

SUPREME COURT OF WISCONSIN  
OFFICE OF LAWYER REGULATION

---

Public Reprimand With Consent

09-OLR-17

Suzanne M. Smith  
Attorney at Law

---

The Respondent, Attorney Suzanne M. Smith, practices in Burlington, Wisconsin. This reprimand is based on Respondent's conduct in three separate matters.

First Matter

In the first matter, a client hired Respondent in September 2006 to represent him with respect to a dispute he had with a trucking company (LLC) owned by the client's sister. The client was a driver for the LLC. Although no complaint had yet been filed, the LLC believed it had various causes of action against the client, which included breach of contract, conversion, and unjust enrichment. The client disputed the LLC's claims and believed he had a cause of action against the LLC.

On June 19, 2007, the LLC filed a complaint against the client and the client was served with a copy of the summons and complaint on June 26, 2007.

A few days after being served, the client and his wife met with Respondent and gave her a copy of the summons and complaint. The client said he and Respondent discussed his responses to the allegations and whether they should be admitted or denied. The client also asked Respondent to file a counterclaim against the LLC. Respondent agreed to file the answer and counterclaim.

Subsequently, the client said he called Respondent periodically to see if there was anything he could do to assist her and was told there was nothing else for him to do at that point.

Respondent did not file an answer to the LLC complaint on behalf of the client.

On September 5, 2007, a default judgment was entered against the client in the amount of \$63,786.23. The judgment was docketed on September 6, 2007, and a transcript of the judgment was filed in the client's county of residence on September 14, 2007.

On October 9, 2007 an order to appear for a supplemental examination was served on the client. The client said he did not understand that a default judgment had been entered against him and did not realize the significance of a supplemental examination.

The client gave the supplemental examination order to Respondent, and he says Respondent told him he did not have to appear for the examination. Respondent admits she told the client "...not to worry about the hearing and that I was going to take care of it, i.e., reopen it." Respondent said it was her intention to file a motion to reopen the judgment.

Neither Respondent nor the client appeared for the October 2007 supplemental examination. Additionally, Respondent never filed a motion to vacate the judgment.

Respondent states she told the client she would file a motion to vacate the judgment, but she cannot remember exactly when she told him. In a January 22, 2008 affidavit, the client said he did not learn that a default judgment in an amount greater than \$60,000 had been entered against him until late December 2007, when he appeared for a second supplemental examination.

On November 13, 2007, an order to appear and show cause at a November 21, 2007 hearing was served on the client. On November 20, 2007, Respondent and the attorney for the LLC entered into a stipulation to remove the November 21, 2007 order to show cause hearing from the court calendar, with the proviso that the client pay the plaintiff \$364.50 by December 1,

2007 for the costs and attorney's fees incurred in setting the supplemental examination and order to show cause hearings. The stipulation also required the client to submit to a supplemental examination prior to December 31, 2007. The stipulation permitted the court to enter an order effectuating the stipulation without notice to any party.

Respondent did not consult with the client prior to entering into the November 20, 2007 stipulation, nor did she send him a copy of the stipulation and order. Respondent said she did not consult with the client about the stipulation "because I saw that as more of a stipulation between myself and the other attorney resetting the date (which I did advise [the client]) and I agreed to pay the costs."

Respondent did not pay the \$364.50 in costs by December 1, 2007.

Subsequently, Respondent notified the client that he was required to appear for a supplemental examination on a date in late December 2007. Respondent told the client she would also attend.

Respondent did not appear at the December 2007 supplemental examination because she said her car broke down along the way, but she did call to report why she was absent.

Subsequent to the December 2007 supplemental examination, the client's wages were garnished three times, resulting in lost wages totaling \$385.00.

Subsequent to the December 2007 supplemental examination, the client and his wife said they made numerous attempts to contact Respondent, but received no response.

Respondent admits that her telephone log shows she received calls from the client's wife on December 20 and 26, 2007, and calls from the client on January 8, 2008 and February 11, 2008, none of which she returned. Respondent explained that she had been experiencing some family problems in the fall of 2007 and early 2008, and also that her husband, who was her office

manager, had been out ill during much of the relevant time period. Respondent said that it was due to these circumstances that she, regrettably, failed to attend to the client's matter.

On January 22, 2008 the client filed a *pro se* motion to vacate the default judgment against him. The client sent a January 22, 2008 letter to Respondent, which enclosed a copy of his motion and stated, in part:

As you can see, this matter is set for hearing on March 7, 2008. I fully expect you to attend this hearing and protect my interests in this matter...

Obviously, I have now learned that you did not file an answer on my behalf and allowed default judgment to be taken against me. You need to try and get this default judgment vacated. If there is anything else that needs to be filed to help with this motion I expect you will do it. Please confirm in writing, that you are going to handle this matter.

The client received no response from Respondent to his January 22, 2008 letter. Respondent said she does not believe she ever received the client's January 22, 2008 letter.

On February 15, 2008, the client hired successor counsel to represent him with respect to the LLC litigation.

On February 21, 2008, successor counsel filed an amended motion to vacate the default judgment and a brief in support of the motion. The hearing on the motion remained scheduled for March 7, 2008. In a March 6, 2008 email to successor counsel, Respondent admitted that she had failed to file an answer to the LLC's complaint and further, that she had failed to file a motion to reopen the default judgment. In the email, Respondent said that the client had done nothing wrong and that she intended to cooperate with successor counsel in his efforts to vacate the judgment.

On March 7, 2008, successor counsel's motion to vacate the default judgment was granted. On April 24, 2008, the LLC's attorney offered to settle the case for \$6500. Subsequently, the case apparently settled and was it dismissed on June 24, 2008.

In a March 27, 2008 letter, successor counsel informed Respondent that, as a result of her failure to file an answer to the LLC's complaint, the client had incurred \$2,255.00 in attorney's fees to reopen the matter, \$364.50 in costs associated with the supplemental examination, which Respondent had never paid, and \$385 in lost wages due to garnishment. Successor counsel said that if Respondent paid the client \$3004.50, the client would sign a release of claims for malpractice.

Respondent agreed to pay the client \$3004.50 and the client accepted a payment schedule of \$250 a month. Respondent submitted evidence to the Office of Lawyer Regulation that she made regular payments and that she tendered a final payment of \$504.50 to successor counsel on March 14, 2009. In an April 20, 2009 letter to Respondent, successor counsel returned Respondent's check because he said the client had decided not to sign a release of claims. The letter informed Respondent that successor counsel no longer represented the client.

By failing to file an answer to the LLC's complaint against her client, thereby causing a default judgment in the amount of \$63,786.23 to be entered against him, Respondent violated SCR 20:1.3, which states:

A lawyer shall act with reasonable diligence and promptness in representing a client.

By failing to file a motion to vacate the default judgment against her client and, further, by failing to appear with the client at the first supplemental examination in October 2007, thereby causing an order to show cause to be entered against him, Respondent violated SCR 20:1.3.

By failing to timely inform the client that she had failed to file an answer to the LLC's complaint and that a default judgment had been entered against him, and by failing to adequately

explain to the client the purpose of a supplemental examination, Respondent violated SCR 20:1.4(a)(3) and SCR 20:1.4(b).

SCR 20:1.4(a)(3) states that a lawyer shall:

Keep the client reasonably informed about the status of the matter.

SCR 20:1.4(b) states:

A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

By entering into the November 20, 2007 stipulation with opposing counsel without first consulting with the client about it and informing him of its contents, particularly when the stipulation obligated the client to pay \$364.50 in costs to the opposing party and to appear at a supplemental examination by December 31, 2007, Respondent violated SCR 20:1.2(a), SCR 20:1.4(a)(1) & (2), and SCR 20:1.4(b).

SCR 20:1.2(a) states, in relevant part:

...a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by SCR 20:1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.

SCR 20:1.4(a)(1) &(2) state that a lawyer shall:

(1) Promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in SCR 20:1.0(f), is required by these rules.

(2) Reasonably consult with the client about the means by which the client's objectives are to be accomplished.

By entering into the November 20, 2007 stipulation, which required the client to submit to a post-judgment supplemental examination that could, and did, result in adverse financial

consequences for him, when she knew that the judgment against the client was a default judgment and that a motion to vacate it was necessary because the client had valid defenses and counterclaims that he had not had an opportunity to present, Respondent violated SCR 20:1.1, which states:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

By failing to pay the \$364.50 in costs that the November 20, 2007 stipulation and order obligated the client to pay, when she said she had not consulted the client about the stipulation because she intended to pay the costs herself, which failure caused the client to incur those costs, Respondent violated SCR 20:1.3.

By failing to respond to at least four telephone calls from the client and his wife in December 2007 through February 2008, Respondent violated SCR 20:1.4(a) (4), which states that a lawyer shall, “[P]romptly comply with reasonable requests by the client for information.”

#### Second Matter

In a second matter, Respondent was appointed by the State Public Defender (SPD) on July 28, 2006, to represent a client in probation revocation proceedings.

The client’s administrative appeal from an administrative decision to revoke his probation was denied on October 23, 2006. Subsequently, Respondent represented the client at a November 30, 2006 resentencing hearing. The client’s probation was revoked at that time and he was sentenced to three years in prison, with credit for 462 days served.

In order to obtain judicial review of the denial of an administrative appeal, a defendant must file a petition for a writ of certiorari in circuit court.

In a December 1, 2006 letter to Respondent, the client reminded her that she had told him she would file a petition for a writ of certiorari, and he asked about the deadline for doing so. Respondent and the client agree that they had discussed the client's desire to file a petition for a writ even before the administrative appeal had been denied, and they discussed it again after the denial of his appeal. Respondent agreed to file the petition on the client's behalf.

In his December 1, 2006 letter, the client also asked Respondent to file a Notice of Intent to Seek Post-Conviction Relief within the twenty day time limit for doing so.

Subsequent to his December 1, 2006 letter, the client says he heard nothing further from Respondent about the writ.

The deadline for filing the petition for a writ of certiorari was 45 days after the October 23, 2006 denial of the client's administrative appeal, or December 7, 2006.

A Notice of Intent to Seek Post-Conviction Relief was filed on December 4, 2006, but no petition for a writ of certiorari was filed.

On December 4, 2006, Respondent sent a letter to the client in jail, which stated:

Please be advised that in order for me to file a writ on your behalf, I will need to have you sign an authorization for the release of funds from your prisoner trust account. Please forward this to me as soon as possible.  
Thank you.

The client was transferred from the jail to a correctional institution on December 5, 2006. The client said he never received Respondent's December 4, 2006 letter.

Respondent did not attempt to follow-up with the client to find out why he did not respond to her December 4, 2006 letter, nor did she request an extension of the December 7, 2006 deadline for filing the petition for the writ.

In an April 7, 2008 letter to the Office of Lawyer Regulation (OLR), Respondent stated that when she received no response to her December 4, 2006 letter to the client, she assumed he did not want to proceed with the writ after all.

On January 8, 2007, the SPD appointed an attorney to serve as the client's appellate counsel. On February 1, 2007, Respondent sent the client's file to appellate counsel. Throughout most of 2007, appellate counsel sought and received various time extensions for filing a post-conviction motion or an appeal.

On October 9, 2007, appellate counsel filed a motion to toll the deadline for filing a petition for a writ of certiorari and also for resentencing. A hearing on appellate counsel's motion was held on November 28, 2007. At the hearing, Respondent testified that she had agreed to file a petition for a writ of certiorari after the client's administrative appeal was denied, that the deadline for filing the petition was December 7, 2006, that she had written to the client on December 4, 2006 but had received no reply from him, and that she did not attempt to contact the client again when she received no reply to her December 4, 2006 letter. The client testified that he never got Respondent's December 4, 2006 letter and that he never intended to abandon his desire to file a petition for a writ of certiorari.

At the conclusion of the hearing, the court denied the motion for resentencing, but granted the motion to reset the time for filing a petition for a writ of certiorari. The court's order stated that the client had 45 days from November 28, 2007, or until January 12, 2008, to file a petition for a writ.

After speaking with appellate counsel, who had been appointed to handle only post-conviction or direct appeal matters, the client sent Respondent a December 3, 2007 letter asking

her to file a petition for the writ of certiorari. The letter also asked Respondent to contact him before drafting the petition for the writ to “ensure that all issues and bases are covered.”

Respondent did not respond to the client’s December 3, 2007 letter.

On December 20, 2007, the trial office of the SPD sent a letter to the client stating that Respondent had agreed to file his petition for a writ of certiorari and that all further inquiries about the matter should be made to Respondent.

On January 4, 2008, the client sent a letter to Respondent asking about the petition for the writ, “which needs to be filed by January 12, 2008.” The client stated, “Needless to say as of this date, I have not heard anything from you since the hearing in Kenosha on November 28, 2007.”

On February 1, 2008, the client sent Respondent another letter stating that he had not heard from her or received anything from her office about the petition for his writ. In the letter the client stated, “I do not know if the writ was timely filed, or if you even requested an extension of time thru (sic) the court for which to get this document filed.”

In an April 7, 2008 submission in response to an OLR inquiry, Respondent said she had not received the client’s January 4, 2008 and February 1, 2008 letters. Respondent admitted that she had failed to file the petition for the client’s writ. Respondent explained that, due to the family problems and her husband’s illness in the fall of 2007 and early 2008, a reminder about the client’s deadline had inadvertently been left off her calendar.

In her April 7, 2008 letter, Respondent also stated she been contacted by the SPD’s office about the matter “right before I received your grievance.” Respondent explained that she had not yet responded to the SPD, but said she was going to do so immediately.

Subsequently, on April 7, 2008, Respondent emailed the SPD, advising them that she had missed the deadline for filing for the writ and asking them to appoint a different attorney to seek another extension. According to Respondent, she was informed by the SPD that another attorney would not be appointed. Respondent agreed to make a request for another extension and to file a petition for the writ.

Respondent submitted to OLR a copy of a May 1, 2008 letter addressed to the client. In the letter, Respondent said the SPD would not appoint another attorney and that she had been advised to seek another extension. The letter further stated:

I will still need you to send me the prisoner litigation document that we had previously discussed, regarding authorizing release of funds from your prisoner account. Once I have that, I will file the writ and the extension motion.

In a June 18, 2008 letter to OLR, Respondent said she had not yet filed a request for an extension of time within which to file for the writ because she wanted to submit the request at the same time that she filed the petition for the writ. Respondent submitted a draft of the petition for the writ and an accompanying memorandum. Respondent said she was waiting to receive the prisoner litigation document from the client, after which she would file the petition and also the request for an extension.

In a July 7, 2008 letter to OLR, the client said that, as of that date he had not received any mail or telephone contact from Respondent regarding the writ. As confirmation, the client submitted a copy of a June 19, 2008 letter he had written to appellate counsel which stated:

...as of this date I have yet to receive or hear anything from Attorney Suzanne Smith pertaining on (sic) the Writ of Certiorari she agreed to do after the November 28, 2007, hearing...

In his July 7, 2008 letter, the client said that if Respondent had filed a timely petition for a writ of certiorari "it could have created the elimination of at least twenty (20) months of incarceration on

my situation.” The client pointed out that his prison term would soon be over and he would be released.

In a July 21, 2008 response to the client’s July 7, 2008 letter, Respondent reiterated that she had not yet filed a motion for an extension of time to file the writ because she had not yet received the prisoner litigation forms from the client. Respondent also said that even if she had filed a timely petition for a writ of certiorari, it is unlikely that the client would have prevailed.

The client was released from prison on August 12, 2008.

By failing to file a petition for a writ of certiorari for the client by the December 7, 2006 deadline when she knew, at least by the October 23, 2006 denial of his administrative appeal, that he wanted the petition filed and that she had agreed to do it; by failing to request documentation from the client, needed in order to file for the writ, until three days before the filing deadline, or, by failing to file a motion for an extension of time within which to file the petition in order to obtain the required documentation from the client, Respondent violated SCR 20:1.3.

By failing to contact the client to inform him that she had missed the December 7, 2006 deadline, Respondent violated former SCR 20:1.4(a), effective prior to July 1, 2007, which stated:

A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

By failing to file a petition for a writ of certiorari for the client by the January 12, 2008 deadline, Respondent violated SCR 20:1.3.

By failing to respond to the client’s December 3, 2007 letter, by failing to communicate with the client at all between the time she agreed to file the petition for the writ and the January 12, 2008 deadline for doing so, and by failing to inform the client that she had missed the

January 12, 2008 deadline for filing the petition for the writ, Respondent violated SCR 20:1.4(a)(3) & (4), effective beginning July 1, 2007.

SCR 20:1.4(a)(3) & (4) state that a lawyer shall:

- (3) Keep the client reasonably informed about the status of the matter;
- (4) Promptly comply with reasonable requests by the client for information.

#### Third matter

In a third matter, the SPD appointed Respondent on December 20, 2006, to represent a client with respect to sentencing after probation revocation proceedings. The sentencing hearing was scheduled for Tuesday, January 23, 2007.

Respondent's SPD time records indicate she spent 1.4 hours reviewing the client's files on December 21, 2006. Respondent's next time entry was for a letter dated January 19, 2007 to the client in jail. The letter, which was Respondent's first attempt to communicate with the client, advised him that she had been appointed to represent him and that the next court date was January 23, 2007. The letter concluded by stating, "Please contact me upon receipt of this letter to discuss this matter. Thank you."

Information in Respondent's file indicates that her January 19, 2007 letter was postmarked on January 20, 2007, a Saturday. January 23, 2007 was the following Tuesday. Respondent's January 19, 2007 letter was returned to her on January 26, 2007 because the client had been moved to a different jail.

Respondent's only meeting with the client was at the courthouse on January 23, 2007, prior to the sentencing hearing. Respondent said she explained to the client that she had been ill and unable to meet with him until that day. Respondent said she offered to ask for a continuance but the client said he wanted to proceed with the hearing.

The client denies that Respondent told him she would ask for a continuance.

After the sentencing hearing on January 23, 2007, the court sentenced the client to two years and six months in prison, to be followed by five years and six months of extended supervision.

On January 23, 2007, the client signed the Notice of Right to Seek Postconviction Relief indicating that he planned to seek post-conviction relief. Respondent also signed the document certifying that she understood it was her duty to file the Notice of Intent Pursue Postconviction Relief (Notice of Intent) for the client within twenty days. The Notice of Right to Seek Postconviction Relief was filed on January 23, 2007.

Respondent's file for the client contains a January 31, 2007 letter from Respondent addressed to the clerk of courts. The letter states that the original and a copy of the client's Notice of Intent are enclosed. The letter requests that the original be filed and that a file-stamped copy be returned to Respondent's office. Respondent's file also contains a copy of a Notice of Intent signed by Respondent on January 31, 2007.

Respondent submitted her bill for the client's representation to the SPD on January 31, 2007. The bill contained four time entries totaling 2.9 hours. In addition to the time spent on December 21, 2006 to review the file and the .1 hour entry for the January 19, 2007 letter, the bill included a 1.2 hour entry for time spent on the January 23, 2007 sentencing date and a January 31, 2007 .2 hour entry for the Notice of Intent.

The Notice of Intent was never filed with the court.

Respondent said she closed her file immediately after mailing the Notice of Intent. Respondent did not realize she had not received a file-stamped copy back from the court because

she did not calendar the file for review to confirm that the Notice of Intent had actually been received by the court and filed.

According to the client, his wife called Respondent numerous times over the next year and a half to ask about the status of his appeal but received no response to her inquiries.

Respondent submitted copies of her telephone message logs, which show that she received telephone messages from the client's wife on May 4, 2007, May 22, 2007 and July 10, 2007, each containing the notation "appeal." According to Respondent, her records indicate she returned the May 4, 2007 and July 10, 2007 calls, but not the May 22, 2007 call. Respondent recalls telling the client's wife that she had filed the Notice of Intent.

The client's wife's telephone calls did not prompt Respondent to check the client's file, check with the clerk of court, or look on Wisconsin Circuit Court Access (WCCA) to ascertain whether the Notice of Intent had actually been filed.

In an April 2, 2009 telephone conversation, the client's wife told OLR she was sure she called Respondent's office more than three times because the client called her constantly to ask her to find out why he had heard nothing from the SPD about his appeal. The client's wife said that on the one occasion she recalls actually speaking with Respondent, she was told that the Notice of Intent had been filed.

By failing to meet with the client or communicate with him in any way until just prior to the sentencing hearing on January 23, 2007, and by failing to respond to at least one telephone call from the client's wife and accurately respond to her inquiries about the Notice of Intent, Respondent violated former SCR 20:1.4(a), effective prior to July 1, 2007.

By failing to calendar the client's file for review to confirm that the Notice of Intent to pursue Postconviction Relief had actually been filed or to otherwise ensure that the client's

