

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 08-309
District Docket No. VB-07-24E

IN THE MATTER OF
CHARLES E. AUSTIN
AN ATTORNEY AT LAW

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Corrected Decision

Argued: January 15, 2009

Decided: March 12, 2009

Kathleen Goger appeared on behalf of the District VB Ethics Committee.

Respondent waived appearance for oral argument.

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

This matter came before us on a disciplinary stipulation between respondent and the District VB Ethics Committee ("DEC"). The DEC requested the imposition of an admonition for respondent's stipulated violations of RPC 5.5(a) (practicing

while ineligible), RPC 1.15(d) (recordkeeping violations), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation). We determine that a reprimand more adequately addresses respondent's infractions.

Respondent was admitted to the New Jersey bar in 1996. At the relevant times, he maintained an office for the practice of law in Orange. He has no history of discipline. However, respondent was on the Supreme Court's list of ineligible attorneys for failure to pay the annual assessment to the New Jersey Lawyers' Fund for Client Protection ("CPF") during the following periods: September 20 to October 27, 1999; September 24 to December 10, 2001; September 30, 2002 to May 27, 2003; September 26, 2005 to August 1, 2006; and September 24 to October 29, 2007. The 2005-2006 ineligibility is at issue in this case.

According to the stipulation, in 2001, a grievance against respondent was filed with the District VI Ethics Committee, alleging that he had issued a New York attorney trust account check against insufficient funds. Although the investigation established that the bounced check was the fault of the bank, not respondent, it revealed that respondent did not maintain attorney trust and business accounts in New Jersey.

Nevertheless, the ethics investigator concluded that there was no clear and convincing evidence of an ethics violation because respondent (1) practiced primarily in New York, (2) was forthcoming with all financial documents requested of him, and (3) represented that he had no New Jersey accounts because he was no longer practicing in the state. The investigator instructed respondent to open trust and business accounts in New Jersey, if he returned to practice in this state.

Respondent did not comply with the investigator's instruction. Yet, in the years 2003 through 2006, respondent represented, on the annual attorney registration form, that he maintained attorney trust and business accounts in a New Jersey financial institution.

Respondent became ineligible to practice law, effective September 26, 2005. He was removed from the ineligible list on August 1, 2006. During his ineligibility, respondent made three court appearances in an Atlantic County Superior Court case, captioned In re Tiffany Evans, on behalf of an attorney-friend who was not admitted to practice law in New Jersey. Although respondent did not issue bills for these appearances, he was paid \$500 cash for each of them. He did not keep a record of the payments.

Based on these facts, respondent stipulated to having practiced while ineligible (RPC 5.5(a)), committing recordkeeping violations (RPC 1.15(d)), and making false statements on the annual attorney registration statement about the existence of New Jersey attorney bank accounts (RPC 8.4(c)).

Following a review of the record, we find that the facts recited in the stipulation clearly and convincingly establish that respondent's conduct was unethical.

As stipulated, respondent violated RPC 5.5(a), when he made three court appearances in the Evans matter, during the 2005-06 period of ineligibility. In addition, he violated the recordkeeping rules (R. 1:21-6) and, therefore, RPC 1.15(d), when he failed to maintain any trust account records with respect to the Evans matter. Finally, he violated RPC 8.4(c), when he misrepresented, on the CPF annual attorney registration forms that he maintained attorney trust and business accounts in New Jersey.

In recommending an admonition, the DEC pointed to a number of mitigating factors: respondent's unblemished disciplinary record; his cooperation with the DEC; the fact that, during the period of ineligibility, he did not engage in practice "in a

general way," that is, his misconduct was an isolated incident not motivated by personal gain; and no injury to the client.

Practicing law while ineligible, without more, is generally met with an admonition, if the attorney is unaware of the ineligibility or advances compelling mitigating factors. See, e.g., 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); 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); and In the Matter of Richard J. Cohen, DRB 04-209 (July 16, 2004) (attorney practiced law during nineteen-month ineligibility; he did not know that he was ineligible).

If the attorney is aware of the ineligibility, a reprimand is usually imposed. See, e.g., 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).

Here, the stipulation is silent as to whether respondent was aware of his ineligibility. Nevertheless, the circumstances compel us to conclude that he must have known of his status. Respondent is not associated with a New Jersey law firm and, therefore, was the person primarily responsible for the payment of the fee, which he repeatedly failed to do in a timely manner. Because respondent must have known of his ineligible status, for this violation alone the minimum measure of discipline should be a reprimand.

Moreover, a reprimand is the appropriate measure of discipline for respondent's misrepresentation on his annual attorney registration forms. Reprimands have been consistently imposed for misrepresentations to clients, disciplinary authorities, and the courts. See, e.g., In re Kantor, 165 N.J.

572 (2000) (misrepresenting to a municipal court judge that attorney's vehicle was insured on the date it was involved in an accident when, in fact, the policy had lapsed for nonpayment of premium when attorney's girlfriend had misplaced the envelope containing the bill and the payment and, consequently, never mailed it); In re Sunberg, 156 N.J. 396 (1998) (lying to the OAE about the fabrication of an arbitration award and also failing to consult with a client before permitting two matters to be dismissed; mitigating factors included the attorney's unblemished disciplinary record, the passage of time since the incident, the lack of personal gain and harm to the client, the aberrational nature of the misconduct, and the attorney's remorse); In re Kasdan, 115 N.J. 472, 488 (1989) (intentionally misrepresenting to a client the status of a lawsuit); and In re Powell, 148 N.J. 393 (1997) (misrepresenting to the district ethics committee that an appeal had been filed, as well as exhibiting gross neglect, lack of diligence, and failure to communicate with his client).

The information provided by attorneys on the annual registration form is forwarded to the OAE for its records. Thus, when respondent misrepresented on the annual registration

form that he maintained attorney trust and business accounts, the misrepresentation was to the OAE. R. 1:20-1(c).

We considered two aggravating factors in determining whether a reprimand is sufficient discipline for respondent's misrepresentations. First, during the investigation of the 2001 grievance, when it was first discovered that respondent had no New Jersey accounts, the ethics investigator expressly instructed him to open trust and business accounts in New Jersey, if he returned to practice in the state. Second, not only did respondent fail to follow the investigator's instruction, he repeatedly misrepresented on the annual registration form that he maintained attorney accounts at New Jersey financial institutions.

In mitigation, the record establishes that, since 2001, respondent had made only a single court appearance, as a favor to a friend who was not admitted to practice in New Jersey. Thus, he did not formally return to the practice of law in this state.

Further, in mitigation, respondent's disciplinary record has been unblemished in the thirty-five-plus years that he has been a member of the New Jersey bar. He cooperated with the DEC in this matter, his misconduct was not motivated by personal

gain, and, according to the stipulation, he did not injure the client.

We, therefore, determine that the mitigating factors serve to keep the discipline at a reprimand. However, they do not justify a downgrade to an admonition, as requested in the stipulation. On the rare occasion when an admonition has been imposed for a misrepresentation, the attorney involved had directly and immediately admitted to and corrected the misrepresentation. See, e.g., In re McGivney, DRB 01-060 (March 18, 2002) (where attorney who signed his superior's name to an affidavit in support of an emergent wiretap application moments before its review by the court and who knew at the time that the judge might be misled by his action was admonished because he brought the matter to the court's attention the next day, had an unblemished disciplinary record, was authorized to make the application, the omission of his superior's signature was an oversight, he was motivated by the pressure of the situation rather than venality, and he forthrightly brought the matter to the court's attention within one day of the misconduct) and In the Matter of Robin Kay Lord, DRB 01-250 (September 24, 2001) (attorney who represented a client using an alias in municipal court but failed to inform judge of his real name was admonished

because, the next day, she notified the court of her client's actual name). Here, respondent not only failed to immediately correct the misrepresentation on the annual attorney registration form, he repeated it year after year.

In sum, we determine to impose a reprimand on respondent for his practicing while ineligible, recordkeeping violations, and his misrepresentations on the annual attorney registration forms filed with the CPF.

Member Doremus voted to impose an admonition.

Members Baugh, Boylan, Clark, and Lolla 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: *Sullivan A. Broderick*
for Sulianne K. DeCoe
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD


In the Matter of Charles E. Austin
Docket No. DRB 08-309

Argued: January 15, 2009

Decided: March 12, 2009

Disposition: Reprimand

Members	Disbar	Suspension	Reprimand	Admonition	Disqualified	Did not participate
Pashman			X			
Frost			X			
Baugh						X
Boylan						X
Clark						X
Doremus				X		
Lolla						X
Stanton			X			
Wissinger			X			
Total:			4	1		4


Julianne K. DeCore
Chief Counsel