

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

**IN THE MATTER OF
ERNEST PAUL FRANCIS**

VSB DOCKET NO. 17-42-107034

**AGREED DISPOSITION MEMORANDUM ORDER
REVOCATION**

On Tuesday, January 12, 2021 this matter was heard by the Virginia State Bar Disciplinary Board upon the joint request of the parties for the Board to accept the Agreed Disposition signed by the parties and offered to the Board as provided by Part 6, Section IV, Paragraph 13-6.H of the Rules of the Supreme Court of Virginia. The panel consisted of Carolyn V. Grady, First Vice Chair, Kamala H. Lannetti, Alexander N. Simon, Michael J. Sobey and Martha J. Goodman, Lay Member. The Virginia State Bar was represented by M. Brent Saunders, Senior Assistant Bar Counsel. Ernest Paul Francis was present and was represented by counsel Mary T. Morgan. The Chair polled the members of the Board as to whether any of them were aware of any personal or financial interest or bias which would preclude any of them from fairly hearing the matter to which each member responded in the negative. Court Reporter Jennifer Hairfield, Chandler and Halasz, P.O. Box 9349, Richmond, Virginia 23227, telephone (804) 730-1222, after being duly sworn, reported the hearing and transcribed the proceedings.

WHEREFORE, upon consideration of the Agreed Disposition, the Certification, Respondent's Answer, Respondent's Disciplinary Record and Remittal of Disqualification and Waiver, the arguments of the parties, and after due deliberation,

It is **ORDERED** that the Disciplinary Board accepts the Agreed Disposition and the Respondent shall receive a Revocation, as set forth in the Agreed Disposition, which is attached and incorporated in this Memorandum Order.

It is further **ORDERED** that the sanction is effective March 23, 2021.

On Motion of the Respondent, and it appearing proper to the Board so to do, it is Ordered that the Declaration and Exhibit A attached thereto, filed by the Respondent, be and the same is hereby placed under seal.

It is further **ORDERED** that:

The Respondent must comply with the requirements of Part 6, Section IV, Paragraph 13-29 of the Rules of the Supreme Court of Virginia. The Respondent shall forthwith give notice by certified mail of the Revocation of his license to practice law in the Commonwealth of Virginia, to all clients for whom he is currently handling matters and to all opposing attorneys and presiding Judges in pending litigation. The Respondent shall also make appropriate arrangements for the disposition of matters then in his care in conformity with the wishes of his clients. The Respondent shall give such notice within 14 days of the effective date of the Revocation, and make such arrangements as are required herein within 45 days of the effective date of the Revocation. The Respondent shall also furnish proof to the Bar within 60 days of the effective day of the Revocation that such notices have been timely given and such arrangements made for the disposition of matters.

It is further ORDERED that if the Respondent is not handling any client matters on the effective date of the Revocation, he shall submit an affidavit to that effect within 60 days of the effective date of the Revocation to the Clerk of the Disciplinary System at the Virginia State Bar. All issues concerning the adequacy of the notice and arrangements required by Paragraph 13-29 shall be determined by the Virginia State Bar Disciplinary Board, which may impose a sanction of Revocation or additional Suspension for failure to comply with the requirements of this subparagraph.

The Clerk of the Disciplinary System shall assess costs pursuant to Part 6, Section IV, Paragraph 13-9.E. of the Rules.

It is further ORDERED that an attested copy of this Order be mailed to the Respondent by certified mail, return receipt requested, at his last address of record with the Virginia State Bar

at 105 Oronoco St., Ste. 309, Alexandria, VA 22314, and a copy by electronic mail to Mary T. Morgan, Respondent's counsel, and a copy by electronic mail to M. Brent Saunders, Senior Assistant Bar Counsel.

Enter this Order this 12th day of January, 2021

VIRGINIA STATE BAR DISCIPLINARY BOARD

Carolyn V. Grady

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Grady
Date: 2021.01.12 15:39:37 -05'00'

Carolyn V. Grady
First Vice Chair



VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF
ERNEST PAUL FRANCIS

VS B Docket No. 17-042-107034

AGREED DISPOSITION
(REVOCATION)

Pursuant to the Rules of the Supreme Court of Virginia, Part 6, Section IV, Paragraph 13-6.H., the Virginia State Bar, by M. Brent Saunders, Senior Assistant Bar Counsel, and Ernest Paul Francis (“Respondent”) and Mary T. Morgan, Respondent’s counsel, hereby enter into the following Agreed Disposition arising out of the referenced matter.

I. STIPULATIONS OF FACT

1. At all times relevant hereto, Respondent was an attorney licensed to practice law in the Commonwealth of Virginia. Respondent is also licensed in the District of Columbia and Maryland, and has practiced law for 36 years, having graduated from Georgetown University Law Center in 1984.

2. This matter was initially set for hearing before the Fourth District Committee, Section II. Following a hearing conducted on April 11, 2019, May 9, 2019, and May 21, 2019, the Fourth District Committee, Section II, certified this complaint to the Disciplinary Board.

3. On February 5, 2016, a “Motion for Sanctions Pursuant to 28 U.S.C. §1927” (the “Motion”) was filed against Respondent by counsel for the defendants in the matter of *Andrew Blowers v. Andrew S. Lerner, Esquire, et al.*, Civil No. 1:15-cv-889-GBL-MSN, a case then pending in the United States District Court for the Eastern District of Virginia. Respondent filed that case naming his client Andrew Blowers (“Mr. Blowers”) as plaintiff, on July 9, 2015, against attorneys Andrew Lerner, Esquire and Gregory Walz, Esquire. The suit alleged violations by Messrs. Lerner and Walz of the Fair Debt Collections Practices Act arising out of their efforts to collect on a past due American Express card account issued to Mr. Blowers. Messrs. Lerner and Walz had earlier filed a collection action on behalf of American Express Centurion Bank against Mr. Blowers in Fairfax County Circuit Court in which Respondent represented Mr. Blowers.

4. In response to the Motion, Respondent filed his objections thereto as well as his own Motion for Sanctions under Rule 11, asserting that the Motion was frivolous. Respondent also filed a Motion to Suppress Mr. Blowers’ January 12, 2016 deposition testimony, discussed in more detail below. These motions were reviewed and considered by United States Magistrate Judge Michael S. Nachmanoff.

5. On February 19, 2016, Judge Nachmanoff held two (2) hours of oral argument on both parties' motions following which he granted them leave to supplement the record given the gravity of the issues raised. Judge Nachmanoff also provided Respondent with an opportunity to either obtain the direct testimony of Mr. Blowers or seek a waiver of the attorney client privilege so that Respondent could offer the court information concerning the particulars of the representation which Respondent claimed would aid in his defense against the sanctions motion. Respondent did not seek to obtain Mr. Blowers' direct testimony and instead submitted a Supplemental Declaration.

6. Thereafter, on March 14, 2016, Judge Nachmanoff issued a detailed Report and Recommendation (the "Report"), denying Respondent's Rule 11 motion and granting the defendants' Motion for Sanctions.¹ Judge Nachmanoff recommended that Respondent be sanctioned for "unreasonably and vexatiously" multiplying the underlying proceedings in violation of 28 USC §1927, finding, inter alia, that Respondent pursued the litigation unilaterally without Mr. Blower's concurrence, and failed to convey to his client a September 30, 2015, settlement offer (the "Offer"), which would have ended the case.²

7. The Report found that Respondent did not contest the facts underlying the sanctions motion "in any material respect,"³ and that he had admittedly failed to communicate the Offer in a timely manner to Mr. Blowers because it did not include sufficient attorneys' fees for Respondent's benefit.⁴ The Report noted specifically that Mr. Blowers testified at his January 12, 2016 deposition in the underlying case, taken by counsel for Messrs. Lerner and Walz, Manuel H. Newberger, Esquire ("Mr. Newburger"), that Respondent never informed him of the Offer, and that he [Mr. Blowers] never authorized Respondent to reject it.

8. Testimony and evidence adduced at the District Committee hearing established that Respondent also failed to communicate an earlier offer of settlement made in the case on July 28, 2015. Respondent then proceeded to make a counter-offer in the amount of \$30,000.00 which he characterized as his "standard demand" since "[he] simply ha[d] no time to do customized demands in such cases." Respondent both rejected the July 28th offer and made this counter-offer without first informing his client or obtaining his client's authorization to do so.

¹ Judge Nachmanoff flatly rejected Respondent's Motion to Suppress as legally unsupported.

² Evidence and testimony presented at the District Committee hearing established that Respondent provided a copy of the federal suit to Mr. Blowers on July 10, 2015, the day after it had been filed.

³ Judge Nachmanoff noted, "This is so notwithstanding [the Court's] express invitation to Mr. Francis to supplement the record, and to secure the Court's aid in cross-examining [Mr. Blowers] if need be. Instead, Mr. Francis has conceded the essential facts underlying [Mr. Blowers's] testimony."

⁴ Respondent contended that he and Mr. Blowers had an "understanding" that Respondent was authorized to reject any offer that did not include sufficient attorneys' fees. However, there is no written documentation of this "understanding," nor is it set forth in the engagement agreement between Respondent and Mr. Blowers. Mr. Blowers also denied that any such agreement had been reached during his testimony at the hearing of this matter.

9. During cross-examination of Respondent during the District Committee hearing, he admitted that he did not timely advise Mr. Blowers of either of the settlement offers, claiming that he informed Mr. Blowers of these offers later. The record did not reflect whether the offers had with withdrawn when communicated by the Respondent to the client, although they had been rejected by Respondent.

10. During his January 12, 2016, deposition, Mr. Blowers testified further that, in any event, the Offer, which provided for payment to Mr. Blowers of \$1,100.00 plus his attorneys' fees and costs, was not something he would even have accepted since, "This is unfair. This isn't right. I owed them [American Express] a debt, simply put." Mr. Blowers went on to testify that he never took issue with, nor did he dispute, the sums he owed to American Express for which he was sued, and that he had no intention of accepting any money from American Express since it was he who owed American Express a debt and he did not intend to take "unfair advantage." However, Mr. Blowers also admitted during his deposition that he did not tell the Respondent that he did not intend to take money from American Express.

11. The Report took note of Mr. Blowers' further deposition testimony that he had had no contact with Respondent after suit was filed in the United States District Court for the Eastern District of Virginia on July 9, 2015. Mr. Blowers testified that Respondent contacted him for the first time about one (1) week prior to his January 2016 deposition. Under questioning from Mr. Newberger, Mr. Blowers confirmed that he had no interest in pursuing the litigation against American Express, had suffered no harm that would justify the litigation, testified that he did not want the relief sought in the case, and had no interest in proceeding any further with it. At the conclusion of his deposition, Mr. Blowers fired Respondent as his attorney and agreed to settle the case with the defendants in exchange for their promise not to pursue him for fees and costs.

12. The Report considered this as evidence that Respondent pursued the litigation for his own purposes and concluded that Respondent's actions unnecessarily extended the proceedings in violation of 28 USC §1927. Although this accurately reflects Judge Nachmanoff's findings, the Respondent denies that he pursued the litigation for his own purposes.

13. Evidence presented at the District Committee hearing also suggested that after Mr. Blowers filed for bankruptcy protection on September 29, 2015, he informed Respondent in a telephone call that it was his understanding that this would put an end to the federal lawsuit. Mr. Blowers expressed his relief that the federal suit would be ended, but Respondent failed to consult with his client at this point as to how he wished to proceed. Instead, Respondent pressed ahead with the federal suit.

14. In addition, the Report recited the facts that Respondent: failed to communicate the July 28th offer to his client; was alleged to have threatened to file bar complaints against his opposing counsel; "instigated" "numerous collateral disputes" including unreasonably opposing a motion seeking the *pro hac vice* admission of one of defendants' attorneys; and conducted the litigation in a manner inconsistent with his duties to the court.

15. In addition to the federal suit itself, Respondent filed other pleadings in the case, including but not limited to his Supplemental Declaration and an unreasonable opposition to Mr. Newberger's *pro hac vice* admission that were frivolous and/or were not based on any good faith basis. Further, in the Fairfax County Circuit Court suit filed against Mr. Blowers by American Express Centurion Bank, Respondent filed responses to Interrogatories, prepared by Respondent albeit signed by Mr. Blowers, wherein Mr. Blowers falsely disclaimed liability for the debt..

16. The evidence presented to the District Committee established that based on what he believed to be unethical behavior by the Defendants, Respondent made threats to pursue bar complaints or other actions against Mr. Lerner in at least one email to Mr. Newberger, and threatened Mr. Newberger himself. In addition, there was ample evidence that Respondent opposed Mr. Newberger's *pro hac vice* admission after having previously agreed to the same, with no good faith basis for doing so.

17. The evidence presented to the District Committee also established that, following Mr. Blowers' deposition, Respondent attempted to convince Mr. Blowers to rehire him. Respondent made unrealistic representations to Mr. Blowers in an effort to convince him to rehire him. Ultimately, Mr. Blowers relented and agreed to rehire Respondent to continue the federal lawsuit on the condition that Respondent assure Mr. Blowers in writing that no legal harm would come to him. Respondent did not do so and as a result Mr. Blowers put an end to his involvement with Respondent, asking that he stop contacting him about the case.

18. Respondent's engagement letter with Mr. Blowers for representation in the American Express case contained a provision authorizing Respondent to initiate additional litigation without Mr. Blower's prior consent or knowledge: "In the event that this firm decides to pursue a separate action against the plaintiff in [the Fairfax suit], the attorneys for the plaintiff in that action, or any other party, any such action is hereby authorized and the terms of this agreement shall apply to that action . . ."

19. Judge Nachmanoff determined that Respondent did pursue additional litigation without first consulting with his client, stating that "[Respondent] pursued this litigation unilaterally, usurping [Mr. Blowers's] role in these proceedings. [Mr. Blowers's] testimony establishes that [Respondent], for example, prepared the Complaint filed in this matter without consulting with [Mr. Blowers.] In doing so, [Respondent] – to put it mildly – greatly overestimated [Mr. Blowers's] damages." Respondent disputed these findings.

20. The Report found further that, "[Respondent] undertook to litigate this case unilaterally, making substantive decisions regarding this matter without his client's knowledge or consent. Those decisions included the unauthorized rejection of two settlement offers . . . the proffer of an unauthorized settlement demand . . . and the submission to the Court of filings containing factual representations that [Respondent] had reason to believe to be false." Judge Nachmanoff noted that, "In short, [Mr. Blowers's] sworn testimony establishes that this acrimonious litigation could have been avoided had [Respondent] adequately communicated with his client. Instead, [Respondent] arrogated to himself decisions reserved to [Mr. Blowers] and pursued this litigation unilaterally beyond the point at which his client had any interest in it."

21. The Report noted that these failures on Respondent's part amounted to "reckless indifference to the law."

22. Further, Respondent's representations to the court and to the Bar notwithstanding, nowhere in Respondent's letter agreement with Mr. Blowers is there any term memorializing an "understanding" between Respondent and Mr. Blowers that Respondent was authorized to reject any offer of settlement that did not include payment of his fees. The Report noted that, "[T]he decision to settle a claim *is the client's alone*." (emphasis in the original.) Accordingly, any such "understanding" was one that would inure only to the benefit of Respondent, thereby undermining his incentive to zealously represent his client's interests above his own. The Report concluded, "Accordingly, agreements which limit a client's ability to settle a case except on terms acceptable to his or her attorney are void as unethical and contrary to public policy."

23. As further evidence of the fact that Mr. Blowers did not share Respondent's "understanding" concerning the parameters under which the underlying litigation could have been resolved, the Report observed that Mr. Blowers' desire to settle the case, without any remuneration from the Defendants in the federal case, "was in fact so vehement that he discharged [Respondent] when [Respondent] attempted to impede the settlement."⁵

24. The Report also took note of Respondent's pervasive "incivility" in his conduct of the case, noting that, "[T]he record is replete with instances of such incivility," including threats to file bar complaints against Messrs. Lerner and Walz. The Report also noted that, "[Respondent's] threats of a bar complaint have since multiplied, and his targets now include Defendants' counsel."

25. During the course of the District Committee hearing, Respondent similarly exhibited "pervasive incivility" including disrespectful conduct towards the tribunal and opposing counsel and threatening outbursts both inside and outside the courtroom.

26. The Report summarized Respondent's conduct of the underlying litigation as follows:

"In short, [Respondent's] conduct towards Defendants and opposing counsel has been unreasonable, bordering on the malicious. [Respondent's] apparent distaste for his opponents spawned a host of unnecessary motions, needlessly increasing Defendants' costs and wasting the Court's time."

27. On March 4, 2016, Judge Nachmanoff issued the Report recommending that the United States District Court (the "District Court") grant Messrs. Lerner and Walz's Motion for Sanctions and award them their fees incurred after September 30, 2015, the date of the Offer. The Report also recommended that the District Court deny Respondent's Motion for Rule 11

⁵ The Report observed, "[Respondent's] Declaration therefore establishes at best that a self-interested, one-sided and clearly unethical "understanding" led [Respondent] to gravely misapprehend his client's goals and desires with respect to this litigation. At worst, [Respondent's] Declaration establishes that he willfully ignored his client's wishes with respect to this litigation and instead pursued his own financial interests, engaging in what might arguably be termed barratry."

Sanctions. On March 28, 2016, Respondent filed his objections thereto, advancing six (6) arguments.

28. Following a hearing and independent review of the record, the United States District Court, by Order dated August 31, 2016, adopted the recommendations made in the Report in their entirety and ordered Respondent to pay the reasonable attorneys fees and costs incurred by Messrs. Lerner and Walz as a result of Respondent's unreasonably and vexatiously prolonging the litigation, which was assessed at \$84,752.00.⁶

29. The District Committee, after considering the testimony of Mr. Blowers, Mr. Lerner, and Mr. Newberger, the testimony of Respondent, and the exhibits of both the Bar and Respondent, reached the same conclusion as the District Court and concluded the Report's findings were well founded, although disputed by the Respondent.

30. During the course of the Bar's investigation of this matter, Mr. Blowers was interviewed and confirmed his testimony as given at the January 12, 2016, deposition. Mr. Blowers also testified at the District Committee hearing that at no time did he suffer any emotional distress as a result of being sued by American Express in Fairfax County, and he never informed Respondent that he had suffered any such emotional distress or other damages Respondent had claimed on his behalf.

II. STIPULATIONS OF MISCONDUCT

Respondent stipulates that such conduct constitutes violations of the following provisions of the Rules of Professional Conduct:

RULE 1.2 Scope of Representation

(a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (b), (c), and (d), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision, after consultation with the lawyer, whether to accept an offer of settlement of a matter...

RULE 1.4 Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

⁶ On September 12, 2017, the District Court reduced the sanctions award to \$79,752.00 due to "inadequate documentation" for certain of the legal fees claimed by Messrs. Lerner and Walz.

(c) A lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter.

RULE 3.1 Meritorious Claims And Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law...

RULE 3.4 Fairness To Opposing Party And Counsel

A lawyer shall not:

(i) Present or threaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter.

(j) File a suit, initiate criminal charges, assert a position, conduct a defense, delay a trial, or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

RULE 4.1 Truthfulness In Statements To Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of fact or law...

III. PROPOSED DISPOSITION

Accordingly, Senior Assistant Bar Counsel and Respondent and his counsel tender to the Disciplinary Board for its approval the agreed disposition of the revocation of Respondent's license to practice law in the Commonwealth of Virginia, effective on the date selected by the Panel of the Disciplinary Board which considers this Agreed Disposition.

If the Agreed Disposition is approved, the Clerk of the Disciplinary System shall assess costs pursuant to ¶ 13-9.E of the Rules.

[SIGNATURES ON FOLLOWING PAGE]

THE VIRGINIA STATE BAR

By: *M. Brent Saunders*
M. Brent Saunders
Senior Assistant Bar Counsel

Ernest Paul Francis
Respondent

Mary T. Morgan
Mary T. Morgan
Respondent's Counsel

THE VIRGINIA STATE BAR

By: _____

M. Brent Saunders

S e n i o r A s s i s t a n t B a r C o u n s e l

Ernest P. Francis

Ernest Paul Francis

Respondent

Mary T. Morgan

Respondent's Counsel