

Book

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 94-171

IN THE MATTER OF :
:
CLAIRE K. SCHMIDT, :
:
AN ATTORNEY AT LAW :
:

Decision and Recommendation
of the
Disciplinary Review Board

Argued: July 20, 1994

Decided: January 18, 1995

Thomas J. Smith, III appeared on behalf of the District IX Ethics Committee.

Respondent did not appear for oral argument.¹

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

This matter was before the Board on a recommendation for public discipline filed by the District IX Ethics Committee ("DEC"). The four-count formal complaint charged respondent with violations of RPC 3.2 (failure to expedite litigation), RPC 3.3 (communicating with the court in a false or misleading manner); RPC 8.4(b) (committing a criminal act that reflects adversely on a lawyer's honesty, trustworthiness or fitness as a lawyer); RPC 3.3(a)(1) (making a false statement of material fact or law to a tribunal); RPC 8.4(d) (engaging in conduct prejudicial to the administration of justice); and RPC 7.5(b) (using unauthorized

¹ Notice by publication was made in the New Jersey Law Journal and the Asbury Park Press.

letterhead). The DEC concluded that respondent violated RPC 3.2, RPC 3.3, and RPC 8.4(d).

Respondent was admitted to the New Jersey bar in 1987. She has no prior disciplinary record. She has been ineligible to practice law in New Jersey since July 18, 1991, for failure to pay the annual assessment to the New Jersey Fund for Client Protection.

This matter, which was originally docketed as IX-91-42E, arose from a grievance filed by the Honorable Raymond Shebell, J.M.C. It was dismissed by the Office of Attorney Ethics ("OAE") after an investigation failed to disclose respondent's "whereabouts." The grievance was reopened as Docket No. IX-92-79E after respondent was arrested in New York in the summer of 1992, on bench warrants issued by United States Magistrate John C. Manna, from the United States District Court at Fort Monmouth. 1T⁴². Soon after her arrest, by letter dated August 18, 1992, respondent filed an ethics complaint against her former attorney and Judge Shebell. The original grievance against respondent was reopened once the DEC was able to locate her.

COUNT ONE

In 1990, respondent issued a check in the approximate amount of \$280 to Bradley Fuel Oil Company for oil delivered to her tenant. Respondent's check was dishonored, whereupon the oil company filed a complaint against her. Respondent was charged in Bradley Beach Municipal Court, on February 19, 1990, with a

² 1T denotes the transcript of the DEC hearing on February 3, 1994.

violation of N.J.S.A. 2C:21-5 (bad checks), which, on June 13, 1990, was downgraded by the Prosecutor's Office to a disorderly persons offense.

Hearing dates on the above violation were scheduled for June 4, 1990, August 27, 1990, November 19, 1990, March 11, 1991 and July 8, 1991. Respondent failed to appear on any of the above dates. Moreover, in each instance respondent failed to properly adjourn the hearing date.

On July 29, 1991, respondent appeared before Judge Shebell in Bradley Beach Municipal Court, accompanied by her counsel, Leonard S. Needle, Esq. At that time, she was being detained on a contempt warrant for failure to appear on the above court dates. Respondent's excuses for not appearing included that the notice had been sent to the wrong location, that her daughter had been ill, that her daughter had disappeared, and that she had been too distressed to appear because of what had happened to her in Superior Court. 3T2.³ (The record is silent as to the circumstance surrounding that Superior Court matter). Finally, respondent submitted a letter to the court that was post-marked July 8, 1991, the date of the scheduled hearing. The letter informed the judge that she was going on vacation and, therefore,

³ 3T (also referred to as Exhibit P-3) denotes the August 5, 1991 transcript of proceedings before Judge Shebell in Bradley Beach Municipal Court.

would not appear at the hearing. 2T3.⁴ The court did not receive the letter prior to the hearing.

During the course of the year, several bench warrants were issued for respondent's arrest. Notwithstanding that respondent was eventually arrested and released on bail, she continued to ignore the scheduled court dates after her release. 2T6. On August 5, 1991, respondent again appeared before Judge Shebell, with Needle, on contempt charges for failure to appear in court. 3T2.

The record makes no reference to the outcome of the contempt proceedings before Judge Shebell. Because of Judge Shebell's involvement with the matter, he transferred the charges relating to respondent to another judge to avoid any claim of bias in the disposition of the matters.

COUNT TWO

Respondent was the defendant in a variety of matters in municipal courts throughout Monmouth County, including Tinton Falls, Bradley Beach and Highlands, as well as the United States District Court at Fort Monmouth. The charges against respondent included issuing bad checks and an assault on law enforcement personnel. Exhibit P-5 (an investigative report regarding the charges filed by respondent against her attorney, in the matter docketed as IX-92-65E) also alluded to charges pending against

⁴ 2T (also referred to as Exhibit P-2) denotes the July 29, 1991 transcript of proceedings before Judge Shebell in Bradley Beach Municipal Court.

respondent in Long Branch. Exhibit P-5 included several references to five pending charges at Fort Monmouth, including assault and contempt charges (Exhibit P-5 at 2); prior arrests for failure to appear in that court; prior convictions for assaults and traffic charges in New York City (Exhibit P-5 at 3); and the most serious allegation, a conviction in West Long Branch Municipal Court for forging and carrying false insurance identification (Exhibit F to Exhibit P-5 at 2).

At the DEC hearing, the presenter informed the panel that he had been present at Highland Municipal Court during respondent's appearance before that court. The presenter stated that the allegations against respondent involved the fact that she had purchased stamps at the Highland Post Office, paid by check, and thereafter stopped payment on the check. Respondent's counsel persuaded the postal authorities to dismiss the complaint against respondent upon restitution to the post office for the "stopped check." The charges against respondent were, therefore, dismissed.

At the Board hearing, the presenter indicated that, as to the remaining charges in count two, the cases were either dismissed or the charges were downgraded. Count two of the complaint was, therefore, dismissed because of the absence of specific findings of criminal conduct. BT7⁵.

⁵ BT denotes the transcript of the Board hearing on July 20, 1994.

COUNT THREE

Respondent was charged with filing a frivolous motion in the Fort Monmouth Court and a baseless ethics complaint against her former attorney. A review of the record fails to disclose any formal motion filed with the court. However, Exhibit P-5 contains a written statement by respondent detailing her account of the incident at Fort Monmouth youth center, for which she was charged with assault of a youth center caregiver. In respondent's statement, she charged the caregiver with harassment and assault. There is no reference in either the hearing transcript or the DEC report to any other frivolous motion filed in the Fort Monmouth Court.

As to the grievance filed against respondent's former attorney, the DEC investigator, Daniel M. Waldman, conducted a thorough investigation of respondent's allegations. Respondent alleged that the attorney had failed to answer her telephone calls for weeks; failed to forward documentation, presumably to her; failed to perform the job for which he was retained; made an application for bail reduction two weeks later than she believed it would be made; and exposed her to risk of incarceration. Respondent also claimed that, after she was arrested, the attorney was alerted of her situation, but did nothing. She was, therefore, required to act on her own behalf and succeeded in obtaining a release on her own recognizance. Exhibit P-4 at 3.

Waldman's investigation detailed the efforts taken by the attorney to represent respondent: the attorney prepared for

respondent's July 20, 1992 trial on the assault charges before the United States District Court; sought discovery and supplemental discovery; conducted legal research; conferred with his client; and moved to reduce the bail set in another matter before the Bradley Beach Municipal Court. The motion was denied and the attorney appealed the denial. With regard to the Fort Monmouth assault charges, the magistrate set a peremptory trial date of July 20, 1992 because of respondent's failure to appear on four earlier trial dates. Nevertheless, respondent repeatedly telephoned the attorney to persuade him to have the trial date adjourned or to obtain a change of venue. Each time, the attorney informed respondent that she was required to appear in court on July 20, 1992 or risk having a bench warrant issued for her arrest.

Notwithstanding the attorney's representations that the trial date was peremptory, the court continued the trial date to July 27, 1992 because the attorney had to attend a funeral. Respondent failed to appear in Fort Monmouth on July 27, 1992. Thereafter, the magistrate issued a bench warrant for respondent's arrest and she was arrested in New York City on August 14, 1992.

Upon respondent's arrest, she informed Magistrate Manna that the attorney had instructed her not to appear in court on July 27, 1992. The attorney denied making such statement. In fact, he claimed that respondent tried to "trick" him into advising her not to appear in court by making the following statements: "So I shouldn't appear on Monday"; "It would be useless for me to appear and be arrested, wouldn't it"; "There probably won't be a trial on

Monday, will there?" The attorney claimed that he advised respondent that she was to appear in court and that it was her responsibility to post bail in Tinton Falls, Long Branch and Bradley Beach Municipal Courts. Exhibit F to Exhibit P-5 at 4.

On August 18, 1992, the attorney moved to be relieved as respondent's counsel alleging, among other things, that respondent had failed to heed his advice.

Based on Waldman's analysis and investigation of respondent's grievance, he concluded that it was without merit and designed to harass the attorney because he had moved to be relieved as her counsel. Waldman further concluded that the attorney had provided respondent with exemplary legal services and that the grievance was a further attempt by respondent to avoid an appearance before the magistrate in Fort Monmouth.

COUNT FOUR

Respondent was charged with using unauthorized letterhead, in violation of RPC 7.5(b), when she filed a grievance against her former attorney on letterhead that contained the following:

CLAIRE K. SCHMIDT
COUNSELLOR AT LAW
TEN WEST BERGEN PLACE
RED BANK, NEW JERSEY 07701.
(emphasis supplied)

Below the letterhead caption, and in parenthesis, the following was typed in: "(not in active practice in New Jersey)".

At the time that respondent filed the grievance, she was on the ineligible list for failure to pay the Lawyers' Fund for Client

Protection annual assessment. The DEC found that the letterhead clearly indicated that she was not representing herself as an active practitioner:

[T]his standard letterhead with the addition that she does not practice law is her personal stationery and she can use it as she sees fit, as long as it is not for any illegal or improper purpose.

* * *

Based on the evidence before it, the DEC concluded that, in count one, respondent had violated RPC 3.2 for failing to expedite litigation and RPC 3.3 for communicating with the court in a false or misleading manner. The DEC dismissed the charges in count two of the complaint. In count three, the DEC found that respondent had violated RPC 3.3(a)(i), by making false statements of material fact or law to a tribunal — the DEC — and RPC 8.4(d), by engaging in conduct prejudicial to the administration of justice, when she repeatedly attempted to avoid a hearing on the charges against her. As to count four, the DEC did not find a violation of RPC 7.5(b). The DEC recommended public discipline and a psychiatric evaluation.

The DEC apparently found that respondent violated RPC 3.3 based on its conclusion that her explanations for failing to appear before Judge Shebell were untrue. The hearing panel report states, in relevant part:

The respondent's explanations for her failure to appear, for those appearances for which she had explanations, were simply insufficient. . . . [Respondent's] excuses were that she had to care for her child as she could not obtain a sitter, the child was ill, and the child disappeared. On one occasion,

referenced in P4, at P3, the request for an adjournment made by letter was postmarked after the court date.

[Hearing Panel Report at 3-4.]

The only claim that these explanations were "untrue" is found in a letter from her former attorney to Daniel Waldman. At page three, the attorney states:

As an aside, please also note that, although [respondent] constantly uses her daughter as a scheduling excuse, she leaves the child unattended, has her in day care and constantly neglects the child. When [respondent] was arrested again on Judge Manna's warrant on August 14, 1992, she appeared in Court, on August 24, 1992 and falsely stated, on the record to said Judge, that she had missed Court on July 27, 1992 because her daughter was sick. Upon further enquiry [sic] the Judge ascertained the child had actually been away at summer camp the whole time, including July 27, 1992.

[Exhibit F to Exhibit P-5 at 3]

This statement is an excerpt from a supplemental report to the investigator. It is not part of a sworn statement, certification or affidavit. Further, there is no evidence in the record to corroborate that respondent had lied with respect to her daughter's whereabouts.

CONCLUSION AND RECOMMENDATION

Upon a de novo review of the record, the Board is satisfied that the DEC's conclusion that respondent's conduct was unethical is fully supported by clear and convincing evidence. Respondent violated RPC 8.4(d), by her repeated failure to appear in court, by the contempt charges filed against her and by her arrest and

detention based on bench warrants issued for failure to appear in court. There is also clear and convincing evidence of respondent's violation of RPC 8.1(b), for her failure to cooperate with the disciplinary authorities.

The Board is unable to agree, however, with the DEC's finding of a violation of RPC 3.3. There is no clear and convincing evidence in the record that respondent communicated with the Bradley Beach court in a false or misleading manner. Exhibit P-5 is not sufficient evidence of such a violation. Moreover, her former attorney's letter references an incident that occurred before Magistrate Manna at the Fort Monmouth court, not the Bradley Beach court, as charged in the complaint. There is, therefore, no proof of a violation of RPC 3.3.

As to a violation of RPC 8.4(d) (conduct prejudicial to the administration of justice), the DEC properly concluded that respondent's explanations for her failure to appear "were simply insufficient" and that there was a "clear intent" on her part "never to appear in court to respond to the charges against her." Under those circumstances it may be properly found that respondent violated RPC 8.4(d).

With respect to a violation of RPC 3.2, that rule states, in relevant part: "a lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client" (emphasis added). This rule is, therefore, inapplicable. Respondent was not involved in the representation of a client. Rather, she herself was represented by counsel.

As to count two, there was no clear and convincing evidence presented from which to conclude that respondent committed a criminal act that reflects adversely on her honesty, trustworthiness or fitness as a lawyer.

In count three, respondent was charged with violations of RPC 3.3(a)(1), for making a false statement of material fact or law to a tribunal, and RPC 8.4(d), for engaging in conduct prejudicial to the administration of justice. There is no evidence in the record that respondent filed a frivolous motion before the Fort Monmouth court. As to the grievance filed by respondent against her former attorney, the investigator recommended dismissal, concluding that the attorney acted competently from beginning to end in his representation of respondent's case. In his report, the investigator noted the fact that Magistrate Manna ordered a psychological evaluation of respondent. The investigator, however, did not know the results of the evaluation. The investigator also noted the fact that the attorney explored with respondent the use of an insanity defense on her behalf. This apparently was rejected by respondent. Moreover, Judge Shebell stated at the DEC hearing that respondent had an alcohol problem. 1T14. Finally, respondent indicated that she believed that her ex-husband was behind the assault charges filed against her stemming from the incident at the youth care center. Exhibit P-4.

In light of the foregoing, which places respondent's state of mind in question, it is conceivable that respondent believed all of the allegations contained in the grievance against the attorney to

be true. There is, therefore, no clear and convincing evidence in the record that respondent filed a frivolous grievance against her former attorney. To sustain such a charge could create a chilling effect on other potential grievants.

The DEC properly dismissed count four of the complaint, reasoning that respondent could continue to use her letterhead as personal stationery, with the disclaimer "not in active practice in New Jersey," as long as the letterhead was not used for any illegal or improper purpose. In the absence of sufficient evidence in the record, that respondent used the letterhead for business related reasons, the dismissal of count four is appropriate.

The only issue remaining is, thus, the appropriate level of discipline for respondent's violations of RPC 8.4(d) and 8.1(b). While "prior cases are helpful in suggesting the scope of appropriate discipline", In re Lunn, 118 N.J. 163, 167 (1990), there are no cases directly analogous to this matter. In other cases dealing with violations of RPC 8.4(d), however, and specifically with contempt of court, the discipline has ranged from a public reprimand to a term of suspension. See, e.g., in In re Stanley, 102 N.J. 244 (1986) (public reprimand where attorney engaged in shouting and other discourteous behavior toward the court in three cases); In re Yengo, 92 N.J. 9 (1983) (public reprimand where attorney was absent for two days from a five-week trial, without prior notice to the court; mitigating factors included the attorney's age, his failing health, his wife's precarious health, and his imminent withdrawal from the practice of

law); In re McAlevy, 69 N.J. 349 (1976) (public reprimand where attorney physically attacked opposing counsel; in mitigation, attorney had no previous disciplinary record and expressed regret for his actions); and In re Mezzacca, 67 N.J. 387 (1975) (public reprimand for referring to a departmental review committee as a "kangaroo court," as well as making other discourteous comments).

Suspensions have been reserved for more serious misconduct. See In re McAlevy, 94 N.J. 201 (1983) (three-month suspension for discourteous conduct toward a judge and adversary; prior ethics history was an aggravating factor); In re Vincenti, 92 N.J. 592 (1983) (one-year suspension based upon twenty-three counts of making insulting verbal attacks on judges, lawyers, witnesses and bystanders); and In re Vincenti, 114 N.J. 275, 281 (1989) (three-month suspension where attorney engaged in name-calling of adversary and judge's law clerk; the attorney's prior discipline was an aggravating factor).

Respondent's behavior in the instant matter showed a total disregard for the integrity of the judicial process. The record indicates that, if respondent had not been arrested, she would most likely not have appeared in court. Respondent's conduct is difficult to comprehend. Had she initially cooperated with the courts, she could have avoided the majority of her problems. Moreover, respondent continued to display a complete indifference toward the judicial process by failing to appear at the DEC hearing, failing to accept certified mail from the DEC and failing to provide a forwarding address to the DEC. Similarly, notices of

the Board hearing were sent by certified and regular mail to respondent at her last known address. Both packages were returned undelivered. Notice was thereafter made by publication in two legal periodicals. Subsequently, Office of Board Counsel learned of a new address for respondent. The notice and materials were forwarded to the new address by certified and regular mail. Only the certified mail was returned undelivered. As noted earlier, respondent did not appear at the Board hearing.

In mitigation, it should be considered that respondent has no history of ethics infractions and that her actions did not injure any client. While it is likely that respondent's conduct may be attributable, in some measure, to her personal problems, her conduct was, nevertheless, defiant and outrageous. Accordingly, a six-member majority of the Board recommends that she be suspended for a period of six months, with the additional requirement that she demonstrate psychiatric fitness to practice law, before reinstatement. One member dissented, voting for disbarment. Two members did not participate.

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

Dated: _____

1/18/95

By: _____

Elizabeth L. Buff

Elizabeth L. Buff
Vice-Chair

Disciplinary Review Board