

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN RE: DISCIPLINE OF JANICE E.
SMITH, ESQ.

No. 43165

FILED

MAR 25 2005

J. Acovilla
DEPUTY CLERK

ORDER OF SUSPENSION¹

This is an automatic appeal from a Southern Nevada Disciplinary Board hearing panel's recommendation that attorney Janice E. Smith be suspended from the practice of law for thirty days, based on the panel's findings that she violated Supreme Court Rules 157 (conflict of interest), 165 (safekeeping property), 170 (meritorious claims), 172 (candor to the tribunal), and 203(3) and (4) (misconduct involving misrepresentation and conduct that is prejudicial to the administration of justice). The panel found the following mitigating factors: (1) Smith cooperated and participated in good faith in the disciplinary process, (2) she has practiced law for approximately twenty-three years, and (3) she has had no prior discipline. In addition to the suspension, the panel recommends that Smith be ordered to pay the disciplinary proceeding's costs.

Although the recommendations of a disciplinary panel are persuasive, this court is not bound by a panel's findings and

¹The Honorable A. William Maupin, The Honorable Mark Gibbons, and The Honorable Ronald Parraguirre, Justices, voluntarily recused themselves from participation in the decision of this matter.

Effective date April 9, 2005*

Bar Number: 3816

*Immediately as to new clients, 15 days to wind down existing cases.

90 DAY SS

05-05842

recommendations, and must examine the record anew and exercise independent judgment when determining whether and what type of discipline is warranted.² Ethical violations must be proven by clear and convincing evidence, which this court has described as evidence which “need not possess such a degree of force as to be irresistible, but [which must include] evidence of tangible facts from which a legitimate inference . . . may be drawn.”³

In 1998, Smith incorporated Accent’s, Inc. on behalf of Donald Suttle and Ruth Roy, who were made equal partners of the corporation. Smith acted as the corporation’s registered agent and corporate counsel. On the list of corporate officers and directors that Smith filed with the Secretary of State, Suttle was listed as president and Roy was listed as secretary/treasurer.

In April 2000, Suttle and Roy began disputing the distribution of corporate money and the re-payment of Suttle’s start-up loans. Roy also asserted that Suttle had hired illegal aliens to work for Accent’s. In June 2000, Roy seized corporate funds and delivered them to Smith, who deposited the funds into her attorney trust account. Smith testified that she represented to both Suttle and Roy that she only represented the corporation. Suttle claimed in a letter, however, that he had received a letter from Roy, faxed from Smith’s office, in which Roy indicated that she had received legal advice from Smith. Roy testified that she went to Smith, as a friend, after she seized the corporate proceeds, and Smith said

²See In re Kenick, 100 Nev. 273, 680 P.2d 972 (1984).

³In re Stuhff, 108 Nev. 629, 635, 837 P.2d 853, 856 (1992) (quoting Gruber v. Baker, 20 Nev. 453, 477, 23 P. 858, 865 (1890)).

she would place the funds in her trust account. At some point, Roy retained independent counsel regarding her concerns about the corporation and Suttle's alleged conduct.

According to the record, Suttle sent letters to Smith directing her to pay bills on behalf of the corporation from the funds she held. In response, Smith informed Suttle that she had paid the bills from the funds held in trust. When Suttle subsequently retained counsel, however, he learned that Smith had not paid all the forwarded bills. Suttle's counsel tried several times to contact Smith, but she did not respond. Subsequently, Suttle filed a complaint against Roy and Smith for an accounting, breach of fiduciary duty, and for injunctive relief. The court granted Suttle a preliminary injunction against Roy and directed Roy and Smith to provide an accounting. Smith testified during the disciplinary proceeding that she had paid all bills for which she received proper invoicing and/or documentation.

In July 2000, Suttle wrote a letter to Smith terminating her as corporate counsel. Initially, Smith refused to accept the termination until Suttle provided her with proof that he was the corporation's president. Eventually, Smith resigned.

In October 2000, Smith, who primarily practices bankruptcy law and is an accountant, filed a petition for involuntary bankruptcy against Suttle on behalf of three creditors: Apollo Credit, Bland Ford House Movers, and JTR Enterprises. JTR Enterprises is a business that Smith incorporated on behalf of Jeff Anderson. Anderson was Roy's boyfriend, and Anderson and Suttle had previously been partners in a home moving business. The bankruptcy petition was filed eight days after

the preliminary injunction was entered in the district court. Suttle retained counsel to defend himself.

Suttle then moved to dismiss the involuntary bankruptcy. The motion was granted, and Suttle was awarded \$1,000 in attorney fees and \$78 in costs. Additionally, the court informed Suttle that if he wanted additional fees, he had to prove bad faith at an evidentiary hearing. In July 2001, an evidentiary hearing was held. Testimony established that Smith did not have an attorney-client relationship with two of the three creditors that she purported to represent in the bankruptcy proceedings: Apollo Credit and Bland Ford House Movers. Consequently, the bankruptcy court found that Smith had filed the involuntary bankruptcy petition in bad faith. Accordingly, Smith and JTR Enterprises were ordered to pay Suttle, jointly and severally, \$5,000 in compensatory damages, \$1,000 in punitive damages, \$5,622.50 in attorney fees, and \$51.80 in costs.

After the bankruptcy proceedings concluded, Suttle filed a grievance with the State Bar concerning Smith's conduct. Following a disciplinary hearing, the panel recommended a thirty-day suspension. Smith did not file a brief in this court opposing the panel's recommendation.

SCR 157 (conflicts of interest) provides that an attorney must not represent a client if the representation of that client is directly adverse to another client, unless the attorney obtains each client's consent and the attorney reasonably believes that the representation will not adversely

affect the relationship with the other client.⁴ Moreover, an attorney must not represent a client if the representation might be materially limited by the attorney's responsibilities to another client, unless the attorney obtains each client's consent and the attorney reasonably believes that representing the new client will not be adversely affected by representing the other client.⁵

The panel found a conflict of interest, under SCR 157, based on Smith's representation of one corporate officer against another officer. When Roy came to Smith with allegations that a monetary conflict existed and that Suttle was putting the corporation at risk by hiring illegal aliens, Smith did not notify Suttle of what was transpiring. If Smith was representing Roy as corporate counsel, then she was also representing Suttle and clearly had a conflict. Once Smith was aware of the conflict, she should have sought consent from both parties to represent Roy, or at the very least advised them to seek independent counsel. Moreover, Smith could not reasonably have believed that advising Roy would not adversely affect Suttle. Thus, we conclude that clear and convincing evidence support's the panel's findings that a conflict of interest existed.⁶

⁴SCR 157(1)(a) and (b). Also, it appears that Smith's conduct in filing the involuntary bankruptcy on behalf of JTR Enterprises against Suttle violated SCR 159 (conflict of interest: former client), but the panel did not charge her with this violation. See In re Discipline of Schaefer, 117 Nev. 496, 516, 25 P.3d 191, 204, as modified by 31 P.3d 365 (2001) (noting that violations of professional conduct rules not charged in an attorney disciplinary complaint will not be considered by this court).

⁵SCR 157(2)(a) and (b).

⁶In re Stuhff, 108 Nev. 629, 837 P.2d 853.

The panel also found that Smith violated SCR 165(2) (safekeeping property) when she failed to immediately inform Suttle that she was in possession of the corporate funds, and when she failed to render a full accounting at Suttle's request. Smith placed the corporate proceeds in her trust account and was not entirely forthright with Suttle regarding whether corporate bills had been paid with the funds. The panel's findings regarding violation of SCR 165 are supported by clear and convincing evidence.⁷

The discipline panel concluded, in addition to the conflict of interest and safekeeping property violations, that Smith violated SCR 170 (meritorious claims). This rule is violated when an attorney brings or defends a proceeding, or asserts an issue that is frivolous.⁸ Although the panel did not explicitly identify the basis upon which it found a violation by Smith, the panel likely based its finding on the involuntary bankruptcy proceedings. The panel also concluded that Smith violated SCR 172 (candor to the tribunal) in light of her false statements regarding her representation of two corporate creditors in the involuntary bankruptcy proceedings. Finally, the panel concluded that "the involuntary bankruptcy should never have been filed" and that Smith's misconduct involved misrepresentation (SCR 203(3)) and was prejudicial to the administration of justice (SCR 203(4)). Each of these violations is supported by clear and convincing evidence, especially in light of the bankruptcy court's bad faith findings.⁹

⁷Id.

⁸SCR 170.

⁹Id.

Although the panel recommended a thirty-day suspension, we conclude that this recommended discipline is too lenient. Smith's main practice area is bankruptcy, and she is an accountant. The record establishes that Smith took sides with Roy against Suttle during the corporate conflict, all without Suttle's consent, that she failed to immediately inform Suttle that she was in possession of the corporate funds or to render an accounting, that she filed the involuntary bankruptcy petition in bad faith, and that Smith's misconduct involved misrepresentation and was prejudicial to the administration of justice. Accordingly, Smith shall be suspended from the practice of law for ninety days.¹⁰ In addition, Smith shall pay the costs of the disciplinary proceedings.

It is so ORDERED.¹¹

Becker, C.J.
Becker

Rose, J.
Rose

Douglas, J.
Douglas

Hardesty, J.
Hardesty

¹⁰Under SCR 115, the suspension is effective fifteen days from the date of this order. Smith and the State Bar shall comply with SCR 115.

¹¹This constitutes our final disposition of this case. Any future proceedings concerning Smith will be filed under a new docket number.

cc: Howard M. Miller, Chair, Southern Nevada Disciplinary Board
Allen W. Kimbrough, Executive Director
Rob W. Bare, Bar Counsel
Potter Law Offices
Perry Thompson, Admissions Office, U.S. Supreme Court