SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket Nos. DRB 07-386 and 07-387
District Docket Nos. XIV-03-317E and XIV-03-318E

IN THE MATTERS OF

ANTHONY J. FUSCO

AND

ROY R. MACALUSO

ATTORNEYS AT LAW

Decision

Argued: June 19, 2008

Decided: August 19, 2008

Michael J. Sweeney appeared on behalf of the Office of Attorney Ethics.

Justin P. Walder appeared on behalf of respondents.

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

These matters came before us on recommendations for discipline (a one-year suspension for respondent Fusco and a censure for respondent Macaluso) filed by Special Master John M. Boyle, J.S.C. (Ret.). These cases arose as a result of a random audit conducted by the Office of Attorney Ethics ("OAE"). That audit revealed that respondents, partners in a law firm named Fusco and Macaluso ("the firm"), paid a nonlawyer employee a percentage of legal fees that the firm received in personal injury cases. The OAE contended that these payments constituted improper fee-sharing; respondents argued that the payments were made pursuant to a permissible profit-sharing plan.

The complaint charged respondents with violating RPC 5.3(a) (failure of law firm to adopt and maintain reasonable efforts to ensure that the conduct of nonlawyer employees is compatible with the lawyer's professional obligations); RPC 5.3(b) (failure of lawyer with direct supervisory authority over nonlawyer to make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the lawyer's professional obligations); RPC 5.3(c) (ordering or ratifying the conduct of a nonlawyer employee that would be an RPC violation if engaged in by a lawyer); RPC 5.4(a) (sharing legal fees with a nonlawyer), RPC 5.5(a)(2) (assisting in the unauthorized practice of law), RPC 7.2(c) (giving

something of value to a person for recommending the lawyer's services), RPC 7.3(d) (compensating or giving something of value to a person to recommend the lawyer's employment by a client or as a reward for having made a recommendation resulting in the lawyer's employment by a client), RPC 8.3(a) (failing to inform disciplinary authorities of another lawyer's RPC violation that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer), RPC 8.4(a) (violating or attempting to violate the RPCs, knowingly assisting or inducing another to do so, or doing so through another's acts), and RPC 8.4(b) (committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects). In addition, the complaint charged respondent Fusco with violating RPC 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation).

Like the special master, the OAE recommended that Fusco receive a one-year suspension and Macaluso receive a censure. We agree with those recommendations.

Fusco was admitted to the New Jersey bar in 1972. In 1995, he received a reprimand by consent for improperly delegating his trust account recordkeeping responsibilities to an associate attorney over whom he had direct supervisory authority and for

failing to supervise that attorney, resulting in the knowing misappropriation of client funds by that attorney and an overdraft of $262,000 in the firm's trust account, all in violation of RPC 5.1(a) and (b) and RPC 1.15(a) and (d). In re Fusco, 142 N.J. 636 (1995). In December 2007, we transmitted to the Court a decision concluding that Fusco should be reprimanded for signing the name of an associate attorney on a reply to a grievance without that associate's consent, and then denying that he had done so, in violation of RPC 3.3(a)(1), RPC 8.1(a), and RPC 8.4(c). On August 8, 2008, after the Court remanded that matter to us for further proceedings, we issued a supplemental decision again determining that a reprimand should be issued. That matter is pending with the Court.

Macaluso was admitted to the New Jersey bar in 1987. He has no disciplinary history.

The interpretation of RPC 5.4(a)(4) is critical to our resolution of these cases. That rule provides:

> **RPC 5.4 Professional Independence of a Lawyer**
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> Except as otherwise provided by the Rules of Court:
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> (a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:
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> . . . .

(4) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

The facts are not in dispute. Indeed, the OAE and respondents entered into a stipulation of facts, which was supplemented by testimony and exhibits submitted at the ethics hearing.

In 1992, Fusco hired Macaluso as an associate. After Macaluso was given the title of partner in 1999, he continued to be treated as an employee. Fusco had exclusive decision-making authority in the firm.

In 1996, Fusco hired as claims manager Adam Greenspan, a nonlawyer who had worked for approximately ten years in the insurance industry, as both an insurance adjuster and a claims examiner. When he became employed by respondents, his last annual salary had been between $40,000 and $50,000.

Although Greenspan worked very closely with Macaluso, who was the head of the firm's personal injury department, both respondents directly supervised Greenspan.

Greenspan's duties included collecting and recording client information; reviewing the firm's personal injury files for completeness; discussing personal injury cases with insurance claims adjusters; obtaining medical and police reports, photographs, and other evidence; coordinating clients' medical

insurance billing; and managing the firm's computer, telephone, and alarm systems.

The firm paid Greenspan both a salary and a percentage of its legal fees. In 1996, Greenspan received $31,057, representing part of his $40,000 annual salary. In addition, pursuant to his employment agreement, during the first six months of 1996, he was paid five percent of the firm's net fees in personal injury matters resolved with his "substantial involvement."

In mid-1996, this compensation was increased from five percent to ten percent. In cases requiring litigation, Greenspan received no fee percentage, regardless of the amount of work he performed in those matters.

From 1997 to 2004, Greenspan's annual salary was $31,200 ($600 per week), except for 1999, when he received $51,451.

At some point in 1996, Greenspan and Fusco agreed that, in addition to the above compensation, Greenspan would be paid forty-two and one-half percent of the firm's fees received in cases that he "originated," that is, cases that he referred to the firm. This amount was reduced to thirty-seven and one-half percent in cases that were litigated. Macaluso learned of this agreement in 1996.

Macaluso calculated Greenspan's percentage compensation upon settlement of a case. Macaluso used an adding machine with paper tape to calculate fees, expenses, and Greenspan's percentages. Macaluso then gave the paper tape to the firm's bookkeeping department, which issued the payments in accordance with his calculations. These tapes were maintained with the client files.

The firm deposited all settlement proceeds in the trust account, disbursing fees and expenses, including Greenspan's shares, from that account. At Greenspan's request, the firm issued his checks payable to "AFG Enterprises," an unincorporated entity. Fusco signed all trust account checks.

In January 2000, the firm changed its procedure for paying Greenspan's shares. Instead of issuing the checks directly to Greenspan, the firm issued the checks payable to "A.J. Fusco, Jr." Fusco then endorsed the checks to Greenspan, who, in turn, signed the checks as "AFG Enterprises" and retained the funds. The memo portion of the check contained the file number and client name. In most cases, the check indicated "Fees (AFG)," although, in some cases, it simply indicated "Fees," without Greenspan's initials. The same information appeared on the firm's client ledger cards.

Although Macaluso was not specifically aware of the preparation of the checks to Greenspan, he knew that Greenspan received checks in the amounts appearing on the tapes that Macaluso had prepared.

From 1996 to May 2003, the firm paid Greenspan the following compensation:

Year	Salary	Percentage Payments	Total Payment
1996	$31,057.00	$ 8,000.00	$ 39,057.00
[illegible]	[illegible]	[illegible]	[illegible]
1998	$31,200.00	$ 73,484.00	$104,684.00
[illegible]	[illegible]	[illegible]	[illegible]
2000	$31,200.00	$112,479.00	$143,679.00
[illegible]	[illegible]	[illegible]	[illegible]
2002	$31,200.00	$158,727.84	$189,927.84
[illegible]	[illegible]	[illegible]	[illegible]

Altogether, the firm paid Greenspan in excess of $780,000, via more than 700 percentage payments, in addition to his annual salary. The firm discontinued the percentage payments to Greenspan in May 2003, after the OAE indicated, during the audit, that such practice was improper.

In the stipulation, the OAE did not dispute the firm's position that the personal injury cases that Greenspan originated were meritorious or that those cases generally came from Greenspan's friends, relatives, and others who were referred to him. In addition, the OAE did not allege that any financial loss

resulted from the services provided by Greenspan. No client complained to the OAE about Greenspan or filed a grievance about him. Although not charging that Greenspan held himself out as a lawyer, the OAE alleged that several people erroneously referred to him as a lawyer in written correspondence.

The OAE agreed that respondents cooperated with its investigation.

Much of the testimony at the ethics hearing focused on the reason that Fusco discontinued issuing checks to Greenspan and, instead, began issuing checks to himself and then endorsing them to Greenspan. The OAE's position was that, because Fusco knew that payments to nonlawyers were prohibited, he had initiated this change in response to the July 12, 1999 enactment of the "runner statute," N.J.S.A. 2C:21-22.1, in an attempt to conceal the checks issued to Greenspan.[1] In contrast, Fusco claimed that

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[1] That statute provides:

> b. A person is guilty of a crime of the third degree if that person knowingly acts as a runner or uses, solicits, directs, hires or employs another to act as a runner.
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> "Runner" means a person who, for a pecuniary benefit, procures or attempts to procure a

(footnote cont'd on next page)

he had changed the payment mechanism as a result of advice from his accountant.

During the audit, OAE auditor Barbara Galati noticed that checks were no longer being issued to AFG Enterprises and, instead, were made payable to Fusco, as described above. Galati testified that approximately 424 checks had been issued to Fusco and then endorsed to Greenspan, while about eighty-seven checks had been made payable directly to AFG Enterprises. When Galati learned that Greenspan was not an attorney, she told Fusco that it was improper to pay a fee to a nonlawyer. According to Galati, Fusco then ended the discussion about the Greenspan payments.

Galati asserted that of the approximate $195,000 that Greenspan received as percentage payments in 2001 about $130,000 represented payments for originating cases; the balance of about

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(footnote cont'd)

> client, patient or customer at the direction of, request of or in cooperation with a provider whose purpose is to seek to obtain benefits under a contract of insurance or assert a claim against an insured or an insurance carrier for providing services to the client, patient or customer, or to obtain benefits under or assert a claim against a State or federal health care benefits program or prescription drug assistance program.

$60,000 represented payments for cases with Greenspan's substantial involvement.

Fusco's accountant, Steven Pinto, testified that he began working for the firm in the summer or fall of 1998 and continued to provide services for the firm as of the date of the ethics hearing. He converted the firm's bookkeeping from a manual to a computerized system. Although Pinto provided accounting services to the firm, he admitted that he was not familiar with the Court rules governing attorney trust accounts.

At the ethics hearing, OAE attorney Michael Sweeney questioned Pinto about the payments to Greenspan:

> Q. Did you ever have any discussions with Mr. Fusco back in 1999 in terms of the way he was paying Mr. Greenspan out of the trust account?
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> A. It was a long time ago. I think I might have had a conversation about it. It was probably more for purposes of how we would track Mr. Greenspan's compensation for tax reporting purposes, and so it was if a check was coming out of the trust account, I wanted it to be trackable in the operating account, because I really didn't do any reporting on the trust account. My focus was the operating account in terms of the business' profit and loss, employee compensation reporting such as W-2s and 1099s, things like that. That was just in the conversation that I can recall.
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> Q. I want to show you an exhibit that's marked P-3 in evidence. This is a check payable to Mr. — payable to A.J. Fusco, Jr. Did you ever tell Mr. Fusco that he should pay Mr. Greenspan with checks like P-3 out of the trust account?

A. The way that I recall describing this specific thing is that I said there's a bookkeeping entry that needs to be made in the operating account. By that I meant, a check from the trust account should be made payable to Mr. Fusco's operating account, and then from there it should be disbursed like any other business expense; that was the purpose of the way that I advised my clients.

Q. So the specific question, though, is did you tell him to make checks payable to himself and endorse those checks over to Mr. Greenspan?

A. I did not.

[1T103-21 to 1T105-1.][2]

On cross-examination by respondent's counsel, the following exchange took place:

Q. Did you ever have that kind of specific conversation with Mr. Fusco that you were just asked by Mr. Sweeney where you specifically said to make a check out to yours and endorse it over, did you ever discuss that specifically that way with Mr. Fusco?

A. No, I think that that was a misunderstanding. I think that I expected that in the normal course of business that if a check was made payable to Mr. Fusco, that it would be transacted the way all other checks would be transacted, which means it would be deposited to the operating account.

[1T105-2 to 14.]

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[2] 1T refers to the transcript of the February 13, 2007 disciplinary hearing.

In addition, Pinto remarked that, although Greenspan's salary could be ascertained from his W-2 form, the percentage payments could not be tracked because neither W-2 nor 1099 forms were issued for those payments.

Greenspan denied that generating cases or claims was part of his job with the firm. At the ethics hearing, he was given a document listing the cases that he had originated at the firm, during a period of slightly more than four years. He was asked to identify whether the claimants had been friends, relatives, or "other." That document reveals that of 130 claimants none were relatives, fifteen were friends, and 115 were neither friends nor relatives. When asked how he was able to refer an average of twenty-seven claimants per year, most of whom were not friends, Greenspan replied that a number of those cases had been referred to the firm by a chiropractor with whom he had been acquainted, prior to his employment with the firm.

Greenspan would receive credit for a case if a referral developed from a previous client whom he had referred. Simply stated, if a client originally obtained by Greenspan later referred an individual to the firm, Greenspan received credit for originating the second case.

Greenspan's compensation arrangement with the firm was not in writing. According to Greenspan, he received a "profit share" of ten percent of the firm's fee, if he was substantially involved in the file. Macaluso received fifteen percent of the fee in every case that Greenspan originated, with Greenspan and Fusco dividing the remaining eighty-five percent, that is, receiving forty-two and one-half percent each. Greenspan's profit share remained the same if the case went into litigation and Macaluso handled it. However, if another attorney handled the case, that attorney would receive a ten percent "profit share" and Greenspan and Fusco would divide the remaining seventy-five percent, with each receiving thirty-seven and one-half percent. In the event of no recovery, whether by settlement or litigation, Greenspan received no compensation.

Greenspan claimed that, on the advice of an accountant, he used the title "AFG Enterprises" for payments other than his regular salary. Because Greenspan worked between fifty and sixty hours per week, his $31,200 annual salary amounted to compensation at the rate of about $10 per hour. He accepted the employment, however, because he believed that the profit shares presented an opportunity for additional compensation. When asked why, during his eleven years at the firm, he had never asked for or received a

larger salary, Greenspan replied that Fusco likes to keep his employees "motivated" to do their jobs and to ensure that they work hard. Although Greenspan initially estimated that about twenty-five to thirty percent of his job responsibility was administrative and not related to personal injury work, he conceded that he spent only about seven percent of his time on administrative work.

Similarly, when Macaluso was asked why Greenspan, who appeared to work hard and contribute to the firm, had never received a salary increase, he replied, "Why didn't my salary ever increase? Why eventually did my salary disappear? Because it's an incentive based firm; you get up earlier, work through lunch as we always do, and you are rewarded."

When Macaluso was interviewed for a job with the firm, Fusco indicated that, although he paid low salaries to associates, he offered a profit-sharing percentage as an incentive. After Macaluso became a partner, his salary was discontinued and his profit share increased to fifteen percent of all fees received in personal injury cases, as well as fifteen percent of all fees received in cases that he originated. He did not receive any share of the profits, other than a percentage of the personal injury fees.

Although Macaluso was Greenspan's direct supervisor, he had no role in determining Greenspan's compensation arrangement. Macaluso and Greenspan worked very closely together, meeting between twenty and twenty-five times a day to discuss cases. Macaluso was solely responsible for determining whether the firm would accept a personal injury case. In addition, only Macaluso had the authority to determine whether to recommend a settlement offer to a client. According to Macaluso, of the firm's approximate 900 personal injury cases received per year Greenspan referred between thirty and thirty-five. Ninety percent of the firm's personal injury cases were settled, regardless of whether Greenspan originated them.

The profit share program was established before Macaluso became an associate. Macaluso used the term "profit share" to refer to a percentage of the firm's fees in personal injury cases.

Macaluso confirmed that, in cases that Greenspan originated, the fee would be disbursed as follows: Macaluso, fifteen percent; Fusco and Greenspan, forty-two and a half percent each. In one matter given as an example, the Chu case, Greenspan received a fee share in excess of $14,000, while Macaluso received less than $5,000. When asked why Greenspan, an employee that he supervised, should receive $9,000 more than he

did, Macaluso replied that, if not for Greenspan's originating the case, Macaluso would not have received *any fee*.

Macaluso did not disclose to clients that Greenspan received a percentage of the fee in their cases.

Macaluso conceded that he had not reviewed the Rules of Professional Conduct in connection with Greenspan's receipt of percentage payments. Fusco had indicated to him that the payments were pursuant to a permissible profit-sharing plan. Early in Greenspan's employment with the firm, Macaluso cautioned him that he was not permitted to solicit cases. According to Macaluso, that discussion had been prompted by the publicity surrounding a case in which attorneys were disciplined for improperly soliciting clients, after a gas explosion at an apartment complex in Edison.[3]

As to his failure to report Fusco to disciplinary authorities, Macaluso asserted that he had no knowledge of the preparation of the checks to Greenspan. He, thus, argued that

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[3] Although he could not recall the name of the case, it is likely that Macaluso was referring to In re Ravich, 155 N.J. 357 (1998).

there is no duty to report wrongdoing in the absence of knowledge.

Fusco, too, testified about the arrangement with Greenspan. In his answer to the complaint, he had asserted that, "prior to the law firm's arrangement with Mr. Greenspan, Mr. Fusco had learned of such arrangements from another lawyer and believed them to be appropriate." At the ethics hearing, however, Fusco could not name any attorneys who had paid nonlawyers a percentage of fees. Instead, he knew of attorneys who had employed claims adjustors and compensated them on a _per diem_ basis, rather than on a fee percentage.

As did Macaluso, Fusco testified that Greenspan was told not to solicit cases. Yet, Fusco conceded that part of Greenspan's value was his ability to attract business to the firm. Fusco asserted that he had discussed with Greenspan the limitations on soliciting cases and the prohibition against "ambulance-chasing." Although Greenspan may have had a financial incentive to solicit cases, Fusco never questioned his integrity, believing that he would not "drum up business." In addition, because Macaluso was responsible for deciding whether to accept all cases and because the firm had a system of checks

and balances, Fusco was never concerned that Greenspan would improperly obtain case referrals.

Although Fusco had previously paid attorneys a fee percentage, Greenspan is the only nonlawyer who participated in the firm's fee percentage program. Thus, if a secretary referred a personal injury case to the firm, that secretary would not receive a share of the fee, when the case was resolved.

As to the change in payment procedures by which checks were issued to Fusco and then endorsed to Greenspan, Fusco denied that the motive was to conceal the profit-sharing arrangement. He further denied that the change was related to the enactment of the runner statute. As mentioned above, Fusco testified that his accountant, Pinto, had advised him that trust account checks should not be issued to a nonlawyer.

Fusco claimed that he had misunderstood Pinto's advice, believing that he could make the checks payable to himself and then endorse them to Greenspan, rather than simply paying Greenspan from the business account. The following exchange between OAE attorney Michael Sweeney and Fusco took place at the ethics hearing:

> Q. [Y]our understanding was that you were not to pay compensation out of the trust account?
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> A. That's what [Pinto] said.

Q. How did you not understand that the checks you were endorsing to [Greenspan] were for compensation?

A. [A]ll I got from [Pinto] was that it was for accounting purposes.

[2T137-9 to 16].[4]

Fusco conceded that he had not reviewed the RPCs before entering into the compensation arrangement with Greenspan. Thus, he had not relied on the profit-sharing exception of RPC 5.4(a). Instead, he claimed, he had applied to Greenspan the same profit-sharing plan that he had established with lawyers in his firm, because he understood that he was permitted to do so. He did not take any steps to assure that the profit-sharing plan was qualified with the Internal Revenue Service. He admitted that it was a mistake to issue the checks to AFG Enterprises, asserting that he did so as an accommodation to an employee.

Fusco contended that, until the May 2003 OAE audit, he had not known that Pinto was not familiar with the rules governing attorney trust accounts.

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[4] 2T refers to the transcript of the March 9, 2007 disciplinary hearing.

After the OAE indicated that the fee payments to Greenspan were improper, Fusco ceased that program and increased Greenspan's salary to $100,000 per year.

The OAE alleged that respondents assisted Greenspan in the unauthorized practice of law, based on Greenspan's "non-routine" correspondence sent to others, mostly insurance companies, the receipt of several letters from insurance companies addressed to "Adam Greenspan, Esq.," and respondents' payment of fee shares to Greenspan. In turn, respondents asserted that Macaluso closely supervised Greenspan, that all correspondence that Greenspan sent was routine, and that all of the claims adjustors with whom Greenspan dealt were not lawyers.

Greenspan, too, asserted that the insurance company employees with whom he dealt, when resolving claims, were not attorneys; that he had no authority to accept or settle a case for the firm; that he had never held himself out as an attorney; and that, in the thousands of files that he had handled for the firm, he had received five or ten letters mistakenly referring to him as an attorney.

As to his failure to report Macaluso to disciplinary authorities for sharing fees with a nonlawyer, Fusco explained

that, because he did not believe that the fee-sharing was unethical, he had no duty to report Macaluso.

Respondents offered numerous "character letters" and documents recognizing or commending them for various services and contributions. In addition, respondents submitted the report and testimony of Paul Dorf, who was proffered as an expert in compensation. Dorf worked for ten years in human resources for various corporations and, for the past thirty years, as a compensation consultant.

Respondents retained Dorf to prepare an evaluation of Greenspan's compensation paid by the firm between 1999 and 2003. Dorf ascertained Greenspan's duties and responsibilities and then sought to find comparable positions within either law firms or general industry. He equated Greenspan's position with that of an insurance claims handler and then compared Greenspan's compensation to that of others performing similar functions in the insurance industry.

Dorf opined that Greenspan's compensation in 1999, 2000, 2002, and 2003 was within the competitive range of that of similar positions. He asserted that, although Greenspan's 2001 compensation of $226,831 was above the market range of $121,120 to $181,680, such fluctuations occur when compensation is based

on variables, such as performance or profitability, and not strictly a fixed salary. Dorf conceded that insurance companies typically compensate employees using an approach that is the reverse of that of the firm in this case, that is, insurance companies pay a larger salary and a smaller variable component.

Dorf agreed that, if Greenspan had received only his salary, he would have been underpaid. He further conceded that insurance companies do not compensate claims managers for bringing business to the company. He admitted that he was not aware that Greenspan's 2003 compensation of $126,870 represented payments not for the full year, but only through May. He also admitted not knowing that nonlawyers are not permitted to receive fee shares. He concluded that Greenspan's total compensation was similar to that of insurance claims managers.

Dorf acknowledged that his report contained no reference to the compensation paid by law firms that receive contingent fees. Although he relied on surveys of corporate compensation, those surveys did not cover law firms. He was not able to find any data about law firm claims managers. He acknowledged that he had not consulted any New Jersey law firms to ascertain their practices concerning claims manager employees.

In addition, Dorf revealed that he had compared Greenspan's title to that of a top claims executive, which is the highest executive claims title. He explained, however, that he had reviewed very small insurance companies in making this comparison.

Dorf concluded that the firm's compensation system constituted a profit-sharing plan, notwithstanding that the payments were made on a case-by-case basis, rather than a lump sum payment at the end of the year.

As indicated above, the OAE recommended that Fusco receive a one-year suspension and that Macaluso receive a censure. Respondents, in turn, argued that they had not violated any RPC; that, if their conduct were found to be unethical, no discipline should be imposed because there had not been sufficient guidance to the bar that their conduct was prohibited; and that, if discipline were to be imposed, the appropriate sanction would be an admonition.

The special master determined that respondents violated RPC 5.4(a), RPC 7.2(c), RPC 7.3(d), and RPC 8.3(a). He dismissed the charges that respondents violated RPC 5.3(a), (b), and (c), RPC 5.5(a)(2), and RPC 8.4(a), (b), and (c).

Specifically, the special master found that the firm's compensation arrangement with Greenspan constituted fee-sharing

with a nonlawyer, a violation of RPC 5.4(a). Citing our decision in In the Matter of Evans C. Agrapidis, DRB 06-083 (July 19, 2006), the special master concluded that the RPCs clearly prohibit attorneys from paying employees a percentage of fees received from cases referred by them.

The special master rejected respondents' contention that Greenspan's compensation was paid pursuant to a profit-sharing plan permitted under RPC 5.4(a)(4). He observed that the arrangement did not contain indicia of a bona fide profit-sharing plan, as defined under regulations of the Employment Retirement Security Income Act and the Internal Revenue Service ("IRS"). Although the special master acknowledged that a profit-sharing plan need not necessarily qualify under IRS regulations to be valid, he ruled that it should include all of the normal indicia of a legitimate profit-sharing plan. The special master relied on Borteck v. Riker, Danzig, Scherer, Hyland & Perretti, LLP, 179 N.J. 246, 254 (2004), in which the Court analyzed, for compliance with RPC 5.6, a law firm's retirement plan. Remarking that the Court has not ruled on the parameters of a profit-sharing plan under RPC 5.4, the special master noted that, in Borteck, the Court held that a party defending a restriction on a lawyer's right to practice upon termination of a partnership

or employment agreement must show that the plan "contains sufficient indicia of a bona fide retirement arrangement."

Noting that, if Greenspan had received only his annual salary of $31,200, his compensation would have amounted to merely $10 to $12 per hour, the special master surmised that Fusco's office policy was to pay Greenspan a very low salary to motivate him to refer cases to the firm and, in turn, increase his income. The special master discussed the firm's profit-sharing plan as follows:

> The sharing of fees with Mr. Greenspan was not part of a *profit sharing* agreement, but part of an *income sharing* one. By definition profit sharing means just that – sharing *profits* after all expenses, including office overhead and the like, are paid. Here Mr. Greenspan was paid a percentage on his cases before such deductions.
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> [SMR9].[5]

As for the testimony of the expert witness, Dorf, the special master found that it was neither helpful nor relevant. He noted that Dorf (1) focused on whether Greenspan's compensation was within the range of the salary of an insurance claims manager; (2) did not know that, as a nonlawyer, Greenspan

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[5] SMR refers to the special master's report.

was not permitted to share legal fees; (3) was not aware that Greenspan received a percentage of the gross, not net, profits; and (4) made no effort to determine the amount of the firm's net profits.

In addition, the special master rejected Fusco's explanation that he had misunderstood the advice of his accountant, Pinto, when he had instructed Fusco not to issue trust account checks to employees. The special master concluded that Fusco's testimony in this regard was not credible and that Fusco's intent was to conceal the payments to Greenspan:

> The indicators of obfuscation are obvious: first, payments were made to Adam Greenspan Enterprises, a trade name or entity not affiliated with the firm; second, these payments were treated as to a vendor in the payout from the trust account, not as *income* to an employee, with no W-2 or 1099 filed; third, after the enactment of the runner statute (NJSA 2D:21) [sic], checks were made out to Mr. Fusco and then endorsed over to Adam Greenspan Enterprises.
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> Only the audit by OAE discovered these payments to Adam Greenspan and the payment method bears all the earmarks of an attempt to hide the basis for the payments. Attempts by Mr. Fusco to explain why he went to such lengths are not credible coming from a seasoned veteran of the bar since 1972.
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> It is interesting to note that once the so called profit sharing ceased and after the OAE audit, Mr. Greenspan's salary was

increased to $100,000 yearly from the static base formerly of $31,200.

In short, therefore, it seems clear that the only reason Adam Greenspan was given disguised payments was because the respondents knew it was wrong to pay a non-lawyer a percentage of cases he referred, and the low base salary achieved Mr. Fusco's stated policy: to keep the lawyers in the firm and Mr. Greenspan motivated to bring in more business, because that is where the money is.

The evidence is clear and convincing. The basic facts were uncontested. The stipulations attached speak for themselves. I could not accept the testimony of respondents as credible, particularly that of Mr. Fusco. At the hearing, he still maintained that this was truly a permitted profit sharing arrangement under RPC 5.4(a)(4).

[SMR11-SMR12].[6]

The special master determined that the same facts on which the RPC 5.4(a) violation was based also supported the finding that respondents violated RPC 7.2(c) and RPC 7.3(d).

Because respondents failed to report each other's conduct to the disciplinary authorities, the special master found that they violated RPC 8.3(a).

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[6] Despite this determination, the special master did not address the charge in the complaint that Fusco violated RPC 8.4(c) by disguising the checks to Greenspan.

The special master dismissed the remaining *charged* violations, RPC 5.3, RPC 5.5(a), RPC 8.4(a), RPC 8.4(b), and RPC 8.4(c).

In assessing the aggravating factors, the special master considered (1) the duration (seven years) and extent (700 fee payments amounting to $780,000) of respondents' misconduct; (2) respondents', particularly Fusco's, lack of candor in trying to justify the fee share payments; (3) the deliberate nature of the violations, which reflected an intent to deceive; and (4) the lack of contrition, remorse, or admission of wrongdoing. The special master considered, in mitigation, (1) respondents' good reputations; (2) their lack of a disciplinary history;[7] (3) the numerous character letters submitted on their behalf; (4) respondents' service to the community; (5) the termination of payments to Greenspan after the OAE audit; (6) the passage of time (then four years) since the improper incidents; (7) the absence of grievances in any cases involving Greenspan; and (8) the lack of harm to the public.

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[7] As previously mentioned, Fusco was reprimanded in 1995. The events leading to the disciplinary matter that is pending with the Court took place after the events in this case.

Finding that Fusco was the "creator, director and the dominant partner who devised and carried out this scheme," the special master recommended that he be suspended for one year. The special master relied on the following cases, in which the attorneys received one-year suspensions: In re Berglas, 190 N.J. 357 (2007); In re Birman, 185 N.J. 342 (2005); In re Berger, 185 N.J. 269 (2005); and In re Silverman, 185 N.J. 133 (2005).

The special master recommended that Macaluso receive a censure, noting that, although he had complied with Fusco's plan, he "was not the prime mover, nor the decision maker."

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

Respondents do not dispute that, from 1997 to 2003, they paid Greenspan, a nonlawyer employee, a percentage of legal fees received in certain personal injury cases. RPC 5.4(a) prohibits attorneys from sharing fees with nonlawyers, with certain exceptions. One of those exceptions, found at RPC 5.4(a)(4), provides that a lawyer or a law firm may include nonlawyer employees in a compensation or retirement plan, even though that plan is based on a profit-sharing arrangement.

Fusco contended that the fee-sharing agreement with Greenspan constituted a permissible profit-sharing plan. He asserted that, for many years, he compensated attorney employees with a percentage of fees received from cases that those attorney employees referred. He maintained that, after he hired Greenspan, he included him in this long-standing and established plan. Fusco was either unable or unwilling to appreciate the difference between compensating lawyers and nonlawyers for referring cases to the firm. The former is permitted; the latter is not. Macaluso asserted that he had relied on Fusco's assurances that the profit-sharing plan was proper.

As the special master pointed out, respondents shared income, rather than profits, with Greenspan. They compensated him based on a percentage of their gross revenue, without making any deductions for expenses, such as overhead. Moreover, there was no "profit-sharing plan." Respondents simply paid Greenspan a percentage of the fees that he generated, whether by case referral, or by his "substantial involvement." If this fee-sharing arrangement were a permissible profit-sharing plan, the <u>RPC</u> 5.4(a)(4) exception would swallow the rule. Every attorney could claim that payments of fee shares to nonlawyers were made

pursuant to a profit-sharing plan, without being required to demonstrate the legitimacy of that plan.

In addition, respondents' expert, Paul Dorf, provided no assistance in the resolution of the issues in this case. His report and testimony focused on the amount of Greenspan's overall compensation, including both salary and fee shares, compared to that of high level insurance claims executives. He was not aware of the amount of salaries paid to nonlawyer employees; he was not aware that nonlawyers are not permitted to receive fee shares; and he was not aware that Greenspan was paid a share of the gross profits, before deductions for overhead and other expenses. The employee compensation surveys on which he relied were derived from insurance companies, not law firms.

More importantly, the amount of Greenspan's compensation is irrelevant to a finding that respondents acted improperly. It is the character of the compensation, that is, the sharing of legal fees, not the amount of the compensation, that violated the rules.

RPC 5.4(a)'s prohibition against the sharing of legal fees with nonlawyers was designed to ensure that referrals are made in the client's interest, not in the interest of the party making the referral. Also, the rule is intended to preserve the lawyer's independent professional judgment by having the lawyer,

not the referring party, retain control over the case. In re Weinroth, 100 N.J. 343 (1985). In that case, the Court discussed the purpose of the predecessor of the rule:

> The prohibition of the Disciplinary Rule is clear. It simply forbids the splitting or sharing of a legal fee by an attorney with a lay person, particularly when the division of the fee is intended to compensate such a person for recommending or obtaining a client for the attorney. The policy served by this Disciplinary Rule is to ensure that any recommendation made by a non-attorney to a potential client to seek the services of a particular lawyer is made in the *client's* interest, and not to serve the business impulses of either the lawyer or the person making the referral; it also eliminates any monetary incentive for transfer of control over the handling of legal matters from the attorney to the lay person who is responsible for referring in the client. The Disciplinary Rule also serves to discourage overzealous or unprofessional solicitation by denying compensation to a lay person who engages in such solicitation on behalf of a lawyer, or even as to another lawyer unless the latter has also rendered legal services for the client and the fee that is shared reflects a fair division of those services. For these policies to succeed, both indirect as well as direct fee-sharing must be banned so as fully to preserve the integrity of attorney-client relations.
>
> The plain terms of the Disciplinary Rules and the salutary policy they serve indicate that infractions are to be regarded as serious matters.
>
> [Id. at 349-50; citations omitted.]

Here, the compensation arrangement that respondents used was designed to encourage Greenspan to settle cases before filing suit, particularly in cases in which he was substantially involved. Under the terms of the agreement, Greenspan received ten percent of those fees, but only in cases settled without litigation. In cases that were litigated, he received no compensation. Greenspan, thus, had a financial incentive to settle cases, regardless of whether settlement before litigation was in the clients' best interests. Because Greenspan, by definition, had substantial involvement in these cases, he was in a position to affect the outcome of the settlement. Furthermore, this compensation structure belies respondents' claim that their intention was to reward Greenspan for his hard work. In cases that were litigated, he received no compensation for his hard work, despite his substantial involvement.

The financial incentive for Greenspan to settle cases before litigation extended to the cases that he referred to the firm. In those cases, his percentage of the fee was greater: forty-two and one-half percent, compared to thirty-seven and one-half percent in cases settled before litigation.

Respondents argued that, because this case involves a novel interpretation of the rules, RPC 5.4(a) should be applied

prospectively. As noted above, however, the Weinroth opinion, which unambiguously interprets the rule and sets out its prohibition, was issued in 1985. Moreover, in 1991, an attorney was (publicly) reprimanded for paying fee shares to his paralegal/investigator for cases referred by that employee, a violation of RPC 5.4(a)'s predecessor rule, DR 3-102. In re Gottesman, 126 N.J. 376 (1991). These two cases were decided eleven and five years, respectively, before Fusco's implementation of the compensation arrangement with Greenspan, in 1996. Respondents, thus, were on notice that the act of paying a nonlawyer employee a fee share is unethical, regardless of whether the employee operated as a runner.

When an attorney shares fees originated from cases referred by an employee, the attorney rewards the employee for having made a recommendation that results in the lawyer's employment by a client, a violation of RPC 7.3(d). See, e.g., In re Agrapidis, 188 N.J. 248 (2006) (attorney shared legal fees with nonlawyer employees as a reward for suggesting his services to friends and relatives, a violation of RPC 5.4(a) and RPC 7.3(d)). By rewarding Greenspan for recommending their law firm to clients, respondents, too, violated RPC 7.3(d).

In several decisions, this Board has found (and the Court has adopted this finding) that an attorney who either shares a legal fee with a nonlawyer employee or compensates a third-party runner also violates RPC 7.2(c). See, e.g., In re Agrapidis, supra, 188 N.J. at 248, and In re Pease, 167 N.J. 597 (2001) (attorney paid a tow-truck driver for referring to him fifteen prospective clients). RPC 7.2(c) provides, in pertinent part:

> **RPC 7.2 Advertising**
>
> (c) A lawyer shall not give anything of value to a person for recommending the lawyer's services [exceptions omitted].

Notwithstanding the decisions finding violations of RPC 7.2(c) in fee-sharing and runner cases, we now believe that the better practice is to find that RPC 7.2(c) is inapplicable, because that rule addresses attorney advertising matters. Recently, we refrained from finding RPC 7.2(c) violations in these types of cases. The Court has confirmed our finding that RPC 7.2(c) does not apply in non-advertising cases. See, e.g., In re Tomar, et al., ___ N.J. ___ (2008); In re Gonzalez, 189 N.J. 203 (2007). Cf. In re Howard A. Gross, 186 N.J. 157 (2006)

(accepting the attorney's stipulation to having violated the only rule charged in the complaint, RPC 7.3(d), for his use of a runner).[8]

Moreover, nothing is lost by excluding RPC 7.2(c), because the conduct prohibited by the advertising rule is subsumed within RPC 7.3(d). RPC 7.2(c) prohibits an attorney from giving "anything of value to a person for recommending the lawyer's services." RPC 7.3(d) also prohibits an attorney from giving "anything of value to a person . . . as a reward for having made a recommendation resulting in the lawyer's employment by a client."

Respondents also violated RPC 5.3(a). That rule imposes on all lawyers the responsibility to adopt and maintain reasonable efforts "to ensure that the conduct of nonlawyers is compatible with the professional obligations of the lawyer." Greenspan's improper receipt of fee shares was not conduct compatible with

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[8] Parenthetically, we note that there is no evidence that respondents used Greenspan as a runner. In the stipulation, the OAE did not dispute respondents' position that Greenspan's cases came from friends, relatives, and others who were aware of his background and employment at the firm. The record does not support a finding of improper solicitation by Greenspan.

respondents' professional obligations. Rather, respondents created a fee-sharing program that violated the RPCs.

Similarly, respondents violated RPC 5.3(b) (failure of lawyer with direct supervisory authority over nonlawyer to make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the lawyer's professional obligations). By offering improper fee shares to Greenspan, respondents failed to make reasonable efforts to ensure that his conduct was compatible with their professional obligations.

As to RPC 5.3(c), the basis for this charge is the receipt of fee shares by Greenspan. This rule provides that a lawyer is responsible for conduct of a nonlawyer employee that would be a violation of the RPCs "if engaged in by a lawyer". However, it is an ethical and common practice for firms to reward lawyers by paying them a percentage of the fee generated by cases that they bring into the firm. But payments to lawyers are not at issue in this case, and RPC 5.3(c) is not applicable. Instead, as discussed above, that conduct is addressed by RPC 5.3(a) and (b). We, therefore, dismiss the RPC 5.3(c) charge.

In addition, respondents violated RPC 8.4(a). That rule provides that it is professional misconduct for a lawyer to "violate or attempt to violate the Rules of Professional Conduct,

knowingly assist or induce another to do so, or do so through the acts of another." By paying Greenspan improper fee shares, respondents violated the RPCs through the acts of another.

We dismiss the RPC 5.5(a) charge, however, because there is no clear and convincing evidence that respondents assisted Greenspan in the unauthorized practice of law. Although the OAE alleged that Greenspan engaged in the practice of law by submitting "non-routine" letters to insurance companies, negotiating with insurance adjusters, and performing similar tasks, nothing in the record establishes that Greenspan's duties exceeded those of a paralegal. He was closely supervised by Macaluso. There is no evidence that he engaged in activities that only lawyers may perform.

In In re Opinion No. 24 of the Committee on the Unauthorized Practice of Law, 128 N.J. 114 (1992), the Court was confronted with the issue of whether independent, or free-lance, paralegals (as opposed to those employed by a law firm) were engaged in the unauthorized practice of law. The Court ruled that there was no reason to distinguish between paralegals who are permanent employees of a law firm and those who are retained on a temporary basis. Id. at 135. In discussing the roles of paralegals, the Court remarked:

> There is no question that paralegals' work constitutes the practice of law. *N.J.S.A.* 2A:170-78 and 79 deem unauthorized the practice of law by a nonlawyer and make such practice a disorderly-persons offense. However, *N.J.S.A.* 2A:170-81(f) excepts paralegals from being penalized for engaging in tasks that constitute legal practice if their supervising attorney assumes direct responsibility for the work that the paralegals perform. *N.J.S.A.* 2A:170-81(f) states:
>
> > Any person or corporation furnishing to any person lawfully engaged in the practice of law such information or such clerical assistance in and about his professional work as, except for the provisions of this article, may be lawful, but the lawyer receiving such information or service shall at all times maintain full professional and direct responsibility to his client for the information and service so rendered.
>
> Consequently, paralegals who are supervised by attorneys do not engage in the unauthorized practice of law.
>
> [In re Opinion No. 24 of the Committee on the Unauthorized Practice of Law, supra, 128 N.J. at 123].

Here, there is no clear and convincing evidence that Greenspan was not properly supervised. To the contrary, the record reveals that Macaluso worked closely with Greenspan and carefully monitored his activities.

Moreover, the fact that others may have misunderstood Greenspan's position and mistakenly used the title "Esquire" in

letters addressed to him does not establish that respondents held Greenspan out as a lawyer. The OAE stipulated that Greenspan did not hold himself out as an attorney.

More problematic is the allegation that, by sharing fees with Greenspan, respondents assisted in the unauthorized practice of law. In In re Pajerowski, 157 N.J. 509 (1998), the Court found, among numerous other violations, that the lawyer assisted in the unauthorized practice of law by sharing fees with a runner who referred cases to him. Id. at 516. We also made that finding in our decision. In the Matter of Patrick M. Pajerowski, DRB 97-003 (June 29, 1998) (slip op. at 10).

Since the Pajerowski case, however, the OAE has not charged attorneys who share fees with nonlawyers with violating RPC 5.5(a). Even in the "Tomar cases" and in Agrapidis, where the attorneys shared fees with their employees, no RPC 5.5(a) violation was charged for that conduct. As mentioned above, RPC 5.4(a) forbids a lawyer to share fees with nonlawyers; RPC 7.3(d) prohibits a lawyer from compensating or giving anything of value to a person to recommend the lawyer. Because these rules fully address respondents' misconduct, we dismiss the charge that, by sharing fees with a nonlawyer, respondents assisted in the unauthorized practice of law.

As to the charged violation of RPC 8.4(b) (criminal conduct), the OAE relied on the runner statute, N.J.S.A. 2C:21-22.1. The OAE's position was that the law does not require active contact or solicitation of clients. According to the OAE, the law is violated when a person, for a pecuniary benefit, procures a client to file an insurance claim.

The OAE cited no precedent for such an expansive interpretation of the runner statute. As discussed above in connection with the charge of assisting in the unauthorized practice of law, RPC 5.4(a) and RPC 7.3(d) fully address the misconduct in this case, that is, the sharing of fees with a nonlawyer for his referral of cases. Thus, for lack of clear and convincing evidence that respondents violated a criminal statute, we dismiss the RPC 8.4(b) charge.

Another impropriety committed by respondents was their failure to report each other's conduct to disciplinary authorities. There is no doubt that the compensation arrangement with Greenspan was unethical. RPC 8.3(a) requires lawyers to report another lawyer's RPC violation that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer. To date, there have been only two reported New Jersey decisions in which attorneys were charged with violating

DR 1-103 (the predecessor of RPC 8.3)(a)), and none in which RPC 8.3(a) was implicated. In the first case, In re Bonafield and Tedeschi, 75 N.J. 490 (1978), Tedeschi was found guilty of failure to report his partner's unethical conduct. In the second case, In re Gold, 115 N.J. 239 (1989), the special master found the attorney guilty of a violation of DR 1-103, but the Court opinion made no reference to that rule.

In Bonafield and Tedeschi, Bonafield, a workers' compensation judge, continued to practice law, despite the enactment of N.J.S.A. 34:15-49, which prohibited such judges from engaging in the practice of law. He maintained his practice in his law office by arranging with Tedeschi to place Tedeschi's name on his own office stationery, telephone listing, and bank accounts. Bonafield agreed to pay Tedeschi a small portion of the fees generated by his law practice. Tedeschi admitted to having violated DR 1-102 (misconduct), DR 1-103 (disclosure of information to authorities), DR 2-107 (division of fees among lawyers), and DR 3-101 (aiding unauthorized practice of law).

Tedeschi asserted that, during his original discussions with Bonafield, he understood that he would be taking over Bonafield's practice. He admitted, however, that he should have

withdrawn from the arrangement when he realized that Bonafield continued to practice law.

Tedeschi received a "severe reprimand." Although he admitted that he had failed to report Bonafield's misconduct, the primary issues were Tedeschi's aiding another in the unauthorized practice of law and the receipt of fees that were not based on services performed and responsibilities assumed.

In Gold, the attorney pleaded guilty to embezzlement after he took no action to prevent his law partner, who was his brother, from misappropriating client funds. Presumably, the attorney failed to report his brother's misconduct. As indicated above, although the special master found that the attorney violated DR 1-103(A), the Court's opinion contains no reference to that rule or to the issue of failure to report unethical conduct.

In the "Tomar cases", we found RPC 8.3(a) violations under circumstances very similar to those in this matter. There, the law firm had a long-standing and pervasive practice of paying fee shares to its nonlawyer employees for referring cases. We found that the attorneys violated RPC 8.3(a) for failing to report each other's misconduct. The Court's order provides that our finding of wrongdoing in this regard was supported by clear and convincing evidence. In re Tomar, ___ N.J. ___ (2008).

Here, respondents argued that, because they did not believe that the conduct was unethical, they had no reason to report it. The Court has long held that ignorance of the rules is not a defense to charges of unethical conduct. In re Berkowitz, 136 N.J. 134, 147 (1994) ("Lawyers are expected to be fully versed in the ethics rules that regulate their conduct. Ignorance or gross misunderstanding of these rules does not excuse misconduct") and In re Eisenberg, 75 N.J. 454 (1978):

> We view with increasing concern the practice of attorneys facing discipline by this Court to treat the applicable disciplinary rules as terra incognita. Although this astonishing lack of familiarity with the rules is sometimes characterized as a "defense," ignorance of our ethical rules and case law cannot be permitted to diminish responsibility for conduct in violation of these rules.
>
> [Id. at 456-57 (n.1).]

As we noted above, respondents are charged with constructive notice of the disciplinary rules, which prohibit fee-sharing with nonlawyers, and of case law, such as Weinroth, which clearly discussed the reasons for the prohibition. We, therefore, find that they violated RPC 8.3(a) by not reporting to disciplinary authorities each other's unethical conduct.

Finally, the complaint charged only Fusco with having violated RPC 8.4(c), in connection with his attempt to conceal

the payments to Greenspan. According to the OAE, between October 1999 and January 2000, Fusco changed the method of paying Greenspan in response to the July 1999 enactment of the runner statute. Instead of issuing the checks directly to Greenspan, Fusco issued the checks to himself and then endorsed them to Greenspan. Fusco claimed that Pinto, his accountant, had directed that he stop paying Greenspan from the trust account, but never specifically instructed him to issue the checks from the proper account, the business account. He, thus, alleged that he believed that he was following Pinto's advice by issuing the checks to himself and then endorsing them to Greenspan.

We find no merit in respondent's assertion. We accept the fact that Pinto had not specifically instructed Fusco to issue the Greenspan checks from the firm's business account. We conclude, however, that Fusco could not have so misunderstood Pinto's instructions and could not have believed that it was proper to issue the Greenspan checks from the trust account.

The special master determined that Fusco's testimony was not credible. We agree. Fusco's explanation that he acted on the advice of Pinto does not ring true. If Fusco believed that the import of Pinto's suggestion was to cease issuing checks to Greenspan from the trust account, he accomplished nothing by

issuing the checks to himself and endorsing them to Greenspan. The effect was the same because, essentially, he created a conduit. Moreover, as the special master pointed out, there were other signs that Fusco took steps to conceal the payments to Greenspan. He issued the checks to AFG Enterprises, an unincorporated entity. He did not issue W-2 forms or 1099 forms for the fee shares to Greenspan. These actions, combined with the issuing of checks payable to himself, clearly establish an attempt to hide the fee share payments to Greenspan, a violation of RPC 8.4(c).

In sum, we find that both respondents violated RPC 5.3(a), RPC 5.4(a), RPC 7.3(d), RPC 8.3(a), and RPC 8.4(a) and that Fusco also violated RPC 8.4(c).[9]

There remains the quantum of discipline for both of these respondents.

The appropriate measure of discipline in fee-sharing cases, determined on a case-by-case basis, ranges from a reprimand to a one-year suspension. In In re Gottesman, supra, 126 N.J. 376, the lawyer was reprimanded for sharing fees with his

[9] As previously noted, Macaluso was not charged with an RPC 8.4(c) violation in this regard.

paralegal/investigator, whom he also assisted in the unauthorized practice of law. Gottesman entered into an agreement whereby the employee, who had a large family and circle of friends, would refer personal injury and workers' compensation cases to him and render certain services thereon, in return for one-half of Gottesman's legal fees from those cases. Gottesman claimed that the agreement was necessitated by his inability to pay the employee a salary. Eventually, the compensation was reduced to one-fourth of Gottesman's fee.

Although Gottesman admitted that he had divided legal fees with a nonlawyer employee, he believed that it was permissible to do so, as long as that employee had rendered substantial paralegal services. Gottesman's former firm had the same arrangement and he never questioned its propriety. The Court found that his ignorance of the disciplinary rules was not a defense to the ethics charges.

Another attorney who shared legal fees with his employees also received a reprimand. In re Agrapidis, supra, 188 N.J. at 248. Over a period of four years, Agrapidis paid twelve referral fees, totaling $20,000, to his nonlawyer employees. The amount of the fee share was based on a percentage of the total fee that the firm received. The fee shares were paid through payroll,

taxes were deducted, payments were kept in the ordinary course of business, and IRS 1099 forms were issued to the recipients.

Agrapidis did not know that the payment of fee shares, which he considered to be bonuses, was improper. He discontinued the practice before the OAE's investigation, when he "read about a somewhat similar practice in a legal periodical and recognized that sharing fees with his office staff was questionable."

In determining the appropriate measure of discipline, we noted that Agrapidis did not pay a runner to generate business. We found his conduct similar to Gottesman's. Like Gottesman, Agrapidis received a reprimand.

More egregious conduct has resulted in one-year suspensions. See, e.g., In re Berglas, 190 N.J. 357 (2007) (attorney shared legal fees with a nonlawyer and improperly paid third parties for referring legal cases to him; the conduct took place over three years and involved two hundred immigration and personal injury matters; the case was heard by way of reciprocal discipline); In re Birman, 185 N.J. 342 (2005) (reciprocal discipline imposed on attorney who agreed to compensate an existing employee for bringing new cases into the office, after she offered to solicit clients for him); In re Berger, 185 N.J. 269 (2005) (attorney who paid two runners nearly $42,000 between

January 1995 and December 1996 received reciprocal discipline; although the New York court determined that the attorney had also filed 350 inaccurate, incomplete and/or misleading statements, the record did not reveal the number of cases in which the attorney used misleading information to conceal his use of a runner); and In re Silverman, supra, 185 N.J. 133 (attorney paid a chiropractor a $400 fee for each case that the chiropractor referred to him).

More recently, the Court issued an order imposing discipline in the "Tomar cases." Eleven Tomar partners, plus one lawyer from another firm, were charged with numerous RPC violations stemming from the Tomar firm's practice of paying fee shares to its nonlawyer employees for referring cases. Three of the firm's partners, Michael Kaplan, Ronald Graziano, and Charles Riley, were found to have engaged in more serious misconduct than the others. The Court concluded that those attorneys were guilty of RPC 5.3(a) and (b), RPC 5.4(a), RPC 7.3(d), RPC 8.1(b), RPC 8.3(a), and RPC 8.4(a), (c), and (d), violations similar to the infractions involved in this case. The Court in Tomar determined that, although the attorneys' actions warranted suspensions, because of the delay in the resolution of

the disciplinary matters, the suspensions were suspended and the attorneys were placed on probation.

Here, respondents paid Greenspan more than 700 improper fee shares, totaling in excess of $780,000. Respondents maintained that Greenspan's referrals amounted to only about three percent of the firm's caseload and, therefore, were not significant to the firm. They were, however, significant to Greenspan. His fee share payments increased almost every year and constituted approximately seventy-five percent of his entire compensation from the firm, which intentionally kept his salary low to "motivate" him. Even if the firm's financial survival did not depend on Greenspan's referrals, the fact remains that respondents gave him the incentive to bring cases to the firm.

Moreover, unlike Agrapidis, Fusco made efforts to conceal the Greenspan payments; he did not pay the fee shares by ordinary payroll checks; he did not deduct taxes; he did not issue W-2 or 1099 forms; and he did not report the fee shares to the IRS. Fusco took steps to conceal these payments, first issuing the checks to "AFG Enterprises" and then to himself. Therefore, his claim that he was not aware of the prohibition against sharing fees with nonlawyers is simply not credible.

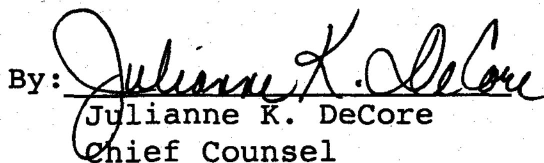
We consider, as mitigating factors, respondents' good reputations and the numerous letters submitted attesting to their service to the community and to their good character. Aggravating factors include the long-term nature of the misconduct, which took place over seven years; the extent of the misconduct, which involved approximately 700 fee share payments, totaling more than $780,000; respondents' failure to acknowledge any wrongdoing; the absence of any contrition or remorse on their part; and respondents' lack of candor.

We determine that Fusco's pervasive payment of fee shares to Greenspan, his dishonesty in concealing those payments, and his failure to report Macaluso's misconduct to disciplinary authorities warrant a one-year suspension. Unlike the Tomar matters, there is no cause to suspend the suspension.

As pointed out by the special master, Macaluso was less culpable. Although he was aware of the fee-sharing agreement, he did not orchestrate it. He also had little, if any, decision-making authority in the firm. Despite the fact that he had the title of "partner," he had no input on issues, such as the amount of compensation paid. We determine that a censure sufficiently addresses Macaluso's participation in the prohibited compensation arrangement and his failure to report Fusco's unethical conduct.

We further determine to require respondents 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

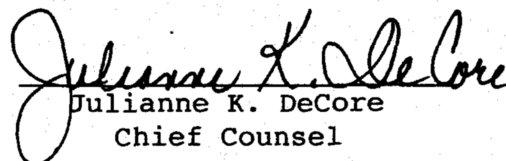
In the Matter of Anthony J. Fusco, Jr.
Docket No. DRB 07-386

Argued: June 19, 2008

Decided: August 19, 2008

Disposition: One-year suspension

Members	Disbar	One-year Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Pashman		X				
Frost		X				
Baugh		X				
Boylan		X				
Clark		X				
Doremus		X				
Lolla		X				
Stanton		X				
Wissinger		X				
Total:		9				



Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

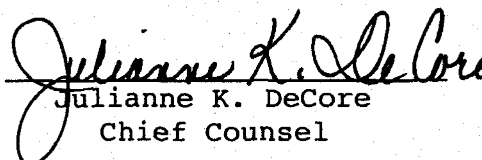
In the Matter of Roy Macaluso
Docket No. DRB 07-387

Argued: June 19, 2008

Decided: August 19, 2008

Disposition: Censure

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



Julianne K. DeCore
Chief Counsel