SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket Nos. DRB 96-048, 96-049 and 96-485

IN THE MATTER OF

JOAN GERTSACOV SMITH

AN ATTORNEY AT LAW

Decision

Argued: May 15, 1996 and March 20, 1997.

Decided: June 13, 1997

Mark E. Herrera appeared on behalf of the District IV Ethics Committee.

Marvin Lehman appeared on behalf of respondent.

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

These matters were before the Board based on three separate recommendations for discipline filed by the District IV Ethics Committee ("DEC"). For reasons not explained in the record, although these three matters were heard by the DEC on the same day, June 23, 1995, the DEC delayed in forwarding the record in the DiEva matter (DRB 96-485) to the Board. Therefore, the Board considered two matters, Tato (DRB 96-049) and Saia (DRB 96-048), in May 1996 and the third matter, DiEva, in March 1997.

The complaint filed in the Tato matter charged respondent with violations of RPC 1.3 (lack of diligence), RPC 1.4 (failure to communicate with client), RPC 8.4(d) (conduct prejudicial to the

administration of justice) and former R.1:20(3)(f) [currently R.1:20-3(g)(3)] (failure to cooperate with the DEC). The complaint filed in the Saia matter charged respondent with violations of RPC 1.3, RPC 1.16(d) (terminating representation), RPC 8.4(d) and former R.1:20-3(f). [1] The complaint filed in the DiEva matter charged respondent with a violation of RPC 1.5 (unreasonable fee and failure to maintain time records), RPC 1.5(d)(1) (contingent fee in a domestic relations matter), RPC 1.15(b) (failure to safeguard client property) RPC 1.16(d) (failure to turn over a client's file and failure to return an unearned fee) and RPC 8.1(b) and R.1:20-3(g)(3) (failure to cooperate with the DEC), mistakenly charged as a violation of RPC 8.4(d).

Respondent neither filed answers to the complaints nor appeared at the DEC hearing, despite proper notice. [2]

* * *

Respondent was admitted to the New Jersey bar in 1974. She maintains an office in Cherry Hill, Camden County.

By letter dated October 29, 1991, respondent was privately reprimanded for misconduct in a matrimonial matter, including lack of diligence, failure to communicate with the client and failure to cooperate with the disciplinary authorities.

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[1] The complaint filed in Saia mistakenly stated: "In connection with the District IV Ethics Committee's investigation of grievances received from Colleen M. DiEva, Respondent failed to respond and/or cooperate." DiEva is the grievant in a different matter involving respondent. The reference in the complaint should have been to Saia. Despite this error in the complaint, respondent had sufficient notice of the allegations against her in this regard.

[2] Respondent was notified of the hearing date by letter dated May 25, 1995. The record does not reveal if that letter was sent via regular or certified mail. In addition, either the panel chair or his office "checked with all parties to ensure presence," earlier during the week of the hearing. It is not clear if respondent was personally contacted or if a message was left for her. At 10:00 A.M., before the hearing, a message was left on respondent's answering machine notifying her that the hearing was going forward. Respondent did not reply to that message.

At the Board hearing on May 15, 1996, respondent's counsel moved to expand the record to include evidence of respondent's emotional and physical problems during the events in question. The Board denied that motion. During the March 20, 1997 proceeding, respondent's counsel sought to introduce in the record a letter and certification about the underlying facts in the DiEva matter and about respondent's psychological condition. Although the Board accepted the filing of those documents, it rejected its contents based on the lack of supporting documentation.

* * *

The Tato Matter (Docket No. DRB 96-049)

On or about April 7, 1992, Antoinette Tato received correspondence from Louis Cappelli, Jr., Esq., who represented her former husband, Charles Aston. Cappelli's letter concerned the modification and enforcement of Aston and Tato's July 10, 1991 judgment of divorce issued in New Jersey. Cappelli asked Tato to retain an attorney and to have that individual contact him. Tato, now a North Carolina resident, was referred to respondent by a lawyer referral service. On or about May 8, 1992, Tato called respondent and discussed the matrimonial matter. Respondent agreed to accept the representation and asked for $350 for three and one-half hours' work— respondent's estimate of how long the matter would take to resolve—and an additional $20 for the referral fee. Tato forwarded the $370. In addition, at respondent's request, Tato followed up their call with a letter to respondent, outlining her concerns in the matter. Specifically, Tato wanted restrictions on Aston's visitation rights as well as increased child support. Respondent forwarded a case information statement to Tato to fill out and return to her. Tato did so. Respondent did not send a retainer agreement for Tato's signature.

By letter dated May 18, 1992, respondent contacted Cappelli and informed him of her

representation of Tato and of the latter's position in the matter. It appears that respondent took no further action in Tato's behalf. The record contains a letter dated July 27, 1992 from Cappelli to respondent, informing her of Aston's visitation plans with the child of the marriage. There is no indication in the record that respondent replied to that letter. (Tato did not know about that letter until the DEC hearing in June 1995).

During the course of the representation, Tato called respondent on numerous occasions to ascertain the status of her case. Tato's phone bills for the relevant period are in evidence as Exhibit AT-5. Those bills show at least thirty calls from Tato to respondent during that time period. Although Tato left a number of messages for respondent that went unanswered, Tato was able to talk to respondent on an undisclosed number of occasions. Respondent continuously told Tato that nothing was happening in the matter, that she was waiting to hear from Cappelli and that "[n]o news is good news." During one conversation in mid-August to early September 1992, respondent told Tato that her retainer had been exhausted and that, if Tato wanted to proceed on the support issue, she would have to pay an additional fee. (According to Tato's grievance, respondent told her that the retainer had been depleted because of respondent's calls to Cappelli).

On October 16, 1992, Tato called respondent's office and informed her secretary that she had to talk with respondent and that her calls were never returned. Later that afternoon, Tato again left a message with respondent's secretary, this time announcing that she was terminating respondent's representation. Tato also asked for an accounting of respondent's efforts in her behalf. Respondent did not contact Tato or supply the requested accounting of her services and time.

On or about October 20, 1992, Tato received a letter from Cappelli, stating that respondent had not contacted him for a couple of months, that he did not know if she still represented Tato and

that, as a result, he was contacting Tato directly. Cappelli set out Aston's position about visitation and told Tato that he considered her in violation of the final judgment of divorce.

On an undisclosed date, Tato retained James Bodner, Esq., who resolved the matter within four months.

* * *

By letter dated December 3, 1992, the DEC secretary asked that respondent submit, within ten days, a written reply to the allegations in Tato's grievance. No reply was forthcoming. By letter dated January 6, 1993, the DEC secretary again asked respondent to supply information, this time within five days. This request, too, was ignored. On an undisclosed date, the DEC investigator sent a letter to respondent requesting information. In response to that letter, the investigator met with respondent and her then counsel on February 12, 1993. In addition, respondent supplied Cappelli's above mentioned July 27, 1992 letter. Respondent, however, never furnished a written reply to the grievance. She neither filed an answer to the complaint nor appeared at the DEC hearing.

* * *

The DEC determined that respondent had violated RPC 1.3, RPC 1.4, former R.1:20-3(f) and RPC 8.4(d) [more properly, RPC 8.1(b)], based on her failure to cooperate with the DEC.

The Saia Matter (Docket No. DRB 96-048)

In March 1992 Janet Ann Saia retained respondent in connection with a domestic violence and divorce proceeding. After an initial discussion about the case and about respondent's fees, Saia signed a retainer agreement. Respondent requested a $3,000 initial retainer. Saia's father, George Scheurich, who was present at the meeting, gave respondent a check for $3,000. Saia's meeting with

respondent lasted an additional two hours, during which time they further discussed her case. Respondent agreed to provide Saia with itemized accountings of her expenditures. (Saia did not recall how frequently these were to be supplied). Nevertheless, respondent never gave any accounting to Saia.

On April 9, 1992, respondent appeared in Saia's behalf in Atlantic County Superior Court, Family Division, for a hearing on the domestic violence matter. Saia, respondent, Saia's father, Saia's estranged husband and his counsel conferred for two or three hours. Thereafter, they informed the court that they had reached an agreement on the domestic violence issue, as well as other collateral issues. Respondent offered to submit a form of order to the court under the five-day rule, memorializing the parties' agreement.

Approximately two weeks after the court appearance, Saia, her father, her estranged husband and his attorney met in respondent's office. According to Saia, they made no progress at that time toward a divorce settlement. The record is silent about any discussion of the proposed form of order to be prepared by respondent. That meeting was Saia's last contact with respondent. Respondent never submitted the proposed form of order to the court.

Thereafter, for approximately three months, Saia attempted to contact respondent by phone at least three times a week. Saia left messages on respondent's answering machine and with her secretary. None of Saia's calls were returned.

In or about September 1992, Saia retained Michael J. Pimpinelli, Esq. By letter dated September 17, 1992, Pimpinelli asked respondent to return Saia's file and to sign a substitution of attorney. Although respondent signed and returned the substitution of attorney, she did not turn over Saia's file. By letter dated October 23, 1992, Pimpinelli asked that respondent supply an accounting

of Saia's $3,000 retainer and return the balance. Pimpinelli also gave respondent a copy of his executed substitution of attorney. Respondent again did not comply with Pimpinelli's request.

On undisclosed dates after she retained Pimpinelli, Saia sent four letters to respondent, including two by certified mail, asking for an accounting and a refund of the balance of her retainer. (The record is silent as to proof that respondent received any of the letters). Respondent did not reply to the letters. As of the date of the DEC hearing in June 1995, Saia had not received an accounting or a refund.

Ultimately, Pimpinelli filed an order with the court memorializing the April 9, 1992 agreement, which was signed on November 2, 1992.

* * *

By letter dated April 7, 1993, the DEC investigator asked that respondent call him to set up a date and time to discuss the allegations in Saia's grievance, as well as the allegations in the DiEva matter, below. Respondent did not reply. The investigator also placed several calls to respondent asking that she contact him. Respondent did not return his calls. The formal complaint was filed on or about April 5, 1994. Respondent neither filed an answer nor appeared at the DEC hearing.

* * *

The DEC determined that respondent had violated RPC 1.3, RPC 1.16(d) and R .1:20-3(f) [currently R.1:20-3(g)(3)]. The DEC also found a violation of RPC 8.4(d), based on respondent's failure to communicate with Saia and failure to cooperate with the DEC [more properly a violation of RPC 8.1(b)].[3]

[3] Although RPC 1.4 is also implicated here, respondent was not charged with a violation of that rule and the language of the complaint did not supply adequate notice of a potential finding in that regard. Thus, a finding of a violation of RPC 1.4 is inappropriate.

The DiEva Matter (Docket No. DRB 96-485)

In March 1991, Colleen DiEva retained respondent in connection with a divorce matter. The retainer agreement specified an initial payment of $3,000, which DiEva paid, and an hourly rate of $125. The retainer also stated that respondent would forward periodic itemized bills to DiEva. During the course of the representation, DiEva repeatedly asked respondent to supply the itemized bills. No bills were forthcoming. In addition, DiEva testified that respondent continuously assured her that there were funds remaining from the $3,000 retainer.

On May 20, 1992, the court entered a judgment in DiEva's divorce proceeding. As part of the judgment of divorce, DiEva's former husband was to pay $12,508 in back child support payments. Counsel for the parties worked out a plan of three installment payments for the overdue support payments. According to DiEva's testimony, while in court, in May 1992, respondent told DiEva's former husband to send the third payment to her office. The record is unclear whether DiEva knew and consented to this arrangement.

DiEva received directly from her former husband the first two payments, totaling $9,000, but not the third payment of $3,508. The third installment payment was indeed sent to respondent. The check, Exhibit CD-2, is dated October 16, 1992 and is made out to Colleen Daly, DiEva's maiden name.[4] Without DiEva's knowledge or authorization, respondent endorsed the check "for deposit only attorney trustee account" and deposited the check into her attorney trust account. Respondent did not sign DiEva's or her own name to the check.

Although the ensuing events are not entirely clear, on or about October 16, 1992 DiEva

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[4] A note on the checks states, "to replace lost check #430." Respondent lost the original check.

contacted respondent to see if she had received the check. Respondent informed DiEva that she had. Respondent explained, however, that she had been incorrect when she advised DiEva that she still had retainer funds on account and that, in fact, DiEva owed her additional attorney fees. Respondent told DiEva that she was, therefore, withholding the funds in her trust account and that DiEva could come to her office to discuss the situation. Respondent assured DiEva that the money was "safe and that [DiEva would] get it." Respondent offered to return $1,000 to DiEva at the time of the call.

DiEva's grievance filed with the DEC is dated October 19, 1992, just three days after respondent deposited the $3,508 check in her trust account. In her grievance, DiEva referred to an additional conversation with respondent on October 19, 1992, at which time respondent again refused to turn over the disputed funds and suggested that DiEva come to the office to discuss the problem. In her grievance, DiEva also pointed to respondent's claim that DiEva owed her $8,700 above the initial $3,000 retainer.

Thereafter, DiEva attempted to contact respondent via telephone, to no avail. In January 1993, DiEva retained a new attorney. By letters dated January 28 and February 18, 1993, the attorney asked that respondent forward DiEva's file.[5] Respondent never complied with his request. The record contains a letter dated February 24, 1993 from the attorney to counsel for DiEva's former husband, asking that counsel supply a copy of his file to DiEva's new attorney, in light of respondent's failure to comply with his requests for the file. (In March 1993, DiEva filed a second grievance with the DEC complaining about respondent's failure to release the file). As of the date of the DEC hearing, respondent had not returned DiEva's file or the $3,508.

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[5] The attorney's February 18, 1993 letter also referred to his conversation with respondent on February 8, 1993 about the return of the file.

* * *

By letters dated October 27 and November 22, 1992, the DEC secretary requested that respondent reply to the allegations in DiEva's grievance. Respondent did not reply. On an undisclosed date, the DEC investigator/presenter wrote to respondent. In response to that letter, respondent and her then counsel met with the investigator on February 12, 1993. At that time, respondent supplied the investigator "with a copy of her checking account statement evidencing the fact that the $3,508 check had been deposited into her trust account." The investigator was satisfied that, as of February 12, 1993, the $3,508 in question remained in respondent's trust account. The investigator had no further contact with respondent.

As noted above, respondent did not file an answer to the complaint or appear at the DEC hearing.

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The DEC determined that respondent had violated RPC 1.16(d) (failure to turn over DiEva's file) and RPC 8.4(d), more properly RPC 8.1(b) and R.1:20-3(g)(3) (failure to cooperate with the DEC).

The DEC did not find that respondent had failed to maintain time records, had charged an unreasonable fee or had charged an improper contingent fee, in violation of RPC 1.5 and RPC 1.5(d)(1).[6] Pointing to DiEva's October 19, 1992 grievance, the DEC stated as follows:

> As cited in the Statement of Facts, Exhibit CD-4 [the grievance form] contains a description of what appears to be a fee dispute between DiEva and Respondent regarding an outstanding $8,700.00 balance

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[6] As the DEC noted, there is no reference to a contingent fee in respondent's retainer agreement. The contingent fee reference in the complaint is to the disputed $3,508.

> due over and above the original retainer fee of $3,000.00. Because Exhibit CD-4 is an Attorney Grievance Form, a [sic] contemporaneously completed, reviewed, and signed by DiEva, a question arises as to whether a standard of clear and convincing evidence can be met with regard to an alleged violation of RPC 1.5, including (d)(1).

Similarly, the DEC did not find clear and convincing evidence that respondent failed to turn over DiEva's funds, in violation of RPC 1.15(b):

> . . . Exhibit CD-4 offered by the presenter in this case, suggest[s] that Respondent had made a more complete effort at communication with DiEva on fees than she suggested in her testimony. According to CD-4, DiEva's own grievance, $1,000.00 of the $3,508.00 had been offered by Respondent to be turned over immediately. The remaining $2,508.00, according to DiEva's Grievance Form, Respondent proposed to keep as a fee for additional services rendered. Based on DiEva's own testimony at the hearing, and review of the original Attorney Grievance Form filed on October 19, 1992, contemporaneous[ly] with the incidents being testified to, there does not appear to be clear and convincing evidence that Respondent has violated RPC 1.15(b).

In the DEC's view, the problem between respondent and DiEva more properly constituted a fee dispute, to be decided by a fee arbitration committee, instead of an ethics committee. Based on the record, especially DiEva's 1992 grievance, which the DEC deemed more credible than her testimony almost three years later, the DEC ruled that the fee arbitration committee should resolve the dispute. The DEC added that, depending on the result of that proceeding, additional charges against respondent could be warranted.

One panel member filed a separate opinion, concurring and dissenting in part with the panel majority's determination. The dissenting member agreed with the majority's conclusion that respondent had violated RPC 1.16(d) and RPC 8.4. He also agreed with the majority's conclusion that the record did not establish a violation of RPC 1.5(d)(1). The dissenting member disagreed,

however, with the DEC's dismissal of a violation of RPC 1.5 [presumably section (a)], based on respondent's failure to maintain time records and charge reasonable fees, and RPC 1.15(b), based on her failure to promptly deliver DiEva's funds. The dissenting member agreed with the majority's view that the fee dispute should more properly be decided by a fee arbitration proceeding. Because, however, of respondent's failure to produce time records for DiEva and because of the lack of evidence that time records were maintained in a manner to enable a determination to be made as to whether respondent's fees were reasonable, the dissenting member concluded that respondent had violated RPC 1.5(a).

With regard to the alleged violation of RPC 1.15(b), the dissenting member found that the record showed that a check made out to DiEva was endorsed by respondent and deposited into her attorney trust account, all without DiEva's authorization. The dissenting member believed that, even if the problem was more properly a fee dispute, respondent was wrong in depositing the check in her trust account without DiEva's consent. The dissenter also noted respondent's failure since that time to attempt to resolve the dispute. In his view, the majority's suggestion that the matter be referred to the fee arbitration committee erroneously assumed that respondent acted properly in endorsing and depositing the check. The dissenter would have found a violation of RPC 1.15(b) in this regard. In light of respondent's failure to reply to the grievance and the passage of time since the check was deposited, the dissenter also suggested that the Board order an audit of respondent's attorney records to determine whether the funds remained intact in her trust account.

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Upon a de novo review of the record, the Board is satisfied that the conclusion of the DEC that respondent was guilty of unethical conduct is fully supported by clear and convincing evidence.

In Tato, the DEC correctly determined that respondent had violated RPC 1.3, RPC 1.4(a), RPC 8.1(b) [mistakenly cited as RPC 8.4(d)]. In Saia, the DEC properly found that respondent violated RPC 1.3 and RPC 1.16(d), as well as RPC 8.4(d) [more properly RPC 8.1(b)]. In DiEva, the DEC did not find a violation of RPC 1.5, RPC 1.5(d)(1) or RPC 1.15, seemingly because of the existing fee dispute. The Board agreed with the DEC's conclusion with regard to RPC 1.5 and RPC 1.5(d)(1), but not with its reasoning. Because there are no time records in evidence or information about respondent's efforts in DiEva's behalf, it cannot be concluded by clear and convincing evidence that respondent charged an unreasonable fee or that she failed to maintain time records, in violation of RPC 1.5. With regard to the alleged violation of RPC 1.5(d)(1), it does not appear that this was a contingent fee. Rather, respondent simply kept the funds in her possession when she determined that DiEva owed her additional fees. Accordingly, the Board did not find a violation in this regard. As to the charged violation of RPC 1.15(b), the DEC's conclusion was incorrect. Even if a fee dispute existed between respondent and DiEva, it is unquestionable that respondent failed to safeguard DiEva's funds. If respondent believed that DiEva owed her additional fees, the proper procedure would have been to talk it over with her client and then proceed to fee arbitration, if necessary, instead of availing herself of the funds without DiEva's knowledge or consent. To aggravate matters, it is now four years later and respondent has taken no steps to resolve this issue. In sum, in DiEva, respondent was guilty of failure to safeguard client property, failure to turn over a file and failure to cooperate with the DEC, in violation of RPC 1.15(b), RPC 1.16(d) and RPC 8.1(b) and R.1:20-3(g)(3).

As noted above, respondent was privately reprimanded, by letter dated October 29, 1991, approximately five to six months before she began her representation in the Saia and Tato matters

and one year before her misconduct in DiEva. Despite the fact that respondent had already been disciplined for conduct strikingly similar to that in these matters, she repeated her wrongdoing. This is a respondent who has failed to learn from her mistakes.

Moreover, respondent failed to reply to the DEC's requests for information, failed to file an answer to the complaint and failed to appear at the DEC hearing. Although she and her then counsel did meet on one occasion with the DEC investigator, her failure to appear for the hearing or, at a minimum, to inform the DEC that she would not be present was contemptuous, despite her eventual appearance before the Board.

Respondent's misconduct in these three matters, coupled with her prior discipline and her disrespect for the ethics system, warrants a suspension. By a requisite majority, the Board determined to suspend respondent for a period of six months for her misconduct in these matters. See In re Bosies, 138 N.J. 169 (1994) (six-month suspension imposed for gross neglect, violation of the scope of representation, lack of diligence, failure to communicate, misrepresentation and a pattern of neglect in four matters).

Prior to reinstatement, respondent is to present proof of her fitness to practice law. In addition, upon reinstatement, respondent is to practice under the supervision of a proctor for one year.

The Board was concerned that the DiEva matter might be a case of knowing misappropriation. No audit was conducted of respondent's attorney books and records. Although the presenter stated that the funds in question were in respondent's trust account as of February 12, 1993, it is now four years later and it would be extremely difficult to know from this record whether the funds remained inviolate, or indeed whether the funds were in the account from the deposit in

October 1992 to the February 12, 1993 review. Accordingly, the Board directed that the OAE conduct an audit of respondent's attorney books and records. In addition, respondent is not to be reinstated until she pays a $500 monetary sanction imposed by the Court in 1996.

One member dissented from the majority's view. That member would not impose discipline at this time in the DiEva matter and would remand the entire DiEva case to the DEC. Two members did not participate. One member recused himself.

The Board further required respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: Jan 13, 1997

By: James R. Zazzali
Vice-Chair
Disciplinary Review Board