SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 10-297
District Docket No. VA-08-0018E

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

Decision

Argued: November 18, 2010

Decided: December 13, 2010

Kevin J. O'Connor appeared on behalf of the District VA Ethics Committee.

Bernard K. Freamon appeared on behalf of respondent.

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

This matter was previously before us at our July 22, 2010 session, on a recommendation for an admonition filed by the District VA Ethics Committee (DEC). At that time, we determined to treat it as a recommendation for greater discipline, pursuant to R. 1:20-15(f)(4).

The complaint charged respondent with violating RPC 1.3 (lack of diligence), RPC 1.4(b) (failure to keep a client reasonably informed about the status of a matter or to promptly comply with reasonable requests for information), and RPC 1.4(c)

(failure to explain a matter to the extent reasonably necessary to permit the client to make informed decisions about the representation).

We determine that a three-month suspension, to be served concurrently with respondent's 2010 one-year suspension, sufficiently addresses the totality of the present circumstances.

Respondent was admitted to the New Jersey bar in 1994. At the relevant time he maintained a law office in Newark, New Jersey but, as will be seen below, was suspended for one year effective August 24, 2010.

Respondent has an extensive ethics history. In 2002, he was admonished for failure to maintain a bona fide office, improper use of letterhead, and recordkeeping violations. 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 in a 2001 municipal tax appeal matter and failure to cooperate with ethics authorities. In re Witherspoon, 176 N.J. 419 (2003).

In 2003, respondent received another admonition for failure to communicate with a client in a 2000 municipal tax appeal matter. In the Matter of David J. Witherspoon, DRB 03-280 (October 24, 2003).

On February 13, 2008, respondent was censured for failure to communicate with a client in yet another municipal tax appeal matter. The Court imposed progressive discipline because respondent had not learned from prior mistakes - his failure to communicate with clients. In re Witherspoon, 193 N.J. 489 (2008).

Finally, in 2010, the Court imposed a one-year suspension, effective August 24, 2010, finding (1) that respondent engaged in a conflict of interest (RPC 1.7(a)(2)) by repeatedly making sexual propositions to three female clients and the daughter of a fourth client, which propositions the clients interpreted as offers of legal services in exchange for sex; (2) that, in his professional capacity, respondent engaged in discriminatory conduct based on the sex of his clients (RPC 8.4(g)); (3) that he violated the recordkeeping rules and did not bring his books into compliance, following his 2002 admonition for recordkeeping improprieties (RPC 1.15(d) and R. 1:21-6); and (4) that he practiced law while ineligible for failure to pay his annual attorney assessment, during which time he filed approximately 260 bankruptcy cases and three municipal tax appeal cases (RPC 5.5(a)). The Court ordered that, prior to reinstatement, respondent enroll in and successfully complete a course in sensitivity training approved by the OAE, and demonstrate to the

OAE that he has appropriate accounting controls in place and is in compliance with the recordkeeping requirements. In re Witherspoon, 203 N.J. 343 (2010).

The conduct that gave rise to this matter was as follows:

On August 25, 2005, Deborah Thomas retained respondent to file a chapter 7 bankruptcy petition on her behalf. Thomas gave respondent $100 towards the $760 retainer. The $660 balance was due at or before the creditors' meeting. The retainer included the cost of the filing fee.

Thomas' primary reason for seeking bankruptcy protection was to stop Ford Motor Credit Company's (FMC) execution on her wages, pursuant to a writ filed on November 14, 2000. Thomas had two subordinate creditors as well: Great Financial and Sherman Acquisitions. Respondent informed Thomas that, under the bankruptcy laws' automatic stay provision, the filing of the bankruptcy petition would immediately stop the wage execution.

On August 26, 2005, respondent filed a chapter 7 bankruptcy petition on Thomas'behalf. Thomas claimed that she did not have the opportunity to review the petition before respondent filed it because he rushed her through it; he just printed it, had her sign it, and told her he would take care of it. As a result, Thomas did not realize that FMC was not listed as a creditor. Thomas claimed that she had given respondent the information

about FMC at some unspecified point before she signed the petition.

Respondent, in turn, had no independent recollection of when he had learned that FMC was a creditor. He believed from Thomas' testimony at the DEC hearing that he had first learned of its existence at the second scheduled creditors' meeting, on November 10, 2005. Respondent had adjourned the first creditors' meeting, scheduled for October 7, 2005, because Thomas had not yet paid the balance of his fee.

Thomas had left six or seven telephone messages for respondent and had written two letters complaining about his lack of communication with her, in the weeks preceding the October 7, 2005 creditors' meeting. However, respondent did not reply to her attempts at communication with him. At the rescheduled creditors' meeting, on November 10, 2005, Thomas paid the balance of respondent's retainer. According to Thomas, she again gave respondent copies of the FMC and subordinate writs of execution and informed him that her wages were still under execution.

On November 23, 2005, following the creditors' meeting, Thomas wrote to respondent about her dire financial situation, the continuing wage execution, and his repeated failure to reply to her telephone messages. Respondent did not reply to Thomas'

letter and did not take any action on the wage execution until December 19, 2005. At that time, he filed a motion in the bankruptcy court to enforce the automatic stay provision and to end the Thomas' wage execution. Respondent, however, filed the motion against Great Seneca, rather than FMC. He claimed that the mistake was inadvertent, the result of Thomas' improper information to him. In response to the motion, Great Seneca filed a cross-motion for sanctions. Eventually, both motions were withdrawn.

Because respondent did not inform Thomas about the withdrawal of the motions, she appeared in court on January 23, 2006, the original return date of the motion. On that date, Thomas complained to the judge that her wages were still being executed and that she continued to experience communication problems with respondent.

By letter dated January 24, 2006, the court informed respondent about Thomas' unnecessary appearance, noted that respondent had not returned Thomas' numerous telephone calls, and instructed him to notify Thomas and the court about the action he had taken with regard to the FMC wage execution. On that same day, Thomas met with another attorney, Herbert Raymond.

In January 2006, the bankruptcy court notified Thomas that respondent had not paid the $109 filing fee, which, respondent admitted, he inadvertently failed to pay. Thereafter, Thomas paid the fee directly to the court. She notified the judge that her wages were still being executed and that she could not reach respondent, despite her repeated efforts.

On January 29, 2006, Raymond wrote to respondent about the filing fee issue and Thomas' entitlement to approximately $600 from the FMC wage execution. At the end of January, respondent reimbursed Thomas for the filing fee. On January 31, 2006, he requested that the Union County Sheriff's Office "refund all funds" that had been the subject of execution since August 26, 2005. Also on that date, respondent filed an amended bankruptcy schedule that listed the FMC judgment. He claimed that, although FMC was executing on Thomas' wages, Thomas must have given him the name of the wrong attorneys representing the creditor. He asserted that the delay in stopping the wage execution was caused by his confusion over the identity of the garnishee.

In February 2006, Thomas contacted respondent to find out when her wages would no longer be garnished and when the improperly garnished funds would be returned to her. When Thomas eventually spoke to respondent, he informed her that it would take "at least a year" before she would receive her money. He

added that, if she did not receive it by then, she should contact him.

Thomas received her first and only $229.15 check from the Sheriff's Office in mid-February 2006. Although she believed that she was entitled to more, she received nothing further. She tried contacting respondent again, but he neither returned her telephone calls nor replied to her letters. Afterwards, she realized that there was no point in continuing to try to contact him.

Thomas last spoke to respondent in April 2009, after she filed the grievance against him. She claimed that he had contacted her at that time, had offered to reimburse the monies that had been improperly garnished, and had asked her not to pursue the ethics grievance.[1]

Respondent admitted offering to reimburse Thomas and did not deny asking her to withdraw the grievance. Despite respondent's offer, Thomas received nothing from respondent. Respondent claimed that he stopped communicating with Thomas once he retained counsel in the ethics matter.

---

[1] Although asking a client to withdraw an ethics grievance in return for compensation is a violation of RPC 8.4(d) (conduct prejudicial to the administration of justice) (See In re Mella, 153 N.J. 35 (1998)) that offense was neither charged in the complaint, nor litigated at the DEC hearing.

Respondent attributed his lack of communication with Thomas to the change in the bankruptcy laws that resulted in a dramatic increase in bankruptcy filings. He contended that he was extremely busy, worked late into the night and on weekends, and had clients lined up in the hall of his office. In his written reply to the ethics investigation, respondent acknowledged that "more diligent action could have been taken to assist [Thomas] in having the garnishment stopped." He claimed that he had changed his law practice by adding an office manager, upgrading his electronic communications, completing multiple ethics courses, and retaining an accountant to review his fiscal records.

The DEC noted that, throughout his testimony, respondent had appeared contrite, had repeatedly expressed his regret that Thomas had suffered any financial harm, and had not blamed her, beyond stating that she had provided him with unclear information about the proper garnishee. Respondent offered to repay Thomas any outstanding amounts related to the FMC garnishment.

The DEC found that respondent did not act diligently in stopping FMC from garnishing Thomas's wages, the primary impetus for Thomas's bankruptcy. In addition, after obtaining some money from the Union County Sheriff's Office, respondent took no

further action to recover the remaining funds. The DEC found clear and convincing evidence that respondent failed to act diligently and promptly in representing Thomas (RPC 1.3).

The DEC also found that, over an extended period, respondent failed to communicate with Thomas, despite her repeated efforts to contact him. The DEC did not accept that the dramatic increase in respondent's bankruptcy cases excused him from communicating with Thomas. It noted that, while such increase could have excused a short delay, it did not explain the weeks or months that elapsed, during which respondent had little or no contact with Thomas. In other words, although respondent was free to increase his workload, he "was not free to allow this increase to marginalize his existing clients to whom he owed an ethical duty." The DEC, thus, found clear and convincing evidence that respondent failed to properly communicate with Thomas (RPC 1.4(b)). It did not address the charged violation of RPC 1.4(c).

In recommending only an admonition, the DEC considered respondent's "genuine remorse" and the positive changes he made to his law practice.

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

The DEC properly found that respondent failed to communicate with Thomas and lacked diligence in stopping FMC's wage execution and in failing to obtain the return of funds that had been improperly garnished, violations of RPC 1.4(b) and RPC 1.3, respectively. Given respondent's lack of communication with Thomas and the volume of bankruptcy cases that he was handling at the time, it is likely that the omission of FMC from the original bankruptcy petition and the filing of a motion against the wrong creditor were entirely respondent's fault and not the result of improper information from Thomas. We underscore the fact that the reason for Thomas filing the bankruptcy petition in the first place was her wage execution. When Thomas met with respondent, only FMC had a writ of execution. Regardless of where the blame ultimately falls, however, respondent's failure to promptly rectify the mistake that occurred was a violation of RPC 1.3.

Neither did the panel report address the charged violation of RPC 1.4(c) nor do the facts establish such a violation. We, therefore, dismiss this charge.

Generally, an admonition is the appropriate discipline for lack of diligence and failure to communicate with the client. See, e.g., In the Matter of James C. Richardson, DRB 06-010 (February 23, 2006) (attorney lacked diligence in an estate

matter and did not reply to the beneficiaries' requests for information about the estate); In the Matter of Anthony R. Atwell, DRB 05-023 (February 22, 2005) (attorney did not disclose to the client that the file had been lost, canceled several appointments with the client for allegedly being unavailable or in court when, in fact, the reason for the cancellations was his inability to find the file, and then took more than two years to attempt to reconstruct the lost file); and In the Matter of John F. Coffey, DRB 04-419 (January 21, 2005) (attorney did not file a bankruptcy petition until nine months after being retained and did not keep the client informed of the status of the case; only after the client contacted the court did she learn that the petition had not been filed).

Here, the DEC considered, in mitigation, respondent's contrition, as well as his contention that he had changed his practices by completing multiple ethics courses, hiring an office manager, upgrading his electronic communications, and retaining an accountant to review his financial records. We find the fact that respondent took ethics courses to be of little relevance. In December 2007, we determined to require him to take twelve hours of Professional Responsibility courses (DRB 07-171), a condition that the Court did not incorporate into its order of discipline. Nevertheless, we do not consider

respondent's purported completion of such courses to be a mitigating factor. An attorney's knowledge of and conformance to the ethics rules is an obligation, whether or not the attorney attends ethics courses.

Apparently, the DEC did not consider respondent's extensive ethics history, a significant aggravating factor, when recommending the appropriate discipline: a 2002 admonition; a 2003 reprimand (failure to communicate with a client and failure to cooperate with disciplinary authorities); a 2003 admonition (failure to communicate with a client); a 2008 censure (failure to communicate with a client – progressive discipline imposed based on respondent's failure to learn from prior mistakes), and a 2010 one-year suspension. This aggravating factor far outweighs any mitigation offered by respondent.

We are greatly troubled by respondent's failure to learn from his prior mistakes. He has a long history of failing to communicate with clients. His repetitive conduct highlights the lack of importance he places on keeping his clients apprised of the status of their cases.

Based on respondent's continuing practice of churning out cases with little or no communication with his clients and his propensity to violate the Rules of Professional Conduct, we find that an admonition, the recommended sanction by the DEC, is

insufficient discipline. Under the principles of progressive discipline (respondent's 2008 censure was for similar misconduct – failure to communicate with clients), we determine that a three-month suspension is warranted in this instance. We further determine that the suspension should run concurrently with the one-year suspension that he is presently serving, which took effect on August 24, 2010.

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
Louis Pashman, Chair

By: Julianne K. DeCore
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 10-297

Argued: November 18, 2010

Decided: December 13, 2010

Disposition: Concurrent three-month suspension

Members	Disbar	Concurrent Three-month Suspension	Reprimand	Censure	Dismiss	Did not participate
Pashman		X				
Frost						X
Baugh		X				
Clark		X				
Doremus		X				
Stanton		X				
Wissinger		X				
Yamner		X				
Zmirich		X				
Total:		8				1

Julianne K. DeCore
Julianne K. DeCore
Chief Counsel