

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 11-086
District Docket No. XII-09-0070E

IN THE MATTER OF
KEITH O.D. MOSES
AN ATTORNEY AT LAW

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Decision

Argued: June 16, 2011

Decided: September 7, 2011

Karen Bezner appeared on behalf of the District XII Ethics Committee.

Respondent appeared pro se.

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

This matter was before us on a recommendation for discipline filed by the District XII Ethics Committee (DEC). The complaint charged respondent with violating RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), RPC 1.4(a), (b), and (c) (failure to inform a client of how, when, and where to communicate with the attorney, failure to keep a client

reasonably informed about their matter, and failure to explain a matter to the extent necessary for the client to make informed decisions about the representation), and RPC 8.1(b) (failure to cooperate with disciplinary authorities).¹ We determine that a reprimand is the proper discipline in this case.

Respondent was admitted to the New Jersey bar in 1990. He was admonished in 2002 for failure to cooperate with the DEC's investigation of two grievances filed against him. In the Matter of Keith O. Moses, DRB 02-248 (October 23, 2002).

We originally heard this matter, as a default, at our July 2008 session (Docket No. DRB 08-162). Respondent filed a motion to vacate the default, which we granted by letter dated July 23, 2008. Thereafter, by letter dated November 5, 2008, the DEC hearing was scheduled for December 15, 2008. The letter was sent via certified and regular mail to respondent's office address. A second letter, confirming the hearing date, was also sent to respondent via certified and regular mail.

¹ No subsection of RPC 1.1 was cited. The complaint used the language of RPC 1.1(b) "pattern of neglect," which is not applicable here. RPC 1.3 was charged twice in the complaint, once using the term "gross negligence," which is not an element of RPC 1.3 but, rather, of RPC 1.1(a). The correct RPCs are set forth herein.

Prior to the scheduled hearing date, the presenter and respondent had some communications about entering into a stipulation of facts. Respondent seemingly agreed to stipulate to the allegations in the complaint.

The December 15, 2008 hearing was scheduled to begin at 10:00 a.m., but the hearing panel chair delayed it until 11:05 a.m., after respondent represented that he would be thirty minutes late. Respondent arrived at 11:45 a.m., after the presenter had concluded his case. Respondent testified that he had been late due to illness, that morning, from stress. He also testified that he had not understood to what he had stipulated and was not admitting to all of the allegations in the complaint.

The DEC recommended, on the record, that respondent be censured. Following the hearing, respondent filed a letter of apology/request for reconsideration.² The DEC considered his submission as a request for reconsideration and allowed him time

² Although respondent's letter indicated that he had copied the attorney and public members of the panel, they did not receive it from him.

to submit a "position paper." Respondent submitted no further documents to the DEC.

The matter came to us as a recommendation for a censure (Docket No. DRB 09-184), which we reviewed at our September 2009 session. At that time, we determined to remand it to a different district ethics committee for a hearing. We concluded that respondent and the presenter did not have a meeting of the minds regarding the scope of the stipulation and found that respondent's interpretation of the stipulation had not been unreasonable.

After the remand, the hearing panel chair scheduled a pre-hearing conference for June 29, 2010.³ Respondent did not attend the conference. By letter dated July 9, 2010, the hearing date was set. Deadlines for witness lists and documents were established.

The DEC hearing was held on August 16, 2010. The panel chair noted, on the record that, although respondent had received notice of the pre-hearing conference, he had not been present and had not adhered to the deadlines for the submission

³ Exhibit T, the letter scheduling the pre-hearing conference, contains a certified mail receipt that bears what appears to be respondent's signature.

of proposed exhibits and witness lists. The DEC allowed respondent to present exhibits out of time.

The hearing was not completed on that date. A second hearing date was set for October 14, 2010, to begin at 9:30 a.m. Respondent did not arrive timely. The panel chair telephoned respondent, who represented that he had overslept and would be there before 11:00 a.m. Respondent did not arrive at the promised time, whereupon the hearing began without him. The grievant testified that there was nothing in her testimony from the first hearing that she wanted to amend or add. The exhibits of both respondent and the presenter were admitted into evidence. Respondent arrived at 11:30 a.m. and was permitted to "do a summation of his position, which he did."

We now turn to the facts that gave rise to this disciplinary matter.

Respondent represented Livingstone and Florence Joan Douglas (mother and son) in two matters, a deportation proceeding and a personal injury matter. The deportation proceeding concerned Livingstone, who was ultimately deported to England. Because Livingstone was not available for cross-examination, the DEC determined not to consider the allegations arising out of respondent's representation of Livingstone. The

hearing proceeded only on the allegations of misconduct in Florence's (Douglas) matter.

In February 2003, Douglas retained respondent to represent her in a claim for damages allegedly caused by certain prescription medications. She signed a retainer agreement and paid respondent \$550. In March 2003, respondent filed a complaint in the United States District Court. Although respondent sent Douglas a copy of the filed complaint, she received no further written communications from him.

All defendants named in the complaint were New Jersey citizens or New Jersey corporations. A hearing was scheduled to take place, on April 1, 2003, to determine why the case should not be dismissed for lack of subject matter jurisdiction. For reasons that are not revealed in the record, respondent did not appear, but was allowed to appear, via telephone, the following day. The complaint was, in fact, dismissed for lack of subject matter jurisdiction. Douglas knew of the development, apparently from respondent.

Respondent then prepared a complaint to file in the New Jersey Superior Court.⁴ This complaint was identical to the federal court complaint, with the exception of the caption. Respondent never filed the complaint in state court.

Douglas had no communication with respondent about the complaint to be filed in state court. At some point, respondent advised her that he was unable to proceed with a claim on her behalf, because her injuries "did not cause [her] to die." Douglas left telephone messages for respondent, which went unreturned.

Respondent testified about the lack of merit to Douglas' claim, specifically, the lack of evidence linking her medical condition to the medications that she had taken. He stated:

I believe that Miss Douglas honestly felt that Avandia caused her illness and while she was probably right in the long run because we're not doctors, none of us is, it has probably been established that this is a dangerous drug. In 2003, four, five and six and seven there was no evidence to support that and this case was brought in 2003 so all I had to go on when someone came to me was where is your proof and when the proof could not come forward, my - I think I did what was probably the most advisable thing

⁴ Respondent conceded that the matter should have originally been brought in state court.

for an attorney to do is to not pursue the case and I told Miss Douglas that, that the case would not succeed because you don't have evidence.

[2T24-13 to 2T25-2.]⁵

Respondent did not refer Douglas to any medical experts. He never retained a medical expert to review the matter or to render an affidavit of merit. Although that might have been advisable, he stated that the financial resources were not available. Respondent spoke with two of her doctors, who did not believe that she had suffered, as a result of the medication. According to respondent, he never returned her medical records to her, because he was never asked to do so. Respondent opined that, if there is evidence that Avandia caused Douglas' injuries, "the underlying cause of action still exists for her today." Respondent did not recall writing to Douglas, but he believed that all of their communications were oral.

The DEC concluded that respondent had violated each of the charged RPCs, with the exception of RPC 8.1(b), which it did not discuss. As to RPC 1.1(a), the DEC noted that respondent filed a complaint in federal court that, on its face, lacked subject

⁵ 2T refers to the transcript of the DEC hearing on October 14, 2010.

matter jurisdiction and that he never obtained an affidavit of merit. Although the DEC considered respondent's argument that Douglas' case lacked sufficient evidence to proceed, it noted that he had conducted no inquiry "to determine that proofs were actually lacking."

With regard to RPC 1.3, the DEC found that respondent failed to take any action to preserve or prosecute Douglas' claim in state court, following the federal court dismissal. In the DEC's view, "the unreasonable delay" and respondent's failure to communicate with Douglas caused her additional anxiety.

As to RPC 1.4, the DEC pointed to Douglas' testimony that she had only two meetings with respondent and received no written communications from him. Douglas testified that her many calls to respondent went unreturned; respondent produced no evidence to contradict that testimony. The DEC found that respondent failed to keep Douglas informed about the status of her case and failed to allow her the opportunity to participate in decisions about it.

In concluding its report, the DEC stated:

It should be noted that the Respondent was not on time for the second hearing (being over two hours late), failed to

attend the prehearing conference or provide a reason for non-attendance and failed to provide advance copies of the exhibits and witness list. Notwithstanding the above lackadaisical attitude of the Respondent he was still afforded every opportunity to be heard by the Panel and to provide all evidence to support his defense.

[HPR12-HPR13.]⁶

The DEC recommended that respondent be censured.

Upon a de novo review of the record, we are satisfied that the conclusion of the DEC that respondent was guilty of unethical conduct is fully supported by clear and convincing evidence.

Although most of the DEC's findings were supported by the record, we are unable to agree with two of its conclusions. First, the DEC's finding that respondent violated RPC 1.4(a) is not supported by the record. That rule addresses an attorney's failure to provide a prospective client with information necessary to contact the attorney. There is no indication that Douglas did not know how to contact respondent.

Second, and a closer call, is the finding that respondent violated RPC 1.1(a). According to respondent, he did not pursue

⁶ HPR refers to the hearing panel report, dated January 31, 2011.

Douglas' claim in state court because he did not have evidence that her illnesses were linked to the prescription medications that she had taken. Also, the financial resources were not available to him to retain a medical expert to render an opinion. There is no question that whether to pursue the matter should have been discussed with Douglas, who might have offered the resources for an expert or chosen to try her hand without one. For having unilaterally decided not to pursue the claim, respondent violated RPC 1.4(c). Similarly, he violated RPC 1.4(b) by failing to communicate with Douglas and lacked diligence in his handling of the case by "throwing in the towel" perhaps too soon, in violation of RPC 1.3. More properly, respondent should have researched and used all resources at his disposal to determine if Douglas had a claim and should have discussed his conclusions with her.

This was not, however, gross neglect. Respondent was in a difficult position in a difficult case. He did not pursue the case because he thought that he had no basis for a claim. In fact, had he proceeded without evidence linking Avandia to Douglas' condition, he could have been found guilty of pursuing frivolous litigation. In short, the only violations in connection with the Douglas matter that are supported by clear

and convincing evidence are of RPC 1.3, RPC 1.4(b), and RPC 1.4(c).

Generally, an admonition is the appropriate form of discipline for lack of diligence and failure to communicate with the client. See, e.g., In the Matter of James C. Richardson, DRB 06-010 (February 23, 2006) (attorney lacked diligence in an estate matter and did not reply to the beneficiaries' requests for information about the estate); In the Matter of Anthony R. Atwell, DRB 05-023 (February 22, 2005) (attorney did not disclose to the client that the file had been lost, canceled several appointments with the client for allegedly being unavailable or in court when the reason for the cancellations was his inability to find the file, and then took more than two years to attempt to reconstruct the lost file; and In the Matter of John F. Coffey, DRB 04-419 (January 21, 2005) (attorney did not file a bankruptcy petition until nine months after being retained and did not keep the client informed of the status of the case; only after the client contacted the court did she learn that the petition had not been filed).

The presence of a disciplinary record or other aggravating factors may serve to enhance the admonition to a reprimand. See, e.g., In re Carmen, 201 N.J. 141 (2010) (reprimand for attorney

who, for a period of two years, failed to communicate with the clients in a breach-of-contract action and failed to diligently pursue it; aggravating factors were the attorney's failure to withdraw from the representation when his physical condition materially impaired his ability to properly represent the clients and a prior private reprimand for conflict of interest) and In re Oxfeld, 184 N.J. 431 (2005) (reprimand by consent for lack of diligence and failure to communicate with the client in a pension plan matter; two prior admonitions).

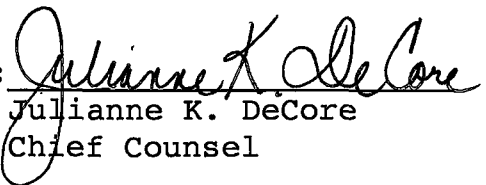
As indicated previously, in 2002 respondent received an admonition for failure to cooperate with disciplinary authorities. Possibly, the presence of the prior admonition could still have kept his current RPC 1.3 and RPC 1.4 violations at the admonition level. But his conduct in the course of these disciplinary proceedings was troubling and deserving of greater discipline. He appeared late for the DEC hearings in 2008 and 2010; he did not attend a pre-hearing conference; he did not comply with deadlines for the production of exhibits and a list of his witnesses; and he did not submit his "position paper," following the December 2008 hearing. His cavalier attitude toward the disciplinary system cannot be tolerated. We, therefore, determine that his serious violation of RPC 8.1(b),

coupled with his RPC 1.3 and RPC 1.4 violations, requires the imposition of a reprimand.

Member Baugh recused herself. Vice-chair Frost and member Clark did not participate.

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs and actual expenses incurred in the prosecution of this matter, as provided in R. 1:20-17.

Disciplinary Review Board
Louis Pashman, Chair

By: 
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

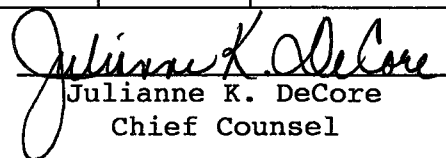
In the Matter of Keith O.D. Moses
Docket No. DRB 11-086

Argued: June 16, 2011

Decided: September 7, 2011

Disposition: Reprimand

Members	Disbar	Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Pashman			X			
Frost						X
Baugh					X	
Clark						X
Doremus			X			
Stanton			X			
Wissinger			X			
Yamner			X			
Zmirich			X			
Total:			6		1	2


Julianne K. DeCore
Chief Counsel