

SUPREME COURT OF NEW JERSEY  
Disciplinary Review Board  
Docket No. DRB 01-059

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IN THE MATTER OF  
BEN W. PAYTON  
AN ATTORNEY AT LAW

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Decision

Argued: July 19, 2001

Decided: December 31, 2001

Anne L. Cascone appeared on behalf of the District XII Ethics Committee.

Respondent appeared pro se.

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

This matter was before us based on a recommendation for discipline filed by the District XII Ethics Committee ("DEC"). The complaint charged respondent with violations of RPC 1.1(b) (pattern of neglect) — a charge that was withdrawn at the hearing — RPC 1.3 (lack of diligence), RPC 1.4(a) (failure to communicate with client)<sup>1</sup>, RPC 1.5(a)

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<sup>1</sup> The complaint mistakenly cited a violation of RPC 1.4(c).

(charging an unreasonable fee) and RPC 1.5(b) (failure to provide client with a written retainer agreement). This matter was referred to the DEC by the District XII Fee Arbitration Committee, following a fee arbitration hearing.

Respondent was admitted to the New Jersey bar in 1992. At the relevant times, he maintained offices in Linden and Plainfield, New Jersey.

In 1997 respondent received an admonition for violations of RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence) and RPC 1.4(a) (failure to communicate with client). In the Matter of Ben W. Payton, Docket No. DRB 97-247 (October 27, 1997). In 2001 respondent received a reprimand for lack of diligence, failure to communicate with client, failure to communicate a fee in writing, failure to expedite litigation and failure to cooperate with ethics authorities. In re Payton, 167 N.J. 2 (2001). In June 2001 respondent was suspended for three months for violations of RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), RPC 1.4(a) (failure to communicate with clients), RPC 1.5(b) (failure to provide client with a written fee agreement) and R.1:21-6 and RPC 1.15(d) (recordkeeping deficiencies). That matter proceeded on a default basis. In re Payton, 168 N.J. 109 (2001)

Respondent failed to appear at the September 27, 2000 DEC hearing, despite proper notice, but filed an answer to the complaint. Before the hearing started, the DEC telephoned respondent and left a message on his answering machine about the hearing. Respondent did not reply to the call or letters sent to him after the hearing, providing him with an opportunity to be heard post-hearing.

The grievant, Charlotte Briscoe, was the only witness at the DEC hearing. Briscoe testified that she met with respondent on August 5, 1998 to discuss a possible suit against her former employer for wrongful termination of employment. Prior to meeting with respondent, Briscoe had filed an action with the Equal Employment Opportunity Commission ("EEOC"),<sup>2</sup> which resulted in a finding of no cause of action. Thereafter, she had ninety days to file a lawsuit. At their August 5, 1998 meeting, respondent agreed to take the case on a contingency basis and informed Briscoe that she needed to pay the court filing fees "up front." Briscoe was uncertain, however, whether she wanted to proceed with the case. She and respondent met a second time, on August 25, 1998, three days before the filing deadline. Respondent informed Briscoe that he would be able to file the complaint in time, if she were to promptly give him a \$560 check for filing fees and provide him with the paperwork related to her former job. As requested, on the next day, August 26, 1998, Briscoe put the package in respondent's mailbox. Also on that day, Briscoe sent a certified letter to respondent to confirm that he had received the check and the information requested. Briscoe testified that she had no further contact with respondent after their August 25, 1998 meeting.

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<sup>2</sup> It is possible that Briscoe was required to file an action in federal court. See 29 CFR § 1601.19. However, no evidence was presented about the substance of her claim or whether her claim could be redressed under this State's Law Against Discrimination, NJSA 10:5-1 et seq. or whether she may have filed her claim with the Division on Civil Rights.

According to Briscoe, she tried to contact respondent by telephone immediately after leaving the package, either that day or the following day and several times thereafter, without receiving a return telephone call. Therefore, on September 11, 1998, she wrote to respondent, complaining that she had tried to contact him several times by telephone to confirm that he had received both the package containing the check and her August 26, 1998 letter. She asked him to confirm that the complaint had been filed by August 28, 1998. She further requested that respondent provide her with a letter outlining their agreement, as well as a receipt for the check. According to Briscoe, she had already contacted the bank and learned that her check had been cashed by respondent on August 31, 1998. Briscoe stated that she had contacted the Middlesex County clerk's office to determine whether a complaint had been filed in her behalf; for unknown reasons, the clerk's office was unable to provide her with any information regarding her matter.

In respondent's answer to the DEC complaint, he stated that, on August 31, 1998, he filed a complaint with the New Jersey Superior Court, Law Division, Middlesex County.

When respondent failed to reply to Briscoe's September 11, 1998 letter, she again tried to telephone him, to no avail. She then contacted the DEC for advice on how to proceed. She was advised to file for fee arbitration and did so. Respondent did not appear at the fee arbitration hearing. The fee arbitration decision ordered respondent to refund to Briscoe the entire amount (\$560) paid to him. When respondent failed to do so within thirty days, as prescribed by the rules, the Office of Attorney Ethics ("OAE") filed a motion for

his temporary suspension. On the return date of the motion before us, respondent and the OAE entered into a consent order for the refund of the fee. Although respondent was somewhat late in complying with the terms of the consent order, he ultimately issued the refund and also paid a \$500 sanction to the Disciplinary Oversight Committee.

As noted earlier, notwithstanding respondent's failure to attend the DEC hearing, he filed an answer to the complaint, claiming that he had filed a complaint in Briscoe's behalf on August 31, 1998. He did not, however, submit any documentation to corroborate this claim.

According to Briscoe, from August 26 until September 18, 1998 she attempted to reach respondent approximately six or seven times, but was unsuccessful.

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The DEC found that respondent violated RPC 1.3 because there was no evidence that he had filed a complaint in Briscoe's behalf. In addition, the DEC noted that respondent had failed to submit any information on the status of Briscoe's matter. As a result, the DEC reasoned that, if the complaint had been filed more than two years ago, there would have been some evidence of the progress of the case.

The DEC also found that respondent's failure to reply to any of Briscoe's requests for information about the status of her case was a violation of RPC 1.4(a). Respondent's

defense to this charge was his inability to locate Briscoe's file, following the departure of one of the tenants from his law office. The DEC found that respondent's failure to return Briscoe's numerous telephone calls was inexcusable.

The DEC did not find a violation of RPC 1.5(a) because there was no indication that the \$560 he received was a fee for his services. The check was purportedly to cover the filing fees and costs associated with initiating the lawsuit. The DEC found, however, a violation of RPC 1.5(b), based on respondent's failure to provide Briscoe with a written fee agreement.

Finally, the DEC found that respondent's failure to appear at the DEC hearing was an aggravating factor. The DEC remarked that, if not for respondent's ethics history, it would have recommended a reprimand, instead of a three-month suspension.

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

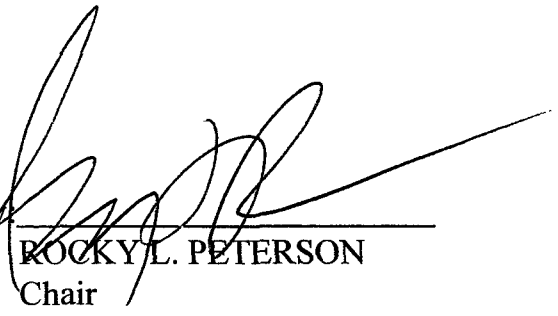
We agree with the DEC's findings in this matter, with the exception of the violation of RPC 1.3. There is no clear and convincing evidence that respondent failed to file a complaint in Briscoe's behalf, after meeting with her on August 25, 1998. It is unquestionable, however, that respondent failed to contact his client and ignored her

repeated telephonic and written inquiries about the status of her case, in violation of RPC 1.4(a). Also, the DEC correctly determined that there was a violation of RPC 1.5(b) for respondent's failure to provide his client with a written retainer agreement. Furthermore, the DEC properly dismissed the charge of a violation of RPC 1.5(a). Finally, respondent's failure to participate in the DEC hearing is, as the DEC stated, an aggravating factor.

Had this been respondent's first brush with the ethics authorities, then either an admonition or a reprimand would have been appropriate discipline. See In the Matter of Angela C. W. Belfon, Docket No. DRB 00-157 (January 11, 2001) (admonition for gross neglect, lack of diligence, failure to communicate with client, failure to expedite litigation, failure to promptly deliver funds to a client); In the Matter of Michael A. Amantia, DRB Docket No. 98-402 (September 22, 1999) (admonition for gross neglect, lack of diligence and failure to communicate with client); and In re DeBosh, 164 N.J. 618 (2000) (reprimand for gross neglect, failure to communicate with client, failure to provide client with written fee agreement and failure to cooperate with disciplinary authorities). Respondent, however, has already received an admonition, a reprimand and a three-month suspension. And although we noted that respondent's conduct occurred during the course of the acts that led both to his reprimand (1996 to 1999) and to his three-month suspension (1995 to 1999), we nevertheless unanimously determined that a three-month concurrent suspension is the appropriate discipline for respondent's infractions because it recognizes the repetitive nature of his conduct toward his client matters, as well as his repeated failure to cooperate with the DEC. Two members did not participate.

We further determined to require respondent to reimburse the Disciplinary Oversight

Committee for administrative costs.

By   
ROCKYL. PETERSON  
Chair  
Disciplinary Review Board



**SUPREME COURT OF NEW JERSEY  
DISCIPLINARY REVIEW BOARD  
VOTING RECORD**

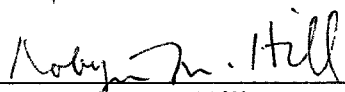
In the Matter of Ben W. Payton  
Docket No. DRB 01-059

Argued: July 19, 2001

Decided: December 31, 2001

Disposition: Three-month suspension (concurrent)

<i>Members</i>	<i>Disbar</i>	<i>Three-month Suspension</i>	<i>Reprimand</i>	<i>Admonition</i>	<i>Dismiss</i>	<i>Disqualified</i>	<i>Did not participate</i>
<i>Peterson</i>		X					
<i>Maudsley</i>		X					
<i>Boylan</i>		X					
<i>Brody</i>		X					
<i>Lolla</i>							X
<i>O'Shaughnessy</i>		X					
<i>Pashman</i>		X					
<i>Schwartz</i>							X
<i>Wissinger</i>		X					
<b>Total:</b>		7					2

  
 Robyn M. Hill  
 Chief Counsel