

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 99-232

IN THE MATTER OF :
: :
JOAN GERTSACOV SMITH :
: :
AN ATTORNEY AT LAW :
:

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

Decided: June 15, 2000

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

Pursuant to R. 1:20-4(f), the Office of Attorney Ethics ("OAE") certified the record in this matter directly to us for the imposition of discipline, following respondent's failure to file an answer to the formal ethics complaint.

On April 22, 1999 the DEC forwarded a copy of the complaint to respondent's last known address by regular and certified mail. The certified mail was returned. The regular mail was not returned.

On May 13, 1999 the DEC sent a second letter to respondent, advising her that, unless she filed an answer to the complaint within five days of the date of the letter, the allegations of the complaint would be deemed admitted and that, pursuant to Rule 1:20-4(f) and Rule 1:20-6(c)(1), the record would be certified directly to us for the imposition of sanction. This letter was sent to the same address by certified and regular mail. The certified mail was returned, but the regular mail was not. Respondent did not file an answer to the formal ethics complaint.

Respondent was admitted to the New Jersey bar in 1974. Her most recent New Jersey law office address is listed in the OAE's records as 3 East Second Street, Moorestown, New Jersey. Respondent was ineligible to practice law from September 1995 until May 1997 for failure to pay the 1995 and 1996 annual assessments to the New Jersey Lawyers' Fund for Client Protection.

On October 29, 1991 respondent was privately reprimanded for allowing a divorce complaint to be dismissed for lack of prosecution, failing to re-file both the complaint and a motion for pendente lite support and failing to communicate with her client, in violation of RPC 1.3 and RPC 1.4(a), respectively. Effective November 12, 1997 respondent was suspended for six months for misconduct in three matters, including lack of diligence, failure

to communicate with clients, failure to return a file, failure to safeguard a client's property and failure to cooperate with the disciplinary system. In our decision, we noted that respondent had failed to learn from the prior mistakes that led to her private reprimand. To date, respondent has not petitioned the Court for reinstatement.

The complaint charged respondent with violations of RPC 1.4(a) (failure to communicate with the client), RPC 1.5(a) (charging and collecting an unreasonable fee), RPC 1.5(b) (failure to communicate the basis or rate of the fee in writing), RPC 1.16(d) (upon termination of representation, failure to take steps to the extent reasonably practicable to protect a client's interests), R. 1:20-20 (failure to give notice of suspension to all persons required to be notified or to file a detailed affidavit with the OAE reciting compliance with R. 1:20-20) and RPC 8.1(b) (failure to cooperate with disciplinary authorities).

Linda Abroitz retained respondent on or about August 12, 1997 to handle her divorce. By that time respondent was aware that we had determined to suspend her for six months in the prior disciplinary matter. Yet, she agreed to take on the representation of Abroitz in the divorce case. Respondent quoted a flat fee of \$1,400, which Abroitz paid. Respondent did not have Abroitz sign a written retainer agreement and did not forward Abroitz a written confirmation of their fee agreement at any time.

On September 11, 1997 respondent appeared in court to obtain a restraining order against Abroitz's spouse. After the September 1997 court appearance, respondent told Abroitz that she was about to be suspended from the practice of law, and that she had a

"helper," an attorney, who would be taking over the handling of Abroitz's case for her. Respondent's statement to Abroitz was improper. R. 1:20-20 (b) (11) states that, even if requested by the client, a disciplined attorney may not recommend an attorney to continue the representation of the client.

Once suspended, respondent did not send Abroitz written notice of her suspension or advise her of the desirability of retaining new counsel. Thereafter, respondent refused to communicate with Abroitz, despite her client's repeated requests for information about her case.

On or about February 6, 1998 Abroitz retained new counsel to handle her divorce. She was charged a flat fee of \$1,500. Thereafter, both Abroitz and her new attorney attempted to obtain the original file from respondent, to no avail.

On March 7, 1998 Abroitz wrote to respondent, advising her that she had retained new counsel and asking her to return all materials relating to her divorce action. Abroitz also requested the return of her income tax documents, a statement of respondent's services and a refund for any unearned fees. Respondent did not reply to Abroitz's letter.

On July 12, 1998 Abroitz submitted her grievance to the DEC. On July 31, 1998 DEC secretary Jaffa F. Stein wrote to respondent, advising her of the grievance and requesting a written response within twenty days. Respondent did not comply with the DEC secretary's request.

On September 3, 1998 the DEC secretary again wrote to respondent, requesting a

written response to the grievance by September 10, 1998. Again, respondent did not reply. On October 22, 1998 the DEC docketed the grievance and forwarded it to the OAE for investigation.

By letter to respondent dated November 2, 1998 Deputy Ethics Counsel Walton W. Kingsbery, III enclosed a copy of the grievance and requested a written response by November 23, 1998. Respondent did not reply.

On February 23, 1999 OAE Investigator Mary Jo Bolling wrote to respondent, again requesting a written response to the allegations. This request, too, was ignored.

* * *

Service of process was properly made in this matter. Following a 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)(1).

Specifically, respondent did not have Abroitz sign a written retainer agreement and did not forward to Abroitz a written confirmation of their fee agreement at any time. Respondent's conduct in this regard was a violation of RPC 1.5(b).

Also, Abroitz wrote to respondent notifying her that she had retained new counsel and asking for the return of her documents and of any unearned fees, as well as the submission

of a bill for legal services. Respondent did not comply with Abroitz's request. Respondent's failure to surrender papers and property to which Abroitz was entitled and her failure to return any unearned fees to Abroitz constituted a violation of RPC 1.16(d).

Respondent also violated R. 1:20-20 by failing to send Abroitz written notice of her suspension and to file a detailed affidavit with the OAE, as required by that rule. In addition, respondent violated RPC 8.1(b) by not complying with the DEC's and OAE's requests for information about the grievance.

Respondent's failure to disclose her probable impending suspension to Abroitz when she was retained violated RPC 1.4(a) as charged. Moreover, although respondent was not specifically charged with a violation of RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation), the facts in the complaint gave her sufficient notice of the alleged improper conduct and of the potential violation of that rule. In re Logan, 70 N.J. 222, 232 (1976). We found, thus, that respondent acted with dishonesty, in violation of RPC 8.4(c), when she failed to disclose to Abroitz, at the time she was retained, that we had determined to suspend her.

There is however, insufficient support in the record to find respondent guilty of a violation of RPC 1.5(a). Similarly, there is nothing in the record indicating that respondent charged an unreasonable fee for the services actually rendered. Abroitz paid respondent a flat fee of \$1,400. Respondent appeared in court to obtain a restraining order against Abroitz's spouse. It is possible that respondent performed other services, such as reviewing the file or discussing the case with Abroitz. In any event, the complaint does not allege that

the court appearance was the only service that respondent provided. Therefore, we dismissed the charges that respondent violated RPC 1.4(a) and RPC 1.5(a).

In sum, respondent violated RPC 1.5(b), RPC 1.16(d), R. 1:20-20, RPC 1.4(a), RPC 8.4(c) and RPC 8.1(b).

Ordinarily, a suspension is the appropriate discipline for misconduct of this nature, where the attorney has also defaulted under R. 1:20-4(f). In a recent default decision, an attorney was suspended for one year when he accepted retainers in five matters, ranging from \$500 to \$1500, and thereafter took no action in behalf of those clients. That attorney also refused to reply to any communications from his clients and, in every matter, refused to cooperate with the DEC's investigation. In re Lawnick, 162 N.J. 113 (1999). That attorney had been disciplined four times before.


In another recent default matter, an attorney was suspended for six months for conduct similar to that of Lawnick's. In re West, 156 N.J. 451 (1998). In three matters, the attorney demonstrated a pattern of accepting retainers, performing no services, failure to do any work for his client and failure to cooperate with the ethics investigations. We noted that, although ordinarily this conduct might result in only a suspension of three months, a six-month suspension was required because of the attorney's ethics history and his total disregard for the ethics system.

Here, respondent deceived Abroitiz by accepting a retainer when she knew that she was about to be suspended, did not prepare a retainer agreement, did not return to Abroitiz

her documents and unearned fee, did not send Abroitza a notice of her suspension or file an affidavit with the OAE, as required by R.1:20-20, and did not reply to the disciplinary authorities' requests for a reply to the grievance. Adding that misconduct to respondent's failure to answer the formal ethics complaint and to her disciplinary history, we determined, by a seven to one vote, to suspend respondent for six months. One member dissented, voting for a three-month suspension, and one member recused himself.

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

Dated: June 15 2000

By: 
ROCKY L. PETERSON
Vice-Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Joan Gertsacov Smith
Docket No. DRB 99-232

Decided: June 15, 2000

Disposition: Six-month Suspension

Members	Disbar	Six-month Suspension	Three-month Suspension	Admonition	Dismiss	Disqualified	Did not Participate
Hyerling							x
Cole		x					
Boylan			x				
Brody		x					
Lolla		x					
Maudsley		x					
Peterson		x					
Schwartz		x					
Wissinger		x					
Total:		7	1				1

Robyn M. Hill 7/12/00
 Robyn M. Hill
 Chief Counsel