

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 16-033
District Docket No. VI-2012-0041E

IN THE MATTER OF
PAUL J. FORSMAN
AN ATTORNEY AT LAW

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Decision

Argued: June 16, 2016

Decided: November 1, 2016

Sapana S. Shah appeared on behalf of the District VI Ethics Committee.

Respondent did not appear, despite proper notice.

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 VI Ethics Committee (DEC). The complaint charged respondent with having violated RPC 5.5(a) (practicing while ineligible) and RPC 8.4(a) (knowingly violating the Rules of Professional Conduct). We determined to impose a reprimand.

Respondent was admitted to the New Jersey bar in 1979. He has been ineligible to practice since August 25, 2014, for

failure to pay his annual assessment to the Lawyers' Fund for Client Protection (the Fund).

On September 19, 2002, in a default matter, respondent received a reprimand for negligent misappropriation and recordkeeping violations. In re Forsman, 174 N.J. 337 (2002).

On June 15, 2016, on the eve of the hearing before us, respondent sent the presenter an e-mail, requesting an adjournment. He explained that he was "disabled by a stroke, homeless and indigent" and "surviving on small government assistance." Respondent requested a listing as "inactive, disabled, the assignment of competent pro bono counsel and an adjournment of these proceedings"

We determined to treat respondent's e-mail to the presenter as a formal motion for an adjournment. Based on the motion and the procedural history of this matter, we further determined to deny the motion. Respondent repeatedly has made the same motion on the eve of every hearing throughout the disciplinary process, as discussed below. Moreover, respondent has been instructed, on several occasions, on the proper procedure for requesting disability inactive status. He has chosen not to avail himself

of this option.¹ Hence, as stated, we determine to deny respondent's motion for an adjournment.

On September 18, 2015, the DEC held the first of two hearings in this matter. On the eve of the hearing, respondent e-mailed the panel chair, requesting an adjournment of the proceedings to allow him to seek a transfer to disability inactive status, and to make an application for assignment of counsel as an indigent. The presenter objected to the adjournment, arguing that the matter had been adjourned for over two years due to respondent's personal issues; that he had had ample time to obtain an attorney; that case management conferences already had been held; and that discovery had been exchanged. The presenter, therefore, urged the DEC to proceed with the hearing.

The DEC observed that, about one year earlier, on September 1, 2014, the hearing had been scheduled for October 24, 2014. The hearing notices to respondent were returned as undeliverable. On October 10, 2014, the panel chair sent an e-

¹ Subsequent to our hearing, on August 4, 2016, the Court entered an Order transferring respondent to disability inactive status. The Court's Order, however, did not stay any ethics matters pending against respondent.

mail to respondent, requesting his new address and confirming his availability for trial. On October 17, 2014, respondent replied, indicating that he had suffered a stroke and was on disability indefinitely. As a result, the October 24, 2014 hearing date was adjourned.

On October 20, 2014, the DEC sent an e-mail to respondent, requesting proof of his medical condition within ten days. Although respondent provided medical records, along with a certification, the medical records appeared to be outdated. Thus, on February 6, 2015, the panel chair sent another e-mail to respondent, requesting a current letter from his doctor addressing respondent's present condition, and again requesting a mailing address within ten days. On February 12, 2015, the vice-chair of the DEC contacted the Office of Attorney Ethics (OAE) statewide coordinator to seek procedural guidance. Respondent was given an opportunity to submit an updated medical report, indicating that he medically was unable to participate in his defense, along with his certification, indicating that he was not practicing law. Presumably, he did not do so. Thus, the DEC scheduled the hearing for September 18, 2015.

The DEC denied respondent's request for an adjournment, based on his failure, for more than one year, to apply for disability inactive status and to request the appointment of

counsel. Respondent did not appear for the hearing and the matter proceeded in his absence. The following facts were established:

Respondent was administratively ineligible to practice law between November 5, 2010 and May 9, 2013, based on his failure to register with the Interest on Lawyers Trust Account Fund (IOLTA), as required by R. 1:28A-2(d). Nevertheless, respondent engaged in the practice of law during that period.²

Specifically, on July 1, 2010, respondent left private practice to become a full-time government attorney with the City of Paterson, where he continued to practice during the period of his ineligibility. Prior thereto, as he had explained in his February 19, 2014 certification to the OAE, from sometime in 2003 to July 1, 2010, respondent was of counsel to Madnick Milstein Mason Weber & Farnsworth, PA (Madnick), in Brick, New Jersey. Previously, in 2001, he had opened an IOLTA account in his name with First Union Fidelity Bank. He stopped using that account in 2001, when he opened an IOLTA account with Sovereign

² At the case management conference, in which respondent participated by telephone, the parties entered into certain stipulations. Respondent stipulated that he practiced law during his period of ineligibility.

Bank. However, he did not close the First Union IOLTA account when he switched to Sovereign Bank in 2001. Thus, the First Union account remained open for more than ten years. At the time of the hearing, respondent had recently closed that IOLTA account.

When respondent joined Madnick, in 2003, he began using Madnick's IOLTA account, although he still maintained his own Sovereign Bank IOLTA account. Respondent stated that, when he left private practice to join the City of Paterson, he did not have any further trust account transactions. He believed, however, that he still had an open IOLTA account during his tenure with Paterson.

A second day of the ethics hearing was scheduled to take place on October 22, 2015. Once again, on the eve of the hearing, respondent e-mailed the panel chair, maintaining that he was not able to attend because of his disability. He represented that he had submitted an application for transfer to disability inactive status, and, further, objected to

continuation of the hearing on due process grounds.³ His request was again denied.

The presenter called one witness, Ellen D. Ferrise, Executive Director of IOLTA. Ferrise explained that R. 1:28A sets forth IOLTA requirements for attorney and bank participation. Unlike the Fund, IOLTA registration does not involve a fee, but, rather, is a simple process to show that each attorney in private practice maintains the required attorney trust account. IOLTA registration is not an online process and does not occur at the same time as the Fund's registration.

Ferrise testified that, each year, in early December, IOLTA sends a registration packet to every New Jersey law firm that registered in the prior year, as well as out-of-state law firms with attorneys who practice in New Jersey. The response from these firms is typically due by the first or second day of

³ The validity of respondent's statement is unclear. On December 18, 2015, almost two months after he told the panel he had filed his application, respondent's counsel submitted to us a petition seeking such relief. On January 6, 2016, Office of Board Counsel informed respondent it did not have jurisdiction to consider the request and referred counsel to the Court. On April 26, 2016, respondent submitted a disability inactive application to the Court. As noted earlier, the Court entered its Order in respect of that application on August 4, 2016.

February of the following year. Once the deadline has passed, IOLTA processes all of the registrations and determines which attorneys have not responded. A second mailing is sent in the spring, this time to the individual attorney. Once those responses are processed, a third mailing is sent, in August, to the home addresses of the attorneys who failed to respond to the first two mailings. The third mailing contains a reminder that a list of attorneys who have failed to respond will be sent to the Court in the late fall, and that those attorneys will be ordered ineligible to practice for failure to register with IOLTA. Thus, Ferrise testified, in each cycle, IOLTA reaches out to an attorney three times before that attorney is added to the ineligible list.

Ferrise explained that, because each mailing is sent by first class mail, the post office will return the undeliverable mail for tracking in the IOLTA database. Through this process, IOLTA can determine whether it used an invalid address for an attorney and can attempt to find the correct address.

To be reinstated, an attorney need only file the correct IOLTA registration form. Attorneys also may inform IOLTA that they are in-house counsel, government employees, disabled, not practicing, or otherwise exempt. In any event, however, attorneys must inform IOLTA of their status.

Ferrise was aware that respondent was an attorney for the City of Paterson, and had encountered some difficulty because he failed to register with IOLTA. Respondent's home address in Atlantic Highlands, New Jersey, has been in the IOLTA database since 2005. From 2005 forward, respondent also had a law firm address listed under his own name in Toms River, New Jersey. He did not comply with IOLTA in 2005. He remained on the ineligible list from 2005 until 2009, when he became compliant. At that time, he informed IOLTA that he was of counsel to Madnick, and that he should be included on the firm's IOLTA registration for that year. Nonetheless, in 2010, neither Madnick nor respondent replied to IOLTA during the registration period.

According to Ferrise, IOLTA mailed registration notifications to respondent at his private practice firm address in Toms River in December 2009, for the 2010 compliance cycle, and to his home address in April and August 2010. The mailing to the firm address was returned. The mailings to respondent's home were not returned. Because respondent did not reply, he was included on the list of attorneys who failed to respond, and, on November 5, 2010, the Court ordered him ineligible to practice. The same mailings occurred for the 2011 cycle and the 2012 cycle, with the same results.

Ferrise then elaborated on respondent's interaction with IOLTA during the 2013 cycle. She explained that respondent had contacted her, asking why he was on the ineligible list. Although respondent wanted to certify that he was not required to comply with IOLTA rules, IOLTA could not accept such a certification because respondent had an open trust account with a balance at a New Jersey bank. Moreover, it was an IOLTA attorney trust account, and the bank issued monthly reports to IOLTA. From these reports, IOLTA learned of the account in respondent's name and of the account's balance, which was accruing interest. Respondent, however, claimed no knowledge of this account. Upon his own subsequent investigation, he learned from the bank that there had been no activity in the account since 2006. At that point, respondent provided an IOLTA registration, certifying that he had an attorney trust account, and, thus, was in compliance with IOLTA requirements.

Soon thereafter, respondent worked with the bank to close the attorney trust account at issue. The bank issued him a check for the balance, but respondent was adamant that the funds did not belong to him. Hence, respondent worked with IOLTA to expedite the process of transferring those funds to the Superior Court Trust Fund. Eventually, IOLTA received confirmation from the bank that respondent's trust account was closed.

It was during this process that Ferrise and IOLTA learned that respondent was an attorney for the City of Paterson. Ferrise recalled that she had been contacted by the Director of Communications for the Judiciary, who was inquiring about respondent's status. A reporter who was writing an article about respondent had contacted the Director of Communications with questions. The reporter's article was focused on a government attorney who was ineligible to practice law. Eventually, a local Paterson newspaper published the article. Immediately after its publication, respondent called IOLTA to inquire about the reason for his ineligibility.

According to Ferrise, respondent was eligible from January 1 to November 5, 2010, and ineligible from November 5, 2010 to May 9, 2013.

The DEC unanimously concluded that the presenter failed to prove by clear and convincing evidence that respondent violated RPC 5.5(a) by practicing law from January 1 to November 4, 2010. Ferrise testified that, during these months, respondent was eligible to practice law and no evidence was presented to indicate otherwise. However, the DEC unanimously concluded that respondent engaged in the practice of law while administratively ineligible, from November 5, 2010 to October 22, 2012, in violation of the above rule.

Specifically, the DEC found that respondent failed to file his IOLTA registration for almost two years. Although respondent may have been exempt from IOLTA requirements from July 1, 2010 thru October 22, 2012, based on his status as a full-time government attorney, he had not filed the appropriate exemption requests with IOLTA. He was declared by the Court ineligible to practice, but continued to do so following the Court's Order, thus violating RPC 5.5(a).

Further, the DEC found that, by violating RPC 5.5(a), respondent also engaged in professional misconduct under RPC 8.4(a).

In aggravation, the DEC considered the length of time it took respondent to rectify the problem, as well as his prior discipline, a 2002 reprimand. In mitigation, the DEC considered that no member of the public was harmed because of these violations. Based on the foregoing, the DEC recommended a reprimand.

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.

The record demonstrates, by clear and convincing evidence, that respondent violated RPC 5.5(a) by practicing law as counsel for the City of Paterson from November 5, 2010 to October 22,

2012, while he was ineligible to do so, based on his failure to comply with the registration requirements of IOLTA. During that time, although respondent was not required to maintain an attorney trust account, he was required to register with IOLTA regarding his status and that exemption. He failed to do so, despite several notices sent to his home address.

Respondent's registration history is somewhat convoluted. In his May 13, 2013 letter to the presenter, he claimed that he was of counsel to Madnick from 2003 to 2010. Yet, Ferrise testified that, in 2005, respondent registered an office address in Toms River as his own practice. It was at this point that his problems with his IOLTA registration began, and, from 2005 through 2008, he was ineligible to practice.⁴ In 2009, however, respondent again came into compliance with his IOLTA registration requirements when, according to Ferrise, he contacted IOLTA to be included on Madnick's registration. In our view, this is a critical fact because it evidences not only respondent's knowledge that he was required to register annually with IOLTA, but also his knowledge that his registration was

⁴ Respondent was not charged with an ethics violation as it relates to this period of ineligibility.

affected by a change of employment. Nonetheless, respondent's compliance was short-lived and, on November 5, 2010, after he became employed by the City of Paterson, respondent was again declared ineligible to practice by the Court and remained ineligible until 2013.

Although Ferrise's description of IOLTA's mailing process suggests that the 2010 registration notices perhaps should have been sent to the Madnick office, respondent cannot claim that he never received them. Indeed, the notices that IOLTA sent to respondent's Toms River office, instead of to Madnick, were also sent to respondent's home address in Atlantic Highlands. Respondent acknowledged this as his home address and even used that address on his letterhead in his communications with the investigator in this matter.

In sum, although the record discloses some minor missteps in IOLTA's mailing process, the record clearly and convincingly establishes that respondent received the IOLTA notices at his home address, that he did not respond to them, and that he was, therefore, declared by the Court to be administratively ineligible to practice law. Specifically, respondent was ineligible to practice between November 5, 2010 and May 9, 2013. That notwithstanding, he continued to practice during a portion of that ineligibility in his attorney position with the City of

Paterson. By doing so, respondent violated both RPC 5.5(a) and RPC 8.4(a). The DEC was correct, however, in determining that, respondent was eligible to practice law for most of 2010, and therefore, committed no violation in that regard.

Practicing law while ineligible, without more, is generally met with an admonition if the attorney is either unaware of the ineligibility or advances compelling mitigating factors. See, e.g., In the Matter of James David Lloyd, DRB 14-087 (June 25, 2014) (during an approximate thirteen-month period of ineligibility, the attorney handled three client matters; mitigating factors were that the attorney was changing careers to become a youth minister at the time, 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 after learning of it; and that he had no prior discipline in his eighteen-year legal career); and In the Matter of Adam Kelly, DRB 13-250 (December 3, 2013) (during a two-year period of ineligibility, the attorney handled at least seven DYFS cases that the Public Defender's Office had assigned to him; the record contained no indication that the attorney was aware of his ineligibility; and he had no history of discipline since his 2000 admission to the New Jersey bar).

A reprimand, however, is usually imposed when the attorney is aware of the ineligibility and practices law nevertheless, has a significant ethics history, or has also committed other, serious ethics improprieties. See, e.g., In re Davis, 194 N.J. 555 (2007) (motion for reciprocal discipline; attorney represented a client in Pennsylvania when the attorney was ineligible to practice law in that jurisdiction as a non-resident active attorney, and later, as an inactive attorney; the attorney also misrepresented his status to the court, to his adversary, and to disciplinary authorities; extensive mitigation considered); 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 to pay the annual attorney assessment, she negotiated the check instead of mailing it to the Fund; later, her personal check to the Fund was returned for insufficient funds; the attorney's excuses that she had not received the Fund'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). But see In re Lynch, 186 N.J. 246

(2006) (censure for attorney who, aware of his ineligibility, practiced law during that period; the attorney had a prior admonition and a reprimand).


Here, although respondent cannot credibly claim that he did not receive the IOLTA notices, it is unclear whether he was aware of his ineligibility. On the one hand, once respondent left private practice to become a government attorney, presumably, he no longer needed an attorney trust account and may have believed he need not register. On the other hand, respondent received multiple notices at his home regarding the registration requirements and, with even the slightest amount of diligence, should have recognized the notices as an indication that something was amiss. Further, he had contacted IOLTA in 2009 to update his status as an attorney for Madnick, which rectified his prior three years of ineligibility. Nonetheless, without more, we decline to find that respondent was aware of his ineligibility, based on the presumption that he did not understand that, as a government attorney, he was still required to register with IOLTA. Respondent's conduct, however, is exacerbated by his two-year delay in bringing this matter forward, all the while claiming disability, but never producing documentation to support that claim. In further aggravation, we take into consideration respondent's prior reprimand.

In mitigation, as noted by the DEC, there was no harm to any clients. Hence, on balance, we determine to reprimand respondent for his conduct.

Members Hoberman and Rivera 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
Bonnie C. Frost, Chair

By: 
Eileen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD


In the Matter of Paul J. Forsman
Docket No. DRB 16-033

Argued: June 16, 2016

Decided: November 1, 2016

Disposition: Reprimand

Members	Reprimand	Recused	Did not participate
Frost	X		
Baugh	X		
Boyer	X		
Clark	X		
Gallipoli	X		
Hoberman			X
Rivera			X
Singer	X		
Zmirich	X		
Total:	7		2


Ellen A. Brodsky
Chief Counsel