SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 06-254
District Docket No. IIA-03-015E

IN THE MATTER OF

JOSEPH LOWENSTEIN

AN ATTORNEY AT LAW

Decision

Argued: November 16, 2006

Decided: December 21, 2006

Patrick J. Kelly appeared on behalf of the District IIA 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 a reprimand filed by the District IIA Ethics Committee ("DEC"). The five-count complaint charged respondent with violating RPC 1.6 (confidentiality of information), RPC 4.1 (knowingly making a false statement of material fact or law to a third person), RPC 8.1(b) (failure to comply with a lawful demand for information from a disciplinary

authority)[1], and RPC 8.4, presumably (c) (conduct involving dishonesty, fraud, deceit or misrepresentation). These charges stem from respondent's failure to protect a lien against his client's settlement proceeds. We find that a reprimand is appropriate for respondent's conduct.

Respondent was admitted to the New Jersey bar in 1985. At the relevant time, he maintained a law office in Paterson, New Jersey.

In 2006, respondent was admonished for misconduct in three matters, including gross neglect, pattern of neglect, lack of diligence, and failure to communicate with clients.

In July 2000, Raye Futerfas, Esq., of Jacoby & Meyers, represented Kelby Sanders in a personal injury matter until respondent took over the case. Futerfas filed a complaint on Sanders' behalf, after failing to obtain a settlement acceptable to Sanders.

During the course of Futerfas' representation, Sanders needed financial assistance and requested "an advance" on his claim from Resource Management Company ("RMC"), a "funding institution" or "factor." According to Futerfas, on June 20, 2001, Sanders entered into an agreement with RMC that provided

[1] Although the complaint did not specifically cite this rule, it alleged that respondent failed to cooperate with the DEC during the course of the investigation.

for a $3,000 advance to Sanders, in exchange for a lien on the proceeds of his case. More specifically, the agreement provided:

> 1. [Sanders] shall irrevocably assign a security interest in a portion of his/her claim or any subsequent related claim to RMC in order to avoid having to settle his/her claim for less than he/she deems it to be worth. This is an agreement for an interest in [Sander's] lawsuit and not a loan.
>
> . . . .
>
> 4. [Sanders] hereby waives any defenses to payment of the amount, and hereby agrees not to seek to avoid payment of this amount.
>
> [Ex.C6.]

The RMC agreement required Sanders to be represented by counsel. The agreement further required written notification of the details of the case, including the name of the defendant, the circumstances of the accident, the medical information, and the name of the insurer.

Futerfas signed a June 20, 2001 authorization letter, agreeing to pay RMC at the conclusion of Sanders' matter. The authorization letter provided for the escrow of settlement funds if a dispute arose between the attorney and/or his client and RMC, or any other party. Futerfas and Sanders both signed the letter. In so doing, Sanders authorized his attorney to pay RMC from the settlement before funds were disbursed to him. According

to the letter, the amount owed to RMC constituted "a lien on the proceeds of the case."

In addition to the above documents, Futerfas completed RMC's attorney questionnaire, a document used by RMC to assess the risk involved in the transaction. In it, Futerfas estimated that Sanders' case was worth $50,000.

In correspondence to Futerfas, Benjamin Riggs, the owner of RMC and the grievant in this matter, explained that Sanders might not be eligible for the $5,000 that he had originally requested because "the payback amount could end up being too high a percentage of his initial settlement." Riggs further advised Futerfas that, because of the cost of RMC's services, Sanders should limit the amount of his advance "to what he absolutely need[ed]" and exhaust all other possibilities because RMC was "expensive, a last resort." Sanders then agreed to a smaller amount ($3,000) and to RMC's payment terms. RMC based its offer to Sanders on Futerfas' $50,000 valuation of the case.

On July 3, 2001, Prudential Insurance Company, one of the insurers in the case, offered Sanders a $10,000 settlement, which he rejected. Ultimately, Sanders became dissatisfied with Futerfas' representation. On June 6, 2002, he notified Futerfas that respondent would be taking over his case. On either June or July

24, 2002, Futerfas forwarded the Sanders file to respondent and asserted a $1,000 attorney's lien on the proceeds of the case.

In a certified letter dated June 25, 2002, Riggs notified respondent about RMC's lien against Sanders' settlement proceeds:

> We understand that your firm now represents Kelby Sanders . . . . Our firm provided an advance to Mr. Sanders through Jacoby & Meyers on June 19, 2001 of $3,000. That amount, plus any amount of fees accrued, constitute a lien on the proceeds of the case [emphasis added].
>
> Our purpose is to provide necessary funding to permit a plaintiff to pursue a more equitable settlement of their claim. Consequently we encourage the client to take only the minimum amount they need from us . . . .
>
> Copies of the Purchase Agreement and Authorization Letter that set forth the terms and conditions of our advance and lien are enclosed for your convenience. You will note Mr. Sanders is restricted from obtaining any further advances on the case in accordance with our agreement.
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> [Ex.C7.]

Riggs and respondent discussed the contents of the agreement and authorization letter on more than one occasion. In an October 22, 2002 memorandum, Riggs notified respondent, among other things, that, as of October 19, 2002, Sanders owed RMC $8,760. According to Riggs, respondent had informed him that

> it was a lousy case. He wanted to get rid of it. It wasn't worth his time. He couldn't persuade Mr. Sanders to settle. Because he wasn't going to walk away with enough money after paying our lien off. And could we

> reduce the amount he owed us in order to facilitate him persuading Mr. Sanders to settle the case. And he wanted to know what the exact amount was.
>
> [1T154.][2]

Elizabeth Reilly, a claims adjuster with Prudential, recalled discussions with respondent spanning the course of a month. According to Reilly, there were liability issues with Sanders' case. Prudential, therefore, stood firm on its settlement offer, which had been raised to $20,000. On March 7, 2003, respondent accepted the offer on Sanders' behalf.

Shortly thereafter, respondent advised Reilly that Sanders was going to discharge him because Sanders "wanted to go direct." Respondent also told Reilly that he had a $3,000 attorney lien and that "money was upfronted." He did not provide her with the details of the RMC advance, however. Reilly's note memorializing their February 26, 2003 conversation stated, in relevant part:

> JAY LOWENSTEIN CALLED . . . . ADVISED MY EXPERT DISAGREED WITH HIS EXPERT AND I WOULD MAINTAIN DEFENSE . . . . HIS DEMAND IS 25K . . . . I HAVE OFFERED 20K (HE THEN ADVISED HIS CLIENT WAS UPFRONTED BY A COMPANY 3K AND WAS TO HAVE CLMT REIMBURSE UNDER A SPECIFIED PERIOD OF TIME SINCE THIS CASE DIDN'T SETTLE CLMT NOW OWES 9K . . . . TO THIS COMPANY. I ADVISED NOT MY PROBLEM THAT I LOOK AT THE MEDICALS PRESENTED AND ONLY THE MEDICALS . . . .
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> [Ex.C15 at 2.]

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[2] 1T refers to the transcript of the DEC hearing on January 5, 2006.

Reilly explained that, as a matter of protocol, Prudential forwarded to attorneys the "lien language" to be included in standard, general releases, to ensure that all liens were paid from the settlement proceeds. Although respondent had notified Reilly of RMC's lien before, he did not raise it again or provide her with any specific information about it, as he had done with his own lien.

Sanders signed the Prudential release, dated March 11, 2003, in which he agreed that all liens would be satisfied directly from the proceeds of the settlement. Sanders faxed the release to Reilly on March 10, 2003. Sanders also forwarded to Prudential a note dated March 11, 2003, also faxed on March 10, 2003. The note stated:

> I, Kelby Sanders, hereby discharge Jay Lowenstein, Esq. from representing me. I no longer want Jay Lowenstein to represent me and hereby inform Prudential Insurance Company that Mr. Lowenstein is no longer representing me. Please send my settlement check in my name only. [3]
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> [Ex.C22at4.]

Reilly testified that, had she known the specifics of the RMC lien, she would have included that information in the Sanders' release, to avoid a lawsuit. Reilly explained that Prudential's

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[3] Respondent explained that the discrepancies between the dates on the release and discharge notice and the date they were faxed were caused by errors. It appears that respondent faxed the release and discharge for Sanders' signature before March 10, 2003, the date Sanders faxed that information to Reilly. The next day, respondent faxed the same discharge note and letter to Reilly, asserting his lien.

standard practice did not include checking files for liens, because the general release covered all liens.

On March 12, 2003, Prudential issued two separate checks – one to Sanders ($17,000) and one to respondent ($3,000).

Benjamin Riggs testified that RMC is involved in merger and acquisition consulting, and the advance of funds to attorneys. On occasions, RMC would advance funds to plaintiffs through "a purchase of an assignment of contingency fees."

According to Riggs, he filed a grievance against respondent because, even though he had formally notified respondent about his lien against respondent's client, his lien had not been protected. Riggs explained that the authorization letter applied to successors and was irrevocable, thereby making respondent responsible for payment to RMC, from his escrow account, for the full amount owed to RMC.

Riggs testified that, at some point, respondent told him that he was unable to settle Sanders' case because RMC's fee was too high. So as not to impede the settlement, Riggs agreed to consider discounting RMC's fee, but first wanted to see a summary of anticipated disbursements from the settlement. Although respondent agreed to send that information, he never did. After further negotiations, Riggs agreed to cut his fee in half.

In a March 11, 2003 conversation, respondent informed Riggs that Sanders had discharged him and was proceeding pro se. Riggs inquired about the status of RMC's lien. Respondent would not confirm whether he had filed a lien on RMC's behalf or provide the name of the adjuster or claim number, asserting that he was bound by the attorney/client privilege and that Sanders had directed him not to divulge that information. Respondent, nevertheless, told Riggs that he would attempt to ensure payment to RMC.

Absent the information that Riggs had requested, his efforts to contact the appropriate claims adjuster at Prudential were to no avail. Riggs was able to obtain Reilly's name and Prudential's claim number from Futerfas. However, by the time Riggs contacted Reilly, it was too late; Sanders had already picked up his settlement check. As of Riggs' March 14, 2003 conversation with respondent, respondent had not revealed that he, too, had already received his legal fees from Prudential.

According to Riggs, he had several conversations with respondent about a number of issues, including the details of RMC's business and its propriety. Riggs, therefore, provided respondent with a copy of an ethics opinion to justify RMC's practices. Respondent also purportedly asked Riggs if he could represent RMC in certain matters, including collection cases.

Riggs believed that Sanders and respondent had arranged for respondent's discharge based on a number of factors, including respondent's complaint that he could not "get rid" of the case because Sanders would not accept the settlement, and respondent's request that Riggs reduce RMC's lien to facilitate a settlement. In addition, Riggs believed that the timing of events and respondent's refusal to give him information about whom to contact at Prudential supported the conclusion that there was some type of arrangement between Riggs and Sanders. According to Riggs, he assumed that, once he obtained the information from Futerfas, he would have several days to contact the adjuster. However, when he spoke to Reilly a few days later, he discovered that Prudential had already paid Sanders and respondent.

Riggs found suspicious, too, that the letters faxed to him on March 10, 2003 were dated March 11, 2003; that Sanders would either be acting pro se or hiring another attorney because he was unhappy with Prudential's offer; that respondent was also representing Sanders' mother; and that respondent had asserted that the Prudential claim number and the adjuster's name were protected from disclosure by the attorney-client privilege.

For his part, respondent explained that he had known Sanders prior to taking over the matter from Jacoby & Meyers. He had

represented him once before, and had represented Sanders' mother in personal injury and workers' compensation matters.

Respondent admitted that he learned of RMC's lien early on. Afterwards, he telephoned Riggs to introduce himself as Sanders' new attorney, and challenged the loan as being usurious because RMC was charging approximately 150% interest per annum. Respondent did not contest the agreement in court.

Respondent told Sanders that the amount of interest on the RMC loan was "in excess of the usury rate," and that he would attempt to lower the amount that Sanders owed RMC. Sanders authorized him to negotiate a $5,000 payment. Respondent confirmed that, at the end of February 2003, he told Reilly about RMC's lien, hoping to secure a larger settlement on Sanders' behalf. However, Reilly would not increase Prudential's offer. Respondent was, nevertheless, able to convince Riggs to reduce RMC's lien to $5,000. He also reduced his one-third fee to $3,000. On March 7, 2003, respondent accepted the $20,000 settlement offer from Prudential.

Respondent purportedly told Sanders to pay RMC from the settlement proceeds, but never sent him a letter memorializing this instruction. Although Sanders agreed to make the payment, he failed to do so.

Three days after respondent settled Sanders' case, Sanders discharged him. Respondent could not explain Sanders' reason for doing so. Respondent assumed that it was "to screw everybody . . . to get whatever he [could] on the case." He believed that Sanders was out to cheat him and RMC. Respondent denied planning for his own discharge to avoid payment to RMC. He disavowed any intent to defraud that company.

Respondent prepared the Sanders release utilizing language faxed by Prudential and the statement discharging him from Sanders' case. Sanders, thereafter, faxed the release and the discharge notice to Reilly.

Respondent confirmed that he (1) contacted Reilly to assert his attorney's lien; (2) informed Riggs that he had been discharged and advised him to contact Prudential to assert RMC's lien;[4] and (3) withheld information from Riggs concerning Sanders' claim, asserting the attorney/client privilege, a defense he had not researched. Respondent maintained, however, that Riggs could have obtained enough information from the police report to relay to Prudential to enable it to locate the claim information and adjuster's name.

Respondent's testimony about his knowledge and obligations under the RMC agreement was conflicting. For instance, he

[4] Respondent never mentioned this advice in his reply to the grievance.

conceded his knowledge of the terms of the authorization letter, which required the escrow of sufficient funds to satisfy RMC's lien, if a dispute arose. Nevertheless, he argued first that he was not bound by those terms because he was not a signatory to the agreement, only to admit later that he was not free to disregard its terms. He added, however, that he had been unable to comply with the agreement because Prudential had sent the funds directly to Sanders. He also asserted that, at that time, he did not recall the specific requirements to escrow disputed funds and to forward information to RMC because he was distracted by an ongoing trial and the volume of his law practice.

Respondent admitted that he did not give Prudential written notice that RMC had reduced its lien. His justification was that he believed that it was not in his client's best interests because Prudential might have offered a larger settlement, if it believed that RMC's lien was higher. In addition, he claimed, he did not believe that he was obligated to disclose the exact amount of the lien to Prudential.

Respondent contended that his failure to notify Prudential about RMC's lien was negligent. He blamed his dereliction on being put in the middle between an angry client's pressures about the attorney/client privilege and Riggs' "threats" and requests for information.

Finally, respondent testified that, except for the Sanders case, he had never been discharged from a representation at the last minute. He stated that he had experienced problems with the Sanders family in the past, including a possible theft from his office, and that representing the Sanderses had been a mistake.

The DEC found the testimony of Futerfas, Reilly, and Riggs to be "credible, reliable and trustworthy."

The DEC determined that respondent knew about the terms of the RMC agreement and about RMC's lien against the settlement proceeds. The DEC noted that Riggs had given respondent documentation supporting the validity of RMC's interests, and that the two had had multiple conversations about the propriety of the agreement. The DEC also determined that the authorization letter signed by Sanders first obligated Jacoby & Meyers, and then respondent, to comply with the terms of the RMC agreement.

The DEC found that respondent's negotiations with Prudential and the information respondent conveyed to Reilly about RMC's $9,000 lien to induce her to raise the settlement offer did not provide Prudential with sufficient notice of RMC's lien against the settlement proceeds.

The DEC concluded that respondent's failure to give the same protection to the RMC lien that he had given to his own lien was intentional. The DEC also concluded that respondent did not

cooperate with Riggs when Riggs sought information to protect RMC's lien, and that respondent improperly invoked the attorney/client privilege to withhold information from Riggs.

According to the DEC:

> As a result of the timing of the release, the discharge of the Respondent as counsel for Mr. Sanders and, the immediate release of funds, we find that the Respondent knew or should have known that Mr. Sanders was not going to honor his obligation to RMC. The Respondent's actions or inactions were an attempt to "look the other way" in a situation in which he had an ethical obligation to act. The Respondent knowingly failed to disclose his conclusion that he reached about his client[']s fraudulent intentions to RMC when disclosure was necessary to avoid assisting in a fraudulent act by Mr. Sanders.
>
> [HR4¶24.][5]

The DEC found that respondent violated RPC 4.1 (failure to disclose a material fact to a third person when necessary to avoid assisting a fraudulent act by a client), and RPC 1.6(b)(1) (failure to reveal information to the proper authorities necessary to prevent the client from committing a fraudulent act that the lawyer reasonably believes is likely to result in substantial injury to the financial interest of another).

The DEC dismissed the charged violations of RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation), and RPC 8.1(b) (failure to comply with a lawful demand for information from

[5] HR refers to the hearing report.

a disciplinary authority), in counts one and five of the complaint. The DEC found no clear and convincing evidence that respondent had counseled Sanders to discharge him to avoid the satisfaction of the RMC lien (RPC 8.4(c)).

The DEC recommended a reprimand.

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

The DEC specifically found the testimony of Futerfas, Reilly, and Riggs to be credible, reliable, and trustworthy. It, must, thus, have found respondent's testimony less worthy of belief. Moreover, respondent's inconsistent testimony regarding his knowledge of and obligations under the RMC agreement and authorization letter underscores his lack of credibility.

The evidence clearly and convincingly establishes that, from the outset of the representation, respondent knew of RMC's lien against Sanders' settlement proceeds. Futerfas as well as Riggs had provided respondent with copies of the RMC agreement and authorization letter. Moreover, respondent had a number of discussions with Riggs, which included the legality of the conditions of the advance to Sanders and the compromise of RMC's lien. Eventually, to facilitate a settlement, Riggs agreed to reduce the lien. Respondent never informed Reilly that RMC's

lien had been reduced, believing that, if he did, Prudential would have no incentive to increase its settlement offer.

Respondent's version of events following Sanders' acceptance of Prudential's offer does not ring true.

As noted above, respondent settled the case for $20,000 on March 7, 2003. Thereafter, Sanders purportedly unilaterally decided to discharge respondent from the case. At that point, however, there was nothing left to do but to collect the settlement proceeds. Respondent had already prepared the release and written notice of his attorney lien and had faxed it to Reilly. Significantly, Sanders' March 11, 2003 discharge letter, which respondent prepared, directed Prudential to send Sanders' share of the settlement proceeds in Sanders' name only. Prudential mailed the proceeds the very next day, March 12, 2003.

Respondent claimed that he could not comply with the terms of the RMC agreement and authorization letter protecting RMC's lien because he did not personally receive the settlement funds and because he did not recall his obligation to escrow disputed funds or to keep RMC abreast of new developments in the case. We agree with the DEC that the record does not clearly and convincingly show that respondent violated RPC 8.4(c) by orchestrating with Sanders his discharge, to avoid payment of the RMC lien. However, we find ample evidence that respondent

violated RPC 4.1(a)(2) when he failed to notify Prudential of RMC's lien against the proceeds of the settlement.

RPC 4.1(a)(2) provides that a lawyer shall not knowingly "fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a . . . fraudulent act by a client." After respondent settled the matter, Reilly provided him with language to insert into a release. Respondent, however, failed to make mention of RMC's lien in the release, and failed to provide any specific information to Prudential about the lien - either the name of the lienholder or the amount of the lien. We find that respondent intentionally withheld information from Prudential to avoid the satisfaction of the RMC lien. Unquestionably, thus, his conduct in this regard violated RPC 4.1(a)(2).

The complaint also charged respondent with violating RPC 1.6 for failing to disclose to RMC that Sanders intended to proceed pro se, which would result in Sanders' avoidance of RMC's lien – a fraud against RMC. We find that this conduct was subsumed in RPC 4.1(a)(2), which is the more applicable rule in this context. RPC 1.6(b)(1), which requires reporting certain information to "proper authorities," typically applies to the reporting of information to a tribunal or a law enforcement agency. Michels, New Jersey Attorney Ethics § 15:3-3b. (Gaan

2006). We, therefore, dismiss this charged violation. We agree, however, with the DEC's dismissal of a violation of RPC 8.1(b) for lack of clear and convincing evidence.

The following cases are helpful in determining the proper quantum of discipline for respondent's ethics transgressions. Normally, an admonition results for mere failure to promptly remit funds to satisfy a lien. See, e.g., In the Matter of Douglas F. Ortelere, DRB 03-377 (February 11, 2004) (attorney settled a personal injury case, disbursed his legal fee to himself, withheld money to pay outstanding medical liens but did not promptly disburse those funds, and failed to reasonably communicate with the client about the status of the settlement proceeds despite her numerous requests; the attorney was also ineligible to practice law during a period of the representation); In the Matter of Craig Altman, DRB 99-133 (June 17, 1999) (attorney signed a letter of protection for a medical provider and, after the settlement was paid, did not pay the provider's bill); and In re Spizz, 140 N.J. 38 (1995) (in violation of a court order, the attorney prematurely distributed escrow funds to his clients without notifying his adversary and without obtaining her consent). But see In re Zeitler, 158 N.J. 182 (1999) (attorney reprimanded for the improper release of escrow funds to himself and client despite written assurances to the insurance carrier that medical bills and liens

would be paid out of the settlement proceeds; admonition would have resulted but for the attorney's extensive ethics history (admonition, one-year suspension, and two-year suspension)).

Cases that include an element of deceit have resulted in the more serious discipline. In In re Sonstein, 174 N.J. 293 (2002), the attorney received a three-month suspension for failing to notify a lienholder that he had in his possession settlement funds in which the lienholder had an interest. Although Sonstein had assured the lienholder that it would protect its lien, he escrowed about half of the lien amount and disbursed the remainder of the settlement funds. Sonstein also endorsed the client's and the lienholder's names on the settlement check, without their consent. We found that Sonstein acted with deceit when he improperly endorsed the settlement check and failed to satisfy the lien, after having assured the lienholder that he would do so. Sonstein also charged his client an excessive fee. See also In re Moorman, 176 N.J. 510 (2003) (three-month suspension for attorney who deceived another attorney to whom he had agreed to pay a partial fee for work performed on the case before its referral; the proofs demonstrated that the attorney had not intended to pay the fee; he deposited the settlement check and disbursed the entire fee to himself, stalling the other attorney's inquiries for several years, and eventually miscalculated his fee; in another matter, he forged

a client's endorsement on a settlement check; prior history included a public reprimand, a reprimand, and two three-month suspensions).

While respondent's conduct is most similar to that displayed by the attorney in Sonstein, who received a three-month suspension, Sonstein's conduct was more serious because it involved the additional elements of fee overreaching and forgery of endorsements. Likewise, Moorman's conduct was more serious because it involved misrepresentations and forgery. Also, Moorman had an extensive ethics history.

Under the totality of circumstances, we find that a reprimand is the appropriate extent of discipline for respondent's conduct.

Chair O'Shaughnessy, Member Lolla, and Member Stanton would impose a censure. Member Boylan 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: Julianne K. DeCore
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Joseph Jay Lowenstein
Docket No. DRB 06-254

Argued: November 16, 2006

Decided: December 21, 2006

Disposition: Reprimand

Members	Disbar	Suspension	Censure	Reprimand	Admonition	Did not participate
O'Shaughnessy			X			
Pashman				X		
Baugh				X		
Boylan						X
Frost				X		
Lolla			X			
Neuwirth				X		
Stanton			X			
Wissinger				X		
Total:			3	5		1

Julianne K. DeCore
Chief Counsel