

SUPREME COURT OF NEW JERSEY  
Disciplinary Review Board  
Docket No. DRB 10-436  
District Docket No. XIV-2010-0027E

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

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Decision

Argued: March 17, 2011

Decided: June 8, 2011

Lee A. Gronikowski appeared on behalf of the Office of Attorney Ethics.

Respondent waived appearance for oral argument.

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

This matter was before us on a disciplinary stipulation between respondent and the Office of Attorney Ethics (OAE). Respondent stipulated that he practiced law while ineligible to do so for failure to pay the 2010 New Jersey Lawyers' Fund for Client Protection (CPF). The OAE recommends the imposition of a reprimand. We determine that a censure is the appropriate quantum of discipline.

Respondent was admitted to the New Jersey bar in 1992. He has a significant ethics history. On October 27, 1997, he was admonished for gross neglect, lack of diligence, and failure to communicate with the client in one matter. In the Matter of Ben W. Payton, DRB 97-247 (October 27, 1997).

On March 7, 2001, respondent was reprimanded for gross neglect, failure to communicate with the clients, and failure to cooperate with the investigation of two grievances. In re Payton, 167 N.J. 2 (2001).

On June 22, 2001, respondent was suspended for three months for gross neglect, lack of diligence, failure to communicate with clients, failure to set forth, in writing, the basis or rate of his fee, and recordkeeping deficiencies. That matter proceeded on a default basis. In re Payton, 168 N.J. 109 (2001).

On April 30, 2002, respondent was again suspended for three months for failure to communicate with a client and to set forth, in writing, the basis or rate of his fee. In re Payton, 172 N.J. 34 (2001). The suspension was to run concurrently with the three-month suspension ordered on June 22, 2001. On December 26, 2002, respondent was reinstated to the practice of law. In re Payton, 175 N.J. 66 (2002).

Effective February 28, 2011, respondent was temporarily

suspended for failure to comply with a fee arbitration determination. In re Payton, 205 N.J. 103 (2011).

Respondent has been declared ineligible to practice law seven different times, between 1993 and 2010, for failure to pay the CPF annual assessment.

Respondent and the OAE entered into a December 6, 2010 disciplinary stipulation, in which he admitted having practiced law during a period of ineligibility, from September 28, 2009 to August 18, 2010, for failure to pay the CPF annual assessment for 2010. According to the stipulation, because of respondent's own hospitalization, his financial condition became so dire that he was without sufficient funds to pay the CPF assessment.<sup>1</sup>

In aggravation, the stipulation cites respondent's disciplinary record and his knowledge of his ineligibility. In mitigation, the stipulation mentions respondent's ready admission of wrongdoing during the OAE investigation.

Although the stipulation factually establishes respondent's misconduct, it does not identify the RPC that he violated. If there were some ambiguity about which rule applies, it could constitute grounds for rejection of the stipulation, in its present form. Here, however, there is no ambiguity about the RPC

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<sup>1</sup> Respondent's wife and law partner, Queen E. Payton, has a companion case (DRB 10-441) for identical misconduct, which was also considered at our March 17, 2011 session.

inadvertently omitted from the stipulation. Indeed, only one RPC is implicated when an attorney practices law while ineligible for failure to pay the CPF annual attorney assessment, that is, RPC 5.5(a) (engaging in the unauthorized practice of law). Additionally, the cases cited by the parties are all RPC 5.5(a) cases in which the attorneys practiced law while ineligible.

Following a review of the record, we are satisfied that the stipulation clearly and convincingly establishes that respondent's conduct was unethical.

Respondent stipulated that, from September 28, 2009 to August 18, 2010, after he was placed on the CPF list of ineligible attorneys, he continued to practice law. He conceded that he knew, at the time, that he was ineligible to practice law.

In aggravation, we have considered respondent's extensive disciplinary history (an admonition, a reprimand, and two three-month suspensions), as well as his knowledge of his ineligible status, during the relevant period. In mitigation, we noted that respondent was struggling financially at the time and that he quickly admitted his wrongdoing to the OAE.

A reprimand is usually imposed for practicing law while ineligible, when the attorney either has an extensive ethics

history, or is aware of the ineligibility and practices law nevertheless, or has committed other ethics improprieties, or has been disciplined for conduct of the same sort. See, e.g., In re Austin, 198 N.J. 599 (2009) (during one-year period of ineligibility attorney made three court appearances on behalf of an attorney-friend who was not admitted in New Jersey, receiving a \$500 fee for each of the three matters; the attorney knew that he was ineligible; also, the attorney did not keep a trust and a business account in New Jersey and misrepresented, on his annual registration form, that he did so; several mitigating factors considered, including the attorney's unblemished disciplinary record); In re Marzano, 195 N.J. 9 (2008) (motion for reciprocal discipline, following attorney's nine-month suspension in Pennsylvania; the attorney represented three clients after she was placed on inactive status in Pennsylvania; she was aware of her ineligibility); In re Davis, 194 N.J. 555 (2007) (motion for reciprocal discipline; attorney represented a client in Pennsylvania when the attorney was ineligible to practice law in that jurisdiction as a non-resident active attorney and later as an inactive attorney; the attorney also misrepresented his status to the court, to his adversary, and to disciplinary authorities; the attorney was suspended for one year and a day in Pennsylvania; extensive mitigation considered); 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 CPF; later, her personal check to the CPF was returned for insufficient funds; the attorney's excuses that she had not received the CPF's letters about her ineligibility were deemed improbable and viewed as an aggravating factor); In re Coleman, 185 N.J. 336 (2005) (motion for reciprocal discipline after attorney's two-year suspension in Pennsylvania; while on inactive status in Pennsylvania, the attorney practiced law for nine years, signing hundreds of pleadings and receiving in excess of \$7,000 for those services); In re Perrella, 179 N.J. 499 (2004) (attorney advised his client that he was on the Pennsylvania 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 re Forman, 178 N.J. 5 (2003) (for a period of twelve years, the attorney practiced law in Pennsylvania while on the inactive list; he was suspended for one year and a day in Pennsylvania; compelling mitigating factors considered); In re Lucid, 174 N.J. 367 (2002) (attorney practiced law while ineligible; the attorney had been disciplined three times before: two private reprimands and a

reprimand); In re Hess, 174 N.J. 346 (2002) (attorney practiced law while ineligible and failed to cooperate with disciplinary authorities; the attorney had received an admonition for practicing law while ineligible and failing to maintain a bona fide office in New Jersey); and In re Ellis, 164 N.J. 493 (2000) (one month after being reinstated from an earlier period of ineligibility, the attorney was notified of his 1999 annual assessment obligation, failed to make timely payment, was again declared ineligible to practice law, and continued to perform legal work for two clients; he had received a prior reprimand for unrelated violations). But see In the Matter of Maria M. Dias, DRB 08-138 (July 29, 2008) (although attorney knew of her ineligibility, compelling mitigation warranted only an admonition; in an interview with the OAE, the attorney admitted that, while ineligible to practice law, she had appeared for other attorneys forty-eight times on a part-time, per diem basis, and in two of her own matters; the attorney was unable to afford the payment of the annual attorney assessment because of her status as a single mother of two young children).

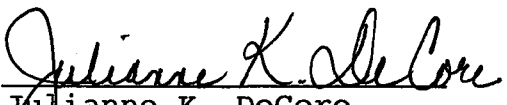
This matter is similar to Lucid (presence of a significant ethics history), but more serious because this respondent received two separate three-month suspensions, an admonition and a reprimand. Attorney Lucid was never suspended from the

practice of law. We, therefore, determine that a censure is the proper sanction for respondent's conduct, as aggravated by his ethics history and his knowledge of his ineligibility. Discipline more severe than a censure is not warranted, given the driving force behind the infraction, that is, respondent's poor financial condition, caused by his poor health. Moreover, because this infraction is unrelated to respondent's prior violations, it cannot be said that he did not learn from similar mistakes.

Member Doremus 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  
Chief Counsel



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SUPREME COURT OF NEW JERSEY  
DISCIPLINARY REVIEW BOARD  
VOTING RECORD

In the Matter of Ben W. Payton  
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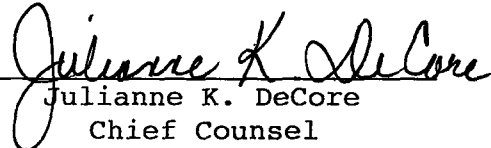
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Argued: March 17, 2011

Decided: June 8, 2011

Disposition: Censure

<i>Members</i>	Disbar	Suspension	Censure	Dismiss	Disqualified	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  
Chief Counsel