

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 09-116
District Docket No. VA-06-11E

IN THE MATTER OF
THOMAS A. HARLEY
AN ATTORNEY AT LAW

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Decision

Argued: September 17, 2009

Decided: November 10, 2009

Mitchell Goldstein appeared on behalf of the District VA Ethics Committee.

Michael D'Alessio appeared on behalf of respondent.

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

This matter came before us on a recommendation for an admonition filed by the District VA Ethics Committee ("DEC"), which we determined to treat as a recommendation for greater discipline. R. 1.20-15(f)(4). The DEC's recommended admonition

was based on respondent's violation of RPC 5.5(a)(1) (practicing while ineligible), as a result of his representation of clients while he was on the Supreme Court's list of ineligible attorneys for failure to pay the 2003 annual assessment to the New Jersey Lawyers' Fund for Client Protection ("CPF"). We determine that respondent should be reprimanded.

Respondent was admitted to the New Jersey bar in 1975. At the relevant times, he maintained an office for the practice of law in Newark.

In 1994, respondent received a private reprimand for practicing law, between 1991 and 1993, while he was on the ineligible list for failure to pay the annual assessment to the CPF. In the Matter of Thomas A. Harley, DRB 93-462 (January 25, 1994).

In 1995, respondent received an admonition for lack of candor toward a tribunal, making a false statement of material fact to a third person, conduct involving dishonesty, fraud, deceit or misrepresentation, and conduct prejudicial to the administration of justice. In the Matter of Thomas A. Harley, DRB 95-215 (July 26, 1995). There, he misrepresented that he was authorized by his client to participate in settlement negotiations when, in fact, the client had discharged him.

Respondent made the same misrepresentation to the court when the terms of the settlement were placed on the record. Respondent also failed to turn over the file and to withdraw from the case after the client had terminated the representation. An admonition was imposed because respondent was suffering from "psychological problems" at the time of the misconduct and because he had admitted the wrongdoing.

Respondent was on the ineligible list for failure to pay the annual assessment to the CPF during the following periods: July 18, 1991 to September 27, 1993; September 25, 1995 to January 23, 1996; September 20 to 29, 1999; and September 15, 2003 to August 9, 2004. The formal ethics complaint alleged that respondent had practiced law while ineligible between September 15, 2003 and August 9, 2004.

At the May 7, 2008 hearing before the DEC, respondent testified that he was not aware of his placement on the ineligible list until it was brought to his attention by a judge. He also testified about his usual practice with respect to the payment of bills and other types of financial obligations. He explained:

What I have done in the past is that when something comes in that is in the nature of a bill and although this is more than a

bill, it's still basically a cost attached to it, I write on the envelope when it's due and I put it in my desk and then when it comes due then I pay. I don't know what happened to this one. Obviously, I didn't pay it.

[T13-8 to 16.]¹

Later, respondent admitted that there have been occasions when he has paid the annual assessment late, but attributed it to "more of an economic thing than anything else." With respect to this notice in particular, respondent explained: "I set it aside just at the moment I had, given my income, I had other things ahead of it and then I just missed it and had I realized that at that point, I would have done what I had done I believe which is call down there and say what do I owe and sent them a check."

In the hearing panel report, the DEC listed the legal activities that respondent carried out between September 15, 2003 and August 9, 2004: an appearance before the New Jersey Division of Workers Compensation; attendance at four court conferences, in four client matters; participation in a

¹ "T" refers to the transcript of hearing, dated May 7, 2008.

mediation, attendance at depositions in two client matters; and the representation of real estate appraisers who either had been sued for negligence or were under investigation by the New Jersey Board of Real Estate Appraisers. In mitigation, the DEC observed that respondent had cooperated fully in the investigation and with the panel; had taken full responsibility for his actions; was contrite and "very concerned with the poor office procedures which allowed this violation to occur, and instituted new procedures to ensure that this violation will not happen again;" and, finally, had paid the fee for the time in question and thereafter.

Following a de novo review of the record, we are satisfied that the DEC's finding that respondent's conduct was unethical is fully supported by clear and convincing evidence.

Respondent violated RPC 5.5(a), when he engaged in the above conduct while on the ineligible list. The appropriate discipline for this infraction depends on whether respondent knew of the ineligibility at the time of the infraction. Ordinarily, an attorney will be admonished if the attorney is unaware of the ineligibility or advances compelling mitigating factors. In the Matter of Matthew George Connolly, DRB 08-419 (March 21, 2009) (attorney ineligible to practice law rendered

legal services; the attorney's conduct was unintentional); In the Matter of Frank D. DeVito, DRB 06-116 (July 21, 2006) (attorney practiced law while ineligible, failed to cooperate with the OAE, and committed recordkeeping violations; compelling mitigating factors justified only an admonition, including the attorney's lack of knowledge of his ineligibility); In the Matter of William C. Brummel, DRB 06-031 (March 21, 2006) (attorney practiced law during a four-month period of ineligibility; the attorney was unaware of his ineligible status); and In the Matter of Richard J. Cohen, DRB 04-209 (July 16, 2004) (admonition for practicing law during nineteen-month ineligibility; the attorney did not know he was ineligible).

If the attorney is aware of the ineligibility, a reprimand is usually imposed. See, e.g., 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 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); and In re Perrella, 179 N.J. 499 (2004) (attorney advised his client that he was on the 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).

Respondent's testimony demonstrated quite clearly that he does not consider the payment of the annual fee a priority. Consider the following:

I didn't pay it [the 2003 fee] and I have no defense to that, obviously it's obligatory to pay it. I will say that I admit the violation and I admitted it when I got the Complaint, the initial inquiry from the secretary and we admitted it in my Answer and we admit it today, I did not pay it timely. If I'm guilty of anything, it's not taking it seriously enough that it would rise to this level. I mean, I can't say anything other than when I put it aside to pay in the future, I did not consider that if I did not catch up to it, that I would be sitting here today, I just - there is a disconnect there and I have no defense to that and I won't pretend that I do.

[T13-20 to T14-9.]

Clearly, respondent learned nothing from the prior disciplinary matter. His 1994 private reprimand should have caused respondent to be vigilant in the future so that he would not miss another payment and risk another placement on the ineligible list. Clearly, he was not. Thus, notwithstanding respondent's alleged lack of awareness that he was on the ineligible list, an admonition is not an appropriate measure of discipline under the circumstances. Indeed, after the 1994 private reprimand issued, respondent continued to neglect his obligation to pay the fee on three more occasions, including the very next year. Not only did respondent lack vigilance in keeping up his eligible status, he made it quite clear that other bills took priority over the assessment. Thus, when the assessment was due, and he had no money to pay it, respondent simply "put it aside to pay in the future" with the thought that he would "catch up to it."

If an attorney has a disciplinary history, or there are sufficient aggravating factors, we may enhance the discipline on the ground that the attorney has failed to learn from his or her prior mistakes. In this case, given respondent's 1994 private reprimand for practicing while ineligible, his subsequent failures to pay the annual fee to the CPF, resulting in another

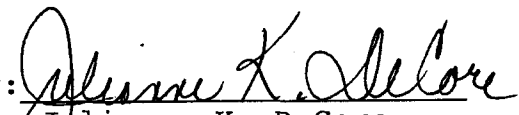
charge for the same misconduct, and the low priority that he attaches to the payment of the fee, we determine to impose a reprimand for his misconduct. In our view, the mitigating factors cited by the DEC (and identified on page five of this decision) do not justify the recommended admonition.

Member Baugh 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

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

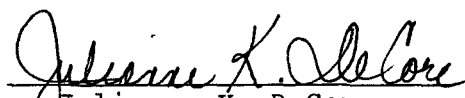
In the Matter of Thomas A. Harley
Docket No. DRB 09-116

Argued: September 17, 2009

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Disposition: Reprimand

Members	Disbar	Suspension	Reprimand	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