

SUPREME COURT OF NEW JERSEY  
Disciplinary Review Board  
Docket No. DRB 00-078

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

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Decision

Argued: May 11, 2000

Decided: September 18, 2000

Michael Mitzner 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 the Board based on a recommendation for discipline filed by the District XII Ethics Committee ("DEC"). The complaint alleged that respondent neglected several matters.

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

reported his findings to Sallie. Apparently, the dealership had long since ceased operations and there was no real prospect for recovery. Respondent claimed that he told Sallie about his findings, that she agreed not to pursue the matter further and that he closed his file with Sallie's approval. Respondent admitted that he did not memorialize any of his conversations with Sallie and had no evidence to corroborate his testimony.

#### The Student Loan

Apparently, Sallie retained respondent to look into a situation involving a student loan taken for her son. There is no record of that transaction. According to respondent, he investigated the matter and found that the business school was no longer in existence. Here, too, he stated, he closed the file with Sallie's approval. No other evidence was presented with regard to this matter.

#### The Medical Malpractice Action

Phyllis testified that, in or about 1997, her mother met with respondent about the possibility of filing a medical malpractice action against a hospital for its part in the death of her father, Sallie's husband. Phyllis stated that she was present for approximately fifteen minutes during Sallie and respondent's discussion about the steps that respondent would take in her mother's behalf.

Respondent testified that he filed a medical malpractice action against the hospital, alleging wrongful death. However, respondent admitted, he did not pursue the matter beyond the filing of the complaint, which was later dismissed for lack of prosecution. Respondent claimed that he lost track of the file when an attorney with whom he shared office space removed the file after a June 1998 office relocation.<sup>1</sup> By his own admission, however, respondent took no further measures to secure the file from either that attorney or the court.

Phyllis also testified that she placed at least nine telephone calls to respondent's office during the pendency of her mother's matters, but received no return call from respondent. Respondent had no explanation for his failure to comply with those requests for information.

It is not clear why respondent was charged with a violation of RPC 8.4(c), as there are no facts alleged to support that charge. With regard to the charge of a violation of RPC 1.5 for respondent's alleged failure to utilize a written retainer agreement, respondent offered no evidence of the existence of retainer agreements for any of the Glasgow matters.

Finally, respondent was charged with a violation of RPC 8.1(b). The DEC first wrote to respondent on June 15, 1999, asking about the grievance. Respondent replied on July 8, 1999. Thereafter, on August 11, 1999 the DEC requested additional information, which respondent did not supply. On September 22, 1999 the DEC filed the formal ethics complaint, which respondent answered three days later.

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<sup>1</sup>Respondent alluded to a falling-out with that attorney, adding that other files were missing as well after her departure.

## II - The Robert Bulle Matter - Docket No. XII-98-53E

The complaint alleged violations of RPC 1.3 (lack of diligence), RPC 1.4(a) (failure to communicate), RPC 3.2 (failure to expedite litigation), RPC 8.1(b) (failure to cooperate with the ethics authorities) and RPC 8.4(c) (conduct involving fraud, dishonesty, deceit or misrepresentation) in connection with respondent's handling of several matters for Robert Bulle. Bulle failed to appear at the DEC hearing, despite proper notice. Respondent was the only witness in this matter.

According to respondent, Bulle retained him in May or June 1998 to file a bankruptcy petition – which was rejected due to Bulle's prior bankruptcy filings – a tax matter and a contract dispute. Respondent testified that he reviewed numerous documents about the tax matter and prepared a complaint in the contract matter. At some point, respondent stated, Bulle lost his house in foreclosure, for which he blamed respondent. Respondent stated that, in a meeting at his office, Bulle “cursed him out” and stormed from the office. Respondent testified that, after that episode, he ceased working on all of Bulle's matters until a fee dispute between the two was settled. Bulle was later awarded the entire \$1,225 fee at an arbitration hearing.<sup>2</sup>

Lastly, regarding the alleged violation of RPC 8.1(b), the DEC first notified respondent about this grievance on February 3, 1999. Hearing nothing, the DEC sent respondent another letter on March 3, 1999. Respondent did not reply to that letter. On

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<sup>2</sup> Only after the Office of Attorney Ethics (“OAE”) filed a motion for respondent's temporary suspension did he refund the fees to Bulle. Exhibit J-4.

May 24, 1999 the DEC filed a formal ethics complaint against respondent. Respondent did not answer the complaint until three months later, on August 20, 1999.

### III - The Myra Muhamed Matter - Docket No. XII-99-10E

The complaint alleged violations of RPC 1.3 (lack of diligence), RPC 1.4(a) (failure to communicate), RPC 3.2 (failure to expedite litigation) RPC 8.1(b) (failure to cooperate with the ethics authorities) and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation.)

In or about April 1997 Myra Muhamed retained respondent to file an action for wrongful termination of employment by Merrill Lynch. Muhamed paid respondent \$452 toward suit expenses.

Muhamed testified that respondent prepared and gave her a copy of a complaint, which she believed respondent would then file in both federal and state court. However, according to Muhamed, respondent never filed the complaint in either court.

Muhamed testified that, by the summer of 1998 she had grown weary of respondent's infrequent updates. Therefore, Muhamed alleged, on numerous occasions in the latter half of 1998, she attempted to contact respondent by telephone in order to obtain information about the case. Respondent did not return those calls.

For his part, respondent testified that, as in the Glasgow matter, the attorney with whom he shared space had taken Muhamed's file during her June 1998 office relocation.

Respondent also stated that he discussed Muhamed's claims with a Chicago law firm that was handling a class action suit of a similar nature against Merrill Lynch. According to respondent, he was told by that firm not to file a complaint without its approval and to consider instead adding Muhamed as a plaintiff in the class action. Indeed, respondent testified that Muhamed had expressed an interest in being joined as a plaintiff in that action.<sup>3</sup> Nevertheless, respondent admitted, he did not pursue the class action lawsuit or file a separate action in either state or federal court.

Respondent also admitted that he failed to communicate with Muhamed for the latter part of 1998, claiming generally that a series of personal and financial setbacks left him "depressed" at about that time and that the matter simply "got away" from him. Respondent offered no medical evidence to support this claim.

With regard to the alleged violation of RPC 8.4(c), there is only one passing reference to a misrepresentation in the hearing transcript, an issue that was never raised again.

With regard to the alleged violation of RPC 8.1(b), the DEC first wrote to respondent on March 9, 1999 for information about the case. Respondent replied four months later, by letter dated July 5, 1999. In the interim, the formal ethics complaint was filed on or about May 24, 1999. Yet, respondent did not file an answer until July 30, 1999.

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<sup>3</sup>Muhamed was aware of the Chicago class action, but knew nothing at the time about the details of respondent's communications with that firm.

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In the Glasgow matter the DEC dismissed all allegations stemming from the automobile lease and the student loan. With regard to the medical malpractice matter, the DEC found violations of RPC 1.3, RPC 1.5(b), RPC 1.4(a), RPC 3.2 and RPC 8.4(c).

In Bulle, the DEC dismissed all of the underlying allegations due to the lack of testimony from the grievant. However, the DEC found a violation of RPC 8.1(b), based on respondent's failure to reply to the investigator's March 9, 1999 request for information about the grievance.

In Muhamed, the DEC found violations of RPC 1.3, RPC 1.4(a), RPC 3.2, RPC 8.1(b) and RPC 8.4(c).

The DEC recommended a six-month suspension, finding that respondent's earlier 1997 admonition was an aggravating factor.

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

The record in these matters is scanty. In some instances, there is little or no evidence of wrongdoing. In others, respondent made certain admissions.

In Glasgow, the DEC correctly dismissed the alleged violations regarding the automobile lease and student loan matters. We agree that there is no evidence of wrongdoing in those matters. With regard to the medical malpractice action, however, respondent essentially admitted his misconduct. He took no further action in his client's behalf beyond the filing of the complaint. Moreover, respondent did not refute Phyllis' testimony that he failed to return her numerous requests for information about the case. Finally, respondent presented no evidence that he utilized a retainer agreement. Therefore, we found violations of RPC 1.3, RPC 1.5(b), RPC 1.4(a) and RPC 3.2. We dismissed the remaining charge of a violation of RPC 8.1(b). Respondent replied to the investigator's inquiries within several weeks of the first DEC letter and filed his answer within days of his receipt of the complaint.

In Bulle, too, the DEC correctly dismissed the allegations that the matter was mishandled. The only evidence of wrongdoing in the matter relates to respondent's failure to cooperate with the ethics authorities. We found a violation based on the fact that respondent twice failed, for months at a time, to reply to the DEC.

In the Muhamed matter, respondent did no work beyond the filing of the complaint. Thereafter, he failed to communicate with his client, despite Muhamed's repeated requests for information about the case. Here, respondent violated RPC 1.3, RPC 1.4(a) and RPC 3.2, as alleged. Respondent also violated RPC 8.1(b) when, for a period of four months,



he did not reply to the DEC's requests for information and when he filed his answer several months late.

There remains an issue that was not raised below: a violation of RPC 1.1(a). In both matters, respondent completely neglected the case after either drafting or filing the complaint. Although respondent was not specifically charged with a violation of RPC 1.1(a), the facts in the complaint gave him sufficient notice of the alleged improper conduct and of the potential violation of that RPC. Furthermore, the record developed below contains clear and convincing evidence of gross neglect. Respondent did not object to the admission of such evidence in the record. In light of the foregoing, we deem the complaint amended to conform to the proofs. R. 4:9-2; In re Logan, 70 N.J. 222, 232 (1976).

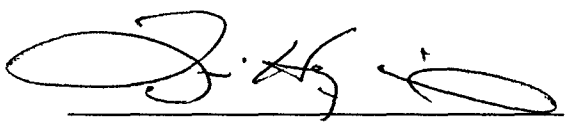
Respondent grossly neglected two matters and is guilty of failure to communicate with his clients and failure to cooperate with the ethics authorities. Generally, an admonition or reprimand is the appropriate range of discipline for this sort of misconduct. See, e.g., In the Matter of Paul Paskey, DRB 98-244 (1998) (admonition imposed where the attorney exhibited gross neglect, lack of diligence and failure to communicate with the client by twice allowing a complaint to be dismissed; for a four-year period, the attorney also failed to apprise the client of the dismissals or to reply to the client's numerous requests for information.) In fact, respondent's prior case is often cited as precedent for an admonition for such misconduct. In the Matter of Ben W. Payton, DRB 97-247 (1998) (admonition for gross neglect, lack of diligence and failure to communicate with the client; after filing a

complaint four days after the expiration of the statute of limitations, the attorney allowed it to be dismissed for lack of prosecution and never informed his client of the dismissal.)

Because, however, respondent had a prior admonition for identical misconduct, we unanimously determined that a reprimand is the appropriate degree of discipline in this matter. In re Carmichael, 139 N.J. 390 (1995) (reprimand imposed where the attorney showed a lack of diligence and failure to communicate in two matters; the attorney had a prior private reprimand); and In re Gordon, 121 N.J. 400 (1990) (reprimand imposed where the attorney showed gross neglect and a failure to communicate in two matters; prior public reprimand.) One member did not participate. We further required respondent to practice under a proctor, approved by the Office of Attorney Ethics, for a period of one year.

We also required respondent to reimburse the Disciplinary Oversight Committee for administrative expenses.

Dated: 9/18/00



LEE M. HYMERLING  
Chair  
Disciplinary Review Board

**SUPREME COURT OF NEW JERSEY**

**DISCIPLINARY REVIEW BOARD  
VOTING RECORD**

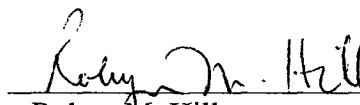
**In the Matter of Ben W. Payton  
Docket No. DRB 00-078**

**Argued: May 11, 2000**

**Decided: September 18, 2000**

**Disposition: Reprimand**

Members	Disbar	Suspension	Reprimand	Admonition	Dismiss	Disqualified	Did not Participate
Hymerling			X				
Peterson			X				
Boylan			X				
Brody			X				
Lolla			X				
Maudsley			X				
O'Shaughnessy			X				
Schwartz							X
Wissinger			X				
<b>Total:</b>			8				1

  
Robyn M. Hill 11/13/00  
Chief Counsel