SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 08-302
District Docket Nos. XIV-06-095E,
XIV-06-096E, XIV-06-482 and
XIV-06-483E

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

Decision

Argued: April 16, 2009

Decided: July 23, 2009

John McGill, III. Appeared on behalf of the Office of Attorney Ethics.

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 before us on a recommendation for discipline (censure) filed by the District VI Ethics Committee ("DEC"). It alleged that respondent engaged in sexual harassment, sexual discrimination, recordkeeping violations, and

practicing law while ineligible for failure to pay the New Jersey Lawyers' Fund for Client Protection ("CPF") annual assessment. We determine to impose a three-month suspension on respondent.

Respondent was admitted to the New Jersey bar in 1994. 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 an admonition for failure to communicate with the 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 the client in yet another municipal tax appeal matter. The Court determined to impose progressive discipline, on the basis that respondent had not learned from

prior mistakes, which included failure to communicate with tax appeal clients. In re Witherspoon, 193 N.J. 489 (2008).

The first count of the complaint alleged that respondent sexually harassed or discriminated against three female bankruptcy clients and against a fourth woman who was tangentially involved in one of the matters, in violation of RPC 1.7(a)(2) (conflict of interest), RPC 4.4, presumably (a) (using means that have no substantial purpose other than to embarrass third persons), RPC 8.4(d) (conduct prejudicial to the administration of justice), and RPC 8.4(g) (discrimination based on sex or sexual orientation).

Respondent admitted essentially all of the facts of the complaint in his four-count answer. He and the Office of Attorney Ethics ("OAE") also entered into a February 5, 2008 stipulation of facts. In order to protect the grievants' identities, they have been identified by their initials throughout these proceedings.

COUNT ONE

I. The T.B. Matter – District Docket No. XIV-06-095E

On August 13, 2005, L.B., Sr. retained respondent to represent him in a personal bankruptcy. He paid respondent a $700 flat fee.

According to the stipulation, if called to testify, T.B., L.B., Sr.'s daughter, would have stated that

> L.B. Sr. was assisted by . . . T.B. in discussing with respondent the fees required for handling L.B. Sr.'s Bankruptcy. Respondent's retainer agreement required a legal fee of $700 from L.B. Sr. When T.B. advised respondent that L.B. Sr. was short $300 in legal fees, respondent offered to meet T.B. in a hotel room for three hours, to take care of the $300. T.B. understood respondent's comments to constitute a proposal to exchange sexual favors for the $300 balance owed by L.B. Sr. in legal fees.
>
> In or about January 2006, T.B. delivered documents to respondent's office on behalf of L.B. Sr. At that time, L.B. Sr. owed respondent a balance of $200 in legal fees, which T.B. told respondent she was unable to remit on L.B. Sr.'s behalf. Whereupon, respondent offered that T.B. could come to his office in a bathing suit and dance for him, to take care of the $200. T.B. understood respondent's comments to constitute a proposal to exchange sexual favors for the $200 balance owed by L.B. Sr. in legal fees.
>
> [S¶2(a).][1]

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[1] S refers to the stipulation between respondent and the OAE.

Respondent did not recall making the specific remarks above, but stated that, if he made them, they were meant in jest. In fact, he was "saddened" that T.B. took offense to the comments, as he "thought at the time that T.B. and [he] were getting along fine." Respondent claimed that, had he known that T.B. was offended, he would have apologized "right there and then."

II. The A.C. Matter – District Docket No. XIV-06-483E

A.C. retained respondent, in September 2005, to file a bankruptcy petition on her behalf. According to the stipulation, had A.C. testified, she would have stated that

> [at an] appointment at respondent's law office, respondent stated to A.C., "Oh, so you're the gay girl". After confirming her personal sexual orientation, respondent continued to remark about A.C.'s sexuality, as well as suggest that A.C.'s lesbianism was caused by a bad experience with the male sex organ. A.C. understood respondent's comments to constitute a denigration of her lesbian lifestyle. Thereafter, after the conclusion of a bankruptcy hearing, respondent commented to A.C. that he was a "breast man," that she was looking good that day and that if she came back to his office and joined him on his "office couch," he would return to her $660 of the legal fees she previously paid, to which A.C. refused. A.C. understood respondent's comments to

> constitute a proposal to exchange sexual favors for legal fees paid to respondent.
>
> [S¶2(d).]

Respondent stated his belief that A.C. had been "put up" to filing the grievance against him by her female friend, S.B., as described immediately below.

III. The S.B. Matter – District Docket No. XIV-06-096E

In September 2005, S.B. retained respondent to represent her in a bankruptcy matter. According to the stipulation, had S.B. testified, she would have stated that

> [o]n one occasion, when she visited respondent's office in the presence of her female friend, respondent remarked that many gay women "come on" to respondent and that respondent would like to see S.B. and her friend "make out". At that time, respondent continued to state to S.B. that if he were permitted to watch them "make out," he would file the bankruptcy free of charge. S.B. understood respondent's comments to constitute a proposal to exchange sexual favors for the balance owed to respondent in legal fees. Thereafter, in a second incident, S.B. came to respondent's office to make a fee payment and to inform him of an additional bankruptcy creditor. At that time, respondent stated that he would only add the creditor to S.B's bankruptcy if she lifted her skirt, at which S.B. refused, and left respondent's office. S.B. understood respondent's comments to constitute a proposal to exchange sexual favors for

> representation in her bankruptcy matter. Thereafter, on another trip to respondent's office to make payment on the balance of legal fees owed to respondent, respondent stated that S.B. could satisfy her outstanding legal fees by either allowing him to watch her with her female friend or by allowing him to join in, to which S.B. refused. S.B. understood respondent's comments to constitute a proposal to exchange sexual favors for the balance owed to respondent in legal fees. Thereafter, S.B. retained new counsel to complete her bankruptcy matter.
>
> [S¶2(b).]

Respondent admitted having made the above comments, but insisted that he had made them in jest. He stated that S.B. was A.C.'s lesbian lover and that A.C. had "put her girlfriend up to it when she was mad at me." Respondent also stated that S.B. "was pissed off because she didn't pay her legal fees and I ceased doing work" on the bankruptcy case.

IV. The S.S. Matter – District Docket No. XIV-06-482E

On July 18, 2001, S.S. retained respondent to represent her in a bankruptcy matter. According to the stipulation, had S.S. been called to testify, she would have stated that

> [d]uring the course of respondent's representation, he began to question S.S. about her personal life, ask if she would go out with him and made inappropriate sexual

> advances to S.S., but S.S. declined his proposals. S.S. understood respondent's comments to constitute a proposal to exchange sexual favors for representation in her bankruptcy matter. Thereafter, S.S. retained new counsel to complete her bankruptcy matter.
>
> [S¶2(c).]

Respondent did not deny S.S.'s version of events. Rather, he speculated that S.S. filed a grievance against him because she "was annoyed about how her case was processing through the bankruptcy course [sic]." Respondent claimed to be "kind of hurt" that she had turned on him. After all, he added, he had volunteered to accompany her to a bankruptcy court hearing just after September 11, 2001. S.S., a Muslim, had worn "the full garb, the full cover from head to toe." Respondent recalled having been "uncomfortable" that day, because he perceived anti-Muslim sentiment "going on at that period of time." He concluded that it was "when [her] bankruptcy case fell apart . . . the complaint took on [a] nature that I harassed her and I think it was – I felt it was more of a retaliatory nature."

Although respondent admitted making the statements in the four matters above, he attempted to put them in a different context. In every instance, he claimed that he had intended no

offense to any of the women. He denied that he wanted sex in exchange for his legal services, asserting that he had been "joking around" with the women. He explained that he fostered a free-wheeling atmosphere in his office:

> In my office anything can be discussed. I have people who come in who discuss crimes they committed, drugs that they've had and conversations on sexual preferences, gender, anything goes. It's always been my opinion that, you know, we have freedom of speech and freedom to discuss what we want, and I believe in the free market. I believe that if a person doesn't like an attorney, then they are free to go find another one, there is [sic] 80,000 attorneys.
>
> I don't agree that my morals should be questioned because morals is [sic] a very subjective matter . . . .
>
> [T15-6 to 22.][2]

The presenter repeatedly asked respondent if he thought that it was wrong for him to make the above comments. Respondent replied as follows:

> The problem with the question and the answer, you know, if the Ethics Committee wants to write strict rules on what we can talk about and not talk about, fine, then put it out there but the Ethics Committee has too many rules that are generalities, appropriate behavior, appropriate conduct, whose definition? Your's [sic], mine,

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[2] "T" refers to the transcript of the March 28, 2008 DEC hearing.

> Catholic, Protestant, Muslim, you can't tell me what's appropriate and I can't tell you what's appropriate unless you want to say this is a moral ethics course and, I'm sorry, John, I can't – it's hard to get boxed in because you're talking about freedom of speech, you're talking about I can't discuss what we want, talking about free market. If clients are offended, get another attorney, maybe people in here don't like that answer but that's what's called free marketplace and if you want to be strict, then write strict rules, you know, you need stricter rules, your rules are too general.
>
> [T36-8 to T37-3.]

Later in the day, respondent retreated somewhat from that position:

> Looking back, I have to agree with Mr. McGill, which I did before, and you think about it, yeah, certain comments probably are definitely inappropriate. I mean, let's face it, I always looked at my office as a place we talked, joked about a lot of things, things carried over from what goes on around town, a lot of people I know from out and about but as you get older, you realize you have to keep certain things out of the office and just so it doesn't muddle up the water, just keep it out, it makes it easier even if you have to cut people off and say we can't discuss that.
>
> [T57-16 to T58-3.]

COUNT TWO

The second count alleged that respondent practiced law while ineligible to do so for failure to pay the CPF annual assessment for 2005, in violation of RPC 5.5(a)(1) (unauthorized practice of law) and RPC 8.4(d) (conduct prejudicial to the administration of justice). Respondent acknowledged his misconduct in this regard.

On September 26, 2005, respondent was placed on the Supreme Court's list of ineligible attorneys for failure to pay the annual assessment. Thereafter, at a November 15, 2006 demand audit of respondent's trust and business accounts, the OAE advised respondent of his ineligibility. The next day, November 16, 2006, respondent paid the assessment. His name was then removed from the list.

During respondent's fourteen-month period of ineligibility, he actively represented about 260 bankruptcy clients and filed three property tax appeals.

Respondent conceded that he had practiced law while ineligible to do so and offered his surprise at being placed on the ineligible list. He explained that, as a sole practitioner, he found it difficult to keep up with his administrative duties. He added that he was also overwhelmed with a very busy

bankruptcy practice at the time and, thus, failed to pay the assessment.

COUNT THREE

The final count of the complaint charged respondent with various recordkeeping violations, in contravention of RPC 1.15(d) and R. 1:21-6.

The OAE's November 15, 2006 demand audit revealed that respondent's attorney books and records were still noncompliant with the rules and contained violations found in a 1999 audit, for which respondent had received the March 18, 2002 admonition. Specifically, respondent failed to maintain fully descriptive client ledgers; failed to conduct monthly trust account reconciliations; and failed to maintain a running balance in the trust account checkbook ledger.

Respondent admitted that he had failed to properly maintain his books and records. In mitigation, he offered that he rarely uses his trust account and, in fact, did not use it in either 2006 or 2007. He also stated that client funds were never in danger and that no client has ever complained about his handling of trust funds.

With respect to count one, the DEC was not persuaded by respondent that his overtures to the four females were intended in jest. The DEC determined that respondent may have intended to trade his legal services for sexual favors. The DEC found respondent guilty of having violated RPC 1.7(a)(2) because his personal interest in the three clients and in T.B., the daughter of a fourth client, gave rise to a significant risk of materially limiting the representations. The DEC also found that respondent's comments had no substantial purpose other than to embarrass the victims/clients, in violation of RPC 4.4, presumably (a).

With regard to RPC 8.4(d), the DEC found that respondent's misconduct violated the rule, citing In re Liebowitz, 104 N.J. 175 (1985), where the Court held that an attorney who made sexual advances toward an assigned pro bono client "brought the pro bono matrimonial counsel program into disrepute."

Finally, the DEC found respondent guilty of having violated RPC 8.4(g), citing In re Pinto, 168 N.J. 111 (2001), where the attorney made inappropriate comments to a female client, such as "I'll make a deal with ya, instead of giving me wild sex when this is over, pose for me. I'm serious, with your clothes on."

In the Matter of Harry J. Pinto, Jr. DRB 00-049 (April 13, 2000) (slip op. at 6).

With regard to counts two and three, the DEC found respondent guilty of practicing law while ineligible (RPC 5.5(a) and 8.4(d)), as well as recordkeeping violations (RPC 1.15(d) and R. 1:21-6)).

The DEC recommended a censure, without supporting case law.

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

The most serious aspect of respondent's misconduct was his treatment of three female clients and the daughter of a fourth client. In all four matters, respondent repeatedly made sexual propositions that they interpreted as offers of respondent's legal services in exchange for sex.

Specifically, respondent offered T.B. a $300 reduction in her father's bankruptcy fee if she spent three hours with him in a hotel room and, later, a $200 reduction in fees if she danced for him in a bathing suit.

Respondent also offered to pay a filing fee for S.B. if she and her female friend "made out" in front of him. He noted to S.B. that "gay women" often "came on" to him. On another

occasion, he offered to pay a court fee if S.B. lifted her skirt. In a third incident, when S.B. tried to pay the balance of the fee, respondent told her that he would waive it if he could watch her and her female friend engage in sex or if they allowed him to join them for sex.

Respondent tried to take advantage of S.S., a Muslim woman, apparently on a train ride to Trenton, just days after the terrorist attacks of September 11, 2001. The record does not detail the inappropriate sexual advances, but S.S. clearly understood them to be a proposal of sex in exchange for legal services.

Knowing that his bankruptcy client, A.C., was a lesbian, respondent suggested to her that she had become so because of a bad experience with "the male sex organ," which comment A.C. interpreted as a slur about her sexual preference. At the conclusion of her bankruptcy matter, respondent also told her that he was a "breast man", liked the way she looked, and would refund $660 of his fee if she came back to his office to join him on his office couch.

Respondent did not deny any of these comments. Rather, he claimed to have been "joking around" with the women, when he made them. He provided no evidence to support his assertion that

the remarks were jokes, other than to suggest that he had fostered a relaxed atmosphere in his office that included joking around.

The DEC gave little credence to respondent's claim that his comments had been made in jest. To the contrary, the DEC gave considerable weight to the clients' interpretations – that respondent was attempting to obtain sexual favors from them.

Like the DEC, we find that respondent created a conflict of interest situation (RPC 1.7(a)(2)) with regard to all four of the matters. Having placed his own prurient interests above those of his clients, he created the possibility that he would not view their matters favorably if his advances were rejected.

We also find that respondent violated RPC 8.4(g), insomuch as he sexually harassed the four women, some of them on more than one occasion. He also discriminated against two of them (S.B. and A.C.) on the basis of their sexual preference.

On the other hand, although the first count of the complaint charged respondent with having violated RPC 8.4(d), it is not so clear that he engaged in conduct prejudicial to the administration of justice, as the DEC concluded. The DEC reasoned that respondent's actions tainted the bankruptcy system. The record, however, contains no evidence that the

bankruptcy system was affected in any way by respondent's misconduct. We, thus, we determine to dismiss this charge.

Likewise, as to the RPC 4.4, presumably (a) charge, there is no evidence that respondent's purpose was to embarrass, burden or delay a third person. Rather, it appears that respondent's purpose was to obtain sex. For this reason, we dismiss this charge as well.

Respondent committed additional acts of misconduct. He stipulated to having violated the recordkeeping rules. In fact, the OAE's 2006 demand audit concluded that respondent had never brought his books and records into compliance after his 2002 admonition for recordkeeping improprieties. We, thus, find that respondent violated RPC 1.15(d) and R. 1:21-6.

Respondent also conceded that he practiced law for over a year, from September 2005 to November 2006, while ineligible to do so for failure to pay the 2005-2006 CPF annual assessment. In that time, he filed approximately 260 bankruptcy and three municipal tax appeal cases.

On this score, respondent claimed to have been unaware that he had been placed on the ineligible list. As a sole practitioner, he complained, he had no one to handle administrative duties or a "compliance officer" to monitor him.

On the other hand, he did not contend to have delegated the duty of paying his assessment to anyone else in his office. Thus, it was clearly upon respondent, who must have personally received the CPF materials, to make sure that he paid the annual assessment. Respondent must have known about the outstanding assessment, for he alone would have paid it. We find that respondent knew or should have known of his ineligibility and continued to practice law nevertheless. His conduct in this regard violated RPC 5.5(a)(1) and RPC 8.4(d).

In cases involving sexual misconduct by attorneys, the discipline has ranged from a reprimand to disbarment. Reprimand cases include In re Tucker, 174 N.J. 347 (2002) (attorney pulled aside a client's sweater slightly and asked for a "peek" of her breasts); In re Pinto, supra, 168 N.J. 111 (attorney made inappropriate comments of a sexual nature to his client and improperly touched her); In re Hyderally, 162 N.J. 95 (1999) (unwanted sexual advances made to two legal aid clients); In re Gilligan, 147 N.J. 268 (1997) (conviction of lewdness for exposing and fondling genitals for sexual gratification in front of three individuals, two of whom were children under the age of thirteen); In re Pierce, 139 N.J. 433 (1995) (conviction of lewdness for exposing genitals to a twelve-year old girl); In re

Pearson, 139 N.J. 230 (1995) (attorney improperly touched his client and made inappropriate comments about her chest); In re Rea, 128 N.J. 544 (1992) (attorney had a sexual relationship with a client who, because of her past history and mental health, lacked the capacity to freely consent to the relationship); and In re Liebowitz, supra, 104 N.J. 175 (sexual misconduct toward an assigned client).

Suspension cases, most of which include offenses toward children, include In re Gernert, 147 N.J. 289 (1997) (one-year suspension for attorney who pleaded guilty to the petty disorderly persons' offense of harassment by offensive touching; the victim was the attorney's teenage client); In re Seaman, 133 N.J. 67 (1993) (sixty-day suspension without pay; the Court found that Judge Seaman's remarks of a sexual nature to his law clerk, lifting her skirt, placing his hand under her skirt, and attempting to place her hand on his crotch constituted sexual harassment); In re Ruddy, 130 N.J. 85 (1992) (two-year suspension for attorney guilty of four counts of endangering the welfare of a child, a third-degree offense, by fondling several young boys); In re Herman, 108 N.J. 66 (1987) (three-year suspension for attorney who pleaded guilty to the second degree offense of sexual assault for touching the buttocks of a ten-

year old boy); and In re Addonizio, 95 N.J. 121 (1984) (three-month suspension for attorney who pleaded guilty to criminal sexual contact; although the attorney's association with the victim arose from a lawyer-client relationship, the offense was not related to the practice of law).

The most serious sexual misconduct cases have resulted in disbarment and involved children as victims, not the case here. In re Wright, 152 N.J. 35 (1997); In re Palmer, 147 N.J. 312 (1997); and In re X, 120 N.J. 459 (1990).

Here, respondent preyed on his female clients in much the same way as the single-instance attorney in Pinto and the attorney in Hyderally, who made lewd remarks and unwanted sexual advances against two assigned clients. Like Hyderally, this respondent was not accused of touching the women. The conduct was limited to words. Here, however, the misconduct involved four separate women, at what was arguably one of the most vulnerable times in their lives – while under bankruptcy protection (the fourth woman was accompanying her father, a bankruptcy client, to respondent's office). His conduct was also spread out over a five-year time period, between 2001 and 2006 and, for some of the women, occurred on multiple occasions. Respondent offered discounted legal services, fee refunds – even

free motion-practice – in hopes of receiving sexual favors. The misconduct was, thus, more serious and pervasive than that committed by the attorneys in Pinto and Hyderally. It was not, however, as serious as the above lengthy suspension and disbarment cases dealing with child molesters.

In addition, respondent apparently never brought his books and records into compliance, after his 2002 admonition for recordkeeping violations. Although, ordinarily, recordkeeping infractions result in an admonition, See, e.g., In the Matter of Thomas F. Flynn, III, DRB 08-359 (February 20, 2009) (for extended periods of time, attorney left in his trust account unidentified funds, failed to satisfy liens, allowed checks to remain uncashed, and failed to perform one of the steps of the reconciliation process; no prior discipline); In the Matter of Jeff E. Thakker, DRB 04-258 (October 7, 2004) (attorney failed to maintain a trust account in a New Jersey banking institution); and In the Matter of Arthur G. D'Alessandro, DRB 01-247 (June 17, 2002) (numerous recordkeeping deficiencies), a reprimand would be warranted here because of respondent's inability or unwillingness to learn from his prior mistakes.

Respondent also practiced law for more than a year, in over 260 cases, while on the ineligible list, with the knowledge that

he had not paid the assessment. A reprimand is usually imposed when the attorney is aware of the ineligibility and practices law nevertheless. See, e.g., In re Marzano, 195 N.J. 9 (2008) (motion for reciprocal discipline; attorney represented three clients after she was placed on inactive status in Pennsylvania; the attorney was aware of her ineligibility); In re Kaniper, 192 N.J. 40 (2007) (attorney practiced law during two periods of ineligibility; although the attorney's employer gave her a check for the annual attorney assessment, she negotiated the check instead of mailing it to the Fund; later, her personal check to the Fund was returned for insufficient funds; the attorney's excuses that she had not received the Fund's letters about her ineligibility were deemed improbable and viewed as an aggravating factor); and In re Perrella, 179 N.J. 499 (2004) (attorney advised his client that he was on the inactive list and then practiced law; the attorney filed pleadings, engaged in discovery, appeared in court, and used letterhead indicating that he was a member in good standing of the Pennsylvania bar).

In aggravation, respondent also has a significant history of prior discipline, including a March 2002 admonition, a May 2003 reprimand, an October 2003 admonition, and a February 2008 censure.

We find that the OAE and the DEC's recommendations of a censure are insufficient to address respondent's overall behavior. We have been generous to respondent in the past, but he has repeatedly come back before us. This time, his core misconduct shows a serious character flaw. We, therefore, determine to impose a three-month suspension for the totality of his conduct. In a separate dissenting decision, Vice-Chair Frost and Member Doremus voted for a six-month suspension.

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
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of David J. Witherspoon
Docket No. DRB 08-302

Argued: April 16, 2009

Decided: July 23, 2009

Disposition: Three-month suspension

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

By Julianne K. DeCore
Chief Counsel