

*People v. Smollen*. 10PDJ074. June 2, 2011. Attorney Regulation. Following a sanctions hearing, the Presiding Disciplinary Judge suspended Lindasue Smollen (Attorney Registration Number 13083) for thirty days, effective July 3, 2011. Respondent knowingly failed to respond to two key motions in a child support matter and knowingly failed to protect her client's interest when she ignored subsequent counsel's request to stipulate to substitution of counsel. Her misconduct constitutes grounds for the imposition of discipline pursuant to C.R.C.P. 251.5 and violated Colo. RPC 1.1, 1.3, 1.16(a)(3), 1.16(d), and 8.4(d).

<p style="text-align: center;">SUPREME COURT, STATE OF COLORADO</p> <p style="text-align: center;">ORIGINAL PROCEEDING IN DISCIPLINE BEFORE THE OFFICE OF THE PRESIDING DISCIPLINARY JUDGE 1560 BROADWAY, SUITE 675 DENVER, CO 80202</p>		
<p><b>Complainant:</b> THE PEOPLE OF THE STATE OF COLORADO</p> <p><b>Respondent:</b> LINDASUE SMOLLEN</p>		<p>Case Number: <b>10PDJ074</b></p>
<p><b>DECISION AND ORDER IMPOSING SANCTIONS PURSUANT TO C.R.C.P. 251.19(c)</b></p>		

On April 19, 2011, the Presiding Disciplinary Judge (“the Court”) held a sanctions hearing pursuant to C.R.C.P. 251.15(b). Margaret B. Funk appeared on behalf of the Office of Attorney Regulation Counsel (“the People”), and Lindasue Smollen (“Respondent”) appeared pro se. The Court now issues the following “Decision and Order Imposing Sanctions Pursuant to C.R.C.P. 251.19(c).”

## I. SUMMARY

Respondent violated Colo. RPC 1.1, 1.3, 1.16(a)(3), 1.16(d), and 8.4(d) by neglecting her representation of a client in a child support matter and failing to protect her client’s interest when she ignored subsequent counsel’s request to stipulate to substitution of counsel. After considering the nature of Respondent’s misconduct and its consequences, as well as her own testimony, the Court finds the appropriate sanction for Respondent’s misconduct is suspension for thirty days.

## II. PROCEDURAL HISTORY

The People filed a complaint in this matter on July 13, 2010, setting forth four claims for relief based on violations of Colo. RPC 1.1, 1.3, 1.16(a)(3) & (d), and 8.4(d). The People mailed the complaint on that date by certified and regular mail to Respondent’s registered address. On July 15, 2010, Respondent personally signed for receipt of the citation and complaint. The People filed with the Court a “Proof of Service of Citation and Complaint” on July 19, 2010.

On September 13, 2010, the People filed a motion for default, to which Respondent did not respond. The Court granted the People's motion and entered default on all claims in the People's complaint on October 10, 2010. Upon the entry of default, the Court deems the well-pled facts set forth in the complaint admitted and all rule violations established by clear and convincing evidence.<sup>1</sup>

At the sanctions hearing, the Court heard testimony and admitted the People's exhibits 1-10.<sup>2</sup>

### **III. ESTABLISHED FACTS AND RULE VIOLATIONS**

The Court hereby adopts and incorporates by reference the factual background of this case fully detailed in the admitted complaint.<sup>3</sup> Respondent took the oath of admission and gained admission to the bar of the Colorado Supreme Court on August 19, 1983. She is registered upon the official records under attorney registration number 13083 and is therefore subject to the jurisdiction of the Court pursuant to C.R.C.P. 251.1.

Between mid-2008 and April 2009, Respondent represented Jeffrey Anderson ("Anderson") in a child support matter in Adams County District Court case number 08DR926. In this matter, the mother had little contact with the child for approximately ten years and had paid no support to Anderson during that time. As a teenager, the child reconnected with his mother and began living with her. Anderson and the child's mother then initiated proceedings to allocate parenting responsibility and child support. On July 25, 2008, during the first hearing on child support issues, the court ordered Anderson<sup>4</sup> to pay the mother \$485.80 per month in support. The court then set a permanent orders hearing in October of that year to resolve outstanding parenting time and child support issues.

Respondent represented Anderson during the permanent orders hearing on October 1, 2008. During that hearing, the parties agreed Anderson would pay only \$50.00 per month in child support to the mother to offset his expenses of supporting the child for ten years without assistance from the mother. The court accepted the parties' proposed stipulation by order of that same date. The mother had no representation during this hearing.

On January 26, 2009, the mother filed a motion for revised support order, requesting an increase in the \$50.00 of support she received from

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<sup>1</sup> See *People v. Richards*, 748 P.2d 341, 346 (Colo. 1987); C.R.C.P. 251.15(b).

<sup>2</sup> Exhibits 2-10 were admitted under seal.

<sup>3</sup> See the People's complaint for further detailed findings of fact.

<sup>4</sup> Paragraph 3 of the People's complaint alleges, "the court ordered that *respondent* pay the mother \$485.80/month in support." Based on the People's exhibit 4, the Court has modified these findings to reflect the fact that *Anderson*, in fact, was ordered to pay this monthly amount.

Anderson per month. Respondent failed to respond to this motion on Anderson's behalf. Receiving no response from Respondent or Anderson, the court concluded that in the best interest of the child it should deviate from the parties' earlier stipulated amount of support. Accordingly, on February 11, 2009, the court ordered Anderson to pay \$709.41 per month to the mother. This new amount was based on an income statement provided to the court by Anderson in 2008.

During a conference with the court on March 30, 2009, Respondent requested that the court hold an evidentiary hearing on its February 11, 2009, order, as well as a hearing on several other outstanding matters. In response, the court set a global evidentiary hearing for all pending matters for April 27, 2009.

In the meantime, Anderson did not pay the increased amount in child support, nor did he pay health care expenses ordered against him in previous hearings. Thus, on April 9, 2009, the mother filed a motion for citation for contempt of court, alleging Anderson failed to pay the increased child support and continued to fail to pay for long-overdue health care expenses. The court issued an order to show cause to Anderson regarding these allegations. While the contempt motion was pending, the parties moved to continue the hearing set for April 27, 2009.

On April 10, 2009, the mother moved to have their former child and family investigator ("CFI") reappointed and to shift CFI costs from a 50/50% distribution, reallocating them entirely to Anderson due to his alleged intentional failure to adhere to the court's orders. Respondent failed to object to this motion on Anderson's behalf. As a result, the court granted the mother's request to Anderson's detriment.

On May 9, 2009, Anderson was personally served with the motion for citation for contempt of court and the court's corresponding order to show cause. Anderson terminated Respondent prior to the hearing on this motion and hired new counsel to file a C.R.C.P. 60(b) motion for reconsideration of all previous orders entered against him on the grounds that Respondent had provided him ineffective assistance of counsel.

Subsequent counsel Michael Zywicki ("Zywicki") left several messages for Respondent, who failed to return any of his calls regarding completing a substitution of counsel. Zywicki was thus forced to move for permission from the court to replace Respondent. Respondent did not respond to this motion or facilitate in any way Anderson's transition to new counsel.

Anderson and the mother's counsel, Ellen Toomey Hale, also found Respondent mostly unreachable by phone, email, or regular mail throughout the spring and early summer of 2009.

Respondent's failure to respond to two motions requesting the court modify previous child support orders violated Colo. RPC 1.1, which provides that a lawyer must provide competent representation to a client, including the thoroughness and preparation reasonably necessary for the representation. Respondent's misconduct also violated Colo. RPC 1.3. That rule mandates a lawyer act with reasonable diligence and promptness in representing a client, which Respondent did not do when she failed to respond to two motions on Anderson's behalf and, later, when she failed to respond to Zywicki's request to stipulate to his substitution as counsel of record.

Further, Respondent never withdrew from Anderson's case nor took requisite steps to protect his interests during the transition of his case to new counsel, thereby violating Colo. RPC 1.16(a)(3) and 1.16(d). Finally, Respondent acted in contravention of Colo. RPC 8.4(d), which provides that it is professional misconduct for a lawyer to engage in conduct prejudicial to the administration of justice. By failing to respond to two motions, by later moving the court to set a hearing to reconsider its ruling on one of those two motions, and by failing to assist Anderson's subsequent counsel in entering his appearance and substituting in as counsel of record, Respondent engaged in conduct prejudicial to the administration of justice.

#### **IV. SANCTIONS**

The ABA Standards for Imposing Lawyer Sanctions ("*ABA Standards*") and Colorado Supreme Court case law are the guiding authorities for selecting and imposing sanctions for lawyer misconduct.<sup>5</sup> In selecting a sanction after a finding of lawyer misconduct, the Court must consider the duty violated; the lawyer's mental state; the actual or potential injury caused by the lawyer's misconduct; and the existence of aggravating and mitigating evidence pursuant to *ABA Standard 3.0*.

##### ***ABA Standard 3.0 – Duty, Mental State, and Injury***

*Duty:* Respondent's failure to respond to two key motions in Anderson's case and her decision not to withdraw from the case violated her duty to her client to act with reasonable competence, diligence, and promptness. Respondent also violated her duty to her client by failing to communicate with his subsequent counsel regarding the transition of the matter. Finally, by engaging in conduct prejudicial to the administration of justice, Respondent violated duties she owed to the legal system.

*Mental State:* With respect to her failure to respond to two motions in Anderson's case, Respondent testified, "I did not follow through. I have no qualms saying this. I was being paid . . . a very low amount. It seemed . . . that I was weighing a choice of evils." She said she performed a

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<sup>5</sup> See *In re Roose*, 69 P.3d 43, 46-47 (Colo. 2003).

“cost/benefit analysis,” concluding that because, in her mind, it was preordained the judge would grant the mother’s motion to modify child support, she decided not to “rack up tons of attorney’s fees” by responding. As regards Zywicki’s requests to coordinate substituting as counsel and to return Anderson’s file, Respondent admitted that she received Zywicki’s call but declined to return it because she deemed it “bizarre.” Finally, she acknowledged that she did not move to withdraw when she was terminated, but she defended that decision because new counsel had entered the case. Based on her testimony, the Court concludes that Respondent knowingly failed to respond to two motions, knowingly failed to return her client’s file, and knowingly failed to communicate with her client’s subsequent counsel.

*Injury:* Respondent caused potential and actual harm to Anderson. Because Respondent failed to respond to two motions, the court modified the child support orders to her client’s significant financial detriment, raising his monthly payments from \$50.00 to \$709.41, which also caused him some measure of stress. Her failure to respond to the second order also resulted in the court’s reapportionment of the entire CFI cost to Anderson, which would have caused Anderson substantial financial injury had those services been required. Anderson also suffered reputational injury; he stated that the court “looked upon [me] negatively for not having responded to those” motions, and he “went into the next phase of the case . . . trying to catch up, trying to fight things that were already established.”

In addition, when Respondent failed to adequately represent him, Anderson was forced to come up with funds for a retainer and fees for his new counsel, Zywicki. Zywicki spent considerable time attempting to reach Respondent to coordinate substitution of counsel, moving for permission of the court to replace Respondent as counsel, recreating the case file when Respondent failed to return it to Anderson, and duplicating work Respondent had already done.

Respondent’s misconduct also caused Zywicki harm, who “slashed” his attorney’s fees in order to facilitate Anderson’s payment of the ultimate settlement. Zywicki testified that his fees “had been driven up” due to Respondent’s failure to be actively involved in the case and specifically because he had to defend against Anderson’s contempt of court charge, which resulted from Respondent’s neglect.

### **ABA Standard 3.0 – Aggravating & Mitigating Factors**

Aggravating circumstances include any considerations or factors that may justify an increase in the degree of discipline to be imposed.<sup>6</sup> Mitigating circumstances include any considerations or factors that may justify a

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<sup>6</sup> See ABA Standard 9.21.

reduction in the degree of discipline to be imposed.<sup>7</sup> The Court considered evidence regarding the following aggravating and mitigating circumstances in deciding the appropriate sanction.

Pattern of Misconduct – 9.22(c): Respondent’s knowing neglect of Anderson’s case—through her failure to respond to motions, failure to respond to Zywicki’s calls, and failure to withdraw from the case—constitutes a pattern of misconduct.

Multiple Offenses – 9.22(d): By the Court’s order of default, Respondent was found to have violated five Rules of Professional Conduct.

Substantial Experience in the Practice of Law – 9.22(i): Respondent had twenty years of experience in the practice of law at the time of her misconduct in this case.

Personal or Emotional Problems – 9.32(c): Respondent testified that at the time of her misconduct she was still dealing with the fallout from a 2004 divorce. Specifically, she was spending significant amounts of time in Venezuela, traveling there six times a year to manage a beachfront hotel and dive shop she had purchased years before with her former husband, who had previously run the day-to-day operations but later walked away from the project. She testified that her ex-husband “left me with this business, but I had no idea how to run it and my husband refused to help me. This was my life during this time. I have since walked away from this venture and my husband has now sued me. I was trying to do everything at the time, and things fell through the cracks at that time.”

While the Court does not doubt that Respondent struggled to juggle these various responsibilities—including what she portrayed as the albatross of the Venezuelan hotel—it cannot accord this factor anything more than minimal weight, since her approach to the Anderson matter appears to have been driven primarily by her own cost/benefit analysis, as opposed to her having felt overwhelmed or underwater.

Character or Reputation – 9.32(g): Former Boulder County Judge Care Enichen testified to Respondent’s reputation as a “very zealous and aggressive lawyer” to whom she referred many difficult pro se parties. She said Respondent is a “very sharp, smart attorney.” The People stipulated that Enichen’s testimony was evidence of Respondent’s good reputation.

Remorse – 9.32(l): The Court will not consider remorse a mitigating factor in this case. Although Respondent testified that she “absolutely could have done [the case] differently,” and that “this is not who I am,” she failed to

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<sup>7</sup> See ABA Standard 9.31.

recognize the harm she caused others or express regret for her misconduct except to the extent that its consequences negatively affected her.

Remoteness of Prior Offense – 9.32(m): Respondent was sanctioned once previously in 1997. The Court regards the existence of the prior discipline and the remoteness of that offense as offsetting one another, and therefore it considers these factors neither in mitigation nor aggravation.

### **Analysis Under ABA Standards and Colorado Case Law**

ABA *Standard* 4.42 provides that suspension is generally appropriate when a lawyer causes injury or potential injury to a client by knowingly failing to perform services for a client or engaging in a pattern of neglect. Colorado Supreme Court case law applying the ABA *Standards* also holds that a short suspension is appropriate in cases similar to this one.

Here, the Colorado Supreme Court's decision in *People v. Masson* provides particularly relevant precedent.<sup>8</sup> In that case, Masson failed to respond to a summary judgment motion and never alerted his client to his failure to do.<sup>9</sup> Once the motion was deemed confessed, Masson neither notified his client of a status conference on the issue of attorney's fees nor appeared at the conference himself, and the court assessed \$2,000.00 in attorney's fees against Masson's client.<sup>10</sup> Masson was found to have knowingly violated several professional rules, thereby causing injury to his client.<sup>11</sup> The Colorado Supreme Court found a thirty-day suspension appropriate, observing that "any sanction less than a suspension would unduly detract from the seriousness of the respondent's misconduct in the eyes of the public and the legal profession."<sup>12</sup>

By the same token, the Court finds that Colorado case law does not suggest a lengthier suspension need be imposed in this matter. Respondent's appearance at the sanctions hearing abrogates any implication that she is indifferent to or in disregard of these disciplinary proceedings. In the absence of such an inference, available authority suggests a thirty-day suspension would not be too lenient.<sup>13</sup> Accordingly, the Court accepts the People's recommendation and imposes a thirty-day suspension in this case.

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<sup>8</sup> 782 P.2d 335 (Colo. 1989)

<sup>9</sup> *Id.* at 335.

<sup>10</sup> *Id.* at 336.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*; accord *People v. LaSalle*, 848 P.2d 348, 350 (Colo. 1993) (imposing thirty-day suspension for attorney's inaction on client matter for more than two years and misrepresentations to client that he would file certain motions, but where several mitigating factors, including absence of selfish motive, cooperation, and strong reputation for truth and veracity, were present).

<sup>13</sup> *People v. Kirk*, 863 P.2d 341, 342-43 (Colo. 1993) (suspending for ninety days an attorney who neglected a client's legal matter, failed to withdraw properly from a legal proceeding, and failed to appear or answer the disciplinary charges against him); *People v. Crimaldi*, 804 P.2d



## V. CONCLUSION

Respondent's calculated and knowing neglect of Anderson's child support matter caused him significant financial injury and reputational harm, as did Respondent's failure to cooperate with Anderson's subsequent counsel. In light of the several aggravating factors at play, counterbalanced by the evidence of Respondent's good reputation and, ultimately, her decision to appear and participate in the sanctions hearing, the Court concludes Respondent should be suspended for a period of thirty days.

## VI. ORDER

The Court therefore **ORDERS**:

1. Lindasue Smollen, Attorney Registration No. 13083, is hereby **SUSPENDED FOR THIRTY (30) DAYS**. The suspension **SHALL** become effective thirty-one days from the date of this order upon the issuance of an "Order and Notice of Suspension" by the Court and in the absence of a stay pending appeal pursuant to C.R.C.P. 251.27(h).
2. Respondent **SHALL** file any post-hearing motion or application for stay pending appeal with the Court **on or before Wednesday, June 22, 2011**. No extensions of time will be granted.
3. Respondent **SHALL** pay the costs of these proceedings. The People shall submit a "Statement of Costs" within fifteen (15) days of the date of this order. Respondent shall have ten (10) days within which to respond.

DATED THIS 2<sup>nd</sup> DAY OF JUNE, 2011.

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WILLIAM R. LUCERO  
PRESIDING DISCIPLINARY JUDGE

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863, 866 (Colo. 1991) (suspending attorney for sixty days where attorney failed to prepare two wills promptly, return his client's file and retainer, and appear in the disciplinary hearing or otherwise answer the complaint); *People v. Fahrney*, 782 P.2d 743, 744 (Colo. 1989) (holding that neglecting legal matters, failing to carry out contract for professional services, failing to seek lawful objective of client, and engaging in conduct prejudicial to administration of justice, in conjunction with failing to answer grievance complaint, warranted sixty-day suspension, even though attorney had no prior disciplinary record).

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