SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 07-171
District Docket Nos. VA-04-020E,
VA-04-021E, and VA-05-011E

IN THE MATTER OF	:
DAVID J. WITHERSPOON	:
AN ATTORNEY AT LAW	:

Corrected Decision

Argued: October 18, 2007

Decided: December 17, 2007

Lisa Love appeared on behalf of the District VA Ethics Committee.

Respondent appeared pro se.

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

This matter came before us on a recommendation for a reprimand filed by the District VA Ethics Committee (DEC). The complaint alleged a combination of gross neglect, lack of diligence, and failure to communicate with clients in three matters. We determine to censure respondent.

Respondent was admitted to the New Jersey bar in 1994. In 2002, he was admonished for listing mail-drop addresses on his

letterhead, thereby misleading an existing client and potential clients into believing that he maintained an office in those locations when, in fact, he had a home office. He also failed to comply with the recordkeeping rules. In the Matter of David J. Witherspoon, DRB 02-050 (March 18, 2002).

On May 6, 2003, respondent received a reprimand in a default matter for failure to communicate with a client and failure to cooperate with ethics authorities. In re Witherspoon, 176 N.J. 419 (2003). Also in 2003, respondent received an admonition for failure to communicate with a client. In the Matter of David J. Witherspoon, DRB 03-280 (October 24, 2003).

I. The Harvey Matter

The complaint alleged that respondent failed to reply to the client's requests for information about a matter, a violation of RPC 1.4, (presumably (b) (failure to communicate with the client).

In October 2002, Angela Harvey, the grievant in this matter, retained respondent in connection with a bankruptcy

matter. On October 4, 2002, respondent filed a petition on her behalf.[1]

According to the complaint, on numerous occasions thereafter, Harvey called respondent to obtain information about her case. Respondent did not return any of her calls.

On February 10, 2004, respondent withdrew as counsel.

In conjunction with his answer to the formal ethics complaint, respondent submitted a copy of a fee application that he had filed in Harvey's bankruptcy case. The application, which was granted, showed that he had recorded over ten hours of legal services in the case and had engaged in substantial communications with Harvey.

In addition, in his answer, respondent stated that, at the bankruptcy hearing on his motion to withdraw as Harvey's counsel, Harvey had "told the Judge of the numerous times she came to my office without an appointment, the numerous times we talked on the phone."

Harvey did not appear at the DEC hearing. The presenter, however, read into the record several lengthy letters that Harvey had written to the bankruptcy judge, complaining bitterly about respondent. Although Harvey did not send respondent copies

[1] The formal ethics complaint mistakenly lists that date as October 4, 2004.

of the letters, the bankruptcy court forwarded them to him. Harvey blamed respondent for being unresponsive and unprofessional, and cast him as the problem in her case, which was ultimately dismissed for her failure to make bankruptcy payments.

Respondent contested Harvey's account, stating that he had spent a considerable amount of time on her matter, had remained in contact with her, and had successfully confirmed a chapter 13 plan. In particular, respondent asserted that Harvey's own failure to make payments to Toyota Motor Credit, after agreeing to do so in the bankruptcy proceeding, resulted in Toyota's attempt to repossess her car. In addition, respondent claimed, after the bankruptcy court set the monthly plan payment that Harvey was to make to the chapter 13 trustee, she immediately fell behind on that obligation and then defaulted on it, all through no fault of respondent.

Respondent conceded, however, that he had been unavailable to Harvey for two brief periods during the representation, including July 2003, when Toyota was attempting to repossess her car. Respondent insisted that his unavailability had not contributed to Harvey's problems, which, he claimed, were the direct result of her failure to make scheduled payments to Toyota and to the chapter 13 trustee.

II. The Kany Matter

The complaint alleged that respondent failed to communicate with his client, in violation of RPC 1.4, presumably (b) and (c) (failure to explain the matter in detail to permit the client to make informed decisions about the representation).

On February 13, 2003, Lori and Steven Kany retained respondent to file an appeal from the municipal tax assessment on their Short Hills property.

According to the complaint, the Kanys made numerous telephone calls to respondent and sent him letters requesting information about the appeal, but respondent never replied to their requests for information.

Although the Kanys did not appear at the DEC hearing, the record contains a November 6, 2003 letter from Steven Kany to respondent, which states:

> By letter dated February 13, 2003, my wife, Lori Feinberg Kany, retained you on a contingency fee basis to pursue for us an appeal from the property tax assessment on our house at 26 Farmstead Road, Short Hills, New Jersey. As you had requested, that letter enclosed a check for $75 to cover your costs. You cashed the check, which we understood to mean that you accepted the engagement.

> Since, then, we have heard nothing from you. My wife and I have each, on numerous occasions, left messages with your receptionist or telephone answering service inquiring about the progress of the appeal, but none has been returned. On September 10, I wrote asking you to provide, by September 22, a status report on the matter or, if such was the case, to let us know if you had abandoned or wished to withdraw from the engagement. I also asked that you advise us whether the time within which to take an appeal has expired, and to return the $75. After nine months of silence, we are concerned.
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> [Ex.KP-4.]

For his part, respondent furnished the DEC with a judgment of dismissal from Essex County, showing that he had filed a tax appeal for the Kanys. He also testified briefly about the case, recalling that the Kanys had purchased their property for $1,150,000 and that it had an assessed value of $949,000. Because respondent considered that to be an under-assessment of its value, he had withdrawn the appeal to avoid a higher re-assessment.

Respondent asserted that, because he had done "hundreds" of appeals in the few months around that time, he was unable to recall if he had told the Kanys about his decision to withdraw the appeal. Because he could not locate the Kanys' file in

preparation for the DEC hearing, he had no further documents to support his version of events.

III. The Stewart Matter

The complaint alleged violations of RPC 1.1(a) (gross neglect), RPC 7.1(a)(1) (material misrepresentation of fact or law about the lawyer's service), RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation), RPC 8.1(b) (failure to cooperate with disciplinary authorities), cited as R. 1:20-3(g)(3) and (4), and RPC 8.4(d)(conduct prejudicial to the administration of justice).

On February 26, 2004, Darryl Stewart retained respondent to file a chapter 7 bankruptcy petition. Among other debts, Stewart sought to discharge certain IRS tax obligations. According to the complaint, Stewart sought relief for tax years 1992, 1996, 1997, 1998, and 2000. According to the complaint, Stewart had given respondent copies of his tax returns for each of those years.

It is uncontested that respondent filed a bankruptcy petition and that Stewart received a discharge in bankruptcy. The complaint charged, however, that respondent failed to list Stewart's 2000 IRS taxes in the petition, and that he later told his client that it was unnecessary to do so because the IRS

would eliminate the debt for that year, as being at least three years old.

In October 2004, the IRS demanded that Stewart pay back taxes for the year 2000. According to the complaint, Stewart immediately spoke to respondent about this issue and requested that he file a motion to re-open the bankruptcy proceeding to add the IRS taxes for 2000 and 1997.[2] The complaint alleged that respondent told Stewart that he had not erred in leaving out those taxes and that the bankruptcy judge may have been mistaken about the need to include them.

Hearing nothing from respondent, on October 14, 2004, Stewart wrote him a letter requesting action. On the same day, Stewart filed, pro se, a motion to re-open the bankruptcy case to include the IRS obligations.

Respondent contested all of Stewart's assertions. According to respondent, Stewart never furnished him with any tax records, but merely indicated that he "had tax problems."

Respondent testified that the bankruptcy rules, as drafted at the time, did not require him to obtain client tax returns for inclusion in the bankruptcy petition materials, in order to verify client claims. A 2005 amendment to the bankruptcy code

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[2] The IRS sought taxes for 1997 as well, but for unrelated reasons.

changed that procedure. According to respondent, attorneys are now required to obtain copies of filed tax returns as inclusions with the debtor's petition.

Respondent further asserted that Stewart was not credible, and that Steward had "collected unemployment when he was working . . . [and had] failed to notify the Department of Labor of his job status, accounting for his claim of $7,019."

Respondent also took issue with the charge that he had grossly neglected the case. He claimed to have fulfilled his obligations regarding the IRS claims, having named the IRS as a creditor in the petition.

According to respondent, once the IRS was named as a creditor, it was its duty to establish the amounts due from Stewart for the years in question. Furthermore, according to respondent, he had relied on the veracity of Stewart's statement to him that he owed taxes for the years 1990 through 1999, exclusive of 2000. In his answer, respondent asserted that "[t]hat is why schedule F shows IRS debt from 1990-1999. Mr. Stewart signed his bankruptcy under penalty of perjury that the information is true and correct. Mr. Stewart reviewed the petition and signed as to the accuracy before filing of the petition."

Respondent maintained that, under the bankruptcy code in effect prior to October 17, 2005, he was under no obligation to verify any financial information provided by Stewart for inclusion in the bankruptcy petition.

Finally, in order to show that Stewart had been mistaken about the necessity to reopen his case to include additional IRS debt, respondent analyzed numerous bankruptcy rules addressing the dischargeability and non-dischargeability of IRS tax obligations. Respondent concluded from his analysis, which was unchallenged below, that Stewart's pro se motion was unnecessary and that it had no effect on the dischargeability of his various tax obligations.[3]

Finally, respondent testified that, after the filing of Stewart's grievance, he had called the IRS and had been advised that Stewart's 2000 tax obligation was $1,100 and that no fines had been assessed against Stewart for that year.

Respondent concluded his testimony by addressing the RPC 7.1(a)(1) charge, which was not directly explored in the record:

> I was charged with miscommunicating concerning a lawyer's service. All I did is

[3] Stewart's letter to respondent requested him to file a motion to re-open the case. Yet, Stewart gave respondent no time to comply with the request. Stewart filed the pro se motion that same day.

> hold myself out I do bankruptcy. It charges misrepresentation concerning a lawyer's services. Going over my charges and I will shut up. I don't think I'm found guilty or offensive with that one, I advertise that I do bankruptcy law. I do 300 a year. I'm a member of the American Bankruptcy Institute, I completed two Inn of Courts and this year I'm in my third Inn of Court, what is called the Master's level, and I know bankruptcy and I have done over 1500 bankruptcies so I don't think I miscommunicated my services.
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> [T187.][4]

The complaint also charged respondent with failure to cooperate with the DEC's investigation of the Stewart grievance. The investigator/presenter acknowledged that she had made only one attempt to obtain information from respondent about the Stewart grievance. The next DEC communication with respondent was the service of the formal complaint. Respondent recalled that, in a telephone conversation with the investigator, prior to filing his answer to formal complaint, he had apologized to the investigator for not having promptly replied to her letter.

According to respondent, at the time of the investigator's inquiry, he had been consumed by his bankruptcy practice. He had

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[4] T denotes the transcript of the DEC hearing on October 23, 2006.

attended bankruptcy seminars in Florida at about that time, just before the new bankruptcy rules had taken effect, in October 2005. He claimed that, like many other bankruptcy attorneys, he had been "swamped" with work, as "two-million people" had filed petitions in the months preceding the changes. He added that, during a brief period, even the bankruptcy courts had remained open seven days a week.

This count of the complaint also charged respondent with a pattern of neglect.

At the conclusion of the hearing below, the DEC found no clear and convincing evidence that respondent had failed to communicate the status of the matter to Harvey and, therefore, dismissed the sole RPC 1.4 charge.

In the Kany matter, the DEC found that respondent violated RPC 1.4, presumably (b) and (c), when he failed to communicate the status and outcome of the tax appeal to his clients. The DEC noted that respondent's recollection of the case was vague and that the evidence that respondent produced was insufficient to refute the charges.

The DEC dismissed all the charges in the Stewart matter. Although the DEC did not overtly find Stewart's assertions incredible, the hearing panel report noted respondent's argument that Stewart had "gamed" the system by failing to pay taxes for

years and by wrongfully collecting unemployment benefits while employed.

As to the dismissal of the RPC 8.1(b) charge, the DEC cited the investigator's single attempt to obtain respondent's cooperation before filing the formal ethics complaint, after which respondent cooperated with authorities.

As noted above, the DEC recommended a reprimand.

Following a de novo review of the record, we find that the DEC's finding that respondent's conduct was unethical was fully supported by clear and convincing evidence. We also agree with the DEC's dismissal of some of the allegations.

Specifically, in the Harvey and Stewart matters, the presenter was at a disadvantage because the grievants did not appear to testify against respondent. Respondent, too, was at a due process disadvantage, because he was unable to confront and cross-examine the witnesses against him. Under the circumstances, because respondent called Harvey's and the Stewarts' credibility into question and the DEC was unable to assess their credibility first-hand, the dismissal of the RPC 1.4 charges was appropriate. So was the dismissal of the Stewart charges relating to RPC 1.1(a), RPC 1.1(b), RPC 7.1(a)(1), RPC 8.4(c), and RPC 8.4(d), for lack of clear and convincing evidence.

As to the charged violation of RPC 8.1(b) in Stewart, although respondent should have complied with the investigator's single request for information about the grievance, we accept respondent's explanation that he did not submit a reply timely because the new bankruptcy rules were about to take effect and he, like many other bankruptcy lawyers, was overwhelmed with the great number of petitions that had to be filed before the rule changes took place. We took into account that respondent contacted the investigator upon receipt of the complaint, apologized for his delay, and thereafter cooperated fully with ethics authorities. We, therefore, agree with the DEC's dismissal of that charge.

The sole remaining allegation is that respondent failed to communicate with the Kanys in connection with their 2003 municipal tax appeal. Respondent admitted that he could not recall the communications that he may have had with his clients over the course of the representation. In fact, respondent did not know whether he had disclosed to the Kanys that he was going to be voluntarily dismissing their appeal, after learning that their property had an under-assessed value.

Based on the dearth of information from respondent and on his utter failure to recall any details of communications with

his clients during their appeal, we find that the charged violations of RPC 1.4(b) and (c) have been sustained.

Failure to *communicate* with clients generally results in an admonition. See, e.g., In the Matter of Gerald M. Saluti, Jr., DRB 07-117 (June 22, 2007) (attorney failed to communicate with the mother and girlfriend of an incarcerated client; violation of RPC 1.4(b)); In the Matter of Edward G. O'Byrne, DRB 06-175 (October 27, 2006) (attorney did not inform his client about court-imposed costs against the client and delayed notifying him of a motion subsequently filed by the adversary for the collection of those costs; violation of RPC 1.4(a) found); In the Matter of William H. Oliver, DRB 04-211 (July 16, 2004) (attorney failed to keep client apprised of developments in her matter, including a sheriff's sale of her house); and In the Matter of Howard S. Diamond, DRB 01-420 (February 8, 2002) (failure to reply to executrix' inquiries and concerns about an estate matter; violation of RPC 1.4(a)).

Here, respondent's sole violations were his failure to reply to the Kanys' requests for information about their appeal and to explain to them that the under-assessment of their property worked against proceeding with their appeal. It might appear, thus, that an admonition would be appropriate in this instance. In fashioning the suitable degree of discipline for

respondent's conduct, however, we must factor in his disciplinary record: an admonition in 2002, and a reprimand (in a default matter) and an admonition in 2003. The conduct that led to the latter two included failure to communicate with clients in tax appeal matters.

That respondent did not learn from his prior mistakes is troubling to us. Indeed, in mid-2003, when he agreed to represent the Kanys, he had just received his reprimand, which was based, in part, on his failure to communicate with clients. Furthermore, in November 2003, when the Kanys complained to respondent about his lack of communication with them, he had just received the October 24, 2003 admonition for failure to communicate with clients in yet another tax appeal matter.

In view of the foregoing, we determine that an admonition is wholly inadequate discipline in this instance and that respondent's demonstrated unwillingness to learn from past mistakes requires that he be censured. Respondent is hereby cautioned that similar conduct in the future may result in more severe discipline.

We also require respondent to show proof to the Office of Attorney Ethics (OAE), within six months from the date of this decision, that he has completed twelve hours of Professional Responsibility Courses approved by the OAE.

Member Lolla 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
William J. O'Shaughnessy
Chair

By: _____
for Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of David J. Witherspoon
Docket No. DRB 07-171

Argued: October 18, 2007

Decided: December 17, 2007

Disposition: Censure

Members	Suspension	Censure	Admonition	Disqualified	Did not participate
O'Shaughnessy		X			
Pashman		X			
Baugh		X			
Boylan		X			
Frost		X			
Lolla					X
Pashman		X			
Stanton		X			
Wissinger		X			
Total:		8			1

Julianne K. DeCore
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Chief Counsel