

STATE OF WISCONSIN

IN SUPREME COURT

IN THE MATTER OF
DISCIPLINARY PROCEEDINGS
AGAINST JOSEPH M.
CAPISTRANT, ATTORNEY AT LAW.

CASE CODE 30912

OFFICE OF LAWYER REGULATION,
Complainant;

CASE NO. 2014AP 2535-D

JOSEPH M. CAPISTRANT,
Respondent.

RECEIVED

OCT 31 2014

CLERK OF SUPREME COURT
OF WISCONSIN

COMPLAINT

NOW COMES the Wisconsin Supreme Court - Office of Lawyer Regulation (OLR) by Assistant Litigation Counsel, Sheryl St. Ores, and alleges as follows:

1. The OLR was established by the Wisconsin Supreme Court and operates pursuant to Supreme Court Rules. This Complaint is filed pursuant to SCR 22.11.

2. Respondent, Joseph M. Capistrant (Capistrant), is a Wisconsin attorney (State Bar No. 1064645) admitted to practice law in Wisconsin in 2007. Capistrant's Wisconsin law license is presently suspended for dues, CLE

noncompliance, and trust account certification. Capistrant is also licensed to practice law in Minnesota.

**Regarding Wisconsin Law License Suspension
(OLR Matter No. 2011MA1124)
Counts 1 through 8**

3. During 2008-2009 Capistrant knew he was required to comply with Wisconsin's continuing legal education (CLE) reporting of credits for the 2008-2009 reporting period.

4. Capistrant received notice from the Wisconsin Board of Bar Examiners (BBE) setting forth his 2008-2009 CLE reporting requirements.

5. An April 8, 2010 BBE notice advised Capistrant his Wisconsin law license would be automatically suspended as of the close of business on June 7, 2010 unless he complied with the CLE reporting requirements.

6. Effective at the close of business on June 7, 2010, Capistrant's license to practice law in Wisconsin was suspended pursuant to SCR 31.10(1) due to his noncompliance with the 2008-2009 Wisconsin mandatory continuing legal education requirements.

7. On June 8, 2010, BBE sent a notice of suspension to Capistrant.

8. Capistrant took no action between June 7, 2010 and April 29, 2011 to comply with Wisconsin's SCR 31.03 CLE

reporting requirements or to reinstate his Wisconsin law license related to the 2008-2009 CLE reporting period.

9. During the period of June 7, 2010 to April 29, 2011, Capistrant practiced law in Wisconsin.

10. During the suspension of his Wisconsin law license, Capistrant continued to draft legal documents and correspondence regarding legal matters, including preliminary construction lien materials and notices of default in pending matters, in or related to the Wisconsin activities of:

- Specialty Contracting Services, Inc., dba ServiceMaster,
- Specialty Contracting Services - East Metro, Inc., dba ServiceMaster,
- Specialty Contracting Services - Madison, LLC, dba ServiceMaster, and,
- Superior Construction Services, Inc.

(collectively, "SCS"), all four of which are owned or operated by Denise and Randy Hedden.

11. During the suspension of his Wisconsin law license, Capistrant drafted documents for an employee's signature, rather than his signature.

12. The SCS entities operated from an office in Maple Grove, Minnesota.

13. Beginning in or about January 2009, Capistrant became SCS's "on site (in house) general legal counsel" at their Maple Grove, Minnesota location.

- **Burbach Case**

14. On June 28, 2010, Capistrant filed a garnishment summons in a Wisconsin Dane County Circuit Court matter. *Specialty Contracting Services - Madison, LLC v. Burbach Flooring, LLC, et al.*, Dane County Circuit Court Case No. 2009CV3907. (Burbach case)

15. Capistrant failed to effect service of the garnishment in the Burbach case.

- **Roper Case**

16. On July 28, 2010, Capistrant filed a Wisconsin Sauk County Circuit Court Summons and Complaint, arranged to effect service, and conducted settlement negotiations with James Roper in September 2010. *Superior Construction Services, Inc. v. James M. Roper, et al.*, Sauk County Circuit Court Case No. 2010CV887 (Roper case)

17. On January 18, 2011, the Sauk County Circuit Court issued a Notice of Dismissal in the Roper case based upon failure to diligently prosecute and Capistrant's failure to respond to a December 15, 2010 court letter.

18. The Notice of Dismissal stated the dismissal order would become effective twenty days after entry unless good cause was shown by either party.

19. On February 22, 2011 the Sauk County Circuit Court entered an Order of Dismissal in the Roper case for Capistrant's failure to take action.

- **Ahern Case**

20. On June 30, 2010, Capistrant participated in a Wisconsin St. Croix County Circuit Court hearing and filed a certified copy of a *lis pendens* in said matter. *Specialty Contracting Services vs. Roy E. Ahern*, St. Croix County Circuit Court Case No. 2010CV193.

- **Gue Case**

21. On or about July 8, 2010, Capistrant filed a Wisconsin Dane County Summons and Complaint. *Specialty Contracting Services - Madison, LLC vs. Tamericia Gue*, Dane County Circuit Court Case No. 2010CV3657. (Gue case)

22. In the Gue case, Capistrant arranged to effect service, negotiated a settlement agreement with the defendant, and, on or about September 27, 2010, filed an Addendum to Settlement Agreement and Stipulation for Stayed Judgment (Addendum).

23. In response to the September 27, 2010 Addendum filed in the Gue case, Dane County Circuit Court Judge William C. Foust sent a September 27, 2010 letter to Capistrant advising Capistrant of concerns the Judge had regarding the stipulation, and further, Judge Foust advised Capistrant his license to practice law in Wisconsin was suspended for noncompliance with CLE reporting requirements.

24. Capistrant did not respond to Judge Foust's September 27, 2010 letter nor did he advise the Heddens or anyone else associated with SCS of his Wisconsin law license suspension or Judge Foust's September 27, 2010 letter.

25. On November 5, 2010, Judge Foust issued a *Notice of Intent to Dismiss*, stating the Gue case would be dismissed on December 10, 2010 unless a response to his September 27, 2010 letter was filed by an attorney licensed to practice law in Wisconsin.

26. Subsequent to November 5, 2010, Capistrant took no action on the *Notice of Intent to Dismiss* in the Gue case.

27. On December 14, 2010 the court dismissed the Gue case.

28. After receipt of Judge Foust's September 27, 2010 letter, Capistrant continued to state on his letterhead he was, "Also admitted in the State of Wisconsin."

- **Boomsa Case**

29. In August 2010, Capistrant engaged in negotiations regarding post-judgment payments in connection with a Wisconsin Dodge County Circuit Court case. *Specialty Contracting Services - Madison LLC vs. Elizabeth Boomsma, et al.*, Dodge County Circuit Court Case No. 2007CV818.

- **Webb Case**

30. On September 16, 2010, Attorney A. Steven Porter (Porter) filed a Dane County Circuit Court Complaint against Superior Construction Services, Inc. on behalf of Gordon Webb (Webb). *Gordon Webb v. Superior Construction Services, Inc.*, Dane County Circuit Court Case No. 2010CV4983. (Webb case)

31. Sometime prior to October 2010, Porter attempted to enter into settlement negotiations with Superior Construction Services, Inc. on behalf of Webb.

32. In mid-October 2010, Capistrant accepted the service of process on behalf of Superior Construction Services, Inc. in the Webb case.

33. Capistrant failed to diligently pursue the settlement negotiations including failing to respond to one or more settlement demands made by Porter on behalf of Webb.

34. Capistrant communicated with various persons associated with SCS regarding the Webb case, but failed to inform any of them his Wisconsin law license was suspended.

35. On November 4, 2010, Capistrant filed an Answer in the Webb case.

34. Capistrant did not research what effect his suspension would have on any Answer he filed.

35. In a November 18, 2010 letter in the Webb case, Porter informed Capistrant he was aware Capistrant's license was suspended, demanded Capistrant withdraw from the representation, and advised Capistrant that if he did not hear from Capistrant, Porter would "be taking appropriate action with the Court in this matter forthwith."

36. Capistrant did not respond to Porter or notify the Heddens or any other agent or officer of his client of Porter's November 18, 2010 letter.

37. On November 30, 2010, Porter filed a motion to strike the Answer in the Webb case due to Capistrant's suspension.

39. Capistrant did not respond to the motion to strike the Answer in the Webb case nor did he advise his client of the November 30, 2010 motion in the Webb case.

40. On December 1, 2010, notice of a December 13, 2010 hearing on the motion to strike in the Webb case was sent to Capistrant and to his client.

41. The notices of hearing in the Webb case were directed to Capistrant by SCS's receptionist.

42. Capistrant asserted he did not open the notices of the December 13, 2010 hearing in the Webb case.

43. On December 13, 2010, the motion to strike hearing in the Webb case was heard without appearances by Capistrant or anyone associated with SCS.

44. On December 13, 2010, the court issued an order granting the motion to strike the Answer in the Webb case and granting a default judgment against Capistrant's client.

45. On December 16, 2010, an order of default judgment was entered in the Webb case.

46. At the time of the court's orders in the Webb case, Capistrant's client, SCS, had no knowledge of the entry of judgment or the suspension of Capistrant's Wisconsin law license.

47. On or about April 11, 2011, the plaintiff attempted to execute against Superior Construction Services, Inc.'s property located in Dane County.

48. In an email dated April 12, 2011, Capistrant communicated to the Heddens as follows:

- He advised of his Wisconsin law license suspension.
- He advised of his actions in the Webb matter.
- He did not disclose fully the other actions he had taken during his period of suspension on behalf of the Heddens' business entities.
- He suggested to the Heddens that Capistrant continue to engage in the unauthorized practice of law, stating: "If you cannot get [Dane County Circuit Court Case No. 2010CV4983] resolved, then you will have to hire another Wisconsin attorney to bring a motion to vacate the default judgment, although I could prepare the papers to keep the cost down."

49. On June 14, 2011, Capistrant's Wisconsin law license was reinstated.

- **Freeman Case**

50. On June 12, 2012, Capistrant's Wisconsin law license became suspended due to his failure to comply with CLE reporting requirements.

51. On June 28, 2012, Capistrant filed a Prime Contractor's Notice of Intention to File Claim of Lien on behalf of Superior Construction Services, Inc. *Superior*

Construction Services, In. vs. Marilyn Freeman, Jefferson County Case No. 2012CL9.

• **Reinstatement Petition**

52. By letter dated April 29, 2011, Capistrant filed a Petition for Reinstatement of his Wisconsin law license.

53. In his petition, Capistrant failed to disclose all incidents of practice during his period of suspension, omitting from his petition his practice of law in *Specialty Contracting Services vs. Roy E. Ahern*, St. Croix County Case No. 2010CV193 and non-litigation related legal advice and drafting of documents for others' signatures between June 7, 2010 and April 29, 2011.

COUNT ONE

54. By representing clients in legal matters in or related to Wisconsin at a time when his license to practice law in Wisconsin was suspended, **Capistrant violated SCR 31.10(1)¹, and SCR 22.26(2)², enforced via SCR 20:8.4(f)³.**

¹ SCR 31.10(1) provides: "A lawyer shall not engage in the practice of law in Wisconsin while his or her state bar membership is suspended under this rule."

² SCR 22.26(2) provides: "An attorney whose license to practice law is suspended or revoked or who is suspended from the practice of law may not engage in this state in the practice of law or in any law work activity customarily done by law students, law clerks, or other paralegal personnel, except that the attorney may engage in law related work in this state for a commercial employer itself not engaged in the practice of law."

³ SCR 20:8.4(f) provides: "It is professional misconduct for a lawyer to violate a statute, supreme court rule, supreme court order or supreme court decision regulating the conduct of lawyers."

COUNT TWO

55. By: (i) failing to pursue his client's interests in *Superior Construction Services, Inc. v. James M. Roper, et al.*, Sauk County Circuit Court Case No. 2010CV887; (ii) failing to respond to the court's September 27, 2010 letter in *Specialty Contracting Services - Madison, LLC vs. Tamericia Gue*, Dane County Case No. 2010CV3657, or, to advise his client that he did not intend to file a response; (iii) failing to pursue settlement negotiations prior to the filing of *Gordon Webb v. Superior Construction Services, Inc.*, Dane County Case No. 2010CV4983; (iv) failing prior to filing an answer on behalf of his client in *Gordon Webb v. Superior Construction Services, Inc.*, Dane County Case No. 2010CV4983, to research the potential ramifications of filing an answer at a time when his license to practice law in Wisconsin was suspended; and/or, (v) failing between November 2, 2010 and April 22, 2011 to open mail from opposing counsel and the court related to *Gordon Webb v. Superior Construction Services, Inc.*, Dane County Case No. 2010CV4983 and to take any action to check the status of

Gordon Webb v. Superior Construction Services, Inc., Dane County Case No. 2010CV4983, **Capistrant violated SCR 20:1.3⁴**.

COUNT THREE

56. By failing to advise his clients or the Heddens that his license to practice law in Wisconsin was suspended, including by discussing the handling of *Gordon Webb v. Superior Construction Services, Inc.*, Dane County Case No. 2010CV4983, while omitting the information that his license to practice law in Wisconsin was suspended, **Capistrant violated SCR 20:1.4(b)⁵**.

COUNT FOUR

57. By failing to advise his clients or the Heddens that his license to practice law in Wisconsin was suspended, including by discussing the handling of *Gordon Webb v. Superior Construction Services, Inc.*, Dane County Case No. 2010CV4983, while omitting the information that his license to practice law in Wisconsin was suspended, **Capistrant violated SCR 20:8.4(c)⁶**.

⁴ SCR 20:1.3 provides: "A lawyer shall act with reasonable diligence and promptness in representing a client."

⁵ SCR 20:1.4(b) provides: "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

⁶ SCR 20:8.4(c) provides: "It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

COUNT FIVE

58. By failing to advise his clients or the Heddens that his license to practice law in Wisconsin was suspended, including by discussing the handling of *Gordon Webb v. Superior Construction Services, Inc.*, Dane County Case No. 2010CV4983, while omitting the information that his license to practice law in Wisconsin was suspended, **Capistrant violated SCR 22.26(1)(a) and (b)⁷, enforced via SCR 20:8.4(f).**

COUNT SIX

59. By failing to provide notice to courts and opposing counsel in pending litigation matters that his license to practice law in Wisconsin had been suspended, **Capistrant violated SCR 22.26(1)(c)⁸, enforced via SCR 20:20:8.4(f).**

COUNT SEVEN

60. By failing to advise his clients that he was not opening mail from the court or opposing counsel, or

⁷ **SCRs 22.26(1)(a) and (b) provide:** "On or before the effective date of license suspension or revocation, an attorney whose license is suspended or revoked shall do all of the following: (a) Notify by certified mail all clients being represented in pending matters of the suspension or revocation and of the attorney's consequent inability to act as an attorney following the effective date of the suspension or revocation. (b) Advise the clients to seek legal advice of their choice elsewhere."

⁸ **SCR 22.26(1)(c) provides:** "On or before the effective date of license suspension or revocation, an attorney whose license is suspended or revoked shall... Promptly provide written notification to the court or administrative agency and the attorney for each party in a matter pending before a court or administrative agency of the suspension or revocation and of the attorney's consequent inability to act as an attorney following the effective date of the suspension or revocation. The notice shall identify the successor attorney of the attorney's client or, if there is none at the time notice is given, shall state the client's place of residence."

monitoring the status of *Gordon Webb v. Superior Construction Services, Inc.*, Dane County Case No. 2010CV4983, Capistrant violated SCR 20:1.4(a)(3)⁹ and SCR 20:1.4(b).

COUNT EIGHT

61. By continuing after June 7, 2010 to state on his letterhead that he was "admitted in the State of Wisconsin" when his license to practice law in Wisconsin was suspended, Capistrant violated SCR 20:7.1(a)¹⁰ and SCR 20:7.5(a)¹¹.

WHEREFORE the Office of Lawyer Regulation asks that Attorney Joseph M. Capistrant be found in violation of the Supreme Court rules as alleged in Counts One through Eight of this Complaint, that the Court suspend Attorney Joseph M. Capistrant's Wisconsin law license for a period of 90 days, and for such other and further relief as may be just and

⁹ SCR 20:1.4(a)(3) provides: "A lawyer shall keep the client reasonably informed about the status of the matter."

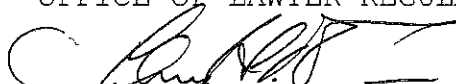
¹⁰ SCR 20:7.1(a) provides: "A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it: (a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading."

¹¹ SCR 20:7.5(a) provides: "A lawyer shall not use a firm name, letterhead or other professional designation that violates SCR 20:7.1."

equitable, including an award of costs.

Dated this 31 day of October, 2014.

OFFICE OF LAWYER REGULATION



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