

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 94-212

IN THE MATTER OF :
SHIRLEY F. GAJEWSKI, :
AN ATTORNEY AT LAW :

Decision and Recommendation
of the
Disciplinary Review Board

Argued: September 21, 1994

Decided: October 28, 1994

Charles B. Clancy, III, appeared on behalf of the District V-B Ethics Committee.

Respondent appeared pro se.

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

This matter was before the Board on a recommendation for public discipline filed by the District V-B Ethics Committee ("DEC"). Respondent was charged with violations of RPC 1.16(d) (failure to surrender file to new counsel), RPC 1.15(d) (failure to maintain bank accounts under recordkeeping provisions of R. 1:21-6) and RPC 5.5(a) (lack of a bona fide office in New Jersey). Although respondent filed an answer to the complaint, she failed to appear at the DEC hearing on November 19, 1990. The grievant, Irma McBride, also failed to appear at the hearing.

Respondent was admitted to the New Jersey and the New York bars in 1983. She has no prior disciplinary record.

Irma McBride retained respondent in 1985 to represent her in a divorce action. After the custody hearing in April 1987, but before the final judgment, McBride advised respondent that she had engaged another attorney and that she would be picking up her file.

The DEC investigator reported that some fourteen months passed (from April 1987 to approximately June 1988), during which time McBride neither picked up her file nor contacted respondent's office. Respondent attempted to advise McBride that her husband was proceeding with the divorce and that respondent had moved, on notice to McBride, to be relieved as counsel. P-4 in evidence; P-6 in evidence at 2; panel report at 5. The record is silent as to the dates of motions, judgments or orders thereon.

Herman Osofsky, Esq., of Clifton, testified at the DEC hearing that McBride had come to his office for an initial interview on September 28, 1988. T23.¹ He identified the case as a Passaic County divorce and indicated that McBride had been divorced by default judgment (the date is unknown). T23. On October 12, 1988, McBride signed a retainer with Osofsky's office. T25. A note in the file, dated October 19, 1988, showed that someone at Osofsky's office had spoken to a secretary at respondent's New York telephone number and had noted that the file was to be released upon payment of the legal fee, with the notation "\$300." T26. On October 26, 1988, Osofsky's associate sent a letter to respondent's New York office requesting her file. T25-26, P-2 in evidence.

¹ T refers to the transcript of the hearing before the DEC on November 19, 1990.

On November 14, 1988, McBride filed a grievance against respondent. Respondent replied to the DEC correspondence by letter dated February 2, 1989. P-6 in evidence. On June 13, 1989, respondent was charged with failure to return a client's file and failure to maintain a bona fide office. Respondent answered on August 2, 1989. Thereafter, on June 1, 1990, the complaint was amended to charge failure to maintain New Jersey business or trust accounts, in violation of R. 1:21-6(a) and RPC 1.15(d). As noted earlier, neither respondent nor grievant appeared at the DEC hearing on November 19, 1990. T53-54. Osofsky testified about his unsuccessful attempt to obtain the file. Similarly, the OAE Investigator and the DEC Secretary described their efforts to determine whether respondent maintained a bona fide office in New Jersey.

As seen above, respondent was admitted to practice in New Jersey and New York in 1983. P-1 in evidence. She reported her address as 28 West Avon Avenue, Irvington, on the 1989 Annual Registration Statement, P-1 in evidence; in the 1990 Lawyers' Diary, P-5 in evidence; and on her 1989 letterhead, P-6 in evidence. While the 1990 Lawyers' Diary shows respondent's telephone listing as 201-374-0472, her 1989 letterhead notes 201-242-1164 as the telephone number. P5 and P6 in evidence.

When the OAE investigator called the 1990 Diary listing, the woman who answered said she had never heard of respondent and she had had the same number for ten years. He did not ask the woman's identification or visit the address, but he determined that the

telephone is at a housing project on North Munn Avenue. T9,13. (The record does not reveal whether the project is in Irvington or Newark. The OAE investigator referred to the number as a "Newark exchange", although the phone company explained that it could be either Newark or Irvington.) It is, of course, possible that the Lawyers' Diary listing contained a typographical error. The DEC investigator's report indicated one call to 242-1164 at 9:20 a.m. on a Wednesday, with no answer after fifteen rings.

The DEC investigator testified that respondent was candid and forthright regarding her New Jersey office. She described it as a sunporch in a relative's home, without office equipment or personnel. T48-49. She also described it as "one room in the front of the second floor apartment" in Irvington. She changed the telephone number in anticipation of relocating her office to Newark. When the move did not materialize, she continued her office at the Irvington apartment, which was owned by her sister, "who was able and willing to answer the telephone." When her sister was not available, the calls were forwarded to respondent's New York office. Answer, paragraphs 3 and 11.

At the Board hearing, respondent acknowledged that she still did not have business or trust accounts in New Jersey, but that she had obtained paperwork to open accounts at a local institution. Likewise, she admitted that she had no office complying with the requirements of a bona fide office; she was looking at office rentals or office sharing. She has not continued to practice in New Jersey, in the interim.

* * *

The DEC found that respondent had violated RPC 1.16(d) (failure to surrender file to new counsel), RPC 1.15(d) (failure to maintain bank accounts pursuant to R. 1:21-6) and RPC 5.5(a) (lack of a bona fide office).

CONCLUSION AND RECOMMENDATION

Following a de novo review of the record, the Board is satisfied that the DEC's conclusion that respondent's conduct was unethical is fully supported by clear and convincing evidence. The Board, however, is unable to agree with the DEC's finding that respondent violated RPC 1.16(d).

That rule states: "Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest, such as . . . surrendering papers and property to which the client is entitled"

There is no dispute that Osofsky advised respondent, by letter, that he had been retained by McBride or that McBride advised respondent, by telephone, that she intended to pick up the file. The question is whether respondent failed or refused to surrender the file to the extent reasonably practical. There is no allegation that either Osofsky or grievant attempted to pick up the file and was refused. Nor does the record reveal that McBride specified orally or in writing to respondent that she had retained

Osofsky or that Osofsky had forwarded a written authorization from his new client to respondent. The grievance was filed merely nineteen days after Osofsky's first and only letter to respondent.

Respondent may have felt that McBride would eventually appear at her office for the file. Fourteen months had elapsed between McBride's advice to respondent that she would retain new counsel and any further contact by McBride. Another four months passed before Osofsky wrote to respondent regarding his retainer by McBride. It was, therefore, reasonable for respondent to conclude that the file was not urgently needed and that she could wait for further instruction from McBride. Respondent asserted in her answer that "the file has been ready for pick up since the end of October, 1988." Respondent's answer was not contradicted by McBride, according to the investigative report. P-4 in evidence at 4.

In light of the foregoing, the Board cannot find clear and convincing evidence of a violation of RPC 1.16(d). The Board recommends that that charge be dismissed.

As to a violation of RPC 1.15(d), R. 1:21-6 requires (1) a trust account for funds entrusted to the attorney's care and (2) a business account for all funds received for professional services to be deposited. Admittedly, respondent did not maintain any trust and business accounts in New Jersey. Respondent received about \$500 towards a retainer in the McBride matter, a New Jersey matter. P-6 in evidence. Hence, that fee should have been deposited in a New Jersey bank account. Respondent was under the mistaken

impression that New Jersey did not require accounts "if there is little or no income." P-7 in evidence. In her 1989 answer to the complaint, respondent stated that, since 1983, she had represented a total of approximately eight clients in New Jersey, of whom two were pro bono assignments and the other six had contacted her in New York. Regardless of the size of the fees earned, however, they should have been deposited in a New Jersey account. Respondent, thus, violated RPC 1.15(d) and R. 1:21-6.

As to the charge that respondent violated R. 1:21-1(a), that rule states that a bona fide office "is more than a maildrop, a summer home . . . or an answering service unrelated to a place where business is conducted." The comments to the rule note that the definitional limitations were effective September 1981; effective January 1989, violation of the office requirement is deemed a violation of RPC 5.5(a).

The requirements of a bona fide office include the following: more than occasional and irregular attendance by the attorney; more than an answering service unrelated to a place where business is conducted; a responsible person at the office to answer questions posed by courts, clients, or adversaries, to give accurate information about the attorney's whereabouts and to obtain competent advice from the attorney within a reasonable period of time. It does not suffice that an employee receives and transmits messages with nothing more. It is unquestionable, thus, that respondent violated the bona fide office requirements.

The Board has found that an attorney did not have a bona fide office when the purported office was a basement in a New Jersey friend's house (equipped with a desk, chair, phone, typewriter and bookcase) but had no signs or law books and was never used to meet clients. In re Pitt, 121 N.J. 398 (1990). See also Opinion 19 of the Committee on Attorney Advertising released on September 8, 1994 and subsequently published in the New Jersey Law Journal.

Although each of respondent's ethics transgressions, viewed in isolation, would ordinarily merit an admonition (formerly a private reprimand), respondent's total misconduct warrants more serious discipline. The Board therefore unanimously recommends that respondent be reprimanded (formerly public reprimand).

The Board also recommends that respondent be temporarily suspended until she submits satisfactory proof that she has established a bona fide office and the requisite business and trust accounts in New Jersey.

The Board further recommends that respondent be required to reimburse the Ethics Financial Committee for administrative costs.

Accordingly, the Board unanimously recommends that respondent receive a reprimand.

By: _____

10/28/1994

Dated: _____



Raymond R. Trombadore
Chair
Disciplinary Review Board