SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 08-390
District Docket Nos. XI-07-005E,
XI-07-020E, XI-07-031E,
XI-07-041E, and XI-08-005E

IN THE MATTER OF	:
JOSEPH J. LOWENSTEIN	:
AN ATTORNEY AT LAW	:

Decision

Argued: March 19, 2009

Decided: June 26, 2009

John Pogorelec, Jr. appeared on behalf of the District II Ethics Committee.

Miles R. Feinstein appeared on behalf of respondent.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of New Jersey.

This matter came before us on a recommendation for discipline (three-month suspension) filed by the District XI Ethics Committee ("DEC"). Three complaints, comprising five client matters, charged respondent with violating RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), and RPC 1.4(b) (failure to keep a client reasonably informed about the status of a matter and to promptly comply with reasonable requests for information).

For the reasons expressed below, we determine to dismiss the complaint in District Docket No. XI-07-005E (the Witherspoon matter) and to impose a three-month suspension for respondent's conduct in the remaining matters.

Respondent was admitted to the New Jersey bar in 1985. He maintains a law office in Patterson, New Jersey.

In 2006, respondent was admonished for misconduct in three matters. Although he filed complaints on behalf of his clients in each case, two were dismissed for lack of prosecution. The third was dismissed because of a "clerical error." Respondent was found guilty of gross neglect, a pattern of neglect, lack of diligence, and failure to communicate with clients. In the Matter of Joseph Jay Lowenstein, DRB 06-016 (February 23, 2006).

In 2007, respondent was reprimanded for not disclosing a material fact to a third person (RPC 4.1(a)(2)). In re Lowenstein, 190 N.J. 58 (2007). There, he failed to protect a lender's lien by not disclosing the lien to the insurer, prior to the insurer's disbursement of the settlement proceeds.

In 2008, on a motion for discipline by consent, respondent received a censure for lack of diligence and a pattern of neglect in five of six matters and, in each of the six matters, failure to keep his clients reasonably informed about the status of their cases. In re Lowenstein, 195 N.J. 180 (2008).

On the first day of the DEC hearing, April 28, 2008, the presenter offered witness testimony in only the Witherspoon matter (District Docket No. XI-07-005E). At the May 29, 2008 continuation of the hearing, the parties stipulated that respondent engaged in lack of diligence and failure to properly communicate with the clients in the Vargas matter (District Docket No. XI-07-0020E), the Thompson matter (District Docket No. XI-07-0031E), the Chiavarra matter (District Docket No. XI-07-0041E), and the Woodward matter (District Docket No. XI-08-005E).

The Witherspoon Matter – District Docket No. XI-07-005E

According to the complaint, Lester and Geneva Witherspoon retained respondent in connection with the sale of their property. Following the November 6, 2006 closing, the closing agent escrowed $5,000 for the removal of an oil tank on the property. The complaint alleged that respondent failed to "actively" pursue the return of the escrow for the Witherspoons and failed to communicate with them about the status of the escrow.

The complaint charged that respondent's "nonfeasance and flagrant neglect" in failing to follow through to obtain the return of the deposit from a closing that occurred "almost a

year ago" constituted gross neglect and lack of diligence. The complaint also charged that respondent failed to communicate with Witherspoon on a regular basis and to fully inform him about the status of the litigation.

At the DEC hearing, Lester Witherspoon testified that, in 1998, he had retained respondent for a personal injury action and, later, for a tax foreclosure issue. The real estate transaction that gave rise to the grievance against respondent was respondent's third representation of Witherspoon's interests.

Before the November 6, 2006 closing, there had been another prospective buyer, who wanted $5,000 escrowed to secure the removal of an oil tank from the property. Witherspoon did not have the money available. Witherspoon admitted that he did not disclose the existence of the tank to the new purchaser. He stated, "they didn't ask and I didn't tell." The issue about the oil tank, therefore, did not surface until either the day of or "a couple of days before the closing." Respondent had not been involved in that part of the transaction. Witherspoon recalled that the new buyer would not go through with the closing, unless the money was escrowed. After the closing, $5,000 was escrowed for the removal of the tank.

Witherspoon understood that it was his responsibility to have the tank removed from his property and knew that the escrow funds could not be released until that was accomplished. In December 2006, he contacted an environmental company, ANCO, about the tank's removal and, later, received ANCO's December 15, 2006 proposal.

Witherspoon claimed that he tried to telephone respondent about the status of the escrow, but could not always reach him. Witherspoon also claimed that there were other issues that he wanted to discuss with respondent. Most of his telephone calls to respondent were in November 2006, before he had even contacted ANCO.

According to Witherspoon, he was not receiving regular updates from respondent. He claimed that, prior to the closing, he telephoned respondent once or twice a week, but respondent did not return his calls. Witherspoon's telephone bill showed that, after the closing (from November 7 to November 20, 2006), he called respondent twenty-eight times.

Respondent's counsel pointed out that respondent had given Witherspoon his office telephone number, as well as his cell phone number, and that the length of the telephone calls to respondent implied that Witherspoon had spoken to someone. The majority of the calls, however, were for either one or two

minutes. Two calls lasted four minutes and only one lasted six minutes.

During Witherspoon's occasional conversations with respondent, respondent informed him that he had been in contact with the title company, but was having problems getting information from them. On cross-examination, Witherspoon conceded that respondent had informed him that, as a trial lawyer, he was in court frequently and that there would be times when he would not be able to answer Witherspoon's calls.

By letter dated December 18, 2006 to respondent, Witherspoon complained that he had tried to reach him "several times," to no avail; that he had not received an itemized bill from him; that he had not received copies of the closing documents; and that he had not received "the amount of the tax that was owed." At the DEC hearing, however, Witherspoon admitted that respondent provided him with the settlement statement after the closing, either via fax or mail. Witherspoon also admitted having some conversations with respondent, from mid-December 2006 until March 2007, when he filed the grievance.

Witherspoon claimed that the only information that he received about the status of the release of the escrow was respondent's April 11, 2007 letter to the DEC investigator, which stated, in part:

> On April 6, 2007, the closing agent indicated that in fact, he never paid for the removal of the oil tank and that the money was still in his trust account. If the money is not returned to Mr. Witherspoon and Mr. Witherspoon retains me, I will file suit against the buyer and his closing agent.
> . . . .
> With regard to "3e" I told Mr. Witherspoon everything that I knew, I did not fail to communicate with him.
>
> [Ex.P6.]

Witherspoon claimed that respondent did not communicate that information directly to him.

During cross-examination, Witherspoon admitted that, during the relevant period, respondent's employee, "Nancy," had handled his file and had corresponded with him. He admitted talking to Nancy on numerous occasions. He also admitted that, "at some point," respondent told him that he had not received some of Witherspoon's messages conveyed to Nancy. Respondent apologized for that omission.

Witherspoon remarked that, at some point after the closing, he learned that the title company had offered to send respondent a copy of the $5,000 check that it purportedly issued to pay for the removal of the oil tank. Later, on a date not mentioned, Witherspoon learned that the settlement agent had lied about the oil tank's removal from the property and that the title agent had refused to return the escrow deposit, despite respondent's

telephone calls and letters. According to Witherspoon, that was his last communication with respondent.

Witherspoon testified that he filed the grievance against respondent because he was not getting expected "updates" and respondent was not returning his telephone calls or providing him with any written communications about the matter. Witherspoon conceded that he had been satisfied with the way respondent had represented him in prior matters, but added that he had become annoyed with respondent "over the issue with the money for the tanks."

On March 19, 2007, the DEC mailed Witherspoon's grievance to respondent. Respondent replied by letter dated April 11, 2007. Months prior to the filing of the formal ethics complaint (October 5, 2007) against respondent, he filed a civil complaint against the buyer and the title company for the return of the escrow funds. When both defaulted, respondent obtained a judgment against them on April 17, 2008.

Witherspoon admitted that, before respondent filed the complaint, he and respondent had a few telephone conversations about getting the escrow back and that respondent let him know what was going on. Witherspoon did not know whether respondent had taken any action to get the escrow back, prior to his filing of the grievance.

Witherspoon did not pay respondent any additional sums to pursue the return of the escrow.

The Vargas Matter – District Docket No. XI-07-0020E

In 1999, Pablo Vargas retained respondent in connection with an automobile accident and, in 2000, for a "workers' compensation case." According to the complaint, respondent's "failure to institute appropriate and timely prosecution of Vargas's interest in the personal injury action which ha[d] been dismissed for lack of prosecution in 2001, and his failure to commence litigation in a timely fashion on the breach of contract claim, for which he was retained on in October 2001, constitute[d] gross neglect."

The complaint further charged respondent with violating RPC 1.4(b) and RPC 1.3 for not communicating with Vargas and for not conducting "periodic monitoring of Vargas's files to insure that Vargas's interests were adequately represented."

In his answer, respondent denied the allegations of misconduct. He asserted that he had been in contact with Vargas, that Vargas' niece worked at his law office, and that she had informed Vargas about the status of his matters.

Respondent further claimed that Vargas' personal injury action was "currently on appeal" and that Vargas' breach of contract claim had various issues, which if prosecuted, could be detrimental to Vargas. According to respondent, "a settlement was attempted without court involvement."

The Thompson Matter - District Docket No. XI-07-0031E

According to the complaint, respondent represented Germaine Thompson, on behalf of her minor child, Cierra, in connection with a personal injury matter. The matter settled in 1999. Respondent failed to ensure that the settlement funds were deposited into the Surrogate Court's Trust Fund, failed to return Germaine's telephone calls about the status of the matter, and failed to institute appropriate action to have the settlement funds released to Cierra, thereby violating RPC 1.1(a), RPC 1.3, and RPC 1.4(b).

Respondent's answer denied the allegations of the complaint.

The Chiavarra Matter - District Docket No. XI-07-0041E[1]

Floribeth Chiavarra retained respondent to represent her in connection with a personal injury action. The complaint alleged that respondent failed to communicate with her on a regular basis and failed to return her telephone calls (RPC 1.4(b)). The complaint further alleged that respondent's failure to institute appropriate and timely prosecution of Chiavarra's interests in the personal injury action constituted gross neglect (RPC 1.1(a)) and that he lacked diligence by failing to "conduct periodic monitoring of the Chiavarra's file to insure that [her] interests were adequately represented."

The Woodward Matter – District Docket No. XI-08-005E

Kescha Woodward retained respondent in connection with a medical malpractice matter. According to the complaint, respondent did not return her telephone calls seeking information about the status of the matter and failed to "institute appropriate and timely prosecution" of her interests. The complaint charged violations of RPC 1.1(a), RPC 1.3, and RPC 1.4(b).

[1] Respondent waived filing an answer in this and in the Woodward matter, below.

As mentioned above, at the continuation of the DEC hearing, the parties stipulated that respondent engaged in lack of diligence, negligence, but not gross neglect, and failure to return telephone calls in all of the matters, except Witherspoon. Respondent's counsel stated, in relevant part:

> [A]s to . . . Vargas . . . Chiavarra . . . Woodward, and . . . Thompson, as to all Mr. Lowenstein would acknowledge that, in fact, there was a lack of diligence which included an omission of not returning phone calls. Much of it, by the way, was his office, but he has the responsibility of that and there wasn't adequate communication between his office, let alone him with these individuals. We would also acknowledge that with all of these there was, as a corollary to the lack of due diligence, negligence, but we deny that there was gross negligence as to all of them and the circumstances bear that out, so we're admitting everything but gross negligence. We're not admitting anything as to Witherspoon. You'll have to decide that.
>
> [3T4-20 to 13.][2]

As to the Chiavarra matter, respondent's counsel noted that respondent had brought the file with him; that the file was voluminous; and that respondent had done "many things in the matter," but not other things. With regard to the Thompson matter, counsel noted that the case had been pending for a long

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[2] 3T refers to the transcript of the May 29, 2008 DEC hearing.

period, that "people got aggravated because of the lack of communication," and that, although respondent did "much work" in the matters to try to "rectify all the situations, the fact [was] that through the years there was neglect in some respect or other" with all of the matters, except Witherspoon.

Notwithstanding the parties' stipulation, the presenter urged the DEC to find that respondent also engaged in gross neglect in all of the matters.

Respondent's counsel stated that respondent's problems did not surface until 2006, even though some of the complaints dated back to the late 1990s. Counsel explained that respondent took on too many cases and was very disorganized. Respondent conceded that he had to get more organized and accept fewer cases. He also admitted that he did not properly supervise his staff and that he was seldom in the office to return calls and handle "other responsibilities."

Respondent's counsel advanced several mitigating factors: respondent's "tremendous amount of pro bono work;" his work for the community; his involvement with Vista, Big Brothers, Big Sisters; his help to the poor; the fact that he is respected by judges and other attorneys; his remorse for his misconduct; and

his problems with depression, for which he had obtained counseling and had taken medication.[3]

Counsel acknowledged that respondent's conduct was deserving of a suspension and that he needed proctoring. He added that a three-month suspension would give respondent the opportunity to reflect and to get organized, when he returns to the practice of law.

The DEC found respondent guilty of gross neglect, lack of diligence, and failure to communicate with clients, except in the Witherspoon matter, which the DEC dismissed. The DEC recommended a three-month suspension and a one-year proctorship, upon reinstatement.

Following a de novo review of the record, we are satisfied that the DEC's conclusion that respondent was guilty of unethical conduct is supported by clear and convincing evidence.

The DEC properly dismissed the complaint in the Witherspoon matter. Although Witherspoon may have had some difficulty reaching respondent, his own testimony established that either respondent or respondent's staff did communicate with him about his matter. That respondent did not communicate with Witherspoon

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[3] Apparently, respondent turned to his brother, a doctor, for assistance with his depression.

as frequently as Witherspoon would have liked does not establish a violation of RPC 1.4(b).

With respect to the remaining Witherspoon charges (gross neglect and lack of diligence), the evidence showed that respondent filed a complaint for the return of the escrow funds on August 17, 2007, nine months after the closing, eight months after Witherspoon received an estimate for the removal of the oil tank, and five months after respondent was served with Witherspoon's grievance. Respondent's conduct was not grossly negligent or indicative of a lack of diligence, given Witherspoon's acknowledgement that respondent had trouble communicating with the title company, had received false information from it, and that he and respondent had had conversations about getting the escrow funds back, prior to respondent's filing a complaint in the matter. Moreover, respondent succeeded in obtaining a default judgment against the title company and the buyer nine months after filing the complaint in the matter. It cannot be found, thus, that respondent either grossly neglected or lacked diligence in handling the case.

As to the remaining matters, Vargas, Thompson, Chiavarra, and Woodward, respondent stipulated only to lack of diligence and failure to communicate. He did not stipulate to gross

neglect. We note that the parties' stipulation was meager and failed to address whether respondent's simple negligence or lack of diligence caused his clients to suffer irreparable harm. At the DEC hearing, respondent's counsel pointed out that the Chiavarra file was voluminous. We, therefore, infer that respondent did some work on Chiavarra's behalf. In any event, without more facts in the record before us, there is no clear and convincing evidence that respondent engaged in gross neglect in any of the above matters.

Other than in the Witherspoon matter, the record does not give us a clear factual basis for respondent's misconduct and the time period during which respondent failed to act in the Witherspoon and Vargas matters. Moreover, the absence of the latter information, which was similarly lacking from respondent's 2007 ethics matter (motion for discipline by consent – censure) prevents us from determining whether respondent's misconduct in the instant matters were part and parcel of his earlier acts of misconduct or whether he simply did not learn from his prior mistakes.

Although a remand might uncover evidence that respondent also engaged in gross neglect in all four matters, such a finding would not necessarily increase the amount of discipline warranted for the misconduct to which respondent has already

stipulated. Respondent consented to a three-month suspension and to a proctorship. His counsel noted that a period of suspension would afford respondent time to reflect and reorganize his practice. Based on these factors, we determine that a remand, without the prospect of a meaningfully different outcome, would seem to be a waste of the disciplinary system's resources.

On this record, the evidence supports only that respondent failed to communicate with his clients and lacked diligence in four matters. Respondent also conceded that he was negligent in the matters, thereby allowing us to find a pattern of neglect, an aggravating factor. Although a single instance of ordinary negligence does not constitute an ethics violation, when an attorney repeatedly demonstrates incompetence, that attorney displays a patter of neglect. See, e.g., In re Rohan, 184 N.J. 287 (2005) (three-month suspension for, among other improprieties, a pattern of simple neglect).

Generally, attorneys who display a pattern of neglect are reprimanded. See, e.g., In re Weiss, 173 N.J. 323 (2002) (lack diligence, gross neglect, and pattern of neglect); In re Balint, 170 N.J. 198 (2001) (in three matters, attorney engaged in lack of diligence, gross neglect, pattern of neglect, failure to communicate with clients, and failure to expedite litigation); and In re Bennett, 164 N.J. 340 (2000) (lack of diligence,

failure to communicate in a number of cases handled on behalf of an insurance company, gross neglect, and pattern of neglect).

Here, our assessment of the measure of discipline must include the aggravating and mitigating circumstances. Respondent's ethics history, an aggravating factor, consists of an admonition and a censure for misconduct similar to that charged in this case, as well as a reprimand for failure to disclose a material fact to a third person. As mitigation, respondent offered his twenty-four years at the bar; his pro bono activities; his cooperation with the investigation; and his problems with depression.

After weighing the aggravating factors against the mitigation advanced by respondent, we find that the former outweigh the latter. This is respondent's fourth brush with the disciplinary system. In the space of two years, from 2006 to 2008, he was disciplined three times. Altogether, his unethical behavior extended to fourteen matters (three in the matter that led to his 2006 admonition, one in the 2007 reprimand, six in the matter that resulted in his 2008 censure, and four here). We, therefore, determine that a three-month suspension is warranted at this juncture. We further determine that, prior to reinstatement, respondent should submit to the Office of Attorney Ethics ("OAE") proof of fitness to practice law, as

attested by a mental health professional approved by that office. Upon reinstatement, respondent should be supervised, for a two-year period, by a proctor approved by the OAE.

Chair Pashman and Vice-Chair Frost did not participate.

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs and actual expenses incurred in the prosecution of this matter, as provided in R. 1:20-17.

Disciplinary Review Board
Edna Y. Baugh, Acting Chair

By: Julianne K. DeCore
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Joseph J. Lowenstein
Docket No. DRB 08-390

Argued: March 19, 2009

Decided: June 26, 2009

Disposition: Three-month suspension

Members	Disbar	Three-month Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Pashman						X
Frost						X
Baugh		X				
Clark		X				
Doremus		X				
Lolla		X				
Stanton		X				
Wissinger		X				
Total:		6				2

Julianne K. DeCore
Chief Counsel