SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket Nos. DRB 94-191 and
DRB 95-162

IN THE MATTER OF

EDWARD J. GAFFNEY, JR.

AN ATTORNEY AT LAW

Decision of the
Disciplinary Review Board

Argued: July 20, 1994 (DRB 94-191)
and October 26, 1995 (DRB 94-191 and DRB 95-162)

Decided: April 22, 1996

Mark J. Friedman and James D. Bride appeared on behalf of the District X Ethics Committee.

Charles V. Bonin appeared on behalf of respondent.

These matters were before the Board based upon recommendations for discipline filed by the District X Ethics Committee (DEC). The Board originally heard the two matters under Docket No. DRB 94-191 at its July 20, 1994 meeting. At that time, the Board determined to carry the disposition of DRB 94-191 until the completion of the proceedings in the nine matters consolidated under Docket No. DRB 95-162, which were, at that time, pending before the DEC. These nine matters were heard by Special Master Suzanne Low, Esq.

By letter dated June 29, 1995, the Board adjourned and remanded DRB 95-162 for the limited purpose of allowing respondent to introduce character testimony by three former clients. A hearing for that purpose was held before the Special Master on September 8, 1995, and a supplemental report was filed shortly thereafter.

Prior to the October Board hearing, respondent, through counsel, filed a motion for recusal of five of the nine current Board members from hearing this case, based on the fact that those members' names had appeared on a witness list in a federal lawsuit in which respondent is a party. The Board unanimously denied the motion.

The complaints in the eleven total matters charged respondent with numerous instances of misconduct. For the sake of clarity, the specific charges are set forth within the recitation of the facts in each matter.

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Respondent was admitted to the New Jersey bar in 1989. He formerly practiced law in Sussex County. On June 22, 1993, the Court issued an order publicly reprimanding him for misconduct amounting to gross neglect, lack of diligence, failure to communicate, failure to expedite litigation and failure to cooperate with the DEC. The Court further ordered that respondent be examined by a psychiatrist approved by the Office of Attorney Ethics (OAE) and that he practice law under the supervision of a proctor until further order of the Court.

On March 8, 1994, upon motion of the OAE, the Court temporarily suspended respondent based upon the abrupt abandonment of his law practice and a preliminary finding of gross neglect in many client matters.

By order dated November 1, 1994, respondent was suspended for a period of two years and six months for misconduct in a number of matters, including gross neglect, lack of diligence, failure to communicate, failure to treat with courtesy and consideration all persons involved in the legal process, false statement of material fact to a tribunal, misrepresentation and conduct prejudicial to the administration of justice. The Court further ordered that, prior to reinstatement, respondent take the ICLE Skills Training Course core courses and submit psychiatric and medical proof of his fitness to practice law. Lastly, the Court ordered that, upon reinstatement, respondent practice under the guidance of a proctor for two years. In re Gaffney, 138 N.J. 86 (1994). Respondent remains under suspension at this time.

A. Docket No. DRB 95-162

I. The Dana Matter (District Docket No. X-94-27E)

Respondent initiated a proceeding against the North Warren Regional High School District, Warren County, before the Office of Administrative Law (OAL). The grievant herein, Craig U. Dana, Esq., represented the defendant during the proceeding before the Honorable James A. Ospenson, A.L.J. On September 11, 1992, respondent and Mr. Dana attended a prehearing conference. At the conference, hearing dates of January 19, 20 and 22, 1993 were set. Those dates were confirmed in a prehearing order.

Respondent failed to appear at the hearing on January 19, 1993. He gave no prior notice to Mr. Dana or the court. Instead,

he telephoned the court at 8:25, on the morning of January 19, stating that he was involved in a continuing criminal trial and could not appear. Respondent also did not appear on January 20, 1993. He did not contact Mr. Dana or the court on that date to advise of his non-appearance.

Respondent did appear before Judge Ospenson on January 22, 1993. Respondent was, however, unable to proceed because he had another OAL hearing scheduled for the same date – a special education case that allegedly took precedence over the matter before Judge Ospenson. (The hearing before Judge Ospenson was eventually held in March 1993).

On January 29, 1993, Mr. Dana moved to dismiss the matter or to impose costs against respondent for his failure to appear without prior notice. By order dated May 14, 1993, Judge Ospenson recommended that respondent be sanctioned, calling his conduct "reprehensible." Exhibit C-1, Exhibit A. On July 6, 1993, the Director of the OAL imposed a $1,000 sanction for costs against respondent, which he did not pay.

Respondent did not contest the allegations against him, but offered testimony by way of explanation. Respondent testified that, on January 18, 1993, he was involved in a criminal proceeding before the Honorable John J. Grossi, Jr., J.S.C. It was his belief that a plea would be entered on that date. He learned late in the afternoon on that date that there was no plea and that the jury trial would go forward the following day. Respondent contended that his request for an adjournment was denied. As noted above,

respondent contacted the court on the morning of January 19, 1993. It was his belief that Judge Ospenson and Judge Grossi discussed the scheduling problem on that date. (The record does not reveal if his belief was correct; there is, however, no reference to any such conversation in Judge Ospenson's May 14, 1993 order. Exhibit C-1, Exhibit A). Respondent did not appear on January 20, 1993 because of the criminal trial. He contacted neither Mr. Dana nor the court. Respondent believed that the matter before Judge Ospenson had been adjourned after the latter spoke with Judge Grossi; he, therefore, did not see any need to call the court.

With regard to the January 22, 1993 appearance, respondent admitted that he was negligent in not realizing that the two trials were scheduled for the same date.

Respondent admitted that he did not pay the $1,000 sanction for lack of funds. He claimed that he would pay it as soon as he is able.

The complaint charged respondent with violations of RPC 3.4(c) (knowingly disobeying an obligation under the rules of a tribunal), RPC 3.5(c) (engaging in conduct intended to disrupt a tribunal) and RPC 8.4(d) (engaging in conduct prejudicial to the administration of justice). The Special Master found that respondent had violated each of the charged rules.

II. The Wiley Matter (District Docket No. X-93-31E)

In or about October 1990, Josephine King retained respondent to represent her in a matter arising from an incident at Kittatiny

Regional High School. The grievant herein, Stephen B. Wiley, Esq., represented the defendant. Mr. Wiley filed an answer and, on October 13, 1992, filed a counterclaim for malicious prosecution. Respondent failed to supply answers to interrogatories propounded by Mr. Wiley and failed to file an answer to the counterclaim. As a result, default was entered on the counterclaim on December 4, 1992.

In March 1993, Ms. King's complaint was dismissed without prejudice, based on respondent's failure to provide answers to the interrogatories. Thereafter, Mr. Wiley filed a motion for dismissal with prejudice, based on respondent's continued failure to give answers to the interrogatories. That motion, as well as a proof hearing on the counterclaim, came before the court on July 23, 1993.

Respondent appeared at the July 23 proof hearing and, without prior notice to Mr. Wiley, presented answers to the interrogatories and a motion to vacate the default. Respondent filed a certification in support of his motion, stating that the failure to file an answer to the counterclaim was the result of his own "gross negligence." Exhibit C-9.

In August 1993, a hearing was held on respondent's motion to vacate the default. The judge granted respondent's motion to vacate the default on the condition that Ms. King pay Mr. Wiley's attorney fees and that the answer to the counterclaim be filed within ten days. Furthermore, Ms. King was to attempt to obtain another attorney within two weeks of the date of the order. When

respondent did not file an answer to the counterclaim, default was entered on September 29, 1993. By order dated October 12, 1993, Ms. King was again directed to pay Mr. Wiley's attorney fees in the amount of $4,529, before proceeding with the complaint or defending the counterclaim. The record does not clearly reveal what occurred thereafter. The matter was administratively dismissed in December 1993.

The complaint charged respondent with violation of RPC 1.1(a) and (b) (gross neglect and pattern of neglect), RPC 1.3 (lack of diligence) and RPC 1.16(a)(2) (failure to withdraw when the lawyer's physical or mental condition materially impairs his ability to represent the client). The last allegation was based on respondent's acceptance of the representation knowing that he suffered from carpal tunnel syndrome, which, according to respondent, compromised his ability to practice law.

The Special Master found that respondent had violated RPC 1.1(a) and (b) and RPC 1.3. She made no reference to the alleged violation of RPC 1.16 (a)(2).

III. The Grau Matter (District Docket No. X-94-26E)

On February 19, 1992, Nancy Grau retained respondent on a contingent fee basis in connection with a defamation proceeding against a local television station, arising from an August 1990 broadcast. Ms. Grau gave respondent a videotape of the television broadcast in question and unspecified documents.

During a telephone conversation between respondent and Ms. Grau in May or June 1992, during which respondent was watching the videotape, he assured her that she had a good case against the television station. After September 1992, Ms. Grau made numerous attempts to contact respondent, leaving messages with his secretary and on his answering machine, to no avail. She ultimately discovered that his office was empty.

Respondent took no action on Ms. Grau's behalf and admitted during the DEC hearing that he was negligent. He further admitted that he failed to communicate with her after September 1992, because of his own health problems. Respondent explained that he had not done sufficient research when he told Ms. Grau that she had a good case for defamation. He subsequently determined that no cause of action existed, but failed to so advise Ms. Grau. Respondent testified that, at the time, he was in a "total crisis," attempting to file documents and to transfer cases to other attorneys (1T88).[1] Respondent added that Ms. Grau's case did not take priority, in terms of communicating with her.

With regard to Ms. Grau's file, respondent testified that he was forced to vacate his office due to a foreclosure action. During the move, some files, including Ms. Grau's, were inadvertently thrown away. He still had possession of her videotape, however.

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[1] 1T refers to the transcript of the hearing before the Special Master on January 9, 1995.

The complaint charged respondent with violations of RPC 1.4(a) (failure to communicate), RPC 1.16(d) (failure to return client property) and RPC 1.1(b) (pattern of neglect).

The Special Master determined that respondent had violated RPC 1.4(a) and also RPC 1.16(d), by failing to return Ms. Grau's videotape.

IV. The Dice Matter (District Docket No. X-93-42E)

In February or March 1992, Frank Dice retained respondent on a contingent fee basis, in connection with a civil rights action against an unspecified sheriff's office, based on the denial of medical assistance to Mr. Dice. Mr. Dice appeared in court on December 27, 1991, for reasons not revealed in the record and not relevant to the allegations against respondent. According to Mr. Dice, he suffers from a heart condition and, during the December 27, 1991 court appearance, the judge ordered that he be transported directly to a hospital. According to Mr. Dice, that action was delayed, his medication was denied to him and his treatment was not appropriate for someone in his physical condition.

In March 1992, Mr. Dice gave respondent $120 for the filing fee. The two had several subsequent meetings. During one meeting, respondent stated that he had filed the complaint. Respondent showed Mr. Dice a copy of the complaint without a "filed" stamp. Respondent stated that the stamped copy was in another file. In fact, respondent had not filed the complaint.

Mr. Dice was aware from reports in the media that respondent had had problems with the courts, with the sheriff's office and with his health. Mr. Dice, thus, became concerned about whether his complaint had been filed. Thereafter, for approximately ten months, Mr. Dice attempted to contact respondent. He left numerous messages on respondent's answering machine. Respondent did not return his calls.

At an undisclosed time, Mr. Dice saw in a newspaper the name of an attorney handling cases in respondent's behalf. Mr. Dice contacted that attorney and learned that respondent had not filed his complaint. Mr. Dice had another attorney file a complaint in late April 1994, apparently without the benefit of Mr. Dice's file. The statute of limitations, however had already run. As of the DEC hearing, Mr. Dice had been unable to retain counsel to handle his case and was proceeding pro se.

On an undisclosed date in 1993, Mr. Dice contacted the DEC to attempt to retrieve his file. The record does not reveal what attempts were made by the DEC to retrieve the file. Respondent did not return his file or the $120 Mr. Dice had given him for the filing fee. On the date of the DEC hearing, January 9, 1995, respondent disclosed to Mr. Dice the name of the law firm that had his file.

The complaint charged respondent with violations of RPC 1.1 (neglect), RPC 1.4 (failure to communicate), RPC 1.16(d) (failure to return client property) and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

The Special Master determined that respondent had violated RPC 1.1, RPC 1.4, RPC 1.16(d) and RPC 8.4(c).

V. The Stevens Matter (District Docket No. X-93-33E)

The grievant, Sandra Stevens, was unable to testify at the DEC hearing because she has a handicapped child and it would have been an undue hardship on her. Although respondent appeared to contest some of the allegations, he agreed to stipulate that he failed to communicate with Ms. Stevens and failed to pursue the matter diligently. The presenter withdrew the remaining allegation, failure to demonstrate candor toward a tribunal. The facts, as set forth in the complaint, are as follows:

In or about December 1991, Ms. Stevens retained respondent in connection with a proceeding against the Monmouth County Board of Education. Sometime before January 10, 1992, the date the statute of limitations would run, respondent requested that Ms. Stevens send him funds for the filing fee, which she forwarded by check dated January 6, 1992. Ms. Stevens had asked respondent to call her after he received the funds so they could discuss arrangements for her to sign documents. Respondent did in fact call Ms. Stevens, who was not at home.

Thereafter, despite several calls with respondent and with his secretary about scheduling an appointment, Ms. Stevens had no further contact with respondent.

Respondent did, in fact, file a complaint in Ms. Stevens's behalf in federal court on an undisclosed date. He failed,

however, to attend two scheduling conferences, the dates of which are not revealed in the record. Respondent failed on both occasions to notify the magistrate that he would not appear. On an undisclosed date, the magistrate telephoned respondent's office, but heard a recorded message that the office was closed. By letter dated March 9, 1993, the magistrate directed respondent to submit a certification explaining his non-appearance. Respondent failed to comply with the court's directive. By letter dated August 31, 1993, the magistrate instructed respondent to communicate his intentions regarding the case no later than September 10, 1993. In reply, respondent sent a "fax" with dates when he would be available. A telephone scheduling conference was set for September 28, 1993. When the magistrate called on that date, respondent failed to answer.

The complaint charged respondent with violations of RPC 1.1 (neglect), RPC 1.3 (lack of diligence) and RPC 1.4 (failure to communicate). The withdrawn allegation of lack of candor toward a tribunal, RPC 3.3, was erroneously charged as a violation of RPC 8.4(d) (conduct prejudicial to the administration of justice).

The Special Master determined that respondent was guilty of the charged violations of RPC 1.1, RPC 1.3, RPC 1.4 and, erroneously, RPC 8.4(d). (As noted above, this last allegation had been withdrawn by the presenter).

VI. The Walker Matter (District Docket No. X-93-39E)

Edward Walker retained respondent in September 1992 in connection with a criminal matter. Mr. Walker was convicted in January 1993. By letters dated February 26 and April 7, 1993, Mr. Walker requested that respondent return his file to him to enable him to proceed pro se in an appeal. Respondent did not turn over the file.

Mr. Walker is incarcerated and, thus, did not testify at the DEC hearing. Respondent testified that Mr. Walker had most of the discovery materials, but that he did not return the file, as requested by his client. Respondent explained that Mr. Walker's file and several others (including, as noted above, the Grau file) were accidentally thrown away when respondent was forced to vacate his office during a foreclosure proceeding.

The complaint charged respondent with a violation of RPC 1.16(d).

In light of the lack of testimony by grievant and of respondent's testimony that the file was inadvertently thrown away, the Special Master was unable to find clear and convincing evidence of misconduct and recommended the dismissal of this matter.

VII. The Duane Matter (District Docket No. X-93-23E)

On November 4, 1991, Karen Ann Duane retained respondent in connection with a proceeding before the Division of Civil Rights (DCR). A fact-finding hearing was scheduled for January 27, 1992. Respondent's secretary instructed Ms. Duane to come to his office

one hour early so that Ms. Duane and respondent could review her case. Ms. Duane arrived at his office, as instructed, and waited approximately one hour for him, eventually meeting with respondent for two or three minutes. They did not discuss her case during that time. Respondent was, thus, unprepared at the hearing and made certain inaccurate statements.

In late February or early March 1992, Ms. Duane called respondent about the status of her case. He informed her that he had not yet received a determination and would send a letter to the DCR. Subsequently, in May 1992, Ms. Duane received a call from an individual from the DCR stating that because that office had been unable to get information from respondent, it needed to obtain information directly from Ms. Duane. By letter dated July 31, 1992, Ms. Duane requested status information from respondent. Respondent called Ms. Duane back on October 18 or 19, 1992 and assured her that he would look into the status of the case. Ms. Duane received no further information. By letter dated February 9, 1993, she discharged respondent from representation. She also advised the DCR that respondent no longer represented her.

In late March or early April 1993, respondent contacted Ms. Duane to inform her that he had received an opinion from the DCR finding probable cause for her to proceed with a complaint. During a meeting in early April, respondent explained to Ms. Duane that he had been having personal problems, but that he was now able to proceed with her case. Ms. Duane rehired respondent. She signed a retainer agreement on May 26, 1993 and reviewed a complaint

respondent had prepared. Respondent stated that he would file the complaint the next day. Thereafter, on June 29 and 30 and July 6, 1993, Ms. Duane left messages on respondent's answering machine, requesting information on her case. Respondent did not reply. On July 8, 1993, Ms. Duane reached respondent and asked him if the defendant had been served. Respondent stated that he had no information and would go to court the next day, get the complaint and serve the defendant himself. As of that date, Ms. Duane was under the impression that a complaint had been filed. On July 14, 1993, Ms. Duane contacted respondent, who told her that he was waiting for confirmation that the complaint had been served on the defendant. Later that day, Ms. Duane telephoned the court and learned that no complaint had been filed. On July 15, 1993, she telephoned respondent, only to learn that his telephone had been disconnected. That same day, she sent a letter to respondent, again discharging him.

In the Fall of 1993, Ms. Duane saw respondent in a luncheonette. He apologized for his conduct and stated that he would refer her to another attorney. Ms. Duane had already obtained new counsel. As of the date of the DEC hearing, her matter was still pending.

Respondent testified that he recalled one conversation with Ms. Duane, during which he told her that he had filed a complaint in her behalf. He further testified that, at the time, he had been under the impression that he had indeed done so. Respondent,

however, took no steps to confirm his belief that he had filed the complaint.

The ethics complaint charged respondent with violations of RPC 1.1(a) and (b) (gross neglect and pattern of neglect), RPC 1.3 (lack of diligence), RPC 1.4 (failure to communicate) and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

The Special Master determined that he had violated RPC 1.1 (a) and (b), RPC 1.3, RPC 1.4 and RPC 8.4(c).

VIII. The Hanf Matter (District Docket No. X-94-04E)

In October 1992, Susan Hanf retained respondent to represent her and her son before the OAL. She paid him $650 during the course of the representation. The matter was scheduled for a hearing in January 1993. Respondent telephoned Ms. Hanf at 6:30 or 7:00 a.m. on the scheduled hearing date in the matter and informed her that he was unable to appear because of a scheduling conflict. Respondent apparently did not notify opposing counsel because, according to Ms. Hanf, the opposing party in the matter appeared at the hearing. On the second hearing date, respondent informed the Hanfs that, for an unspecified reason, they did not have to appear. Again, the opposing party appeared. Respondent appeared with the Hanfs on the third scheduled date and the hearing proceeded. The hearing lasted for four or five days. (Although she was uncertain, Ms. Hanf believed that respondent had failed to appear on an additional date).

In March 1993, at the close of the hearing, the attorneys were directed to file summary briefs. One or two days after the hearing, the Hanfs met with respondent to review the record. Thereafter, Ms. Hanf left eight to ten messages on respondent's answering machine and visited his office twice. Respondent did not return her calls and no one was present in his office on either occasion. The Hanfs had no further contact with respondent after their March 1993 meeting. Respondent did not file the brief and did not return the $650 to the Hanfs.

Respondent admitted that Ms. Hanf's testimony was accurate and that he was guilty of the misconduct charged in the complaint in this matter: violations of RPC 1.1 (a) and (b) (gross neglect and pattern of neglect; the latter allegation was based on earlier findings of gross neglect by respondent), RPC 1.3 (lack of diligence) and RPC 1.4(a) and (b) (failure to communicate).

The Special Master found that respondent had violated each of the charged RPCs.

IX. The Allegretta Matter (District Docket No. X-94-05E)

In November or December 1991, Frank Allegretta retained respondent to represent him in a matter against the Hunterdon Developmental Center. Mr. Allegretta's son, who has autism and mental retardation and was a resident at the center, had allegedly been the victim of attacks at that facility. Although respondent told Mr. Allegretta that he did not need to pay him, Mr. Allegretta testified that he gave respondent $800 out of gratitude.

The record does not clearly reveal what occurred in this matter. Respondent initiated a proceeding in United States District Court. Apparently, a number of meetings or hearings were held with school officials and a representative of the Attorney General's office. The complaint was eventually dismissed without prejudice for insufficient service of process.

At some point, Mr. Allegretta became dissatisfied with respondent's representation and sought the return of his file. To that end, Mr. Allegretta left a number of messages on respondent's answering machine. None was returned. Mr. Allegretta also sent three certified letters to respondent, dated January 6, 1992, January 23, 1992 and December 20, 1993, concerning the status of the case. In one, Mr. Allegretta asked for the return of $300. The letters went unanswered, although it is not certain that respondent received them. Eventually, Mr. Allegretta filed a grievance with the DEC. Subsequently, respondent returned his file. As of the DEC hearing, Mr. Allegretta had been unable to retain another attorney.

Respondent admitted that the allegations against him were true.

The complaint charged respondent with violations of RPC 1.4(a) and (b) (failure to communicate) and RPC 1.16(d) (failure to return client property). (The latter was originally charged as a violation of RPC 1.15, but was amended during the DEC hearing). The presenter withdrew a charged violation of RPC 1.1(b) because

there were no allegations regarding respondent's substantive representation of Mr. Allegretta.

The Special Master determined that respondent violated RPC 1.4 and RPC 1.16.

The Special Master also determined that, when the above matters were considered in concert, it was obvious that respondent displayed a pattern of neglect of client matters, in violation of RPC 1.1(b).

* * *

Respondent was charged in the Dana, Grau, Hanf and Allegretta matters with failure to cooperate with the DEC, in violation of RPC 8.1(b). (The applicable rule is mistakenly mentioned several times in the record as RPC 8.4.) The Special Master found a RPC 8.1(b) violation in each of these four matters. Respondent was not specifically charged with failure to cooperate in the remaining five matters. There is no dispute, however, and the record is clear that he did not cooperate. He also failed to file an answer to the complaints.

With regard to his failure to cooperate with the DEC, respondent stated:

> A. Because I choose not to cooperate with the legal community. I present my case directly to the Disciplinary Review Board and the Supreme Court of New Jersey.
>
> Q. What is the authority for that refusal?

A. The authority, mine, is that my case, particularly the prior complaints that have been filed against me shows a clear taint on how these proceeding are being handled and how my case in particular has been handled. I have presented motions to have individuals recuse themselves that have refused to do so . . . .

. . . .

Q. Is there any statutory case law or court rule which provides that you do not have to cooperate with this Committee?

A. What it is is my objection, sir, to my due process rights being violated. That those proceedings have been tainted since the very beginning.

[1T43-45]

Respondent also referred to the DEC proceedings as a "witch hunt" (T46). Respondent failed to contact the DEC investigator/presenter to inform him that he would not be replying to the allegations against him.

At the close of the testimony by grievants, respondent sought to present testimony by several of his former clients as to his rehabilitative efforts, the nature of the work he does and his relationships with his clients. The Special Master declined to hear their testimony because they would not be testifying about any of the within matters.

As noted above, this matter was remanded by the Board to enable respondent to present the testimony of these witnesses. The transcript of that hearing and the Special Master's subsequent report have been made a part of the record. The testimony of each of the three clients was similar and referred to their satisfaction with respondent's services.

In her supplemental report, the Special Master did not find that the witnesses' testimony served to mitigate respondent's misconduct in the underlying matters.

During the hearings, respondent also mentioned his carpal tunnel syndrome on several occasions. He pointed out that there was information on that issue that was already a part of the record in other disciplinary proceedings and he did not need to "take up [the Special Master's] time with that" (1T187).

* * *

B. Docket No. DRB 94-191

At the beginning of the DEC hearing, respondent moved to disqualify the presenter and the panel chair, based upon a conflict of interest or bias. The motions were denied. (Respondent's motion to disqualify the presenter had earlier been considered by the DEC).

I. The Miller Matter (District Docket No. X-93-11E)

In October 1992, Elaine Miller retained respondent to represent her in connection with a wrongful discharge/discrimination claim. Respondent did not prepare a written retainer agreement. On October 16, 1992, respondent requested and received a $500 retainer. It was Ms. Miller's understanding that the $500 would cover all pre-litigation expenses, including filing the complaint, no matter how long the

case went on. If the matter were actually litigated, respondent would be paid on a contingent fee basis.

The record contains letters between respondent and Ms. Miller's employer, indicating that respondent was initially pursuing the matter. On December 9, 1992, Ms. Miller left a note with an unidentified woman in respondent's office, requesting that respondent prepare a complaint and that she be permitted to review it before filing. Ms. Miller's request was brought about by her awareness of typographical errors in previous correspondence from respondent to her former employer.

On December 17, 1992, Ms. Miller made an appointment to meet respondent at his office on December 24, 1992. Respondent had promised that he would have the complaint ready for Ms. Miller's review at that time. Although Ms. Miller and her husband appeared at respondent's office at the appointed time, respondent was not present. Ms. Miller testified that, while it was her recollection that respondent, at some time, placed a sign up at his office indicating that he had closed or changed location, she did not recall if the sign was posted on the day of her appointment (2T44-45).[2]

Thereafter, Ms. Miller made repeated attempts to contact respondent via telephone, to no avail. At some point, she heard a message on respondent's answering machine, stating that he was not taking on any new cases, but would continue to work on those cases

[2] 2T refers to the transcript of the hearing before the DEC on December 2, 1993.

he already had. Ms. Miller testified that she was aware that respondent had opened a new office and of its location. Although she drove by, presumably looking for respondent, she never saw a light on in the office. She continued to believe that respondent was still pursuing her case, despite the fact that she had no communication with respondent after the above mentioned December 17, 1992 conversation.

In February 1993, Ms. Miller retained new counsel, Laura N. Benenson-Bagdan, Esq. Despite efforts by Ms. Miller and Ms. Benenson-Bagdan to obtain the file and the return of the $500 retainer from respondent, neither was promptly provided. Ms. Miller filed an ethics grievance in April 1993. In or about May 1993, respondent left a message on her answering machine. It is unclear if Ms. Miller returned his call. Ultimately, respondent returned the file to her shortly before the December 2, 1993 DEC hearing. The record does not reveal if the $500 retainer was ever returned. As of the date of the DEC hearing, a civil complaint in the underlying matter was pending in Superior Court.

The complaint charged respondent with a violation of RPC 1.1(b) pattern of neglect), RPC 1.4 (failure to communicate), RPC 1.5(b) (failure to communicate in writing the basis of a fee) and RPC 1.16(a)(2) (failure to withdraw from representation).

The DEC determined that respondent had violated RPC 1.4 and RPC 1.5(b). The DEC did not find credible respondent's claim that carpal tunnel syndrome constituted a physical limitation on his ability to represent Ms. Miller. Therefore, the DEC concluded that

respondent's failure to advise Ms. Miller of his condition and to withdraw from the representation did not constitute a violation of RPC 1.16(a)(2).

II. The Hunterdon County Prosecutor Matter (District Docket No. X-93-006E)

As the DEC noted in its report, much of the factual dispute in this case is irrelevant to the allegation in the complaint that respondent's within conduct, coupled with earlier ethics transgressions, constituted a pattern of neglect, in violation of RPC 1.1(b). Specifically, the investigation and testimony before the DEC centered at times on a dispute between respondent and Assistant Prosecutor James Lankford about whether a certain witness should be called during a juvenile proceeding in which respondent represented the defendant. Respondent's demeanor toward Mr. Lankford was also a focal point, and is, similarly, not relevant to the within charge.

Briefly, the underlying facts are as follows:

Respondent undertook the representation of a juvenile in a proceeding in Hunterdon County. The hearing, originally scheduled for October 21, 1992, was adjourned until December 7, 1992. Because of calendar congestion, the case was not reached on December 7, 1992. and was rescheduled for January 11, 1993. Respondent did not appear. The case was rescheduled for February 1993. Respondent appeared on the trial date and explained that he had been in federal court on January 11, 1993. He stated that he

had called Family Case Management (FCM) regarding an adjournment. An individual from FCM was present when respondent made the statement about the adjournment at the February 1993 hearing. According to Mr. Lankford's testimony, that individual stated that no request for an adjournment had been made (2T59). Respondent also told the judge, at that time, that he suffers from carpal tunnel syndrome. In addition, he explained that his office could only be reached via "fax" (2T60).

Mr. Lankford testified that, between December 7, 1992 and January 11, 1993, he attempted to contact respondent via telephone, fifteen to twenty times, leaving five to seven messages on the answering machine and one message with an unidentified woman in respondent's office. Respondent did not reply. Mr. Lankford recalled hearing an answering machine message on approximately five occasions, stating that respondent had been injured and was not taking on any new cases until March 1993 (3T69).

Mr. Lankford's recollection was that all communications, oral and written, were addressed to respondent's office on High Street, in Newton, but he was uncertain (T63). It appears that he received no response to his letters. Mr. Lankford testified that he did discuss the case with respondent, although he did not specifically recall the dates of the conversations.

On the days when respondent appeared on the juvenile's behalf, he approached Mr. Lankford regarding a potential exculpatory witness. Respondent wanted Mr. Lankford to call the witness. Mr.

Lankford was aware that the police had interviewed the individual, who had no useful information to offer.

On February 22, 1993, First Assistant Prosecutor Steven C. Lember sent a letter to the Unauthorized Practice of Law Committee, based on his concern over Lankford's inability to contact respondent. The matter was referred to the DEC.

* * *

In connection with allegations raised during the hearing as to the location of his office and Mr. Lankford and Ms. Miller's inability to contact him, respondent indicated, in his reply to the grievance in the Hunterdon matter, that his office had relocated in or about October 1992. (In his reply to the Miller grievance, he stated that it was relocated in December 1992.) He claimed that a notice had been placed in the window of his former office and that a change of address had been filed with the post office. In fact, the change of address was filed twice, on January 27 and 28, 1993. He further informed the New Jerseys Lawyers' Fund for Client Protection of his new address, although the date cannot be determined. Respondent also indicated, in his reply in Miller, that a letter was sent to his clients informing them that, due to a medical condition, he was closing his office and offering them the opportunity to obtain new counsel. He admitted that he was wrong in not sending the letter to Ms. Miller.

Respondent testified briefly about several mitigating factors with regard to both matters. He noted that he had reduced his caseload from 125 to twenty-five cases and worked under the supervision of a proctor. In addition, he explained that, unless he was meeting with a client in his office, he worked out of his house and that his office telephone was connected to his house so that he could be contacted there.

Respondent noted here, as in previous matters before the DEC and the Board, that he suffers from carpal tunnel syndrome. With regard to that condition, respondent testified as follows:

> . . . the incident with the Newton Police occurred in September 1992[3] and got progressively worse, particularly in December and January of 1993 with the cold weather. The cold weather, I had an enormous amount of pain, and, in fact, had quite a bit of difficulty writing. And, in essence, I think it went beyond just physical. I think it went to -- it went to an ability -- my ability to be as aggressive, as forthright, as diligent as I was before.
>
> [2T98-99]

The complaint charged respondent only with a violation of RPC 1.1(b) (pattern of neglect), based on the within misconduct and on his previous disciplinary matters. The complaint was amended to include an allegation of a violation of RPC 8.1(b) (failure to cooperate with the DEC).

The DEC found that, in both the Miller and Hunterdon matters, respondent's "lack of organization in the operation of his law office," together with his prior ethics transgressions, constituted a violation of RPC 1.1(b). Hearing panel report at 7. The DEC

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[3] This incident was the possible cause of the injury; See Exhibit J-1.

also found that respondent's failure to file a detailed, responsive answer to the complaint in the Hunterdon matter constituted a violation of RPC 8.1(b).

* * *

Upon a de novo review of the record, the Board is satisfied that the conclusion of the DEC that respondent was guilty of unethical conduct is fully supported by clear and convincing evidence. Not only did he violate the Rules of Professional Conduct in great numbers but he also failed to cooperate with the DEC, terming its investigative process a "witch hunt." Disrespect to the disciplinary authorities is disrespect to the Supreme Court, of which the committees are an arm. In re Grinchis, 75 N.J. 494 (1978).

This respondent has engaged in a spree of unethical conduct since his 1989 admission to the bar. In In re Spagnoli, 115 N.J. 504 (1989), the attorney was disbarred for accepting retainers from fourteen clients over a three-year period without any intention of representing them. The Court found that Spagnoli had, in essence, defrauded his clients. Furthermore, Spagnoli lied to the court in order to excuse his failure to appear and failed to cooperate with the disciplinary authorities. Spagnoli had previously been publicly reprimanded.

In several respects, Spagnoli is a more egregious case than this. Spagnoli lied to the court and failed to appear before the

DEC and the Board. Moreover, he fraudulently obtained retainers, never intending to pursue his clients' interests. That does not appear to be the situation here. Indeed, the testimony before the DEC revealed that respondent undertook the representation in most of these matters on a contingent fee basis. It is undeniable, however, that, as in Spagnoli, respondent's clients were harmed. As the foregoing shows, respondent's neglect of his clients' interests was pervasive and indicative of serious misconduct. He not only failed to safeguard the interests of his clients, he abandoned them. Abandonment of clients may at times result in disbarment. See In re Clark, 134 N.J. 522 (1993).

The Board has considered respondent's psychiatric report submitted on the day of the Board hearing. That report attributes his misconduct to his above-mentioned September 1992 encounter with the police and to the onset of tendonitis, previously thought to be carpal tunnel syndrome. Although the Board is sympathetic to respondent's difficulties, the Board concludes that his physical/psychological problems do not serve to excuse his misconduct in the within matters for several reasons: (1) respondent's misconduct in these matters began in or about January 1992, prior to his September 1992 injury; (2) if respondent was disabled, he had a duty to take steps to protect his clients, such as withdrawing as counsel of record and notifying each client to seek new counsel; although more than one grievant recalled a message on his answering machine that respondent was disabled and closing his law office, respondent left no information on how

clients could contact him and/or retrieve their files; and (3) respondent submitted to an earlier examination in or about 1993 that found that, although he was "totally overwhelmed," he was not suffering from a psychological problem (3T 14).[4]

Respondent's breach of his clients' trust and his resulting infliction of emotional harm on them are inexcusable. It does not appear, however, that respondent is either venal or seeking to enrich himself. Indeed, respondent appears to view himself as a crusader of sorts and takes on many cases few other attorneys would touch. The problem is that respondent ofttimes has done more harm than good.

Although the Board considered whether to disbar or to suspend respondent, it concluded that, given time, respondent may be able to resolve his problems and maintain his practice in accordance with the standards expected of the profession. Accordingly, a five-member majority of the Board determined to impose a three-year suspension, to run consecutively to the suspension currently being served by respondent. Prior to reinstatement, respondent is to complete the skills and methods program offered by the Institute for Continuing Legal Education, as well as twelve hours of ethics courses. Respondent is also to provide proof of his fitness to practice law. In addition, upon reinstatement, respondent is to practice under the supervision of a proctor until further order.

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[4] 3T refers to the transcript of the hearing before the Disciplinary Review Board on October 26, 1995.

Two members dissented, believing that respondent should be disbarred.

One member recused himself in the matter under District Docket No. X-94-027E (The Dana Matter). Two members did not participate.

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

Dated: 4/22/96

By: _____
Lee M. Hymerling
Chair
Disciplinary Review Board