

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 00-237

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

Decision
Default [R. 1:20-4(f)(1)]

Decided: January 29, 2001

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

Pursuant to R. 1:20-4(f)(1), the District VI Ethics Committee ("DEC") certified the record in this matter directly to us for the imposition of discipline, following respondent's failure to file an answer to the formal ethics complaint.

Respondent was admitted to the New Jersey bar in 1992. On October 27, 1997, he was admonished for failure to promptly file a complaint, failure to prosecute the matter and failure to communicate with his client, in violation of RPC 1.1(a), RPC 1.3, and RPC 1.4(a).

In the Matter of Ben W. Payton, DRB 97-247 (October 27, 1997).

In a recent matter, we determined to reprimand respondent for his conduct in two matters, including gross neglect, lack of diligence, failure to communicate with the clients, failure to reduce his fee agreement to writing, failure to expedite litigation and failure to cooperate with ethics authorities, in violation of RPC 1.1(a), RPC 1.3, RPC 1.4(a), RPC 1.5(b), RPC 3.2 and RPC 8.1(b). That matter is awaiting Supreme Court's review. In the Matter of Ben W. Payton, DRB 00-078 (September 18, 2000).

* * *

On May 5, 2000, a copy of the complaint in this matter was sent by certified and regular mail to respondent's law office in Plainfield, New Jersey. The certified mail receipt was returned signed by Falani Payton, indicating delivery on May 12, 2000. The regular mail was not returned. When respondent failed to answer the complaint, the OAE forwarded him a second letter on June 14, 2000, seeking a reply within five days. The letter notified respondent that, if he did not reply, the matter would be certified to the Board for the imposition of sanctions. The letter also amended the complaint to include the charge of failure to respond to a lawful demand for information by a disciplinary authority, in violation of RPC 8.1(b). The certification is silent as to the manner of service used for the second letter or whether there was proof of its receipt. Respondent did not file an answer to the complaint.

* * *

The two-count complaint charged respondent with violations of RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), RPC 1.4 (presumably (a)), (failure to communicate with a client), RPC 1.5(b) (failure to reduce a fee agreement to writing) (count one) and RPC 1.15(d) and R. 1:21-6 (failure to properly maintain records) (count two).

The first count of the complaint and incorporated exhibits allege that, in June 1995, respondent was retained by grievants Linda Muhammad and Edith Rogers to represent the estate of Edward Riley, who died on May 5, 1993. Muhammad and Rogers were the nieces and heirs of the decedent. At the time of Riley's death, his primary assets consisted of real property located in Elizabeth, New Jersey, and a certificate of deposit in the amount of \$30,578.64, which was deposited in respondent's attorney trust account. While respondent ultimately accepted \$4,500 in legal fees, no written fee agreement was ever prepared.

In June 1996, approximately three years after Riley's death and one year after respondent was retained, respondent prepared an inheritance tax return on behalf of the estate and filed it with the New Jersey Division of Taxation. In October 1996, respondent received a notice of assessment from the Division of Taxation for over \$12,000, with a balance of approximately \$8,000 remaining due after a credit for a previous payment. More than \$1,600 of the assessment was for interest, assessed, in part, because of respondent's failure to promptly file the inheritance tax return. Respondent submitted an independent appraisal in support of his position that the Division of Taxation's appraisal of Riley's property was inflated. By letter dated May 5, 1997, the Division of Taxation notified

respondent that it would not change the tax assessment, even after consideration of respondent's independent appraisal. Respondent took no action in response to this letter.

In August 1997, the Division of Taxation informed respondent that a balance of \$8,525.71 (including interest) was due from the estate. On October 17, 1997, respondent requested that the Division of Taxation review the amount due. One month later, however, the Division of Taxation had informed respondent that the time for filing an appeal had expired and that the balance of \$8,525.71 remained due. In addition, the Division assessed \$1.64 per diem starting on September 20, 1997. Respondent took no further action regarding payment of the assessed taxes.

By letter dated January 10, 1999, Muhammad and Rogers notified the District XII Ethics Committee that there were difficulties concerning the administration of Edward Riley's estate and respondent's representation and that respondent had failed to reply to their numerous telephone calls, messages and letters. Three days later, the committee sent that letter to respondent, requesting a written reply. When he failed to do so, the matter was referred to the OAE.

In early March 1999, respondent provided the OAE with a response to the grievance and acknowledged the ongoing problem with the Division of Taxation. On April 28, 1999, respondent appeared for a demand audit at the OAE to account for the estate's funds held in trust. After frequent prodding, respondent remitted payment of the balance of the inheritance taxes due, which, by that point, had accrued to \$10,303.97.

The second count of the complaint arose from the April 28, 1999 demand audit and charged respondent with failure to maintain records, in violation of R. 1:21-6 and RPC 1.15(d). At the audit, it was discovered that respondent did not prepare quarterly trust account reconciliations, did not prepare complete and fully descriptive client ledgers, did not maintain trust disbursement or receipt books, and did not keep business account disbursement books or detailed deposit slips. Despite numerous requests and audits by the OAE, respondent has not changed his recordkeeping practices to conform to proper procedures.

* * *

Service of process was properly made in this matter. The complaint contains sufficient facts to support the charged violations. Because of respondent's failure to file an answer, the allegations of the complaint are deemed admitted. R. 1:20-4(f)(1).

Respondent's failure to timely file inheritance tax returns or to appeal the Division of Taxation's assessment significantly delayed the administration of his clients' estate, and resulted in close to \$2,000 in interest penalties to the estate, in violation of RPC 1.1(a) and RPC 1.3. Also, respondent's failure to memorialize the fee agreement with his clients violated RPC 1.5 (b). Moreover, his failure to communicate with his clients after their repeated attempts to contact him violated RPC 1.4(a). Further, respondent's deficient

recordkeeping practices, discovered at the OAE demand audit, violated R. 1:21-6 and RPC 1.15(d).

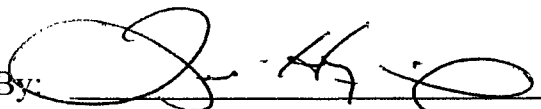
Absent the default, a reprimand might have been appropriate here. See In re Kessler, 157 N.J. 73 (1999) (reprimand in non-default matter, where attorney failed to communicate, failed to safeguard client funds, engaged in recordkeeping violations and misrepresented the status of a matter, all in violation of RPC 1.4(a), RPC 1.15(a), RPC 1.15(d) and RPC 8.4(c)).

Given that this case has proceeded on a default basis, a three-month suspension is appropriate. See In re Banas, 157 N.J. 18 (1999) (three-month suspension in default matter, where attorney had prior six-month suspension and exhibited gross neglect, lack of diligence, failure to communicate, failure to reduce fee agreement to writing and failure to cooperate with disciplinary authorities, in violation of RPC 1.1(a), RPC 1.3, RPC 1.4(a), RPC 1.5 and RPC 8.1(b)).

Respondent has previously received both an admonition and a reprimand and has allowed this matter to proceed on a default basis. Based on these aggravating factors, as well as the precedent set in Banas, we unanimously determined to impose a three-month suspension. Additionally, prior to reinstatement, he must submit proof to the OAE that his attorney records are in compliance with the recordkeeping rules, by having his records certified by an accountant approved by the OAE. Two members did not participate in the review of this matter.

We further direct that respondent reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: 1/29/01

By: 

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 00-237**

Decided: January 29, 2001

Disposition: Three-month suspension

Members	Disbar	Three-month Suspension	Reprimand	Admonition	Dismiss	Disqualified	Did not Participate
Hyerling		X					
Peterson							X
Boylan		X					
Brody		X					
Lolla		X					
Maudsley		X					
O'Shaughnessy		X					
Schwartz							X
Wissinger		X					
Total:		7					2

 5/1/01
Robyn M. Hill
Chief Counsel