

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 07-347
(formerly DRB 07-244)
District Docket No. IIA-2006-0004E

IN THE MATTER OF :
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:
RACHEL D. KAPLAN :
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:
AN ATTORNEY AT LAW :
:
:

Decision

Argued: February 21, 2008

Decided: May 28, 2008

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

This matter came before us on a recommendation for an admonition filed by the District IIA Ethics Committee (DEC), which we determined to bring on for oral argument. The complaint charged respondent with violating RPC 1.3 (lack of diligence) and RPC 1.4, presumably (b) (failure to reply to client's requests for information about the status of the matter). We determine to impose a three-month suspension.

Respondent was admitted to the New Jersey bar in 1992. She has no prior discipline.

In 2001, Gerald D'Imperio retained respondent to represent her in his divorce action. On April 3, 2002, D'Imperio and his wife executed a property settlement agreement, which was incorporated into a final judgment of divorce, dated April 22, 2002.

One of the provisions of the settlement agreement called for D'Imperio's receipt of forty percent of his wife's 401 K plan (the pension plan), which had an estimated value of \$55,000. The parties agreed that the division of the pension plan was to be implemented through a Qualified Domestic Relations Order and that the costs of a valuation expert would be equally shared.

In February 2003, ten months from the date of the property settlement agreement, D'Imperio sent respondent, at her request, \$150 to cover the costs of the appraisal. This was respondent's first request for the check. Respondent took no action to finalize the pension distribution.

One year later, in February 2004, respondent filed a cross-motion seeking, among other things, to compel D'Imperio's ex-wife to disclose the identity and address of the plan administrator for the pension plan. Respondent testified that

she had made telephonic requests for this information, before filing the cross-motion.

On March 5, 2004, the court ordered D'Imperio's ex-wife to disclose such information within ten days. She did so. Nevertheless, respondent took no action to accomplish the equitable distribution of the pension plan. In addition, she failed to return more than twenty-five phone calls from D'Imperio. The last time D'Imperio was able to reach respondent, she assured him that he would receive his share of the pension plan within ten days.

As of the date of the DEC hearing, April 30, 2007, the pension issue still had not been finalized. Respondent did not return the \$150 to D'Imperio. She testified that the money had been inadvertently applied to D'Imperio's bill, when her law partnership had dissolved.

Both in her answer and at the DEC hearing, respondent admitted having violated RPC 1.3 and RPC 1.4(b). She also admitted that she had not replied to two letters from the DEC, seeking information about the grievance. Respondent attributed such failure to "pride," "embarrassment," and "being an ostrich and sticking my head in the sand."

At the start of the DEC hearing, respondent made certain promises to D'Imperio and apologized for her inaction, an

apology that D'Imperio readily accepted. During his cross-examination by respondent, D'Imperio summarized the essence of their conversation:

We discussed that you, at no charge, would go ahead and get me the money, and you had been very apologetic. You explained to me you had some medical condition, which certainly I understand, I have been going through a whole bunch of stuff with myself, my family, you name it, and I understand that very well and I'm very willing to, you know, move forward with that and that was my only purpose, to get what was due to me, the only thing I got out of this whole divorce. I mean, I lost my house, my kids, you know. The only thing I got out of this divorce was the 401 (K) as the settlement.

[1T29-17 to 1T30-3.]¹

According to the panel report, at the hearing respondent expressed remorse for her conduct, was "clearly upset by her inaction," and promised to complete the pension distribution at no cost to D'Imperio. The following exchange took place between the panel chair and respondent:

Q. Can you briefly describe for me the procedure time payment - timetable spent in getting Mr. D'Imperio his 40 percent interest?

A. I have the plan administrator information from Mrs. D'Imperio; what I will

¹ 1T refers to the first transcript of the April 30, 2007 DEC hearing.

be doing later this afternoon is getting a letter by certified and regular mail to the plan administrator asking if they have any documentation and specific forms that they need for the implementation of the QDRO. If they do, once I get that I will forward it to the Pension Appraisers, Incorporated . . . in Allentown, Pennsylvania.

Their turn-around time is usually a week to two weeks, depending on their backlog. Once I get the form from Pension Appraisers, I send it back to the plan administrator for their review and appraisal. That's sometimes where the process takes the longest, they don't always do it as quickly as we would like

Once the plan administrator approves it it's sent to the court for filing by a judge. Once the judge approves it I get it back and send it back to the plan administrator for implementation.

Q. So, it's a three- to six-month process?

A. No, I can't say it's a three- to six-month process.

Q. Ballpark.

A. It could be, I would say, probably more likely three. It's a small company, we're not dealing with thousands and thousands of employees but it could take another few months, but I will also tell you that the file will not be leaving my desk.

[2T14-2 to 2T15-11.]²

In assessing the quantum of discipline for respondent's conduct, the DEC took into account numerous mitigating factors:

² 2T denotes the second transcript of the April 30, 2007 DEC hearing.

(1) her acknowledgement of wrongdoing and remorse; (2) her offer to "take all steps necessary to obtain [D'Imperio's] interest in the 401 Plan, without charge to [D'Imperio]", an offer that D'Imperio accepted; (3) her institution of a tickler system and improved office organization, in order to ensure that matters be timely addressed; (4) the dissolution of her law firm, in October 2003; and (4) her hospitalization for pulmonary emboli in November 2005, which caused her to work part-time until January 2006.

Based on the above factors, the DEC recommended an admonition for respondent's violation of RPC 1.3 and RPC 1.4(b).

On September 29, 2007, however, five months after the DEC hearing, D'Imperio wrote a letter to the DEC presenter, complaining that, despite respondent's promise to the DEC and to him, she still had not tackled the pension distribution and was dodging his calls. His letter states:

As per your request, I have compiled a small list of recorded/documented phone calls to Rachel Kaplan, regarding my still unresolved case. The last 5-6 calls to her, she has not returned my calls, at all. These last 5-6 phone calls I left messages, on her voicemail and with her secretary, stating that I would report her, again, to the Board of Ethics Committee and the Better Business Bureau. She does not respond and continues not to inform me of my case. I just don't get it . . . and I am extremely frustrated. She promises me and the committee that she would finish my case in a quick manner and

for free. To date, she has not done so. I am right back where I was before the committee's disciplinary hearing, actions and recommendations of admonition.

D'Imperio then listed eight telephone calls that he had made to respondent, from June 12 to August 6, 2007, and estimated that he had made an additional ten to twelve calls, from August to September 2007.

After receiving a copy of D'Imperio's letter from the panel chair, Office of Disciplinary Review Board Counsel sent the following letter to respondent and to the presenter, on October 22, 2007:

This office . . . received a copy of a letter from Jerry D'Imperio, the grievant in this case, informing [the presenter] that respondent still has not taken steps to complete his claim for the equitable distribution of his ex-wife's retirement account, despite her assurance to the hearing panel that she would do so expeditiously and at no charge to Mr. D'Imperio. As the hearing panel report shows, respondent's assurance was one of the mitigating factors that the hearing panel took into account in determining to recommend an admonition.

As the parties were informed, this matter is scheduled for the Disciplinary Review Board's review on November 15, 2007. Please be advised that the above letter will be submitted to the Board along with the record developed below. In conducting its de novo review of the record, the Board will consider whether respondent's failure to fulfill her promise to the hearing panel

should affect the quantum of discipline recommended by the panel.

If respondent intends to submit a letter explaining her inaction, she must do so no later than October 29, 2007, with a copy to the presenter. That letter, too, will be made part of the record to be reviewed by the Board.

Despite having been given an opportunity to explain her failure to make good on her pledge to the DEC and to her client, respondent stood silent. Office of Board Counsel received nothing from her.

Following a de novo review of the record, we find that the DEC's conclusion that respondent violated RPC 1.3 and RPC 1.4(b) is fully supported by clear and convincing evidence.

Had respondent fulfilled her promise to the DEC and to D'Imperio, an admonition would have been sufficient discipline for her lack of diligence and failure to communicate with her 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, in fact, 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 the client learn that the petition had not been filed).

What takes this case out of the realm of an admonition is respondent's failure to deliver on a promise that weighed heavily in the DEC's decision to recommend an admonition. We find it troubling that respondent, who was full of mea culpas at the DEC hearing; who expressed regret to the panel for not having wrapped up the pension distribution in the four years that followed the parties' divorce; who appeared to the panel to be "clearly upset by her inaction in this matter;" who offered to do whatever was necessary to complete the pension distribution, at no cost to D'Imperio; and who knew that the DEC had taken her at her word in recommending an admonition, proceeded to turn her back on the client (and on the DEC) by not doing what she had promised to do and by ignoring the client's twenty phone calls to her. The conclusion is unavoidable that respondent deceived both the hearing panel and D'Imperio.

As mentioned above, the final judgment of divorce, entered in April 2002, called for D'Imperio's receipt of a forty percent share of his wife's pension plan. This asset distribution was to be accomplished through a Qualified Domestic Relations order ("QDRO"), which would divide the wife's pension and provide D'Imperio with his share of the pension when the wife retired. A draft order may be prepared by specialized companies, at a modest cost, or by an attorney knowledgeable as to QDROs. Yet, as of the date of the DEC hearing, April 2007, respondent had not even taken the first step toward obtaining a draft QDRO on the plan. She did not hire an expert to draft the QDRO nor did she do it herself.

Before the DEC hearing began, respondent sought to capitalize on D'Imperio's forgiving nature. She was most successful in that endeavor. In a pre-hearing conversation with D'Imperio, respondent blamed her inaction on illness and vowed to launch into the preparation of the QDRO with vigor and dispatch.

Believing in respondent's display of contrition and sincerity, D'Imperio accepted her apology. As he told the hearing panel, he understood respondent's explanation because "he had been going through a whole bunch of stuff with

[him]self, [his] family, you name it, and [he understood] that very well and [was] very willing to move forward"

In retrospect, we now detect what turned out to be respondent's first and obvious effort to deceive D'Imperio. Indeed, as serious as respondent's illness might have been, it was not the cause of her neglect of her client's interests. She fell ill in November 2005, three and a half years after the equitable distribution award. Even then, her work schedule was not interrupted for a long stretch, but only reduced to a part-time practice for a few months (until January 2006). Therefore, her illness was never the reason for her inertia.

The DEC, too, gave credit to respondent's expression of regret. It noted that she seemed "clearly upset by her inaction." Like D'Imperio, the DEC trusted respondent's word that she would act on the pension distribution with unparalleled zeal. The DEC heard respondent's detailed account of how she intended to swiftly accomplish what she estimated to be a three-month process. At her presentation's end, she assured the DEC that "the file [would] not be leaving [her] desk."

Manifestly swayed by respondent's contrition and promises, the DEC recommended the lowest possible sanction for her five-year "languor": an admonition.

Untrue to her word, respondent did absolutely nothing to advance D'Imperio's interests, despite having vowed, at the DEC hearing, that she would send a letter to the pension administrator "this afternoon." She paid no attention to D'Imperio's twenty or so phone calls, turned a deaf ear to Office of Board Counsel's attempt to get an explanation for her behavior, and waived appearance before us. Although respondents are free to waive appearance for oral argument, respondent rejected one more opportunity to present what we hoped to be a reasonable, acceptable excuse for her failure to honor her commitment to D'Imperio and to the DEC. Instead, she has demonstrated that she cares neither for her client's welfare nor for any consequences that may flow from her disrespect for the disciplinary system. In short, she deliberately rejected every chance for redemption.

Deeply troubling as well is the loss of confidence in the legal profession that respondent's conduct might have caused the public to experience. D'Imperio, for one, expressed his frustration with respondent's failure to keep her promise to him and to the DEC. Rightfully so, he complained that he was "right back where I was before the committee's disciplinary hearing, actions and recommendations of admonition." His loss of faith in

the disciplinary system was all too apparent. It is up to us to restore it.

For respondent's indifference toward the disciplinary process, her demonstrated disregard of her client's well-being, and, more significantly, her deceptive practices toward the DEC and D'Imperio, we are convinced that nothing short of a term of suspension would be adequate. See, e.g., In re Bar-Nadav, 174 N.J. 537 (2002) (three-month suspension imposed on attorney who submitted two fictitious letters to the district ethics committee in an attempt to justify his failure to file a divorce complaint on behalf of a client; the attorney also filed a motion on behalf of another client after his representation had ended and failed to communicate with both clients) and In re Rinaldi, 149 N.J. 22 (1997) (three-month suspension for attorney who submitted three fictitious letters to a district ethics committee in an attempt to show that he had worked on a client's case, did not diligently pursue the case, and made misrepresentations to the client about the status of the case).

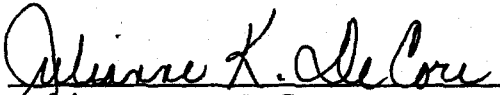
We see no great distinction between respondent's conduct and that of Bar-Nadav and Rinaldi. Although those two attorneys fabricated letters to district ethics committees to conceal their neglect, respondent's pattern of verbal deceit was no less

egregious than if it had been in writing. We, therefore, determine to suspend her for three months.

Chair O'Shaughnessy and Member Boylan would have imposed a censure. Members Lolla, Neuwirth, and Baugh 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 J. O'Shaughnessy, Chair

By: 
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

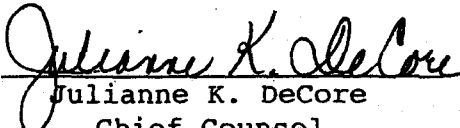
In the Matter of Rachel D. Kaplan
Docket No. DRB 07-347

Argued: February 21, 2008

Decided: May 28, 2008

Disposition: Three-month suspension

Members	Disbar	Three-month suspension	Censure	Reprimand	Admonition	Did not participate
O'Shaughnessy			X			
Pashman		X				
Baugh						X
Boylan			X			
Frost		X				
Lolla						X
Neuwirth						X
Stanton		X				
Wissinger		X				
Total:		4	2			3


Julianne K. DeCore
Chief Counsel