SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 01-060

IN THE MATTER OF

LAWRENCE J. McGIVNEY

AN ATTORNEY AT LAW

Decision

Argued: May 17, 2001

Decided: September 18, 2001

Brian D. Gillett appeared on behalf of the Office of Attorney Ethics.

Robert J. Gilson appeared on behalf of respondent.

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

This matter was before us based upon a disciplinary stipulation between the Office of Attorney Ethics (OAE) and respondent.

Respondent was admitted to the New Jersey bar in 1990 and has no prior disciplinary history. At the relevant time, he was employed as an assistant prosecutor in the Mercer County Prosecutor's Office, in Trenton. The stipulated facts are as follows:

> On or about July 12, 1999, the Honorable Linda R. Feinberg, A.J.S.C. wrote to the Office of Attorney Ethics concerning the conduct of Lawrence J. McGivney, Esq. (Exhibit 1).

1. On or about June 30, 1999, respondent, an Assistant Prosecutor in the Mercer County Prosecutor's Office, was assigned to the Special Investigations Unit (SIU). Part of SIU's responsibilities included making applications for electronic surveillance under N.J.S.A. 2A:156A-1 et seq. ('New Jersey Wiretapping and Electronic Surveillance Control Act,' hereinafter the 'Wiretap Act') as well as prosecuting cases resulting from those applications, as well as narcotics and gambling cases. Respondent, an Assistant Prosecutor since 1990, was assigned to that unit in 1996, serving under Assistant Prosecutor Timothy J. McNamara, who was the supervisor of SIU at all relevant times.

2. On or about June 30, 1999, the Honorable Linda R. Feinberg, A.J.S.C., was one of seven judges authorized by the Chief Justice of the Supreme Court to receive applications for and to enter Orders authorizing interceptions of wire and or oral communications under the Wiretap Act. In that capacity, Judge Feinberg reviewed and, when appropriate, signed wiretap applications submitted by law enforcement agencies, including the Prosecutor's Office in the counties of Mercer, Burlington, Warren, Sussex, and Hunterdon, as well as the Office of Attorney General, Division of Criminal Justice.

3. In March 1999, Judge Feinberg signed an Order, authorizing interception of communications with regard to an investigation conducted by the Special Investigations Unit of the Mercer County Prosecutor's Office. Later, the Court also signed arrest warrants for certain individuals who had been named in previous search warrants. Several of those individuals were arrested on or about Tuesday, June 29, 1999.

4. On or about June 30, 1999, respondent was given a Petition in Support of an Application to Disclose Electronic and Oral Communications and an Order to Disclose Electronic Communications by his supervisor, Timothy J. McNamara, and told to deliver same to Judge Feinberg.[1] The Petition, in the

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[1] Pursuant to N.J.S.A. 156A-1 et seq., the Petition and the Order remain under seal, and thus confidential.

form of an affidavit, consisted of seven pages. In wiretap matters, the Mercer County Prosecutor's Office obtained Orders to Disclose from Judge Feinberg, pursuant to N.J.S.A. 2A:156-17 (c) in order to reveal confidential wiretap information to a Superior Court Judge not authorized to review wiretaps for use at arraignment and bail hearings as well as to reveal such information to defense attorneys.

5. On the afternoon of June 30, 1999, respondent appeared at Judge Feinberg's chambers for the purpose of delivering the Petition. Respondent was directed to the Judge's library and told that the Judge would see him shortly. While waiting, respondent made a quick review of the papers and discovered that McNamara had neglected to affix his signature to the affidavit in support of the Application. Respondent signed McNamara's name to the affidavit and thereafter affixed his own signature to the jurat. (Exhibit 2). Immediately thereafter, the Petition was presented to Judge Feinberg.

6. In reliance upon the Petition with the purported signature of Timothy McNamara, Judge Feinberg signed the Order to Disclose on June 30, 1999. Pursuant to that Order, the Honorable Paul Innes, J.S.C. was to preside over the July 1, 1999 arraignments and bail hearings for those defendants arrested on June 29, 1999.

7. After the Order was signed by Judge Feinberg, respondent returned the documents to McNamara and briefly advised him of the circumstances surrounding the Order's execution.

8. On the morning of Thursday, July 1, 1999, respondent returned to work and informed McNamara that he intended to clarify the signing of the Petition presented to the Court the previous day. After re-printing the identical Petition and witnessing McNamara's signature, respondent contacted Judge Feinberg's chambers requesting an opportunity to deliver a new Petition in Support of an Application to Disclose Electronic and Oral Communications. Upon his arrival at the Judge's chambers that morning, Judge Feinberg inquired as to why a new petition was being offered. Respondent informed the Judge that the Petition offered to the Judge the previous day did not bear the true

signature of Assistant Prosecutor McNamara. Respondent indicated that he had signed Mr. McNamara's signature on the Petition without McNamara's knowledge or authorization and without thinking it through, then improperly notarized the document.

9. Respondent then presented Judge Feinberg with the new petition, duly signed by Timothy J. McNamara, dated July 1, 1999, which respondent had notarized. (Exhibit 3). A new Order was prepared which Judge Feinberg signed on July 1, 1999.

10. Thereafter, Judge Paul Innes presided over the bail hearing and arraignments of those arrested on June 30, 1999.

11. On July 2, 1999, respondent provided the Prosecutor's Office First Assistant with a written explanation, wherein he acknowledged his error in presenting the original Petition to Judge Feinberg. (Exhibit 4).

12. As a result of respondent's actions, respondent has been disciplined by the Mercer County Prosecutor, in that he has been verbally admonished by the Prosecutor, removed from the SIU, and had a letter of reprimand placed in his personnel file. (Exhibit 5).

13. The respondent and the OAE agree that the respondent's conduct, in connection with the transaction on June 30, 1999, in which he signed another's name without authorization and then affixed his jurat to a signature that he knew he had not personally witness [sic], and presented that affidavit to a judge, constitutes a failure to disclose a material fact to a tribunal with knowledge that the tribunal may tend to be misled by such failure to disclose, in violation of RPC 3.3 (a)(5).

14. It is the position of the OAE that respondent's conduct in connection with the same transaction constitutes engaging in conduct involving dishonesty, fraud, deceit or misrepresentation, in violation of RPC 8.4 (c), knowingly making a false statement of fact to a tribunal, in violation of RPC 3.3 (a) (1), and engaging in conduct that is prejudicial to

> the administration of justice, in violation of RPC 8.4(d). Respondent denies that his conduct as set forth in the stipulation and the attached exhibits violates RPC 8.4(c), RPC 3.3(a)(1) or RPC 8.4(d). Respondent shall have the right to argue against said ethics violations. Respondent believes that he exercised poor judgment due to fatigue and illness. The OAE disputes the claim and does not believe that it excuses his conduct.

The OAE recommended the imposition of a reprimand for respondent's misconduct.

* * *

Following a de novo review of the record, we find that there is clear and convincing evidence that respondent's conduct was unethical.

Respondent stipulated his misconduct and a violation of RPC 3.3 (a) (5). He denied however, that he had violated any other Rules of Professional Conduct. In mitigation, he contended that he had acted out of fatigue and sickness.

Our review of the record yields a conclusion different from that of the OAE. With respect to RPC 3.3(a)(1) (failure to disclose to the tribunal a material fact with knowledge that the tribunal may tend to be misled by such failure), respondent's purpose in signing his superior's signature was not to mislead the judge. After all, Assistant Prosecutor Timothy J. McNamara had approved the application, but had neglected to sign it. The record is clear that respondent was rightfully before the judge and with McNamara's knowledge. Apparently, McNamara's failure to sign the affidavit was an oversight. Thus, we do not find that this signing was a violation of RPC 3.3(a)(1). Nor do we find a violation of RPC 8.4

(c) (misrepresentation). Here, respondent had McNamara's approval for his appearance, did not hatch a scheme and did not benefit from signing McNamara's name. To the contrary, respondent explained that he was embarrassed when he discovered the unsigned affidavit and was afraid to waste the court's time by going back to his office to obtain McNamara's signature, since the judge had left the bench specifically to review his application. His actions were, therefore, motivated by the pressure of the circumstances, rather than venality. For the same reasons, we do not find that respondent's conduct was prejudicial to the administration of justice, in violation of RPC 8.4(d). We point out, however, that the result would have been different if the original order's infirmity had come to light after the arrests and arraignments in the underlying matters. In that event, the criminal process would have been severely tainted. However, no disclosure of confidential wiretap information resulted from respondent's actions.

In light of the foregoing, we conclude that respondent violated only RPC 3.3(a) (5) (failure to disclose to a tribunal a material fact with knowledge that the tribunal may tend to be misled by such failure.) In mitigation, we considered that this is respondent's first brush with the disciplinary system. Importantly, respondent also "came clean" and turned himself in of his own volition, within one day of his misconduct. In addition, he was reprimanded by the Mercer County Prosecutor's Office and was transferred from his unit at the Mercer County Prosecutor's Office.

Cases involving a single instance of signing another person's name on a document and/or improperly executing a jurat, without more, ordinarily warrant discipline ranging

from an admonition to a reprimand. See, e.g., In the Matter of Stephen H. Rosen, (April 29, 1996) (admonition imposed where the attorney witnessed and notarized the signature of an individual on closing documents signed outside of his presence and also failed to cooperate with the district ethics committee's investigation of the case); In the Matter of Robert Simons, (July 28, 1998) (admonition imposed where the attorney signed a friend's name on an affidavit, notarized the "signature" and then submitted that document to a court); In re Coughlin, 91 N.J. 374 (1982) (reprimand imposed where the attorney, who had been told by a real estate agent that the grantor had signed the deed to a transaction in her presence, later acknowledged the deed and executed the jurat on the affidavit of consideration, out of the presence of the grantor; mitigating factors included the attorney's admission of wrongdoing, absence of harm and the attorney's lack of intent to benefit); and In re Conti, 75 N.J. 114 (1977) (public reprimand imposed where the attorney's clients told his secretary that it was impossible for them to come to the attorney's office to sign a deed and instructed her to do "whatever had to be done" to record the deed; the attorney had the secretary sign the clients' names on the deed, then witnessed the signatures and took the acknowledgment; in mitigation, the Court considered that the clients were anxious to conclude the transaction and that the attorney did not act out of self-benefit).

Comparing respondent's misconduct to that of the above attorneys, a six-member majority determined to impose an admonition for respondent's misconduct, finding that his action was motivated by the pressure of the moment, rather than venality, and taking into consideration respondent's quick acknowledgement of his wrongdoing. Two members voted

to dismiss the matter, reasoning that respondent's momentary lack of judgment was sufficiently explained by the exigent circumstances here and that the special mitigating factors present in this matter justify not imposing discipline for this respondent. One member did not participate.

We also determined to require respondent to reimburse the Disciplinary Oversight Committee for administrative expenses.

Dated: 9/18/01

ROCKY L. PETERSON
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

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Disposition: Admonition

Members	Disbar	Suspension	Reprimand	Admonition	Dismiss	Disqualified	Did not Participate
Peterson				X			
Maudsley					X		
Boylan							X
Brody				X			
Lolla				X			
O'Shaughnessy				X			
Pashman				X			
Schwartz					X		
Wissinger				X			
Total:				6	2		1

Robyn M. Hill 10/29/01
Robyn M. Hill
Chief Counsel