

Supreme Court of New Jersey
Disciplinary Review Board
Docket No. DRB 19-375
District Docket No. XI-2017-0006E

In the Matter of
Anthony J. Fusco, Jr.
An Attorney at Law

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Decision

Argued: May 21, 2020

Decided: August 5, 2020

Norman I. Klein appeared on behalf of the District XI Ethics Committee.

Adolph J. Galluccio 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 XI Ethics Committee (DEC). The formal ethics complaint charged respondent with a violation of RPC 1.7(a) (engaging in a conflict of interest).

For the reasons set forth below, we determine to impose a censure.

Respondent was admitted to the New Jersey bar in 1972 and to the New York bar in 1990. In 1995, he was reprimanded for improperly delegating recordkeeping responsibilities for his attorney trust account to an associate attorney over whom he had direct supervisory authority. He then failed to make reasonable efforts to ensure that the associate properly maintained the attorney books and records, resulting in the associate's knowing misappropriation of client funds. In re Fusco, 142 N.J. 636 (1995).

On January 20, 2009, respondent received a second reprimand for signing the name of a law firm associate on a reply to a grievance, without having received the associate's consent, and then denying that he had done so. He was guilty of knowingly making a false statement of fact to a tribunal, knowingly making a false statement of material fact in connection with a disciplinary matter, and engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. In re Fusco, 197 N.J. 428 (2009).

Also on January 20, 2009, the Court suspended respondent for three months, effective February 20, 2009, finding him guilty of sharing fees with a nonlawyer; failing to ensure that the conduct of nonlawyers was compatible with the professional obligations of the lawyer; failing to report unethical conduct of an attorney to the ethics authorities; and engaging in conduct involving

dishonesty, fraud, deceit or misrepresentation, by attempting to conceal the payments made to a nonlawyer. In re Fusco, 197 N.J. 428 (2009). On May 29, 2009, he was reinstated to practice law. In re Fusco, 199 N.J. 117 (2009).

In the matter currently before us, in respondent's answer to the formal ethics complaint, in an undated stipulation of facts that he entered into with the DEC, and during his testimony at the ethics hearing, he admitted having engaged in a concurrent conflict of interest in respect of his representation of Vicente R. Gonzalez-Rodriguez in the appeal of a criminal conviction for which Gonzalez-Rodriguez was serving a twelve-year prison term in New Jersey.

Specifically, in 2013, Gonzalez-Rodriguez retained Arturo S. Suarez-Silverio, Esq. to file an appeal of his conviction and, through family members, paid Suarez-Silverio at least \$15,000 for the representation. Although Suarez-Silverio filed a notice of appeal and case information statement in behalf of Gonzalez-Rodriguez, on August 1, 2013, the appeal was dismissed for failure to file the required appellate brief.

On March 6, 2014, Suarez-Silverio retained respondent and the Fusco & Macaluso law firm (F&M) to move to vacate dismissal of the appeal. Respondent prepared, and Suarez-Silverio signed, a written fee agreement for the representation, and Suarez-Silverio paid respondent a \$15,000 retainer using a personal credit card. Although the fee agreement did not initially delineate the

scope of the representation, respondent's handwritten note, which Suarez-Silverio initialed, stated, "Initial fee. After filing of brief fee will be reviewed."

Respondent asked Suarez-Silverio to visit Gonzalez-Rodriguez in prison to inform him that the appeal had been dismissed, and that F&M would seek to reinstate it. Suarez-Silverio, however, contacted Gonzalez-Rodriguez via telephone, and told him that someone from F&M would contact him about taking over the case.

Respondent assigned the appeal to an F&M associate attorney, Alfred V. Gellene, Esq., who met with Gonzalez-Rodriguez in prison on March 20, 2014. More than three years later, in an April 17, 2017 letter to the disciplinary investigator, Gellene stated that he had explained to Gonzalez-Rodriguez that his appeal had been dismissed and that F&M had been retained to represent him to reinstate the appeal. He also explained to Gonzalez-Rodriguez that F&M required his consent for the representation; that Gonzalez-Rodriguez was free to select another attorney if he did not wish F&M to handle the appeal; and that, if he selected the law firm, F&M would seek no further legal fees from him. Gonzalez-Rodriguez decided to retain F&M; accordingly, Gellene provided him with a substitution of attorney form, which Gonzalez-Rodriguez read, claimed to understand, and signed.

On March 26, 2014, Gellene mailed a certification to Gonzalez-Rodriguez for his execution. Thereafter, Meiron Bar-Nadav, Esq. informed Gellene and respondent that Gonzalez-Rodriguez had retained him to seek reinstatement of the appeal. On April 4, 2014, Bar-Nadav forwarded to F&M an April 3, 2014 letter from Gonzalez-Rodriguez terminating the F&M representation and directing F&M to provide a copy of the file to Bar-Nadav and to return to Gonzalez-Rodriguez's family any fee that Suarez-Silverio had turned over to F&M, which had allegedly originated with the family. Upon receipt of Bar-Nadav's correspondence, F&M ceased working on the case.

On April 9, 2014, respondent sent Bar-Nadav a letter with a copy of the substitution that Gonzalez-Rodriguez had signed. Respondent's letter stated that F&M had performed substantial work in the case and would return no funds, because F&M was not privy to any financial arrangements between Gonzalez-Rodriguez and Suarez-Silverio. Respondent offered to copy the client file, at Bar-Nadav's expense, so that Bar-Nadav could continue the representation. By letter dated April 14, 2014, Bar-Nadav asked respondent and Gellene for a copy of the client file and an accounting of all legal work performed in the matter. On April 24, 2014, respondent provided the client file.

The ethics complaint alleged that, thereafter, Maria Rodriguez, Gonzalez-Rodriguez's mother, contacted Suarez-Silverio for the return of the retainer that

the family had provided to him for the appeal. In turn, Suarez-Silverio sought the return of the \$15,000 fee he had paid to respondent. In his answer to the ethics complaint, respondent denied any knowledge of communications between Suarez-Silverio and Maria Rodriguez. In his reply to the grievance, however, respondent claimed that he had been unable to return to the Rodriguez family the funds he received from Suarez-Silverio, because they had been drawn on Suarez-Silverio's personal credit card. He asserted that, therefore, the Rodriguez family had no apparent right to those funds. Moreover, he claimed that Suarez-Silverio's fee had been paid to assist in the gathering of transcripts, organizing the file, drafting a certification, and providing legal advice in respect of Suarez-Silverio's ethics obligations in the event of an ethics complaint, contending, "[t]he retainer was not only for work associated with Gonzalez-Rodriguez's file but additionally work that was done to aid Mr. Suarez-Silverio directly. . . . The fee paid to us from Suarez-Silverio was initially to represent him in any possible malpractice or ethics claim."

Respondent admitted that he considered both Gonzalez-Rodriguez and Suarez-Silverio to be his clients and that, in addition to representing Gonzalez-Rodriguez for the appeal, he represented Suarez-Silverio for possible exposure to malpractice and ethics complaints. Moreover, respondent acknowledged that he owed an undivided loyalty to both Gonzalez-Rodriguez and Suarez-Silverio.

Respondent further admitted that he never informed Gonzalez-Rodriguez of F&M's personal representation of Suarez-Silverio and the resulting conflict of interest. Finally, respondent admitted that his actions created an inherent conflict of interest, in violation of RPC 1.7.

On May 28, 2019, the DEC panel chair entered a case management order authorizing respondent to return Suarez-Silverio's \$15,000 to Maria Rodriguez. On June 4, 2019, respondent, through counsel, sent Bar-Nadav a trust account check from F&M for \$15,000, payable to Maria Rodriguez.

The hearing panel concluded that respondent had engaged in a concurrent conflict of interest by representing both Gonzalez-Rodriguez and Suarez-Silverio, "since Respondent's representation of Suarez-Silverio was to defend a potential ethics and malpractice claim which may have been made by Rodriguez, against Silverio, created a division of loyalty to Rodriguez and Silverio by Respondent."

A two-member majority of the hearing panel recommended the imposition of a reprimand. The public member filed a dissent, pointing out that respondent is a seasoned attorney of forty-five years, that he failed to disclose the conflict of interest to Gonzalez-Rodriguez, and that he failed immediately to remit the \$15,000 when Bar-Nadav requested that he do so. This member voted to suspend respondent for an undisclosed period.

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 facts are not in dispute. Suarez-Silverio retained respondent to seek the reinstatement of an appeal of Gonzalez-Rodriguez's criminal conviction and twelve-year custodial sentence. Suarez-Silverio paid respondent \$15,000, drawn on his own credit card, for that representation.

Respondent's written fee agreement, however, also provided that respondent represented Suarez-Silverio in respect of any malpractice or ethics charges that Gonzalez-Rodriguez might file against Suarez-Silverio.

Respondent assigned the case to Gellene, who met with Gonzalez-Rodriguez in prison, and described Suarez-Silverio's alleged transfer of the case to F&M. Although Gellene informed Gonzalez-Rodriguez that he was not required to use respondent's law firm, neither respondent nor Gellene informed Gonzalez-Rodriguez that F&M also represented Suarez-Silverio for potential ethics and malpractice claims.

Gonzalez-Rodriguez accepted Gellene's offer of representation, and signed a substitution of attorney, after which F&M began to work on the case. Within a few weeks, however, Gonzalez-Rodriguez terminated F&M's representation and retained Bar-Nadav to seek reinstatement of his appeal. Bar-

Nadav requested a copy of the client file and the return of the \$15,000 retainer from Suarez-Silverio. Because respondent had received those funds via Suarez-Silverio's personal credit card, respondent copied the file but refused to turn over the funds to Bar-Nadav. Once the DEC authorized him to do so, respondent remitted those funds to Maria Rodriguez.

Respondent agreed that he engaged in a concurrent conflict of interest and that he never should have considered the dual representation of Gonzalez-Rodriguez and Suarez-Silverio. Indeed, their interests were diametrically opposed to one another. Respondent, thus, violated RPC 1.7(a)(2).

In sum, we find that respondent violated RPC 1.7(a)(2). The sole issue left for us to determine is the appropriate quantum of discipline for respondent's misconduct.

It is well-settled that, absent egregious circumstances or serious economic injury, a reprimand is the appropriate discipline for a conflict of interest. In re Berkowitz, 136 N.J. 134, 148 (1994). See, also, In re Rajan, 237 N.J. 434 (2019) (the attorney engaged in a conflict of interest and an improper business transaction with a client by investing in a hotel development project spearheaded by an existing client; no prior discipline); In re Drachman, 239 N.J. 3 (2019) (the attorney engaged in a conflict of interest by recommending that his clients use a title insurance company in eight, distinct real estate transactions, without

disclosing that he was a salaried employee of that company; there was no evidence of serious economic injury to the clients; the attorney also violated RPC 5.5(a)(1) by practicing law while ineligible to do so; no prior discipline); and In re Allegra, 229 N.J. 227 (2017) (the attorney engaged in a conflict of interest by engaging in a sexual relationship with an emotionally vulnerable client; the attorney also engaged in an improper business transaction with the same client by borrowing money from her; respondent promptly repaid all the funds and had no prior discipline).

In aggravation, respondent has prior discipline: 1995 and 2009 reprimands, and a 2009 three-month suspension, all for dissimilar misconduct. In mitigation, respondent readily admitted his misconduct in this matter and returned the entire \$15,000 retainer to the Rodriguez family. Additionally, respondent's actual representation of Suarez-Silverio was short-lived, because Gonzalez-Rodriguez quickly terminated F&M's representation and retained Bar-Nadav to take over his appeal.

Because respondent is a very seasoned attorney and this is not his first brush with the disciplinary system, we determine that a censure is the quantum of discipline necessary to protect the public and preserve confidence in the bar.

Vice-Chair Gallipoli and Member Zmirich voted to impose a one-year suspension.

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
Bruce W. Clark, Chair

By: 
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

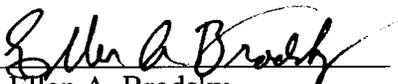
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Disposition: Censure

<i>Members</i>	Censure	One-Year Suspension	Recused	Did Not Participate
Clark	X			
Gallipoli		X		
Boyer	X			
Hoberman	X			
Joseph	X			
Petrou	X			
Rivera	X			
Singer	X			
Zmirich		X		
Total:	7	2	0	0


Ellen A. Brodsky
Chief Counsel