

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 07-179
District Docket No. I-05-017E

IN THE MATTER OF :
VERA McCOY :
AN ATTORNEY AT LAW :
:

Decision

Argued: October 18, 2007

Decided: November 29, 2007

Willis F. Flower appeared on behalf of the District I Ethics Committee.

Roderick Baltimore appeared on behalf of respondent.

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

This matter came before us on a recommendation for a reprimand filed by the District I Ethics Committee (DEC). The complaint charged respondent with violating RPC 1.3 (lack of diligence), RPC 1.4(b) (failure to keep a client reasonably informed about the status of the matter and to comply with a

client's reasonable requests for information), 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), and RPC 1.16 (although no subsection was cited, the record shows that the intended charge was respondent's failure to decline or terminate the representation of complex litigation that was beyond her competence). We agree with the DEC that a reprimand is the appropriate discipline in this matter.

Respondent was admitted to the New Jersey bar in 1986. She maintains a law office in Clementon, New Jersey. She has no history of discipline.¹

The record contains a joint stipulation of facts, signed and dated by respondent's counsel, and dated, but not signed, by the presenter. The stipulated facts are as follows.

In July 2000, Mill Polishing Industries, Inc. (MPI) terminated Larry Henderson's employment. MPI's "stated" reasons for Henderson's dismissal were his violation of the company's attendance policy and his failure to pass a drug test.

¹ On October 18, 2007, we also reviewed a disciplinary stipulation between respondent and the Office of Attorney Ethics, addressing respondent's recordkeeping violations and negligent misappropriation of client's funds. We determined to impose and admonition in that matter. In the Matter of Vera McCoy, DRB 07-269 (November 13, 2007).

On August 9, 2000, Henderson, with the assistance of his union, filed a grievance seeking reinstatement. The grievance was denied.

On August 14, 2000, Henderson filed a complaint with the New Jersey Division on Civil Rights and Equal Employment Opportunity Commission (EEOC). On October 10, 2001, the EEOC issued a notice of right to sue letter.

In January 2002, Henderson's former attorney filed a complaint against MPI in a New Jersey state court. The complaint alleged race discrimination, contrary to 42 U.S.C. 1981. In March 2002, the case was removed to the United States District Court.

In August 2002, MPI offered Henderson a \$20,000 settlement. Henderson's then attorney strongly recommended that he accept the offer. Henderson, however, rejected the settlement and demanded \$75,000. Shortly thereafter, in October 2002, Henderson retained respondent.

On July 2, 2003, respondent filed a motion seeking leave to file an amended complaint. Prior to the expiration of the statute of limitations on race discrimination and NJLAD claims (July 2, 2003), respondent was aware of Henderson's intention to join Teamster Local Union #676 (Local 676) as a defendant. Respondent initially believed that her motion served to toll the statute of limitations as to the claim against the union.

More than a year later, on September 4, 2003, respondent filed an amended complaint, naming Local 676 as a defendant. By then, the statute of limitations had expired.

The amended district court complaint alleged race discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000 et seq. and the New Jersey Law Against Discrimination (NJLAD), N.J.S.A. §10:5-1 et seq., and disability discrimination under the American with Disabilities Act (ADA), 42 U.S.C. §12101 et seq., and 42 U.S.C. §1981.

On an unknown date, the defendant (presumably, MPI) offered Henderson a settlement of \$30,000, which respondent endorsed. However, Henderson rejected this offer as well.

Respondent engaged in discovery by propounding and answering interrogatories, producing documents, and representing Henderson at his deposition. However, she did not take depositions or obtain witness certifications or statements. She claimed that, because of Henderson's recent bankruptcy and incarceration, he could not afford deposition costs, which he was required to bear under their retainer agreement. Respondent stipulated that she conducted discovery, "albeit in an inadequate manner."

Respondent did not notify Henderson that the failure to take depositions of favorable witnesses could prejudice his

case. In addition, she stipulated that she failed to advise Henderson to seek counsel who could pursue the matter on a "pure-contingency [basis] and advance costs for necessary pre-trial discovery." Finally, she stipulated that she "had never personally conducted a trial of an employment discrimination case of this type and lacked the experience and resources to properly prepare and handle the case."

On September 17, 2003, Local 676 moved to dismiss the complaint, pursuant to F.R.C.P. 12(b)(6) (failure to state a claim upon which relief may be granted). Although respondent had obtained an extension until October 15, 2003 to oppose the motion, she did not do so until October 21, 2003. Because she did not request an additional extension, or provide the court with any explanation for the "untimeliness of the opposition brief," the court treated the defendant's motion as unopposed.

The court granted Local 676's motion in part and denied it in part. The court determined that Henderson was time-barred from asserting discrimination claims under 42 U.S.C. § 1981 and the NJLAD against Local 676. However, the court rejected the union's contentions that Henderson had failed to exhaust his administrative remedies under Title VII and the ADA, and to state a claim upon which relief could be granted.

On March 23, 2004, respondent filed a voluntary dismissal, with prejudice, of the remaining charges against Local 676. Respondent neither notified Henderson of the dismissal nor obtain his consent to it.

On April 2, 2004, MPI moved for summary judgment to dismiss Henderson's complaint. The court granted the motion on November 3, 2004. The court's opinion criticized respondent's failure to comply with F.R.C.P. Local Civil Rule 56.1, by not providing the court with a statement of material facts. The court also noted that respondent had failed to supply evidence contradicting MPI's reason for terminating Henderson, as well as evidence to support Henderson's allegations of disparate pay, harassment, and other discrimination claims. The court dismissed Henderson's ADA and NJLAD disability claims, based on Henderson's failure to demonstrate that he was disabled, as defined by statute. In addition, the court found that respondent's opposition brief failed to support Henderson's claim that MPI's proffered reason for the termination was pretextual, and failed to demonstrate how his physical restrictions "impacted" his life.

According to the stipulation, respondent failed to submit any expert report, medical record or affidavit to support the extent of Henderson's disability or its impact on his lifestyle. The brief was devoid of proofs to meet the requisite threshold on

the discrimination issues. The stipulation provided that, in sum, respondent's brief consisted "of an across-the-board failure to bring evidence to the attention of the Court sufficient to create a controverted issue of material fact."

It was not until February 2005 that respondent informed Henderson that summary judgment had been entered in favor of MPI on November 3, 2004. By then, the time to file an appeal had already expired.

On March 8, 2005, Henderson filed, pro se, a notice of appeal with the United States Circuit Court of Appeals, Third Circuit. The court dismissed the appeal for lack of jurisdiction because the time to appeal had expired "and could not be extended."

On February 22, 2005, Henderson filed a grievance against respondent. The grievance claimed that respondent had misrepresented to Henderson that the complaint had been timely amended to join Local 676. According to the stipulation, respondent's filing of the motion seeking leave to amend the complaint on the day the statute of limitations ran supported her claim that she mistakenly believed that the statute of limitations had been tolled.

Respondent testified that she is a solo practitioner. Her recollection of the case was not entirely clear. She testified

without benefit of the file because she had turned it over to Henderson.

According to respondent, she thought that, initially, Henderson's case was proceeding properly. However, her mother's death, in 2003, had affected her performance. Henderson's financial problems added to her difficulties with the case, as did being "bombarded" with discovery requests. Respondent explained that normally her fee is \$150 an hour, and that she had represented Henderson on a contingency fee basis because otherwise her fees would have approached \$10,000.

According to respondent, she had made it clear to Henderson, in her retainer agreement, that he was responsible for the costs of the litigation. Henderson maintained, however, that he had never received a copy of the retainer agreement and had not read it before signing it.

Respondent did not recall if she had discussed the potential costs of the litigation with Henderson, but testified that she generally would tell her clients that their out-of-pocket expenses could range from \$2,000 to \$5,000, that she would not "foot" the expense of litigation, that it was difficult to estimate expenses, and that depositions were expensive. Respondent did not consider that Henderson's financial limitations might have required her to withdraw from the representation.

Respondent asserted that, during discovery, the defendants had produced documentation showing that Henderson had failed a drug test and had failed to report to work afterwards. Respondent claimed that, based on this information, she had been unable to determine if Henderson's claim was meritorious. She added that, although Henderson had contended that Caucasian employees were not penalized for similar violations, he had provided her with no evidence to support his contention.

Respondent testified further that, when she filed the motion for leave to amend the complaint, she was under the mistaken impression that the motion had added the union as a defendant and that the motion had tolled the statute of limitations. Thus, she claimed, when she told Henderson that the complaint had been amended, she believed that to be true.

As to the voluntary dismissal of some of the claims against the union, respondent was unable to recall why she had decided to do so.

With respect to the court's dismissal of Henderson's complaint against MPI, respondent testified that, after she reviewed the court's opinion, she did not believe that there was any basis for an appeal. By letter dated February 2005, three months after the dismissal, she ultimately informed Henderson of the court's action. She claimed also that she and Henderson had

discussed the dismissal, during a meeting at the Camden County Corrections Center, where he was incarcerated. She contended that she had not notified Henderson sooner, because he had been convicted of murder and she believed that he needed to focus his energy on obtaining his release. She explained that, at the time, Henderson's family was struggling financially and that she thought that his funds should be used to support his family, rather than pursue an appeal. She conceded that she had never advised Henderson to retain another attorney who could "front" the litigation expenses for him.

Respondent maintained that she had tried to represent Henderson to the best of her ability. Since then, however, she has refrained from accepting wrongful termination/discrimination cases because of her lack of experience in this area.

For his part, Henderson testified that, had he known that respondent's mother had passed away, he would have realized that she was grieving and could not fully focus on his case. Henderson was incarcerated in January 2003. He recalled that respondent had met with him at the county jail and had recommended that he accept the settlement. He testified that, despite respondent's recommendations, he had refused the settlement because of all of the suffering that he and his family had endured.

The presenter acknowledged that respondent had been cooperative, responsive, and truthful during the course of the investigation of the grievance. According to the presenter's calculations, respondent had understated the amount of time that she had spent on Henderson's case. Her records revealed that her services had approached \$16,000, rather than the \$10,000 she had estimated. The presenter recognized that these types of cases are time-consuming, expensive, and technically "very, very difficult." He believed that respondent had undertaken a case in an area in which she did not have adequate experience and that, when the case had not settled, she had been at a loss on how to proceed. The presenter found no evidence that respondent's actions had been undertaken for gain, or with any evil motive or deliberate intent to deceive Henderson.

The presenter remarked that, had the matter proceeded in state court, respondent's six-day delay in filing a reply to the motion for summary judgment would not have been met with such dire consequences.

The DEC noted that respondent did not timely attempt to amend the complaint and that she failed to oppose the union's motion to dismiss the race discrimination and NJLAD claims within the required time, thereby violating RPC 1.3. The DEC also found that respondent violated RPC 1.4(c), when she

voluntarily dismissed with prejudice the surviving ADA claim against the union without Henderson's knowledge or authorization, and RPC 1.4(b), when, for three months, she failed to notify Henderson that his MPI case had been dismissed.

The DEC also found that respondent violated RPC 1.16, in that she took on the representation of a case in an area in which she lacked experience, did so without ensuring that the client had the financial resources necessary for the proper handling of the claim, and then failed to withdraw from the representation when she realized that the client's financial difficulties rendered her incapable of filing an "effective" reply to MPI's motion for summary judgment.

In mitigation, the DEC considered respondent's unblemished record of twenty years, her cooperation and candor during the investigation of the grievance, and her self-imposed limitation on her practice. In aggravation, the DEC noted Henderson's inability to seek redress for his claims.

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

That respondent lacked diligence in handling Henderson's case is undeniable. Although Henderson retained respondent in October 2002, she waited approximately nine months to file a

motion for leave to amend the complaint. She did so on the date the statute of limitations expired on the discrimination claims. Thereafter, she did not amend the complaint for more than a year.

Furthermore, after Local 676 filed a motion for summary judgment, respondent obtained an extension for the filing of an objection. She, nevertheless, filed it out of time, without requesting the court for an additional extension or providing the court with an explanation for the delay. The court, therefore, treated the summary judgment motion as unopposed and granted it in part.

Finally, as to MPI's motion for summary judgment, respondent failed to provide the court with a statement of material facts and to present evidence in support of Henderson's claims. As a result, the court dismissed Henderson's ADA and NJLAD disability claims.

Respondent also failed to properly communicate with Henderson, thereby violating RPC 1.4(b) and RPC 1.4(c). She failed to explain to him the importance of taking the deposition of witnesses and failed to promptly notify him that his case against MPI had been dismissed. This cost Henderson the ability to file an appeal from the dismissal. Respondent unilaterally decided that Henderson's funds would be better spent supporting his family and getting himself out of jail than filing an appeal.

Respondent also failed to obtain Henderson's approval to the dismissal of the remaining charges against Local 676 or even to discuss with him her intention to file a voluntary dismissal.

The record addressed one additional violation. The complaint charged, and the DEC found, that "[r]espondent lacked the experience, expertise and resources to handle this specialized complex type of litigation and [that] her failure to decline the case or terminate her representation in a matter beyond her competence constitute[d] a violation of RPC 1.16 [declining or terminating representation]." Neither the complaint, nor the hearing panel report cited a subsection of the rule.

Although it would seem that RPC 1.16 should be applicable in this instance, no subsection of that rule specifically addresses a lawyer's duty to decline or withdraw from representation in an area of the law in which the lawyer does not have sufficient experience. We, therefore, dismiss the charged violation of RPC 1.16. On the other hand, such conduct may be considered as an aggravating factor. We so find here.

Conduct involving lack of diligence and failure to communicate with clients, even if accompanied by gross neglect, ordinarily results in either an admonition or a reprimand, depending on the number of client matters involved, the gravity of the offenses, the harm to the clients, and the attorney's disciplinary history. See,

e.g., In the Matter of Anthony R. Atwell, DRB 05-023 (February 22, 2005) (admonition for attorney who did not disclose to the client that the client's 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; the attorney violated RPC 1.4(a) (now RPC 1.4(b)) and RPC 1.3); In the Matter of Ben Zander, DRB 04-133 (May 24, 2004) (admonition imposed on attorney whose inaction caused a trademark application to be deemed abandoned on two occasions; the attorney also failed to comply with the client's requests for information about the case; violations of RPC 1.1(a), RPC 1.3, and RPC 1.4(a)); In the Matter of Jeri L. Sayer, DRB 99-238 (January 11, 2001) (admonition for attorney who displayed gross neglect, lack of diligence, and failure to communicate with the client; a workers' compensation claim was dismissed twice because of the attorney's failure to appear in court; thereafter, the attorney filed an appeal, which was dismissed for her failure to timely file a brief); In the Matter of Jonathan H. Lesnik, DRB 02-120 (May 22, 2000) (attorney who failed to file an answer in a divorce matter, resulting in a final judgment of default against the client, received an admonition; the attorney also failed to keep the client informed about the status of the case); In the

Matter of Paul Paskey, DRB 98-244 (October 23, 1998) (admonition for attorney guilty of gross neglect, lack of diligence, and failure to communicate with the client); In the Matter of Ben Payton, DRB 97-247 (October 27, 1997) (admonition imposed on attorney guilty of gross neglect, lack of diligence, and failure to communicate with the client; the attorney filed a complaint four days after the expiration of the statute of limitations, and then allowed it to be dismissed for lack of prosecution; the attorney never informed the client of the dismissal; the attorney also failed to reply to the client's numerous requests for information about the case); In re Aranguren, 172 N.J. 236 (2002) (reprimand for attorney who failed to act with diligence in a bankruptcy matter, failed to communicate with the client, and failed to memorialize the basis of his fee; prior admonition and six-month suspension); In re Zeitler, 165 N.J. 503 (2000) (attorney guilty of lack of diligence and failure to communicate with clients received a reprimand; extensive ethics history); In re Gordon, 139 N.J. 606 (1995) (reprimand for lack of diligence and failure to communicate with the clients in two matters; in one of the matters, the attorney also failed to return the file to the client; prior reprimand); and In re Wildstein, 138 N.J. 48 (1994) (misconduct in three matters, including gross neglect, lack of diligence, and failure to communicate with clients merited a reprimand).


Because respondent has no ethics history, it would seem that an admonition might be adequate discipline here. Two significant aggravating circumstances, however, warrant greater discipline: Henderson's loss of his appeal rights because of respondent's failure to timely disclose to him that the court had entered summary judgment against the defendant, and her failure to withdraw from the case because of her lack of expertise in the area. We, therefore, determine that a reprimand more appropriately addresses the extent of respondent's conduct.

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 J. O'Shaughnessy, Esq.

By:


for Julianne K. DeCore
Chief Counsel

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


In the Matter of Vera McCoy
Docket No. DRB 07-179

Argued: October 18, 2007

Decided: November 29, 2007

Disposition: Reprimand

Members	Suspension	Reprimand	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


By Julianne K. DeCore
Chief Counsel