

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 03-207

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

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

Decided: September 15, 2003

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 complaint.

Respondent was admitted to the New Jersey bar in 1974. At the relevant times she maintained a law practice in Moorestown, New Jersey.

In 1991, respondent received a private reprimand for lack of diligence, failure to communicate with a client, and failure to cooperate with disciplinary authorities, in connection with a matrimonial matter. In the Matter of Joan Gertsacov-Smith, Docket No. DRB 91-300 (October 29, 1991).

Respondent was ineligible to practice law from September 1995 to May 16, 1997 for failure to pay her 1995 and 1996 annual assessments to the New Jersey Lawyers' Fund for Client Protection.

Respondent received a six-month suspension effective November 12, 1997, for lack of diligence, failure to communicate with a client, failure to turn over a client's file, failure to return an unearned fee, and failure to cooperate with disciplinary authorities. In re Smith, 151 N.J. 483 (1997). In 1999, she was again suspended for an additional six-month period, in a default matter, for failure to communicate the basis or rate of the fee in writing, failure to surrender the client's papers upon termination of representation, failure to cooperate with disciplinary authorities, and R.1:20-20 (failure to give notice of suspension to all persons required or to file an affidavit of compliance in accordance with R.1:20-20). In re Smith, 165 N.J. 541 (2000).

Respondent did not petition the Court for reinstatement at the expiration of her suspensions and, therefore, remains suspended to date.

On March 17, 2003, the OAE mailed a copy of the complaint to respondent at her last known office address listed in the New Jersey Lawyers' Diary and Manual, 3 East Second Street, Moorestown, New Jersey 08057, by regular and certified mail, return receipt requested. The certified mail envelope was returned marked "unclaimed" and included a hand-written address of 1 Regency Plaza, Providence, Rhode Island, 02903. The regular mail envelope was not returned.

On April 29, 2003, the OAE mailed a copy of the complaint to respondent at the Rhode Island address, by regular and certified mail, return receipt requested. The

certified mail receipt was returned indicating delivery on May 2, 2003. The signature of the recipient is Jane Lord. The record is silent about the regular mail. Respondent did not file an answer to the complaint. The OAE sent respondent another letter on May 27, 2003, notifying her that, if she did not file an answer within five days of the date of the letter, the allegations of the complaint would be deemed admitted and the matter certified to the Board for the imposition of sanction. The letter was sent to respondent at the Rhode Island address by regular and certified mail, return receipt requested. As of the date of the OAE certification, June 4, 2003, neither the certified mail nor the regular mail had been returned. Respondent did not file an answer.

By letter dated July 30, 2003, respondent requested additional time to file an answer to the complaint, citing, among other things, eye surgery performed the prior week, and complications emanating therefrom. Respondent claimed that it was impossible, at that time to read the “plethora” of materials involved in her matter. As a result, she needed sufficient additional time to obtain help to file an answer to the complaint.

We considered respondent’s request for additional time in which to file an answer, her reasons for the request and the fact that she was in receipt of the underlying grievance as early as August 28, 2002. We have also considered that respondent has not filed a motion to vacate the default. As such, we have determined to deny respondent’s request.

The two-count complaint charged respondent with violations of RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), RPC 1.5(a) (charging an unreasonable fee), RPC 1.15(a) (failure to safeguard client funds – negligent misappropriation), RPC 1.15(b)

(upon receiving funds or property in which a client or third person has an interest, failure to promptly deliver to the client or third person any funds or property that the client or third person is entitled to receive), RPC 1.15(c) (when coming into the possession of property in which both the attorney and another person claims an interest, failure to keep the property separate until there is an accounting and severance of their interests), RPC 3.4(c) (knowingly disobeying multiple obligations under the rules of a tribunal), RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) (count one); and RPC 8.1(b) (failure to reply to a lawful demand for information from a disciplinary authority) (count two).

The complaint stemmed from respondent's handling of an estate matter. Bernard Nassano died on August 18, 1982. Although he had executed a will in 1978, Nassano's holographic inscriptions on the will declared it to be "null and void." The Department of Law and Public Safety, Division of Law, Financial Section ("Division of Law") litigated a will contest in which the trial court determined that Nassano had died intestate. The court also found that Nassano's relatives, a second cousin and her two daughters, were outside the degree of consanguinity required by N.J.S.A. 3B:5-4 and, therefore, could not inherit his estate. The decision was affirmed on appeal and a petition for certification was denied. Nassano's estate, therefore, escheated to the State of New Jersey ("State") pursuant to N.J.S.A. 3B:5-5.

In December 1982, respondent was appointed the administratrix of the Nassano estate. At Nassano's death, his gross estate was valued at approximately \$308,600. It consisted of two bank accounts totaling \$4,028.98; three stocks: AT&T valued at

\$108,500, Campbell Soup valued at \$39,325, and Federal Companies valued at \$155,750; an automobile valued at \$400; and home furnishings worth \$600.

Respondent's Neglect in the Administration of the Nassano Estate

On April 16, 1987, the Division of Law asked respondent to submit an informal accounting and to make a final distribution from the Nassano estate. When she failed to do so, by letter dated January 21, 1988, the Division of Law reiterated its request, stressing that the estate had been pending at that point for almost five and one-half years. Approximately nine months later, on October 10, 1988, respondent provided a first accounting for the period of December 1, 1982, through August 31, 1988, but failed to make any distribution of the estate. In the accounting, respondent listed the corpus on hand as \$399,193.44 and the income on hand as \$140,524.54, for a total of \$539,717.98 on hand as of August 31, 1988.

Five months later, on March 3, 1989, respondent directed stock-broker, Janney Montgomery Scott ("JMS") to sell, on March 6, 1989, certain stocks valued at \$263,134.75. On March 5, 1989, respondent issued a check to the State for \$100,000 as partial distribution of the Nassano estate. On April 20, 1989, JMS issued a \$263,134.75 check to the State, representing the proceeds from the sale of the stock.

By letter dated March 10, 1990, the Division of Law implored respondent to conclude the administration of the estate, liquidate certain stocks, remit the proceeds of the sale, wind up the estate, and prepare a supplemental accounting. Respondent did not comply, despite the Division of Law's repeated requests over the next two years.

On July 19, 1993, the Division of Law filed a complaint in the Superior Court of New Jersey, seeking to compel an accounting, or in the alternative, to have respondent removed as administratrix and to enforce the surety bond. Respondent was ordered to file an accounting three weeks prior to the hearing, scheduled for August 20, 1993. Respondent did not comply. At the hearing, respondent was ordered to file her final accounting on or before September 20, 1993. She, however, obtained a thirty-day extension. Prior thereto, on August 20, 1993, respondent remitted to the State a check in the amount of \$120,000, representing the third partial distribution of the estate. She again failed to provide the ordered accounting.

From November 1993 to November 1994, the Division of Law repeatedly requested that respondent provide an accounting. In the interim, on June 15, 1994, she remitted a check to the State in the amount of \$46,628.25, representing the fourth partial distribution of the estate.

Again on December 6, 1994, the Division of Law filed a complaint to compel an accounting, to remove respondent as the administratrix, and to enforce the surety bond. The order to show cause, returnable January 6, 1995, was postponed to May 25, 1995. On April 27, 1995, respondent remitted \$250,000 to the State as a fifth partial distribution of the estate. After the May 25, 1995 hearing, respondent was again ordered to file her final accounting, but she did not comply. Thereafter, from July 1995 to February 1998, the Division of Law periodically requested that respondent file her final accounting. She ignored all such requests. Accordingly, on March 25, 1998, the Division of Law filed

another complaint to compel respondent to provide an accounting or be removed as administratrix.

The court issued orders on March 26 and May 15, 1998 giving respondent dates certain to submit her accounting. She failed to comply with both orders. The court then entered an order to show cause to remove her as administratrix, returnable January 22, 1999. On April 5, 1999, respondent signed a consent order removing her as administratrix and requiring her to turn over all estate funds and to provide an accounting. Prior thereto, on April 2, 1999, she remitted two checks to the State totaling \$137,087.36. On June 29, 1999, she forwarded a JMS check to the State in the amount of \$176.95, which she represented constituted the balance of the estate proceeds. She did not, however, provide the accounting. As a result, on May 24, 1999, the Division of Law filed a motion to enforce litigant's rights, seeking respondent's arrest for her failure to comply with the court's order of April 5, 1999, and directing her to prepare, file and bring for judicial approval her accounting of the administration. On June 8, 1999, respondent's counsel filed a certification in opposition to the motion. As seen below, respondent finally filed the accounting in June 1999.

Commissions and Fees Taken by Respondent

On or about June 30, 1999, respondent's counsel filed a verified complaint requesting approval of the accounting, administrator's commissions, legal fees and release of administrator. Attached to the complaint were respondent's first intermediate

accounting for the period of August 18, 1992 to December 31, 1994, and second and final accounting for the period of January 1, 1995 to April 2, 1999.

In the verified complaint, respondent sought, among other things:

1. Attorney's fees in the amount of \$51,010, which she had previously paid to herself, for legal services from 1992 through 1995;
2. Corpus commissions in the amount of \$33,534.93 under N.J.S.A. 3B:18-17¹, which she had already paid to herself;
3. Income commissions in the amount of \$19,073.88 under N.J.S.A. 3B:18-13 (6% may be taken without court approval on all income received by the fiduciary) of which she had already paid herself \$10,050;
4. Additional corpus commissions in the amount of \$12,018.12 under N.J.S.A. 3B:18-17, which was unpaid; and
5. Additional corpus commissions of 1% of corpus or \$8,724.27 pursuant to N.J.S.A. 3B:18-16 (as approved by the court on a showing of unusual or extraordinary services by the fiduciary) for extraordinary services to the estate.

The Division of Law filed exceptions to the first intermediate accounting, alleging that:

(1) Respondent had failed to timely invest dividends in an interest-bearing account.

(2) She delayed settling the estate, causing unnecessary expenditures for annual surety bond premiums and the assessment of interest and penalties for the delinquent filing and the untimely payment of estate or fiduciary taxes.

¹ N.J.S.A. 3B:18-17 states, in relevant part:

Fiduciaries may annually, without court allowance, take sums as follows on account of corpus commissions: if there is but one fiduciary, the amount so taken may equal one-fifth of 1% of the value of the corpus. . . .

(3) She expended estate funds for her personal benefit by paying \$284 to the State and \$2,100 to the IRS for the benefit of "J. G. Smith."

(4) She sought allowances for accountant and paralegal fees, without describing the nature or necessity of the services.

(5) She reported different numbers for income disbursements to herself in different documents, without explaining the discrepancy.

In its exceptions, the Division of Law also disputed the entire amount of respondent's \$33,544.93 request for corpus commissions, which she had already paid to herself, for the following reasons:

a. The rates, which formed the basis of the calculation for the commissions sought, were incorrect and, as a result, the commissions exceeded the amounts permitted under N.J.S.A. 3B:18-14 (calculation of corpus commissions);

b. Respondent sought an allowance for corpus commissions computed on corpus appreciation after five years of administering the estate, but any corpus appreciation after five years was solely the result of her failure to settle the estate in accordance with N.J.S.A. 3B:10-28 (requiring the expeditious settlement and distribution of a decedent's estate);

c. Respondent's affidavit of services did not show "pain, trouble, and risk" in settling the estate, but rather computed the corpus commission on an inflated value of the estate; based on the minimal effort that should have been required to settle the estate, the maximum fair and reasonable allowance for counsel fees should have been \$10,000;

d. Respondent did not take custody and responsibility for two bank accounts, which, therefore, should have been deducted from the calculation of the corpus;

e. Respondent did not carry out and fulfill her fiduciary obligations, but instead engaged in misfeasance, malfeasance and neglect including:

- (1) failure to marshal estate assets;
- (2) failure to file some fiduciary income tax returns;
- (3) failure to timely deposit dividend checks; and
- (4) repeated refusal to obey court orders to account.

Respondent sought an allowance of \$12,018.12 in annual corpus commissions. The Division of Law objected to the portion that exceeded the amounts that an administrator may take annually, without court allowance. However, it did not specify the amount.

Respondent further sought an allowance of \$19,073.88 in income commissions, all of which she had taken between 1985 and 1994. The Division of Law asserted that the amounts claimed after five years were excessive in that they were generated solely by respondent's failure to timely settle the estate. The Division of Law also objected to respondent's requested allowance of \$8,724.27 in additional corpus commissions for extraordinary services "marshalling and investing the estate in a superior manner." It maintained that the estate was modest and uncomplicated and could have been settled promptly many years earlier.

The exceptions pointed out that respondent did not pay some fiduciary taxes, subjecting the estate to interest and penalties. Furthermore, her accounting included the sum of \$6,552.25, which was listed as "unaccounted for Items per Sheet" in the intermediate accounting, but she failed to identify or explain the entry.

The OAE's investigation validated the State's exceptions to respondent's first intermediate accounting.

The Division of Law also filed the following exceptions to respondent's final accounting (January 1, 1995 to August 2, 1992):

(1) Respondent sought additional allowances for surety bond premiums paid to Western Surety, which were incurred solely because of her delay and neglect in settling the estate.

(2) She sought an allowance for the payment of an accountant's fee to prepare the accounting, which was required because she failed to maintain books and records.

(3) She sought an allowance of \$6,176.09 for "tax withholding" without explaining or describing the nature of the tax withholding.

(4) In a February 1999 draft accounting, she sought an allowance for a disbursement on August 11, 1998, in the amount of \$975 designated "no description," which did not appear in later accountings and was discovered to be a payment to the surety company.

(5) She sought an allowance in a February 1999 draft accounting for an unidentified disbursement in the amount of \$5,000, which was not mentioned in later accountings but appeared to be a commission disbursement.

(6) She did not marshal two estate bank accounts, which were later described in the final accounting as "appears escheated."

(7) She sought an allowance of \$51,010 in legal fees, of which she indicated \$40,200 was taken between October 1995 and June 1998 in the final accounting. The verified complaint that respondent filed, however, stated that all fees had previously been taken and that legal fees were sought for services that respondent was required to render as administratrix of the estate for which she was previously compensated by her commission. She later agreed to forgo submitting additional bills for legal services if her commissions were approved as requested.

(8) She sought an allowance of \$15,672 for attorney's fees for her attorney, whose services were necessitated by her "maladministration" of the estate and by her request for approval of excessive fees and commissions.

Respondent did not reply to the Division of Law's exceptions. The OAE's investigation validated the exceptions to the final accounting.

On September 8, 2000, the court entered an order approving the administratrix's first and final accounting and approving a settlement, which required respondent and Western Surety Company to pay \$10,000 and \$35,000, respectively, to the State. Western Surety's obligation was paid. However, respondent's obligation was reduced to judgment and remains outstanding.

The complaint charged that the disbursements noted above for respondent's own benefit or for no apparent estate-related purpose, resulted in the negligent misappropriation of estate funds.

Count two of the ethics complaint charged respondent with a violation of RPC 8.1(b), for failing to reply to the grievance. On August 8, 2002, the OAE wrote to respondent at her last known home address, 3 East Second Street, Moorestown, New Jersey by regular and certified mail, return receipt requested, seeking a reply to the grievance by August 30, 2002. On August 28, 2002, the certified mail receipt was returned signed by respondent. The regular mail was not returned. Respondent did not reply to the grievance or otherwise communicate with the OAE.

Service of process was properly made in this matter. Following a review of the record, we determined that the facts recited in the complaint support a finding of

unethical conduct. Because of respondent's failure to answer the complaint, the allegations are deemed admitted. R.1:20-4(f).

The Nassano estate remained open for a period of seventeen years. Respondent delayed rendering accountings and making timely distribution of the estate despite repeated requests from the Division of Law and five court orders requiring her to do so. According to the complaint, among other things, respondent failed to marshal estate assets, failed to file some fiduciary income tax returns, failed to timely deposit dividend checks, made inconsistent entries in her accountings and was unable to identify certain entries in the accountings. Her conduct in this regard violated RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence) and RPC 3.4(c) (knowingly disobeying an obligation under the rules of a tribunal).

The record further establishes that respondent took more in corpus and income commissions, and counsel fees, than permissible. This finding is supported by the court's order requiring respondent and the surety company to make payment to the State in satisfaction of the Division of Law's objections to the administration of the estate.

The allegations of the complaint, thus, support findings that respondent charged an unreasonable fee, in violation of RPC 1.5(a); failed to safeguard client funds, in violation of RPC 1.15(a); did not promptly deliver to the client or third person, funds or other property that the client or third person was entitled to receive, in violation of RPC 1.15(b); and failed to keep separate property in which she and another claimed an interest until there was an accounting and severance of their interests, in violation of RPC 1.15(c).

The complaint alleged that respondent paid \$284 to the State of New Jersey and \$2,100 to the IRS for the benefit of "J. G. Smith," expending estate funds for her personal benefit. The investigator's report noted that these entries in respondent's intermediate accounting, are listed as follows:

| | | |
|---------|---|------------|
| 6/15/92 | J. G. Smith – error State of New Jersey | \$284.00 |
| 6/15/92 | J. G. Smith – error Internal Revenue Service | \$2,100.00 |

The investigator's report further stated that respondent provided no reply to either set of exceptions filed by the Division of Law, or to the OAE, to refute the inferences that may be drawn from these entries. The complaint did not, however, charge respondent with knowing misappropriation, nor is there clear and convincing evidence of such a violation from the facts alleged in the complaint and we do not make such a finding.

The complaint also charged respondent with a violation of RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation). It did not, however, point to any specific acts. The investigator's report states:

Smith's conduct in keeping this Estate administration open violated RPC 1.15(a) and RPC 8.4(c). From our investigation, it appears that Smith kept this Estate open for no other reason than to justify her continued billings and her continued receipt of commissions. In this regard, she collected fees and commissions for approximately ten years (1989 to 1999) while performing almost no administration functions and no legal services. The Division of Law repeatedly requested distribution of the Estate. Smith placated the State by making periodic payments, but refused to close the matter. As such, she did not safeguard funds entrusted to her and did not handle those funds in an honest manner.

We do not agree with the investigator's analysis. We do not find clear and convincing evidence that respondent kept the estate open solely for her own financial

gain. Instead we find that respondent's lack of diligence and gross negligence prevented her from completing the administration of the estate in a timely manner. We, therefore, do not find a violation of RPC 8.4(c)

In sum, respondent's misconduct included gross neglect, lack of diligence, charging an unreasonable fee, failure to safeguard property, disobeying the obligations under the rules of a tribunal and failure to reply to lawful demands for information from a disciplinary authority.

In a recent case involving the mishandling of an estate, a three-year retroactive suspension was imposed. In re Schmeling, 174 N.J. 539 (2002). In Schmeling, the attorney took more in annual corpus commissions than permitted by N.J.S.A. 3B:18-17, claiming that he was unaware of the statute. He also took excessive interim commissions without obtaining court approval. Because he did not keep accurate records of the estate income, it appeared likely that the excessive income commissions he took were the result of mistake, rather than the intentional misuse of estate funds.

Schmeling's reckless disregard of his fiduciary responsibilities cost the estate hundreds of thousands of dollars. He failed to take steps to correct the problems his negligence created and disobeyed two court orders for the production of estate records, an accounting, and the return of all fees and commissions to the estate. It was not until he was arrested that he agreed to produce the accounting. The court ordered Schmeling to repay to the estate \$53,997.93. The attorney's misconduct included violations of RPC 1.1(a) (gross neglect), RPC 1.15(b) (failure to safeguard the estate's funds and property), RPC 1.15(d) (failure to comply with the recordkeeping provisions of R.1:21-6), RPC

8.1(b) (failure to cooperate with the OAE's investigation), and RPC 8.4(d) (conduct prejudicial to the administration of justice by failing to comply with the court's orders).

In In re Simeone, 108 N.J. 515 (1987), the Court imposed a six-year retroactive suspension for the attorney's misconduct in two matters. The attorney was not disbarred because the proofs fell short of establishing a knowing misappropriation of funds. The Court, however, determined that the Simeone's conduct was extremely serious and warranted the most severe discipline short of disbarment.

In the estate matter, Simeone took excessive commissions, claiming an incorrect understanding of the percentage of corpus income to which he was entitled; failed to render an accounting despite a court order; failed to notify all of the beneficiaries about the will; immediately cashed in the savings bonds and paid a tax on the accumulated interest, resulting in a tax loss to the estate; and failed to produce the estate records to the ethics authorities.

In a real estate matter, Simeone received proceeds from a December 1979 closing, but despite repeated requests from the seller, did not turn over the funds until April 1, 1980. At that time he had to use some of his own funds. He blamed his trust account shortage on his poor accounting practices. The Court found negligent, not intentional, misuse of client's funds and of estate funds, as well as multiple instances of gross neglect and misrepresentations to the clients about the status of their cases. But see In re Ort, 134 N.J. 146 (1993) (attorney disbarred for misconduct while representing a widow in settling her husband's estate including mortgaging the estate residence without his client's permission, then using the loan to take excessive and unauthorized legal fees, overstating

and exaggerating his legal fees, charging legal fees for non-legal work and making misrepresentations to his client about his representation).

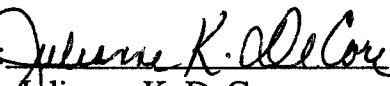
While respondent's conduct was not as egregious as the attorney's actions in Ort, it was certainly as serious as Schmeling's conduct. Here, however, we have significant aggravating factors, which include respondent's ethics history – a private reprimand and two six-month suspensions, and the fact that both this and respondent's prior ethics matter proceeded on a default basis. Respondent's disinterest in her own ethics matters, her failure to apply for reinstatement, and her repeated disregard of the court's orders in the estate matter, demonstrate her indifference to the judicial process.

In order to protect the public, seven members determined to impose a three-year suspension.

We further determined to require respondent, prior to her reinstatement, to submit proof of completion of a course in estate administration offered by the Institute for Continuing Legal Education, and proof of satisfaction of the judgment entered against her in connection with the administration of the Nassano estate.

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

Disciplinary Review Board

By: 
Julianne K. DeCore
Acting Chief Counsel

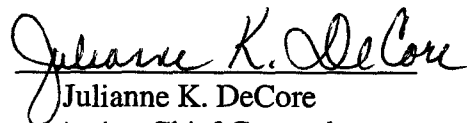
**SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD**

In the Matter of Joan Gertsacov-Smith
Docket No. DRB 03-207

Decided: September 15, 2003

Disposition: Three-year suspension

| <i>Members</i> | <i>Disbar</i> | <i>Three-year Suspension</i> | <i>Reprimand</i> | <i>Admonition</i> | <i>Dismiss</i> | <i>Disqualified</i> | <i>Did not participate</i> |
|----------------------|---------------|----------------------------------|------------------|-------------------|----------------|---------------------|--------------------------------|
| <i>Maudsley</i> | | X | | | | | |
| <i>O'Shaughnessy</i> | | X | | | | | |
| <i>Boylan</i> | | X | | | | | |
| <i>Holmes</i> | | X | | | | | |
| <i>Lolla</i> | | X | | | | | |
| <i>Pashman</i> | | | | | | | X |
| <i>Schwartz</i> | | | | | | | X |
| <i>Stanton</i> | | X | | | | | |
| <i>Wissinger</i> | | X | | | | | |
| Total: | | 7 | | | | | 2 |


Julianne K. DeCore
Acting Chief Counsel