

FILE NO. CX-96-1459
STATE OF MINNESOTA
IN SUPREME COURT

**In Re Petition for Disciplinary
Action against RAGNHILD A. WESTBY,
an Attorney at Law of the
State of Minnesota.**

**FINDINGS, CONCLUSIONS, AND
RECOMMENDATION
FOR DISCIPLINE**

PREFACE

The above-captioned matter came on for hearing on January 10, 2001, before the undersigned acting as referee by appointment of the Minnesota Supreme Court. Kenneth L. Jorgensen, First Assistant Director appeared on behalf of the Director of the Office of Lawyers Professional Responsibility (hereinafter Director). Respondent Ragnhild A. Westby appeared *pro se*.

The findings and conclusions made below are based upon the testimony of the witnesses and respondent at the hearing, the parties' exhibits, the demeanor and credibility of the testimony as determined by the undersigned, and the reasonable inferences to be drawn from the exhibits and the testimony.

Based upon the evidence as outlined above, and upon all the files, records and proceedings herein, the referee makes the following:

FINDINGS OF FACT

Disciplinary History

1. Respondent's prior discipline is as follows:
 - a. Private Admonition. On December 9, 1993, respondent was issued a private admonition for neglect and failing to communicate adequately with a client in violation of Rules 1.3 and 1.4, Minnesota Rules of Professional Conduct (MRPC).

b. **Suspension.** On December 4, 1997, respondent was suspended from the practice of law for sixty days for conduct involving failure to deposit retainers in her trust account, failure to maintain proper trust account books and records, failure to communicate with clients, failure to respond to notices of investigation, failure to pay a debt secured by property and failure to timely file and pay federal and state individual income tax returns and employer withholding tax returns. *See In re Westby*, 572 N.W.2d 278 (Minn. 1997).

2. Respondent has not been reinstated since her suspension due to her failure to provide proof of compliance with the Court's suspension order concerning the filing of her federal and state income tax returns and payment agreements with the federal and state tax authorities.

3. Respondent attempted at the hearing to demonstrate that she had in fact complied with the conditions for reinstatement by June 1998. *See e.g.*, Exhibit 105. However, IRS agent Zamora did provide some degree of credibility to the claim that tax returns had been prepared. Nonetheless, none of the applicable exhibits are signed nor do they reflect any sort of official filing stamps. Moreover, respondent cannot contest the claim that she has not yet entered into payment agreements with either the Federal or State tax authorities.

FIRST COUNT

Wytttenback Matter

4. Prior to December 4, 1997, Shirley Wytttenback called respondent about representing her in her divorce. At the time, respondent was licensed to practice law (Resp. testimony). Respondent forwarded to Wytttenback a client inventory form which Wytttenback completed and returned to respondent (Resp. and Wytttenback testimony). Wytttenback did not enter into a written fee agreement with respondent (Wytttenback and Resp. testimony).

5. In late May 1998, Wyttenback's brother, Joe Schmotter called respondent and asked her what it would take to get Wyttenback's divorce "moving." Respondent told Schmotter that nothing could be done until Wyttenback had paid a retainer fee (Schmotter testimony). Respondent told Schmotter if he could get the retainer funds to her immediately, Wyttenback's divorce could get started (Schmotter testimony). Respondent did not tell Schmotter that she was suspended from the practice of law and could not represent Wyttenback at the time (Schmotter testimony).

6. At respondent's direction, on May 29, 1998, Schmotter electronically transferred \$1,900 from his account to a joint personal account that respondent had with her father at US Bank (Resp. testimony and Ex. 8). The account was neither a law firm trust account or business account (Resp. testimony). At the time Schmotter electronically transferred the funds into respondent's account, the account was \$493.23 overdrawn (Ex. 8). On the three days prior to the Schmotter electronic deposit, respondent had incurred six overdraft charges for insufficient funds (Ex. 8).

7. Respondent used \$210.80 of the Schmotter funds to pay the filing fee (\$152), the service fee (\$45), and two courier charges (\$13.80) (Resp. testimony and Exs. 5 and 109). Respondent misappropriated the remainder of the funds for her own personal benefit over the next 35 days (Ex. 10). On July 3, 1998, respondent's account was again overdrawn (Ex. 9). Respondent's account was closed in September 1998 by US Bank due to overdrafts (Long testimony).

8. Respondent drafted the Wyttenback summons and petition for dissolution from the client inventory information (Rowe testimony). Respondent arranged to have the petition forwarded to Wyttenback for her signature on June 9, 1998 (Ex. 5 and Ex. 4), and have it returned to respondent by courier on June 11, 1998 (Ex. 109; Road Runner invoice dated 6/11/98).

9. On June 18, 1998, respondent's ex-husband Tom Rowe (who is a lawyer) was at respondent's home. Respondent asked Rowe to sign the Wyttenback dissolution petition so that she could get it filed. Respondent falsely represented to Rowe that she was about to be reinstated to the practice of law (Exs. 24 and 25).

10. Although he had never met Wyttenback, and had no intention of representing her, Rowe signed the dissolution petition. Respondent later caused the petition to be served and filed with the Ramsey County District Court. Respondent obtained a cashier's check to pay the filing fee (Resp. testimony).

11. In fall 1998, Rowe learned that respondent had not been reinstated to the practice of law (Rowe testimony). Because Rowe had been receiving notices from the Ramsey County District Court, he called Wyttenback and informed her that he would be representing her in her divorce (Rowe and Wyttenback testimony). Prior to Rowe's call to Wyttenback, Wyttenback was unaware that respondent had been suspended from the practice of law and was unable to represent her.

12. Ultimately, Rowe completed Wyttenback's divorce without charging her any fees. However, in the process of representing her, Rowe neglected Wyttenback's divorce and failed to communicate with her (Exs. 24 and 25). Rowe was disciplined by the Supreme Court on January 9, 2001, for *inter alia*, assisting respondent in the unauthorized practice of law in the Wyttenback matter and neglecting Wyttenback's divorce (Ex. 28).

13. Respondent claims that she used the Wyttenback funds to pay health insurance premiums on Rowe's behalf. Rowe testified that respondent in fact did pay premiums of nearly \$600, but the premiums were not paid until late spring 1999. Respondent acknowledges that none of the specific funds received from Schmotter were used to pay insurance premiums on Rowe's behalf. Except for the filing fee (\$152), service fee (\$45), and two courier fees (\$13.80), respondent's bank records show

that she misappropriated the remaining Wyttenback funds within 35 days of receiving them (Exs. 9 and 10).

14. Respondent has not refunded any of the misappropriated retainer funds received from Schmotter to either Wyttenback or Schmotter (Rowe, Wyttenback and Schmotter testimony).

SECOND COUNT

Heyen Matter

15. In April 1998, Sheila Heyen called respondent concerning a custody dispute over Sheila's minor son with her ex-husband (Resp. and Heyen testimony). At the time respondent was suspended from the practice of law and did not disclose to Heyen that she was unable to represent her (Ex. 2 and Heyen testimony).

16. On May 29, 1998, Sheila and her second husband met with respondent in her office concerning an upcoming June 8, 1998, custody hearing in Dakota County (Sheila and John Heyen testimony). Respondent advised Heyen that the notice of the motion was defective (Resp. testimony). Respondent called counsel for Heyen's ex-husband. As a result of respondent's call, the hearing was continued to June 18, 1998.

17. On June 8, 1998, Heyen and her husband again met with respondent at respondent's home. Sheila discussed with respondent affidavits and other evidence that could be used at the June 18 custody hearing. Respondent drafted an affidavit during the meeting (Ex. 26). At the meeting, Sheila issued respondent a \$500 check as a retainer (Sheila Heyen testimony).

18. Respondent deposited Heyen's \$500 check into her personal account at US Bank on the same day she received it from Heyen (Exs. 9 and 29). Respondent did not have Heyen sign a retainer agreement, nor did she advise Heyen that the funds would not be deposited into a client trust account (Sheila Heyen testimony).

19. During the week prior to the June 18 hearing, Sheila was unable to reach respondent. On the evening of June 17, 1998, Sheila reached respondent. Respondent told Sheila that she would not be able to represent her at the hearing on the following morning because respondent had broken her foot (Sheila Heyen testimony).

20. On the morning of June 18, 1998, Sheila and her husband went to respondent's home to retrieve Sheila's file. While Sheila's husband knocked on respondent's door, Sheila called respondent on her cell phone. After about 15 minutes, respondent appeared with Sheila's file. Respondent offered to have Rowe represent Sheila at the custody hearing (Sheila and John Heyen testimony). Sheila declined. Respondent did not disclose that she was suspended from the practice of law and unable to represent Sheila (Sheila and John Heyen testimony).

21. Sheila appeared at the motion hearing on June 18, 1998 *pro se*. When she informed the court that respondent had told her only on the evening before that she would be unable to represent her, the court continued the matter. Thereafter, Sheila retained other counsel.

22. In mid-June 1998, Sheila wrote respondent requesting a refund of the \$500 retainer fee. On June 25, 1998, respondent issued Heyen a \$500 check written on her US Bank account (Ex. 12 and Sheila Heyen testimony). On June 29, 1998, Heyen attempted to cash respondent's check. She was informed by the bank teller that there were insufficient funds in respondent's account to cash the check (Ex. 27). In fact, the balance in respondent's account was insufficient to cover the \$500 check to Heyen from June 26, 1998, to July 2, 1998, when the check finally cleared (Ex. 9).

THIRD COUNT

Jenness Matter

23. Prior to her suspension from the practice of law respondent was representing Linda Jenness n/k/a Tourville in a post-decree support matter. In September 1998, respondent had appeared at a hearing on a motion she had filed to modify a previous support order. The court's decision on this motion was pending before Hennepin County Family Court Referee Karl Doss at the time of respondent's suspension (Ex. 117). When respondent was suspended from the practice of law in mid-December 1997, she admits she did not notify Tourville of her suspension. Respondent similarly did not send a letter to the court (Referee Doss) in the Jenness matter (Darcy Jones testimony and Ex. 3).

24. On December 22, 1997, Referee Doss issued an order reserving the support modification motion and setting the matter for hearing on March 5, 1998 (Ex. 117). Respondent's office forwarded a copy of this order to Tourville and also provided a copy of the order to Rowe who was representing Tourville in a juvenile delinquency matter involving her daughter (Ex. 117). Respondent did not advise Tourville that she was suspended from the practice of law and would not be able to represent her until she was reinstated (Tourville testimony).

25. In February 1998, Tourville contacted respondent's office for assistance with the March 5, 1998, hearing. Respondent assisted Tourville in preparing an affidavit which was later filed with the court (Tourville testimony). Shortly before the hearing scheduled for March 5, 1998, Tourville contacted respondent. Respondent for the first time told Tourville that she had been suspended from the practice of law (Tourville testimony). Respondent falsely represented to Tourville that she expected to receive an order within the next several days reinstating her to the practice of law (Tourville testimony). Respondent told Tourville that she would obtain a continuance of the March 5, 1998, hearing.

26. On the morning of March 5, 1998, respondent called the court and spoke to Darcy Jones. Respondent told Jones that she had been suspended and falsely represented that she expected to be reinstated within the next several days (Jones testimony). Based upon respondent's request, the court continued the matter to March 19, 1998 (Ex. 14, ¶ 4).

27. During the week prior to the March 19 hearing, Tourville was unable to contact respondent. When Tourville contacted respondent on the morning of the 19th, respondent told her that she still had not been reinstated and that the hearing would again be continued (Tourville testimony). After this conversation, Tourville never heard from respondent again (Tourville testimony).

28. Respondent did in fact call the court seeking a continuance of the March 19, 1998, hearing and talked to Jones (Resp. and Jones testimony). After discussing the matter with Referee Doss and contacting opposing counsel, Jones informed respondent that the hearing would not be continued (Jones testimony).

29. Respondent did not advise Tourville that the March 19, 1998, hearing was going to proceed (Tourville testimony). Because neither respondent or Tourville appeared, the court entered a default order against Tourville (Ex. 14).

30. Prior to March 30, 1998, Tourville learned from her daughter that the March 19 hearing had in fact taken place (Tourville testimony). Tourville left several phone messages for respondent (Tourville testimony). Respondent failed to return her calls. In May 1998, Tourville retained other counsel and incurred significant attorney fees in vacating the default order (Tourville testimony and Exs. 15 and 16).

FOURTH COUNT

Yang Matter

31. Prior to her suspension, respondent's law office assisted Mr. Sa Yee Yang in changing the legal name of his adopted daughter (Resp. testimony). The

name change proceeding was done in Ramsey County District Court. The name change was completed by a contract lawyer in respondent's office on June 1, 1998 (Resp. testimony).

32. In October 1999 Yang consulted with attorney Linda Miller concerning his inability to obtain an amended birth certificate and his need for his daughter's original birth certificate which he believed was in respondent's possession (Miller testimony). In fact, there is no actual proof that Yang or anyone else provided respondent with the original birth certificate. On October 25, 1999, Miller called respondent. Thinking that she might have the document in her files, respondent agreed to bring the original certificate to Miller's office within two days (Miller testimony and Ex. 23).

33. When respondent failed to deliver the birth certificate, Miller called respondent and left messages. Respondent did not return Miller's calls (Miller testimony).

34. On December 15, 1999, Miller wrote respondent concerning her agreement to obtain the original birth certificate. Miller told respondent that if she did not receive the birth certificate by December 31, 1999, she would have to contact the Board of Professional Responsibility for its assistance (Ex. 23).

35. When respondent did not respond to Miller's letter, Miller filed an ethics complaint in January 2000 (Miller testimony). Despite two written requests from the Director (Exs. 21 and 22), respondent did not submit a written response to the ethics complaint (Resp. testimony).

36. In March 2000 respondent had the Yang file delivered to Miller's office. Although the file did not contain the original birth certificate, it did include a copy of the birth certificate (Miller testimony). Respondent now claims that she never possessed the original birth certificate, thus explaining the reason for her failure to respond.

FIFTH COUNT

Non-Cooperation

37. On October 1, 1999, respondent was notified by the Director's Office of the Wyttenback ethics complaint. Respondent was requested to provide a written explanation for the disposition of the Wyttenback \$1,900 retainer (paid by Schmotter) and respondent's failure to refund the retainer (Ex. 17). Although respondent submitted a written response to the Wyttenback complaint she did not address the disposition of the Wyttenback \$1,900 retainer or her failure to refund the retainer (Ex. 18).

38. On October 19 and November 3, 1999, the Director again wrote respondent requesting an explanation for the disposition of the Wyttenback \$1,900 retainer (Exs. 19 and 20). Respondent did not submit a written response to either letter (Resp. testimony).

39. On February 3 and 29, 2000, respondent was requested to submit a written response to the complaint filed by attorney Linda Miller concerning her client Sa Yee Yang (Exs. 21 and 22). Respondent did not respond to either letter and never provided a written response to the Miller complaint (Resp. testimony).

MITIGATING CIRCUMSTANCES

40. Normally, one must admit a claim before mitigating circumstances can be addressed. Respondent has tended to deny all of the claims. Frankly, it is feasible that respondent could possess evidence of mitigating circumstances. Subsequent to her suspension, she closed an office, moved everything to her house, and obtained a dissolution of her marriage. From personal observation of the respondent during the trial, it is rather clear that she is not particularly competent in either presenting evidence or explaining herself. Unfortunately for her, the impression she left with this referee is that of a person caught in the act of committing various offenses who, instead of admitting the problems and facing them directly, proceeds to attempt to

obfuscate the issues. I therefore conclude that in reality, respondent provided no evidence of mitigating circumstances.

41. Respondent provided no character witness testimony or other evidence concerning her character and reputation.

AGGRAVATING CIRCUMSTANCES

1. Respondent has failed to make any restitution to Shirley Wyttenback or her brother (Joe Schmotter) for the \$1,689.20¹ she misappropriated from the Wyttenback retainer funds.

2. Due to respondent's dishonesty, Wyttenback was forced to accept the legal services of respondent's ex-husband who neglected her case and failed to communicate with her.

3. Respondent's lack of candor and dishonesty caused unnecessary anxiety to Sheila Heyen by forcing her to appear at a hearing *pro se* and to find substitute counsel without any notice.

4. Respondent's lack of candor and dishonesty caused Linda Tourville unnecessary anxiety and increased her attorney fees by having to vacate the default order resulting from respondent's non-appearance at the March 19, 1998, hearing.

5. Respondent has exhibited a lack of candor and cooperation throughout this proceeding which includes the following:

a. Respondent's testimony at the referee hearing was intentionally evasive and non-responsive. Even upon direct questioning by the referee, respondent refused to respond to simple direct questions concerning her unauthorized practice. In addition, respondent repeatedly asked irrelevant questions of nearly every witness, despite numerous admonitions and several direct instructions by the referee to cease pursuing irrelevant areas of inquiry.

¹ The amount misappropriated is determined as follows: \$1,900 retainer less filing fee \$152, service fee \$45 and two courier fees \$13.80 paid by respondent.

b. At the probable cause hearing, respondent attempted to negate her motive for fraudulently obtaining the Schmotter funds by falsely representing to the Panel that she had a \$1,000 line of credit on her personal account (Resp. testimony). In fact, respondent did not have, nor did she ever have a line of credit associated with the US Bank account (Long testimony). Moreover, respondent was aware there was no line of credit associated with this account inasmuch as the account had been closed by the bank because of continued overdrafts (Long testimony).

c. After the August 2000 Panel hearing, the Director attempted to verify respondent's claims concerning the line of credit and other issues associated with the US Bank account into which the Schmotter and Heyen funds had been deposited. Respondent falsely told the Director's Office that her bank records were in the possession of the IRS (Resp. testimony). After the IRS indicated that they did not have respondent's bank records, respondent was asked to execute an authorization permitting the Director to obtain records directly from US Bank. Respondent refused to provide the authorization thereby requiring the Director to formally schedule a deposition, subpoena the records, and incur additional costs (Resp. testimony).

6. Respondent's failure to deposit the Wytttenback and the Heyen retainers into a trust account and her failure to cooperate with the Director's investigations of the complaints filed by Wytttenback and Miller are aggravated by the fact that she was previously disciplined for the same violations in 1997. *See In re Westby*, 572 N.W.2d 278 (Minn. 1997).

CONCLUSIONS

1. Respondent's conduct in failing to advise Shirley Wytttenback and Joe Schmotter that she was suspended from the practice of law and her dishonesty in

obtaining the \$1,900 retainer, failing to deposit the Wytttenback retainer into a trust account, failing to refund the retainer and drafting Wytttenback's dissolution petition and causing it to be filed violated Rules 1.4, 1.15(a), 3.4(c), 5.5(a) and 8.4(c) and (d), Minnesota Rules of Professional Conduct (MRPC), and Opinion 15 of the Lawyers Professional Responsibility Board (LPRB).

2. Respondent's conduct in providing legal advice to Sheila Heyen, failing to disclose that she was not authorized to represent her, accepting a \$500 retainer and not depositing it into a trust account, and failing to advise Heyen until the night before her hearing that respondent would be unable to represent her violated Rules 1.4, 1.15(a), 5.5(a) and 8.4(c) and (d), MRPC, and Opinion 15, LPRB.

3. Respondent's conduct in failing to advise Linda Tourville f/k/a Jenness and the court that she was suspended from the practice of law and unable to represent Tourville, respondent's failure to advise Tourville that the March 19, 1998, hearing was not going to be continued, and respondent's misrepresentations to Tourville and the court about her reinstatement violated Rules 1.3, 1.4, 3.4(c), 4.1, 5.5(a) and 8.4(c) and (d), MRPC.

4. The Director has failed to prove that respondent possessed the Yang birth certificate. It is therefore questionable whether respondent's failure to respond to Miller's request concerning the birth certificate violated any rule other than the normal rules of courtesy between professionals.

5. Respondent's failure to respond to the Director's request for an explanation concerning the disposition of the Wytttenback retainer and respondent's failure to respond at all to the Miller complaint violated Rules 8.1(a)(3) and 8.4(d), MRPC.

Based upon the foregoing findings of fact and conclusions, the undersigned makes the following:

RECOMMENDATION FOR DISCIPLINE

That respondent be disbarred from the practice of law.

1-29, 2001.



NORBERT P. SMITH
Judge of District Court
Acting as Referee Pursuant to Order
of the Minnesota Supreme Court