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SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 07-174
District Docket Nos. XIV-02-664E,
II-05-900E, IIB-05-901E and
XIV-03-674E

IN THE MATTER OF :
DIANE S. AVERY :
AN ATTORNEY AT LAW :
:

Decision

Argued: October 18, 2007

Decided: December 19, 2007

Lee Gronikowski appeared on behalf of the Office of Attorney Ethics.

Respondent did not appear, despite proper service.

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

This matter came before us on a recommendation for discipline (reprimand) filed by the District IIB Ethics Committee ("DEC"). It stems from respondent's conduct in a case

in which she acted as trustee. We determine that she should receive a censure.¹

Respondent was admitted to the New Jersey bar in 1981. She has no prior final discipline. On August 25, 2003, she was temporarily suspended for failure to cooperate with the Office of Attorney Ethics ("OAE"). In re Avery, 177 N.J. 499.

On May 24, 2002, respondent's former client, Margaret Helg, the creator of an inter vivos trust, filed a grievance alleging that respondent had failed to account for proceeds of the trust, subjected her to Internal Revenue Service ("IRS") levies on her personal bank accounts and social security checks, and mismanaged the trust for years.

The OAE investigated the financial aspect of the grievance, demanding that respondent produce her trust account records. As seen below, respondent failed to cooperate with the OAE in the production of her books and records, prompting the Supreme Court to temporarily suspend her on August 25, 2003.

In the meantime, the DEC investigated the remainder of the charges contained in the Helg grievance. Respondent wrote three letters to ethics investigators, dated August 26, 2002 (the day

¹ By even date with this decision, we considered two default matters, Docket Nos. DRB 07-075 and 07-131. We determined to impose a three-month suspension for the combined misconduct in those two matters.

after her temporary suspension), September 26, 2002, and December 3, 2002. She failed, however, to include requested documents, including an accounting, tax records, and proof that she had turned over trust assets to a successor trustee of the Helg trust.

The grievance alleged that respondent had represented to the new trustee, Christina Nuzzo, that the balance in the Helg account was \$5,000, and had not produced copies of tax returns for the estate from the years 1998, 1999, and 2000 or proof of payment to the IRS for estate taxes.

On March 23, 2003, the DEC filed a formal ethics complaint, alleging that respondent had failed to communicate with Helg. When respondent did not answer the complaint, the matter was certified directly to us as a default. We then remanded the matter to the DEC for consolidation with the remainder of the Helg charges.

In the interim, the OAE pursued the investigation of the financial aspect of the case. Between January and August 2003, the OAE repeatedly requested respondent to produce an accounting of the Helg trust, but she failed to do so. Therefore, the OAE filed a petition for her temporary suspension, which was granted on August 25, 2003. Respondent remains suspended to date.

Thereafter, on August 27, 2003, the OAE sent respondent a subpoena seeking the location and the numbers for her trust and business accounts. Respondent provided some, but not all, information to the OAE. On September 3, 2003, the OAE wrote to respondent, requesting her to contact that office about the missing financial records. Respondent ignored the OAE's request.

On August 8, 2006, the DEC held a hearing on the Helg charges. Respondent testified that she had compiled numerous documents, which she had brought to the January 17, 2003 OAE audit. They included print-outs of all transactions in her trust account, separate files for stock certificates belonging to the Helg trust, a bank statement, and a tax return showing that she had filed the 1998 IRS return on time. Respondent also recalled that she had promised to prepare the requested accounting immediately.

According to respondent, in March 2003, she finally prepared accountings for years 2001 and 2002, but failed to forward them to the OAE. She recalled receiving a "fax" in August 2003, advising her that she had been temporarily

suspended from the practice of law. She did not practice law thereafter.²

Count two of the complaint charged respondent with having violated RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), and RPC 1.4, presumably (b) (failure to communicate with the client). Although the sub-heading of the complaint reads "Respondent's Misrepresentations Concerning Annual Trustee's fees and Failure to Account for the Trust's Assets," the body of the complaint contains no charge of a violation of RPC 8.4(c) (misrepresentation).

According to the complaint, the OAE relied on respondent's accounting for years 1994 through 2000 for its "recap" of the Helg trust transactions. The OAE charged respondent with "distorting how and when respondent took those fees and [giving] Helg the impression that the trustee's fees were taken by respondent in a fiduciary-like manner when such was not the case."

At the DEC hearing, the OAE investigator testified about respondent's trustee commissions for those years and "softened" the previously harsh position taken in the complaint:

² These facts were a part of count one of the complaint, which charged failure to cooperate in the investigation of the matter (RPC 8.1(b)), a charge that would be repeated later in the complaint.

Q. Now, in the great scheme of things, what you're describing isn't a major problem, in other words, she's taking the right fee but she's just telling the beneficiary of the trust that she's taking them at different times?

A. It would be more of a problem if they were taking more of what was there because that would indicate there is a misappropriation and she was taking money that she was not entitled to. At the end of the day if you add up the amount that was taken and the amount that she was allowed to take, she short changed herself if my memory serves me a couple hundred dollars.

Q. She actually shortchanged herself but misreported to Miss Helg how she reported the fees?

A. Exactly.

[T23-11 to T24-3.]³

For her part, respondent explained to the hearing panel that she had prepared accountings for the years 1994 through 2000, but nothing for subsequent years, until much later. She also denied having prepared the accountings to mislead Helg about the amount of her commissions, as alleged in the complaint. She claimed that she took only commissions to which she was entitled.

Respondent also denied failing to communicate with Helg, claiming that she met with her every three months (without

³ "T" refers to the transcript of the August 8, 2006 DEC hearing.

specifying the time period), and kept her informed about events in the matter.

Count three alleged violations of RPC 1.1(a), RPC 1.3, RPC 1.4, presumably (b), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

According to the complaint, respondent failed to timely file 1998 and 1999 federal tax returns for Helg. As a result, the IRS assessed \$5,359 in interest and penalties against Helg, who was eighty-four years old at the time. In order to obtain payment, the IRS levied against Helg's social security checks, as well as her New Jersey homestead rebate, IRS tax credits, and federal tax refunds. This count further alleged that, during the time that the IRS was dunning Helg for payment, respondent "misrepresented to Helg that the taxes had been paid."

For her part, respondent denied lying to Helg. Rather, she stated, after the IRS notified Helg that the 1998 return had not been filed, she took Helg to the IRS' Paramus office. According to respondent, she and Helg were certain that they had signed and filed the original return on March 16, 1999, and that the IRS had negotiated Helg's check for the taxes in April 1999. In 2001, the IRS acknowledged that Helg was actually due a refund of \$561 for her 1998 taxes.

For year 1999, the IRS advised respondent that it had no record of a filing. Therefore, on October 16, 2002, respondent had Helg sign a "duplicate copy," which respondent personally took to the IRS' Paramus office for filing. Upon the filing of the late return, the IRS advised respondent of an outstanding deficiency (\$693), which respondent paid on the spot, from her own funds.

Respondent vehemently denied that her actions with regard to tax years 1998 and 1999 were deceitful, but acknowledged, in her answer, that she had been "less than diligent in making sure that [Helg's] 1999 tax return was received by the IRS and taxes timely paid." Respondent took "full responsibility for all penalties and interest due" for 1999.

Count four alleged failure to cooperate with the successor trustee, Nuzzo, charging violations of RPC 1.1(a) and RPC 1.3. In a letter to respondent, dated May 3, 2003, Nuzzo chronicled respondent's delay in turning over the trust document to her:

Your chronic procrastination, failure to respond and mismanagement of Mrs. Helg's account is inexcusable. Your former client, Mrs. Helg, is 84 years old. As a direct result of your actions her financial well being lies in limbo . . . for nearly nine months I have been requesting, as successor Trustee, all documentation of the Trust from you and have received little more than empty promises. Mrs. Helg is consumed by worry and

her health has been negatively affected as a result of your persistent inaction.

[4C14;Ex32.]⁴

Because respondent did not furnish Helg with accountings for the trust, on November 17, 2003, Helg revoked the trust. On December 5, 2003, respondent transferred to the successor trustee \$7,354 held in respondent's trust account for the benefit of the trust.

The final count of the complaint charged that respondent failed to comply with R. 1:20-20, dealing with suspended attorneys. Specifically, after her temporary suspension, respondent failed to file the affidavit in compliance with R. 1:20-20, in violation of RPC 8.1(b) (failure to cooperate with ethics authorities) and RPC 8.4(d) (conduct prejudicial to the administration of justice).

Respondent admitted the charged misconduct in this count, stating, "I just [now] read R. 1:20-20 and understand that I should have sent an affidavit. I agree that I did not file an affidavit."

Respondent offered considerable mitigation for her actions. Although she was not placed under oath at the DEC hearing, she

⁴ "4C" refers to count four of the formal ethics complaint.

spoke candidly about events in her life that led to the problems in the Helg matter.

Respondent had practiced law with her husband since her admission to the bar in 1981, but their marriage and law practice had fallen apart, she claimed, after her husband had taken on a girlfriend.

According to respondent, she never dealt with trust account issues during her marriage, and was not even a signatory on the trust account, which was controlled solely by her husband. It was not until she divorced her husband and struck out on her own, in 2002, that she first encountered the financial side of a law office, including opening her own trust account.

In a letter to the OAE, respondent explained her inaction in the Helg case:

I am enclosing a copy of the report of Dr. Robert A. Manzi dated August 22, 2005. as I mentioned in my email to you last week, I was embarrassed when I received this report from Dr. Manzi, for he wrote that, although I used to be "well groomed, every hair in place, impeccably dressed and also brilliant" and used to be "stunning", when he saw me in 2002, I was incoherent, depressed, looking a mess. He saw me again in 2003, and he wrote that he scarcely recognized me, referring to me as an overweight, depressed, suicidal, bag lady. I guess the report was rather like a mirror and I was appalled at what I saw. I still am.

I am so afraid that you will read the report and see me only as that pathetic,

unattractive, depressed person and may think that I am too mentally unstable to return to the practice of law, but I have been getting back to my old self, especially in the last six months.

[HPREx.C.]⁵

Dr. Manzi's August 22, 2005 letter to respondent reads as follows:

I have known [respondent] for a number of years. She was married to one of my best friends, who is also my attorney. At this point, I must state emphatically that she was an absolutely stunning woman. Well groomed, every hair in place, impeccably dressed, and also brilliant.

On Saturday, June 24, 2002, I noticed her sitting in a car outside my office. She wouldn't come in; however, she chose to sit there until I was leaving. As I approached her car, I was amazed to see her looking the total opposite of what I described above. Her hair was a mess. She was wearing no makeup, and was wearing clothes that didn't even match. Her eyes were full of tears, and she could barely speak. I asked her what her problem was. She replied that her ex-husband and his girlfriend had thrown her out of the house where she lived, and out of the office where she worked.

I did a total psychological profile on her, and there were no thoughts of suicide. She was extremely agitated and very depressed. I started her on Ativan, 1 mg. by mouth three times a day and Paxil 20 mgs. By mouth daily.

After this first visit, she literally fell off the face of the earth. She left the office that she shared with her husband, and

⁵ "HPR" refers to the hearing panel report.

called me in one month to tell me how she had an office in Fort Lee. She told me that she wished to come to see me. She had taken an overdose of her tranquilizers, but noted that she wanted attention more than she wanted to kill herself.

I did see her one more time in passing on the street, and instead of the well groomed, well dressed lady, she looked like a bag lady. I knew it was her, but I didn't want to say anything to her until she said something to me. She said that she wanted to try to get over this, and she would come in to see me.

At this point, she literally disappeared. Her clients could not reach her, the practice was closed, and she moved away. At this point she was under the care of a psychiatrist and trying desperately to maintain some semblance of emotional stability.

I can basically say no more regarding her situation, except for the fact that it seems quite probable to me that the severity of her depression was more than enough to cause this fall from reasonable behavior.

[HPREx.C.]

Although Dr. Manzi referred to respondent as having received psychiatric care, respondent did not present other evidence of psychiatric treatment.

The DEC found that respondent had failed to communicate with Helg after 2001, a violation of RPC 1.4(b), and had failed to furnish ethics authorities with some of the documents necessary for the investigation, in violation of RPC 8.1(b). The DEC also found a violation of RPC. 8.1(b) for her failure to

file an affidavit in compliance with R. 1:20-20. The DEC dismissed the remaining charges in the complaint.

Following a de novo review of the record, we are satisfied that the evidence clearly and convincingly establishes that respondent is guilty of some violations charged in the complaint.

The DEC correctly found that respondent failed to adequately communicate with Helg, a violation of RPC 1.4(b). Respondent produced no letters, notes of telephone conversations, telephone records or other evidence that she communicated with Helg during the years in question. Nuzzo, too, was unable to obtain from respondent any meaningful information about the trust.

So, too, the DEC properly found that, for long periods of time, respondent ignored ethics authorities' requests for financial and tax information, resulting in her temporary suspension from the practice of law, in August 2003.

Respondent thereafter failed to file the affidavit required of all suspended attorneys, a violation of RPC 8.1(b) and RPC 8.4(d).

Although the DEC dismissed the charges of gross neglect and lack of diligence, we find that respondent did not attend to certain critical aspects of her obligations as trustee, such as

timely filing the 1999 federal tax return, and preparing timely accountings, when requested by her client. Respondent's inaction was so extensive that Helg was forced to appoint a successor trustee, Nuzzo.

Even after Nuzzo's involvement, respondent failed to account for her handling of assets and ignored Nuzzo's pleas for information about the trust. As a result of respondent's inaction, the IRS levied on her eighty-four year old client's assets. Not until 2005 did respondent finally present the accounting for the Helg trust. We find that respondent's dilatory behavior in this regard violated RPC 1.1(a) and RPC 1.3.

Ordinarily, conduct involving gross neglect in one or a few matters, with or without violations such as lack of diligence and failure to communicate with the client, warrants an admonition or a reprimand. See, e.g., In the Matter of E. Steven Lustig, DRB 00-003 (April 10, 2000) (admonition for gross neglect in a matrimonial matter and failure to adequately communicate with the client); In re Wildstein, 138 N.J. 48 (1994) (reprimand for gross neglect and lack of diligence in two matters and failure to communicate in a third matter); and In re Gordon, 121 N.J. 400 (1990) (reprimand for gross neglect and failure to communicate in two matters).

Ordinarily, admonitions are imposed for failure to cooperate with disciplinary authorities, if the attorney does not have an ethics history. See, e.g., In the Matter of Kevin R. Shannon, DRB 04-512 (June 22, 2004) (attorney did not promptly reply to the DEC investigator's requests for information about the grievance); In the Matter of Keith O. D. Moses, DRB 02-248 (October 23, 2002) (attorney failed to reply to DEC's requests for information about two grievances); In the Matter of Jon Steiger, DRB 02-199 (July 22, 2002) (attorney failed to reply to the district ethics committee's numerous communications regarding a grievance).

For an attorney's failure to file an affidavit in compliance with R. 1:20-20, a reprimand is the presumptive discipline. That sanction has been enhanced when an attorney has defaulted in the ethics matter or has an extensive ethics history, neither of which is the case here. Recent cases, most of which are defaults, have generally resulted in suspensions. See, e.g., In re Raines, 181 N.J. 537 (2004) (three-month suspension in a non-default matter, where the attorney's ethics history included a private reprimand, a three-month suspension, a six-month suspension, and a temporary suspension for failure to comply with a previous court order); In re Girdler, 179 N.J. 227 (2004) (three-month suspension in a default matter; ethics history included a private reprimand, a

public reprimand, and a three-month suspension); In re McClure, 182 N.J. 312 (2005) (one-year suspension where the attorney's ethics history included an admonition and two concurrent six-month suspensions; the matter proceeded as a default); In re King, 181 N.J. 349 (2004) (one-year suspension where the attorney had an extensive ethics history, including a reprimand, a temporary suspension for failure to return an unearned retainer, a three-month suspension in a default matter, and a one-year suspension; the attorney remained suspended since 1998, the date of the temporary suspension; default matter); and In re Mandle, 180 N.J. 158 (2004) (one-year suspension in a default case where the attorney's ethics history included three reprimands, a temporary suspension for failure to comply with an order requiring that he practice under a proctor's supervision, and two three-month suspensions; in three of the matters, the attorney failed to cooperate with disciplinary authorities). But see In re Moore, 181 N.J. 335 (2004) (reprimand in a default matter, where the attorney's disciplinary history included a one-year suspension).

In aggravation, we considered that respondent's eighty-four year old client was forced to appoint a new trustee and pay off IRS liens.

We considered mitigation as well. Respondent has no history of final discipline. In addition, her divorce from her husband,

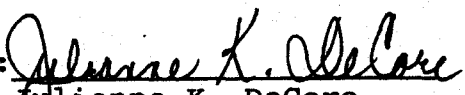
her departure from the marital home, and the break-up of their law practice sent her into a deep depression, which adversely affected her ability to focus on Helg's needs. Respondent provided an uncomplimentary letter from her physician, detailing her appearance and behavior during this time, as well as the medicinal regimen that he had prescribed to her to combat her depressive state.

After balancing the aggravating factors against the strong mitigating circumstances present in this matter, we determine to impose a censure for respondent's neglect of the Helg trust, failure to adequately communicate with Helg and Nuzzo, failure to fully cooperate with the OAE's review of her attorney records, and failure to file an affidavit in compliance with R. 1:20-20.

Member Lolla 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
William O'Shaughnessy
Chair

By: 
Julianne K. DeCore
Chief Counsel

**SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD**

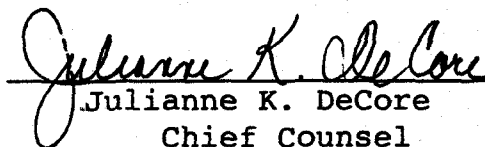
In the Matter of Diane S. Avery
Docket No. DRB 07-174

Argued: October 18, 2007

Decided: December 19, 2007

Disposition: Censure

Members	Suspension	Censure	Admonition	Disqualified	Did not participate
O'Shaughnessy		X			
Pashman		X			
Baugh		X			
Boylan		X			
Frost		X			
Lolla					X
Pashman		X			
Stanton		X			
Wissinger		X			
Total:		8			1


Julianne K. DeCore
Chief Counsel