SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 13-353
District Docket No. VC-2011-0017E

IN THE MATTER OF	
CYNTHIA A. MATHEKE	
AN ATTORNEY AT LAW	

Decision

Argued: March 20, 2014

Decided: April 29, 2014

Peter A. Gaudioso appeared on behalf of the District VC Ethics Committee.

Kevin J. O'Connor waived appearance for oral argument.

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 (reprimand) filed by the District VC Ethics Committee (DEC). A one-count complaint charged respondent with having violated RPC 1.4(b) (failure to keep the client reasonably informed about the status of a matter and to promptly comply with reasonable requests for information) and RPC 1.4(c) (failure to explain a matter to the

extent reasonably necessary for the client to make informed decisions regarding the representation). We determine to impose a reprimand.

Respondent was admitted to the New Jersey bar in 1973. She has no prior discipline.

On July 8, 2005, Ann Reilly retained respondent to represent her in a medical malpractice action arising from treatment for injuries sustained when she was struck by an automobile. The accident occurred on December 11, 2003.

On December 13, 2005, respondent filed a complaint against Jersey Shore University Medical Center (Jersey Shore), fifteen doctors, a nurse, and Jane and John Doe. On October 20, 2006, the complaint was dismissed as to eight doctors.

The formal ethics complaint charged respondent with failure to promptly notify Reilly about discovery requests from the defendants and about some of the defendants' later motions to dismiss the complaint. The court ultimately dismissed the complaint against those defendants, without prejudice. Thereafter, respondent entered into stipulations of dismissal, with prejudice, as to six defendants. Respondent also entered into a stipulation of dismissal, without prejudice, as to defendants Jersey Shore and the nurse. On February 1, 2007, the

court entered an order dismissing the complaint against two remaining defendants, Jersey Shore and the nurse, without prejudice.

In her answer, respondent admitted that she never discussed the stipulations with Reilly, prior to entering into them. She explained that she had released those defendants because there was "no actionable theory of liability" against them.

On January 17, 2008, respondent provided answers to interrogatories, after which some defendants propounded supplemental interrogatories aimed at obtaining Reilly's employment records. On May 5, 2008, respondent filed a motion to reinstate the complaint against them, prompting defendants Jersey Shore and the nurse to file a cross-motion to dismiss the complaint with prejudice. One of the doctors, too, filed a contemporaneous motion to dismiss the complaint with prejudice. On June 23, 2008, the court entered two separate orders, granting those motions.

Respondent never informed Reilly that the complaint had been dismissed with prejudice as to all of the defendants.

In July 2008, respondent filed a timely appeal with the Appellate Division.

On March 4, 2009, at oral argument in the Appellate Division, one of the judges raised the issue of the outstanding forms for the release of Reilly's employment records. According to respondent, the judge advised her to "get that authorization signed." On June 26, 2009, respondent forwarded the forms to Reilly.

On August 25, 2009, the Appellate Division affirmed the trial court's dismissal of the complaint.

On August 13, 2010, respondent met with Reilly and, for the first time, discussed the dismissal with her.[1]

At the DEC hearing, respondent recalled that Reilly had retained her, in the summer of 2005, to file a malpractice action against the various defendants. She discussed Reilly's case with several physicians, before finding one who would sign a "certificate of merit." Respondent then sent Reilly's case materials to several experts, for evaluation. Those experts believed that the treatment that Reilly had received at Jersey

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[1] At page twenty-three of the transcript of the February 7, 2013 DEC hearing, the panel chair noted that, because the complaint did not charge respondent with a violation of RPC 8.4(c) for her non-disclosure of the dismissal of the complaint, the hearing would proceed solely on the RPC 1.4 charges cited in the complaint.

Shore was "aggressive," but insufficient to establish liability. Respondent recalled having had "many" conversations with Reilly, over the course of the representation, about difficulties with liability.

Respondent also testified about Reilly's psychiatrist, Mary F. Beirne, M.D., who began treating Reilly for post-traumatic stress syndrome (PTSD), after Reilly's State Police service, but before the accident, beginning in 2002. After a conversation with Beirne, respondent came away believing that she should not relay to Reilly any bad news about the case, should it occur. Thus, respondent claimed, she purposefully kept from Reilly the dismissal of the complaint. Respondent denied that she had failed to communicate with Reilly. In a colloquy with her counsel, respondent explained the following, at the DEC hearing:

> Q. So as we see the Certificate of Merit was filed. Did you have discussions with Dr. White or Dr. Beirne about Ms. Reilly's potential bad reaction to something that might happen in the case if it went poorly?
>
> A. Well, yes, that -- this was — I don't know if obsession is the right word, but this was a primary concern of hers, to get to the bottom of this medical record, to figure out what happened and to have somebody be held accountable. And I saw enough in the medical record, and I also -- Ms. Reilly is very smart. I really wanted to see if by going through the records and going through the process if we could come to some --

if she could come to some understanding about what had happened to her as opposed to just letting it go by.

Q. Do you recall the specifics of what your conversations with the doctors were on that subject?

A. Well, just that she would be extremely distressed if the matter didn't go forward, and they would need to know that for two reasons, one to -- excuse me, to be able to counsel her, and Number Two, if there was a need to notify third parties. I did not have that conversation with Dr. White, but I did have it with Dr. Beirne. Dr. White was just concerned about her mental status and her reaction to bad news.

Q. And how did you interpret that with regard to what you were doing for her?

A. Well, it was going to be if [sic] we didn't get a chance to move the case forward because of the lack of expert support for the allegation.

[2T207-7 to 2T208-16.][2]

Respondent testified that Reilly had sought to control discovery in the case, even if it meant refusing to comply with discovery requests:

Well, discovery was difficult in regard to the Answers to Interrogatories because she didn't want to put in the facts that were necessary,

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[2] "2T" refers to the transcript of the March 22, 2013 DEC hearing.

> and she wanted to put in facts that were extraneous or not necessary or would in fact be, I thought, fertile fodder for cross examination at a deposition.
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> For instance, in regard to post traumatic stress disorder, she insisted that she never had it, and she was fine before the surgery, and I had wanted to say that she had that diagnosis because of her discharge and the acts of the surgery aggravated the diagnosis.
>
> She was angry at me because I sent the entire record to the doctors and that I didn't edit it to just have the positive points, that they didn't need to see certain things that didn't support her diagnosis.
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> [2T208-24 to 2T209-16.]

Of great significance to respondent was that Reilly, repeatedly and "adamantly," indicated that she would refuse to authorize the release of her State Police employment records to the defendants. Reilly, in turn, testified that they were not necessary and that, if the defendants wanted them, they could have subpoenaed those documents directly from the State Police.

Respondent used a pending motion to dismiss the complaint as an example of why she did not communicate certain aspects of the case to Reilly:

> If I had told her there was a pending motion to dismiss, my life and my staff's life would have been miserable, and I also knew - felt that I was going to get these interrogatories in before the motion was going to be heard.

> I made a judgment call that this is the type of information she would not be able to absorb, the fact that there was a motion, but it was going to be okay. It was very similar to what Dr. Bierne [sic] said in her testimony, that - so between the fact - between my intention to get them in before the return date of the motion and my sense that she would not be able to calmly wait for the motions to be heard and/or withdrawn, and that the process of doing the interrogatories had been disruptive to the point that I did not tell her.
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> [2T213-1 to 16.]

Respondent expressed concern that Reilly could potentially harm herself or others. In fact, during Reilly's cross-examination, respondent's counsel questioned Reilly as follows:

> Q. Do you recall telling Ms. Matheke that you were so upset with them that you wanted to kill?
>
> A. I wouldn't be surprised. People say that all the time when they are upset, you know. I am going to kill [sic] you. I'm going to kill -- I probably said a lot of that stuff.
>
> [2T131-1 to 7.]

When asked, on re-direct examination, if she "was really going to kill someone," Reilly replied, "Of course not. God has rules; that is one of them."

Once again, regarding the dismissal of the complaint with prejudice and the Appellate Division filing, respondent explained that she thought that Reilly was incapable of absorbing that

information and "would become agitated." Also, respondent expressed her confidence that she would prevail in the appeal.

Respondent described Reilly as a difficult and challenging client. In a colloquy with the presenter, respondent said the following:

> A. Well, it's fair to say that she was a difficult client. I can't say why, and I can't say that it was -- your question implied that it was as a result of the injuries.
>
> Q. Fair enough, and I can leave it at that, that Ms. Riley was a challenging client, correct?
>
> A. Challenging client, challenging case, yes.
>
> Q. And this case also, and I appreciate the detailed explanation you gave, the case was also a difficult case to present; it was a challenging case?
>
> A. Well, in terms of -- in terms of getting Annie her day in court, I thought that was going to be difficult in regard to her refusal to accept any of the facts that I was able to present either from my own knowledge or from the information provided by the experts. On the other hand, I wanted to help her as much as I could.
>
> Q. And you would agree that to help a client as much as you can you have to communicate the important happenings in the case with the client, wouldn't you, ma'am?
>
> A. No.
>
> [2T248-8 to 2T249-8.]

Finally, respondent admitted that she did not reveal to Reilly that her case had been dismissed with prejudice as to all parties until August 13, 2010, some two years after that final disposition. By that time, Reilly had discovered, on her own, that her case had been dismissed years earlier.

Reilly, too, testified about respondent's representation. She began by saying that, from 1986 to 1999, she was a New Jersey State Trooper. In 1996, her station commander "snapped and he wanted to kill everybody in the station":

> For seven and-a-half hours I had talked to my station commander and calmed him down. He was retiring right away on a disability -- on a mental disability, but three years after that it happened, I was sent for an evaluation because they noticed I lost weight and I was transferred to another station and my commander noticed I lost some weight. I worked for him early on in my career so he sent me for an evaluation and they diagnosed me with PTSD from the three year earlier event and said, here's your full pension, free medical and have fun, you're done. That's just a mental disorder so they retired me on that.
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> [1T38-3 to 13.]

Then, on December 11, 2003, while trying to rescue a dog that had been struck by a car, Reilly was struck by a car and severely injured. She testified at length about her treatment at Jersey Shore. After the accident, she remained unconscious for

over a month and awakened in another hospital. She learned that, while at Jersey Shore, she had undergone emergency brain surgery, as well as the placement of a feeding tube in her stomach and a breathing tube. She claimed that many of the procedures were unnecessary and that she had been used as a test patient for students at the university hospital. For example, regarding her brain surgery, she stated that the surgery had caused her brain injury, which she did not have, when she arrived in the emergency room. She believed that unnecessary operations had been performed on her because the hospital was "teaching surgical residents, in a nutshell."

Reilly testified that she never knew that her case was in jeopardy. She added that respondent never told her that there was a time limit to answer interrogatories, as a result of which she took six months to complete them. Likewise, she claimed, she knew nothing about motions to dismiss her complaint for failure to answer interrogatories, stipulations of dismissal, requests for her deposition, respondent's motion to restore the complaint, orders dismissing the complaint as to various defendants, the appeal to the Appellate Division, and its order upholding the dismissal of the complaint with prejudice. She was shown each critical exhibit that bore on the status of her case

and repeatedly denied having received or discussed with respondent all of those important documents.

Reilly learned of the 2008 dismissal when, in the summer of 2010, she had become suspicious that something was wrong. She had been calling respondent, but receiving no return calls. She had set up appointments to meet with respondent about the case, but respondent's office kept canceling them. She then decided to visit the Superior Court, on her own, to find out the status of her case. Once there, she was told that her case had been dismissed. Because she thought it "impossible," she was allowed to listen to the audio-tape of the proceeding. On that audio-tape she heard respondent speaking to the judge, "the man who dismissed the case." She contended that she was "devastated" by the contents of that tape.

Reilly testified that it was not for a lack of interest on her part that she had not been informed about important aspects of the case. She maintained that she was in constant contact with respondent's office about her case and that she may have sent as many as fifty emails to respondent and to another attorney who assisted respondent, Stacy Vaca (also spelled Vodka and Vacca, in the record).

When, on cross-examination, respondent's counsel suggested that Reilly may have had as many as twenty-five telephone conversations with respondent, over the course of the representation, she denied only that there were quite that many. In addition, she recalled about five or six meetings with respondent and her associates, during the representation.

Respondent's billing records showed a total of twenty-eight telephone calls between Reilly and the office, seven office meetings, and five letters to Reilly, over the course of the entire representation.

At the DEC hearing, Drs. White (psychologist) and Beirne (psychiatrist) also testified about Reilly's case. Dr. White, who treated Reilly during weekly office visits in the course of respondent's representation, testified that Reilly was very emotionally invested in the case. He also recalled having spoken to respondent, in the early summer of 2006, about his and Dr. Beirne's mutual concern that bad news could be harmful to Reilly. Dr. White recalled having requested respondent to let him and Dr. Beirne know, ahead of time, if there was any bad news to be delivered to Reilly. In this fashion, they could prepare Reilly for that news. Dr. White specifically denied,

however, having discussed with respondent that respondent should refrain from giving bad news to Reilly.

Dr. White also recalled that respondent did not keep him informed about events in the case, so that he could prepare Reilly for bad news. He even sent a fax to Dr. Beirne, on May 20, 2009, asking if she had heard anything from respondent about the case. He sent respondent a similar fax, two days later, but did not recall ever hearing back from her.

Dr. Beirne, too, testified at the DEC hearing. She recalled having grown up a neighbor of respondent, with whom she played. Their families were friendly. Although they did not stay in touch as adults, Dr. Beirne was aware that respondent had become a medical malpractice attorney. Dr. Beirne suggested that Reilly consult with respondent about her concerns, to see if she had a case.

Dr. Beirne knew, from treating Reilly, that the case "was vitally important to her. . . . Ms. Reilly's earlier trauma made this repeated trauma even more extreme than it would have been otherwise, and for her, it was of -- it was of the greatest importance." She recalled several instances, early in the case, when Reilly had become discouraged, such as with experts and the

certificate of merit. She assured Reilly that she should have faith in the legal process.

Dr. Beirne was also concerned about Reilly's ability to handle bad news and discussed that issue with both respondent and Dr. White. Under questioning by the presenter, Dr. Beirne stated:

> I also felt it would be important that if something were to come up that was not positive that it would be useful for me and for Dr. White to be able to assist Annie in processing that information.
>
> Q. Is that something you discussed with Dr. White?
>
> A. Yes.
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> Q. Is that something that you discussed with [respondent]?
>
> A. Yes.
>
> Q. Did you at any time ever tell [respondent] that she should not convey bad news or news that Ms. Reilly might disagree with to Ms. Reilly?
>
> A. No.
>
> Q. Or that she should withhold certain information?
>
> A. No.
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> [2T152-7 to 25.]

Dr. Beirne clarified that all she ever asked of respondent "was that she include us [referring to Dr. White] in letting us know if she had bad information to relay. I certainly asked that she keep us apprised of the court proceedings," as they occurred.

Dr. Beirne testified that respondent had not kept her informed about the important events in the case, of which she was unaware, including the ultimate dismissal of the complaint and failed attempt to revive the case on appeal. Her first inkling of bad news was a call from Reilly, in August 2010, when "she was furious, speaking almost in a growl," and asking why she and Dr. White had not advised her that her case had been dismissed "a significant time prior to that." Dr. Beirne then called respondent, believing that Reilly must have been mistaken. Only then did respondent disclose to her that the case had been dismissed.

When respondent was asked, at the conclusion of the disciplinary hearing, if it was possible that Reilly would never have been told about the case, had she not gone to the courthouse on her own, respondent replied, "Well, one would hope that I would have regained some -- it's possible, but I can't imagine that I would never have told her. I have had to say

horrible things to clients my whole life, my whole professional life, so -- but anything is possible."

There is no indication in the record that Reilly suffered any economic harm from respondent's handling of the matter. No experts testified about the value, if any, of Reilly's claims.

In mitigation, respondent urged that, during the period of time in question, roughly 2005 to 2010, she was suffering from severe, clinical depression, for which she had undergone treatment and counseling. In addition, she was a caregiver to her elderly parents, in their home, from 1998 until her father's 2001 death, living in the home with them, to the detriment of her own family. Thereafter, her mother developed dementia and had to be placed in a facility. Respondent visited her daily to feed her dinner.

In addition, in 1977, respondent had developed a familial relationship with a mother and young child from Hudson County, during respondent's involvement as a court-appointed supervisor of visitation. Years later, the child contacted respondent and they rekindled their friendship. In 2001, the child, now a young woman, gave birth to a child. Respondent babysat and welcomed the young woman, the baby, and the baby's father, into her home for holidays. In 2007, because the mother was neglecting the

child, respondent felt compelled to call DYFS, which ruined their relationship. A DYFS representative asked respondent to take the six-year old into her home, but respondent could not "undertake this new responsibility." The situation caused respondent "a great deal of distress."

Finally, a pipe burst in respondent's house, causing a flood and displacing her in a hotel, from December 1, 2007 through April 1, 2008, while the house underwent repairs, which were completed in July 2008.

The DEC found a violation of RPC 1.4(b) for respondent's failure to keep Reilly reasonably informed about the status of the case and to reply to her reasonable requests for information. The panel report referred to the "absolute dearth" of communication regarding "bedrock issues."

Likewise, the DEC found a violation of RPC 1.4(c). The DEC concluded that, "[i]f there is no communication, then there is no ability to allow Ms. Reilly to make informed decisions about her case."

Although respondent was not charged with having made misrepresentations to Reilly by silence and the DEC did not find a violation of RPC 8.4(c), it noted that respondent's silence

"borders on the equivalent of an affirmative falsehood, if not a misrepresentation by omission."

The DEC cited several cases in which attorneys received reprimands for misconduct that included failure to communicate with the client and concluded that, "given the egregious nature of the failure to communicate in this matter, the scales are tipped in favor of the imposition of a reprimand."

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

Respondent admitted that she did not advise her client, Reilly, about virtually every important event in the malpractice case, starting roughly in June 2006, when motions to dismiss began to surface. In August 2010, Reilly learned, on her own, that in 2008 her case had been dismissed, with prejudice.

Respondent's defense was that Drs. White and Beirne had cautioned her not to give Reilly bad news about the case, because Reilly could not handle such news. Both doctors, however, flatly rejected respondent's version of the events, each stating that they had merely expressed their desire that respondent keep them informed about the case, especially about

bad news, so that they could prepare Reilly for it and treat her accordingly.

If respondent truly felt that she could not advise her client about the actual events that transpired in the case, either out of a fear for Reilly's own safety or for the safety of others, her recourse was to withdraw from the case. Instead, she allowed the matter to take its course, remained silent about setbacks, and never dealt with the consequences of her silence. That Reilly might become upset on hearing unfavorable developments in the case did not relieve respondent of her responsibility to keep her client adequately informed about its posture. Her failure to keep Reilly informed about virtually every important event in the case and to provide detailed information to allow Reilly to make informed decisions about the representation constituted violations of RPC 1.4(b) and (c).

Typically, attorneys who fail to adequately communicate with their clients are admonished. See, e.g., In the Matter of Dan S. Smith, DRB 12-277 (January 22, 2013) (attorney failed to inform his client that a motion to dismiss his appeal had been filed or that the appeal had been dismissed; the attorney had a prior admonition for failure to communicate and lack of diligence in two client matters); In the Matter of David A.

Tykulsker, DRB 12-040 (April 24, 2012) (attorney failed to inform his client that the court had denied a motion to vacate an order dismissing the client's claim; the client did not learn of this development until he called the attorney, twelve days later, to inquire about the outcome; the attorney also failed to comply with the client's multiple requests for a copy of the court's orders until several months later, when the client appeared at his office to obtain them); In the Matter of Neil George Duffy, III, DRB 09-311 (March 10, 2010) (attorney orally informed client that he would no longer represent him but thereafter failed to dispel the client's continuing belief that he was represented by the attorney, as evidenced by the client's sporadic telephone calls to the attorney inquiring about the status of his case); In the Matter of Shelley A. Weinberg, DRB 09-101 (June 25, 2009) (for a one-year period, attorney failed to advise his client about important aspects of a Social Security disability matter; the attorney erroneously advised the client that his claim had been denied and then failed to explain his error; he also failed to notify the client that he had terminated the representation and had retained the "excess" portion of his fee while exploring avenues of appeal; no disciplinary infractions since 1988 admission to the bar); and

In the Matter of Marc A. Futterweit, DRB 08-356 (March 20, 2009) (attorney failed to keep his client informed about the case and failed to reply to the client's requests for information about the matter; the attorney admitted his wrongdoing and had no disciplinary infractions since his admission to the bar in 1989).

In mitigation, respondent has been a member of the bar for over forty years, without prior incident. Also, her misconduct was not pernicious in nature. Rather, it appears that she was moved by a desire to prevent an overreaction by her client, rather than a desire to hide errors and omissions of her own in the case. See In re Kasdan, 115 N.J. 472, 489-490 (1989), where the attorney's "aversion to acquainting her clients with unfavorable tidings about their claims was motivated by her desire to please and pacify the clients, rather than by trickery and deception."

We took into consideration respondent's anecdotal evidence, in her certification of mitigation, that she suffered from depression at the time of these events, due to family and other pressures, including the flooding of her house and ensuing reconstruction, all of which came to bear at the same time.

In aggravation, however, respondent's silence toward Reilly was serious, occurring over a period of years, all the while leaving Reilly to believe that her case, which was of vital importance to her, was never in jeopardy. Moreover, respondent, a seasoned practitioner, must have known better than to permit her client to labor under false hopes for so long.

Because of the sheer length of time that respondent kept Reilly in the dark about her case, roughly 2006 to 2010, we determine to impose a reprimand.

Chair Frost and Member Doremus voted to impose an admonition, based on respondent's lack of intent to deceive and her forty-year unblemished career at the bar. Member Gallipoli abstained.

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
Bonnie C. Frost, Chair

By: Isabel Frank
Isabel Frank
Acting Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Cynthia A. Matheke
Docket No. DRB 13-353

Argued: February 20, 2014

Decided: April 29, 2014

Disposition: Reprimand

Members	Disbar	Admonition	Reprimand	Dismiss	Disqualified	Did not participate
Frost		X				
Baugh			X			
Clark			X			
Doremus		X				
Gallipoli					X	
Hoberman			X			
Singer			X			
Yamner			X			
Zmirich			X			
Total:		2	6		1	

Isabel Frank
Acting Chief Counsel