concurred with Dr. Sadoff's diagnosis of an acute psychotic episode with an acute dissociative disorder. Dr. Fishman disagreed with Dr. Kropsky's diagnosis of "adjustment disorder with mixed disturbance of emotion and conduct."

At the ethics hearing, however, Dr. Fishman changed his diagnosis to a transient dissociative disorder, based on his reading of a 1991 article in the Journal of Abnormal Psychology, titled "Disintegrated Experience - The Dissociative Disorders Revised." Exhibit R-11. Dr. Fishman testified that he discovered the article after he conducted a database search for the latest medical information on dissociative disorders. The search was prompted by Dr. Fishman's recognition of a certain weakness in his prior diagnosis, with which he had never felt entirely comfortable. T1/15/1992 19, 22.

Specifically, Dr. Fishman testified that respondent's symptomatology did not fit into the Diagnostic and Statistic Manual of Mental Disorders, third edition ("DSM III"):

> In the entire section of dissociative disorders I didn't see anything that fits Sam and Sam's symptomatology in terms of the transient, I found nothing that would describe a true transient episode.
>
> * * *
>
> * * * also, Sam didn't fit into the category of someone who had a psychosis, a traditional psychosis leading to schizophrenia or encompassing schizophrenia or depression or anything like that.
>
> * * *
>
> * * * he didn't manifest a psychotic reaction that leads to a prolonged split with reality, it was really a kind of hysterical dissociation from reality.
> [T1/15/1992 20-21]

Dr. Fishman explained that revised diagnoses are the product of more available information:

> That's why I looked further. I mean, the way medicine works it's a progressive process, there's more data and we revise our thinking. It's been said the half-life of a medical education is five years, the facts change that fast.
> [T1/15/1992 22]

Dr. Fishman defined dissociation as a separation of normal mental function, and psychosis as a break with reality. T1/15/1992 8,25. He also explained that, when an individual suffers from a transient dissociative disorder, he or she slips in and out of separate episodes. T1/15/1992 9.

With the above principles in mind, Dr. Fishman opined that respondent first began having separate transient dissociative disorder episodes on December 21, 1989, when his car was shot twice. Another episode occurred when respondent left his office building on New Year's Day and then shot his car. Dr. Fishman testified that respondent had shot his car in response to

hallucinations of being pursued and shot by drug dealers; respondent had shot his own car because he thought he was shooting at the assailants; he did not realize it was his own car. Dr. Fishman believed, however, that respondent was not completely out of touch with reality at the time of the shooting incident because he was able to drive, to talk and to avoid accidents; respondent, thus, was only partially out of touch with reality, consistent with a dissociation disorder. T1/15/1992 13. Dr. Fishman also testified that respondent appeared to be in touch with reality on January 4, 1990, when he gave the statement to the police. As to the graveyard revelation, Dr. Fishman believed that respondent was probably coming out of a transient dissociative disorder episode. Dr. Fishman agreed with Dr. Sadoff's opinion that, when respondent first told his story to the police, he believed it to be true; and when respondent told the police, on January 4, 1990 that he wanted to tell them the truth before, he was lying; he was using a denial mechanism because he was unwilling to blame his conduct on mental illness. Simply put, respondent said so only because he wanted to dispel any notion that he had amnesia; he was "saving face" by saying "I knew it all along, nothing is wrong with me;" he wanted to convey the impression that he was in control. T2/5/1992 80, 84-86.

(3) STANLEY L. PORTNOW

Dr. Portnow, a forensic psychiatrist, examined respondent on June 25, 1991, at the request of the OAE. The examination lasted

approximately two hours. Dr. Portnow disagreed with both Dr. Sadoff's and Dr. Fishman's diagnoses. As to Dr. Fishman's diagnosis of transient dissociative disorder, Dr. Portnow, a member of the task force appointed by the American Academy of Psychiatry and the Law to advise on the revision of DSM III into DSM IV, testified that transient dissociative disorder has not been accepted, or even proposed, as an addition to DSM IV:

> . . . it's not proposed, it's not a disorder, it's not going to be in the book. We have the book so that we don't make up things like that.
> [T3/20/1992 120]

Dr. Portnow added that, even if the disorder were to become a part of DSM IV, it would still not rise to the level of insanity. T3/20/1992 120.

Dr. Portnow similarly disagreed with Dr. Sadoff's diagnosis. In his opinion, respondent was not psychotic. As stated in his report,

> [b]rief psychotic reactions usually present themselves in an unmistakable fashion. They arise rapidly, not over the course of many months of stress, and are often associated with disorganized behavior. Disorientation can occur and there may be impairment in recent memory. Anyone who comes in contact with such a psychotic individual can immediately see that he is very different than usual and in fact must be protected from himself. Such was obviously not the case here. Many co-workers and friends who were in Asbell's company from January 1-4 did not think his behavior strange. He dictated a tape which is a model of clarity. He continued business and gave briefings to his staff * * * * He was on television and looked perfectly calm for all to see. Dr. Sadoff rests his diagnosis on the fact that Mr. Asbell was obviously delusional believing that there was a drug conspiracy after him. A delusion is a symptom of psychosis. It is a firm fixed belief held very tenaciously by the patient which is not confirmed in reality. The problem here is that Mr. Asbell was not delusional. In his statement of January 2, 1990 Asbell

clearly delineates what he saw and heard. [He heard his window blowing in; the two men were black and they were driving a Toyota; heard the burst of an automatic weapon; saw the passenger explode like a watermelon, etc.] If this is to be believed then we are talking about auditory hallucinations and visual hallucinations, not a delusion. These hallucinations may give rise to an idiosyncratic belief or explanatory hypothesis but not to a delusion. It must be further pointed out that the co-existence of both auditory and visual hallucinations is very very rare. It is well documented only in toxic states such as drug and alcohol abuse and malingering! Furthermore delusions are very difficult to influence. If you try to talk the delusional patient out of his delusion the delusion only becomes stronger and more fixed * * * * What happened here? On January 4, 1990 Asbell maintained his assassination hoax until confronted with the eye witness statement. At that point Asbell gave up his alleged delusion without further argument and admitted that the assassination attempt was a fabrication * * * * The Carrier Clinic, where Asbell was observed for two weeks, could not support the diagnosis of acute [brief] reactive psychosis * * * *

* * *

The Carrier Clinic did not diagnose a dissociative disorder. A dissociative disorder in its mildest form is one in which there is a forgetting of either identity, memory or consciousness. In its most severe form dissociative disorder can take the form of multiple personalities or splitting of identity in which there is a separate personality or personality fragment. That is not the case here nor has it even been postulated. The issue here is whether Mr. Asbell has a disturbance or alteration in the integrative function of his memory – not identity. When the disturbance occurs primarily in memory, important personal events cannot be recalled. In a localized amnesia there is failure to recall events occurring during a circumscribed period of time. Somewhat less common is the selective amnesia, which is a failure * * * to recall some, but not all, of the events occurring during a circumscribed period of time. It would appear form Mr. Asbell's initial description of the assassination hoax on January 1st that there was no amnesia at all — hence no dissociation. He remembered everything. He did not complain of a bad memory or of forgetting as dissociated patients frequently do. Instead of making up the story on three different occasions about the two black men and the Toyota he could simply have said that he did not remember. The remarks about wanting to come forward each day with the truth indicating he

> knew the truth all the time also point to the conclusion that he was not dissociated [or delusional]. The slip he made in my office about the amnesia setting in after January 4th is probably truthful and serves the purpose of defending him from the awareness of shame and guilt by repressing the incident into his unconsciousness.
> [Exhibit OAE 9 at 10-12]

Parenthetically, the "slip" to which Dr. Portnow referred consisted of a statement made by respondent at their interview that his memory was "generally good" and that his amnesia for the incidents of January 1 through January 4, 1990 "set in <u>after</u> January 4th." In his report, Dr. Portnow stated that, when he repeated that statement to respondent, the latter "tried to explain away the shocking admission by stating that he was no longer sure what he did or did not remember about the incidents of January 1-4, 1990 since so many people – lawyers, doctors, etc. — have told him bits and snatches and he has read so much about it." Exhibit OAE 9 at 9.

Dr. Portnow disagreed with Dr. Sadoff that respondent was delusional when he shot his car. Dr. Portnow explained that

> [a] delusion is a firm, fixed belief that can not be contradicted by argument or usual other methods of persuasion. Now, in addition, delusion makes a certain amount of sense given a psychosis, delusions are almost always part of a psychosis, but they make sense. You may not know what the sense is but it makes sense to the patient.
>
> For example, just to remove it from Mr. Asbell for a moment so that we can clarify it, the usual delusion of the jealous husband who is going to kill his wife's lover, he doesn't go out and shoot the first person he sees on the street, he has somebody earmarked that is a possible offender and he goes and he shoots that individual, he acts on his delusion as it were. It's not the first guy I'm going to meet I'm going to shoot.

> Now, if Mr. Asbell was suffering from a delusion when he shot up his car because he felt that drug dealers were after him in a green Toyota and were out to shoot him, what is the sense of shooting his own car, were the people, were the drug dealers trying to kill him riding in his own car, is that what he's saying is part of his delusion? That is what he'd have to say to explain why he shot his own car. If he had said, however, I shot a car and you've never found the car and go look for it, that would have been something else. But now he comes and he says I shot my car and that is supposed to be a delusion. Well, that's, excuse me, that's absurd. The delusion has to make a certain amount of sense within the particular psychosis. And that makes no sense whatsoever, he doesn't say that they jumped into his car and they were about to strangle him or kill him or something, he shoots his own car and wants us to believe that it's a delusional belief that drug dealers were after him and that they were going to kill him. It's absurd.
>
> [T3/20/1992 106-107]

Dr. Portnow went on to say that the types of stress enumerated in DSM III as causing a brief reactive psychosis are

> really horrendous events, battle field experiences, hurricanes, the type of thing that is not in the usual realm of human experience. That is not to say, however, that everyone could respond differently to a particular stress that what one individual would experience as a severe stress, another one might not. Mr. Asbell who presents as a very tough, obsessive type of individual and a disciplined type of individual, he would be the last person I would think that would develop a brief psychotic reaction because he might not be reappointed to his job. That would be, that does not go with his macho image.
>
> [T3/20/1992 84-85]

He added that the other cited stresses in respondent's life, including the December 21, 1989 pellet incident, "could not qualify even for a brief reaction psychosis." T3/20/1992 87. Asked if those stresses could lead to a dissociative reaction, Dr. Portnow replied that

> [t]he individual has to have a certain type of personality to even fall into the category of developing a dissociative reaction. The more hysterical * * * the more suggestive individuals are very, are [sic] the candidates for development of a dissociative type of reaction.
>
> Sam Asbell is a very disciplined, tough, law enforcement individual and he is not hysterical as far as I could determine in my examination, and my review of the Carrier Clinic notes, he is the last person in the world because of his orientation to his job and to his own life, to have developed a dissociative type of reaction. He does not have the preexisting personality therefor.
> [T3/20/1992 89-90]

Dr. Portnow also added that not all individuals who are psychotic or dissociated are unable to know the difference between right and wrong or are out of touch with reality.

It was Dr. Portnow's opinion, thus, that respondent experienced not an acute psychotic episode or an acute dissociative disorder but, instead, an "adjustment disorder with mixed disturbance of emotions and conduct," as also found by Dr. Kropsky. Dr. Portnow explained that

> this is not a psychosis but rather a maladaptive reaction to stress. [Mr. Asbell] wanted desperately to be re-appointed Camden County Prosecutor and believing that he would not be so re-appointed he embarked on a foolish plan to further his popularity in Camden County by fabricating the assassination story and releasing details of the hoax to the media in an effort to boost his popularity so that the Governor-elect would feel the political necessity of re-appointing him.
> [Exhibit OAE 9 at 12]

Dr. Portnow further opined that

> [T]he only mental aberration suffered by Mr. Asbell was a disturbance in his ability to adjust to the awareness that he would not be re-appointed Camden County Prosecutor. It was not a mental disorder or psychosis and hence there can be no discussion of a M'Naghten defense. The acute [brief] psychotic episode and dissociative disorders theories must be elliminated [sic]

> for all the reasons set forth above. The dissociative disorder, if in fact it exisited [sic] at all, would not qualify for the M'Naghten defense under any condition if the subject was not psychotic. With specific reference to the shooting of the county owned vehicle on January 1, 1990 as well as Mr. Asbell's subsequent conduct of relating the false assassination attempt to the police and the public which occurred during the period from January 1, 1990 through January 4, 1990 there is no credible evidence to indicate that Mr. Asbell was psychotic during those times. Hence he was responsible for his actions and statements.
>
> [Exhibit OAE 9 at 12-13]

Dr. Portnow concluded, however, that respondent's judgment must have been impaired when he shot his car.

In Dr. Portnow's opinion, respondent knew what he was doing when he shot his car and knew that it was wrong. Respondent was also able to appreciate the wrongfulness of his conduct in giving a false report to the police and perpetuating the concocted story on the subsequent days. Dr. Portnow labelled the alleged brief psychotic reaction, which allegedly developed before or during the shooting and dissipated when respondent arrived at the police station on January 1, 1990, a "psychosis of convenience." T3/20/1992 111-112.

Dr. Portnow believed that the December 21, 1989 pellet incident

> was probably the germination of this idea to go and shoot the car. I think it indicates that it was planned, I don't think it was the result of a sudden psychotic episode, he thought of it on December 21, he thought of it while he was skiing in Vail, he thought of it when he came back from his ski vacation, and he thought of it while he was driving home on January 1 when he said to himself let's do it or words to that effect. This is, so I think that the December 21 incident is really the beginning of the stories so to speak.
>
> [T3/20/1992 92-93]

Dr. Portnow's view was that respondent's conduct was "a planned, premeditated act and it was not the result of anything other than poor judgment." T3/20/1992 96. To support his theory that respondent tends to exercise poor judgment, Dr. Portnow pointed to other serious events in respondent's life, such as throwing a desk through a window while a student, participating in the theft of a Corvette automobile and then throwing it in a lake, and becoming involved in fights while his father was a Prosecutor. T3/20/1992 108-109.

Of significance to Dr. Portnow, in concluding that respondent had planned the incident, was the fact that respondent had taken the unregistered .45 caliber pistol to the office with him, on January 1, 1990. In Dr. Portnow's words, "I think [Mr. Asbell] took the .45 caliber gun because he planned, premeditated this hoax." T3/20/1992 93, 95. To avoid detection, Dr. Portnow noted, respondent put the pistol back in the crawl space (which, Dr. Portnow acknowledged, was nevertheless the place where the pistol was usually kept) and refused to let a police officer carry his briefcase — where he had placed the pistol after the shooting. According to Dr. Portnow,

> [that] indicates good thinking for that particular situation. Certainly doesn't indicate that [Mr. Asbell] doesn't know what's going on around him because if he gives up that gun, everyone knows what's going to happen, it's going to be tested for bullets and so forth. And I think the significance basically is that Sam Asbell planned this thing, executed this hoax, and tried very hard not to be discovered.
>
> [T3/20/1992 99]

To disprove the theory that respondent was psychotic or dissociated, Dr. Portnow also pointed to the audio tape containing respondent's dictation to his secretary on New Year's Day. The dictation, according to Dr. Portnow, was "clear, it was direct, it was oriented to thought processes, and there was -- there isn't the slightest indication on that tape that he was disturbed, that he was psychotic or dissociated." T3/20/1992 101. Dr. Portnow also found very significant that nothing in the video tape of respondent's press conferences of January 2, 1990 indicated that he was delusional or dissociated. Dr. Portnow believed that respondent "was not anything other than very crafty and very calculating in terms of wanting to get his story before the public to engender a certain degree of sympathy so that Governor Elect Florio would hopefully consider reappointing him." T3/20/1992 102.

Lastly, as to the respondent's January 4, 1990 statement to the police that he wanted to come forward with the truth sooner, Dr. Portnow concluded that, at that time, respondent was telling the truth; respondent had given up the hoax and was coming to grips with his maladjustment. Asked whether he agreed with Dr. Sadoff's and Dr. Fishman's "denial mechanism" theory, Dr. Portnow answered "no" and, further, labelled it a "conscious denial mechanism. . . . otherwise known as a lie." T3/20/1992 114.

* * *

At the end of ten days of hearings, the Special Master granted a motion by the OAE to strike the insanity defense on the basis

that it was inconsistent with respondent's admission of guilt on April 24, 1981. As noted above, respondent admitted his guilt in filing a false report with law enforcement authorities, an offense that requires knowledge by the defendant. The Special Master also found that the admission of guilt was, in effect, "an admission of all the events of January 1, 1990 and thus a violation of the Rules of Professional Conduct set forth in the formal complaint, Counts One, Two, Three and Four, RPC 8.4(b)(c)(d)." Special Master's Report at 24-25.

With regard to the question of whether, in an attorney disciplinary matter, an unconditional plea of guilty that is subsequently handled through PTI may be considered as having the same effect as a criminal conviction, the Special Master concluded that it may. As noted by the Special Master, "[t]he Supreme Court has on numerous occasions emphasized that one of the central goals of attorney discipline is to maintain public confidence in the bar, the professionalism of its members, the judiciary, and the Court. I find that the public confidence in the bar would be greatly undermined if a member of the bar were permitted to enter an unconditional guilty plea to a criminal charge in open court and then turn around and argue that the plea cannot be used in a disciplinary proceeding." Special Master's Report at 23-24.

As to respondent's argument that, constitutionally, the burden of proof remained with the OAE to establish, by a clear and convincing standard, responsibility or culpability of a respondent, when that respondent raises insanity as an affirmative defense, the

Special Master withheld consideration of that constitutional question, as mandated by R.1:20-3(i). The Special Master ruled, however, that "[f]or the purpose of this report, I specifically find, based on the testimony of the doctors and the evidence, that if the burden of proof rests with the OAE, then they have met their burden. If the burden of proof rests upon Mr. Asbell, then he has not met that burden, thus the affirmative defense of insanity and/or diminished responsibility must fail for lack of believable medical testimony." Special Master's Report at 17-18.

Lastly, the Special Master found that, in the event that the guilty plea does not have the effect of an admission of all charges, the record supports the finding that respondent's conduct was clearly unethical and that there was a conscious and knowing violation of the Rules of Professional Conduct, as set forth in the four counts of the formal complaint. The Special Master recommended that public discipline be imposed. As stated in the panel report, "[t]he conduct alone requires such a recommendation and the additional factor that Mr. Asbell was prosecutor at the time almost demands such treatment. Mr. Asbell's prior excellent conduct must be set aside and public discipline recommended in order to attempt to maintain public confidence in the profession and the court." Special Master's Report 26.

CONCLUSION AND RECOMMENDATION

Upon a de novo review of the record, the Board is satisfied that the Special Master's conclusion that respondent's conduct was unethical is fully supported by clear and convincing evidence.

During the ethics hearings, the OAE made a motion to strike the insanity/diminished defense capacity on the basis that such a claim was inconsistent with respondent's guilty plea to a crime involving knowing misconduct arising out of the same facts. Specifically, respondent pleaded guilty to the fourth-degree offense of making a false report to law enforcement authorities, in violation of N.J.S.A. 2C:28-4a). At the conclusion of the ethics hearings, the Special Master granted the OAE's motion to strike the insanity/diminished capacity defense. As the Special Master remarked, "if Mr. Asbell lacked the requisite element of criminal responsibility at the time the crimes were charged, then he would not have been able, or permitted, to enter the guilty plea on April 4, 1990." Special Master's Report at 11. The Special Master properly rejected respondent's contention that his plea was qualified by a statement that his actions had been the result of psychological factors. The Special Master noted that there was nothing in the transcript of the guilty plea indicating that respondent's plea was in any way qualified and that the judge had no difficulty in accepting the plea as the voluntary and knowing decision of respondent. The Special Master further noted that, at the time, respondent was under Dr. Fishman's care and that no medical testimony was presented to show that respondent was under

any "mental impairment" that would affect his ability to enter the plea of guilty. Special Master's Report at 20. The Board agrees. If one pleads guilty to a crime requiring intent, one cannot raise the defense that he or she was insane. Intent and insanity are mutually exclusive.

Respondent's counsel, however, argued that the OAE was barred from using anything in the PTI record (1) because the guilty plea was not reduced to a final judgment of conviction (relying on language, contained in all Supreme Court Opinions dealing with motions for final discipline, that a "judgment of conviction is conclusive proof of guilt") and (2) because, on September 17, 1993, the end of respondent's three-year probationary period, the accusation will be dismissed from the record. The Board disagrees.

It is unquestionable that respondent's admission of guilt may be considered. This is an ethics proceeding, not a motion for final discipline. In In re Whitmore, 117 N.J. 472 (1990), the attorney faced disciplinary proceedings after he was admitted into PTI. So did the attorney in In re Farr, 115 N.J. 231 (1989). In addition, while it is true that opinions arising from motions for final discipline talk about judgments of conviction as conclusive proof of guilt, In re Friedman, 106 N.J. 1, 5 (1987), they also talk about criminal convictions as conclusive proof of guilt, In re Kinnear, 105 N.J. 391, 393 (1987).

Respondent's argument that N.J.S.A. 2C:43-13f bars the OAE from using any facts addressed in connection with respondent's

admission into PTI is also meritless. The statutory prohibition was aimed at statements made only to the participant's supervisor.

More significantly, the resolution of whether respondent's admission of guilt may be used in these proceedings is not critical to a finding of misconduct on respondent's part. In the Board's view, the independent record developed at the ethics hearings amply supports the finding that respondent was guilty of each and every charge contained in the formal ethics complaint, including the filing of a false report — the crime to which respondent pleaded guilty.

Respondent's counsel next argued that, constitutionally, the OAE is charged with the burden to prove, by clear and convincing evidence, respondent's responsibility or culpability. This issue is now moot, however. The Special Master properly granted the OAE's motion to strike respondent's insanity defense. But, even if true that the burden rests with the OAE, the Board is of the view that the evidence clearly and convincingly establishes that respondent was responsible for his unethical conduct.

* * *

As to the merits.

The Special Master properly found that the record of the disciplinary proceeding fully established that respondent had knowingly shot his car and had consciously lied to the police. The evidence is clear and convincing that respondent was neither insane under the McNaughten rule nor that he acted with diminished capacity when he shot his car and when he lied to the police.

New Jersey adheres to the McNaughten rule governing insanity as a defense. N.J.S.A. 2C:4-1; State v. Trantino, 44 N.J. 358 (1965), cert. denied 382 U.S. 993, 86 S.C.T. 573, 15 L.Ed. 2d 479 (1966).

> [U]nder the McNaughten rule, the defense of insanity is available where the 'party accused was laboring under such a defect of reason from disease of mind as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know what he was doing was wrong.'
>
> [State v. Humanik, 199 N.J. Super. 283, 299 n.6 (App. Div. 1985) [quoting State v. Lucas, 30 N.J. 37, 68 (1959)].

New Jersey recognizes the defense of diminished capacity as well. N.J.S.A. 2C:4-2; State v. Galloway, 133 N.J. 631 (1993). That statute provides as follows:

> Evidence that the defendant suffered from a mental disease or defect is admissible when it is relevant to prove that the defendant did not have the state of mind which is an element of the defense. In the absence of such evidence, it may be assumed that the defendant had no mental disease or defect which would negate a state of mind which is an element of the offense.

Although respondent asserted the defense of diminished capacity in his answer, he presented no evidence in this regard. Moreover, a careful review of Dr. Sadoff's and Dr. Fishman's expert opinion reveals that respondent was not insane within the meaning of the McNaughten rule. Neither doctor was persuasive that respondent had a mental disease or that, if he in fact had it, it was of such magnitude as to prevent him from either knowing the nature and quality of his act or, if he knew it, that what he was doing was wrong. Dr. Sadoff's testimony, especially, lacked

credibility. He obviously strained to reach a diagnosis justifying the conclusion that respondent's actions fell under the McNaughten rule of insanity. This was particularly evident when Dr. Sadoff amended his initial diagnosis of brief psychotic disorder to brief psychotic disorder with an acute dissociative disorder, in order to explain respondent's lies to the police, a topic with which Dr. Sadoff dealt only superficially in his first report.

Dr. Fishman's testimony, too, was not worthy of great weight. Although he had seen respondent more than seventy times, as his treating psychiatrist, and presumably was most familiar with respondent's mental condition, he initially gave no diagnosis of his own. Instead, he endorsed Dr. Sadoff's diagnosis, only to withdraw his endorsement later because he was not "entirely comfortable" with it. Moreover, his new diagnosis, transient dissociative disorder, which he based on an article upon which he stumbled after further research, is not a recognized disorder by the task force on DSM IV, as Dr. Portnow testified. All in all, both doctors' testimony and opinion lacked believability.

Moreover, those individuals who were closest to respondent and who saw him daily testified that nothing had made them question respondent's mental health. Although they agreed that respondent's behavior had changed during the last six months or so before the shooting incident — respondent had become more irritable and impulsive — they were unequivocal that respondent was never disoriented, out of touch with reality or in a trance. Similarly, the police officers to whom respondent reported the episode and

those who became involved in the investigations testified that, immediately after the incident and in the days that followed it, respondent's answers were always responsive and coherent and his speech understandable. In fact, one of the officers who first saw respondent after the shooting, Lieutenant Klinsham from the Camden City Police Department, remarked that respondent did not appear nervous or upset, compared to other individuals who had been through similar experiences. Detective Sheeran, too, who was assigned to provide security for respondent after the incident, testified that respondent was calm and coherent on the day after the shooting as well as on the next two days, appearing at official functions, conferring with the Attorney General, talking to reporters and even walking to the laundry. Finally, nothing in respondent's press conference prompted his friends and co-workers to conclude that his behavior was anything but normal.

Unlike Dr. Sadoff and Dr. Fishman, Dr. Portnow made a lot of sense. Not only was his testimony highly effective to point out serious flaws in Dr. Sadoff's and Dr. Fishman's theories from a medical viewpoint, but also to explain, within a level of plausibility, the motivation behind respondent's bizarre actions. Both his opinion and testimony were highly persuasive. He attributed respondent's actions to an inability to adjust to the awareness that he would not be re-appointed as Camden County Prosecutor, not to a mental disorder or psychosis, as postulated by Dr. Sadoff and Dr. Fishmann. In fact, Dr. Portnow's diagnosis, adjustment disorder with mixed disturbance of emotions and conduct,

is the same as Dr. Kropsky's, the Carrier Clinic psychiatrist who was respondent's chief physician during his nineteen-day stay at that clinic. Both doctors agreed that respondent's condition was a maladaptive reaction to stress. As pointed out by Dr. Portnow, because of respondent's desperate wish to be re-appointed Prosecutor and of his belief that he might not — a belief further bolstered by his disappointing encounter with Governor Florio on New Year's Eve — he embarked on a foolish plan to boost his reputation as a tough, hands-on prosecutor by staging an assassination hoax and then releasing its details to the press (despite Lieutenant Dunlop's and First Assistant Prosecutor Wixted's advice to the contrary) to further his popularity and render him indispensable as Camden County Prosecutor.

That respondent planned the entire episode there appears to be little doubt. He admittedly had thoughts about shooting his car on a number of occasions. The seed for such thoughts was the so-called December 21, 1989 pellet incident. On that day, respondent discovered two indentations in his automobile and reported them to investigators at the Prosecutor's Office and to the First Assistant Prosecutor, Dennis Wixted. It was respondent's belief that he had been shot upon leaving his office building (more of this later). Thereafter, he discussed the incident with friends at the New Year's Eve party, raising understandable concern on their part. When his hopes that Governor Florio would discuss his re-appointment on that night did not materialize, respondent was greatly disappointed. It was then that he decided to carry out his

plan to stage an assassination attempt. To be sure, his actions, as noted by Dr. Portnow, were the result of an impulse and of poor judgment. But it cannot be said that they were the product of a diseased mind, such that prevented him from appreciating their nature and their wrongfulness. Why else would he have taken to the office, on New Year's Day, an unregistered pistol, if not to escape detection? Significantly, Dr. Sadoff and Dr. Fishman were unable to provide any explanation on that score.

Respondent's lies to the police, also, were deliberate. There is no credible evidence in the record to support the conclusion that respondent experienced amnesia or loss of memory. For instance, his account of the events to the police was clear and precise, with a detailed and accurate description of the route going to and returning from the shooting incident. More likely, as perceptively pointed out by Dr. Portnow, some memory loss occurred after January 4, 1990, as a result of a psychiatric type of repression of unpleasant events. Dr. Sadoff's and Dr. Fishman's theory that respondent did not really know the truth on January 4, 1990 because of a denial mechanism, when he told the police that he wanted to come forward sooner, is wholly unbelievable. Why would respondent be concerned that the police might think that he was mentally disturbed if he admitted to them that he had amnesia, but not be concerned with the fact that the truth itself would undoubtedly cast him as emotionally ill in the police's eyes? Moreover, respondent continued to lie to the police even when

confronted with overwhelming evidence against him. He confessed his hoax only after presented with a search warrant application.

Respondent's testimony, too, was unworthy of belief. He lied, for instance, about the pellet incident and about having no memory of replacing the .45 caliber pistol in the basement. He lied about the pellet incident because he told Wixted and Grady that, on or about December 21, 1989, as he was pulling out of the gate from his office building, he had heard shots coming from a location near the building. He told Wixted that he had heard a "pop" and repeated the story to Wixted over and over again. T7/24/1992 41-43, 72. He also told the police, on January 4, 1990, that the incident had taken place "[o]n Fifth Street coming out of the Parkade Building." Exhibit OAE 4 at 14. Yet, respondent told Dr. Sugerman, from the Carrier Clinic, and Dr. Sadoff that he "was not there when the shooting occurred." Exhibits OAE 32 and R-2 at 4. He also told the Special Master that he had noticed the indentations on the car as he "walked out to go to the car to go to work" on the morning of December 21, 1989. T1/15/1992 157.

He also lied to Dr. Sadoff (Exhibit R-2 at 3) about not remembering putting the .45 caliber pistol back in the crawl space. On January 4, 1990, when respondent gave his last and true statement to the police, he told them that the .45 caliber pistol was in the basement:

D. What weapon did you use Sir?

A. A .45 caliber automatic.

D. Is it your weapon?

A. Yeah.

D. And where is that weapon now?

A. It's in the basement. It would be * * * it's hard to really say where, how you could get to it.

* * *

D. And this [weapon] is in the basement of your home presently?

A. Yeah, but I'll tell Jack [Grady] how to get in there and get it.

D. But you're certain it's there.

A. Oh yeah.

[Exhibit OAE 4 at 7, 19-20]

* * *

It is clear, then, that respondent's conduct was knowing and deliberate. His actions violated RPC 8.4(b), RPC 8.4(c) and RPC 8.4(d).[1] The more difficult question is the appropriate measure of discipline for this respondent.

Discipline in cases dealing with official misconduct has ranged from a public reprimand to disbarment. In In re Whitmore, 117 N.J. 472 (1990), the attorney was indicted for official misconduct, tampering with a witness and conspiracy to commit both of these offenses. He was admitted into PTI, which he successfully completed. Disciplinary proceedings followed. Whitmore's

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[1] The charged violations of criminal statutes, with the exception of the violation of N.J.S.A. 2C:28-4a — to which respondent pleaded guilty — should be dismissed. In the absence of a finding of guilt beyond a reasonable doubt in a criminal proceeding, the Board cannot conclude that those criminal statutes have been violated.

misconduct occurred while he served as municipal prosecutor for the Borough of Monmouth Beach. At the trial of a defendant charged with driving under the influence and having an open container of alcohol in a motor vehicle, Whitmore informed the court that he was not ready to proceed because the arresting officer was unavailable. When the court asked why the officer was unavailable, respondent did not reply, notwithstanding his knowledge that the officer had been present in the courthouse before the case was called and that the officer had informed Whitmore that he was leaving. Defense counsel then immediately requested that the DWI charge be dismissed because of the absence of the testing officer, which motion was granted. The Court found that the gravemen of Whitmore's misconduct was his failure to advise the judge of the apparent or possible motives underlying the officer's departure from the courthouse when the case was called to trial. The Court also faulted respondent for not explaining to the judge his belief or suspicion that the testing officer had left for an improper motive, that is, to cause the dismissal of the prosecution in order to obtain a favorable result for the defendant. Whitmore was publicly reprimanded.

In a recent case, In re Bock, 128 N.J. 270 (1992), the Court suspended for six months an attorney who feigned his own death by drowning and concealed his whereabouts for five weeks despite his knowledge of an official investigation about his disappearance. At the time of his misconduct, the attorney was a part-time municipal court judge in the Borough of Morris Plains. He was also engaged

in the practice of law with a partner and an associate. When he staged his disappearance, the attorney had responsibility for the handling of sixty to seventy files, which, fortuitously, were properly handled by his partner and associate in his absence.

In yet another matter involving an assistant prosecutor, In re Farr, 115 N.J. 231 (1989), the Court suspended for six months an attorney who became involved in a bizarre incident in which he committed serious ethic infractions. The attorney became involved with two police informants, one of whom was a convicted criminal. In the course of his involvement with the couple, respondent became infatuated with the female informant and, in order to ingratiate himself with her, he committed a series of gross improprieties. Among other things, he stole evidence — marijuana and phencyclidine (PCP) — from the prosecutor's office for his personal use and that of his friends. He also promised to bury in his desk drawer a murder warrant on the convicted informant and threatened that informant with severe consequences in his criminal case if he did not accede to the attorney's demands to see the female informant more often. The attorney also committed several improprieties in connection with the convicted informant's release on bail and lied to the Attorney General's Office when he denied his use and possession of controlled dangerous sustances. In suspending the attorney for only a period of six months, the Court considered that his conduct had been aberrational and that he had been fully rehabilitated. The Court also took into account the remoteness of the transgressions — nine years before.

In In re Yaccarino, 117 N.J. 175 (1989), however, the Court ordered the disbarment of an attorney whose misconduct occurred while serving as a judge of the Superior Court. In that case, Yaccarino invoked the prestige of his judicial office in an effort to advance his family's interest. Specifically, Yaccarino's daughter had been arrested and charged in municipal court with offenses arising out of her alleged attack on her college police officer, who had impounded her unleashed dog. When Yaccarino learned of his daughter's arrest, he contacted a sergeant of the college police department, identified himself as a judge of the Superior Court and demanded to know the statute that authorized the detention of the dog. On that same day, Yaccarino called a municipal prosecutor and requested that he contact the prosecutor of the relevant county to have him investigate his daughter's arrest. Yaccarino then threatened the chief of the college police department by announcing that he would sue him, the arresting officer, and the college for the violation of his daughter's civil rights, unless the arresting officer was dismissed within twenty-four hours. In yet another matter, Yaccarino failed to disclose his stock ownership in corporations that held liquor licenses and engaged in a conscious effort to conceal his interest in both enterprises. In a third matter, Yaccarino presided as a trial judge, sitting without a jury, in a case that involved the dissolution of several closely held corporations, the assets of which amounted to $30,000. One of these assets was a large house in Sea Girt, New Jersey. After the case was settled, Yaccarino met

with the parties ex parte, in chambers, off the record, and without the presence of their attorneys. He also improperly attempted to purchase the Sea Girt property. To that end, Yaccarino tried to influence expert witness to provide favorable opinion evidence in the proceedings to assist him in obtaining the Sea Girt property. More seriously, when Yaccarino became aware of the existence of certain tape recordings of his conversations about the Sea Girt property, he embarked on a course of conduct designed to suppress and conceal this evidence. Reasoning that no mitigating factors were sufficient to overcome the enormity of Yaccarino's misconduct of subversion of the judicial process, the Court ordered his disbarment.

In an Illinois case uncannily similar to this matter, In re Crisel, 461 N.E. 2d 994 (Ill. 1984), a stayed three-year suspension was imposed, with probation for a concurrent period of three years and psychological treatment. There, the attorney had served as the State's Attorney of Edwards County since 1976. In 1980, while he was seeking re-election, the attorney drove to a remote location with the intention to commit suicide. Instead, he fired two shots into his automobile. The next morning, he reported the incident to the Edwards County police, claiming that he had been attacked by unknown individuals. There followed a four-month investigation of the alleged attack. The attorney was aware of this investigation and, in fact, had been present during some of it. When it soon became evident that the attorney's story sounded false, he was confronted by the police. Although the attorney continued to

adhere to his version of the event, he agreed to take a polygraph test. Prior to the test, however, the attorney told the police that he had additional information about the incident. Specifically, the attorney claimed that he had been the victim of an extortion plot. He also confessed to the police that, because of his depression over this plot, he had contemplated suicide, but had shot at his own car instead. Thereafter, the attorney left town for approximately one week, without telling anyone of his whereabouts. The attorney later explained that his disappearance had been prompted by his knowledge that the local media would be releasing a story with the "true facts" about the shooting. It was during that one-week period that the attorney sought psychiatric care. Upon returning to town, the attorney contacted the police to admit that, although his confession had been true, the portion about the extortion had been fabricated. The attorney was charged with the disorderly conduct of knowingly transmitting a false report to a police officer, to which he pleaded guilty. He was fined $500 and placed on court supervision for ninety days. After his discharge from supervision, the charges filed against him were dismissed. Giving great weight to expert testimony that the attorney was suffering from a depressive neurosis at the relevant time, albeit not incapacitated, the Illinois Supreme Court ordered a stayed three-year suspension. The Court also considered strong evidence of the attorney's good character and reputation, as well as of his fitness to practice law. The Court added that a more substantial period of suspension would have been imposed, if not

for the evidence of psychological impairment, the root of the attorney's transgressions.

It is unquestionable that this respondent's misconduct was serious. It was particularly egregious because of his status as Camden County Prosecutor. As the chief law enforcement officer in the County, by his actions he cast an adverse reflection on other holders of public office and, specifically, on other County Prosecutors. He also betrayed the public, who reposed confidence in him. Moreover, his actions were taken solely to advance his own interests. In order to preserve the public faith in the profession and in the judicial system, stern discipline must be imposed.

Neverthess, the Board is not convinced that respondent's misdeeds merit disbarment. The Board considered strong mitigating circumstances, such as respondent's lengthy and prior unblemished legal career; his service and dedication to the profession; his excellent reputation and good moral character; his extreme commitment and attachment to his position as prosecutor; the aberrational nature of his conduct — a product of psychological impairment and poor judgment — and, lastly, the ignominy he has suffered as a result of his transgressions.

After conducting a balancing test between the interests of the public and the goals of the disciplinary system on one hand, and the appropriate form of discipline for this respondent on the other, a four-member majority of the Board recommends that a two-year suspension be imposed, with a two-year proctorship and psychiatric treatment for two years. The Board majority further

recommends that the suspension be suspended, because of respondent's demonstrated fitness to practice law, as recognized by the Court in permitting him to resume his practice during the pendency of these proceedings. Three members would impose a one-year active suspension to preserve the public confidence in the bar and in the judicial system and to avoid the perception that, by being charged with one single criminal offense, by being admitted into PTI, and by receiving a suspended suspension, respondent was favored with an overdose of judicial indulgence. Those three members would also recommend a one-year proctorship and concurrent psychiatric care. One member abstained. One member did not participate.

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

Dated: 11/9/93

By: Raymond R. Trombadore
Chair
Disciplinary Review Board