SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 08-410
District Docket No. IIA-07-23E

IN THE MATTER OF

FRANKLIN G. SOTO

AN ATTORNEY AT LAW

Corrected Decision

Argued: March 19, 2009

Decided: June 19, 2009

George Wolfe appeared on behalf of the District IIA Ethics Committee.

Albert Buglione appeared on behalf of respondent.

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

This matter came before us on a recommendation for a censure filed by the District IIB Ethics Committee ("DEC"), as the result of respondent's mishandling of a client's personal injury action. The DEC concluded that respondent had violated

RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), RPC 1.4(a) (failure to communicate with the client), RPC 1.5(c) (failure to reduce contingent fee agreement to writing), and RPC 1.7 (presumably (a)(1)) (conflict of interest). For the reasons set forth below, we determine to impose a reprimand on respondent for these violations.

Respondent was admitted to the New Jersey bar in 1990. At the relevant times, he maintained an office for the practice of law in Paterson. He has no disciplinary history.

Between July 20, 1992 and February 16, 1993, and between September 25 and October 17, 1995, respondent was on the Supreme Court's list of ineligible attorneys for failure to pay the annual assessment to the New Jersey Lawyers' Fund for Client Protection.

The DEC conducted a one-day hearing in this matter, where respondent admitted the allegations of the complaint and presented testimony in mitigation of his misconduct.

On September 17, 2000, Hector Oliver was driving an automobile that was involved in a motor vehicle accident in Rockland County, New York. At the time, Hector was talking to his brother, Bartolome Oliver (the grievant), who was a passenger in Hector's vehicle. The accident happened when a

motorcycle passed a car and struck Hector's vehicle. The operator of the motorcycle was named "Valenti."

At the time of the accident, Hector lived in Passaic, but, as of December 1, 2006, he lived in Florida.

Bartolome was in pain as a result of the accident and consulted with his doctor. He then sought legal representation from attorney Pablo G. Martinez. Bartolome and Martinez entered into a retainer agreement.

Sometime in 2001, Martinez moved to Florida and sent a letter to Bartolome, informing him of this fact and advising him that respondent would now be representing him. Bartolome was not consulted about the change in lawyers. Respondent did not ask Bartolome to sign a retainer agreement. Respondent had not represented Bartolome previously. However, respondent had represented Bartolome's brother (presumably Hector), sister, and his son "in various personal injury claims."

Bartolome "sought to meet Respondent in 2001 at or about the same week as when [Martinez] left the state." Bartolome "saw Respondent in 2001, 2002, 2003, and 2004. On all these occasions Respondent said that everything was fine, the case was okay."

Sometime in 2004, respondent informed Bartolome that he was not licensed in the State of New York and, therefore, could not appear in court there. Respondent told Bartolome that "he had a lawyer who could help him with the case." At the DEC hearing, respondent claimed that he was licensed in New York, but was "not in compliance with the New York rules of procedures." He did not explain how he was non-compliant, although he did state that he did not maintain a bona fide office there, as required by New York.

Respondent "stopped seeing [Bartolome] in 2004 and only the secretary after that saw [Bartolome] for a period." The secretary told Bartolome that his case would settle in 2004.

Sometime in 2005, Bartolome met with respondent at his office. Respondent told him that "everything was okay, that he wanted to try and [sic] resolve the case with the insurance company." Respondent saw Bartolome up until November 2005. When Bartolome attempted to schedule an appointment with respondent in 2006, the "new secretary" refused, stating that respondent would call him.

During a telephone conversation, on January 15, 2006, respondent told Bartolome that he was "negotiating with the

insurance company and that if he could not settle it there was no case and he could not go to Court."

Respondent never gave Bartolome the name of a New York attorney. Eventually, Bartolome sought counsel from another attorney, who told him that he had no case "because of what had transpired with Respondent." Specifically, respondent had instituted suit against Valenti (the motorcycle driver) in a New York court on the day the statute of limitation was to expire, September 17, 2003. Valenti's insurance company retained an attorney named Mr. Losman to defend Valenti in the New York lawsuit. An answer was served sometime in June 2004. On June 18, 2004, Losman wrote to respondent and requested proof that respondent maintained a law office in the State of New York. Respondent did not reply to Losman's letter.

On September 15, 2004, Losman sent a letter to respondent requesting that he comply with the "discovery demands that had been served upon him." Respondent did not reply to this letter either.

On September 24, 2004, Losman filed a motion to dismiss the complaint on the ground that Bartolome was not represented by an attorney licensed to practice law in New York. In Losman's

supporting affirmation, he "put out the idea of [respondent's] aligning himself with local counsel."

The motion was served on respondent, with an October 22, 2004 return date. He did not oppose the motion. Losman wrote to respondent and informed him of the identity of the judge who had been assigned to decide the motion. Respondent did not appear on the motion's return date.

On October 26, 2004, the court conditionally granted the motion to dismiss and gave respondent thirty days to either align with New York counsel or file a motion for admission pro hac vice. On November 3, 2004, Losman's office received a copy of the order and served it on respondent that day.

Respondent failed to obtain local counsel or seek admission pro hac vice. On January 6, 2005, upon the court's direction, Losman served respondent with a notice of non-compliance, with a return date of January 17, 2005. Respondent did not file any opposition to the notice.

On January 25, 2005, the court unconditionally dismissed Bartolome's complaint. Three days later, Losman served the order on respondent, who acknowledged receiving it. On February 4, 2005, judgment in favor of Valenti was entered. A copy of the order was mailed to respondent four days later. Losman kept

the file open for one month. During this time, he heard nothing from respondent.

Respondent admitted the truth of the following general allegations of the complaint:

> The parties met in the State of New Jersey. The Respondent only has an office in the State of New Jersey, even though he is admitted in the State of New York. Because he does not have an office in the State of New York he is not permitted to try cases in the State of New York. The representation originated out of a contract of representation in the State of New Jersey and all the work was to be done in the State of New Jersey, except for the New York litigation, if necessary. The matter conceivably could have been settled without filing a suit in the State of New York.
>
> [T15-8 to 20.][1]

Respondent admitted the ethics infractions charged in the four-count complaint: (1) failing to enter into a written contingent fee agreement with Bartolome (RPC 1.5(c)); (2) engaging in a conflict of interest by representing both Hector and Bartolome in the personal injury action (RPC 1.7(a)); (3) gross neglect (RPC 1.1(a)); (4) pattern of neglect (RPC 1.1(b));

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[1] "T" refers to the transcript of hearing, dated July 29, 2008.

(5) lack of diligence (RPC 1.3); and (6) failure to communicate (RPC 1.4(a)) by his failure to keep Bartolome "aware of what was happening in the case," which resulted in its dismissal.

In mitigation, the presenter informed the DEC that respondent had cooperated in the investigation and that he had no disciplinary history in his eighteen years as an attorney. Respondent's counsel also pointed to a number of mitigating factors: (1) respondent's service as a volunteer with the annual Law Day and "Help America Vote," where, as a lawyer, he has "help[ed] protect the constitutional rights of persons who wanted to vote" by representing them in court on "mini" orders to show cause in Passaic County; (2) his personal problems at the time of the misconduct, which included (a) the illnesses of both of his parents, each of whom required care, leaving respondent responsible for managing that care "either with home health care providers or nurses or arranging the transportation," all which has been very difficult for him, and (b) the death of his forty-six-year-old brother, which caused respondent to help care for his brother's family, including the provision of financial support; (3) his acceptance of responsibility for his misconduct and the adoption of steps to ensure that this will not happen again by working with his

colleagues, rather than trying to handle everything himself; and (4) his remorse.

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

The facts alleged in the complaint, all of which were admitted by respondent, establish that respondent violated most of the RPCs with which he was charged. Respondent grossly neglected Bartolome's matter; he lacked diligence in his representation of Bartolome; and he failed to communicate with Bartolome. By these omissions, respondent violated RPCs 1.1(a), 1.3, and 1.4(b).

After undertaking Bartolome's representation in the personal injury action, sometime in 2001, and informing Bartolome that he would obtain local counsel in New York, respondent failed to do so. Moreover, even though he and Bartolome were in communication through at least January 2006, he never told Bartolome that Losman had served discovery requests, that he had failed to comply with the discovery requests, that a motion to dismiss had been filed and granted, and that judgment had been entered in favor of Valenti.

Also, when respondent failed to obtain from Bartolome a written contingent fee agreement, he violated of RPC 1.5(c). This rule expressly states that a contingent fee agreement must be in writing and sets forth the details that such a fee agreement should contain.

In addition, respondent violated RPC 1.7(a)(1), which prohibits an attorney from engaging in a conflict of interest. In particular, a conflict of interest exists if "the representation of one client will be directly adverse to another client." Respondent's representation of both Hector, the driver, and Bartolome, the passenger, in a personal injury claim, without disclosure and consent, constituted a conflict of interest. In In re Pajerowski, 156 N.J. 509, 516 (1998), the Court stated that "[b]y representing both the driver and passengers without disclosing the potential conflict of interest or obtaining his clients' consent to the multiple representation, respondent violated *RPC* 1.7(a) and *RPC* 1.7(b)."

The complaint's pattern-of-neglect charge (RPC 1.1(b)), however, cannot stand. The charge is based solely on respondent's neglect in this matter. A pattern of neglect requires at least three acts of negligence. In the Matter of Donald M. Rohan, DRB 05-062 (June 8, 2005) (slip op. at 12-16).

Here, although respondent repeatedly failed to act on Bartolome's claim, his neglect was limited to one client matter.

To conclude, respondent violated RPC 1.1(a), RPC 1.3, RPC 1.4(b), RPC 1.5(c), and RPC 1.7(a)(1).

There remains the quantum of discipline to be imposed on respondent for his gross neglect, lack of diligence, failure to communicate with the client, failure to enter into a written fee agreement with the client, and involvement in a conflict of interest.

Generally, in cases involving a conflict of interest, without more, and absent egregious circumstances or serious economic injury to clients, a reprimand constitutes appropriate discipline. In re Byrne, 188 N.J. 249 (2006); In re Berkowitz, 136 N.J. 134 (1984); and In re Guidone, 139 N.J. 272 (1994). In In re Nadel, 147 N.J. 558 (1997), a reprimand was imposed on an attorney who represented one driver against another driver and later represented a passenger against both drivers. Similarly, in In re Starkman, 147 N.J. 558 (1997), an attorney received a reprimand for a conflict of interest when he represented both the driver and two passengers who had been in an automobile accident, withdrew from representing the driver, and sued the driver, his former client, on behalf of the two passengers.

At times, a reprimand may still result if, in addition to engaging in a conflict of interest, the attorney displays other forms of unethical behavior that are not considered serious enough to merit a suspension. See, e.g., In re Barone, 180 N.J. 518 (2004) (reprimand for attorney who engaged in conflicts of interest on two occasions by simultaneously representing driver and passenger in automobile matters; after filing the complaints, the attorney allowed them to be dismissed and took no further steps to have them reinstated; the attorney was found guilty of gross neglect, lack of diligence, and failure to communicate with clients); In re Kraft, 167 N.J. 615 (2001) (reprimand for attorney whose unethical conduct encompassed four matters; in one matter, he was found guilty of a conflict of interest by failing to explain to the client the advantages or disadvantages of pursuing her case jointly or independently of the client's co-worker, who was also represented by the attorney; in another matter, the attorney failed to clearly explain to the client his legal strategy, thereby precluding her from making an informed decision about the course of the representation and the pursuit of her claims; in all four matters, the attorney exhibited lack of diligence and failure to communicate with clients; and, in one of the matters, the

attorney failed to prepare a written fee agreement); and In re Castiglia, 158 N.J. 145 (1999) (on a motion for discipline by consent, the Court agreed that a reprimand was the appropriate discipline for an attorney who engaged in a conflict of interest by simultaneously representing various parties with adverse interests, repeatedly failed to communicate to his clients, in writing, the basis or rate of his legal fee, and witnessed the signature on a deed and affidavit of title, even though the documents had been signed outside of his presence).

Based on the above cases, and taking into consideration the mitigating factors offered by respondent's counsel, we determine that a reprimand is the appropriate measure of discipline for respondent's misconduct in this matter.

Chair Pashman and Vice Chair Frost did not participate.

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs and actual expenses incurred in the prosecution of this matter, as provided in R. 1:20-17.

Disciplinary Review Board
Edna Y. Baugh, Acting Chair

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

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Franklin G. Soto
Docket No. DRB 08-410

Argued: March 19, 2009

Decided: June 19, 2009

Disposition: Reprimand

Members	Disbar	Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Pashman						X
Frost						X
Baugh			X			
Clark			X			
Doremus			X			
Lolla			X			
Stanton			X			
Wissinger			X			
Total:			6			2

Julianne K. DeCore
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Chief Counsel