SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 14-071
District Docket No. IV-2012-0018E

IN THE MATTER OF	:	
FRANCIS J. FALKENSTEIN	:	
AN ATTORNEY AT LAW	:	Decision

Argued: June 19, 2014

Decided: September 10, 2014

Marian I. Kelly appeared on behalf of the District IV Ethics Committee.

Robert N. Agre appeared on behalf of respondent.

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

This matter was before us on a recommendation for a reprimand filed by the District IV Ethics Committee (DEC), based on respondent's stipulated violations of RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), RPC 1.4(b) (failure to communicate with the client), RPC 1.16, presumably (b)(4) (failure to terminate the representation of a client when the client insists upon taking action with which the lawyer

fundamentally disagrees), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

After reviewing the record, we notified the parties that the report from the New Jersey Lawyers' Fund for Client Protection (CPF) revealed that, during the time relevant to this matter, respondent had practiced law while ineligible for failure to pay the annual attorney assessment to the CPF. By letter dated May 15, 2014, we asked the parties to submit a supplemental stipulation addressing the practicing while ineligible charge (RPC 5.5(a)(1)) and to make clear whether respondent was aware of his ineligible status. As an exhibit to his June 2, 2014 brief to us, respondent submitted a May 22, 2014 letter to the presenter, acknowledging that he had practiced law while ineligible, albeit not knowingly.

For the reasons set forth below, we determine to impose a reprimand on respondent.

Respondent was admitted to the New Jersey bar in 2005. At the relevant times, he maintained an office for the practice of law in Haddon Township, Camden County. He has no disciplinary history.

According to a stipulation between respondent and the DEC, sometime in 2011, Mario M. Henry, the owner of Halo America, LLC (Halo America), retained respondent to represent Halo America in business matters, including litigation pending in Camden County

under the caption Green v. Halo America LLC (the action). The action went to trial before the Honorable Lee B. Laskin, J.S.C., in October 2011. After Halo America did not prevail, a judgment was filed against it, on March 14, 2012.

Thereafter, Henry asked respondent to file an appeal from the judgment. Henry and respondent also discussed other potential post-judgment relief, including respondent's attempting to obtain insurance coverage to pay the judgment and to negotiate a settlement between the parties.

Despite respondent's representation to Henry that he would file a motion for post-judgment relief and/or an appeal, respondent did neither. At no time did respondent send notice to or receive consent from Henry "to end the litigation or appellate process on the [a]ction," or to terminate the attorney-client relationship.

Based on these facts, the parties stipulated the following RPC violations:

> (a) RPC 1.1(a) - Respondent neglected to file for post-judgment relief and/or an appeal, despite having been requested to do so by Henry;
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> (b) RPC 1.3 - Respondent failed to diligently pursue post-judgment relief and/or an appeal as requested by Henry;
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> (c) RPC 1.4(b) - Respondent failed to communicate to Henry that post-judgment relief and/or an appeal was not filed;

(d) RPC 1.16 - Respondent failed to terminate his representation of Henry;

(e) RPC 8.4(c) - Respondent misrepresented the status of the appeal to Henry.

Henry's testimony before the DEC added little to the stipulated facts. He did state, however, that Halo America was in the business of helping "credit challenged individuals" purchase homes. He also claimed that, during the time that he believed that the judgment was being appealed, a local Fox News reporter "grilled" him about why the judgment had not been paid. When Henry stated that the matter was on appeal, the reporter told him that no appeal was ever filed.

The clip aired on February 13, 2012. According to Henry, the clip gave the impression to viewers that he was a liar. As a result, "we pretty much lost our investor base." Henry testified that, as of the date of the DEC hearing, Halo America was "a shell of a company."

As to the misrepresentation charge, according to the hearing panel report, "Grievant and the Respondent submitted joint exhibits, which were marked collectively as Joint Exhibit-1 (22 pages) which included the Complaint, the Grievance with attachments and the Answer." Attached to the grievance are numerous emails from respondent to Henry, which demonstrate the breadth of his misrepresentations. On October 27, 2011,

respondent stated, in an email to Henry, that "I want to start it [the appeal] today/tomorrow."

On March 22, 2012, respondent sent three emails to Henry about the appeal. In the first, he stated that he was "checking with the courts to see what happened" and that, "[i]f the notice of appeal expired, it can be refiled." In the second email, respondent wrote the following:

> I am trying to figure this all out.
>
> If the appellate court denied the appeal, which is possible. [sic] They do not have to grant a day in court. They can deny it based off [sic] the papers. I am trying to find out either way.
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> If the appeal was denied, there are still a few things we can do. So if we have to, I will figure something else out. But I am trying here. Either way, if I force the appellate court to hear the matter, then the judment [sic] can still be docketed. There is not [sic] promise or law that states that a judgment cannot be docketed if an appeal is filed. That is why I had to go in originally on the motion to stay the judgment pending appeal. It is always in the courts [sic] discretion. My fear is they denied the appeal and they either sent the decision to my old office or they are in the process of sending it. If that is the case, and the appeal was denied, then we have to figure out what to do next. I will do whatever it takes to get this done. But no matter what, even if we are not denied yet on the appeal, and we have to wait for our day in court, we have to figure out what you will do if the appeal is denied. Because there is no guarantee whatsoever it will be overturned, and there is always the

> chance it will be increased for interest and additional atttorneys [sic] fees.
>
> [Ex.J1.]

Finally, the third email stated:

> I am drafting a motion for reconsideration/ post conviction relief. If the appeal was denied, which I am waiting to hear what the status is. [sic] Then I can still try to file a motion for reconsideration.
>
> [Ex.J1.]

The next day, March 23, 2012, respondent emailed Henry again, stating that he was going to see Judge Laskin's law clerk that morning and that he would ask the clerk if the appeal had been denied. Respondent wrote:

> (2) If he knows the appeal was denied based on the papers (to be specific, there are several standards of review for appeal. I made the argument that there was an error in the judges [sic] judgment of the applicable law in the case, and that the judge relied on the plaintiffs [sic] experts without providing us oppurtinity [sic] to bring our own expert, [sic] the second argument is not as good because we did talk about bringing Bruno in and for obvious reasons you did not want him there, but it is still worth a shot;
>
> (3) and if the appeal has not been decided, if we can have the judgment at least temporily [sic] removed until it is decided [sic].
>
> [Ex.J1.]

On March 27, 2012, respondent emailed Henry that he was "going to Trenton on Thursday morning to at least get a chance

to present our case." The context does not indicate what type of case respondent was going to present or the forum in which he was to present it.

As to the charge of practicing while ineligible, respondent admitted, in a May 22, 2014 letter to the presenter, that he violated RPC 5.5(a) by practicing law while on the ineligible list. Respondent maintained that he was not aware of his ineligibility, adding that (1) the notice of the assessment had been sent to Haddon Heights, while his address was in Haddon Township; (2) on October 11, 2011, a check payable to the CPF was drawn on an account maintained by the Law Offices of Mitchell and Falkenstein, but he does not have access to these financial records, which have been retained by Kevin Mitchell;[1] and (3) as soon as he learned of his ineligibility, he paid the assessment.

In mitigation, respondent submitted to the DEC an undated, written "Character Statement and Summary of Work in Addiction" and some character letters. According to respondent's character statement, he entered an in-patient drug and alcohol program on May 5, 2012, where he remained until June 29, 2012. He stated that he has been clean and sober for more than eighteen months after his discharge from treatment; that he has been very active in the recovery community; that he helps people with addiction

[1] Presumably, that partnership dissolved.

issues, much of it on a pro bono basis; and that he attends NA and AA meetings regularly.

Respondent also submitted eight character letters. Three of them were from members of the recovery community, all of whom attested to respondent's dedication to his sobriety and his willingness to assist others. Another three were from mothers of drug-addicted children, expressing their appreciation for respondent's assistance in getting the children into treatment while, at the same time, handling their legal matters. The remaining letters were from two of respondent's colleagues, both of whom had referred cases to him. The attorneys complimented respondent on his professionalism and dedication.

The DEC accepted the stipulation and agreed with the stipulated violations. However, the DEC believed that a reprimand was the more appropriate measure of discipline, rather than the admonition recommended by the presenter,[2] given the aggravating factors, that is, respondent's "continuing course of dishonesty and misrepresentations" to Henry, as well as respondent's drug use. The DEC did not believe that the character statements and letters were sufficient to reduce the discipline for respondent's unethical conduct.

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[2] Although the presenter recommended, in the stipulation, the imposition of an admonition for respondent's misconduct, at oral argument before us, she asked for a reprimand.

At oral argument, respondent's counsel urged us to impose an admonition, pointing out that all of respondent's misconduct stemmed from the representation of one client in one matter, as well as the practicing while ineligible charge.

Following a de novo review of the record, we are satisfied that the DEC's finding that respondent's conduct was unethical was fully supported by clear and convincing evidence. Respondent failed to file either a motion for reconsideration or an appeal from the judgment entered against Halo America on March 14, 2012, despite his client's request that he do so. We find that this inaction constituted a lack of diligence and gross neglect on respondent's part. Further, he failed to inform Henry that he had not filed the appeal or an application for post-judgment relief. He also engaged in conduct involving dishonesty, fraud, deceit or misrepresentation by leading Henry to believe that he had filed an appeal from the judgment and concocting false stories to support his lies.

If respondent did not believe that the appeal had merit, he should have withdrawn from the case so that Henry would have been afforded the opportunity to seek appellate counsel elsewhere. RPC 1.16 permits a lawyer to withdraw from the representation of a client under a variety of scenarios, including one in which "the client insists upon taking action

that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement." RPC 1.16(b)(4).

Finally, respondent admitted that he practiced law while ineligible, although not knowingly.

There remains for determination the quantum of discipline to be imposed on respondent for his violations of RPC 1.1(a), RPC 1.3, RPC 1.4(b), RPC 1.16(b)(4), RPC 5.5(a)(1), and RPC 8.4(c).

A misrepresentation to a client requires the imposition of a reprimand. In re Kasdan, 115 N.J. 472, 488 (1989). A reprimand may still be imposed even if the misrepresentation is accompanied by other, non-serious ethics infractions, as here. See, e.g., In re Singer, 200 N.J. 263 (2009) (attorney misrepresented to his client for a period of four years that he was working on the case; the attorney also exhibited gross neglect and lack of diligence and failed to communicate with the client; no ethics history); In re Wiewiorka, 179 N.J. 225 (2004) (attorney misled the client that a complaint had been filed; in addition, the attorney took no action on the client's behalf, and did not inform the client about the status of the matter and the expiration of the statute of limitations); In re Onorevole, 170 N.J. 64 (2001) (attorney made misrepresentations about the status of the case; he also grossly neglected the case, failed to act with diligence, and failed to reasonably communicate with

the client; prior admonition and reprimand); In re Till, 167 N.J. 276 (2001) (over a nine-month period, attorney lied to the client about the status of the case; the attorney also exhibited gross neglect; no prior discipline); and In re Riva, 157 N.J. 34 (1999) (attorney misrepresented the status of the case to his clients; he also grossly neglected the case, thereby causing a default judgment to be entered against the clients and failed to take steps to have the default vacated).

Based on the above precedent, respondent's gross neglect, lack of diligence, failure to communicate with and misrepresentations to his client require the imposition of a reprimand. In addition to these violations, respondent failed to terminate the representation and practiced law while ineligible.

Practicing law while ineligible, without more, is generally met with an admonition, if the attorney is unaware of the ineligibility. See, e.g., In the Matter of James David Lloyd, DRB 14-087 (June 25, 2014) (during an approximate thirteen-month period of ineligibility for failure to pay the annual attorney assessment to the CPF, attorney handled three client matters; we considered that, at that time, Lloyd was changing careers from an attorney to a youth minister; that he inadvertently failed to pay the assessment; that the services performed in the three client matters were for friends or acquaintances; that he quickly cured the ineligibility upon learning of it; and that he

had no prior discipline in his eighteen-year legal career); In the Matter of Stephen William Edwards, DRB 12-319 (January 25, 2013) (attorney represented one client in one matter while ineligible for failure to pay the annual assessment to the CPF and for failure to comply with the mandatory IOLTA program; attorney was also guilty of violations of RPC 1.15(d) and RPC 8.4(a)); In the Matter of Anthony J. Balliette, DRB 12-276 (December 11, 2012) (attorney practiced law in an estate matter while ineligible for failure to pay the annual attorney assessment to the CPF; attorney also was guilty of gross neglect and failure to promptly satisfy a lien against the estate, violations of RPC 1.3 and RPC 1.15(b); we considered, in mitigation, the attorney's previously unblemished twelve-year career and the serious personal and health issues that he was experiencing at the time of the misconduct); In the Matter of Robert B. Blackman, DRB 10-137 (June 18, 2010) (attorney practiced law while ineligible for failure to file the IOLTA registration statement for three years); and In the Matter of Matthew George Connolly, DRB 08-419 (March 31, 2009) (attorney ineligible to practice law rendered legal services).

There are, however, mitigating factors for us to consider. By entering into the stipulation, respondent readily acknowledged his wrongdoing; although he has only a nine-year legal career, the absence of a disciplinary history seems to

indicate that his conduct here was aberrational; and he has provided significant assistance, much of it pro bono, to others with addiction issues. On balance, thus, we determine that a reprimand is sufficient discipline for respondent's infractions.

Member Gallipoli voted to censure respondent. Vice-Chair Baugh did not participate. Member Rivera abstained.

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
Bonnie C. Frost, Chair

By: 
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Francis Falkenstein
Docket No. DRB 14-071

Argued: June 19, 2014

Decided: September 10, 2014

Disposition: Reprimand

Members	Disbar	Suspension	Reprimand	Censure	Abstained	Did not participate
Frost			X			
Baugh						X
Clark			X			
Gallipoli				X		
Hoberman			X			
Rivera					X	
Singer			X			
Yamner			X			
Zmirich			X			
Total:			6	1	1	1

Ellen A. Brodsky
Chief Counsel