SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 12-090
District Docket No. XIV-2009-0493E

IN THE MATTER OF	
JOSEPH J. LOWENSTEIN	
AN ATTORNEY AT LAW	

Decision

Argued: June 21, 2012

Decided: August 31, 2012

Maureen G. Bauman appeared on behalf of the Office of Attorney Ethics.

David H. Dugan, III appeared on behalf of respondent.

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

This matter was before us on a recommendation for a three-month suspension filed by the District XI Ethics Committee (DEC). The complaint charged respondent with violating RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), RPC 1.4(b) (failure to keep a client reasonably informed about the status of the matter), RPC 1.4 (c) (failure to explain the matter to the extent reasonably necessary to permit the client to make informed decisions about the representation), RPC 1.7(a) and (b)

(conflict of interest), RPC 3.3(a) (false statement of material fact to a tribunal), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation). We agree with the DEC that a three-month suspension is appropriate.

Respondent was admitted to the New Jersey bar in 1985. In 2006, he was admonished for misconduct in three matters. Although he filed the complaints, two were dismissed for lack of prosecution and the third was dismissed because of a "clerical error." He was found to have engaged in gross neglect, a pattern of neglect, lack of diligence, and failure to communicate with clients. In the Matter of Joseph Jay Lowenstein, DRB 06-016 (February 23, 2006).

In 2007, respondent was reprimanded for not disclosing a material fact to a third person, a violation of RPC 4.1(a)(2). In re Lowenstein, 190 N.J. 58 (2007). There, he failed to protect a lender's lien by not informing the insurer of the lien, prior to the insurer's disbursement of the settlement proceeds.

In 2008, on a motion for discipline by consent, respondent received a censure for lack of diligence and a pattern of neglect in five of six matters and, in each of the six matters, failure to keep his clients reasonably informed about the status of their cases. In re Lowenstein, 195 N.J. 180 (2008).

Effective October 23, 2009, respondent received a three-month suspension for misconduct in four matters. He failed to communicate with the clients and lacked diligence in handling their matters. The Court ordered that, prior to reinstatement, respondent provide proof of fitness to practice law, as attested by a mental health professional approved by the Office of Attorney Ethics (OAE), and that, on reinstatement, he practice under the supervision of an OAE-approved proctor for a two-year period. In re Lowenstein, 200 N.J. 227 (2009). Respondent has not applied for reinstatement.

The facts that gave rise to this disciplinary matter are as follows:

On October 31, 2000, Judith Bejarano De Montoya was a passenger in a motor vehicle driven by her then-boyfriend, Alejandro Gonzalez, when they were involved in a motor vehicle accident.[1] On November 1, 2000, they both retained respondent to represent them in connection with the accident. Norma Garcia, respondent's receptionist, acted as an interpreter during their meeting. De Montoya executed an undated retainer agreement.

According to De Montoya, she suffered back injuries, which prevented her from moving her right leg. She received "electric current" treatment on her leg and spine and underwent three or

[1] De Montoya, then-Bejarano, testified at the DEC hearing through an interpreter.

four months of intensive therapy. She suffered from a series of health problems and claimed that she cannot lead a normal life due to her "many restrictions."

Respondent referred De Montoya to Sall/Myers Medical Associates (SMMA), located three or four blocks from his office. According to respondent, SMMA was very familiar with workers' compensation and personal injury cases, could treat patients, write reports, and make court appearances.

According to respondent, when he agreed to represent both De Montoya and Gonzalez, he did not anticipate a conflict of interest situation, based on their statements and on the information in the police report. The report showed one hundred percent liability on the part of the other driver, who had backed into his clients' vehicle.

Respondent's former associate unsuccessfully attempted to settle the case. "Relatively early on in the case," but not before April 2001, when De Montoya left the country to live in Spain, either respondent or his associate learned from the insurance carrier that Gonzalez may have been at fault. Gonzalez may have rear-ended the other vehicle. According to respondent, he then realized that the dual representation created a potential conflict of interest.

Respondent's office continued to represent Gonzalez. On September 27, 2002, respondent's associate filed a complaint on Gonzalez' behalf. On the day before the statute of limitations expired, October 31, 2002, respondent filed a "pro se" complaint on De Montoya's behalf, naming Gonzalez and others as defendants. Respondent signed De Montoya's name on the complaint.

Respondent denied any attempt at deception by signing De Montoya's name. He conceded that he should have indicated that he had signed it on De Montoya's behalf, but claimed that he was unaware of the correct procedure to do so. In his view, there was nothing improper about signing De Montoya's name, particularly because his secretary had spoken to De Montoya in August (presumably, 2002) and had informed her that, if they were unable to settle the matter, they would try to get another attorney to take on her case and would sign her name on the complaint. Respondent further maintained that Garcia had obtained a "verbal" power of attorney from De Montoya, over the telephone, authorizing the office to sign and file her complaint.

Respondent listed De Montoya's Spain address on the complaint. He reasoned that, in so doing, the court would send notices to her in Spain, including a notice that the complaint had been filed. In addition, she would have received notice that her case would be dismissed within sixty days, if no action were

taken. Respondent found nothing in his files to indicate that his office had mailed a copy of the complaint to De Montoya in Spain, but believed that his associate would have done so.

Respondent explained that he waited until the last minute to file the De Montoya complaint because he was trying to find another attorney to take over the case, which he had been unable to do. Two lawyers whom he contacted declined to take over De Montoya's case.

According to respondent, several months before he filed De Montoya's complaint, he spoke to Rossana Urbina, De Montoya's cousin, who had inquired about the progress of the case. Urbina had a power-of-attorney (POA) from De Montoya.[2] Respondent stated that he had relayed the same information to Urbina, that is, if they were unable to settle the case, they would attempt to find her another attorney and would file a pro se complaint on De Montoya's behalf. Respondent assumed that the reason Urbina had not signed the complaint was that his associate had not been able to locate her.

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[2] In contemplation of leaving the country, De Montoya gave Urbina a POA "to negotiate with the insurance [carrier]." Garcia prepared and notarized the POA on April 23, 2001. The POA gave Urbina the power to settle De Montoya's personal injury claim, sign any and all checks, and "release" De Montoya's share of her settlement.

On April 29, 2003, at Garcia's request, De Montoya executed another POA in favor of Urbina. De Montoya was vacationing in Peru at that time. Garcia told her that the POA was necessary because, in such cases, negotiations with the insurance company were ongoing. The April 2003 POA, written in Spanish, stated:

> I, Judith Bejarano Ramirez, give Power of Attorney to my cousin, Rossana Urbina . . . the power to represent me legally and to sign any check or document on my behalf in the case for damages . . . in the car accident which occurred on October 31st of the year 2000.
>
> [T27-24 to 28-6;Ex.10.][3]

De Montoya testified that, before she left the country in April 2001, she notified respondent of her address in Spain, told him that she would be "communicating continuously to be informed about [her] case," and also told him that, if it were necessary for her to appear in court, she would return to the United States. She left him her husband's business card, which contained the husband's business address.

According to De Montoya, after she left for Spain, she called respondent's office "many times," over the course of two and a half or three years. She maintained that "there were over a thousand calls" to respondent's office, that she called him on a weekly basis, and that she left her telephone number and

[3] T refers to the transcript of the November 18, 2011 DEC hearing.

addresses, but that respondent never contacted her. She claimed that, whenever she called, Garcia would give her the same information, that is, respondent was not there and a court date had not been set. De Montoya added that, in 2005, an English-speaking friend of hers called the office and spoke to respondent on her behalf, at which time respondent said that he still did not have a court date.

Garcia denied Montoya's assertions about the frequency and number of her calls, stating that they had been limited to one or two. Garcia also claimed that respondent's office personnel were unable to reach De Montoya on the phone number that De Montoya had left and that she had tried to obtain De Montoya's contact information from Gonzalez, to no avail; he was no longer in touch with De Montoya. But as respondent's counsel acknowledged, in his brief, respondent "could have made a greater effort to locate De Montoya in Spain."

Respondent, too, testified that De Montoya could not have called his office one thousand times, over a three-year period, because that would have meant daily phone calls, including weekends. He stated that De Montoya rarely, "if ever," communicated with his office and that he had received only five or six messages from her, from 2000 to 2006 or 2007.

During his deposition in De Montoya's legal malpractice suit against him, respondent testified that she would call from overseas every few months. He admitted that he did not return her calls, while she was in Spain. Asked by the presenter if his office had sent mail to De Montoya's Spain address, respondent replied that, in July 2002, his associate had sent a letter to that address, asking De Montoya for some information that the carrier had requested.[4]

Garcia testified that, while De Montoya was in Spain, she called respondent's office on August 9, 2002. De Montoya gave Garcia her address in Spain. According to Garcia, she informed De Montoya that there was a problem with her case, that respondent was unable to settle it, that he would have to file two separate complaints, and that they would have to get a different attorney for her, because she would be filing a claim against Gonzalez, as well as the driver of the other vehicle.

De Montoya, in turn, denied that respondent had explained to her that she might have to sue Gonzalez and that there could be a conflict of interest, if he represented both of them. Likewise, he never asked her to give her written consent to the

[4] That letter was initially sent to De Montoya's United States address, in Paterson, New Jersey. By that time, she was already living in Spain. A handwritten notation on the letter indicates that it was subsequently forwarded to her address in Spain, on September 24, 2002.

dual representation, a contention that respondent admitted. Respondent maintained that, because he did not proceed with De Montoya's case after filing her complaint, there was no conflict of interest.

Respondent did not serve the complaint on the defendants or conduct discovery in the matter. He stated that he had filed the complaint to "protect the statute of limitations;" if and when De Montoya returned, she could retain another attorney. He reasoned that it would have been "too much of a conflict of interest" to do more than file a complaint in De Montoya's name.

At one point, both De Montoya's and Gonzalez' complaints were dismissed, presumably for lack of prosecution. According to respondent, although he did not receive a dismissal notice from the court, he was aware that complaints are subject to dismissal if not served within six months of the filing date. De Montoya testified that respondent never informed her that her case had been dismissed.

Garcia had a different recollection. She recalled that, after De Montoya returned to the United States, she came to respondent's office:

> [De Montoya] came in to find out the status [of her case]. At that point I told her it's been a long time, we lost contact with you, we also lost contact with the Power of Attorney that you gave us, she changed her address, she hasn't been in so we didn't

> really know what to do with your case and at this point your case was dismissed. She said she was gonna' [sic] sue us. I said do what you have to do.
>
> [T68-1 to T68-9.]

De Montoya, in turn, testified that, in 2006, she went to respondent's office, allegedly unannounced, to find out about the status of her case. She claimed that, during that visit, respondent told her that he was waiting for a court date. She developed a feeling that respondent "was not being honest with [her] as a lawyer." "[W]hat's more," she added, "he wanted me to give him an absolute Power of Attorney so that he could supposedly handle my case after five years had gone by. I know at that point cases are withdrawn. I didn't sign."

The day after De Montoya met with respondent, she consulted with another attorney, David Maran. On November 28, 2006, she retained Maran to pursue a legal malpractice case against respondent.

By letters dated November 28, 2006, December 12, 2006, and January 9, 2007, Maran tried to obtain De Montoya's file from respondent, as well as information relating to respondent's malpractice insurer. Respondent did not reply to Maran's letters. Maran then filed a lawsuit against respondent. After respondent did not file an answer, Maran moved for a default judgment. On the day of the proof hearing, respondent filed a

motion to vacate the default, which was granted. According to Maran, respondent did not carry malpractice insurance. The two, therefore, negotiated a settlement for an amount that respondent could afford, $15,000, rather than the value of De Montoya's case.

Despite their settlement agreement, respondent never executed the consent order. Ultimately, Maran obtained a judgment against respondent for the amount of the proposed settlement. As of the date of the DEC hearing, the judgment remained unsatisfied.

At the ethics hearing, respondent testified that he suffers from high blood pressure and heart disease and that, before, during, and after the events, he suffered from varying degrees of depression, which worsened during his suspension. According to respondent, he began treatment for his depression in 1979 or 1980. Since then, he has been treated by a clinical psychologist, a social worker, a psychotherapist for fourteen years, and a forensic psychiatrist. During those periods, two different psychiatrists, one of whom was his brother, prescribed medications for his condition. Currently, he receives sample medications from his brother. He does not have health insurance and, therefore, cannot afford to continue with treatment.

Respondent offered into evidence a December 1, 2005 letter from Peter M. Crain, a forensic psychiatrist. Crain chronicled

respondent's history of depression and treatment with therapy and medication. Crain stated that he "followed" respondent, from October 7, 2003 to May 17, 2004, to treat his depression with medication and psychotherapy. Crain opined that, with treatment, respondent's prognosis is good. At the time of Crain's letter, respondent was to have been followed "in biweekly sessions for psychotherapy and medication monitoring."

In Crain's opinion, the "lifting of [respondent's] depression would have a positive effect on his work product," it was probable that respondent's depression caused his lack of diligence in this case, and treatment would likely overcome the problem.

As indicated previously, respondent has not yet applied for reinstatement from his 2009 three-month suspension. He told the hearing panel that he is waiting for the resolution of the grievances pending against him.

The DEC found clear and convincing evidence that respondent engaged in a conflict of interest, gross neglect, lack of diligence, and failure to communicate with the client. On the other hand, the DEC found insufficient evidence that respondent made a false statement of material fact to a tribunal or that he engaged in conduct prejudicial to the administration of justice. Those charges apparently stemmed from respondent's signing De Montoya's name on the complaint.

The DEC recommended that respondent be suspended for three months. The DEC also recommended that respondent be subject to "mental health monitoring" and that, prior to reinstatement, he be required to submit proof of fitness to practice law.

In his brief to us, respondent's counsel argued that there was no conflict of interest because respondent represented both Gonzalez and De Montoya only in the pre-complaint phase of the litigation and because, as soon as he learned that Gonzalez might have been negligent, he withdrew from De Montoya's representation.

As to respondent's signing De Montoya's name on the complaint, counsel argued that there had been no deception because respondent believed that he had De Montoya's authorization to do so. Counsel added that respondent's intent was to protect her cause of action from a statute of limitations problem.

Counsel argued further that, under the circumstances, to label respondent's failure to prosecute De Montoya's complaint gross negligence or lack of diligence is unfair because, had he done so, "he would have placed himself squarely in the center of a conflict of interest." Counsel noted that RPC 1.7(b)(4) ("notwithstanding the existence of a concurrent conflict of interest . . . a lawyer may represent a client if . . . the representation does not involve the assertion of a claim by one

client against another client represented by the lawyer in the same litigation . . . ."), which became effective on January 1, 2004, would "place such a conflict beyond client waiver." Counsel noted further that, even in 2002, "when the *pro se* complaint was filed and the adversarial relationship between De Montoya and Gonzalez commenced, respondent could hardly have passed the reasonable belief test of then RPC 1.7(b)(1) in order to represent both parties."

As to the failure-to-communicate charge, counsel maintained that respondent's conduct in that regard was relatively minor, blaming De Montoya for not personally contacting respondent until 2006. Counsel pointed out that De Montoya moved frequently, without providing respondent with her new addresses.

Counsel urged us to impose a reprimand, suggesting that this case should be treated as "incidental" to respondent's prior offenses.

Following a de novo review of the record, we are satisfied that the DEC's finding that respondent was guilty of unethical conduct was fully supported by clear and convincing evidence. We are unable to agree, however, with all of the DEC's findings.

We will first address the conflict-of-interest charge. The complaint alleged that respondent engaged in a conflict of interest by representing Gonzalez, the driver, and De Montoya,

the passenger, without "obtain[ing] the informed written consent of both grievant and Gonzales in connection with his representation of them." As seen from the factual recitation, this dual representation lasted from November 2000, when respondent was retained, until at least 2006, when De Montoya had a meeting at respondent's office. Despite respondent's assertion that, after he became aware of a potential liability on Gonzalez' part, he discontinued De Montoya's representation, the evidence shows otherwise.

To recap, after De Montoya retained respondent, in November 2000, respondent's associate tried to settle the case, unsuccessfully. In April 2001, Garcia, respondent's receptionist, prepared and notarized a power of attorney for De Montoya. In September 2002, respondent's associate sent a letter to De Montoya in Spain, asking for some information, which included a declarations page from her policy and medical treatment in the last five years. By that time, respondent was aware of Gonzalez' potential liability and, therefore, of a conflict of interest. Yet, the dual representation continued.

In September 2002, respondent's office prepared and filed a complaint on behalf of Gonzalez. In October 2002, respondent's office prepared and filed a complaint on behalf of De Montoya, naming Gonzalez as one of the defendants. Notwithstanding that

respondent signed De Montoya's, not his, name on the complaint and that, throughout this record, he characterized it as a "pro se" complaint, the preparation of the complaint and its filing clearly constituted legal work on De Montoya's behalf.

After the filing of the complaint, other actions by respondent's office amounted to legal work on De Montoya's behalf. For example, in April 2003, respondent's secretary asked De Montoya to sign another power of attorney because, in De Montoya's words, "there's [sic] always negotiations between the insurance and the parties." Additionally, the office continued to receive requests for information about De Montoya's case, some of which the office answered and some of which it did not. By respondent's own admission, while De Montoya was in Spain, she would call the office every few months; she left five or six messages for him, up to 2006. He did not return those calls. In 2005, however, a friend of De Montoya called respondent's office to inquire about the progress of the case and was told that a court date still had not been set. Again, all of these acts, which post-dated respondent's discovery of a conflict, are clear indications of a continuing legal representation of De Montoya's interests.

In 2000, the year that respondent was retained by both Gonzalez and De Montoya, RPC 1.7 provided, in relevant part:

> (a) A lawyer shall not represent a client if the representation of that client

> will be directly adverse to another client unless:
>
> (1) the lawyer reasonably believes that representation will not adversely affect the relationship with the other client; and
>
> (2) each client consents after a full disclosure of the circumstances and consultation with the client . . .
>
> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client . . . unless:
>
> (1) the lawyer reasonably believes that representation will not adversely affect the relationship with the other client; and
>
> (2) the client consents after a full disclosure of the circumstances and consultation with the client . . .

In 2004, the rule was revised as follows, in pertinent part:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is a significant risk that the representation of one or more clients

> will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> . . . .
>
> (4) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.

Under paragraph (b) of the new rule, thus, the simultaneous representation of a passenger and a driver, when there are issues of liability on the part of the driver, is prohibited because such a situation poses an incurable conflict of interest.

Although paragraph (b) of RPC 1.7 was adopted in 2004, that per se prohibition pre-dated the adoption of the rule. In 1968, the Supreme Court issued a Notice to the Bar, 91 N.J.L.J. 81 (February 8, 1968), providing as follows:

> The Supreme Court is of the view, because of the inherent conflict of interest in the situation, that an attorney should not represent both the driver of a car and his passenger in an action against the driver of another car, unless there is a legal bar to the passenger suing his own driver, as for example, where they are husband and wife, unemancipated child and parent, or employees of the same employer and the accident occurred in the course of their employment. Where an attorney does represent both a driver and his

> passenger and no such legal bar exists, if a crossclaim is made by the other driver, a conflict of interest arises and the Supreme Court has advised the Assignment Judges that the attorney should not be permitted to continue to represent either the driver or his passenger [emphasis added].[5]

Two years later, N.J. Advisory Committee On Professional Ethics Op. 188 (November 12, 1970)[6] addressed the propriety of the representation of both driver and passenger of one vehicle against the driver of another vehicle, when the driver and passenger have agreed that they do not intend to sue one another for damages suffered in the collision and will sign appropriate waivers. The committee held that such proposed representation is improper, notwithstanding consent. The committee reasoned:

> Where a passenger is injured, the passenger . . . has a possible claim against the driver. The facts at the trial may bring this out even though the parties believe to the contrary at the interview . . . . [T]he rule cannot be based upon the attorney's judgment of facts. Public policy precludes an exception by waiver and consent. Should conflict develop, the attorney who undertakes to act for several plaintiffs must retire from all representations with

[5] Subsequently, the Supreme Court "eliminated the doctrines of spousal and parent-child immunity in automobile accident cases [citations omitted]." Kevin H. Michels, New Jersey Attorney Ethics, §19:2-1 at 417 (2012). The Court issued a Notice to the Bar to that effect. Notice to the Bar, 93 N.J.L.J. 712 (October 8, 1970).

[6] This decision will refer to the New Jersey Advisory Committee on Professional Ethics as "the committee" and to its opinions as "Opinion," followed by the opinion number.

> consequent delay, interruption of proceedings and expense [emphasis added].
>
> We hold that consent and waiver do not permit an attorney to represent two or more parties who may have potential claims against one another arising out of the same transaction.

As early as 1968, thus, the bar was on notice that the dual representation of passenger and driver is prohibited, despite the apparent absence of liability on the part of the other driver. Only when the liability of the other driver is obvious may an attorney represent both passenger and driver. See also Opinion 248 (January 25, 1973) Opinion 253 (April 19, 1973), and Opinion 613 (May 19, 1988).

In this instance, the conflict emerged at the outset of the representation. As the committee held in Opinion 188, once a passenger is injured in a collision, the passenger has a potential claim against the driver, despite the parties' belief to the contrary at the interview with the lawyer and despite the lawyer's judgment of the facts. Dual representation is, thus, prohibited, as is the continuing representation of one of the parties. In such situations the lawyer "must retire from all representations." Opinion 188.

In fact, counsel for respondent conceded as much, at oral argument before us. The following exchange took place between a Board member and respondent's counsel:

HONORABLE JUDGE GALLIPOLI: With regard to -- at that particular point when one is aware of the fact that there may be a claim against -- the passenger's claim against both drivers, correct?

MR. DUGAN: Right.

HONORABLE JUDGE GALLIPOLI: At that particular point is there an obligation to withdraw from both cases?

MR. DUGAN: Well, it would depend on if the -- the lawyer had obtained information from -- in this case he was going to keep the -- the driver as the client because he could --

HONORABLE JUDGE GALLIPOLI: How do you keep either one of them at that particular point? You have to give up both, don't you?

MR. DUGAN: Not necessarily. It depends --

HONORABLE JUDGE GALLIPOLI: Why not?

MR. DUGAN: Well, it depends on whether you're going to be using information in the client that you retain and keep –

HONORABLE JUDGE GALLIPOLI: If you –

MR. DUGAN: -- against the party that – that you are entrusted to hold -- let me back up. We're talking at that point if the lawyer withdraws from the representation -- let's say the passenger. The passenger is now a former client under RPC 1.9, correct?

HONORABLE JUDGE GALLIPOLI: Who is suing a present client.

MR. DUGAN: Correct.

> HONORABLE JUDGE GALLIPOLI: Not a conflict?
>
> MR. DUGAN: For the lawyer to continue to represent the driver of that car?
>
> HONORABLE JUDGE GALLIPOLI: Yes. Yes. The person who is being sued.
>
> MR. DUGAN: Yes. I think I'd concede that that's a conflict.
>
> . . . .
>
> HONORABLE JUDGE GALLIPOLI: And then if — if one should have given up both, one never should have filed the pro se complaint on behalf of the passenger.
>
> [BT10-6 to BT12-14.][7]

Counsel then posed the question of what an attorney should do, in such circumstances, when one of the clients is unavailable to be informed about the lawyer's withdrawal from the case:

> MR. DUGAN: Well, then that -- that leads to the second point in the -- in the discussion and that's, what do you do in a situation like that? What -- what should he do now that he has -- he didn't foresee that he would lose contact with the client that went to Spain.
>
> HONORABLE JUDGE GALLIPOLI: Why not hire another lawyer or consult another lawyer to take the case?

[7] BT refers to the transcript of oral argument before us.

MR. DUGAN: He did try that.

HONORABLE JUDGE GALLIPOLI: Okay.

MR. DUGAN: He did try that right on the verge of the statute of limitations running, and, see, that's the pressure that was upon him, what do I do. I mean, that's what -- why this is a great law school question. What -- what would he do at that point? Perhaps he would have -- should have been more cautious in taking the cases, to begin with, but here he is, the statute is running. He cannot because of the conflict of interest file suit on behalf of the passenger, as the lawyer for the passenger, with a cross-claim against his other client. You can't do that, that's a conflict. So what does he do? I submit to you that what he did do was creative and it's probably reasonable, given the emergency that he was faced with. He felt responsibility for this client, couldn't reach her, couldn't get another attorney to represent her, the statute is about to run, he wanted to preserve her cause of action, so he came up with the idea of doing it for her pro se.

MS. FROST: But didn't he have a power of attorney from somebody else? So why didn't he go to the -- first of all, we know -- we're at the point where maybe he shouldn't have done this because he has the conflict. So putting that aside, he files this complaint, he signs her name and he said because I can't reach her, but he has somebody who has a power of attorney, who theoretically could reach and if not, could sign her name. Am I missing something?

> MR. DUGAN: No, you're not missing something, and I -- I don't know the answer to whether that person was available. It may be that he went into the very last moment to start thinking about this and maybe she wasn't available to him. He did have this verbal telephone conversation with the client in which he claims that she said he could sign her name. So he did. The imperfection of what he did is obvious. I mean, he should have said her name by his name, attorney in fact. He didn't do that. He didn't follow proper power of attorney format. But I would submit to you that that's itself not an unethical act. It's a -- it's a mistake. It's not the way it's supposed to be done . . . .
>
> [BT12-15 to BT14-17.]

The answer to counsel's question is apparent. As the Board Vice-Chair pointed out, Urbina could have signed the complaint. As early as April 2001, respondent was aware of Urbina's address, which, coincidentally, was in the same town as his office address, Paterson. Urbina's address was listed on the power of attorney signed by De Montoya. If, on October 31, 2002, when respondent signed De Montoya's name on her complaint, Urbina's address was no longer the same, then respondent could have obtained it from De Montoya. By October 2002, he knew De Montoya's current address and telephone number in Spain. She had given it to his office a mere two months before, on August 9, 2002. If that inquiry had produced no results, then respondent

could have conducted a diligent search of his own. Nothing in the record indicates that he did so. In fact, when respondent was asked, at the DEC hearing, why Urbina had not signed the complaint, he replied, "The only thing I can think of is that [my associate], who was handling the file at the time, wasn't able to get in touch with her. That was basically the only reason." Absent from the record are details of any efforts that respondent's office might have made to find Urbina.

More significantly, even if respondent had conducted a careful investigation of Urbina's address but had come up empty-handed, the one thing that he could not have done was to continue to act as De Montoya's lawyer. Yet, that is precisely what he did, when he drafted and filed her complaint. Instead, he could have informed the court of the circumstances, including his alleged inability to get in touch with De Montoya, and sought the court's guidance.

In sum, because we find that the evidence clearly and convincingly establishes that respondent represented both Gonzalez and De Montoya, starting in 2000, and continued to do so (at least as to De Montoya) until 2006, we conclude that he violated the Supreme Court directive and Opinion 188, as well as RPC 1.7(b)(4).

On the other hand, we tend to agree with respondent's counsel that to find respondent guilty of lack of diligence and gross neglect is inequitable, under the circumstances. When a lawyer runs afoul of the rules prohibiting the representation of parties with adverse interests, to impose a duty of care on the lawyer who undertook the prohibited representation would seem to somewhat condone what, to borrow an expression from the criminal law, is an ethics malum prohibitum. In other words, it would weaken the per se prohibition rule.

If that is so, then how do we ascribe responsibility to respondent for the fact that De Montoya's claim was not pursued and that, as a consequence, her interests were left unprotected from the moment that he recognized a conflict until the dismissal of her complaint? More properly, we view his inaction in De Montoya's case as a consequence of the conflict of interest in which he entangled himself. It is an unfortunate illustration of the inherent perils in representing parties with colliding interests. According to respondent, once he saw a conflict, he kept one of the clients and ceased the representation of the other. Realizing that to remain involved in De Montoya's case would "place himself square in the middle of a conflict of interest," he did not prosecute it and did not act diligently to obtain alternative attention to her potential

claim. We view his passiveness more as the hazardous and painful result that conflict of interest situations produce and, therefore, a factor that aggravates respondent's conduct, rather than a neglect of the client's well-being. We hesitate to prescribe a duty to diligently prosecute a claim that a lawyer is prohibited from pursuing in the first place.

The complaint also charged respondent with violating RPC 1.4(b) and (c), which, prior to 2004, were designated as RPC 1.4(a) and (b), respectively. Although it may have been difficult to reach De Montoya after she left the country, respondent admitted that he received five or six messages from her, from 2000 to 2006 or 2007. Respondent admitted that he did not return De Montoya's telephone calls and did not inform her that her case had been dismissed. He, therefore, violated RPC 1.4(b). He also violated RPC 1.4(c) because, once he found out about Gonzalez's possible liability, he failed to explain the circumstances to De Montoya, in detail, so that she could make an informed decision on how to proceed.

On the other hand, we do not find that respondent's signing of De Montoya's name on the complaint was deceitful. Although the complaint, on its face, would lead anyone to conclude that De Montoya herself had signed it and was filing it pro se, respondent's conduct, although improvident and misguided, was

aimed at preserving De Montoya's claim within the statute of limitations. Although he made a misrepresentation, he was not moved by ill motives. We, therefore, find that it does not rise to the level of conduct requiring discipline.

Finally, we are aware that respondent's depression has been a factor in his life since approximately 1980. In respondent's last disciplinary matter, we considered his depression as a mitigating factor. Because, however, we are not finding respondent guilty of lack of diligence (RPC 1.3), we did not consider the causal connection between his depression and his lack of diligence, a nexus that Crain labeled as "probable."

We now turn to the question of the appropriate form of discipline for respondent's infractions.

An admonition or a reprimand usually results when attorneys engage in the simultaneous representation of driver and passenger. See, e.g., In the Matter of Andrys S. Gomez, DRB 03-203 (September 23, 2003) (admonition for attorney who represented three passengers and the driver of a vehicle involved in an accident; the attorney also exhibited gross neglect and lack of diligence, and failed to communicate with her clients); In the Matter of Victor J. Horowitz, DRB 01-091 (June 29, 2001) (admonition by consent for attorney who filed a complaint for personal injury damages on behalf of the driver

and four passengers of a vehicle allegedly involved in an accident); In re Soto, 200 N.J. 216 (2009) (reprimand for attorney who represented the driver and the passenger in a personal injury action arising out of an automobile accident; the attorney was also guilty of gross neglect, lack of diligence, failure to communicate with one of the clients, and failure to prepare a contingent fee agreement; no ethics history); and In re Barone, 180 N.J. 518 (2004) (reprimand by consent for attorney who represented driver and passenger in two separate automobile cases, allowed the two complaints to be dismissed as a result of his negligence and lack of diligence, and failed to communicate with one of the clients; mitigating factors considered).

In other types of conflicts of interest, it is well-settled that, absent egregious circumstances or serious economic injury, a reprimand is the appropriate discipline. In re Berkowitz, 136 N.J. 134, 148 (1994). Accord In re Olivo, 189 N.J. 304 (2007); In re Mott, 186 N.J. 367 (2006); In re Poling, 184 N.J. 297 (2005); In re Schnepper, 158 N.J. 22 (1999); and In re Kessler, 152 N.J. 488 (1998).

Discipline greater than a reprimand has routinely been imposed where egregious circumstances are present or serious economic harm has resulted from the attorney's actions. See,

e.g., In re Agrait, 207 N.J. 33 (2011) (censure for attorney who represented a buyer and seller in a real estate transaction without obtaining informed, written consent from the clients and subsequently represented the seller in litigation instituted against him by the buyer; the discipline was enhanced because of aggravating factors: the attorney failed to either notice or disclose the existence of a lien to the buyer, who then suffered "serious financial injury" by having to satisfy a $7,000 lien against the property and the attorney had an ethics history, which included an admonition and a reprimand); In re DeClemente, 201 N.J. 4 (2010) (three-month suspension for attorney's misconduct in two matters; the attorney created a conflict of interest by negotiating a real estate contract on behalf of the buyer and seller and engaged in a business transaction with clients by purchasing two condominium units without disclosing his role in the transaction as lender and landlord; the attorney also made misrepresentations to the clients by silence and by actively misleading them about his role; in the second matter, he made misrepresentations and was guilty of conduct prejudicial to the administration of justice; aggravating and mitigating factors were considered); In re Fitchett, III, 184 N.J. 289 (2005) (three-month suspension for attorney who represented a public entity, incapable of consenting to the conflict, and then

accepted a position with a firm that represented the entity's adversary; the attorney was guilty of switching sides; aggravating factors included the entity's loss of over $1 million, its responsibility for repayment of outstanding loans, and the attorney's prior reprimand); In re Guidone, 139 N.J. 272 (1994) (three-month suspension; the attorney, who was a member of the Lions Club and represented the Club in the sale of a tract of land, engaged in a conflict of interest when he acquired, but failed to disclose to the Club, a financial interest in the entity that purchased the land, and then failed to fully explain to the Club the various risks involved with the representation and to obtain the Club's consent to the representation; a three-month suspension was imposed because the conflict of interest "was both pecuniary and undisclosed"); and In re Swidler, 205 N.J. 260 (2011) (six-month suspension in a default matter; the attorney was guilty of engaging in a conflict of interest in a real estate matter by representing the buyer and seller without obtaining their informed written consent, grossly neglecting the matter by failing to file the seller's mortgage, engaging in recordkeeping violation by depositing the sellers check for realty transfer fees into his business account, perpetrating a fraud by subsequently representing the buyer in the sale of the same property to the

buyer's father, failing to disclose to the father's title insurance company that there was an open mortgage on the property, and failing to cooperate with disciplinary authorities; the attorney's ethics history included a reprimand and a three-month suspension).

Were this respondent's first disciplinary matter and absent any economic harm to De Montoya, a reprimand might have been adequate discipline. But there are serious aggravating factors that require consideration. Specifically, as a result of the impermissible conflict of interest, De Montoya's claim was left unattended and her judgment against respondent remains unsatisfied. Additionally, respondent has a prolific disciplinary record: a 2006 admonition for misconduct in three matters; a 2007 reprimand for misconduct in one matter; a 2008 censure for misconduct in six matters; and a 2009 three-month suspension for misconduct in four matters. This is his fifteenth ethics matter. There are no mitigating factors.

After consideration of the extent and nature of respondent's conduct in this case and the factors that serve to aggravate it, we agree with the DEC that the appropriate measure of discipline is a three-month suspension. We determine that the suspension should be consecutive to respondent's prior suspension, which expired on January 23, 2010.

Were it not for the fact that respondent's present transgressions occurred during the same time frame as his prior ones, the imposition of a six-month suspension would have been warranted for his failure to learn from his past mistakes.

We also determine that respondent should not be reinstated until all matters pending against him have been resolved and until he provides proof of fitness to practice law by an OAE-approved mental health professional. If feasible, the pending matters should be consolidated for resolution.

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
Louis Pashman, Chair

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

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Joseph J. Lowenstein
Docket No. DRB 12-090

Argued: June 21, 2012

Decided: August 31, 2012

Disposition: Three-month suspension

Members	Disbar	Three-month suspension	Reprimand	Dismiss	Disqualified	Did not participate
Pashman		X				
Frost		X				
Baugh		X				
Clark		X				
Doremus		X				
Gallipoli		X				
Wissinger		X				
Yamner		X				
Zmirich		X				
Total:		9				

Julianne K. DeCore
Julianne K. DeCore
Chief Counsel