Supreme Court of New Jersey
Disciplinary Review Board
Docket No. DRB 19-117
District Docket No. I-2017-0011E

In the Matter of	:	
Michelle J. Douglass	:	
An Attorney at Law	:	Dissent

Decided: November 8, 2019

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

The majority has recommended that respondent be reprimanded, finding clear and convincing evidence that she violated RPC 1.15(b) (failure to safeguard funds); RPC 3.4(c) (knowingly disobeying an obligation under the rules of a tribunal); RPC 4.1(a)(1) (making a false statement of material fact or law to a third person); RPC 4.1(a)(2) (failure to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client); and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation). For the reasons that follow, I dissent from that recommendation, and recommend that all of the charges against respondent be dismissed.

This case revolves around the single question of whether, under the unique circumstances presented, respondent should be disciplined for failing to comply with a court order requiring funds from any future settlement with Atlantic City Supervisors' Associates/Local 108 (Local 108) to be deposited with the Superior Court Trust Fund Unit (SCTFU). Secondarily, and related to this question, is whether respondent misrepresented to a third party that she did not represent a litigant, Ernest Coursey, in his claim against Local 108.

For these two alleged misdeeds, the majority of the Board would reprimand respondent, and two Board members would impose an admonition. The District I Ethics Committee (DEC) panel that heard this case also recommended a reprimand, but did not find that respondent knowingly misrepresented her status as counsel to Coursey. For the reasons set forth below, I do not believe that violations of any RPC were proven by clear and convincing evidence, and, thus, would dismiss all of the charges.

Respondent is an attorney with an unblemished, thirty-year disciplinary record, who donated her time, acting pro bono, to assist Coursey. Respondent believed that Coursey was being egregiously overreached by George Farmer, his former attorney, who claimed as his fee the entire $250,000 settlement he had negotiated for Coursey, after the court already had awarded Farmer $450,000, pursuant to a fee-shifting scenario. Were Farmer successful in his claims for an

additional fee, he would leave Coursey with no recovery. It was Farmer who filed the ethics complaint underlying this matter, alleging that respondent had violated a court order by failing to deposit with the SCTFU a $10,000 settlement with a second defendant, Local 108 -- still more client funds that Farmer sought for himself.

The facts are laid out in the majority opinion and are not repeated here except for those that require emphasis. On January 8, 2016, Superior Court Judge Joseph Marczyk held a hearing at which Coursey, Oxfeld (who represented Local 108), Farmer, and respondent appeared. It was on that date that the order in question was entered, requiring funds from any future settlement with Local 108 to be deposited in the SCTFU. At the time of this hearing, a $250,000 settlement with another defendant already had been deposited with the court. Respondent did not represent Coursey at the time of the hearing. Indeed, Coursey spoke for himself in court and Judge Marczyk held that, "Mr. Coursey will continue to appear pro se," stating that he was "crossing out Ms. Douglass as attorney of record" and crediting her with "tr[ying] to help Mr. Coursey."

Nor was respondent representing Coursey three months later, in mid-April 2016, when, acting pro se, Coursey settled his case against Local 108, or two

months after that, in June 2016, when the $10,000 settlement with Local 108 began to be paid, in four $2,500 increments.

It was mere happenstance that the $10,000 came into respondent's possession at all, since she represented no party at that time. Respondent came to possess those funds only because Oxfeld, Local 108's attorney, sought respondent's help in locating Coursey (whose home had been damaged by Hurricane Sandy) when she could not reach him to have him sign the settlement agreement that the two had negotiated. Oxfeld prepared that agreement after negotiating it with Coursey, with no input from respondent. Coursey testified that he understood respondent's role only to be reviewing documents drafted by Oxfeld and being "the go-between" collecting money from Oxfeld for him. According to him, respondent "had nothing to do with the settlement" with Local 108.

Since Oxfeld participated in Judge Marczyk's January 8, 2016 hearing, she knew about the court's order requiring funds from any later settlement to be deposited with the SCTFU. But, as she testified at the disciplinary hearing, she had forgotten about the order by the time she disbursed the settlement funds to respondent five months later and so, contrary to the order, she did not send them to the SCTFU. Coursey testified that he also had forgotten about the order when

he did not deposit the settlement funds with the court after he received them from respondent, who had received them from Oxfeld.

Like Oxfeld and Coursey, respondent also testified that she had forgotten about the order when she sent the funds to Coursey after receiving them from Oxfeld. Although the hearing panel did not find her credible in this respect, and deference normally is given to findings of credibility by fact finders, relevant factors were overlooked by the panel that should have impacted this finding. First, neither Coursey nor Oxfeld, both of whom were in court when the order was entered, deposited the funds with the SCTFU as ordered, and both testified that they had forgotten about that provision in the then five-month-old order. Indeed, the duty to send the funds to the court and to inform Farmer about the settlement was first and foremost Oxfeld's who, representing Local 108, was responsible for disbursing the funds. Notably, Oxfeld was not charged with any ethics violation. Second, respondent did not benefit by sending the money to Coursey rather than depositing it with the SCTFU. Third, respondent had no reason to have in mind the provisions of the court's order five months after it had been entered, because she was not representing Coursey, either when the January 8, 2016 order was entered or during Coursey's pro se settlement negotiations with Local 108. She had no reason to believe that she would be receiving those funds which Oxfeld unexpectedly sent to her ,when Oxfeld could

not send them directly to Coursey, because she could not locate him. Respondent testified that, had she remembered that order, she would have checked with Judge Marczyk to see if his interlocutory order was still in effect, now that the Local 108 case had been dismissed. Fourth, at the January 8, 2016 hearing, respondent expressed agreement with Judge Marczyk's decision to require any funds from a later settlement to be deposited with the SCTFU. There was no reason for her to knowingly disobey an order with which she previously had agreed.

As to the second issue regarding respondent's alleged misstatements about her role as Coursey's attorney, the majority makes much of the fact that respondent signed the Settlement Agreement and Stipulation of Dismissal in a signature block identifying her as Coursey's attorney, saying that this shows she lied to Farmer about her role as Coursey's attorney in the Local 108 litigation. However, the majority overlooks Oxfeld's testimony that, when she prepared those documents, she inserted respondent's name as Coursey's attorney mistakenly, with "lack of thought," even though she knew respondent was not representing Coursey in the Local 108 case, and believed respondent was simply "facilitating the passing of papers back and forth," saying, "[t]he case had been resolved" by that time. It does not seem to be disputed by any of the participants that respondent played, at most, a limited role of simply reviewing documents

that Oxfeld had drafted and a settlement that Coursey had negotiated, and then transmitting settlement money between the two. Respondent tried to define this "hybrid" role in a letter to Coursey dated April 13, 2016. This unusual "hybrid" role that respondent played was approved by Judge Marczyk, when he allowed her to withdraw as Coursey's attorney but to remain involved on a limited basis. Because Judge Marczyk himself documented and approved her withdrawal as counsel and then she unexpectedly -- under circumstances described above -- performed only the limited function of reviewing documents and transferring money, it is understandable that there was some confusion, even by her, as to whether she was serving as Coursey's counsel after the court entered its order excusing her. Indeed, the DEC hearing panel dismissed ethics charges accusing her of violating RPC 4.1(a)(1) and (2), and RPC 8.4(c), which were based on her statements to Farmer that she was not Coursey's attorney.

Some of the hearing panel's decision is relevant here. The panel found that:

> 1. Ms. Douglass's mistakes and errors in various letters agreements and pleadings wherein she advised that she was representing Mr. Coursey in the litigation does not constitute a violation of RPC 4.1(a)(1) or RPC 4.1(a)(2). Neither Judge Marczyk nor Ms. Oxfeld nor Mr. Coursey nor anyone else was confused or misled by Ms. Douglass who made it clear that she only represented Mr. Coursey in the context of the Farmer/Coursey fee dispute but not in conjunction with the Local 108 settlement. While . . . references in

agreements, letters, etc. to Ms. Douglass as being the attorney for Mr. Coursey – which references were at various times either accurate or inaccurate – may have caused some confusion to the uninformed reader, it is the finding of the Panel that any errors were not made with the purpose to deceive or prejudice any individual. Instead, these errors were the mistakes of third persons (Ms. Oxfeld, Ms. Douglass' secretary) . . . and caused no harm to Mr. Coursey, Mr. Farmer or the Court.

2. Nor does the Panel recommend a finding against Ms. Douglas for a violation of RPC 8.4(a)(c)(d). Specifically, the Panel does not find that the Respondent was dishonest with either the Grievant or the Court . . . or that she took action which was prejudicial to the administration of justice or that she was engaged in dishonest conduct or misrepresentation.

[DEC hearing panel decision, at 27 - 28.]

In any event, respondent's statements about whether or not she represented Coursey do not seem to me to be material, because no one relied on them. They also were not shown by clear and convincing evidence to be knowing, given the court order relieving her as Coursey's counsel. I prefer to call them misstatements rather than misrepresentations; they seem like much ado about very little and should not serve as a basis for discipline.

In short, this is a case where respondent tried to protect Coursey from a wrong she saw his former lawyer perpetrating. She did so pro bono, accepting no money for her work trying to negotiate a settlement for him with that former attorney who was claiming a right to his client's entire settlement in addition to

a substantial, already court-awarded, fee. Respondent volunteered to help at a time when Coursey had no legal representation and solely because she believed Farmer was acting unjustly. She testified:

> Q. Why would you as a lawyer . . . get involved without a fee?
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> A. I thought it was wrong what had happened. And I have represented thousands of clients in employment matters. I have been practicing for 30 years. Never in my career have I ever experienced an employment lawyer charging such, what I believe to be an egregious fee.
>
> I mean, it's typical in the field of employment law that as in personal injury law, that a lawyer gets one-third. And two-thirds of it goes to the client . . . .
>
> And quite often I get much less than a third in any event, to make clients happy. So I thought that it was wrong. . . . . I thought that I could right the wrong that had happened.
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> [2T58:19-2T59:12].

There is no evidence that any harm was caused to anyone based on the charged RPC violations and no evidence that respondent benefitted from any action or inaction of hers in this case.

In determining the appropriate measure of discipline, we must consider the interests of the public, the bar, and the respondent. "The primary purpose of discipline is not to punish the attorney but to preserve the confidence of the public in the bar." In re Principato, 139 N.J. 456, 460 (1995). It is difficult to see how this purpose would be served by disciplining this respondent, who has no disciplinary record and a sterling reputation and was acting admirably pro

bono to protect a member of the public from the claims of his former lawyer, which she believed amounted to overreaching.

Based on all the circumstances, I do not believe there is clear and convincing evidence of any intentional RPC violation by respondent's failing to place the $10,000 in the SCTFU, as required by court order, or that she knowingly misrepresented that she did not represent Coursey with regard to the Local 108 litigation or even that such statements were material.

But even if there were a violation, I believe it to be an aberration in this attorney's spotless thirty-year record at the bar and no more than a de minimis infraction, insufficient to justify disciplining this attorney, who admirably -- as recognized by Judge Marczyk -- was rendering services pro bono to a member of the public in need. Even the Board's majority opinion recognizes that respondent "perceived that another attorney was victimizing his own client" and that she "desire[d] to provide pro bono legal services to Coursey, whom she believed Farmer was attempting to exploit."

Disciplinary Review Board
Anne C. Singer

By: Ellen A. Brodsky
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Chief Counsel