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SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket Nos. DRB 04-186, 04-187, 04-275, 07-015, 07-016, 07-018, 07-019, 07-020, 07-021, 07-022, 07-023, and 07-024
District Docket Nos. XIV-99-392E, XIV-01-405E, XIV-01-406E, XIV-01-407E, XIV-01-408E, XIV-01-412E, XIV-01-505E, XIV-01-508E, XIV-01-513E, XIV-01-514E, XIV-01-518E, and XIV-01-520E

IN THE MATTERS OF

MICHAEL A. KAPLAN,
RONALD A. GRAZIANO,
CHARLES N. RILEY,
CYNTHIA ANN BRASSINGTON,
DAVID T. JACOBY,
ROBERT F. O'BRIEN,
ALAN H. SKLARSKY,
ROBERT M. CAPUANO,
HOWARD S. SIMONOFF,
EDWARD N. ADOURIAN, JR.,
ALFRED P. VITARELLI,
AND CHARLES L. WINNE

ATTORNEYS AT LAW

Decision

Argued: September 20, 2007

Decided: December 20, 2007

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

John A. Avery appeared on behalf of respondent Michael A. Kaplan.

Kevin H. Marino appeared on behalf of respondent Ronald A. Graziano.

Philip B. Seaton appeared on behalf of respondent Charles N. Riley.

Mark Biel appeared on behalf of respondent Cynthia Ann Brassington.

Katherine Hartman appeared on behalf of respondents David T. Jacoby and Robert F. O'Brien.

Robyn M. Hill appeared on behalf of respondent Alan H. Sklarsky.

Respondent Robert M. Capuano appeared pro se.

Respondents Howard S. Simonoff and Edward N. Adourian, Jr. waived appearance for oral argument.

Robert J. Borbe appeared on behalf of respondent Alfred P. Vitarelli.

Robert N. Agre appeared on behalf of respondent Charles L. Winne.

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

These matters, collectively designated "the Tomar cases," came before us on recommendations for discipline filed by Special Master Herbert S. Friend, J.S.C. (ret.). With one exception, (Cynthia Brassington), respondents were shareholders in the former law firm of Tomar, Simonoff, Adourian, O'Brien, Kaplan, Jacoby and Graziano, P.C. ("the Tomar firm" or "the firm").

INTRODUCTION

We originally held oral argument on three of these Tomar firm "fee sharing" cases (Jacoby, O'Brien, and Riley) in September and October 2004. At that time, we determined not to hear any of the cases separately because of concerns that inconsistent findings could result. On October 27, 2004, we remanded the Jacoby, O'Brien, and Riley cases to the special master, and instructed him to hear all the Tomar cases before he issued his report as to any of them – including those pending[1] and any additional complaints that the Office of Attorney Ethics ("OAE") might file. We also directed the special master to make a comparative analysis of each respondent's culpability.

After the remand, the special master heard the cases individually against the nine remaining respondents. On September 21, 2006, he issued separate reports, finding all respondents guilty of all charged violations. As we requested, he also submitted a comparative analysis assigning levels of

[1] At that time, cases were pending against Graziano, Kaplan, and Jaffa Stein. On August 31, 2006, Stein was disbarred by consent on unrelated grounds.

culpability to each respondent on a scale of one to five, with one representing the lowest level and five the highest.

Because the complaint against each respondent was heard separately, for procedural due process reasons, we evaluated the charges against each respondent based on that record alone.

For the reasons expressed below, we make the following determinations as to each respondent: Kaplan, a one-year suspension; Graziano, a one-year suspension; Riley, a six-month suspension; Brassington, a reprimand; and Jacoby, O'Brien, Sklarsky, Capuano, Simonoff, Adourian, Vitarelli, and Winne, no discipline. In addition, we determine that the Tomar firm should be censured.

In this decision, we first discuss the global facts, and then the facts applicable to each respondent. Next, we analyze each respondent's misconduct and the application of the RPCs. Finally, we address the appropriate level of discipline, if any, for each respondent.

The thrust of each complaint was that the Tomar firm had a practice, spanning decades, of sharing legal fees with nonlawyer employees in violation of RPC. 5.4(a). In addition, the complaints charged a variety of other violations, most of them related, but some unrelated, to that central charge: RPC 1.1(a) (gross neglect); RPC 1.15(a) (failure to safeguard funds); RPC 3.3(a)(5) (lack of candor toward a tribunal); RPC 5.1(a) (law firm shall make reasonable efforts to ensure that member lawyers undertake measures giving reasonable assurance that all lawyers conform to the RPCs); RPC 5.1(b) (failure of lawyer with direct supervisory authority over another lawyer to make reasonable efforts to ensure that the other lawyer conforms to the RPCs); RPC 5.1(c)(1) (ordering or ratifying another lawyer's conduct that violates the RPCs); RPC 5.1(c)(2) (lawyer shall be responsible for another lawyer's violation of the RPCs, if the lawyer having direct supervisory authority over the other lawyer knows of the conduct but fails to take reasonable remedial action); 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 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 5.5 (assisting a nonlawyer 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 8.1(b) (failure to respond to a lawful demand for information from a disciplinary authority); RPC 8.3(a) (failure to inform disciplinary authorities of another lawyer's RPC violation); RPC 8.4(a) (violate or attempt to violate the RPCs, knowingly assist or induce another to do so, or do so through another's acts); RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation); and RPC 8.4(d) (conduct prejudicial to the administration of justice).

GLOBAL FACTS

In the 1990s, when these events took place, the Tomar firm maintained offices in four locations: Haddonfield (the main office, later moved to Cherry Hill), Atlantic County (Atlantic City and then Northfield),[2] Camden, and Wilmington, Delaware. In 1999, the firm had about sixty-five lawyers, including twenty-seven shareholders, and a staff of approximately 160 employees. In addition to having a managing shareholder, the firm was governed by an executive committee, which was described by several of the firm's lawyers as weak and ineffective.

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[2] For ease of reference, the Haddonfield and Cherry Hill offices will be designated as "the Cherry Hill office;" the Atlantic City and Northfield offices will be designated "the Northfield office."

Several Tomar shareholders – Steven Kudatzky, David Jacoby, and Jaffa Stein – served in succession as the District IV Ethics Committee (Camden and Gloucester Counties) secretary. In addition, Michael Kaplan and Ronald Graziano briefly served as members of that committee.

In 1991, the firm hired Patrick Heininger as its director of administration. Heininger supervised all of the firm's accounting personnel. He, in turn, reported to Graziano, the managing shareholder from 1990 to 1999. Heininger and Graziano maintained operational control of the day-to-day management of the firm.

In late spring/early summer 1999, Graziano learned that Heininger had used the firm's credit cards for approximately twelve consecutive days, having withdrawn from $300 to $500 per day. Graziano accepted Heininger's explanation that he needed the money to pay one of the firm's computer consultants in cash. During this time, employee pay checks had been returned for insufficient funds.

In mid-October 1999, Winne assumed from Graziano responsibility for overseeing the firm's finances. Winne immediately began reviewing the Tomar firm's financial records and noticed a number of discrepancies, which Heininger could not satisfactorily explain.

Winne discovered that Heininger had directed bookkeeping staff to transfer funds between the firm's trust and business accounts and that none of the firm's lawyers had been made aware of the transfers. At Heininger's direction, staff kept two sets of records, providing the shareholders with only those that concealed these improper transfers. Eventually, the shareholders learned that more than ten million dollars had been improperly withdrawn from the Tomar trust account between 1997 and 1999, and that the firm's trust accounts were short by more than two million dollars of non-client funds. Shortly after the detection of the trust account problems, Graziano resigned as managing shareholder.

There is no evidence that any of the firm's lawyers participated in, or were aware of, the bank transfers. The shareholders replenished the missing trust account funds with their personal funds and reimbursed the Interest on Lawyers' Trust Accounts fund more than $74,000 in interest lost as a result of the defalcations.

Although no shareholder was aware of it at the time, between 1997 and 1999, Heininger abused alcohol and drugs. The firm terminated Heininger's employment on October 25, 1999. The OAE, not the firm, reported Heininger's conduct to law enforcement authorities. On June 28, 2002, Heininger pleaded guilty to charges of misapplication of entrusted property and theft by deception. After Heininger served four months of a four-year prison term, he was released under the Intensive Supervision Program. He also was ordered to make restitution of $275,000 to either the firm or its insurance company.

Shortly after firing Heininger, the shareholders retained Melvyn Bergstein, Esq., to advise the firm with respect to its responsibility to report the trust account shortage to the disciplinary authorities. There were several meetings with Bergstein — either with all shareholders or shareholder "delegations" — during November 1999. On December 9, 1999, Bergstein, on behalf of the firm, notified the OAE of Heininger's improprieties, and submitted a report, prepared by the accounting firm of BDO Seidman ("BDO"), detailing the irregularities.

The firm also reported to the OAE that Heininger had obtained, on behalf of the firm, bank loans secured by computer equipment. As it turned out, the computer equipment did not exist and Heininger allegedly had forged the signatures of the firm's shareholders on computer leases provided to the firm by PatMarc, a corporation in which Heininger had an interest. There is no evidence that the firm's shareholders were aware of these apparently forged leases.

Shortly after these events, half of the shareholders (thirteen) left the firm, receiving payment for their interests in the firm from the remaining shareholders. Although these remaining shareholders continued to practice law together for some period, the firm eventually dissolved. During argument before us, we were informed by one of respondent's counsel that the firm continues to exist, as an entity, for purposes of winding down its accounts payable and accounts receivable.

It was the BDO report that prompted the OAE investigation, which, in turn, revealed the fee sharing practices, dating back to the 1960s, if not earlier, at issue in these cases.

The fee share paid to the employee was usually a percentage of the legal fee charged by the firm. The percentages ranged from ten to twenty percent, generally depending on the employee's position with the firm. The employee who made the referral, and who ultimately received compensation for doing so, often worked on the case as either a secretary, paralegal, or investigator.

When a case was resolved, the employee who made the referral requested payment. Usually, the lawyer who had been assigned the case approved the "bonus" and directed Heininger to process the payment. At times, Heininger approved the payment on his own authority.

The practice of sharing legal fees with nonlawyer employees was common knowledge within the firm and engrained in its culture. Although some shareholders claimed that they did not know of the fee-share payments until 1997, or later, others offered that it would have been impossible for a shareholder not to have known of the practice.

In several respects, the firm treated the payments as a matter of routine. It paid the fee shares by ordinary payroll checks, deducted taxes and other withholdings from the fee shares, reported the income to the Internal Revenue Service, and issued 1099 forms to the employees. Moreover, the firm expressly included projections for "fee shares" in its budgets for the years 1992, 1993, and 1994.

An employee, Linda Famille, kept records of the payments, such as memos and e-mails, containing staff requests for fee shares. These records, maintained in a binder, were called the "bonus book." The shareholders had no knowledge that Famille kept these records until 2000, when Sklarsky discovered them while reviewing the firm's records in connection with the OAE investigation.

Managing shareholder Graziano took pains to describe the fee shares as "bonuses". In April 1991, he issued a memorandum to "All Partners," reading, as follows:

> I am imploring each of you when you are talking to employees about providing money to them as a result of having brought a case in, please be certain that you refer to that transfer of money as a bonus to demonstrate our appreciation of that employee. Under no circumstances are you to refer to that transfer of funds as a referral fee. Also, you must make it clear to the employee that this bonus is paid to that person when the case is resolved as a bonus. As a result, if that person is not an employee when the case is resolved there obviously can be no transfer of funds.

Between 1986 (the earliest date for which the firm's financial records are available) and 1999, the firm paid more than one million dollars in fee shares to nonlawyer employees. Although the Tomar complaints did not charge respondents with using "runners," and although the OAE acknowledged that this is not a "runner" case, the complaints charged that several fee shares were paid after July 12, 1999, the effective date of the "runner" statute, N.J.S.A. 2C:21-22.1. That statute provides: "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."

By far the largest nonlawyer recipient of the fee share program was Robert Buccilli, the firm's personal injury claims manager for the Northfield office. Buccilli was hired effective January 2, 1990, the day after Graziano became managing shareholder. Steven Kudatzky, the managing shareholder at that time, negotiated Buccilli's compensation — an annual salary of $60,000, plus twenty-five percent of the increase in the income of the firm's Atlantic City office in excess of $240,000, exclusive of cases referred by lawyers or involving prepaid legal services. At a later point, the firm agreed to reduce this threshold from $240,000 to $120,000.

The record does not explain the secret of Buccilli's rainmaking success. At oral argument, the presenter acknowledged that, although Buccilli had many contacts in Atlantic County and was referring more than just his friends and relatives, there is no evidence of how he located and referred so many cases.

Between 1992 and 1997, Buccilli received referral fees of $807,020.99 and a total salary of $460,108. In 1995, he received "bonuses" of $287,619, over and above his $68,326 salary, for a total of $355,445 -- roughly twice the amount paid to any shareholder during that year.

At some point in late 1996 or early 1997, some shareholders in the personal injury department questioned the propriety of paying "bonuses" to nonlawyer employees. This discussion was prompted by publicity generated by <u>In re Pajerowski</u>, 156 <u>N.J.</u>

509 (1998).[3] Graziano was asked to seek an opinion from shareholder Justin Loughry, who taught Professional Responsibility at Rutgers Law School, in Camden, and was considered the firm's ethics expert. After reviewing RPC 5.4, Loughry informed Graziano that the practice was unethical and should be discontinued. That rule states that a "lawyer or law firm shall not share legal fees with a nonlawyer" with exceptions not relevant here.

Loughry expressed the same opinion at a 1997 meeting of the shareholders of the personal injury department. At that meeting, Loughry was asked whether the firm could accept referrals from Buccilli's wife, respondent Cynthia Brassington. Loughry opined that the firm could, but cautioned that the referrals had to be "legitimate" and "not some kind of end run around the rules." He further advised that accepting too many referrals from Brassington could create an "appearance of impropriety." According to Loughry, Michael Kaplan, David Jacoby, Alan Sklarsky, Jaffa Stein, Joshua Spielberg, Charles Riley, and Ronald Graziano attended this meeting.

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[3] In Pajerowski, the Court disbarred an attorney for, among other violations, employing a "runner." Although the Court issued the Pajerowski decision in 1998, articles about the case appeared in legal newspapers in 1996 and 1997.

Recollections differ as to what was said about the firm's fee share policy at a general shareholders' meeting in April 1997. Some respondents say that the shareholders discussed the firm's policy of paying fee shares to nonlawyer employees and the possibility that, if the program were terminated and Buccilli were to leave the firm, the ensuing drop-off in business could cause one or two lawyers to lose their jobs. Some respondents insist that the policy was raised only at the meeting of the personal injury department. In any event, about this time, a decision was made to discontinue the payments, including compensation for "pipeline" cases (cases that had not yet settled). The firm did not document this policy change in writing, or provide staff with formal notice of the decision.

Most shareholders abided by the decision to terminate the fee-share practice. Yet, the payments continued until 1999. As seen below, the issue of whether a respondent knew that the fee-share payments continued was sharply contested. The bonus book reveals that Riley and another shareholder (not a respondent) continued to approve bonuses, and that other bonuses were paid, without shareholder approval, by Heininger or at his direction.

Heininger claimed that he was never instructed to discontinue the bonus program. Graziano, the managing shareholder, asserted that, because Heininger attended the general shareholders' meeting in April 1997 and presumably learned of the firm's decision firsthand, he did not believe a personal instruction was necessary.

On May 1, 1997, Graziano met with Buccilli at the Midway Diner and informed him of the firm's decision: that the nonlawyer referral fee program was being terminated; but that the firm was prepared to pay <u>lawyer</u> referral fees to Buccilli's wife, Brassington. While some had feared that the termination of the fee share program would cause Buccilli to leave, he stayed until February 2000, when the firm formally divided.

Brassington was admitted to the bar in 1993. She and Buccilli were married in October 1994. Although the firm paid no referral fees to Brassington between 1993 and 1996, it paid her $136,801 in 1997, the same year that the firm determined to discontinue its fee share program with nonlawyer employees. Between 1997 and 1999, the firm paid Brassington a total of $588,067.63 in referral fees. Of the 208 cases for which she received referral fees, her husband was the source of at least 151 of those referrals. Between 1992 and 1997, the firm paid Buccilli and Brassington almost $1.4 million.

Not every shareholder believed that all of the referral fees to Brassington were proper. Four shareholders, Gregg Shivers, Richard Schall, Theodore Lieverman, and Donna Siegel-Moffa, provided stipulated testimony indicating that the firm began to pay Brassington referral fees as an indirect way of continuing to compensate Buccilli. Indeed, Brassington received about $231,000 in referral fees in 1998 and $220,000 in 1999. She and Buccilli were still married when the firm split up in February 2000.

Brassington asserted that, at the request of several firm shareholders, she prepared numerous referral letters back-dated as early as 1993 to be inserted in the firm's files. Two of those cases were undertaken before Brassington was even admitted to the bar. Brassington told the OAE during its investigation, that, in addition to Buccilli, those who urged her to prepare these back-dated letters were Graziano, Kaplan, and Stein. Kaplan had been one of Brassington's law school professors.

In turn, Kaplan insisted that Brassington had defrauded the firm by requesting payments on cases that neither she nor Buccilli had referred; and that Brassington had created the backdated letters on her own. Kudatzky's testimony corroborated Kaplan's in this respect.

A class action lawsuit, known as the "Rent-To-Own" case, was also part of the OAE's investigation. In 1994, Riley asked William Santiago, a nonlawyer employee in the firm's Camden office, to find a lead plaintiff for the Rent-To-Own case. Riley was Santiago's direct supervisor. It was understood that Santiago was to receive ten percent of the firm's fee when the Rent-To-Own case was resolved. Santiago produced a lead plaintiff and the case was settled in 1999.

Santiago left the firm in November 1995. Most respondents stipulated that, in 1995, when Santiago left the firm, Riley agreed to pay him the fee share on the Rent-To-Own case, although that case had not yet settled.

The firm's fee from the Rent-To-Own class action was $5.1 million; Santiago's ten percent share was, thus, $510,000. The firm was one of three law firms representing the class action plaintiffs. Riley determined that each of the three firms representing the plaintiffs should contribute one-third, or $170,000, toward the fee share. Riley obtained $340,000 from the other two law firms, which he intended to combine with $170,000 from the Tomar firm for a total to Santiago of $510,000.

In September or October 1999, many of the firm's shareholders learned of Riley's agreement to pay Santiago. In November 1999, the firm received its fee in the Rent-To-Own case. After at least two meetings, and upon the advice of the firm's counsel, Melvyn Bergstein, the shareholders determined not to pay the fee share to Santiago and to return the $340,000 to co-counsel, which they did.

Although the firm did not pay Santiago the ten percent fee share for the Rent-To-Own case, it paid him nearly $69,000 during 1997 through 1999, despite the fact that he was not working for the firm at that time. These "wages" actually represented payments to Santiago for cases that he referred to the firm, including partial compensation for the Rent-To-Own case fee share.

After the firm, through Bergstein, reported the Heininger trust account improprieties to the OAE, that office, under letters of February 29, 2000, asked each respondent the following:

> I would therefore request that you review the enclosed report from BDO Seidman as well as the contents of this letter and advise me in writing on or before March 13, 2000 if you disagree with what has been reported by the Firm or in the alternative if you believe that additional information whether related or unrelated to the above should be reported.

In that letter, the OAE reminded each respondent of the duties imposed by <u>RPC</u> 8.3(a) to report unethical conduct to disciplinary authorities, and by <u>RPC</u> 8.1(b) to disclose facts necessary to correct a misapprehension by disciplinary authorities. Although each respondent acknowledged receipt of the letter, none reported any unethical conduct. As will be seen, at least part of the reason for not doing so was the advice of Bergstein, who counseled that they were required to report only the trust account improprieties.

We next address the facts applicable to each individual respondent.

<u>Michael A. Kaplan</u>
<u>Docket No. DRB 07-016, District Docket No. XIV-01-405E</u>

Kaplan was admitted to the New Jersey bar in 1969. He has no disciplinary history. In 1969, he joined the Tomar firm as an associate. About five years later, he became a shareholder.

The complaint charged Kaplan with having violated <u>RPC</u> 5.1(b) and (c)(2), <u>RPC</u> 5.3(a), (b) and (c), <u>RPC</u> 5.4(a), <u>RPC</u> 5.5, <u>RPC</u> 7.2(c), <u>RPC</u> 7.3(d), <u>RPC</u> 8.1(b), <u>RPC</u> 8.3(a), <u>RPC</u> 8.4(a), and <u>RPC</u> 8.4(c).

As part of its investigation of Kaplan, the OAE reviewed nearly 100,000 pages of documents, including at least 100 client files. The Kaplan hearing spanned twenty-nine days; nineteen witnesses, including Kaplan, testified.

In the mid-1980s, Kaplan became head of the firm's personal injury department, often working out of the firm's Northfield office. He made the intake decisions on all prospective personal injury cases, and assigned each case to a lawyer and a paralegal. Kaplan supervised only those associates assigned to his cases, and no shareholders.

The Northfield office was losing money and the firm needed to make it profitable. Steven Kudatzky, the managing partner at that time, hired Buccilli, as of January 1, 1990, as personal injury claims manager. Kudatzky, who was considered the firm's ethics expert, determined that Buccilli's compensation arrangement (described above) complied with 1979 ABA Informal Opinion 1440.[5]

At the hearing below, Kudatzky and Kaplan explained that Buccilli also was expected to "bring in work . . . through his contacts." Kudatzky referred to Buccilli as "Mr. Atlantic County" because he was a "social butterfly" who seemed to know "everybody down there."

Kaplan openly admitted that the firm paid, and that he participated in the payment of, fee shares to nonlawyers through early 1997. After the firm's April 1997 decision ending the fee-share practice, Kaplan approved none. He did not notify the personal injury department of the firm's decision to end the

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[5] That opinion holds that paying a nonlawyer office administrator a salary and a percentage of a law firm's <u>net</u> profits is not inconsistent with the disciplinary rules because the compensation is not tied to the receipt of particular fees.

payment of fee shares, believing it unnecessary because Heininger and Graziano, who had attended the April 1997 meeting, supervised the issuing of checks.

Kaplan's counsel in this matter prepared summaries of the bonus book entries for nonlawyer employees, which were admitted into evidence and stipulated to be accurate. The summaries showed that Kaplan had approved seven employee bonuses, the last in 1995.

As to Brassington's referrals, Kaplan testified that he understood that Buccilli could refer a case to Brassington, who, in turn, could refer the case to the firm and receive a referral fee -- as long as there was a connection between Brassington and the client's retention of the firm. Between May 1,1996 and July 1, 1998, Brassington referred eleven cases to Kaplan.

As Kaplan emphasized, however, many referral fees were paid to Brassington on the basis of documents forged by Tomar nonlawyer staff. Because those cases had not been referred to the firm by either Brassington or Buccilli, Kaplan maintained that a massive fraud had been perpetrated on the Tomar firm. The OAE agreed that, on many of the vouchers for referral fees to Brassington, the authorizing lawyer's initials were not genuine.

Michael Berger, a certified civil trial attorney, testified as a "character witness" for Kaplan. According to Berger, Kaplan enjoys "an impeccable reputation as a strong advocate for his clients," is viewed as an icon in the personal injury community, and has a "top notch reputation for integrity and for ethics and for advocacy."

In mitigation, Kaplan pointed to his thirty-four year unblemished disciplinary history; his almost thirty years of trial practice instruction at Rutgers Law School; his service as a member of the District IV Ethics Committee and Camden County Bar Association committees; his work with the Institute for Continuing Legal Education and the Camden Inns of Court; his extensive pro bono work; his good moral character; his full cooperation with the OAE's investigation; his reliance on the advice of counsel in not reporting shareholders' misconduct to the OAE; the lack of injury to any client; and his contrition over the firm's pre-early 1997 practice of paying fee shares to nonlawyers.

The special master concluded that Kaplan had violated every rule charged in the complaint but found that there were mitigating circumstances. He assigned Kaplan a culpability level of five and recommended a fifteen-month suspension.

Ronald A. Graziano
Docket No. DRB 07-015, District Docket No. XIV-99-392E

Graziano was admitted to the New Jersey bar in 1974. He has no disciplinary history. He joined the Tomar firm in August 1974 and became a shareholder on January 1, 1980. On January 1, 1990, he became the managing shareholder.

The complaint charged Graziano with having violated RPC 1.1(a), RPC 1.15(a), RPC 3.3(a)(5), RPC 5.1(b), RPC 5.1(c)(2), RPC 5.3(a), RPC 5.3(b), RPC 5.3(c), RPC 5.4(a), RPC 7.2(c), RPC 7.3(d), RPC 8.1(b), RPC 8.3(a), RPC 8.4(a), RPC 8.4(c), and RPC 8.4(d). In addition, the special master granted the OAE's motion to amend the complaint to charge a violation of RPC 5.1(c)(1).

Graziano supervised Heininger, with whom he worked closely. During daily meetings, they reviewed the firm's bank account balances, the anticipated expenses, and the expected receipts. In addition, the firm's bookkeeper gave Graziano daily updates about the firm's bank deposits.

One charge in the complaint alleged that Graziano failed to properly monitor Heininger's financial activities. Before the firm hired Heininger, its previous controller had embezzled about $170,000 by improperly using the firm's credit cards or by using the firm's checks to pay her personal debts. Graziano was aware of this theft; indeed, he had negotiated with the controller's lawyer the return of those funds. The OAE's position was that Graziano should have closely monitored Heininger's financial dealings because he was aware of the prior controller's theft.

On December 31, 1997, Heininger asked Graziano to sign a $300,000 check, transferring funds from the business account to the trust account. Heininger explained that he had mistakenly deposited the funds in the wrong account. Graziano accepted Heininger's explanation without reviewing the underlying records.

In February 1999, representatives of the firm's accountant, Alloy Silverstein ("Alloy"), told Graziano that, between 1997 and 1999, improper cash advances had been made against the firm's credit card account. Although Graziano reproached Heininger for this impropriety, Graziano did not make further inquiry or investigation. According to the OAE, Heininger improperly obtained more than $25,000 in cash by using the firm's credit card.

Several months after informing Graziano of Heininger's credit card use, Alloy told another Tomar shareholder that, although Graziano had said that he had addressed the issue, Heininger had again obtained cash using the firm's credit card.

On July 9, 1999, Alloy told Graziano that an equipment lease purportedly collateralized by computer equipment acquired from PatMarc, Inc. (Heininger's corporation) may not have been secured by any collateral. Heininger explained that the wrong collateral had been recorded on the lease and represented that he would correct the error. Graziano did not review the lease, inspect the computer equipment or take any steps to verify Heininger's explanation.

During the next two months, between July 16 and September 17, 1999, Graziano signed six checks totaling almost $39,000 for computer equipment. Heininger converted these funds to his own use, without Graziano's knowledge.

At the request of the executive committee, a Tomar shareholder investigated the lease issue and submitted a report. That report indicated that much of the computer equipment pledged as collateral in bank leases had never been received by the firm; the firm had pledged the same equipment as collateral in two leases; and some equipment, although in the firm's possession, varied significantly from its description in the leases. Graziano told other shareholders that he had not previously informed them about the lease problems because Heininger had been sick and Graziano had "felt bad for him."

Although the stipulation between Graziano and the OAE is not specific in this regard, between 1991 and 1996, Graziano approved the payment of several referral fees to nonlawyer employees. In addition, between 1992 and 1997, Graziano signed six checks totaling $311,970.78 issued to Robert Buccilli.

Despite Graziano's position as managing shareholder, he took no action to ensure that the payment of fee shares had ceased in 1997. On May 28, 1999, Nidal Wakim, a Tomar receptionist, e-mailed Graziano a bonus request. On June 30, 1999, Wakim sent to Graziano another email about the bonus. Graziano did not reply. Wakim then requested and received the bonus from Heininger. According to Graziano, he was surprised to receive the emails from Wakim and ignored them, hoping that she would not pursue the matter.

According to the stipulation, Buccilli would testify that, at the "Midway Diner" meeting on May 1, 1997, Graziano told him that the Tomar firm would be paying Buccilli's wife, Brassington, instead of Buccilli. Graziano, however, had a different recollection of that discussion. Graziano asserted that Buccilli had asked him whether his wife would continue to receive referral fees for cases that she referred to the firm. Graziano had replied that, as long as the referrals were made by Brassington, the firm would treat her in the same way as it treated other referring lawyers. Buccilli, in turn, asserted that Graziano had told him the firm would pay referral fees to Brassington on any case that she referred to the firm, even if Buccilli was the source of the referral.

Also on May 1, 1997, Graziano signed a $120,000 check issued to Buccilli. Graziano had not obtained approval from other shareholders or discussed this payment with any of them before signing that check. When Heininger gave the check to Buccilli, Heininger explained that it represented monies due for 1996 cases. Graziano claimed that, because the payment was for cases that had settled before the firm's decision to terminate the bonus program, the firm was obligated to compensate Buccilli for those cases.

Between March 6, 1997 and July 1, 1999, Graziano signed twenty-one checks totaling $64,569.70 issued to Brassington. As previously noted, between 1997 and 1999, the firm paid Brassington a total of $588,067.63 in referral fees.

Graziano was also charged with improprieties in connection with an administrative hearing. On March 31, 2000, Donna Colarulo, Riley's former paralegal, filed a complaint against the firm with the New Jersey Department of Labor, Division of Wage and Hour Compliance ("Division"), seeking bonuses of $4,907.15 and other compensation.

On July 11, 2000, Melvyn Bergstein, representing the firm, submitted a letter-brief contending that any promise to pay bonuses to Colarulo was unenforceable as constituting proscribed fee-sharing arrangements. In addition to RPC 5.4(a) and In re Weinroth, 100 N.J. 343 (1985), Bergstein cited and quoted from Gallagher v. Weiner, 1993 WL 460101 (D.N.J. 1993), an unreported decision by the United States District Court of New Jersey:

> Unless and until New Jersey narrows the application of its fee-sharing ban, this Court will not view the white collar office manager any differently from the ambulance chaser under the statutes and rules relevant to this dispute. Pegging employee compensation to fees generated is an evil unto itself when a nonparty lay person is given a stake in the lawyer's performance and practice. Such arrangements must be proscribed and disapproved in the strongest possible terms to prevent the unauthorized practice of law, the exploitation of lawyers and the potential interference with the lawyer's professional judgment.

At the July 13, 2000 Division hearing, Colarulo testified that Graziano had promised to pay her bonuses of twenty percent of the legal fees received in cases that she had referred to the firm, and that the firm owed her $4,907.15 for the period of June through December 1999. In reply to the referee's questions, Graziano stated that a bonus paid in 1999 would have been improper under the firm's policies and procedures and that he never promised to pay fees to a nonlawyer.

On cross-examination, Graziano denied that he was authorized to approve bonuses to nonlawyer employees. He further denied that the Tomar firm had had a policy of paying secretaries a bonus of ten percent of fees, or paying paralegals ten to fifteen percent of fees generated for the firm.

The referee denied Colarulo's claim and Colarulo appealed. On April 5, 2001, almost nine months after the date of the Division hearing and four months after Graziano gave a statement to the OAE in connection with its ethics investigation, Graziano submitted an affidavit to the appellate tribunal. In the affidavit, Graziano asserted that his testimony that the Tomar firm did not have a policy of paying secretaries ten percent bonuses was truthful because the firm paid a "range," not a fixed amount. In addition, Graziano stated that he should have explained at the hearing that, although the firm had a history of paying bonuses to nonlawyer employees, the practice had been discontinued in 1997.

The OAE recommended a one-year suspension for Graziano's conduct. Graziano urged us to impose either no suspension or a suspended suspension.

The special master found that Graziano violated all of the charged <u>RPC</u>s. He found as mitigating factors Graziano's prior unblemished record; his volunteer service to the community; his participation in programs in the legal community; the absence of harm to clients; his execution of the stipulation of facts, which eliminated the need for lengthy hearings; his contrition and remorse; and his outstanding reputation among both the legal and local communities. The special master found as aggravating factors Graziano's failure to admit that his actions were unethical; his responsibility, as managing shareholder, for overseeing the practices and policies of the firm; his active (as opposed to passive) conduct in encouraging and supporting the fee-share practice; and the long period of time over which the misconduct occurred, as well as its scope, which the special master characterized as perhaps the most serious instance of prohibited fee-sharing in New Jersey.

The special master assigned Graziano a culpability level of five and recommended a fifteen-month suspension.

<u>Charles N. Riley</u>
<u>Docket No. DRB 04-275, District Docket No. XIV-01-408E</u>

Riley was admitted to the New Jersey bar in 1973. He began his employment with the firm in 1979, and became a shareholder in 1984. He has no history of discipline.

The complaint charged Riley with having violated <u>RPC</u> 5.1(b) and (c)(2), <u>RPC</u> 5.3(a), (b) and (c), <u>RPC</u> 5.4(a), <u>RPC</u> 7.2(c), <u>RPC</u> 7.3(d), <u>RPC</u> 8.1(b), <u>RPC</u> 8.3(a), and <u>RPC</u> 8.4(a).

During the hearing, the OAE moved to amend the complaint to include a charge that Riley violated <u>RPC</u> 5.1(c)(1), alleging that he had ratified misconduct of other Tomar lawyers. The special master allowed the amendment, over objection.

Riley and the OAE entered into a stipulation of facts that included testimony from eleven individuals connected with these events. Riley agreed that the witnesses' testimony was "generally credible."

According to the stipulation, the firm's fee-sharing policy was in existence when Riley began his employment as an associate. He acknowledged that, while he was a shareholder, he approved numerous bonuses to nonlawyer employees through September 1999. Thus, even after April 1997, the date of Loughry's advice, Riley approved six bonus requests. Although the majority of shareholders stated that they had discussed employee bonuses at a shareholder meeting in early 1997, Riley maintained that those discussions had been limited to Buccilli.

During the period from 1997 through 1999, Riley vociferously opposed Buccilli's continued employment and recommended to various shareholders that his employment be terminated. The OAE stipulated that Riley did not support Buccilli in any manner.

Riley testified that, in 1997, he believed that Graziano and Kaplan would not resolve his objections about Buccilli. Although Riley recognized that there would be future violations of the Rules of Professional Conduct by Graziano and Kaplan through Buccilli, Riley did not report those two shareholders to disciplinary authorities.

Riley supervised paralegal Colarulo. Although not nearly as prolific as Buccilli, on average, she earned $10,000 to $15,000 per year in bonus payments. The bonus book reveals that Riley approved more post-1997 fee shares than any other shareholder because of the payments to Colarulo.

Riley also had direct supervisory authority over William Santiago. Santiago stated that, when he left the firm in 1995, he gave Riley an estimate of his fifteen percent share on the cases that had not yet settled. The firm continued to pay Santiago $500 per week until December 31, 1999. In Riley's statement to the OAE, he asserted that Santiago was "entitled" to his fee share, and referred to the firm's "obligation" to Santiago.

The special master found that Riley violated all of the charges, but did not include RPC 8.4(a), presumably an oversight.

The special master noted, in aggravation, that Riley continued to authorize the payment of fee shares until the end of 1999, well after the shareholders' 1997 decision to cease the payments. In addition, the special master pointed to Riley's failure to see his actions as a violation of the rules. The special master considered, in mitigation, Riley's previously unblemished career; the fact that he enjoyed the respect of the community, his peers, and clients; and his contributions to the community. The special master also considered Riley's distinguished career in the United States Marine Corps. He noted Riley's candor in describing the referral fee practice and Riley's recommendation to other shareholders that Buccilli's employment be terminated.

The special master assigned Riley a culpability level of four and recommended that he be suspended for one year.

Cynthia Ann Brassington
Docket No. DRB 07-018, District Docket No. XIV-01-412E

Brassington was admitted to the New Jersey bar in 1993. She has no disciplinary history. Brassington is the only respondent in these matters who was not a shareholder of the Tomar firm. Her receipt of referral fees from the Tomar firm is the foundation for the disciplinary charges against her.

The complaint charged Brassington with having violated RPC 1.15, [presumably RPC 1.15(d)], R. 1:21-6, RPC 5.5(b), RPC 8.4(a), and RPC 8.4(c).

When Brassington married Buccilli, she knew that he was well-paid and that the bonuses that he received represented compensation for bringing business to the Tomar firm. Brassington claimed that, until the OAE investigation, she was not aware that the payments to Buccilli were based on a percentage of the fees generated by the cases that he referred to the firm. It never occurred to her that the bonuses were referral fees because she knew that it was improper to pay such fees to a nonlawyer and she expected the Tomar firm to comply with all ethics rules.

In 1996, Buccilli told Brassington that the Tomar firm would no longer pay him bonuses because Brassington's referral fees were "kicking in." Buccilli informed Brassington that he learned of this change during a meeting with the Tomar managing partner.

Before 1997, the Tomar firm did not pay any referral fees to Brassington. From 1997 to 1999, the firm paid her $588,067.63 in referral fees, as follows: 1997 - $136,801; 1998 - $230,842; 1999 - $220,434.63.

Although Brassington received referral fees in 1997, she had not provided contemporaneous referral letters to the Tomar firm. She claimed that, in 1997 or 1998, she signed referral letters back-dated to as early as 1993, at the urging of Ronald Graziano, Michael Kaplan, Jaffa Stein, and Buccilli.

According to Brassington, Tomar shareholders, particularly Graziano, encouraged her to view herself and her husband as one person, thereby entitling her to receive fees on cases that her husband referred. She acknowledged that she had received referral fees on cases that her husband had referred to the firm. Brassington admitted that she should have known that the referral fees paid to her were de facto compensation for her husband.

The OAE's investigation revealed that Brassington had referred very few of the cases for which she received referral fees from the Tomar firm (approximately thirty-six of 208). Brassington could not dispute the OAE's analysis of the records.

In late 1999 and early 2000, the Tomar firm refused to honor further Brassington's referral fee requests. The shareholders required that she demonstrate that she was the source of the referral before paying her for particular cases. Brassington retained a lawyer to assist her in collecting these fees.

As to the recordkeeping charge, during 1997 and part of 1998, Brassington failed to deposit in her attorney business account the referral fees from the Tomar firm. Instead, she deposited the fees in a personal bank account she held jointly with Buccilli.

Brassington admitted the recordkeeping violations and the deceit and misrepresentation components of RPC 8.4(c). She denied violating RPC 5.5(b), RPC 8.4(a), and that part of RPC 8.4(c) charging her with dishonesty.

The special master found that Brassington violated all of the RPCs with which she was charged. He concluded that, by receiving fees from the Tomar firm for cases that she knew her husband had referred to that firm, she violated RPC 5.5(b) and RPC 8.4(a). In addition, the special master determined that Brassington engaged in dishonest conduct by submitting backdated referral letters.

The special master found as aggravating factors: Brassington was an active participant in the ongoing practice of sharing legal fees with a nonlawyer; she aggressively pursued payment of referral fees to which she knew she was not entitled; as a recent law school graduate at the time, she should have been aware of the RPCs but chose to ignore them; and her conduct took place between 1997 and 1999. The special master found as mitigating factors: Brassington was an inexperienced lawyer at the time of the violations; her husband persuaded her to participate in the referral fee scheme; she was influenced by the fact that her former law professor, Kaplan, participated in the referral scheme; and a significant amount of time had passed since the events took place.

The special master assigned Brassington a culpability level of three and recommended a three-month suspension.

David T. Jacoby and Robert F. O'Brien[6]
Docket No. DRB 07-018, District Docket No. XIV-01-412E

Jacoby was admitted to the New Jersey bar in 1972. He joined the Tomar firm in 1972, and became a shareholder in the firm in 1977. He served as secretary of the District IV Ethics Committee from September 1981 through August 1982.

O'Brien was admitted to the New Jersey bar in 1969. He joined the Tomar firm in 1968 and became a shareholder in the firm in 1974 or 1975. Neither respondent has been previously disciplined.

The complaint charged respondents with having violated RPC 5.1(b) and (c)(2); RPC 5.3(a), (b), and (c); RPC 5.4(a); RPC 7.2(c); RPC 7.3(d); RPC 8.1(b); and RPC 8.3(a). The complaint was amended during the hearing to further charge both

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[6] These two matters were heard together before the special master and before us.

respondents with violating RPC 8.4(a). Respondents did not object to the amendment.

At the end of the hearings, the OAE moved to amend the complaint to charge respondents with violating RPC 5.1(c)(1). Respondents objected. The special master granted the application only as to respondents' conduct up to 1997.

Respondents and the OAE entered into a stipulation of facts, which included stipulated testimony from sixteen individuals connected with these events. Respondents agreed that those individuals' testimony was "generally credible."

O'Brien testified that, although he knew the payment of fee shares was wrong, he did not think that he had the authority to force the personal injury department, where the payments occurred, to change its practices. He emphasized that he did not want it occurring in his labor law department.

Jacoby, whose practice concentrated on mass tort litigation, testified that the practice of sharing fees was "never a part of [his] life" and, therefore, he never confronted anyone about it.

Respondents knew that Heininger was authorized to approve the payments of referral fees to the firm's nonlawyer employees. They contended, however, that they were unaware that Heininger was authorized to approve such payments to Buccilli. Although respondents knew Buccilli received a large amount of compensation, they believed that he received bonuses based on the productivity of the office in which he worked.

The OAE investigator testified that there was no evidence that either respondent ever approved a fee share. Neither respondent is mentioned in the bonus book.

In addition, the OAE found no evidence that respondents knew that the fee-share payments continued beyond 1997. Finally, the OAE found no evidence that respondents knew, until sometime between August and October 1999, that Riley had agreed to pay a fee share to Santiago for the Rent-To-Own case, or that Santiago was receiving wages while not an employee.

The special master found that respondents violated all of the RPCs with which they were charged,[7] characterizing their involvement in the payment of referral fees as passive, rather than active. In mitigation, the special master considered respondents' previous unblemished careers; the respect of the community, their peers, and clients that they enjoy; their active service to the community; and their remorse.

The special master assigned both respondents a culpability level of two and recommended a reprimand.

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[7] Although the special master did not mention a violation of RPC 8.4(a), presumably that omission was an oversight.

Alan H. Sklarsky
Docket No. 07-019, District Docket No. XIV-01-505E

Sklarsky was admitted to the New Jersey bar in 1978. He has no disciplinary history. Sklarsky joined the Tomar firm in 1979, and became a shareholder in 1986. His practice concentrated on litigation, primarily personal injury, environmental toxic tort, and commercial.

The complaint charged Sklarsky with having violated RPC 5.1(a), RPC 5.1(c)(1), RPC 5.3(a), RPC 5.3(b), RPC 5.3(c)(1), RPC 5.3(c)(3), RPC 5.4(a), RPC 7.2(c), RPC 7.3(d), RPC 8.1(b), RPC 8.3(a), and RPC 8.4(a).

The bonus book contains one instance in which Sklarsky approved a bonus to a maintenance employee. Sklarsky did not sign any bonus checks issued to Buccilli, did not supervise him, and did not work in the Northfield office.

Sklarsky was a member of the executive committee in the early 1990s, including in 1992, when Heininger issued a memo to the executive committee stating that fee shares had increased, in 1992, because of Buccilli.

The OAE acknowledged that Sklarsky did not handle cases in which Brassington received referral fees, and that he did not have contemporaneous knowledge of the referral fees that she received between 1997 and 1999.

In a stipulation, Sklarsky admitted that, before 1997, "he was a shareholder in a law firm that shared legal fees with nonlawyers," a violation of RPC 5.4(a). He denied that he had violated any other RPC.

Sklarsky contended that the charges should be dismissed, asserting that the OAE had failed to demonstrate that he was guilty of any misconduct beyond the approval of one bonus. Moreover, Sklarsky argued that the firm, not individual lawyers, should have been charged with ethics violations, pointing out that, when the first set of Tomar complaints was filed, the firm was still practicing law, and that, even to date, the firm as an entity continues, with one employee handling obligations and accounts receivable. Sklarsky further contended that disciplining him, while other shareholders whose conduct was equal or greater than his may not face discipline, will result in selective enforcement of the RPCs.

The special master found that Sklarsky violated all of the RPCs with which he was charged. He found as mitigating factors Sklarsky's prior unblemished record, his reliance on the advice of counsel on the issue of reporting the firm's misconduct to the OAE, his entering into a stipulation of facts with the OAE, and the substantial passage of time since the violations. The special master found as aggravating factors Sklarsky's failure to stop the fee-share practice and the long period of time over which the misconduct occurred.

The special master assigned Sklarsky a culpability level of two and recommended a reprimand.

Robert M. Capuano
Docket No. DRB 07-023, District Docket No. XIV-01-518E

Capuano was admitted to the New Jersey bar in 1977. He has no disciplinary history. He joined the Tomar firm in 1980, and became a shareholder in 1987. His primary area of practice was workers' compensation.

The complaint charged Capuano with having violated RPC 5.1(a), RPC 5.1(c)(1), RPC 5.3(a), RPC 5.3(b), RPC 5.3(c), RPC 5.4(a), RPC 7.2(c), RPC 7.3(d), RPC 8.1(b), RPC 8.3(a), and RPC 8.4(a).

According to Capuano, he believed that associates in the firm received "fee shares" and employees received "bonuses." He assumed that the fee shares mentioned in the firm's 1992, 1993, and 1994 budgets referred to compensation paid to associates. Although he acknowledged that there was some relationship between the size of the fee and the amount of the bonus paid to nonlawyer employees, he maintained that, at the time, he did not believe that the bonus was calculated as a percentage of the fee.

The "bonus book" mentions Capuano twice. He denied that these references evidence his approval of bonuses, claiming that he reported to Riley the amount of fees that the firm had received, after Riley had asked him for that information. He acknowledged, however, that he knew that Riley would use the information to compute the amount of the bonus.

Capuano believed that Buccilli's compensation was based on the Northfield office's profits, not on a share of individual cases. Although he did not recall the circumstances, he acknowledged that he had signed a January 16, 1995 check in the amount of $28,656.22 to Buccilli. According to Capuano, the shareholders knew that part of Buccilli's job was to refer cases to the firm. Although it occurred to Capuano that the practice of paying fee shares might not be proper, he believed that, because other shareholders, with more ethics knowledge, did not object, the conduct was ethical.

Despite denying that he violated any of the <u>RPC</u>s, Capuano advanced as a mitigating factor his medical condition. In 1995, he was diagnosed with congestive heart failure. In September 2003, he suffered a cardiac arrest requiring police officers to shock his heart with a defibrillator. He has an implantable cardioverter defibrillator in his chest, which functions as both a pacemaker and defibrillator. Capuano submitted a letter from his physician, documenting his heart condition.

Capuano further advanced, in mitigation, the fact that he was not a member of the personal injury department and did not supervise Buccilli or any of the personal injury lawyers.

Like Sklarsky, Capuano complained that the decision to charge some Tomar lawyers and not others was not equitable. He contended that shareholders who were similarly situated were treated differently, that he had been told and believed that the bonus system was ethical, and that shareholders who had engaged in more serious conduct than his own were not subject to discipline.

The OAE urged the special master to recommend a reprimand. Although the OAE presenter contended that Capuano's refusal to accept responsibility for his approval of bonuses and his efforts to shift responsibility to others constituted aggravating factors, the presenter also acknowledged that Capuano's twenty-five year career was previously unblemished and that he did not encourage the improper conduct. Capuano urged the special master to dismiss all of the charges, or to find only that he failed to report unethical conduct of other shareholders. In either event, Capuano contended that no discipline was warranted.

The special master found that Capuano violated all of the RPCs with which he was charged. The special master found, as aggravating factors, the length of time that Capuano either knew or should have known that others in his firm were violating the RPCs and his refusal to acknowledge his responsibilities under those rules. The special master found, as mitigating factors, Capuano's previously unblemished record as a lawyer; the passive/non-responsive, rather than active/affirmative, nature of his violations; and his significant health issues, on which he concentrated his energies during the relevant period.

The special master assigned Capuano a culpability level of two and recommended a reprimand.

Howard S. Simonoff
Docket No. 07-020, District Docket No. XIV-01-508E

Simonoff was admitted to the New Jersey bar in 1961. He has no disciplinary history. Simonoff joined the Tomar firm in 1960, and became a shareholder in 1968. His primary area of practice was labor and employment law.

The complaint charged Simonoff with having violated RPC 5.1(a), RPC 5.1(c)(1), RPC 5.3(a), RPC 5.3(b), RPC 5.3(c)(1), RPC 5.3(c)(3), RPC 5.4(a), RPC 7.2(c), RPC 7.3(d), RPC 8.1(b), RPC 8.3(a), and RPC 8.4(a).

Simonoff asserted that the labor department was separate from other departments in the firm. According to Simonoff, at some point in 1999, he learned about the firm's practice of paying fee shares to nonlawyer employees. He admitted that he should have been aware of the practice in the early 1990s. Although he acknowledged that the firm budgets for 1992, 1993, and 1994 mentioned the words "fee shares," he understood the item to refer to payments made to associate attorneys, not to nonlawyer employees.

Although Simonoff admitted that, in 1997, he had become aware that the firm was paying fee shares to Buccilli, he asserted that he strongly objected to those payments. He also claimed that he was not aware of the amount of Buccilli's salary. He was a member of the executive committee in 1992, when Heininger issued a memorandum to that committee indicating that fee shares increased drastically in 1992 due to Buccilli. Simonoff did not explain why this memorandum had not alerted him to Buccilli's compensation arrangement.

On July 20, 1992, Simonoff signed a $14,207.03 check payable to Buccilli. The record contains no information about the circumstances surrounding this check.

According to Simonoff, after Riley announced the arrangement he had made with Santiago, there was an "uproar".

Riley expected the firm to honor this obligation to Santiago. Simonoff vigorously opposed paying any fee shares to Santiago. At that time, the firm was in financial distress and the shareholders had lost earnings.

In February 2000, Simonoff signed a separation agreement, withdrawing from the firm.

In the stipulation, Simonoff admitted the following violations: RPC 5.1(a), RPC 5.3(a), RPC 5.3(c)(3), RPC 5.4(a), RPC 8.3(a), and RPC 8.4(a). He denied having violated RPC 5.1(c)(1), RPC 5.3(c)(1), RPC 7.2(c), RPC 7.3(d), and RPC 8.1(b).

Simonoff offered, as mitigating factors, his unblemished career of more than forty years; his service as Chair of the New Jersey Bar Association Labor and Employment Law Section and as President of the Columbia Law School Alumni Association of New Jersey; his election to the College of Labor and Employment Lawyers; his lack of direct involvement in any improper conduct at the firm; his forceful objections to the payments to Buccilli and Santiago, which were instrumental in bringing an end to these practices; and his emotional distress caused by the extreme tension and breakup of the firm.

Simonoff, too, objected to the disparate treatment and selective prosecution resulting from his being charged with ethics violations, while other shareholders did not face discipline.

The OAE recommended a reprimand. Simonoff's counsel submitted a letter to us, indicating that Simonoff is retired from the practice of law and that, although Simonoff does not agree with all of the special master's findings, he will not contest any of the special master's recommendations.

The special master found that Simonoff violated all of the RPCs with which he was charged, remarking that it was not credible that Simonoff did not know of the firm's ingrained practice of paying fee shares to nonlawyer employees.

The special master found as aggravating factors Simonoff's position as a senior shareholder in a firm with a long history of paying referral fees to nonlawyer employees and his failure to take affirmative steps to end the practice. The special master found as mitigating factors Simonoff's lengthy and distinguished career as a lawyer; the absence of prior discipline; the fact that he did not actively engage in improper conduct, but chose to ignore it; his contributions to the legal community; and the emotional distress that Simonoff suffered.

The special master assigned Simonoff a culpability level of two and recommended a reprimand.

Edward N. Adourian, Jr.
Docket No. DRB 07-024, District Docket No. XIV-01-406E

Adourian was admitted to the New Jersey bar in 1961. He has no disciplinary history. Adourian joined the Tomar firm in 1961, upon graduation from law school. He concentrated on medical malpractice. In September 1995, he "semi-retired" from the practice of law, at age sixty-five. During his tenure with the firm, Adourian did not serve on the executive committee or assume any management or financial responsibilities. He retired fully, effective January 1, 2000.

The complaint charged Adourian with having violated RPC 5.1(a), RPC 5.1(c)(1), RPC 5.3(a), RPC 5.3(c)(1), RPC 5.3(c)(3), RPC 5.4(a), RPC 7.2(c), RPC 7.3(d), RPC 8.1(b), RPC 8.3(a), and RPC 8.4(a).

According to Adourian, in the summer of 1997, he learned that the firm was compensating Buccilli for cases referred to the firm. Adourian did not attend the shareholders' meeting during which the policy was discussed. Adourian claimed that he later learned that, although the firm had ceased compensating Buccilli for referrals, it had begun to compensate Buccilli's wife, Brassington.

Between 1992 and 1995, Adourian signed five checks issued to Buccilli, in amounts ranging from $3,895.38 to $118,556.01.

Although Adourian acknowledged having signed those checks, he asserted that he had signed thousands of checks presented to him, often in batches of more than one hundred.

When asked how he could not have known about the fee-share policy, Adourian replied that he had not been involved in the administration of the law firm; that, in 1990, he began to gradually withdraw from the firm, in contemplation of retirement; and that he worked on his cases alone, without associates or paralegals.

In the stipulation, Adourian admitted the following violations: <u>RPC</u> 5.1(a), <u>RPC</u> 5.3(a), <u>RPC</u> 5.3(c)(3), <u>RPC</u> 5.4(a), <u>RPC</u> 8.3(a), and <u>RPC</u> 8.4(a). He denied that he violated <u>RPC</u> 5.1(c)(1), <u>RPC</u> 5.3(c)(1), <u>RPC</u> 7.2(c), <u>RPC</u> 7.3(d), and <u>RPC</u> 8.1(b).

Adourian offered the following mitigating factors: all of the unethical conduct charged in the complaint occurred while he was "winding down" his practice; he had no supervisory responsibilities over the firm's nonlawyer personnel; he had no management responsibilities and did not serve on the firm's executive committee; he never shared legal fees with a nonlawyer and did not authorize or order such a practice; he objected to the policy of paying fee shares to nonlawyer employees when he learned of it; although he signed checks issued to Buccilli, he signed many checks presented to him in large batches; he has been a member of the bar for more than forty years and, other than the instant charges, has never been the subject of an ethics or malpractice complaint; he suffered emotional distress from the tension and imminent breakup of the firm; he has provided pro bono legal services, as well as other volunteer services to many organizations; he is a fellow of the American College of Trial Lawyers; and he served as an adjunct professor of Trial Advocacy at Rutgers Law School in Camden.

The OAE urged the special master to recommend a reprimand. Adourian did not submit a brief to the special master or to us. Adourian's counsel indicated in a letter that, although he does not agree with all of the special master's findings, Adourian will not contest any of his recommendations and will not attend any further hearings. According to that letter, Adourian has retired from the practice of law.

The special master found that Adourian violated all of the RPCs with which he was charged. The special master remarked that it was not credible that Adourian did not know of the firm's open and longstanding practice of paying fee shares to nonlawyer employees.

The special master found, as aggravating factors, Adourian's position as a senior shareholder in a firm with a long history of paying referral fees to nonlawyer employees. The special master noted that Adourian benefited from that practice, and his failure to take any steps to end the practice. The special master found, as mitigating factors, Adourian's long and distinguished career as a lawyer, the absence of prior discipline, and his pro bono services and volunteer endeavors.

The special master assigned Adourian a culpability level of two and recommended a reprimand.

Alfred P. Vitarelli
Docket No. DRB 07-022, District Docket No. XIV-01-514E

Vitarelli was admitted to the New Jersey bar in 1977. He has no disciplinary history. He joined the Tomar firm in 1986, and became a shareholder in 1990. His primary area of practice was workers' compensation. He also teaches workers' compensation law at Widener School of Law.

The complaint charged Vitarelli with having violated RPC 5.1(a), RPC 5.1(c)(1), RPC 5.3(a), RPC 5.3(c)(1), RPC 5.3(c)(3), RPC 5.4(a), RPC 7.2(c), RPC 7.3(d), RPC 8.1(b), RPC 8.3(a), and RPC 8.4(a).

Although Vitarelli knew that the firm paid bonuses to Buccilli, he claimed that he did not know that the bonuses were based on a percentage of the firm's fees. Vitarelli believed that, because three shareholders who had served as secretary of the ethics committee did not object to that practice, it was proper. He became uncomfortable when he saw "opinions where attorneys were being disciplined about this activity," presumably referring to the Pajerowski decision. Other than complaining within the firm, Vitarelli took no action to stop the misconduct. Instead, he prevented Buccilli from locating files and receiving referral fees in the cases that he handled.

Vitarelli admitted that, between 1993 and 1996, he approved the payment of five fee share checks, as listed in the "bonus book," ranging in amounts from $77.50 to $310.

In addition, the bonus book contains a bonus request, dated June 2, 1997, sent from a nonlawyer employee to Vitarelli. Although Vitarelli claimed that he refused to approve the bonus, and although the request was made after the firm had determined to discontinue the bonus program, he admitted that he took no action to ensure that the practice was terminated. The bonus book indicates that the $612.32 bonus was approved by an employee in the bookkeeping department, and was paid on June 13, 1997.

When Vitarelli learned that the firm had begun paying referral fees to Brassington, he became concerned that payments were being funneled to Buccilli through his wife. Again, he did nothing to question or terminate these payments to Brassington.

According to Vitarelli, he had very limited involvement with the trust account because, by statute, payments in workers' compensation cases are paid directly to the parties, not through the lawyers.

In the stipulation, Vitarelli admitted the following violations: RPC 5.1(a), RPC 5.1(c)(1), RPC 5.3(a), RPC 5.3(c)(1), RPC 5.3(c)(3), RPC 5.4(a), RPC 7.2(c), RPC 7.3(d), RPC 8.3(a), and RPC 8.4(a). He denied that he violated RPC 8.1(b).

Vitarelli offered the following mitigating factors: most of his alleged misconduct was passive, consisting of his failure to take steps to terminate the firm's policy of paying referral fees to nonlawyer employees; much of the misconduct, such as the actions of those in the personal injury department, was beyond his control; as a member of the less lucrative workers' compensation department, he had little or no power to stop the improper conduct; he was not in a position to leave the firm because his son's medical problems required the excellent health benefits that the firm offered; he has an outstanding reputation; he has volunteered services to the bar and to the community, and, after the events of September 11, 2001, he became a member of the United States Coast Guard Auxiliary; and he is an adjunct professor at Widener University School of Law.

The OAE urged the special master to recommend a reprimand, pointing out that, although Vitarelli directly participated in improper conduct by approving several referral fees, he candidly admitted his violations and accepted responsibility for his actions. Vitarelli contended that the circumstances do not warrant the imposition of discipline, suggesting that he be required to perform service to the public.

The special master found that Vitarelli violated all of the RPCs with which he was charged. As noted above, the only contested charge was that he violated RPC 8.1(b). The special master found that, by failing to report his firm's misconduct and by failing to reply to the OAE's March 10, 2000 letter, requesting information about the firm's misconduct, Vitarelli violated RPC 8.1(b).

The special master found, as aggravating factors, Vitarelli's approval of several referral fees to nonlawyer employees, and his awareness of the practice and decision to ignore it. The special master found, as mitigating factors, Vitarelli's reliance on the advice of counsel as to reporting the Tomar firm's misconduct to the OAE; his otherwise exemplary record as a lawyer; his valuable service to the legal community and to the general community; his good reputation among his peers and colleagues; his admission of unethical conduct; and his son's medical problems.

The special master assigned Vitarelli a culpability level of two and recommended a reprimand.

Charles L. Winne
Docket No. DRB 07-021, District Docket No. XIV-01-513E

Winne was admitted to the New Jersey bar in 1975. He has no disciplinary history. He joined the Tomar firm in 1975, and became a shareholder in 1980. He concentrated on commercial law and estate planning.

The complaint charged Winne with having violated RPC 5.1(a), RPC 5.1(c)(1), RPC 5.3(a), RPC 5.3(c)(1), RPC 5.3(c)(3), RPC 5.4(a), RPC 7.2(c), RPC 7.3(d), RPC 8.1(b), RPC 8.3(a), and RPC 8.4(a).

Winne asserted that, in September 1999, he learned about the firm's prior policy of paying bonuses to nonlawyer employees who referred cases to the firm. Although he admitted that he should have been aware of the policy through the exercise of due diligence, he denied any knowledge of it until 1999. He did not recall reading the April 18, 1991 memorandum from Ronald Graziano, reminding shareholders to refer to fee shares as "bonuses."

According to Winne, also in September 1999, he found out that the firm had paid substantial sums to Buccilli. Winne claimed that, although he knew that Buccilli was well-paid, he did not know how his compensation was calculated. The bonus book reveals that, between 1992 and 1996, Winne signed six checks totaling $149,000 to Buccilli. Winne asserted that any checks that he had signed to Buccilli had been presented to him in batches.

Winne admitted that, through the exercise of due diligence, he should have known that the firm paid Santiago a salary from 1997 through 1999, even though Santiago was not an employee at that time, and that Santiago's salary was compensation for referring cases to the firm, including the Rent-to-Own case.

In the stipulation, Winne admitted the following violations: RPC 5.1(a), RPC 5.3(a), RPC 5.3(c)(3), RPC 5.4(a), RPC 7.2(c), RPC 7.3(d), and RPC 8.3(a). He denied that he violated RPC 5.1(c)(1), RPC 5.3(c)(1), RPC 8.1(b), and RPC 8.4(a).

The OAE contended that Winne ratified the fee-share practice, a violation of RPC 5.1(c)(1), RPC 5.3(c)(1), and RPC 8.4(a), by participating in it, accepting its financial benefits, and failing to repudiate it. Furthermore, the OAE argued that a lawyer may be found to have ratified the misconduct of others, even if the lawyer does not have actual knowledge of the unethical conduct. In support of this proposition, the OAE pointed out that ABA Model RPC 5.1(c)(1) and RPC 5.3(c)(1) provide that a lawyer is responsible for another's violation of the RPCs if "the lawyer orders, or, with knowledge of the specific conduct, ratifies the conduct involved," while New Jersey's version of those rules removed the phrase "with knowledge of the specific conduct." The OAE, thus, maintained that, when the Court adopted the RPCs, it deleted the requirement that the lawyer have actual knowledge of the conduct being ratified.

In turn, Winne, who claimed that, until 1999, he had no knowledge of the fee-share practice, argued that our rules require that a lawyer have knowledge of all material facts, in order to be found guilty of having ratified the conduct of another. He asserted that he had no knowledge of the firm's fee-share policy until 1999, when he reported it to the OAE. According to Winne, the OAE's claim that Winne knew of the firm's policy is based entirely on Graziano's April 1991 memorandum, requesting that shareholders refer to fee shares as "bonuses." Although Winne admitted that, with due diligence, he should have known about the practice, he claimed that he did not, and that he was not aware of Graziano's 1991 memorandum. Winne further contended that, rather than ratifying the firm's improper conduct, he notified the OAE shortly after he became aware of it.

Similarly, as to RPC 8.1(b), Winne contended that he provided the OAE with extensive information and voluntarily gave a statement on April 14, 2000, only one month after the March 13, 2000 deadline imposed by the OAE's letter requesting information about the firm's misconduct.

Finally, Winne denied that he violated RPC 8.4(a), arguing that, because he had no knowledge of the fee-share policy, he did not assist or induce others to violate the RPCs.

Winne advanced the following mitigating factors: he has no history of disciplinary infractions; until the fall of 1999, he had no involvement in the firm's management; after becoming involved with the supervision of the firm's finances in the fall of 1999, he discovered the trust defalcations; his efforts led to the remedial actions in which the shareholders engaged, thereby protecting all clients and their trust funds, and led to the reporting of the defalcations to the OAE; when he learned of the firm's bonus practice, he became instrumental in terminating it; and he had no direct connection to those members of the firm who practiced personal injury law.

The OAE urged the special master to recommend a reprimand. Winne contended that an admonition was appropriate.

The special master found that Winne violated all of the RPCs with which he was charged. He found not credible Winne's assertion that he was unaware of the longstanding practice of paying fee shares to nonlawyer employees.

The special master considered, as aggravating factors, Winne's failure to ensure that he was informed about the firm's activities. The special master took into account, as mitigating factors, the absence of prior discipline, Winne's admission of RPC violations, his efforts to terminated the fee-sharing practice, his opposition to the fee-share payment to Santiago in the "Rent-To-Own" case, and his discovery of the trust account invasions.

The special master assigned Winne a culpability level of one and recommended an admonition.

RPC VIOLATIONS

Following a de novo review of the record, we are satisfied that the special master's finding that respondents' conduct was unethical is supported by clear and convincing evidence. We find that the following RPCs have been violated either by all or by some respondents.

Fee-Sharing

RPC 5.4(a) prohibiting lawyers from sharing fees with nonlawyers was designed to ensure that referrals are made in the client's interest, not the interest of the party making the referral. The rule also is intended to preserve the lawyer's independent professional judgment by having the lawyer, not the referring party, retain control over the case. New Jersey case law on sharing legal fees with nonlawyers has been developing for more than fifty years. The first case on the subject was decided in 1956. In In re Frankel, 20 N.J. 588, 590 (1956), the Court imposed a two-year suspension on a lawyer who agreed to pay a nonlawyer twenty-five percent of the net fee for referring automobile negligence cases to him.

Almost thirty years later, in In re Weinroth, 100 N.J. 343 (1985), the Court reprimanded a lawyer for sharing his legal fees with a state senator as a reward for introducing Weinroth to a prospective client, Wawa, and then intervening in Weinroth's favor when he and Wawa could not agree upon a legal fee. When Weinroth proposed to Wawa's general counsel that the senator be compensated for his work, he was told that Wawa had "closed its books on this project and had no additional funds" with which to compensate the senator. Weinroth then returned a portion of his fee to Wawa, who, in turn, used those funds to pay the senator.

The Court found that Weinroth shared his legal fee with a lay person, a prohibition of which Weinroth was aware. The Court discussed the rationale for the rule:

> <u>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;</u> 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. DR 2-107; <u>see</u> <u>In re Bregg</u>, 61 <u>N.J.</u> 476 (1972); <u>In re Introcaso</u>, 26 <u>N.J.</u> 353 (1958); <u>In re Frankel</u>, 20 <u>N.J.</u> 588 (1956). 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. The fact that respondent did not directly pay [the senator] did not relieve him of responsibility. "[A] lawyer may not circumvent a disciplinary rule through actions of another." DR 1-102(A)(2).
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> [<u>Id.</u> at 350; emphasis added; some citations omitted.]

In imposing a reprimand, the Court considered Weinroth's unblemished disciplinary record, his service to the profession, and his "other civil undertakings."

In <u>In re Gottesman</u>, 126 <u>N.J.</u> 376 (1991), the lawyer was reprimanded for sharing fees with his paralegal/investigator, whom he also assisted in the unauthorized practice of law. Gottesman entered into an agreement whereby a layman, Infante, 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 fifty percent of Gottesman's legal fees from those cases. Gottesman claimed that the agreement was necessitated by his inability to pay Infante a salary. Eventually, Infante's 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.

In In re Finckenauer, 172 N.J. 348 (2002), the Court imposed a three-month suspension on a lawyer who accepted referrals from a client whom he was defending in a murder case, in exchange for reducing the client's bill or providing legal services free of charge. We found that the lawyer's provision of legal services to the client constituted "something 'of value' given in exchange for soliciting clients" for him. The lawyer was guilty of other ethics improprieties.

In In re Silverman, 185 N.J. 133 (2005), the Court suspended the lawyer for a year. Silverman and a chiropractor, Glen Poller, referred work to each other. At some point, Poller became concerned that Silverman was not providing him with an equivalent number of referrals and that Poller was not being compensated adequately for the work he did for Silverman. They agreed that, if Poller made more referrals, Silverman would pay him $400 per each "excess" client. Silverman paid Poller in cash and insisted to the disciplinary authorities that the money was for Poller's services. We, however, determined that Silverman and Poller were knowingly involved in an improper scheme, whereby Silverman paid Poller $400 for each referral "over and above" the referrals Silverman made to Poller, in violation of RPC 7.2(c) and RPC 7.3(d).

In In re Agrapidis, 188 N.J. 248 (2006), the Court reprimanded the lawyer for sharing fees with nonlawyer employees and conduct prejudicial to the administration of justice. Between 1997 and 2000, the lawyer paid twelve referral fees to his nonlawyer employees, totaling $20,000. The amount of the fee share was based upon a percentage of the total fee received by the firm. 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 prior to 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 in order to generate business. Rather, he paid employees a percentage of the fee that his firm received for cases referred by the employees. We found Agrapidis' conduct similar to that of the lawyer in Gottesman, noting that, in some respects, Agrapidis's conduct was less serious than Gottesman's, who employed a runner and assisted him in the unauthorized practice of law. In turn, Agrapidis gave his employees bonuses for suggesting his services to their friends and relatives. Because Agrapidis's misconduct was "no worse" than Gottesman's, and because he paid only twelve fee shares in a four-year period, we determined that a reprimand was appropriate.

In In re Howard A. Gross, 186 N.J. 157 (2006), the Court imposed a three-month suspended suspension for the lawyer's use of a paid runner, David Garcia. Garcia was part of a network that tracked traffic accidents through the use of a CB radio. Upon learning of an accident, Garcia would rush to the scene and would give the victims Howard's[8] business card, which Howard had given to Garcia for that purpose. For each case referred to Howard, Garcia received $300.

Howard stipulated that he paid $300 to Garcia on at least fifty occasions, between 1998 and 2000, for cases that Garcia had generated. The checks were written on the firm's business account, with the notation "client development" on the memo line.

We considered, in mitigation, that Howard inherited a system put into place by his father, fully cooperated with the

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[8] Ordinarily, we refer to parties by their last names. Because Howard Gross shares the same last name as the attorney (his father) in In re Alvin Gross, infra, we use their first names in the interest of clarity.

OAE in its investigation, and was candid and remorseful. Although Howard's transgressions were serious, numerous, and undertaken in an effort to avoid detection, we determined that a three-month suspended suspension was warranted due to the passage of time (six years) since the practice had ended.

One year later, Howard's father, Alvin, was disciplined based on the same facts and circumstances. In re Alvin Gross, 190 N.J. 194 (2007). Alvin denied that he had paid runners to obtain cases, claiming instead that Howard had hired Garcia, whose job Alvin believed was to provide transportation to clients and act as an interpreter. At the hearing, Howard testified against his father.

Alvin admitted that he knew that Garcia had been running cases for the firm, that he had paid Garcia for bringing clients into the firm, and that he had paid other nonlawyers, although he equivocated on the question of whether he knew that they were runners. He maintained that Howard was responsible for bringing runners to the firm. Alvin claimed that, without Garcia, there would have been no work for Howard.

Alvin testified that Howard had earlier ethics problems due to drug use, and that Alvin had provided Howard with a job because he knew that he could not obtain employment elsewhere.

We were unable to conclude that Alvin had compensated anyone other than Garcia for bringing cases into the firm. Because, however, he conceded that he had participated in Howard's running scheme by issuing payments to Garcia, we found that, as Howard's supervisor, he had failed to stop Howard from using the runners. We concluded that he had violated RPC 5.1(c). Because Alvin was the senior member of the firm and was in a position to nip the misconduct in the bud, and because he had benefited financially from the runners, we determined that he was deserving of a suspension. The Court imposed a four-month suspended suspension.

The last fee-sharing case decided to date is In re Berglas, 190 N.J. 357 (2007), which was based on a motion for reciprocal discipline. There, the Court imposed a one-year suspension on a New York lawyer who had been censured in New York for sharing legal fees with a nonlawyer and improperly paying third parties for referring legal cases to him. Berglas also received a separate one-year suspension in New York for counseling clients seeking political asylum in the United States to use a false address on their applications.

Berglas shared an office with Nelson Bloom, who operated a language translation business called General Agency, Inc. For three years, Berglas paid either Bloom or General Agency a portion of his legal fee in two hundred immigration and personal injury matters that they had referred to him. Berglas also received free rent, telephone, and secretarial services.

We noted that the use of the runner would likely have resulted in a one-year suspension in New Jersey, given the number of cases (two hundred) and the extended period of time (three years). We noted further that Berglas likely would have received either a reprimand or a censure in New Jersey for the submission of false immigration applications. We, thus, determined to impose a reprimand for the filing of the false immigration applications and a one-year suspension for the use of, and fee-sharing with, a runner.

We emphasize that the cases before us must be distinguished from the "runner" line of cases. Although we cannot exclude the possibility that one or more Tomar employees may have been "runners," the record does not provide clear and convincing evidence that any were. The OAE did not charge respondents with using runners, and expressly confirmed that to us during oral argument before us.

We find, however, that all respondents, except Brassington, violated <u>RPC</u> 5.4(a). We agree with the special master's findings:

> There was a practice at the Firm of fee sharing with non-lawyer employees that had

been so imbedded in the Firm for many years as to be considered a way of doing business.

RPC 5.4(a) is straightforward: lawyers are not to share legal fees with nonlawyers. This prohibition should have been obvious to respondents long before Loughry so advised them in April 1997. Indeed, it took their counsel, Melvyn Bergstein, just "minutes," if not "seconds," to recognize that the fee-share practice was wrong, as he stated during the September 23, 2003 Jacoby and O'Brien hearing before the special master.

That fee-sharing is prohibited should have been evident to respondents at least as early as 1985, when the Weinroth Court made clear that our ethics rules "simply forbid[] the splitting or sharing of a legal fee by a lawyer 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." 100 N.J. at 349-50.

That the nonlawyer referrals in this case were made by employees of the firm does not, in our view, take the case out of the ambit of RPC 5.4(a). The major purpose behind the rule -- discouraging nonlawyers from recommending counsel for reasons of financial self-interest -- is frustrated in either case.

We also agree with the special master that substituting Brassington for her then-husband Buccilli in 1997 -- leading to some $588,000 in referral fees to her -- was a subterfuge. In this respect, we note that Buccilli elected to continue with the Tomar firm, despite his abrupt "loss" of hundreds of thousands of dollars in referral fees. The arrangement was and should have been perceived by those endorsing it as a ruse designed solely to circumvent the rule.

In assessing the discipline to be imposed for the RPC 5.4(a) violations, we consider, in mitigation, the longstanding Tomar firm's policy of paying fee shares, a practice that became ingrained in the firm's culture. In <u>In re James</u>, 112 <u>N.J.</u> 580 (1988), the Court took into account the influence of firm culture on a lawyer's misconduct. There too, as so many of respondents urge here, the lawyer followed improper business practices and accounting procedures that he had learned from his legal mentors. The lawyer "inherited" this accounting system from his former senior partners and relied on it for twenty-four years, until a random audit disclosed its improprieties. The Court found that the lawyer in good faith perpetuated a system that led to negative balances in his trust account and that he was guilty of negligent, not knowing, misappropriation.

The complaints also charged respondents with violating <u>RPC</u> 7.2(c) and <u>RPC</u> 7.3(d). <u>RPC</u> 7.3(d) prohibits a lawyer 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." Unquestionably, the Tomar shareholders violated this rule also by rewarding their employees for recommending their services to prospective clients.

RPC 7.2(c), which falls under the advertising rules, prohibits a lawyer from giving "anything of value to a person for recommending the lawyer's services." Notwithstanding prior decisions finding violations of RPC 7.2(c) in fee-share cases, RPC 7.2(c) has since been construed to apply only to attorney advertising cases. In re Gonzalez, 189 N.J. 203 (2007).

In sum, we find that all respondents, except Brassington, violated RPC 5.4(a) and RPC 7.3(d), and dismiss the RPC 7.2(c) charge as to all respondents.

Failure to Supervise Lawyers

The complaints charged Sklarsky, Capuano, Simonoff, Adourian, Vitarelli, and Winne with violating RPC 5.1(a), which provides:

> Every law firm . . . shall make reasonable efforts to ensure that member lawyers or lawyers otherwise participating in the organization's work undertake measures giving reasonable assurance that all lawyers conform to the Rules of Professional Conduct.

Unlike the New Jersey rule, the ABA Model Rule is limited to "partners in a law firm" (emphasis added). The RPC 5.1 commentary of the Debevoise Committee[9] provides as follows:

> Model Rule 5.1 ("Responsibilities of a Partner or Supervisory Lawyer") defines the responsibilities of a partner or other supervisory lawyer. . . . The Committee believes that the language of this paragraph [(a)] should be broadened so as to make it clear that that obligation is applicable as well to forms of association other than partnerships [emphasis added].

Thus, New Jersey's RPC 5.1 ensured that the rule would apply to all types of attorney organizations, not only partnerships. The commentary makes it clear, however, that RPC 5.1 applies only to supervisory lawyers, since it refers to "a partner or other supervisory lawyer."

In this respect, the New Jersey Rule has been said to "depart dramatically" from the ABA Model Rule. Kevin H. Michels, New Jersey Attorney Ethics: The Law of New Jersey Lawyering §41:2-3 at 988-89 (2007),

Thus, our case law makes clear that RPC 5.1(a) applies only to supervising lawyers. See, e.g., In re Yacavino, 110 N.J. 50, 56 (1985):

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[9] When adopting the RPCs, the Court declared that reference should be made to the official ABA Comments and the Debevoise Committee's commentary for assistance in interpreting the rules.

> Our Rules of Professional Conduct now make clear the ethical responsibility of a supervising attorney to take reasonable efforts to ensure "that all lawyers [in the organization] conform to the Rules of Professional Conduct." *RPC* 5.1(a). Under that Rule it is the supervising attorney's responsibility to assure that each lawyer in the organization diligently carries out the firm's contracts of employment with clients. *See id.* [emphasis added].

See also In re Fusco, 142 N.J. 636 (1995). There, the Court approved a stipulation of discipline by consent in which the parties agreed that the lawyer had violated RPC 5.1(a) and (b), among others, and that the lawyer had

> improperly delegated recordkeeping responsibilities for his law firm's trust account to an associate over whom respondent had direct supervisory authority and thereafter failed to make reasonable efforts to ensure that the associate maintained the trust account books and records in conformance with Rule 1:21-6 [emphasis added].
>
> [Id. at 636-37.]

Here, the record does not demonstrate that any respondent acted in a supervisory capacity over another respondent or any other lawyers who violated the RPCs. Because there is no such evidence, let alone to a clear and convincing standard, we dismiss all of the RPC 5.1(a) charges.

The OAE charged Kaplan, Graziano, Riley, Jacoby, and O'Brien with violating RPC 5.1(b). This rule applies to lawyers with "direct supervisory authority" over other lawyers. RPC 5.1(b) has been applied to a lawyer who, as the head of the firm, assigned a file to a succession of associates who, in turn, grossly neglected the matter. In re Weiner, 183 N.J. 262 (2005). Similarly, in In re Kivler, 183 N.J. 220 (2005), the Court found a violation of RPC 5.1(b) by a lawyer who, after agreeing to represent a client in three matters, failed to supervise the associates to whom he had assigned the cases.

In short, RPC 5.1(b) requires a showing that the lawyer has direct supervisory authority over another lawyer who violates the RPCs. Here, the record does not establish that respondents were the direct supervisors of any of the lawyers, respondents or not, who violated the RPCs. We, thus, dismiss the RPC 5.1(b) charges as well.

The complaints charged Graziano, Riley, Sklarsky, Capuano, Simonoff, Adourian, Vitarelli, and Winne with RPC 5.1(c)(1) violations. RPC 5.1(c)(1) holds a lawyer responsible for another lawyer's RPC violations "if the lawyer orders or ratifies the conduct involved". The OAE contended that those respondents accepted their shares of the firm's revenues, knowing that part of those monies had been generated by the improper fee-share practice; and that, by doing so and by failing to repudiate the practice, respondents ratified it. We agree. We, thus, find that

Graziano, Sklarsky, Capuano, Simonoff, Adourian, Vitarelli, and Winne violated RPC 5.1(c)(1).

For procedural reasons, we reach a different conclusion as to respondents Riley, Jacoby, and O'Brien, however. The original complaints did not charge that they violated RPC 5.1(c)(1). As to Riley, there is no indication in the record that the special master granted the OAE's motion to amend the complaint to include RPC 5.1(c)(1). With no clear statement in the record granting the motion to amend, and Riley's objection to it, we dismiss this charge as to him.

As to respondents Jacoby and O'Brien, after the close of testimony, the special master allowed the OAE to amend the complaint to include a charge that they violated RPC 5.1(c)(1) in connection with their conduct up to 1997. At that late hour, Jacoby and O'Brien did not have the opportunity to defend the charge as they might have wished. Indeed, their objection to the amendment was grounded, in part, on their claim that their proofs would have been different, had the complaint included a charge of that rule violation. We, thus, dismiss the RPC 5.1(c)(1) charge against Jacoby and O'Brien.

The complaints also charged that Kaplan, Graziano, Riley, Jacoby, and O'Brien violated RPC 5.1(c)(2), which provides:

> (c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:
>
> (2) the lawyer having direct supervisory authority over the other lawyer knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

As previously mentioned, the New Jersey rule differs substantially from the ABA Model Rule, which provides:

> (c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:
>
> (2) <u>the lawyer is a partner in the law firm in which the other lawyer practices</u>, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action [emphasis added].

The Debevoise Committee's commentary provides:

> This amendment to subparagraph (c)(2) would also remove the Kutak Commission's imputation of responsibility upon a partner for the ethical transgressions of his or her law partners.

So too, subpart (c)(2) of New Jersey's version of <u>RPC</u> 5.1 requires that a lawyer have supervisory authority, before he or she can be held responsible for another lawyer's misconduct. Here, there is no proof that these respondents supervised other lawyers who violated the <u>RPC</u>s. We, therefore, dismiss the <u>RPC</u> 5.1(c)(2) charge also.

As for the RPC 5.1(c)(1) charge as to which we did find violations through ratification, the presenter asserted that there are no New Jersey decisions, and very few nationwide, addressing that rule. We agree. In assessing the quantum of discipline, therefore, we look to cases involving violations of RPC 5.1(a) and (b). Cases involving a failure to supervise junior attorneys are often combined with other violations, such as gross neglect, lack of diligence, and failure to communicate with clients, and ordinarily result in a reprimand. See In re DeZao, 170 N.J. 199 (2001) (the lawyer's associate sent a letter to the court indicating that he would not oppose a motion to dismiss the client's complaint; the lawyer was also guilty of gross neglect, pattern of neglect, lack of diligence, failure to communicate with a client, and failure to explain a matter to the extent necessary to permit the client to make an informed decision about the representation); In re Rovner, 164 N.J. 616 (2000) and In re Rovner, Allen, Seiken & Rovner, 164 N.J. 617 (2000) (both the law firm and the partner in charge failed to supervise lawyers; in one matter, the Appellate Division characterized the neglect of a matter as "blatant and totally unprofessional;" in another matter, a client, whose complaint was dismissed, successfully sued the firm for malpractice; the Court also found gross neglect, lack of diligence, and failure to communicate with a client); In re Daniel, 146 N.J. 490 (1996) (the lawyer did not monitor an inexperienced associate's handling of a litigation matter, resulting in an order granting summary judgment against the client based on a failure to reply to discovery requests; the Court also found a lack of diligence and failure to communicate with the client); In re Fusco, supra, 142 N.J. 636 (1995) (the lawyer stipulated that he improperly delegated recordkeeping responsibilities for his firm's trust account to an associate over whom he had direct supervisory authority; the lawyer's failure to supervise the junior attorney resulted in the knowing misappropriation of client funds); and In re Libretti, 134 N.J. 123 (1993) (lawyer exhibited gross neglect, lack of diligence, failure to expedite litigation, failure to communicate with the client, failure to withdraw from the representation, and failure to exercise properly the responsibilities of a supervisory lawyer; the lawyer's associate failed to file a brief, resulting in dismissal of the client's appeal). But see, In re Macias, 159 N.J. 516 (1999) (three-month suspension imposed on lawyer who failed to supervise a junior attorney assigned to a personal injury case, who neglected the matter, resulting in the dismissal of the client's complaint for failure to serve two of the defendants and for failure to pursue a judgment against a third defendant; we found that, because the lawyer failed to take any remedial action to correct the junior attorney's mistakes, the lawyer violated RPC 5.1(c)(2); the lawyer had received two prior reprimands).

Failure to Supervise Nonlawyers

RPC 5.3 parallels RPC 5.1, except that it addresses the supervision of nonlawyer employees, rather than lawyers. All respondents, except Brassington, were charged with violating RPC 5.3(a). Simonoff, Adourian, Vitarelli, and Winne admitted that they violated this rule.

RPC 5.3(a) 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." Here, the Tomar respondents knew that their nonlawyer staff received fee shares for referring clients to the firm. Because this practice was so pervasive, and because we find that every respondent had to have known about it and yet failed to take any action to stop it, we determine that all respondents, except Brassington, violated that rule.

The following respondents were also charged with violating RPC 5.3(b): Kaplan, Graziano, Riley, Jacoby, O'Brien, Sklarsky, Capuano, and Simonoff.[10] We note that RPC 5.3(b) is violated not by the improper conduct of nonlawyer employees but by a lawyer's failure to undertake "reasonable efforts" to ensure proper conduct by nonlawyer employees. Again, this rule applies only to supervising lawyers and speaks in terms of "reasonableness".

In our view, under the circumstances of this case, if an employee's receipt of a bonus was infrequent, it would not be equitable to find a violation by a particular respondent merely because he or she happened to be that employee's supervisor. For example, a lawyer working in the labor department in Haddonfield may have instructed his staff not to participate in the bonus program, which was concentrated in the personal injury department in the Northfield office. The employee, nevertheless, may have received a bonus for referring a client, without the knowledge of the supervising lawyer. Under these circumstances, a finding that the lawyer violated RPC 5.3(b) does not appear warranted.

In contrast, the record established that certain employees, Robert Buccilli, Donna Colarulo, and William Santiago, repeatedly received referral fees. We find that Kaplan, as Buccilli's

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[10] Although the complaint charged Vitarelli with a violation of RPC 5.3(b), the record contains no mention of it. Presumably, that charge was withdrawn or abandoned.

supervisor, and Riley, as Colarulo's and Santiago's supervisor, violated RPC 5.3(b) by failing to make reasonable efforts to ensure that those employees' conduct was compatible with Kaplan's and Riley's professional obligations. We dismiss the charge that Graziano, Jacoby, O'Brien, Sklarsky, Capuano, and Simonoff violated this RPC in connection with the fee-sharing program.[11]

The complaints charged that all respondents, except Brassington, violated RPC 5.3(c), which provides:

> With respect to a nonlawyer employed or retained by or associated with a lawyer:
>
> (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
>
> (1) the lawyer orders or ratifies the conduct involved;
>
> (2) the lawyer has direct supervisory authority over the person and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action; or
>
> (3) the lawyer has failed to make reasonable investigation of circumstances that would disclose past instances of conduct by the nonlawyer incompatible with the professional obligations of a lawyer, which evidence a propensity for such conduct.

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[11] As seen below, however, we find that Graziano violated RPC 5.3(b) with respect to his supervision of Heininger.

The basis for this charge is the receipt of fee shares by nonlawyer employees. 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 a common practice for firms to reward associate lawyers by paying them a percentage of the fee generated by cases that they bring into the firm. But payments to lawyer associates 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).

Accordingly, we dismiss the RPC 5.3(c) charges.

We also consider the quantum of discipline for the RPC 5.3(a) violations discussed above. The Tomar respondents not only knew, or should have known, that their fee shares with nonlawyer staff were improper, they condoned, if not encouraged, the practice.

Because there is no precedent for this type of RPC 5.3 violation, we consider cases involving failure to supervise staff. The typical discipline in those cases is an admonition or a reprimand. We note, however, that none of these cases involved nonlawyer conduct that benefited the lawyer or law firm involved, as it did here. See, e.g., In the Matter of Lionel A. Kaplan, DRB 02-259 (November 4, 2002) (lawyer admonished for failure to supervise his bookkeeper, which resulted in recordkeeping deficiencies and the commingling of personal and trust funds; mitigating factors included the lawyer's cooperation with the OAE, including entering into a disciplinary stipulation, his unblemished thirty-year career, the lack of harm to clients, and the immediate corrective action that he took); In re Bergman, 165 N.J. 560 (2000), and In re Barrett, 165 N.J. 562 (2000) (companion cases; lawyers reprimanded for failure to supervise secretary/bookkeeper/office manager who embezzled almost $360,000 from the firm's business and trust accounts, and from a guardianship account; the lawyers cooperated with the OAE, hired a CPA to reconstruct the account, and brought their firm into full compliance with the recordkeeping rules; a bonding company reimbursed the losses caused by the embezzlement); In re Moras, 151 N.J. 500 (1997) (lawyer reprimanded for failure to adequately supervise his secretary, who stole $650 in client funds, failure to maintain required records, and failure to safeguard client funds; lawyer made restitution); and In re Hofing, 139 N.J. 444 (1995) (reprimand for failure to supervise bookkeeper, resulting in the embezzlement of almost half a million dollars in client funds).

But see In re Stransky, 130 N.J. 38 (1992) in which a lawyer was suspended for similar misconduct. Stransky completely delegated the management of his attorney accounts to his wife/secretary/bookkeeper and improperly authorized her to sign trust account checks. Over the course of one year, the lawyer's wife embezzled $32,000 in client funds. Finding that Stransky was "completely irresponsible in the management of his attorney accounts and totally abdicated his fiduciary responsibilities to his clients," the Court suspended him for one year. No mitigating factors were noted.

<u>Violating the RPCs Through the Acts of Others</u>

The complaints charge all respondents with violating <u>RPC</u> 8.4(a), which 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." Simonoff, Adourian, and Vitarelli admitted to having violated this <u>RPC</u>. Except as to Brassington, the charge relates to the firm's practice of paying fee shares to nonlawyer employees. The OAE maintained that respondents, through the firm's longstanding, institutionalized practice, paid hundreds of improper fee shares, and, thus, violated RPC 5.4(a) -- and therefore <u>RPC</u> 8.4(a) as well -- hundreds of times.

With respect to Brassington, the OAE contended that, by acting as a conduit for the payment of fee shares between the firm and her husband, she "assisted" the firm in breaching the RPCs, within the meaning of RPC 8.4(a).

The Tomar respondents knowingly permitted the fee-share practice to continue for years, resulting in hundreds, if not thousands, of prohibited fee shares. Brassington, too, violated RPC 8.4(a) by accepting referral fees that she knew were intended as improper fee-share payments to her husband.

We, thus, find that all respondents assisted others in violating the RPCs, itself a violation of RPC 8.4(a).

Failure to Report Unethical Conduct and to Cooperate

The OAE charged all respondents, except Brassington, with violating RPC 8.1(b) and RPC 8.3(a) by failing to report the firm's fee-share practice and the improper payments to Santiago. Simonoff, Adourian, Vitarelli, and Winne stipulated to a violation of this rule. We find that respondents were on notice at least by 1985 that our Supreme Court, through In re Weinroth, 100 N.J. 343 (1985), viewed the payment of improper referral fees as serious misconduct. As to the Santiago matter, the OAE contends that, because the firm required Riley to return the

$340,000 to the other law firms, respondents knew that he had obtained those funds "in some improper and dishonest fashion."

Respondents offered the following explanations for not reporting this conduct: (1) because the fee-share practice had been terminated in general in 1997 and because the firm had persuaded Riley to refund the Rent-To-Own money to the other law firms in particular; (2) because the conduct did not raise a question about the "honesty, trustworthiness or fitness of a lawyer;" (3) because they relied on the advice of their counsel, and (4) because there is no duty to self-report, there is no duty to report misconduct of one's partners when it is tantamount to self-reporting. In addition, some respondents claimed that it was not until April 1997 that they were made aware that the fee-share practice was unethical, particularly since several respected lawyers within the firm, who had served on ethics committees, knew about the practice and did not question it.

Before the 1984 adoption of the RPCs, New Jersey lawyers' conduct was governed by the Disciplinary Rules. DR 1-103, the predecessor of RPC 8.3(a), provided:

> **Disclosure of Information to Authorities.**
>
> (A) A lawyer possessing unprivileged knowledge of a violation of DR 1-102 [Misconduct] shall report such knowledge to

> a tribunal or other authority empowered to investigate or act upon such violation.

There have been only two reported New Jersey decisions involving a "failure to report", and none involving fee-sharing.

In In re Bonafield and Tedeschi, 75 N.J. 490 (1978), Bonafield, a workers' compensation judge, continued to practice law, despite the enactment of N.J.S.A. 34:15-49, prohibiting judges from practicing law. Bonafield maintained his practice in his law office by arranging with one Tedeschi to place Tedeschi's name on Bonafield's office stationery, telephone listing, and bank accounts. Bonafield agreed to pay Tedeschi a small portion of the fees generated by his law practice.

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

In In re Gold, 115 N.J. 239 (1989), the focus was on whether the lawyer was guilty of knowing misappropriation. Gold pleaded guilty to embezzlement, after taking no action to prevent his law partner, who was his brother, from misappropriating client funds. Presumably, Gold failed to report his brother's misconduct. Although the special master found that Gold violated DR 1-103(A), the Court's opinion contains no reference to the failure to report issue. The Court determined that Gold's temporary suspension of more than four years was sufficient discipline.

Likewise, in other jurisdictions, the failure to report has typically been combined with other RPC violations. See, e.g., Attorney Grievance Commission v. Brennan, 714 A.2d 157 (Md.1998) (lawyer suspended for ninety days for, among other violations, failing to report that another lawyer, James, was practicing law while suspended; the lawyer had formed an association with James, knowing that James was suspended, assisted him in the unauthorized practice of law, and shared legal fees with him while James was suspended); In re Dowd and Pennisi, 559 N.Y.S.2d 365 (App.Div.1990) (five-year suspension for two partners who paid kickbacks to public officials of the New York City Parking Violations Bureau in order to obtain a contract for a collection agency that they owned; the lawyers also failed to report the extortionate demands of the President of the Borough of Queens, who was a lawyer); In re Rivers, 331 S.E.2d 332 (S.C.1984) (lawyer reprimanded for helping his attorney-employer draft questions for use by an investigator hired by the employer to question jurors in an upcoming trial, in violation of a disciplinary rule prohibiting contact with jury members. The lawyer then failed to report the employer's violations; although the lawyer's ignorance of the anti-contact rule was not considered as a defense, his inexperience, good reputation, and limited involvement in the case were considered in mitigation).

In In re Himmel, 533 N.E.2d 790 (Ill.1988), the Supreme Court of Illinois suspended a lawyer for one year solely for failure to report misconduct. In Himmel, the client's first lawyer, Casey, had settled a personal injury action, but had converted the client's share of the settlement proceeds (about $23,000) for his own use. The client then retained Himmel to obtain her funds, and agreed to pay Himmel one-third of any recovery from Casey, in excess of $23,000. Himmel negotiated an arrangement whereby Casey agreed to pay $75,000, and the client agreed not to file a civil, criminal, or disciplinary complaint against Casey.

The Court rejected Himmel's argument that (1) he failed to report Casey's misconduct at his client's express direction and

(2) the information obtained from his client was confidential. In imposing a one-year suspension, the Court noted that Casey had converted many other clients' funds after Himmel's duty to report arose and that Himmel's failure to report Casey's conversion of funds had been motivated by his own financial gain. Himmel stood to obtain $17,000, had Casey paid the $75,000, as he had agreed.

There is one out-of-state "failure to report" case involving the use of runners. In In re Brigandi, 843 So.2d 1083 (La. 2003), an associate of a lawyer named Cuccia had been questioned by disciplinary authorities about his employer Cuccia's use of runners, and had denied any knowledge about it. Cuccia told disciplinary authorities that runners were in his office every day and that he had discussed the runner-solicitation scheme with Brigandi several times. Brigandi chose not to testify at the disciplinary hearing.

A hearing committee determined that Brigandi had known about Cuccia's use of runners. The Supreme Court of Louisiana determined that Brigandi's failure to report Cuccia's misconduct violated RPC 8.3 and RPC 8.4, and that his failure to make a full disclosure to disciplinary authorities violated RPC 8.1 and RPC 8.4. The Court suspended Brigandi for two years, deferred all but six months of the suspension, and placed him on probation for eighteen months.

The reluctance to report one's partner(s) is certainly understandable. And we recognize that it will be the unusual situation where the fact that one's partner has committed an ethics violation is so clear as to impose a duty to report. But we find that the prohibited fee-sharing practice here was so pervasive, and of such long-standing, that respondents knew or should have known that the practice was not going to be meaningfully corrected from within.

Here, we find that all Tomar respondents violated <u>RPC</u> 8.3(a). Respondents' first argument – that they believed that the fee-share practice had ended in 1997 – is not persuasive. The rule provides that "a lawyer having knowledge that another lawyer <u>has committed</u> a violation . . . " [emphasis added] must inform the appropriate authority. The rule does not require that the misconduct be of a continuing nature. Thus, even if respondents believed that the firm had successfully terminated the fee-share practice, they were still duty-bound to report the misconduct.

Moreover, we disagree with respondents' contention that the conduct did not raise a substantial question about the honesty, trustworthiness, or fitness of lawyers. Because there is no bright-line rule, whether a particular violation must be reported is determined on a case-by-case basis. District of Columbia Opinion No. 246 (Revised) (October 18, 1994). As to the fee-share practice, respondents are charged with constructive notice of the disciplinary rules, which prohibited that conduct, and of case law, such as Weinroth, applying them. Furthermore, at least by April 1997, they were on actual notice of the questionable nature of paying referral fees, based on the advice of Loughry, the firm's ethics expert.

Had the fee-share practice been limited to one or two instances, respondents might not have been required to report it. However, the conduct was sustained and it was pervasive. Hundreds, if not thousands, of fee shares totaling over one million dollars, were paid in violation of the rules. The record is replete with references to the fee share practice as having been "embedded in firm culture," "institutionalized," and "ingrained." Under these circumstances, we believe that the fee-share practice does call into question the honesty, trustworthiness, or fitness of the lawyers engaging in such practice.

Respondents also raised the defense of advice of counsel, stating that Bergstein had advised the shareholders that they need only report the trust fund improprieties.

We reject respondents' "advice-of-counsel" defense. That defense is limited to specific types of cases, all of which are distinguishable from attorney disciplinary proceedings: willful infringement in patent cases, malicious prosecution proceedings, and filing false tax returns. In those cases, the clients are generally nonlawyers, relying on their counsel's advice. Here, respondents are all lawyers, charged with the responsibility for assessing their own ethics obligations.

The advice-of-counsel defense was previously raised, and rejected, in a disciplinary proceeding. In In re Rothman, 12 N.J. 528, 545 (1953), the Court stated:

> [a] layman cannot excuse a violation of the law by saying that he acted on the advice of counsel, and there would appear to be no sound reason for extending such an immunity to an attorney charged with unethical conduct. Were the rule otherwise, a more effective means of circumventing the Canons of Professional Ethics could hardly be devised.

The advice-of-counsel defense has been rejected in other jurisdictions as well. See Matter of Hilson, 863 N.E.2d 483, 494 (Mass. 2007); Colorado v. Katz, 58 P.3d 1176 (Colo. PDJ November 13, 2002); Iowa Supreme Court Board of Professional Ethics and Conduct v. Gallner, 621 N.W.2d 183, 188 (Iowa 2001); In re Gatti, 8 P.3d 966, 972-73 (Or. 2000); Bauer v. Waste Management of Connecticut, Inc., 686 A.2d 481 (Conn. 1996); In re

Ainsworth, 614 P.2d 1127, 1133 (Or. 1980); and Office of the Attorney General of the State of California, Opinion No. CV 76-14, 60 Cal. Op. Att'y Gen. 206 (1977).

Although advice of counsel does not serve as a defense to the failure to disclose information, it may be recognized as a mitigating factor, as suggested by the special master. See Kentucky Bar Association v. Guidugli, 967 S.W.2d 587 (Ky. 1998); In re Ainsworth, supra, 614 P.2d 1127, 1133 (Or. 1980); and Sheffield v. State Bar of California, 140 P.2d 376 (Cal. 1943).

As to the duty to "self-report", New Jersey's rule is similar to the ABA Model Rule, in that it applies to lawyers who have knowledge of the misconduct of "another lawyer." As conceded by the OAE, New Jersey does not require lawyers to report their own unethical conduct. There is no intra-firm exemption, however, from the duty to report another lawyer's misconduct, even at the expense of inviting scrutiny of one's own actions. In this respect, we find the views expressed by two commentators persuasive:

> Model Rule 8.3, in contrast [to DR 1-103], only requires reporting the misconduct of "another lawyer"; self-reporting is not required. However, if a lawyer is jointly involved with another lawyer in reportable misconduct, each lawyer must report the other, which, as a practical matter, is akin to self-reporting. [footnotes omitted.]

> [Greenbaum, "The Attorney's Duty to Report Professional Misconduct: A Roadmap for Reform," 16 Geo. J. Legal Ethics 259, 294 (2003).]
>
> THE UNREALISTIC PROSPECT OF INTRA-FIRM REPORTING
>
> If Rule 8.3(a) is necessary to ensure effective self-regulation (it probably is), it is also worthless when it comes to intra-firm reports of misconduct. If an unethical lawyer and a potential reporting lawyer work in the same law firm, there is little chance that even serious misconduct will be reported to disciplinary authorities. Lawyers typically feel great loyalty to their colleagues and, because of their working relationship, they also fear retaliation.
>
> [Richmond, "The Duty to Report Professional Misconduct: A Practical Analysis of Lawyer Self-regulation," 12 Geo. J. Legal Ethics 175, 202-203 (1999).]

Several respondents have advanced as a defense their deference to others in the firm, whom they viewed as having ethics expertise. For example, Capuano asserted that three shareholders had served as the District IV Ethics Secretary, and one taught ethics courses. Capuano maintained that, if those lawyers did not believe that there was any misconduct to report, he had no basis for disagreeing with them.

Here too, we find such reliance to be a mitigating factor, but not a defense.

As to Riley's conduct in the Rent-To-Own case, the OAE contended that Riley improperly accepted $340,000 from the plaintiffs' other law firms, and that respondents should have reported this conduct. There was no evidence, however, that Riley obtained those funds improperly and, Riley was not charged with violating RPC 8.4(c). According to Riley, the plaintiffs' other counsel knew that the additional $340,000 was to be used to pay Santiago. No contrary evidence was presented. More importantly, because the firm prevailed upon Riley to return the funds and not to pay Santiago, respondents had no duty to report an act that did not take place.

However, the firm kept Santiago on its payroll for about three years, even though he was not an employee at that time. Because of a concern that Santiago would take with him the cases that he had referred to Tomar, the firm agreed to continue paying him a salary, and falsely reported to the Internal Revenue Service that Santiago still was an employee. The record contains clear and convincing evidence that Riley knew of the firm's salary payments to Santiago when he was no longer an employee. There is no clear and convincing evidence, however, that any other respondent had such knowledge. Thus, Riley violated RPC 8.3(a) by failing to report the firm's payment of salary to Santiago when he was no longer an employee.

In short, we find that all Tomar respondents violated RPC 8.3(a) by failing to report the fee-share practice, and that Riley violated RPC 8.3(a) by failing to report the deception as to Santiago.

The OAE also charged all respondents, except Brassington, with failing to cooperate with disciplinary authorities. This allegation was based on the fact that, after the firm reported the trust account improprieties, the OAE, under letters of February 29, 2000, asked each respondent whether he or she had any additional information to report, whether or not related to the trust account issue. All respondents signed and returned the letter without reporting the firm's fee-sharing practices.

All respondents cooperated with the OAE during its investigation, however. Within weeks of the OAE's letter, they gave recorded statements to the OAE, provided documents, answered questions, and several entered into stipulations.

Despite the above instances of cooperation with the OAE, we find that respondents should have been more forthcoming after receiving the OAE's February 29, 2000 letter. Although we conclude that they violated RPC 8.1(b), because their failure to reply to the OAE's inquiry is subsumed in the finding that they failed to report misconduct, contrary to RPC 8.3(a), we do not impose additional discipline for the failure to cooperate.

As previously mentioned, several respondents have claimed that they have been selectively prosecuted while similarly situated Tomar lawyers were diverted, or were not subjected to the disciplinary process at all. The fact that other lawyers, presumably similarly situated, have not been disciplined is not a recognized defense to an ethics charge. We do find that it can be considered in mitigation, however.

We now take up the appropriate level of discipline, respondent by respondent.

__Michael A. Kaplan__

Kaplan admitted that, from at least 1969 (when he was hired) through April 1997, he knew that the firm shared fees with its nonlawyer employees, although not Buccilli. Tomar firm documents also show that, between June 1991 and December 1995, Kaplan personally approved the payment of seven bonuses to five employees.

As to Buccilli, Kaplan knew that Buccilli's initial compensation package was $60,000 per year plus twenty-five percent of the firm's gross fees over $240,000. Kaplan accepted then-managing shareholder Steven Kudatzky's view that such an arrangement was consistent with ABA Informal Opinion 1440, which held that it was not "fee-splitting" for a firm to pay its office manager a fixed salary plus a percentage of its profits. By contrast, the "bonus" paid to Buccilli here was a function of firm revenues, not of profits. Further, it is beyond doubt that Buccilli's "bonus" was based, not on his administrative skills, but on his business generating abilities. Kaplan, having been made aware of Buccilli's compensation arrangement, should have been more questioning, and considered for himself its propriety, particularly as Buccilli's direct supervisor.

We are also not persuaded by Kaplan's efforts to distance himself from the later Buccilli-to-Brassington-to-firm arrangement, which Graziano orchestrated, but of which Kaplan was certainly aware. Beginning April 1997, Brassington, who had previously received, at most, a single referral fee from the firm, suddenly began receiving substantial payments, running to some $588,000. Several of the payments were for referrals to Kaplan himself. Surely he had to have known that most of the referrals were actually generated by Buccilli. Kaplan's testimony, that the firm could pay Brassington referral fees so long as it was a "legitimate arrangement," rings hollow. Kaplan, who was close to the firm's "nerve center," should at least have inquired whether the Brassington referrals were in fact "legitimate." Here again, as in the case of Kudatzky's blessing of the Buccilli arrangement in the first instance, Kaplan went along with things, with little if any inquiry of his own.

We, thus, find that Kaplan violated RPC 5.4(a) and RPC 7.3(d) as a result of his knowledge of and participation in the pre-April 1997 payment of fee shares to nonlawyer employees, including Buccilli, and in the post-April 1997 payments to Brassington. Kaplan also violated RPC 8.4(a), inasmuch as he violated RPC 5.4(a) and RPC 7.3(d), and permitted others to do the same.

We also find that Kaplan violated RPC 5.3(a) because he knew that nonlawyer employees received fee shares and because their receipt of fee shares was incompatible with Kaplan's professional obligation not to share legal fees with them.

Kaplan also violated RPC 5.3(b) because he was Buccilli's "overall supervisor". He knew that Buccilli was hired to bring in cases, and received fee shares for doing so through April 1997, and for some two years thereafter through Buccilli's surrogate, Brassington.

The complaint also charged that Kaplan assisted Buccilli in the unauthorized practice of law. We find this charge strained. "One is engaged in the practice of law whenever legal knowledge, training, skill, and ability are required." In re Jackman, 165 N.J. 580, 586 (2000) (quoting State v. Rogers, 308 N.J. Super. 59, 69-70 (App. Div.), <u>certif. denied</u>, 156 <u>N.J.</u> 385 (1998)). Without question, a paralegal's work "constitutes the practice of law." <u>In re Opinion No. 24 of the Committee on the Unauthorized Practice of Law</u>, 128 <u>N.J.</u> 114, 123 (1992)("<u>Opinion 24</u>"). However, "paralegals who are supervised by attorneys do not engage in the unauthorized practice of law." <u>Ibid.</u>

The specific acts that the OAE claims constituted the practice of law by Buccilli may be placed into the following categories: (1) the firm's receipt of several letters addressed to Buccilli as "Esq."; (2) Buccilli's co-signing (along with the responsible lawyer) settlement distribution letters to clients; (3) letters from Buccilli to opposing counsel and to clients on "non-routine substantive matters;" (4) the receipt of client referrals; and (5) internal memos from Buccilli to Tomar lawyers espousing his opinions on legal strategies and clients' medical issues, "directing" lawyers to file legal pleadings, and "directing" clients to seek specific medical treatment -- Buccilli even scheduled appointments for clients.

We find no evidence, however, that Buccilli acted either without consultation with, or supervision by, a Tomar attorney. Moreover, client interviews do not constitute the unauthorized practice of law. <u>Opinion 24</u>. Although Buccilli was a valued employee, neither the firm nor Buccilli himself held him out as a lawyer. The lawyers, not Buccilli, made the decisions on all files.

We therefore dismiss the charge that Kaplan violated RPC 5.5.

As noted above, we find that Kaplan violated RPC 8.1(b) and RPC 8.3(a) and that the discipline should be based only on a finding that he failed to report, a violation of RPC 8.3(a).

For the reasons previously mentioned, we dismiss the RPC 5.1(b), RPC 5.1(c)(2), RPC 5.3(c)(1),(2), and (3), and RPC 7.2(c) charges as inapplicable.

As to the RPC 8.4(c) charge, the complaint alleged that Kaplan was aware that the firm paid Santiago a "salary" when Santiago was no longer an employee. However, there is no clear and convincing evidence that Kaplan knew about the improper payments to Santiago. We, thus, dismiss the charge that Kaplan violated RPC 8.4(c).

Mitigating factors include: Kaplan's acknowledgment of wrongdoing; his remorse for his misconduct; his nearly forty-year unblemished disciplinary history; his dedication and service to the community through his pro bono services, including the representation of 9-11 victims; and, as in all of these cases, the substantial amount of time, some eight years now, since the violations occurred.

On balance, six members determine that Kaplan's conduct warrants a one-year suspension. Chair O'Shaughnessy, Vice-Chair Pashman, and Member Neuwirth voted to impose a six-month suspension.

Ronald A. Graziano

Graziano was the firm's managing shareholder from 1990 to 1999. He was Patrick Heininger's supervisor and worked closely with him, especially in connection with the firm's financial affairs. Graziano failed to supervise Heininger, permitting him unfettered access to the firm's bank accounts, including trust account funds. As a result, without the firm's knowledge, Heininger and other staff transferred more than twenty million dollars in and out of the firm's trust account, making it out of trust by as much as $2.6 million. Although no client funds were stolen, they were at risk.

Moreover, even after the firm's accountant cautioned Graziano that Heininger was obtaining cash advances with the firm's credit card, Graziano failed to act. Graziano should have been particularly vigilant about credit card usage because the firm's former controller had embezzled about $170,000 from the firm by improperly using the firm's credit cards for personal expenses. Yet, Graziano ignored these warnings and, as a result, Heininger made unauthorized cash advances to himself.

Heininger also apparently forged shareholders' names on computer leases, and committed fraud on lenders, through his corporation, PatMarc, Inc., by accepting equipment financing from banks without providing the promised computer equipment that was to serve as collateral for those loans. Graziano admitted, at a shareholder meeting, that he chose not to inform the shareholders about the lease issue because he felt sorry for Heininger.

Graziano's shortcomings as financial manager of the firm were vividly revealed when Winne discovered the trust account defalcations only one week after assuming management responsibility for the firm's finances.

Graziano argued that, despite the procedures that he instituted to supervise the firm's employees, those measures were circumvented by employee fraud. Yet, Graziano characterized Heininger's conduct as "so egregious that he was indicted for various criminal offenses." If Heininger's conduct was so egregious (and it was), Graziano should have detected it much sooner, as Winne did.

The complaint charged Graziano with gross neglect, failure to safeguard funds, and failure to supervise Heininger. <u>RPC</u>

1.1(a) provides that a "lawyer shall not: (a) Handle or neglect a matter entrusted to the lawyer in such manner that the lawyer's conduct constitutes gross negligence." That rule address a lawyer's duty toward clients, not toward law partners. Although, as indicated, Heininger placed client funds at risk, the record shows that he misused only firm funds.

The Court has found, in cases of employee embezzlement or theft, that lawyers violated RPC 1.15(a) and RPC 5.3(b). See, e.g., In re Bergman, supra, 165 N.J. 560 (2000) and In re Barrett, supra, 165 N.J. 562 (2000) (companion cases); In re Shapiro, 149 N.J. 392 (1997); and In re Hofing, supra, 139 N.J. 444 (1995). We, thus, find that Graziano's failure to supervise Heininger violated RPC 1.15(a) and RPC 5.3(b), and dismiss the charge that he violated RPC 1.1(a).

At oral argument before us, Graziano conceded that the fee-share practice was wrong and that he should have taken steps to discontinue it.

Graziano had a major, protracted role in the firm's fee-sharing program. In 1991, as managing shareholder, he issued a memo "imploring" all partners to refer to fee-share payments to staff as "bonuses"; he stressed that "under no circumstances are you to refer to that transfer of funds as a referral fee." Clearly, this change in terminology was an admission, we believe, that Graziano knew at the time that the firm was doing something improper.[12] His explanation --that he intended to emphasize that the bonuses were payable only to current, not former, employees -- is specious.

Moreover, Graziano had authority over the amount of bonuses given to employees. At one point, Riley asked Graziano to increase a bonus for Colarulo from twenty to thirty-three percent. Obviously, Riley believed that he needed Graziano's approval for this increase.

From 1994 through 1999, the firm paid almost $280,000 in bonuses, not including the Buccilli payments. In addition, between July 1992 and January 1997, the firm paid Buccilli almost $812,000, exclusive of compensation to Brassington, over and above his $460,000 in salary. Graziano, as managing shareholder, was in the best position to appreciate the extent of the fee-share practice. In 1995, the firm paid Buccilli $355,445 while Graziano received $168,545. As a "hands-on" manager, Graziano knew that Buccilli received more than twice his own income. Instead of questioning this practice, Graziano helped perpetuate it, issuing six checks totaling more than $300,000 to Buccilli.

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[12] In another apparent attempt to conceal the bonus program, the firm began to pay fee shares quarterly, rather than contemporaneously as each case was settled.

In April 1997, when the firm determined to end the bonus practice, Graziano should have personally instructed Heininger to discontinue the practice, and taken formal steps to notify staff of the firm's decision. As managing shareholder, it was his responsibility to communicate this important policy change in writing. His failure to take either step suggests that his joinder in this decision was less than wholehearted.

And it was Graziano who, at the May 1, 1997 "Midway Diner" meeting, told Buccilli that the firm would no longer be paying referral fees to him, but would pay them to his wife, Cynthia Brassington, Esq., instead. Although Graziano asserted a belief that the fees paid to Brassington were based on genuine referrals, their scope, both in terms of raw numbers and total dollar amount, suggests otherwise. Graziano had to have known that Brassington was simply a conduit. Before 1997, the firm paid no referral fees to Brassington. However, between 1997 and 1999, coinciding with the termination of bonuses to Buccilli, the firm paid Brassington, a relatively new lawyer, about 200 referral fees, totaling $588,067.63. Graziano signed twenty-one of those checks to Brassington, for a total of more than $64,000, and must have realized that other lawyers in the firm were also signing referral fee checks to her.

Graziano also issued a May 1, 1997 check for $120,000 to Buccilli, as compensation for cases settled in 1996. These were not "pipeline" cases, because they had been settled before the firm determined to end the fee-share practice. Graziano did not inform the other shareholders of this payment.

We, thus, conclude that Graziano had a significantly more active role in the fee-share program than other respondents.

The OAE alleged that Graziano approved, or was aware of, the payment of three bonuses after 1997, apart from the $120,000 check to Buccilli. The bonus book contains a notation, in Linda Famille's handwriting, that Graziano approved a $26,000 bonus to Donna Colarulo on December 24, 1998. Without more, we cannot find by clear and convincing evidence that Graziano actually approved the payment. Similarly, we are unable to find clear and convincing evidence that Graziano knew of or approved a March 1998 bonus to his secretary, Nancy Giordano.

We view the Nidal Wakim bonus differently, however. Wakim sent to Graziano two e-mails, dated May 28, 1999, and June 30, 1999, asking for a bonus for a personal injury case that was settled in November 1998. Graziano admitted that he did not reply to either e-mail. Heininger ultimately paid the bonus to Wakim. If Graziano truly believed that the bonus program had ended, he would have, and should have, so indicated in a reply e-mail to Wakim; he would have, and should have, questioned why an employee was seeking a bonus two years after the program had been terminated. His explanation, that he hoped that if he ignored Wakim, she would not pursue the payment, is not credible. We conclude that Graziano was aware that the bonus program had not ended in 1997.

We, thus, find that Graziano violated RPC 5.1(c)(1), RPC 5.3(a), RPC 5.4(a), RPC 7.3(d), and RPC 8.4(a), with respect to the fee-share practice.

We also find unethical Graziano's conduct in connection with Colarulo's claim to the Department of Labor, Division of Wage and Hour. Colarulo sought almost $5,000 in bonuses. She testified, at the July 13, 2000 administrative hearing, that Graziano had promised to pay her a twenty percent bonus of the fees received in cases that she had referred to the firm. Upon Colarulo's cross-examination, Graziano denied that the firm had a policy of paying secretaries a ten percent fee share, or of paying paralegals a fifteen to twenty percent fee share. His explanation, that his answer was truthful because the actual fee share was a range, not a fixed percentage, is beyond disingenuous. As he acknowledged in the affidavit he submitted to the appellate tribunal, he should have explained at Colarulo's hearing that, until 1997, the firm had a policy of paying fee shares of varying amounts to its employees.

Instead, Graziano's testimony at that hearing was designed to mislead the referee into believing that the firm did not pay fee shares at all. He succeeded. At the hearing, the referee summarized Graziano's testimony, including Graziano's statement that it was not "the company's policy" to pay a fee. Graziano's claim, that although he tried to correct the referee's misunderstanding, the referee interrupted him, is belied by the transcript, which shows that Graziano made a half-hearted attempt to interject and that, after he was interrupted, he made no effort to continue. It was not until nine months after the administrative hearing, and after the OAE had begun its investigation, that Graziano submitted an affidavit asserting that his testimony, although accurate, required an explanation.

In In re Seelig, 180 N.J. 234 (2004), a lawyer failed to disclose to a municipal court judge that the person involved in his client's automobile accident had died. Had the lawyer revealed that information, the client would have been charged with indictable offenses, which are heard in Superior Court. The lawyer failed to disclose the death of the individual, hoping that the municipal court would accept his client's plea to motor vehicle offenses and, thus, preclude, on double jeopardy grounds, the more serious indictable charges. In Seelig, the Court discussed a lawyer's duty to be candid to a tribunal:

> Both rules [RPC 3.3(a)(3) and RPC 3.3(a)(5)] compel a lawyer to act affirmatively against his or her client's interests even when the primary responsibility for informing the court does not (or may not) lie with the lawyer. At their core, the rules impose a duty to disclose in order to prevent errors in decision making by a tribunal that is unaware of adverse legal authority or that has been misled because it lacks information about material facts.
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> [Id. at 253.]

Similarly, here, Graziano was less than candid: he knew that the referee had been misled and, instead of correcting the misunderstanding, took advantage of it. We, therefore, find that Graziano violated RPC 3.3(a)(5), RPC 8.4(c), and RPC 8.4(d). In addition, as previously mentioned, we find that Graziano failed to report his firm's misconduct.

In sum, Graziano violated RPC 1.15(a), RPC 3.3(a)(5), RPC 5.1(c)(1), RPC 5.3(a), RPC 5.3(b), RPC 5.4(a), RPC 7.3(d), RPC 8.1(b), RPC 8.3(a), RPC 8.4(a), RPC 8.4(c), and RPC 8.4(d). We dismiss the charged violations of RPC 1.1(a), RPC 5.1(b), RPC 5.1(c)(2), RPC 5.3(c), and RPC 7.2(c).

The record also reflects a disturbing lack of candor on Graziano's part. His April 1991 memo instructing the other shareholders not to refer to bonuses as "fee shares" was a clear effort to disguise the firm's conduct; he was instrumental in having the Buccilli payments redirected to lawyer Brassington because he knew that the firm could no longer pay referral fees to employees; he approved a check for $120,000 to Buccilli without the knowledge or consent of the other shareholders; and he was not candid with the tribunal at the Colarulo hearing.

As to the failure to supervise charge, because, as previously mentioned, there are no reported decisions involving the type of misconduct seen here, we consider cases in which lawyers failed to supervise other lawyers and nonlawyer staff. The discipline imposed for failure to supervise lawyers, often combined with other violations, is ordinarily a reprimand. See In re DeZao, supra, 170 N.J. 199 (2001); In re Rovner, supra, 164 N.J. 616 (2000), and In re Rovner, Allen, Seiken & Rovner, supra, 164 N.J. 617 (2000); In re Daniel, supra, 146 N.J. 490 (1996); In re Fusco, supra, 142 N.J. 636 (1995); and In re Libretti, supra, 134 N.J. 123 (1993).

In addition, lawyers who fail to supervise nonlawyer staff are typically admonished or reprimanded. See, e.g., In the Matter of Brian C. Freeman, supra, DRB 04-257 (September 24, 2004) (admonition); In the Matter of Lionel A. Kaplan, supra, DRB 02-259 (November 4, 2002) (admonition); In re Bergman, supra, 165 N.J. 560 (2000), and In re Barrett, supra, 165 N.J.

562 (2000) (companion cases) (reprimands); In re Moras, supra, 151 N.J. 500 (1997) (reprimand); In re Hofing, supra, 139 N.J. 444 (1995); In re Klamo, 143 N.J. 386 (1994) (reprimand); and In re Pressler, 132 N.J. 155 (1993) (reprimand).

For misrepresentations to a tribunal, the discipline has ranged from an admonition to a suspension. See, e.g., In the Matter of Robin Kay Lord, DRB 01-250 (September 24, 2001) (admonition for lawyer who failed to reveal her client's real name to a municipal court judge when her client appeared in court using an alias, thus resulting in a lower sentence because the court was not aware of the client's significant history of motor vehicle infractions; in mitigation, the lawyer disclosed her client's real name to the municipal court the day after the court appearance, whereupon the sentence was vacated); In re Mazeau, 122 N.J. 244 (1991) (lawyer reprimanded for failing to disclose to a court his representation of a client in a prior lawsuit, where that representation would have been a factor in the court's ruling on the lawyer's motion to file a late notice of tort claim); In re D'Arienzo, 157 N.J. 32 (1999) (three-month suspension for lawyer who made a series of misrepresentations to a municipal court judge to explain his repeated tardiness and failure to appear at hearings; we noted that, if not for mitigating factors, the discipline would have been much harsher);

In re Forrest, 158 N.J. 429 (1999) (six-month suspension for lawyer who, in order to obtain a personal injury settlement, did not disclose to his adversary, an arbitrator, and the court that his client had died); In re Cillo, 155 N.J. 599 (1998) (one-year suspension for lawyer who, after misrepresenting to a judge that a case had been settled and that no other lawyer would be appearing for a conference, obtained a judge's signature on an order dismissing the action and disbursing all escrow funds to his client; the lawyer knew that at least one other lawyer would be appearing at the conference and that a trust agreement required that at least $500,000 of the escrow funds remain in reserve); In re Kornreich, 149 N.J. 346 (1997) (three-year suspension for lawyer who was involved in an automobile accident and then misrepresented to the police, her lawyer, and a municipal court judge that her babysitter had been operating her vehicle; the lawyer also presented false evidence in an attempt to falsely accuse the babysitter of her own wrongdoing; two members of the Court voted for disbarment).

As previously noted, the discipline imposed for paying improper fee shares ranges from a reprimand to a suspension.[13] These cases are particularly fact-sensitive. For example, in Agrapidis, supra, the lawyer paid twelve referral fees to nonlawyer employees and received a reprimand. But the number and dollar value of fee shares paid here was exponentially greater.

There are, however, mitigating factors present here. Graziano's misconduct occurred eight years ago; he enjoyed an unblemished record of thirty-four years; and he paid a substantial financial price after he, along with other Tomar shareholders, replenished the missing trust account funds and interest, and compensated the departing shareholders when the firm separated. We also considered aggravating factors: Graziano's frequent dissembling; the breadth and scope of the fee-share practice; Graziano's central role in that practice; his awareness that the fee-share practice continued after 1997; and his frequent dissembling.

On balance, we unanimously determine that a one-year suspension is warranted for Graziano.

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[13] Although Pajerowski was disbarred, he paid a "runner" who used predatory tactics to solicit personal injury clients and who fabricated medical claims. Pajerowski was guilty of numerous other ethics violations not present here.

Charles N. Riley

Riley approved more referral fee payments than any other shareholder.

One charge unique to Riley was his implementation of salary payments to Santiago when Santiago was not employed by the firm. Although Santiago may have been performing some small amount of work for the firm, there is no dispute that it did not justify the salary he received. Unquestionably, the payments were referral fees portrayed as salary.

Despite Riley's opposition to the payments to Buccilli, he engaged in the fee-share practice in connection with other employees. His contention that the topic of the 1997 meeting was only Buccilli is logically inconsistent. It defies reason to conclude that, in discussing the propriety of paying Buccilli, the general topic of fee shares would not have arisen. Indeed, Loughry testified that the meeting began with a general discussion of fee shares, and then focused on Buccilli. We find not credible Riley's assertion that the shareholders decided to terminate the fee shares only to Buccilli, and not to other nonlawyer staff.

We, thus, find that Riley violated <u>RPC</u> 5.3(a), <u>RPC</u> 5.4(a), <u>RPC</u> 7.3(d), and <u>RPC</u> 8.4(a).

RPC 5.3(b) applies to lawyers having direct supervisory authority over nonlawyers. Riley can be directly linked to his paralegal, Donna Colarulo. Rather than preventing her from referring clients to the firm, he encouraged this conduct through the bonus payments, a violation of _RPC_ 5.3(b).

We conclude that Riley's failure to report misconduct to the OAE violated _RPC_ 8.3(a) and that, although he failed to cooperate with the OAE, his _RPC_ 8.1(b) violation is subsumed in the _RPC_ 8.3(a) violation.

Although the OAE moved to amend the complaint to charge Riley with having violated _RPC_ 5.1(c)(1), there is no indication in the record that the special master granted the OAE's motion, except for the fact that he found that Riley violated that rule. With no clear statement in the record granting the motion to amend, and with Riley's objection to the amendment, principles of procedural due process preclude any inference that the amendment was allowed. We, therefore, conclude that the special master denied the OAE's motion, and properly so.

We consider as mitigating factors the significant passage of time; Riley's candor about the fee-sharing system; his opposition to Buccilli's continued employment with the firm; his reliance on the advice of counsel (as we do with all respondents on the failure to report issue); his prior unblemished record;

his activism and respect in the community; and his distinguished military service.[14]

We consider as aggravating factors Riley's role as a key player in the fee-sharing scheme; his continued approvals of referral fees after the firm had determined to discontinue the practice; his payment of wages to Santiago when the latter was no longer an employee; and his intent to pay Santiago a referral fee for the Rent-To-Own case, as well as his efforts, such as obtaining $340,000 from co-counsel, to carry out that intent. We do not consider the size of the promised fee share to be aggravating. At the time, Riley had no way of knowing how large the fee would be. According to Riley, the firm's previous largest fee share in a class action case had been $40,000 to $50,000. He had no expectation that the settlement would generate a referral fee exceeding $500,000.

Based on the foregoing, seven members determine that Riley should be suspended for six months. Members Stanton and Wissinger voted for a one-year suspension, noting that, although Riley is in many respects a capable and decent lawyer, for many years he was an active, central player in a course of serious

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[14] The Court considered military service as a mitigating factor in In re Shafir, 92 N.J. 138 (1983), and In re Ritger, 80 N.J. 1 (1979).

misconduct that involved hundreds of ethics violations, and that the imposition of a suspension of less than one year would treat his professional conduct much too lightly.

Cynthia Ann Brassington

Brassington was charged with having violated RPC 1.15, R. 1:21-6, RPC 5.5(b), RPC 8.4(a), and RPC 8.4(c). She admitted the RPC 1.15 and R. 1:21-6 recordkeeping violation – she failed to deposit referral fees from the Tomar firm in her attorney business account – and the RPC 8.4(c) violation, although she denied that her conduct was dishonest. She denied violating RPC 5.5(b) and RPC 8.4(a).

The RPC 8.4(c) violation was based on Brassington's backdating the referral letters that she submitted to the Tomar firm. According to Brassington, several Tomar shareholders and her husband, Buccilli, assured her that it was proper for her to submit backdated referral letters to the firm. Brassington complied with their requests.

Even if Brassington's version of events is accepted, she should have known that one simply does not backdate letters, particularly when one considers that two of the letters predated her admission to the bar. Indeed, in her brief, Brassington acknowledged that she should have known that the payments to her were "de facto compensation for Robert Buccilli." We, thus, find that Brassington's complicity in this arrangement was dishonest.

As previously mentioned, there is no doubt that Brassington violated RPC 8.4(a) by acting as a conduit for the Tomar firm to pay improper fee shares to Buccilli.

We next must determine whether Brassington assisted Buccilli in the unauthorized practice of law. The OAE contended that sharing fees with a nonlawyer constitutes a violation of RPC 5.5(b). According to the OAE, because only lawyers are entitled to receive and share legal fees, paying a nonlawyer legal fees amounts to assisting in the unauthorized practice of law. The OAE argued that, although Brassington did not directly share legal fees with Buccilli, she enabled the Tomar firm to do so by funneling the payments through her.

As the OAE acknowledged, Brassington did not share legal fees with a nonlawyer. She helped the Tomar firm continue the improper payment of fee shares to her husband, through her. We are mindful that, although the Tomar firm paid hundreds of thousands of dollars directly to their nonlawyer employees over many years, the shareholders were not charged with violations of RPC 5.5, based on paying fee shares (the basis for Kaplan's RPC 5.5 charge was his alleged knowledge that Buccilli had engaged in activities amounting to the unauthorized practice of law, a charge that we dismiss). In our view, it would be inequitable to find that Brassington assisted in the unauthorized practice of law by acting as a conduit for fee payments to her husband for two years, while the Tomar shareholders, who directly paid fee shares to many employees for decades, are not found guilty of this violation. We, thus, dismiss the RPC 5.5(b) charge against Brassington.

In summary, Brassington failed to deposit fees in her attorney business account, backdated referral letters, and assisted the Tomar firm in paying improper fee shares to her husband. We have previously discussed cases in which lawyers improperly divided fees with nonlawyers. We will now address Brassington's alteration of the referral letters.

Cases in which lawyers have altered or falsified documents are particularly fact-sensitive. See, e.g., In re Ginsberg, 174 N.J. 349 (2002) (reprimand for assisting a client in backdating estate-planning documents to permit the client to take advantage of tax provisions that might not otherwise have been available); In re Sunberg, 156 N.J. 396 (1998) (reprimand for lawyer who created a phony arbitration award to mislead his partner, and then lied to the OAE about the arbitration award; mitigating factors included the passage of ten years since the occurrence, the lawyer's unblemished disciplinary record, his numerous professional achievements, and his pro bono contributions); In re Buckner, 140 N.J. 613 (1995) (reprimand for lawyer who signed his client's name to a deed, which was then recorded; although we found that the lawyer had misrepresented "to the world" that his client had signed the deed, we took into account the fact that he had his client's oral authorization to do so).

Here, there are substantial mitigating factors. Brassington has no disciplinary history. Her misconduct took place between 1997 and 1999, eight to ten years ago, when she was an inexperienced lawyer and was influenced by her respect for the Tomar firm and the lawyers in it. No doubt Buccilli, too, exercised substantial influence over her decision.

Because of the mitigating factors, we determine that a reprimand is sufficient discipline for Brassington.

David T. Jacoby, Robert F. O'Brien, Alan H. Sklarsky, Robert M. Capuano, Howard S. Simonoff, Edward N. Adourian, Jr., Alfred P. Vitarelli, and Charles L. Winne

In essence, these respondents joined a law firm that, for a long time, shared legal fees with its nonlawyer employees; failed to take any action to terminate the fee-share program; and failed to report their colleagues to the OAE. We agree with the special master's assessment of respondents' roles in the within events as passive. They are, thus, less culpable than the lawyers who actually participated in the fee-share practice.

As to the fee shares post-1997, we find it unreasonable to impose a duty on these respondents to ensure that the firm's decision to stop the payment of referral fees had been implemented. That burden rested with the managing shareholder. Respondents could not be expected to micromanage their law firm and know the dealings of every employee.

We find that Jacoby and O'Brien violated RPC 5.3(a), RPC 5.4(a), RPC 7.3(d), RPC 8.1(b), RPC 8.3(a), and RPC 8.4(a). We also consider that they had little or no active involvement in approving fee shares, or signing fee-share checks.

Sklarsky approved only one bonus, which was paid in 1995, to a maintenance employee. He did not sign any bonus checks payable to Buccilli. He was not involved with any cases in which Brassington received a referral fee. We find that Sklarsky violated RPC 5.1(c)(1), RPC 5.3(a), RPC 5.4(a), RPC 7.3(d), RPC 8.1(b), RPC 8.3(a), and RPC 8.4(a).

As to Capuano, although he claimed that he did not know about the fee-share practice, we find by clear and convincing evidence that he did. The bonus book contains references to two instances in which he gave information to Riley about the amount of fees the firm had received. Capuano admitted that he knew that Riley would use the requested information to calculate the amount of the bonus. He also admitted that he knew that Buccilli received substantial fees for referring cases to the firm. Finally, Capuano indicated that, on one or two occasions, he questioned the propriety of the fee-share practice; he convinced himself, however, that, because others in the firm who were well-versed in the ethics arena did not object, the fee-share practice could not have been improper. By questioning the propriety of the fee-share payments, Capuano, thus, admitted that he was aware of it. We find that Capuano violated RPC 5.1(c)(1), RPC 5.3(a), RPC 5.4(a), RPC 7.3(d), RPC 8.1(b), RPC 8.3(a), and RPC 8.4(a).

Similarly, Simonoff alleged that he was not aware of the bonus program, although he conceded that he should have been. We find it inconceivable that he did not know about it. The practice was open, widespread, and so engrained in the firm's culture that prospective employees were informed about it during job interviews. Almost every Tomar lawyer admitted that, upon joining the firm, he or she learned that nonlawyer employees received bonuses. We find that Simonoff violated RPC 5.1(c)(1), RPC 5.3(a), RPC 5.4(a), RPC 7.3(d), RPC 8.1(b), RPC 8.3(a), and RPC 8.4(a).

Although Adourian also claimed that he was not aware of the fee-share practice, he admitted in the stipulation that he learned about it while a shareholder in the firm. As expressed above, we reject the notion that a lawyer associated with the Tomar firm for even a short period, let alone for almost forty years, could not have known about the fee share program. We, therefore, find that Adourian violated RPC 5.1(c)(1), RPC 5.3(a), RPC 5.4(a), RPC 7.3(d), RPC 8.1(b), RPC 8.3(a), and RPC 8.4(a).

Vitarelli contends that, during the late 1990s, he was preoccupied with his son's health. In addition, as a member of the workers' compensation department, which produced much less revenue than the personal injury department, he had little or no bargaining power to stop the fee-share practice. According to Vitarelli, although he knew that bonuses were paid, he was not aware that they were based on a percentage of the firm's fees and he believed that the firm paid fee shares to associates and bonuses to nonlawyer employees. Despite this claim, the bonus book reveals that, between 1993 and 1996, Vitarelli approved five bonuses to nonlawyer employees, for a total of about $1000. Although Vitarelli admitted that he violated almost all of the RPCs with which he was charged, we find that he violated only

RPC 5.1(c)(1), RPC 5.3(a), RPC 5.4(a), RPC 7.3(d), RPC 8.1(b), RPC 8.3(a), and RPC 8.4(a).

Winne, too, claimed that he was not aware of the fee-share practice. For the reasons expressed in connection with similar claims by other respondents, we reject Winne's assertions and find that he violated RPC 5.1(c)(1), RPC 5.3(a), RPC 5.4(a), RPC 7.3(d), RPC 8.1(b), RPC 8.3(a), and RPC 8.4(a).

We consider as mitigating factors the passage of time since the misconduct occurred, respondents' prior unblemished disciplinary records, their contrition and remorse, their cooperation with the OAE, the lack of injury to any client, the remedial steps taken, the severe financial penalty that respondents have suffered, the advice of counsel, and the selective prosecution of the Tomar lawyers. We further consider the fact that respondents relied on their colleagues, including several who served as ethics committee secretary and one who taught ethics in law school, and that they believed, albeit erroneously, that the fee-share program was ethical because, otherwise, the firm would not have engaged in the practice in an open fashion.

For the foregoing reasons, although we find that these respondents violated the RPCs, as detailed above, we determine that they should receive no discipline.

DISCIPLINE ON THE TOMAR FIRM

While the Tomar firm is now essentially defunct, we believe it appropriate and necessary, for the guidance of other firms, to consider the responsibility of the firm qua firm for the ethics violations found here.

In 1998, R. 1:20-1 was amended to allow discipline to be imposed on law firms, in addition to individual lawyers. Since that date, the Court has imposed discipline on law firms in four cases and as recently as July 2007. See, e.g., In re Sills Cummis Zuckerman Radin Tischman Epstein & Gross, 192 N.J. 222 (2007) (reprimand imposed on firm that employed for seven years a lawyer who was admitted in Massachusetts but not in New Jersey); In re Rovner, Allen, Seiken and Rovner, 164 N.J. 617 (2000) (reprimand imposed on firm for gross neglect, lack of diligence, failure to communicate with clients, and failure to supervise junior attorneys); In re Ravich, Koster, Tobin, Oleckna, Reitman and Greenstein, 155 N.J. 357 (1998) (firm reprimanded for placing a recreational vehicle within 100 feet of the entrance to an emergency shelter established for the victims of a mass disaster and posting advertisements on that vehicle); and In re Jacoby and Meyers, 147 N.J. 374 (1997) (firm reprimanded for failure to process funds received in connection with New Jersey legal matters through an attorney trust account maintained in an approved New Jersey financial institution).

In the above cases, the misconduct was firm-wide. The same circumstances are present here. With several exceptions, respondents admitted that the practice of paying fee shares to nonlawyer employees was engrained in the firm's culture. The practice existed before any of these respondents became associated with the Tomar firm, as far back as 1969. The firm was systematically guilty of violating the fee-sharing rule. All of the shareholders permitted the fee-share program to continue. The record is devoid of evidence that the firm took any action to train its nonlawyer employees about the limits on client solicitation. Thus, the employees were given financial incentives, by way of bonuses, to obtain clients for the firm, without any instruction about the proper way of doing so. Even in 1997, when the shareholders determined to discontinue the policy, they (as a group) failed to so inform their staff, and failed to take any formal steps to ensure that the practice had indeed ended.

In our view, the R. 1:20-1 amendment permitting law firms to be disciplined was intended for precisely this type of case. Indeed, in several of the briefs submitted to the special master, the OAE stated:

> During the time when respondent was a partner, the firm engaged in an institutionalized, structured, longstanding system of violating the Rules of Professional Conduct by the payment of improper fee shares. During this time, there were hundreds of improper payments to non-lawyers and therefore hundreds of violations of the Rules of Professional Conduct known to respondent and accomplished through the acts of others contrary to RPC 8.4(a). The law firm actually budgeted for these fee shares. Such brazen intentional violations, especially when engaged in by a large respected law firm, cause substantial harm to the public perception of the profession.
>
> What makes this case unusual is that these [fee share] approvals were not unauthorized, ultra vires, unanticipated actions undertaken by individual partners. Instead these payments were made in the normal course of law firm business pursuant to a longstanding law firm policy known to this respondent who knew and expected that his partners would continue to approve these fee share payments. They were no different from any other authorized actions exercised by partners within the law firm. Once approved, these fee shares were paid from law firm accounts through procedures followed by law firm employees in the ordinary course of their employment under the supervision of and with the approval of management.

While we have determined that several of the respondents should be held individually responsible, we also find that the Tomar firm, as an entity, should be disciplined. In our view, a reprimand, the discipline imposed in each of the above-cited cases, does not sufficiently address the scope of the misconduct involved here. The fee shares program was a way of life in the Tomar firm. The firm paid hundreds, if not thousands, of improper fee shares to its nonlawyer employees. Although the firm encouraged its employees to generate business, it gave them no guidance as to how to avoid overly aggressive solicitation. We, thus, voted that the Tomar firm should be censured for violations of RPC 5.1(a), RPC 5.3(a), RPC 5.4(a), RPC 7.3(d), RPC 8.3(a), and RPC 8.4(a). Member Wissinger voted for a three-month suspended suspension, noting that the misconduct in this case was much more serious than that of the reprimanded firms in the cases discussed above.

CONCLUSION

The unfortunate picture that emerges from this massive record is one of a successful, mid-sized law firm that operated without leadership sensitive to the appropriate limits on business development. When Kaplan joined the firm in 1969, its fee-share practice was in place. It continued for at least another twenty-eight years (from 1969 to 1997), and through the Buccilli-to-Brassington subterfuge, for two years after that.

We reject respondents' claim that, until April 1997, they believed that the fee-share practice was proper, as they are charged with knowledge of the disciplinary rules and the case law applying them. Graziano's April 1991 memorandum, exhorting all partners to refer to fee shares as "bonuses," reflects both an awareness of the proscription and an effort to cover the firm's tracks. Prohibitions said to have been unclear to respondents were clear in "seconds" to the firm's counsel, Bergstein.

The firm was also casual in the extreme in approving these payments. The fee-share practice required a shareholder's authority before payment could be made. At some point, however, nonlawyer Heininger began to approve fee shares without any shareholder's input. The lack of a shareholder's control over the fee-share program is best illustrated by the following September 1998 e-mail exchange between employees:

> Since I was out Monday & Tuesday I received her [Colarulo's] quarterly bonus on Wednesday and missed the "end of quarter" bonuses. Were there any others this quarter? Can we process her's [sic] with the next pay? Please discuss with me on Friday. Thanks.
>
> ---
>
> Yes, we had several bonus checks cut. I don't have a problem with giving it to her next pay – **what the hell – we don't have any set rules here do we?** [emphasis added].

The bonus book also reveals that, as a group, most shareholders abided by their April 1997 decision to end the fee-share practice. Only Riley (who claims that the decision to end the practice applied only to Buccilli) and a shareholder who is not facing disciplinary action continued to approve employee bonuses after April 1997. There is no evidence that any other shareholder approved an employee fee share after April 1997.[15] But payments clearly earmarked for Buccilli continued for another two years through his wife, Brassington.

We emphasize that the discipline in this case would have been more severe were it not for the passage of so much time since the misconduct took place and respondents' otherwise violation-free disciplinary records.

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
William J. O'Shaughnessy, Chair

By: Julianne K. DeCore
Julianne K. DeCore
Chief Counsel

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[15] Graziano's failure to investigate Wakim's 1999 bonus request, however, supports the conclusion that he was at least aware that the practice continued, even if he did not directly approve any bonuses.