SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 93-136

IN THE MATTER OF

EDWARD J. GAFFNEY, JR.

AN ATTORNEY AT LAW

Decision and Recommendation
of the
Disciplinary Review Board

Argued: June 23, 1993

Decided: February 18, 1994

William F. Fitzgibbons appeared on behalf of the District X Ethics Committee.

Respondent appeared pro se.

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

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

The formal complaint charged respondent with violations of RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), RPC 1.2 (failure to abide by a client's decision), RPC 1.4 (failure to keep a client reasonably informed regarding the status of a matter), RPC 3.3(a)(1), incorrectly designated as RPC 3.4(a)(1) (knowingly making a false statement of material fact to a tribunal), and RPC 3.4(b) (falsifying evidence), incorrectly designated as RPC 3.3(a)(4). In addition, because respondent did not file an answer to the formal complaint, the Secretary of the District X Ethics

Committee, on notice to respondent by way of letter, amended the complaint to charge respondent with a violation of RPC 8.1(b) (failure to respond to a lawful demand for information from a disciplinary authority).

Respondent was admitted to the New Jersey bar in 1989. On June 24, 1993, the Court issued an order publicly reprimanding respondent for misconduct amounting to gross neglect, lack of diligence, failure to communicate, failure to expedite litigation and, finally, failure to cooperate with the District X Ethics Committee. The Court further ordered that respondent be examined by a psychiatrist approved by the Office of Attorney Ethics and that he continue to practice only under the supervision of a proctor.

The facts are as follows:

In or about October, 1991, respondent was retained by Donald Doe to represent him in Hampton Stillwater Municipal Court on a charge of driving while intoxicated ("DWI"). On October 30, 1991, respondent appeared with Doe at a trial before the Hon. John E. Mulhern. That trial resulted in a guilty verdict against Doe. Although Doe apparently had a prior DWI conviction, that conviction was remote in time (ten years). Therefore, at respondent's request, Judge Mulhern sentenced Doe as a first offender and ordered Doe to pay a fine, to appear for a twelve-hour detainment at an Intoxicated Driver Resource Center ("I.D.R.C.") and, further, suspended Doe's driver's license for six months. The judge did not impose a term of imprisonment. Immediately after sentencing,

respondent made a motion for a stay of the sentence pending appeal. Although the judge permitted a twenty-day stay on the fines, he insisted that Doe immediately surrender his driver's license. He further advised Doe, in respondent's presence, that should the appeal not be filed within twenty days, the fines and costs would become immediately due.

Sometime thereafter, Doe and respondent agreed that an appeal from the conviction should be filed. Doe paid respondent, in three installments, a total of $500 to handle that appeal. Respondent subsequently reassured Doe, on numerous occasions, that the appeal, indeed, had been filed. T31-32, 39-40, 42.[1] In fact, respondent never filed the appeal. For that reason, and because Doe did not pay the previously suspended fines, Judge Mulhern issued an order requiring Doe to appear before him. On January 15, 1992, respondent and Doe appeared before Judge Mulhern in response to his order. Respondent brought with him, to that hearing, a copy of a notice of appeal dated January 14, 1992. See Exhibit C-A(6). He apparently gave a copy of that notice to the municipal court clerk and prosecutor and, at least, showed a copy of it to Judge Mulhern. He further told Judge Mulhern:

> We have filed a notice of appeal, however it was in fact delayed. We are filing a motion for an extension. We were researching the matter. And to be frank with you, I've had numerous trials in Federal Court in the last three weeks, so we've been pretty...pretty tied up. But we have in fact filed a notice of appeal in this matter.

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[1] "T" denotes the District X Ethics Committee hearing transcript of March 25, 1993.

[Exhibit C-A(3) at 2]

After chastising respondent for not having filed the appeal in a timely manner, and based upon respondent's representations to the court, Judge Mulhern again suspended payment of the fines pending the outcome of the appeal. At the time respondent represented to the court that an appeal had been filed, that, indeed, was not true. Similarly, respondent did not subsequently file a motion for leave to file the appeal out of time, in spite of his admitted knowledge that such failure would ultimately cause the appeal to be time-barred and in spite of his representation to Judge Mulhern that he would do so. T119-120.

On or about January 1, 1992, Doe received another summons for DWI (and, apparently, for driving while on the revoked list), which he brought to respondent to handle. Respondent again appeared with him before Judge Mulhern for trial of that matter on February 19, 1991. After consultation with respondent, Doe pled guilty to that charge. At that point, respondent still had not filed either an appeal of the previous conviction or a motion for leave to file an appeal out of time. The October conviction, therefore, remained on Doe's record. Prior to sentencing, Judge Mulhern solicited comments and recommendations from both the prosecutor and respondent. The prosecutor urged the court to impose "enhanced penalties" under the applicable statutes and to treat Doe as a third offender, sentencing him to a period of incarceration. See Exhibit C-A(4) at 4, 6. Respondent, on the other hand, urged the judge to consider Doe's 1981 conviction as so remote that it should

not be factored into any tally of his prior convictions. He further advised Judge Mulhern that Doe was taking active and affirmative measures to recover from a serious drinking problem. He said nothing of the October 1991 conviction being the subject of an appeal. Judge Mulhern apparently elected to treat Doe as a third offender. After imposing upon Doe some fairly serious penalties, which included a six-month period of incarceration, the judge called to respondent's attention that the fines imposed as a result of the October 1991 conviction remained open. The judge, therefore, ordered the payment of those fines, in accordance with the payment schedule he set for the fines attributable to the third conviction. After doing so, Judge Mulhern asked respondent if he had any comments. Respondent requested only that those fines be stayed until Doe was released from jail. Respondent did not challenge the judge's treatment of Doe's most recent conviction as a third offense on the basis that he had filed an appeal of the October 1991 conviction.

After hearing the sentence of incarceration imposed upon him and after concluding that respondent was going to say nothing to Judge Mulhern regarding the status of the appeal of the October 1991 conviction, Doe engaged in the following colloquy with the court:

MR. DOE:	Yes, sir, I was just curious why I'm getting ten years and a prison term.
THE COURT:	That's mandatory for a third offense under 39:4-50.
MR. DOE:	Sir, third offense. I don't understand the third offense.

THE COURT: You were convicted of a second offense...

MR. DOE: For D.W.I.?

THE COURT: D.W.I., yes. It's mandatory by statute.

MR. DOE: The first one was over ten years ago.

THE COURT: Well you were convicted of a second offense back last year, which was not over ten years ago.

MR. DOE: But, sir, my understanding is that was under appeal.

THE COURT: No, it's not under appeal. It's not under appeal. That, I would suggest, you talk to your attorney about. But there have been no appeal papers filed, there have been no transcript requests to this court. And that was back in October.

MR. DOE: Yeah, there was.

THE COURT: It is now February

MR. DOE: We did writs...writs.

THE COURT: There have been no requests for transcripts out of this court and there have been no papers filed with the County as to an appeal. So I must treat this as a...as a third offense. And I stayed the imposition of your fines and costs until today. And now I am imposing payment of those after you're released from custody in the amount of seventy-five a week. And your revocation under the second offense will be also...will be consecutive with your ten years and your two years revocation as of today. So I would ask...Well I'm not going to add the numbers up. But...okay. That's something you talk to your attorney about.

[Exhibit C-A(4) at 11-12]

Doe's very first notice that respondent had not filed the appeal for which he paid him in full was during this colloquy, immediately before he was handcuffed and taken into custody. See also T34-35, 54-56.

While incarcerated, Doe attempted to telephone respondent on four or five occasions. However, respondent was apparently never available and never returned any of his calls. T35, 58-60. In fact, the closest thing to a return call that Doe ever received was in the form of a message from a guard, who relayed that respondent telephoned to say that he would visit Doe later that evening (February 27, 1992). Respondent never appeared for that visit.

Ultimately, Doe hired another attorney who, given the circumstances, was allowed to file an appeal of the October 1991 conviction out of time. The conviction, however, was affirmed, after Doe spent his full term in the Sussex County Jail.

At the DEC hearing, respondent testified that, when he appeared before Judge Mulhern on January 15, 1992, he truly believed that the notice of appeal had, indeed, been filed by his secretary that day. T20-21, 24, 26, 112. (But see T146, where respondent testified that it was his belief that he had "filed" the appeal when he handed it to the municipal court clerk and prosecutor). He stated that he signed the Notice of Appeal in his office on January 14th, then put the notice back into the file, gave it to his secretary and told her he needed it for the next day's court appearance. T110. When asked why he believed the notice had been filed by his secretary under that scenario, respondent added that, when he gave the file containing the signed notice of appeal back to his secretary, he told her to "send it out." T110-111. He admitted, however, that he gave her no instructions on how to file the notice and did not instruct her to

enclose a check for transcript costs. However, he explained, this was his first municipal appeal and he believed his indication at the bottom of the notice of appeal that a tape recording was made of the proceedings below would "perfect" his appeal and that the transcript automatically would be forwarded to him, along with an invoice for its cost. T112-113, 123-124. Respondent further testified, after a fair degree of vacillation, that, when he appeared before Judge Mulhern on January 15, 1992, he believed that Doe's time to appeal might have already run and that he would have to file a motion to extend that time so that the appeal would not be totally foreclosed. T113-114, 119-121. He also told his client, both on January 15th and on February 19th, that the appeal was late and he would have to file for an extension. He maintained that Doe had no reaction to that information.

Nevertheless, in spite of his awareness of the necessity to do so, respondent never filed a motion for an extension. He maintained that he made a conscious decision not to do so after January 15th and after telling Doe that he believed the appeal would not be successful. He believed that would have been around the time that Doe brought in the additional DWI charge to handle. T116-118. He admittedly never told his client of that decision. T127.

According to Doe's testimony, however, he met with respondent on that additional charge at respondent's office on or about January 4, 1992 — well before the January 15th court appearance. At that point, respondent had already misrepresented to him, during

their November 14, 1991 meeting, that the appeal had been filed. T39-43. Doe did testify that, when he appeared in court for the February 19th trial, respondent tried to persuade him to plead guilty to both the new DWI charge and the October charge. T33. (In fact, Doe had already been convicted on the October charge. One might, therefore, assume that respondent was trying to dissuade Doe from pursuing the appeal of that charge — whether or not already filed.) In any event, Doe refused to change his position on the October charge, continued to maintain his innocence and told respondent, "I want to appeal it," to which respondent replied, "okay, no problem." T33-34.

Despite his conscious choice not to pursue any motion for an extension, respondent testified that he was, nevertheless, surprised that Judge Mulhern had sentenced Doe as a third offender. This was so because, for some reason, respondent did not believe the October conviction to be final. Rather, be believed that Judge Mulhern would be able to grant a (presumably additional) extension to file the appeal. Respondent, nevertheless, made no such request of the judge at any time. Respondent testified that, when Judge Mulhern began his sentencing on February 19th, respondent had a "look of total confusion" on his face, which he alleged was apparent to the judge, and that he was "trying to figure out what happened, what was going on." T22, 122. It should be noted that the municipal court transcript for the February 19th hearing is totally devoid of any comments by respondent indicating that he was confused or surprised by the sentence of Doe as a third offender.

In fact, respondent never even checked his file during the February 19th hearing to make sure the notice was, indeed, filed. T145. (But see T25 where respondent testified that he "riffled through his file" during that hearing and found the original notice). Respondent basically sat next to Doe with his head "buried in his file" and left his client to speak for himself. T54-55.

Despite his alleged confusion over Judge Mulhern's treatment of Doe as a third offender (in light of an allegedly pending appeal), respondent subsequently did nothing to find out what happened to that appeal. In addition, while respondent acknowledged that he received at least three telephone messages from Doe, his response consisted of calling the prison on only one occasion to say that he would visit Doe later that evening. However, he was not able to get into the prison because it was too late. Respondent made no further attempts to see or speak with his incarcerated client.

When asked why he had not filed an answer to the formal complaint filed by the DEC, especially in light of his prior ethics experience and similar failure, respondent testified, essentially, that he had to make a choice between taking care of his clients' problems or taking care of this and many other complaints against him; his schedule was consistently heavy, requiring him to work almost every day. Furthermore, he alleged that he had suffered from carpal tunnel syndrome since September 1992. Since he had no secretary as of approximately two weeks before the DEC hearing, he would have to write out his answer in longhand — something he

could not do, given his disability. He further testified that he had essentially closed his office as of December 1992 and has spent all of his time trying to clear up the cases he kept and transferring those he could not keep. In any event, despite his failure to file an answer to the complaint, respondent maintained that he did, indeed, cooperate with the DEC investigator. Specifically, he testified that he gave the investigator a detailed, taped statement in this matter and that, further, after the investigator submitted his report, he called him and asked if he could respond to the report by tape recording. The investigator refused to allow that and, instead, suggested that he put his comments in writing. T14, 101-102. The DEC investigator, on the other hand, advised that respondent did meet with him and gave a taped statement on another matter for which he recommended dismissal. Respondent, however, came to that meeting unprepared to discuss the Doe matter and, in fact, did not do so. The investigator, therefore, advised respondent that he would keep his investigation open for another week to allow respondent to submit his file. Respondent, apparently, did not do so.

* * *

The DEC found respondent guilty of gross neglect (RPC 1.1(a)) and lack of diligence (RPC 1.3) both for his failure to file a timely appeal of the conviction and for his failure to file a motion for leave to file the appeal out of time. The DEC further found that respondent knowingly made a false statement of material fact to a tribunal, in violation of RPC 3.3(a)(1), by virtue of his

statements to Judge Mulhern that an appeal had been filed and that a motion for an extension would be filed. In that regard, the DEC specifically noted: "(The) respondent knew when he appeared in court January 15 that the best that could be represented to the Court is that a notice of appeal had been typed up, put in his file and handed to the court administrator on January 15." Hearing Panel Report at 6. The DEC viewed respondent's misrepresentation to Doe that an appeal had been filed as a violation of RPC 1.4 (failure to keep a client reasonably informed of the status of his case). Finally, the DEC found respondent guilty of a violation of RPC 8.1(b) for his failure to file an answer to the formal ethics complaint. The charge of failure to abide by a client's decision (RPC 1.2) was dismissed by the DEC upon the presenter's acknowledgement that no evidence had been presented at the hearing to support that charge.

The DEC determined that respondent's misconduct warranted public discipline. Specifically, the DEC noted:

> This Panel is mindful of the fact that in 1992, a recommendation was made to the Office of Attorney Ethics on a matter, Docket No. of X-91-22, that public reprimand be imposed upon Mr. Gaffney, coupled with the strenuous suggestion that the Respondent, be compelled to submit himself to a psychological evaluation and professional supervision of his law practice for an appropriate period of time.
>
> This Panel had the opportunity to review and observe the demeanor of Mr. Gaffney in this matter, particularly in his opening and more pointedly in his closing comments to this Panel. This Panel can only reinforce the suggestion made a few months ago that a psychological examination is imperative for Mr. Gaffney.

> This Panel strongly urges an immediate suspension of Respondent in light of the repeated nature of his conduct.
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> [Hearing Panel Report at 9-10].

CONCLUSION AND RECOMMENDATION

Upon a de novo review of the record, the Board was satisfied that the DEC's determination that respondent was guilty of unethical conduct is supported by clear and convincing evidence.

Respondent's conduct in failing to file an appeal and/or motion for leave to file an appeal out of time was inexcusable and in clear violation of both RPC 1.1(a) (gross neglect) and RPC 1.3 (lack of diligence). Similarly, despite respondent's protestations to the contrary, the Board found respondent guilty of misrepresentation both to a tribunal and to his client, as well as engaging in conduct that was prejudicial to the administration of justice, all in violation of RPC 3.3(a)(1), RPC 8.4(c) and RPC 8.4(d). The Board recognized that this latter determination rests, to some extent, upon a credibility assessment of respondent's testimony. However, the record is replete with instances where respondent's testimony before the DEC was not only internally inconsistent but also inconsistent with his actions. For example, respondent testified that he made a conscious decision not to file a motion for leave to file the appeal out of time around the time that Doe retained respondent to represent him on the new DWI charges. It was uncontroverted that Doe brought those charges to respondent on January 4, 1992. Yet, when respondent appeared before Judge Mulhern on January 15, 1992 — just eleven days after

having made a conscious decision not to file a motion for leave to file an appeal out of time — respondent clearly misrepresented to the court his intention to file such a motion. Similarly, respondent originally testified that when he presented the court with a copy of the notice of appeal on January 15, 1992 and represented to Judge Mulhern that it was "filed," he believed that his secretary had, indeed, filed it. He later testified, on cross-examination, however, that he believed that he had filed the appeal when he handed it to the municipal court clerk and municipal prosecutor. In addition, respondent originally testified during his opening statement (which he later adopted as his testimony) that, while Doe was protesting to the court his treatment as a third offender, respondent "riffled through his file" and found the original notice of appeal. He later, however, testified that he never checked his file during that February 19th hearing to make sure the appeal was filed.

In addition to these internal inconsistencies, respondent's actions both during and after the municipal court hearings (as well as those of Doe) are somewhat inconsistent with his testimony during the DEC hearing. For example, if, as respondent testified, he told Doe on January 15 and February 19 that a motion "for an extension" had to be filed (i.e., that the appeal was not pending) then why was Doe so genuinely surprised by his treatment as a third offender? If respondent believed the appeal was pending on February 19, 1992, why did he not voice any objection or surprise to Judge Mulhern when Doe was sentenced as a third offender? Why

did he not ask Judge Mulhern for the extension he believed the judge could grant? The answer is simple: Respondent knew, at that time, that he had filed neither a notice of appeal of Doe's conviction nor a motion for leave to file a notice of appeal out of time.

While the Board agrees with the DEC's findings of gross neglect, lack of diligence and misrepresentation, under these facts, it cannot agree that the record clearly and convincingly establishes that respondent was guilty of a failure to cooperate with the disciplinary authorities, in violation of RPC 8.1(b). Similarly, the record is devoid of any evidence to suggest that respondent fabricated or falsified evidence, in violation of RPC 3.4(b). The Board, therefore, recommends that both of those charges be dismissed.

The only issue remaining then is the appropriate discipline for respondent's violations of RPC 1.1(a), RPC 1.3, RPC 3.3(a)(1), RPC 8.4(c), and RPC 8.4(d). Respondent's misconduct was both inexcusable and egregious. Not only did he grossly neglect his responsibilities to his client, but he also lied to his client to conceal his neglect. More troublesome, however, is respondent's conduct towards Judge Mulhern. Respondent lied to a court, ostensibly to obtain a further stay of that court's sentence. His conduct, therefore, was not only dishonest, but also prejudicial to the administration of justice. Such conduct can be tolerated of no one — most especially, however, of an attorney, who is duty-bound

to uphold the integrity of the judicial system. Similar misconduct by attorneys has been met with a period of suspension.

In In re Johnson, 102 N.J. 504 (1986), the Court suspended for three months an attorney who contrived an excuse to delay a trial. The attorney lied to the trial court that his associate was ill in order to obtain an adjournment. After the attorney learned that the judge had called his office to determine if the associate was indeed ill, the attorney met with the associate to discuss the next course of action. Thereafter, he lied to the judge about the time, nature and length of his conference with the associate, in an attempt to avoid responsibility for his conduct. His original lack of candor to the court was, thus, compounded by his attempt to cover up his lie. In imposing a three-month suspension, the Court concluded that the ethics breach was grave because it had intruded directly into the trial of a litigated case. Although the Court considered that respondent's motive was confined to obtaining an adjournment and not to achieving something more nefarious or subversive to the administration of justice, it reasoned that stern sanction was appropriate because of the destructive potential of such conduct to the justice system.

More recently, the Court suspended for three months an attorney who lied in a certification to the court and who fraudulently conveyed property to his mother in order to avoid child support obligations. In re Kernan, 118 N.J. 366 (1990). In that case, the attorney represented himself in a post-judgment proceeding brought by his ex-wife for support arrearages,

distribution of property and counsel fees. Four days before the hearing, the attorney submitted to the court a case information statement listing his assets. which included an improved lot. The day before the hearing, however, the attorney transferred the lot to his mother by quitclaim deed and for no consideration, to avoid distribution of that asset. The attorney did not inform the court, opposing counsel or his ex-wife of the transfer. The attorney also failed to amend his certification of assets, previously submitted to the court as part of his information statement. The Court took into account that the attorney had received a prior reprimand for a conflict of interest situation and imposed a three-month suspension for the totality of his conduct. The Court ruled that the attorney's acts had imperiled the court's ability to determine the truth of the matter and to reach a just result.

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

The Board finds no mitigating factors to be present in this matter. On the other hand, and in aggravation, respondent was previously the subject of a prior public reprimand for conduct almost identical to that present in this case. Here, however, respondent compounded his misconduct by misrepresenting the status of the case to both his client and the court. The Board is, therefore, of the unanimous view that respondent should receive a six-month suspension for his violations of RPC 1.1(a), RPC 1.3, RPC 3.3(a)(1), RPC 8.4(c) and RPC 8.4(d). In addition, given respondent's claims of physical disability, as well as the DEC's and the Board's previously expressed concerns as to respondent's psychological well-being, respondent should be required to submit to a medical and psychiatric exam prior to reinstatement in order to demonstrate his fitness to return to the practice of law. Respondent should also complete the core courses of the ICLE Skills and Methods Program. Furthermore, upon reinstatement, respondent should be required to practice under the supervision of a proctor for a period of two years. One member did not participate.

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

Dated: 2/15/1994

By: Raymond R. Trombadore
Raymond R. Trombadore
Chair
Disciplinary Review Board