

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 08-360
District Docket No. IIIA-08-010E

IN THE MATTER OF
FELICIA B. RUSSELL
AN ATTORNEY AT LAW

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Decision

Argued: February 19, 2009

Decided: May 28, 2009

Christine N. Rossi appeared on behalf of the District IIIA Ethics Committee.

David H. Dugan, III appeared on behalf of respondent.

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 (suspension of unspecified duration) filed by the District IIIA Ethics Committee ("DEC"). The complaint alleged gross neglect, lack of diligence, and failure to communicate with the client in a single matter. We voted to impose an admonition.

This matter was originally scheduled for review at our February 21, 2008 session. The DEC hearing transcript revealed that additional documents had been reviewed on the record and used to elicit testimony from witnesses. Although portions of those had been read into the record and considered in the hearing panel report, they had not been entered in evidence or included in the record before us. Therefore, we administratively dismissed the matter and remanded it to the DEC to give the parties an opportunity to introduce into the record documents relevant to the case and to either question or be questioned about them.

The panel was directed to hold a new hearing and to issue a new panel report to include reference to the documents on which the panel relied in its recommendation. The matter was then presented to us anew.

Respondent was admitted to the New Jersey bar in 1980. She has no prior discipline.

According to the complaint, in 2002, the grievant, Ronald Smith, retained respondent to represent him in a divorce action filed in Hudson County by Ruth, his wife of thirty years. Ronald Smith was totally disabled and collecting Social Security disability payments at the time of the divorce.

Respondent conceded that she did not file an answer to the complaint, purportedly as a litigation strategy. According to respondent, she discussed the strategy with Smith, who accepted her advice to participate only in the equitable distribution of the marital estate, following the entry of default.

Smith, in turn, denied having consented to such a plan and having received an explanation about an entry of default. Rather, he recalled a discussion about the filing of a motion to move the case to Ocean County and stated that he had relied heavily on respondent to guide him through the divorce. However, he remembered telling respondent that he would be satisfied "as long as I'm divorced, that would be okay and she said they can settle the distribution later on, and I said well, as long as we could settle the distribution, yeah, that's okay with me, as long as I was divorced."

In May 2002, without having filed an answer, respondent filed a motion to change the venue to Smith's home county of Ocean, on the basis that a chronic back condition prevented him from traveling long distances.

For reasons that were not revealed in the original record before us, on November 19, 2002, the Ocean County family court dismissed Ruth's complaint for lack of prosecution. The record has now been supplemented with a November 18, 2002 letter from

respondent's adversary, Cheryl Cashman, to the family court judge, clarifying that the complaint was dismissed for plaintiff's failure to file a notice of equitable distribution.

On April 29, 2003, Smith was served directly with a new Hudson County complaint for divorce. Respondent again filed a motion to dismiss or change venue, without having first filed an answer. Between then and November 2003, due to Smith's failure to file an answer, the court entered default against him and scheduled an equitable distribution hearing for November 21, 2003. Smith did not appear. He recalled having been advised of the hearing shortly beforehand and having no time to arrange for transportation. He also recalled asking respondent if his presence was required and her assurance that it was not because she was going to seek an adjournment. On November 21, 2003, however, the court entered a judgment of divorce in the case.

Respondent asserted, in her answer and during her testimony before the DEC, that Smith had brought her the notice of the hearing the day before its scheduled date. She claimed that she had not appeared at the hearing because Smith had told her not to appear. She remembered calling her adversary, however, to request her consent to vacate the default judgment against Smith.

In March 2004, respondent filed a motion to vacate the default judgment and to change venue. The motions were denied on May 10, 2004. In June 2004, respondent filed a motion to modify the final judgment of divorce. The motion was denied on July 2, 2004.

In August 2004, respondent filed a notice of appeal and a case information statement with the Appellate Division. The matter was scheduled for a pre-argument conference before an Appellate Division judge, on December 16, 2004. According to the record, respondent appeared at that session, along with her adversary. The Appellate Division dismissed the appeal on procedural grounds. Respondent then filed a motion to vacate the dismissal order. On June 8, 2005, the Appellate Division vacated its earlier dismissal and reinstated Smith's appeal.

The record contains no further information about the ultimate outcome of the reinstated appeal, other than respondent's recollection that, while the appellate brief was being prepared, Smith had terminated her representation.

The complaint also alleged that respondent failed to explain the matter to the degree necessary for Smith to make informed decisions about the representation (RPC 1.4(c)). Smith testified that, although he recalled numerous meetings and conversations with respondent and with her law partner, he had

not been fully informed about his case. When asked what he meant by not "fully," he stated, "[m]eaning that I didn't know that by her not showing up at the court at the divorce that [sic] I would get nothing".

In turn, respondent testified that she and her law partner had always kept Smith informed about the status of his case. Toward that end, respondent attached a certification from her partner, Ronald J. Sama, and from an office secretary, Danielle Novak. Both individuals certified that Smith was always kept informed about his case. However, neither certification addressed the charge that respondent failed to advise Smith about the ramifications of not filing an answer, as it related to the adequacy of the representation.

Smith was not recalled for testimony at the post-remand DEC hearing. At that hearing, respondent claimed that she recalled the matter more clearly than she had at the first hearing and included some new detail about the representation. She remembered that it was Smith who had come up with the idea of not filing answers to the divorce complaints, as well as a case information statement disclosing his assets. Respondent also remembered that Smith did not want a divorce because his wife was sick with a lung disease and he thought that she might die.

The presenter objected to the introduction of this new testimony because Smith was unavailable for examination. The DEC allowed it, nevertheless. Respondent's counsel elicited the following testimony from respondent about her representation of future clients:

First of all, I've learned to document my file at every turn and to — I should have communicated in written communications to Mr. Smith. Secondly, I've learned not to let my client tell me what to do with regard to a case. Had I to do it over, I would have terminated [the] representation when Mr. Smith did not cooperate with coming forth with the CIS and the other things, I would have terminated the representation. In fact, I just did that because I learned a lesson from this case.

[1T43-9 to 18.]¹

The presenter sought to show that respondent had been twice retained to perform a laundry list of legal services on Smith's behalf. Respondent conceded that she and Smith had executed two retainer agreements (one for each complaint) that established a broad scope for the representations. The first agreement called for a \$1,500 initial fee and the second for a \$2,500 fee. Both documents cited projected services, including a judgment of divorce, separate maintenance and annulment, equitable distribution, settlement agreements, and preparation and filing

¹ "1T" refers to the transcript of the April 23, 2008 DEC hearing.

of all necessary court papers. There is no indication in the record that these documents were anything more than a standard fee agreement for a matrimonial matter or that respondent was required to perform any particular services from them.

The DEC found respondent guilty of gross neglect, lack of diligence, and failure to communicate with the client. With regard to respondent's assertion that she was following her client's wishes by not taking action, the hearing panel chair noted:

While [respondent] insists that this was at the request of Mr. Smith, it seems contrary, since a tremendous amount of attorney time was spent filing Motions to change venue and to vacate Judgments of Divorce and to even take an Appeal on that decision, rather than having simply filed a responsive pleading and taking protective action for Mr. Smith in a matrimonial case.

[HPR9.]²

The DEC recommended a suspension, but did not specify its duration or support it with case law.

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.

Ruth Smith's first complaint was dismissed for lack of prosecution, but not before her attorney, Cheryl Cashman, sent

² "HPR" refers to the June 12, 2008 hearing panel report.

respondent numerous letters requesting action, all of which went unanswered. Respondent never filed an answer to that complaint. The last letter expressed "shock" with respondent for her "lack of responsiveness."

After the first complaint was dismissed for failure to prosecute, Cashman filed a second one, in April 2003. Respondent immediately filed a motion to dismiss and to change venue. Once again, however, she did not file an answer. Thereafter, respondent took no action to protect her client's interests through the summer and into the fall of 2003.

In November 2003, after the entry of a default judgment against Smith, he brought respondent a hearing notice for equitable distribution of the marital estate. Respondent asked Cashman to vacate the default, but did not attend the hearing. She filed another unsuccessful motion to vacate the default and a motion for reconsideration, followed by two Appellate Division notices of appeal. She ultimately succeeded in having the appeal reinstated.

Unquestionably, though, there were long periods of inaction by respondent with respect to both divorce complaints. Here, respondent claimed that the failure to file an answer consisted of litigation strategy. We find that an unlikely story. Smith denied that he had ever instructed respondent to do nothing in

response to his wife's complaint. Rather, he wanted a divorce and for the matter to succeed.

We, therefore, find that respondent's failure to file answers, failure to request more time to do so, and failure to take any action from June to November 2003, during which time a default judgment was entered against Smith, amounted to gross neglect and lack of diligence, violations of RPC 1.1(a) and RPC 1.3, respectively.

Respondent was also charged with a violation of RPC 1.4 (c) (failure to explain a matter to the extent reasonably necessary to permit the client to make informed decisions about the representation). In this regard, Smith testified that respondent had not explained to him the consequences flowing from the failure to file answers to the complaints. Although respondent claimed to have kept Smith informed at all times about his matter, there is no evidence in the record that she advised him about those ramifications. In fact, respondent conceded that there was no evidence to support her version of the events and admitted that she should have better documented her communications with the client. Under the circumstances, where Smith's credible testimony was that respondent had not so advised him, we find clear and convincing evidence that respondent violated RPC 1.4(c) by failing to explain the matter

to Smith to the extent necessary to allow him to make an informed decision about the representation.

Lack of diligence and failure to communicate with the client generally result in an admonition. See, e.g., In the Matter of Jonathan Saint-Preux, DRB 04-174 (July 19, 2004) (in two immigration matters, attorney failed to appear at the hearings, thereby causing orders of deportation to be entered against the clients, and failed to apprise the clients of these developments; violations of RPC 1.3 and RPC 1.4(a) found); In the Matter of Susan R. Dargay, DRB 02-276 (October 25, 2002) (failure to promptly submit to the court a final judgment of divorce in one matter and failure to reply to the client's letters and phone calls in another matter, violations of RPC 1.3 and RPC 1.4(a)); In the Matter of Mark W. Ford, DRB 02-280 (October 22, 2002) (violations of RPC 1.3 and RPC 1.4(a); the attorney failed to file a workers' compensation claim and to reasonably communicate with the client about the status of the case); and In the Matter of W. Randolph Kraft, DRB 01-051 (May 22, 2001) (attorney failed to prosecute a case diligently and failed to communicate with the client; the lack of communication included the attorney's failure to notify the client that the complaint had been dismissed for lack of prosecution; the attorney violated RPC 1.3 and RPC 1.4(a)). But see In re McCoy,

193 N.J. 477 (2008) (reprimand for attorney who, in an employment discrimination matter, violated RPC 1.3 by conducting inadequate discovery and not opposing one of the defendants' motion to dismiss certain claims; the attorney also violated RPC 1.4(c), when she voluntarily dismissed with prejudice the surviving claim against one of the defendants without the client's knowledge or authorization, and RPC 1.4(b), when, for three months, she failed to notify the client that his case against another defendant had been dismissed; aggravating factors were a prior admonition, the client's loss of appeal rights, and the attorney's failure to withdraw from the case because of her lack of expertise in the area).

There are no aggravating factors to consider. In mitigation, respondent has no prior final discipline in over twenty-five years at the bar. We, therefore, determine that an admonition is sufficient discipline for respondent's transgressions.

Vice-Chair Frost and member Doremus would impose a reprimand. Members Boylan and 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
Louis Pashman, Chair

By: Julianne K DeCore
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

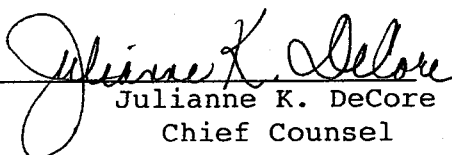
In the Matter of Felicia B. Russell
Docket No. DRB 08-360

Argued: February 19, 2009

Decided: May 28, 2009

Disposition: Admonition

Members	Disbar	Reprimand	Admonition	Dismiss	Disqualified	Did not participate
Pashman			X			
Frost		X				
Baugh			X			
Boylan						X
Clark			X			
Doremus		X				
Lolla						X
Stanton			X			
Wissinger			X			
Total:		2	5			2


Julianne K. DeCore
Chief Counsel