

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 09-097
District Docket No. XIV-08-33E

IN THE MATTER OF
FRANCIS H. SCALESSA
AN ATTORNEY AT LAW

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Decision

Argued: June 18, 2009

Decided: August 7, 2009

Christina Blunda Kennedy appeared on behalf of the Office of Attorney Ethics.

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 Office of Attorney Ethics ("OAE"). The OAE recommends the imposition of a censure for respondent's stipulated violations of RPC 7.1(a) (false or misleading

communication about the lawyer), RPC 8.4(c) (conduct involving dishonesty, fraud, deceit and misrepresentation), and RPC 8.4(d) (conduct prejudicial to the administration of justice). We agree with the OAE's recommendation and determine to censure respondent.

Respondent was admitted to the New Jersey bar in 1972. Prior to his 1996 suspension, as discussed below, respondent maintained an office for the practice of law in Summit.

On May 6, 1991, respondent was suspended from the practice of law for just under two weeks as the result of his failure to cooperate with disciplinary authorities. In re Scalessa, 124 N.J. 16 (1991). In May 1994, respondent received a private reprimand for gross neglect, lack of diligence, and failure to communicate with the client in two matters. In the Matter of Francis H. Scalessa, DRB 93-137 (December 27, 1993).

In 1996, the Supreme Court imposed a three-month suspension on respondent for his violation of multiple RPCs in six client matters: RPC 1.1(a) (gross neglect), RPC 1.1(b) (pattern of neglect), RPC 1.4 (failure to communicate), RPC 1.15(b) (failure to deliver client property), RPC 1.5(b) failure to provide a written retainer agreement), RPC 4.1(a)(1) (making a false statement to a third party), RPC 8.1(b) (failure to cooperate

with disciplinary authorities), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit and misrepresentation). In re Scalessa, 144 N.J. 166 (1996). Respondent has not applied for reinstatement and, therefore, has been suspended for the past thirteen years. In addition, he has not filed an affidavit of compliance with R. 1:20-20.

According to the stipulation, on February 7, 1995, respondent's aunt, Marie Lois Curcio, died. Two years later, on April 24, 1997, respondent wrote to the Brewster Township Tax Assessor on stationery with a letterhead that read: "Francis Scalessa, Esquire." In the letter, respondent stated that he was "assisting in the administration of the estate of Marie Lois Curcio" and requested that all tax bills be forwarded to him. The parties agreed that respondent's use of this letterhead misrepresented that he was an attorney and, therefore, constituted a violation of RPC 7.1(a) and RPC 8.4(c).

On July 22, 1997, respondent's father died. On February 16, 1999, respondent's twin brother, Drew Bradford, sued him in the Superior Court of New Jersey, Law Division, Union County, Special Civil Part, alleging that respondent's negligence had caused their father's death. Bradford also alleged that he had

been injured when he came into contact with asbestos, while visiting respondent at his home.

On June 20, 1999, respondent prepared a "Release & Assignment" in which Bradford agreed to dismiss the suit against respondent in exchange for \$2750. In the release, Bradford agreed not to file an ethics grievance against respondent. The parties agreed that respondent had violated RPC 8.4(d) "by preparing an instrument intended to settle civil litigation that also purported to limit the plaintiff's ability to file an ethics grievance."

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.

The stipulation supports the finding that respondent's use of letterhead identifying him as an attorney violated RPC 7.1(a) and RPC 8.4(c). At the time respondent wrote the letter, he was suspended from the practice of law. R. 1:20-20(b)(4) prohibits a suspended attorney from using any stationery even suggesting that the attorney is entitled to practice law.

RPC 7.1(a) prohibits a lawyer from making "false or misleading communications about the lawyer, the lawyer's services, or any matter in which the lawyer has or seeks a

professional involvement." RPC 8.4(c) prohibits an attorney from engaging in conduct involving dishonesty, fraud, deceit and misrepresentation. Respondent's letterhead falsely communicated that he was authorized to practice law, which was patently false. Thus, he violated both RPC 7.1(a) and RPC 8.4(c).

The stipulated facts also support the finding that respondent violated RPC 8.4(d) (conduct prejudicial to the administration of justice) when he drafted the settlement agreement prohibiting Bradford from filing an ethics grievance against him. In re Wallace, 104 N.J. 489, 595 (1986). In that case, the attorney agreed to purchase from the heirs of his deceased client a promissory note between the decedent and a third party, which the attorney had negligently drafted. Id. at 592. In exchange, the heirs agreed to dismiss "any pending actions, in particular the ethics complaint." The Supreme Court said of such conduct:

Such behavior shows extreme indifference to the intent of the Disciplinary Rules. Public confidence in the legal profession would be seriously undermined if we were to permit an attorney to avoid discipline by purchasing the silence of complainants.

[Id. at 593-94.]

The stipulation identified as a mitigating factor respondent's intention not to apply for reinstatement. In aggravation, the stipulation identified respondent's ethics history.

There remains for determination the appropriate measure of discipline to be imposed for respondent's misconduct. As stated previously, the OAE recommends that respondent be censured.

The use of a misleading letterhead ordinarily results in an admonition. See, e.g., In the Matter of Jean Larosiliere, DRB 02-128 (March 20, 2003) (admonition for allowing the name of a law school graduate to appear on the letterhead in a manner indicating that the individual was a licensed attorney and allowing a California lawyer not admitted in New Jersey to sign letters on the firm's letterhead with the designation "Esq." after the attorney's name; the attorney also lacked diligence and failed to communicate with a client) and In the Matter of Morrison, Mahoney & Miller, LLP, DRB 01-364 (December 5, 2001) (admonition for using letterhead that did not identify attorneys licensed in New Jersey, did not indicate the jurisdictional limitations on attorneys not admitted in New Jersey, and did not indicate "one or more of its principally responsible attorneys"

licensed in New Jersey; the firm also failed to maintain an attorney trust and business account in New Jersey).

However, a misrepresentation in any context typically results in the imposition of at least a reprimand. The Court has consistently imposed reprimands for misrepresentations to clients, disciplinary authorities, the courts, and third parties. See, e.g., In re Lowenstein, 190 N.J. 58 (2007) (attorney failed to notify an insurance company of the existence of a lien that had to be satisfied out of settlement proceeds; the attorney's intent was to avoid the satisfaction of the lien); In re Manns, 171 N.J. 145 (2002) (attorney misled the court in a certification in support of a motion to reinstate a complaint as to the date attorney learned that the complaint had been dismissed; he also lacked diligence, failed to expedite litigation, and failed to communicate with the client); In re Kantor, 165 N.J. 572 (2000) (attorney misrepresented 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)(attorney lied to the OAE about the fabrication of an arbitration award and also failed 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 his remorse); In re Kasdan, 115 N.J. 472, 488 (1989) (attorney intentionally misrepresented to a client the status of a lawsuit); and In re Powell, 148 N.J. 393 (1997) (attorney misrepresented to the DEC that an appeal had been filed, and was guilty of gross neglect, lack of diligence, and failure to communicate with his client).

There remains the issue of respondent's settlement of Bradford's claim against him in exchange for, among other things, Bradford's agreement not to file "any ethics complaints" against respondent. In In re Wallace, supra, 104 N.J. at 594, the attorney was given a six-month suspension based on this conduct, plus his gross neglect in handling the promissory note on behalf of the deceased client, as well as his recordkeeping violations.

In other cases, however, attorneys who have engaged in this misconduct have been admonished or reprimanded. See, e.g., In re Levin, 193 N.J. 348 (2008) (admonition for attorney's violation of RPC 8.4(d), resulting from his aggressive attempt to have a grievant withdraw her grievance against him; we had determined to impose a reprimand based on an additional violation (lack of courtesy and consideration to all persons involved in the legal process), which the Court rejected because the violation was not charged in the ethics complaint); In the Matter of R. Tyler Tomlinson, DRB 01-284 (November 2, 2001) (admonition for attorney who improperly conditioned the resolution of a collection case upon the dismissal of an ethics grievance filed against him by his client's parents); and In re Mella, 153 N.J. 35 (1998) (reprimand for attorney who attempted to have the grievant dismiss the grievance in exchange for a fee refund and some additional remedial conduct; the attorney also failed to act with diligence and to communicate with his clients in two matters). In 1992, a private reprimand (now an admonition) was imposed on an attorney who had prepared a

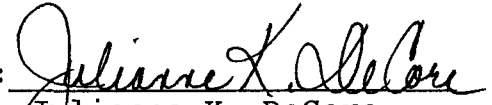
"Payment Affidavit and Cash Receipt," intended to force his client to withdraw all ethics grievances against him.¹

For the totality of respondent's violations, coupled with his ethics history, we determine that discipline no harsher than a censure is appropriate, particularly because of the passage of time since respondent's transgressions.²

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

¹ Private reprimands were confidential. Thus, the attorney's name is omitted from this decision. In 1995, private reprimands were abolished and replaced by admonitions.

² Although the events that gave rise to the charges against respondent occurred ten and twelve years ago, respectively, they did not come to the attention of the OAE until 2008.

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VOTING RECORD

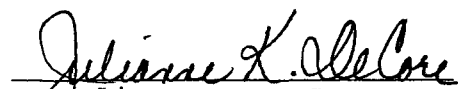
In the Matter of Francis H. Scalessa
Docket No. DRB 09-097

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Disposition: Censure

Members	Disbar	Suspension	Censure	Dismiss	Disqualified	Did not participate
Pashman			X			
Frost			X			
Baugh			X			
Clark			X			
Doremus			X			
Stanton			X			
Wissinger			X			
Yamner			X			
Zmirich			X			
Total:			9			


Julianne K. DeCore
Chief Counsel