

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 01-306

IN THE MATTER OF
AARON SMITH
AN ATTORNEY AT LAW

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Decision
Default [R.1:20-4(f)]

Decided: January 3, 2002

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

Pursuant to R.1:20-4(f), the District IV Ethics Committee ("DEC") certified the record directly to us for the imposition of discipline following respondent's failure to file an answer to the complaint.

Respondent was admitted to the New Jersey bar in 1981. At the relevant times, he maintained a law office in Camden, New Jersey.

Recently, we determined to suspend respondent for three months, in a default matter, for practicing while ineligible, failing to communicate with clients, failing to expedite

litigation and failing to cooperate with the DEC investigation. In the Matter of Aaron Smith, Docket No. DRB 01-014 (October 31, 2001). That matter is currently pending before the Court. In September 1998, respondent was also the subject of a diversion, pursuant to R.1:20-3(I)(2)(B), for allowing his client's father to forge the client's signature to a document, with the client's consent.

On March 27, 2001, the DEC sent a copy of the complaint to respondent's last known office address listed in the New Jersey Lawyers' Diary and Manual, via regular and certified mail. A certified mail receipt was returned indicating delivery on March 29, 2001. The signature of the person accepting delivery is illegible. The record is silent about the regular mail. On June 20, 2001, the DEC mailed a second letter to respondent by certified and regular mail, indicating that, if he did not file an answer within five days, the record would be certified to us for the imposition of sanction. The certified mail was returned marked "unclaimed." The regular mail was not returned.

Respondent failed to file an answer to the complaint.

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The two-count complaint charged respondent with violations of RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), RPC 1.4(a) (failure to communicate with client), RPC 5.5(a) (practicing law while ineligible), RPC 8.1(b) (failure to reply to a lawful demand for

information from a disciplinary authority), RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) (count one) and RPC 8.1(b) (count two).

According to the complaint, on September 21, 1998, respondent was declared ineligible to practice law for failure to pay his 1998 annual assessment to the New Jersey Lawyers' Fund for Client Protection ("The Fund"). He remained ineligible until November 11, 1999 and was again declared ineligible on September 25, 2000 for failure to pay the 2000 annual assessment. As of the date of the complaint, respondent was still ineligible to practice law.

In June 1999, Debra Whitaker filed a domestic violence complaint against her husband, Floyd Whitaker. She had earlier filed a complaint seeking custody of her stepson. At that time she was represented by Cynthia L. Gehring of the Camden Regional Legal Services, Inc. On July 20, 1999, Whitaker's complaint was dismissed and she was ordered to pay Floyd's counsel fees and costs.

The ethics complaint alleged that Debra met with respondent on June 27, 1999 to consult with him about the dismissed cases. She paid him a \$100 consultation fee. At the time, respondent was ineligible to practice law.

On August 9, 1999, Gehring filed a motion for reconsideration of the orders dismissing Debra's complaints. On August 13, 1999, Floyd's attorney filed an opposition to the motion. On that same date, Debra retained respondent to represent her in connection

with the child custody matter. Respondent's fee was \$500 plus \$160 for costs. Debra gave respondent a \$300 retainer. Respondent was still ineligible to practice law at that time.

The complaint states that, on August 16, 1999, the court assessed counsel fees and costs against Debra for \$750 in the domestic violence matter and \$515 in the child custody matter.

Shortly thereafter, on August 19, 1999, Debra informed Gehring that she had retained respondent to take over her cases. Gehring immediately telephoned respondent and left a message that it was imperative that he contact her because deadlines for submissions were quickly approaching. Respondent failed to return her call or to contact Debra. Thus, on August 30, 1999, Gehring wrote to respondent about her prior attempt to contact him and enclosed a signed substitution of attorney form. Gehring requested that respondent call her. Respondent did not reply to Gehring's letter.

On September 2, 1999, Debra paid respondent an additional \$100. Although respondent was still ineligible to practice, he accepted the fee.

According to the complaint, on September 8, 1999, Gehring filed a motion to withdraw as counsel. The motion was returnable on September 22, 1999. Sometime between August 30, 1999 and September 15, 1999, respondent signed the substitution of attorney form, which was filed with the court on September 17, 1999.

On September 13, 1999, Floyd's attorney filed a cross-motion for counsel fees and costs in connection with the motion for reconsideration. Respondent did not reply to the

motion. On September 15, 1999 Floyd's attorney learned that respondent was ineligible to practice law. Respondent failed to appear on Debra's behalf at the September 22, 1999 return date of the motion for reconsideration and cross-motion for attorney's fees and costs. At that time, Floyd's attorney informed the court that respondent was ineligible to practice. Debra, who apparently was present in the courtroom, learned for the first time about respondent's ineligibility. When she met with respondent later that evening, he told her that he had paid his dues and was currently eligible to practice law. According to the complaint, respondent told Debra that, while he was ineligible, he had appeared before the judge on several occasions and the judge had "never said anything to him."

During their meeting, respondent told Debra that she would not be responsible for counsel fees. He instructed his assistant "Sonny" to file a motion in connection with the judgment, but no motion was ever filed.

In a September 29, 1999 order, the court granted Gehring's motion to withdraw as counsel, denied Debra's motion for reconsideration and entered judgment in favor of Floyd for counsel fees and costs for the July 20, 1999 hearing and for the motion for reconsideration.

On January 18, 2000, Floyd's attorney served Debra with an information subpoena, in an attempt to collect on the judgment for counsel fees. On February 29, 2000, the attorney moved for an order to enforce litigant's rights and for Debra's arrest, if she failed to comply with the subpoena. Debra still believed that respondent was representing her.

In a March 7, 2000 letter addressed "To Whom It May Concern," respondent wrote that Debra was required to appear for a custody hearing on March 17, 2000. Thereafter, by letter dated March 9, 2000, Floyd's attorney notified Debra that the motion to enforce litigant's rights would be heard on March 24, 2000. No opposition was filed to the motion. Thus, on March 21, 2000, the court granted the motion on the papers. The order stated that Debra had violated the defendant's rights as a litigant and that she was to furnish answers to the information subpoena within ten days or a warrant for her arrest would issue without further notice.

On March 27, 2000, Debra appeared before the court on the warrant for her arrest. She told the court that respondent had assured her that he would appear on her behalf, but he failed to do so. Debra also told the court that respondent had previously filed a motion on her behalf to vacate the judgment for attorney's fees and costs. The court notified Debra that no such motion had been filed and adjourned the motion to another date.

According to the complaint, Debra met with respondent later that day. He assured her that he would appear at the next hearing, but again failed to do so.

On May 3, 2000, Robert P. Dintino notified respondent that the Camden County Bar Association Lawyer Referral Service had referred Debra to him to assume her representation. Dintino requested that respondent contact him about his representation of Debra and his failure to appear in court on her behalf. Respondent failed to comply with Dintino's request.

In a letter dated June 22, 2000, Debra wrote to respondent about his failure to reply to her telephone calls, his failure to appear in court or file any motions in her behalf since she retained him in August 1999 and her need to seek legal advice from another attorney. Debra complained that his inaction caused her great harm, including the entry of a judgment against her. She, therefore, requested that he return the \$600 she had paid to him. Respondent did not reply to Debra's letter.

By letters dated August 31, October 25, and November 27, 2000, the DEC requested that respondent reply to the grievance. Respondent failed to comply with the DEC's requests or to otherwise communicate with the DEC.

* * *

Service of process was properly made in this matter. Following a de novo review of the record, we found that the facts recited in the complaint support a finding of unethical conduct. Because of respondent's failure to file an answer, the allegations of the complaint are deemed admitted. R.1:20-4(f).

The complaint contains sufficient facts to support the charges. Respondent accepted a retainer from Debra and, thereafter, did not take any action in her behalf. As a result, a judgment was entered against her and the threat of a warrant for her arrest hung over her head. Respondent also failed to reply to both the attorney whom he replaced and the

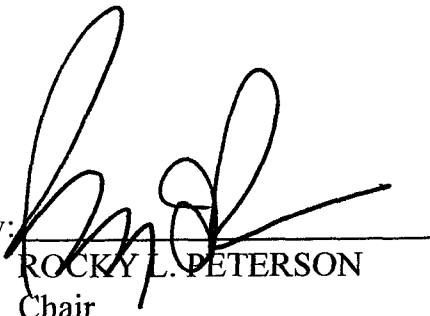
attorney to whom Debra was referred. He also failed to file a response to any motions and failed to appear in court. Respondent admitted to Debra that he was ineligible to practice law, assuring her that she would not be disadvantaged by his ineligibility. Respondent's conduct, thus, included violations of RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), RPC 1.4(a) (failure to communicate with client) and RPC 5.5(a) (practicing law while ineligible). Also, respondent's failure to reply to the DEC's requests for a written response to the grievance violated RPC 8.1(b). Respondent's misrepresentation to Debra that the court was aware of his ineligibility, though not charged as a violation of RPC 8.4(c), constitutes an aggravating factor.

While ordinarily misconduct of this nature would warrant a reprimand, because this matter is before us as a default, a three-month suspension is the appropriate discipline. See In re VanWart, 162 N.J. 102 (1999) (three-month suspension in a default matter where attorney failed to turn over a deed to third party, practiced law while on the ineligible list and failed to cooperate with the ethics authorities); In re Dudas, 156 N.J. 540 (1999) (three-month suspension in a default matter where attorney practiced law while ineligible, failed to cooperate with disciplinary authorities, displayed lack of diligence and failed to safeguard property; attorney had prior admonition) and In re Hoffman, 156 N.J. 579 (1999) (three-month suspension in a default matter for failure to communicate with the client, failure to cooperate with disciplinary authorities and misrepresentation of the status of the case to the client; attorney previously reprimanded).

One more point warrants mention. While a three-month suspension is the required discipline in this case, we note that respondent's conduct in an earlier default matter occurred during the same time span as his misconduct here. The matters should have been considered together. Based on the fact that they were heard separately, we unanimously determined to make the three-month suspension concurrent with respondent's earlier suspension. Three members did not participate.

We also determined to direct the DEC to consolidate respondent's pending matters for hearing.

We further determined to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

By: 
ROCKY L. PETERSON
Chair
Disciplinary Review Board