

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 97-173

IN THE MATTER OF :
JOSEPH F. FLAYER :
AN ATTORNEY AT LAW :

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

Decided: March 19, 1998

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 X Ethics Committee ("DEC") certified this matter directly to the Board for the imposition of discipline, following respondent's failure to file an answer to three formal ethics complaints. Service of the complaints was properly made by certified mail.

Respondent was admitted to the New Jersey bar in 1976. He has an extensive ethics history. Respondent was publicly reprimanded on July 7, 1992 for the improper release of escrow funds without the consent of the seller in a real estate transaction and for failure to cooperate with the ethics authorities. On December 6, 1994 he was again publicly reprimanded for gross neglect, failure to act with diligence, failure to communicate with his

client, failure to explain a matter to his client and failure to expedite litigation. One matter is currently pending, involving allegations that respondent failed to remit \$2,500 to his clients from a personal injury settlement. Lastly, respondent was temporarily suspended on May 9, 1995 for failure to comply with a fee arbitration determination. He remains suspended to date.

The formal complaints charged respondent with violations of RPC 1.1(a) (gross neglect - two counts), RPC 1.1(b) (pattern of neglect - three counts), RPC 1.3 (lack of diligence - two counts), RPC 1.4(a) (failure to keep client informed about status of matter and promptly comply with reasonable requests for information - two counts), RPC 1.4(b) (failure to explain matter to extent reasonably necessary to permit client to make informed decisions - two counts), RPC 1.5(a) (fee overreaching - one count), RPC 3.2 (failure to expedite litigation and to treat with courtesy and consideration all persons involved in the legal process - two counts), RPC 5.5(a) (failure to maintain a *bona fide* office in the State of New Jersey - two counts), RPC 8.1(b) (failure to cooperate with disciplinary authorities - three counts) and RPC 8.4(a) (violation of *Rules of Professional Conduct* - three counts).

The Quinn Matter

Respondent was retained in February 1993 to represent Barbara Quinn ("grievant") in a domestic relations action. Subsequently, grievant filed a request for fee arbitration. Respondent did not file an attorney fee response or appear at the arbitration hearing. The fee

arbitration committee determined that respondent's fee of \$4,215 was unreasonable. Finding that \$830 was a reasonable fee and that grievant had already paid \$3,250, the Fee Arbitration Committee ordered respondent to refund \$2,420 to grievant. It also referred the matter to the DEC. The DEC investigator's attempts to reach respondent were unsuccessful. Respondent's office telephone number had been disconnected, his office had been vacated and his home telephone number had been assigned to another party.

The Heddy Matter

Respondent was retained in March 1991 to represent Linda Heddy ("grievant") in a personal injury action. Although grievant signed a contingent fee agreement, she was not provided with a copy. Grievant became concerned after she had not heard from respondent for quite some time. Grievant's repeated attempts to contact respondent by telephone and in writing, from March 1991 through July 1992, were unsuccessful. Finally, in July 1992 respondent told grievant he would proceed with the matter.

In October 1992, having received no communication from respondent, grievant telephoned him to ask when he would be filing the complaint. Respondent's reply was that he did not understand what the "big hurry" was. Concerned about the approaching expiration of the two-year statute of limitations period, grievant began leaving messages on respondent's telephone answering machine and sending him letters. When respondent finally

returned grievant's telephone call, she explained her concern about the statute of limitations. In reply, respondent demanded the \$135 filing fee, yelled at grievant, told her to stop bothering him and slammed down the telephone. Shortly thereafter, respondent filed a personal injury complaint on grievant's behalf. Respondent failed to reply to grievant's May 1992 letter requesting a status update. From January through March 1994 grievant left messages on respondent's telephone answering machine on a weekly basis. Finally, on March 23, 1994 respondent informed grievant that he was about to send very important papers to her and that depositions had been scheduled but postponed. Grievant never received the papers from respondent.

In April 1994 grievant tried to telephone respondent, only to find that the telephone had been disconnected. She learned that respondent had opened an office in Montague, New Jersey. Her daily telephone messages were not returned. On the morning of May 10, 1994 grievant was able to reach respondent by telephone; he told her he was in the middle of a closing and promised her that he would call her at home that afternoon, which he failed to do. During a subsequent telephone call, respondent hung the phone up on grievant. Grievant sent respondent a letter by certified mail on June 6, 1994 that was returned to her marked "unclaimed."

On July 5, 1994 grievant retained new counsel, Jacqueline M. O'Donnell, to represent her in the personal injury action. Respondent failed to return O'Donnell's telephone call to him. Her letters to respondent were returned by the postal service. Upon obtaining grievant's

file from the court clerk, O'Donnell learned that the complaint had been dismissed on June 24, 1994 for failure to answer interrogatories and failure to attend an arbitration hearing. Although Ms. O'Donnell obtained an order vacating the dismissal, that order was on appeal at the time the ethics complaint was filed. Also pending at the time the ethics complaint was filed was O'Donnell's motion to compel respondent to produce his file. Grievant had not been able to retrieve photographs and other materials from respondent's file. In addition, a party who should have testified at a deposition had passed away, thus impeding the prosecution of grievant's personal injury action.

The Schultz Matter

Respondent was retained in September 1989 to represent Terri Schultz ("grievant") in a personal injury action arising from an automobile accident in which she and her infant son sustained injuries. Although grievant signed a fee agreement, she did not receive a copy of that document. Grievant had sporadic contact with respondent from September 1989 until December 1992. During this period, after grievant expressed concern about the statute of limitations, respondent informed her that he had filed a complaint on her behalf on July 11, 1991.

Because respondent failed to return grievant's telephone calls or answer her letters from December 1992 through July 1993, grievant retained another attorney, Robert Francis

Gold. After Gold's repeated attempts to obtain a copy of grievant's file were unsuccessful, Gold filed a motion to compel the execution of a substitution of attorney and return of the file. Upon reviewing the court file, Gold learned that the complaint had been dismissed on March 27, 1992 for failure to appear at an arbitration hearing. By order dated March 30, 1994, respondent was directed to turn his file over to Gold. The order noted that no inference about the viability of grievant's complaint, dismissed two years earlier, should be drawn from the entry of the order. On September 1, 1994 Gold filed a subsequent motion to compel respondent to comply with the March 30, 1994 order or, in the alternative, to hold him in contempt. The record has no additional information about this motion.

* * *

Following a *de novo* review of the record, the Board deemed the allegations contained in the complaint admitted. R.1:20-4(f)(1). The complaints contain a sufficient factual basis to support the charges of unethical conduct.

In the *Quinn* matter, respondent overreached his client by charging a \$4,215 fee for services that the fee arbitration committee valued at \$830. In addition, respondent failed to cooperate both with the fee arbitration committee and the DEC. The charges of violations of RPC 1.5(a) and RPC 8.1(b) are, thus, warranted and deemed admitted. Unlike other rule violations, such as lack of diligence (RPC 1.3) or failure to communicate (RPC 1.4), findings

of overreaching and failure to cooperate with disciplinary authorities bear no relationship to neglectful conduct or, by reference, a pattern of neglect. Nor does the record independently support a finding of a violation of RPC 1.1(b) (pattern of neglect) in the *Quinn* matter. Similarly, the charge of violation of RPC 8.4(a) was deemed cumulative and unnecessary and cannot be sustained.

In the *Heddy* and *Schultz* matters, respondent agreed to represent the grievants, filed complaints and then neglected the matters, permitting the complaints to be dismissed. Respondent also failed to keep the grievants informed of the status of their matters. Indeed, in the *Schultz* matter, grievant learned that the complaint had been filed only after she contacted respondent about the imminent expiration of the statute of limitations. In the *Heddy* matter, respondent yelled at grievant, ordered her to stop bothering him and slammed down the telephone. On another occasion, he “hung up on her”.

Based on the foregoing, a finding of violations of RPC 1.1(a), RPC 1.1(b), RPC 1.3, RPC 1.4(a), RPC 1.4(b), RPC 3.2 and RPC 8.1(b) is appropriate. Respondent agreed to represent grievants and then permitted their complaints to be dismissed, in violation of RPC 1.1(a) and RPC 1.3. Respondent’s neglect in these two matters, as well as his prior reprimand for lack of diligence, failure to communicate with client, failure to expedite litigation and gross neglect, support the charge of pattern of neglect, in violation of RPC 1.1(b). The numerous attempts by both grievants to contact respondent establish failure to communicate, in violation of RPC 1.4(a) and RPC 1.4(b). Respondent’s obnoxious behavior towards the

grievant in the *Heddy* matter supports a violation of RPC 3.2. Finally, his failure to reply to the grievances or answer the formal complaints violated RPC 8.1(b).

The charge of a violation of RPC 5.5(a) cannot be sustained, however. That rule requires attorneys practicing in the State of New Jersey to maintain a *bona fide* office in New Jersey. The record appears to indicate that in 1994 respondent virtually abandoned his practice. His office was vacated, his office telephone was disconnected and his mail was not accepted. There was no evidence that respondent continued to practice law in New Jersey. In fact, respondent was temporarily suspended in 1995. Accordingly, he was not required to maintain a *bona fide* office. Similarly, the charge of a violation of RPC 8.4(a) was based on respondent's failure to cooperate with the disciplinary authorities. Because respondent was charged with a violation of RPC 8.1(b), the charge of a violation of RPC 8.4(a) is dismissed as cumulative.

Similar misconduct has resulted in a six-month suspension. *See In re Smith*, 140 N.J. 212 (1995) (attorney suspended for six months for lack of diligence and failure to cooperate with disciplinary authorities; attorney had a prior private reprimand and a one-year suspension) and *In re Bosies*, 138 N.J. 169 (1994) (attorney suspended for six months for engaging in a pattern of neglect in four matters, gross neglect in three matters, lack of diligence in three matters, misrepresentation and conduct prejudicial to the administration of justice in two matters, violation of the scope of representation in two matters and failure to communicate in one matter).

Here, respondent has been reprimanded twice and remains suspended for failure to comply with a fee arbitration determination. In the matters currently before the Board,

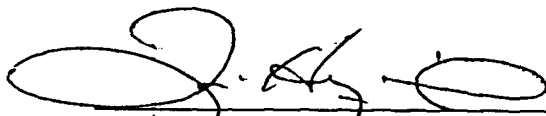
respondent has demonstrated complete disregard for his clients and contempt for the disciplinary system.

In light of the foregoing, the Board unanimously determined to suspend respondent for six months, said suspension to run consecutively to the current temporary suspension. In addition, the suspension shall not start until after respondent satisfies the outstanding fee arbitration award. The Board also determined not to consider a petition for reinstatement until all pending ethics matters are resolved.

The Board further determined to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: _____

3/19/98



LEE M. HYMERLING
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY

**DISCIPLINARY REVIEW BOARD
VOTING RECORD**

**In the Matter of Joseph F. Flayer
Docket No. 97-173**

Decided: March 19, 1998

Disposition: Six-Month Suspension

Members	Disbar	Six-Month Suspension	Reprimand	Admonition	Dismiss	Disqualified	Did not Participate
Hymerling		X					
Zazzali							X
Brody		X					
Cole		X					
Lolla		X					
Maudsley		X					
Peterson		X					
Schwartz		X					
Thompson		X					
Total:		8					1

Robyn M. Hill 4/13/98
Robyn M. Hill
Chief Counsel