

IN RE: DIANE P. CAGGIANO

S.J.C. Order of Term Suspension entered by Justice Cordy on December 4, 2007, with an effective date of January 3, 2008.<sup>1</sup>

SUMMARY<sup>2</sup>

The respondent was suspended for one year and one day for her misconduct in three unrelated client matters involving a pattern of neglect and for her failure to cooperate with bar counsel's investigations.

In the first matter, in July of 2001, the respondent agreed to represent a client in claims against a city concerning the death of the client's daughter. The daughter, a single mother, had died at home in December of 1999 from complications of diabetes. The client's seven-year-old granddaughter went to school that day, and the client claimed that employees of the school learned that the granddaughter had told other students that her mother was dead but failed to investigate or report this information. As a result, the client claimed that the granddaughter returned home from school and spent the night with her mother's body before another family member came by the next morning.

In December of 2002, the respondent filed suit on behalf of the client, as next friend of her granddaughter and as administratrix of her daughter's estate, seeking damages for wrongful death, emotional distress and loss of consortium. The respondent named as defendants the city's mayor, superintendent of schools and three other municipal employees. The respondent understood that individual municipal employees were proper defendants and did not fully appreciate that the Massachusetts Tort Claims Act (G.L. c. 258, § 2) provided immunity to individual employees and required the respondent to name the city as defendant. When she filed the suit, the respondent had little experience or requisite legal knowledge in school or municipal law and only obtained assistance in drafting the initial complaint. She did not associate herself with a lawyer with sufficient competence to handle the matter and did not provide the client with competent representation.

In August of 2003, the mayor served through counsel interrogatories on the respondent. The respondent did not take any action to prepare answers or objections to these interrogatories. In May of 2004, the court entered a final judgment dismissing the complaint as to the mayor. Shortly thereafter, the defendant's counsel agreed to assent to a motion to vacate the dismissal if the respondent provided answers to the interrogatories by June 11, 2004. On June 10, 2004, the respondent had the client sign answers to the interrogatories but took no further action to file the answers or to seek relief from the judgment of dismissal.

In November of 2003, the defendants' counsel filed a motion for summary judgment, the sole basis of which was that the exclusive remedy for the client's claims was against the city and not the five named defendants. The respondent filed two motions for an extension of time to oppose the motion for summary judgment but took no further action concerning the motion and did not amend the complaint to name the city as a defendant.

From the beginning of the respondent's representation of the client through at least mid-2004, the respondent engaged in settlement discussions with the defendants' counsel and the city's insurer. Although the defendants' settlement offer was for nearly the full amount

available under the Massachusetts Tort Claims Act, none of these discussions resulted in a settlement offer that was acceptable to the client. From at least mid-2004 through late 2005, the respondent took only limited action to prepare the case for trial. The respondent did not tell the client that her claim against one defendant had been dismissed, that the defendants had filed a motion for summary judgment or that there was a question whether she had sued the correct defendants.

In November of 2005, the client consulted with an attorney in Pennsylvania, where she was then living. The attorney agreed to determine the status of the case, to evaluate whether a current settlement offer was reasonable and to determine whether he would be willing to become involved as counsel pro hac vice. At his and the client's request, the respondent agreed to provide the attorney with copies of all pleadings, discovery material and correspondence concerning the case. The attorney confirmed his requests in two letters to the respondent, to which she did not reply. At some point, the respondent notified the attorney of a family crisis and stated that she would forward the file as soon as possible. In late January of 2006, the respondent provided the attorney with some documents but did not provide any of the pleadings or correspondence with the defendants' counsel. In early March of 2006, the respondent forwarded some additional documents, although not a full set of the documents requested and not the defendants' motion for summary judgment.

The respondent filed a motion to withdraw from the case on March 13, 2006. She did not notify the client or the Pennsylvania attorney that she filed the motion and did not take reasonable steps to protect the client's interests, such as explaining the status of the pending motion for summary judgment or the need to prepare for an upcoming final pre-trial conference.

On June 27, 2006, a pre-trial conference was held. The respondent did not appear. The court granted the defendants' motion for summary judgment, noting that no opposition to the motion was filed "although the time for opposing the motion as extended is long since expired." The court rescheduled the pre-trial conference and scheduled a hearing on the respondent's motion to withdraw for July 27, 2006, with notice sent to both the respondent and the Pennsylvania attorney. The respondent did not notify the client or the attorney of the conference and neither the respondent nor the attorney appeared at the conference. A judgment for the defendants for failure to prosecute was entered.

The respondent's failure to provide the client with competent representation by naming the correct defendant was in violation of Mass. R. Prof. C. 1.1 and 8.4(h); her failure to serve answers to the interrogatories of the mayor, thereby causing a judgment of dismissal of the complaint as to that defendant, and her failure to seek relief from the judgment of dismissal, were in violation of Mass. R. Prof. C. 1.1, 1.2(a), 1.3 and 8.4(h); her failure to file an opposition to defendants' motion for summary judgment, thereby causing the entry of summary judgment as to all defendants, and her failure to amend the complaint to name the city as a defendant were in violation of Mass. R. Prof. C. 1.1, 1.2(a), 1.3 and 8.4(h); her failure to maintain reasonable communication with the client concerning the status of her case and her failure to explain the status of the case sufficiently to allow the client to make informed decisions regarding the representation were in violation of Mass. R. Prof. C. 1.4(a), 1.4(b) and 8.4(h); her failure to provide the Pennsylvania attorney with file material within a reasonable time of the client's request were in violation of Mass. R. Prof. C. 1.16(e); and her failure to notify the client that she filed the motion to withdraw, her failure to take reasonable steps to protect the client's interests and to notify the client or the Pennsylvania attorney of scheduled conferences in the case and her failure to appear for pre-trial conferences on June 27 and July 27, 2006, thereby causing a judgment of dismissal of the complaint for lack of prosecution, were in violation of Mass. R. Prof. C. 1.1, 1.2(a), 1.3, 1.16(d), 8.4(d) and 8.4(h).

In the second matter, a client retained the respondent in August of 2003 to represent her in filing for bankruptcy. The client provided the respondent with records concerning her finances

and a check to cover the respondent's fee and the filing fee.

The respondent prepared and filed a declaration of homestead at the client's request in May of 2004. Otherwise the respondent took no action of substance on the client's behalf. From at least October of 2004 through mid-2005, the respondent did not respond to a number of telephone calls from the client and otherwise failed to maintain reasonable communication with the client about her case.

After the client filed a grievance with the Office of Bar Counsel in June of 2005, the respondent offered either to return her fee or to complete the bankruptcy. The client requested that the respondent complete the bankruptcy. From late July through mid-October of 2005, the respondent did not respond to a number of telephone calls from the client and otherwise failed to maintain reasonable communication with the client about her case.

On October 16, 2005, the respondent electronically filed a Chapter 7 voluntary petition with supporting schedules on behalf of the client. On December 5, 2005, the court issued a notice to the respondent that it had not received the filing fee and ordered that it be paid by December 15, 2005. The respondent received this notice but failed to pay the filing fee, as a result of which the court dismissed the client's petition. The respondent received notice of the dismissal and took no action to pay the filing fee or to seek relief from the dismissal. To date, the respondent has not returned to the client the funds she had advanced to the respondent for her filing fee.

After receiving notice of the order of dismissal from the court, the client retained another attorney, who successfully filed a motion to vacate the dismissal and paid the filing fee. The client was granted a discharge on March 7, 2006.

The respondent's substantial delay in filing a petition for bankruptcy on behalf of the client was in violation of Mass. R. Prof. C. 1.1, 1.2(a), 1.3 and 8.4(h); her failure to maintain reasonable communication with the client about the status of her case were in violation of Mass. R. Prof. C. 1.4(a) and 8.4(h); her failure to pay the filing fee for the client's petition, thereby causing the petition to be dismissed, and her failure to seek relief from the dismissal, were in violation of Mass. R. Prof. C. 1.1, 1.2(a), 1.3 and 8.4(h); and her failure to return to the client the funds she had advanced for the filing fee were in violation of Mass. R. Prof. C. 1.15(c), 1.16(d), and 8.4(h).

In the third matter, a client retained the respondent in July of 2004 to represent her on sexual harassment and constructive termination claims resulting from the termination of her employment on May 12, 2004. The client paid the respondent a retainer of \$500.

In August of 2004, the respondent obtained and reviewed the client's employee records from her employer. At a meeting in October of 2004, the respondent told the client that she would file a complaint with the MCAD. The client provided the respondent with a second \$500 for her legal fees.

After that meeting, the respondent took no further action of substance on the client's behalf, did not file a complaint with the MCAD and did not respond to a number of telephone calls from the client concerning the status of her claim. Section 5 of G. L. c 151B (the Massachusetts Discrimination statute) provides that any claim under the statute must be filed with the Massachusetts Commission Against Discrimination (MCAD) within 300 days from the alleged discriminatory act. The respondent did not advise the client that her complaint had to be filed with the MCAD by no later than March 7, 2005.

In February and again in March of 2005, the client wrote to the respondent complaining about the respondent's lack of communication and lack of progress on her case. The client requested a full refund of her \$1,000 fee payments and her client file. The respondent did not respond to either letter.

After the client filed a grievance with the Office of Bar Counsel on March 14, 2005, the respondent sent the client a check for \$875.25, the unused portion of her fee payments. The respondent did not provide the client with her file or with a full written accounting of her fee payments.

The respondent's failure to file the client's claim with the MCAD and her failure to advise the client of the applicable statute of limitations were in violation of Mass. R. Prof. C. 1.1, 1.2(a), 1.3 and 8.4(h); her failure to maintain reasonable communications with the client about the status of her case to allow the client to make informed decisions regarding the representation was in violation of Mass. R. Prof. C. 1.4(a), 1.4(b) and 8.4(h); her failure to return the unused portion of the client's fee payments promptly upon request and her failure to provide the client with a full written accounting of her fee payments were in violation of Mass. R. Prof. C. 1.15(c), 1.15(d)(1), 1.16(d) and 8.4(h); and her failure to provide the client with her file upon request was in violation of Mass. R. Prof. C. 1.16(e) and 8.4(h).

The respondent failed to cooperate with bar counsel's investigations of the above client matters. She knowingly failed without good cause to respond or fully respond to six letters from bar counsel requesting a response to a grievance, and her failures necessitated the issuance of two subpoenas requiring her testimony. The respondent's failure to cooperate with bar counsel's investigations was in violation of Mass. R. Prof. C. 8.1(b), 8.4(d), 8.4(g) and 8.4(h), and S.J.C. Rule 4:01, § 3.

In mitigation of the respondent's misconduct, in January of 2004, the respondent was diagnosed with acute Major Depressive Disorder. This depression resulted in immobility, disorganization and reduced cognitive functioning. She remains in psychotherapy and on medication. In further mitigation as to the first matter, the limitations periods for the claims of the minor plaintiff, the client's granddaughter, are tolled during her minority pursuant to G.L. c. 260, § 7.

This matter came before the Board of Bar Overseers on a stipulation of facts and disciplinary violations and a joint recommendation for a suspension of one year and one day. Because the respondent had already ceased practicing law, the parties also stipulated that the respondent could file a petition for reinstatement after serving nine months of the term of her suspension. On November 19, 2007, the Board voted to accept the stipulation and the joint recommendation. On December 4, 2007, the Court entered an order suspending the respondent from the practice of law for a period of one year and one day, with a provision that the respondent could file a petition for reinstatement after serving nine months of the term of her suspension.

#### FOOTNOTES:

<sup>1</sup> The complete Order of the Court is available by contacting the Clerk of the Supreme Judicial Court for Suffolk County.

<sup>2</sup> Compiled by the Board of Bar Overseers based on the record before the Supreme Judicial Court.

Please direct all questions to [webmaster@massbbo.org](mailto:webmaster@massbbo.org).

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