SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 06-212
District Docket No. I-04-06E

IN THE MATTER OF	
FRANK G. OLIVO	
AN ATTORNEY AT LAW	

Decision

Argued: September 21, 2006

Decided: November 16, 2006

Bonnie Laube appeared on behalf of the District I Ethics Committee.

David DeClement appeared on behalf of respondent.

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

This matter initially came before us on a recommendation for an admonition filed by the District I Ethics Committee (DEC), which we determined to bring on for oral argument. The grievance stems from respondent's representation of one party in

a business transaction and his subsequent representation of the opposite party in a lawsuit arising from the same transaction. For the reasons expressed below, we determine that respondent should be reprimanded.

Respondent was admitted to the New Jersey bar in 1979. He maintains an office for the practice of law in Hammonton. Respondent has no disciplinary history.

The record in this matter is not entirely clear with respect to dates and general timeframes. Moreover, although the parties stipulated to certain facts, they, too, are somewhat unclear. We, therefore, recite the facts in a manner that we believe best conveys what happened.

Grievant John McGill owned a Mullica Hill restaurant called the Moonlight Cabaret. He also owned a company called Metcar Hospitality Services, Incorporated (Metcar). Steven Fondacaro owned a company called ADKS Corporation (ADKS).

On April 27, 2001, ADKS and Metcar entered into a plenary retail consumption license purchase agreement (the agreement), which was drafted by Gary Levin, the attorney for McGill and Metcar. Attorney William Cappuccio represented ADKS and Fondacaro. Respondent, who did not represent either party, was not involved in the preparation or execution of the agreement.

According to the agreement, ADKS, which owned a liquor license issued by the Township of Mullica (the Township), was to sell the license to Metcar for $50,000. Metcar placed a $10,000 deposit into Cappuccio's trust account. The agreement provided that, if Metcar defaulted, ADKS was to retain $5000 of the escrowed funds and return $5000 to Metcar. If ADKS defaulted, the $10,000 was to be returned to Metcar.

On May 18, 2001, upon Levin's referral, McGill met with respondent to discuss the purchase of the liquor license. As to what transpired at this meeting, McGill's and respondent's recollections differed.

According to respondent's testimony, McGill asked him if he handled liquor license transfers. Respondent said yes and then explained "what was going to be required to get the liquor license transferred." He also explained his hourly fee and told McGill that he would need copies of certain documents. McGill gave Fondacaro's telephone number to respondent, who stated that he would communicate with Fondacaro and Cappuccio "to try to determine what, if anything, I could do for [McGill]."

On the day of the May 18, 2001 meeting, McGill wrote a $500 check to respondent, which — according to respondent — represented payment for his time in "looking at the status of

the liquor license" and seeing "what [was] needed to transfer a liquor license." Respondent never presented McGill with a bill detailing the time spent on this preliminary work.

According to McGill's version, however, when he told respondent that he wanted to have the liquor license transferred to the "Moonlight Cabaret," respondent stated that he had done "hundreds of them so it shouldn't be a problem" and that the license would be on McGill's property within thirty to ninety days. McGill repeatedly denied that respondent had told him that he had to investigate whether the liquor license could be transferred.

McGill testified that, when he met with respondent, he imparted confidential information to him, including personal background information, on the belief that he had a confidential relationship with respondent. According to McGill, the $500 check represented a partial retainer. Respondent did not provide him with a fee agreement.

McGill testified that, in addition to initially meeting with respondent, he spoke to respondent several times about the transaction. According to McGill, he "lost track of how many times [he] called [respondent's] office . . . and got into

screaming matches with him and his secretary concerning this matter."

Contrary to the terms of the agreement, ADKS did not own the liquor license. When the agreement was executed, a company called TMDQ owned the license. According to respondent, after his meeting with McGill, Fondacaro and Cappuccio provided him with "voluminous materials," which confirmed that the license was not in Fondacaro's name.

Respondent testified that, to place the license in a position consistent with the agreement, he had to make two liquor license applications to Mullica Township: one that reflected Fondacaro's ownership interest in TMDQ, followed by one in the name of ADKS. Thus, the representation "really had to be on the seller's side of the transaction." However, because, by this point, respondent had discussed the matter with both McGill and Fondacaro, he believed that he "need[ed] a waiver of conflict." Thus, on July 24, 2001, respondent wrote the following letter to McGill, McGill's wife, and Fondacaro:

> Dear Mr. Fondacaro and Mr. and Mrs. McGill:
>
> This office has been requested to provide legal services relative to the securing of a liquor license issued by the Township of Mullica, License No.: 0117-33-010-010. This license is held in the name of TMD, Inc.

[sic] in which Steven A. Fondacaro is a corporate officer and stockholder.

The liquor license is also the subject of a purchase and sale agreement between Steven A. Fondacaro and John and Nadia McGill wherein the respective parties were represented by independent counsel.

This office was originally contacted by Mr. and Mrs. McGill for the purpose of securing the license, which was held by a defaulting creditor of Mr. Fondacaro. I have now been requested to provide further legal services in connection with the transfer of the liquor license from TMD, Inc. [sic] to Steven A. Fondacaro and ultimately into the proposed purchaser or his assignee.

The code of professional responsibility prohibits duel [sic] representation under certain circumstances unless all parties are fully aware of the issues, which exist and could arise as a result of the duel [sic] representation. A waiver of conflict of interest may be given in order to accomplish a common goal to both parties.

In this instance it appears that Fondacaro and McGill have a common goal in effecting a transfer of the license from TMD, Inc. [sic] to Steven A. Fondacaro, which would then place the license in a position for sale consistent with the agreement. In order for this office to continue in this representation, a Waiver of Conflict of Interest is required and I am specifically requesting each party execute a Waiver of Conflict of Interest in order for me to continue with representation.

I also wish to advise that any Waiver of Conflict of Interest should be a voluntary

> act on your part and you may wish to consult with independent counsel prior to executing the Waiver.
>
> Should you feel that a Waiver of Conflict is desirable, I would appreciate your executing the enclosed Waiver and returning it to this office in the self addressed stamped envelope I have provided.
>
> Should you have any questions relative to the above, please do not hesitate in contacting this office.
>
> [Ex. P-4]

As seen below, notwithstanding this letter, respondent later claimed that he had never represented McGill or any of his companies. McGill, in turn, testified that, at the time of July 24, 2001 letter, "[t]here was no doubt in my mind [respondent] was representing me." McGill, his wife, and Fondacaro signed the waiver, which identified the conflict as "any conflict of interest which may exist with the representation by FRANK G. OLIVO, ESQUIRE in the liquor license transfers for License NO.: 0117-33-010-010 issued by the Township of Mullica." In signing the waiver, McGill understood that respondent was going to represent him and Fondacaro with respect to the transfer of the liquor license.

By the time of the July 24, 2001 letter, respondent testified, he "had been now inundated with information from both

sides." According to respondent, the scope of what he had been asked to do was to "get the license in a position to get it transferred so Mr. McGill could get a license at his location." Respondent claimed that he was "not doing it on behalf of anybody." Rather, he "was consulted for the purpose of what needs to be done to get it done."

Respondent testified that he sent the July 24, 2001 letter because, at that time, "the only person that [he] actually had any conversation with where there was compensation was Mr. and Mrs. McGill." Therefore, he could not "proceed on behalf of Mr. Fondacaro who actually needed the work done unless Mr. McGill would consent to waive the conflict since he had come in to talk to me." Moreover, respondent continued, the waiver was necessary so that, if he did represent Fondacaro, Fondacaro would not be able to raise the conflict issue on the ground that respondent had previously spoken to McGill.

On July 27, 2001, after McGill had signed the waiver, respondent wrote the following letter to him:

> This letter shall confirm our telephone conference wherein I advised that Mr. Fondacaro will require an attorney to get the license in a position to transfer it to a third party.

> This can not be done from your side of the transaction as the problem is Mr. Fondacaro's. Notwithstanding this, you have requested that I do what needs to be done.
>
> I have provided you with a Conflict of Interest Waiver letter and you have signed the waiver. I will therefore proceed to represent the license holder and a retainer agreement will be entered with Mr. Fondacaro, if he is in agreement.
>
> You advised that you do have an attorney who did the contract should the need arise.
>
> Should you have any questions in this regard, please do not hesitate in contacting this office.
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> [Ex.P-6.]

According to McGill, despite the contents of this letter, he still believed that respondent was representing him "[t]hrough the entire situation." In fact, on the same date of the letter, McGill paid respondent an additional $800, which, according to McGill, represented payment of respondent's total $1300 charge for services.

Respondent testified that the purpose of the waiver was not to allow him to represent both McGill and Fondacaro. Rather, he "had taken information from both of them, and if they didn't both agree to the waiver, [he] didn't feel as though [he] could represent either of them."

Respondent believed that the July 27, 2001 letter to McGill clearly stated that he would represent Fondacaro, if that was what Fondacaro wanted. Neither McGill nor his wife ever questioned respondent about the letter. Moreover, according to respondent, McGill had "several attorneys," including Levin. Thus, "if [McGill] thought he needed an attorney throughout the process, that [sic] he had plenty of them on his side that would represent him."

With respect to McGill's $800 payment, respondent could not commit to its true purpose. On the one hand, he testified that "there were discussions they were going to share in the cost of the fees." Thus, the $800 "was actually a part of the – of Mr. McGill's responsibility under the agreement of getting the license resolved with Mr. Fondacaro." By "agreement," however, respondent did not mean the purchase agreement. Instead, he meant a contract between McGill and Fondacaro for the release of $2500 in escrow funds and in which they agreed to share the cost "of the legal expense of getting the license transferred." However, although McGill paid $800 on July 27, 2001, the agreement was not signed until August 9, 2001. On the other hand, respondent speculated that the $800 could have been

applied to a $1600 credit on respondent's August 24, 2003 bill to Fondacaro.

The August 9, 2001 agreement between Fondacaro and Metcar provided for the release of $2500 in escrow funds so that Fondacaro could buy the liquor license that he did not own and transfer it to McGill pursuant to the purchase agreement.[1] To accomplish this task, Fondacaro and Metcar agreed to "share in legal + other costs," up to $1750.

Respondent testified that, after he wrote the July 27, 2001 letter to McGill, Fondacaro decided to retain him. On August 15, 2001, respondent entered into a fee agreement with Fondacaro, who paid him a $1750 retainer. The services to be provided were identified as "[l]iquor license transfers within the Township of Mullica."

In a December 19, 2001 letter, respondent told Levin that the Mullica police department would not allow the transfer of a liquor license to an entity controlled by McGill. According to McGill, the Moonlight Cabaret was "not capable of having a liquor license for reasons unknown." Thereafter, Fondacaro and

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[1] According to a May 21, 2003 letter from McGill to respondent, the $2500 represented additional legal fees that were paid to respondent.

respondent asked the Township if the license could be located at the Moonlight Cabaret "under concessionaire's agreement." When the Township declined, Fondacaro made an "in pocket" application.

On January 18, 2002, respondent wrote to McGill and requested that he stop calling respondent's office seeking legal services. In the letter, respondent stated that he could "no longer render" legal services to McGill and "decline[d] any representation" on McGill's behalf. According to respondent: "I knew what he wanted and I knew what Mr. Fondacaro wanted. It seemed like they both wanted the same thing. I couldn't represent both sides at the same time."

Attorney Igor Sturm testified that he represented McGill and his wife regarding "their problems in obtaining the transfer of the license." Sturm was aware of nothing that would disqualify McGill from holding a liquor license, so he speculated that the reason was that the Township "had something against" McGill. Sturm never communicated with the Township on behalf of McGill.

In June 2002, Marie Jantus and her company, MAJN Enterprises, applied to the Township for a liquor license. Sturm, who also represented Jantus, explained that she was a

friend of the McGills, who wanted to help them "save the property," that is the Moonlight Cabaret. Jantus planned to own the liquor license, while the McGills would continue to run the restaurant. Sturm prepared Jantus's application for the liquor license and communicated with the Township in that regard. It appears that, in late 2002 or early 2003, Metcar assigned to MAJN its rights under the agreement with ADKS.

McGill testified that, sometime in 2003, but before McGill assigned Metcar's right to MAJN, Fondacaro sued him for the release of the $7500 remaining on deposit in Cappuccio's trust account (the Fondacaro v. McGill matter). Fondacaro testified that he sued McGill because McGill was not accepting certified letters, and it appeared to Fondacaro that he had abandoned the property. Thus, Fondacaro believed that McGill had "thr[own] in the towel on this liquor license transfer." Fondacaro filed the action pro se. Respondent claimed to be unaware of it.

On April 9, 2003, the court ordered the release of the $7500 to Fondacaro. Cappuccio turned over the funds, which Fondacaro used to pay attorney fees and other expenses. Later that month, McGill retained attorney Keith Smith, who demanded that Fondacaro return the money to Cappuccio.

On May 21, 2003, McGill and his wife wrote to respondent and placed him "on notice that a conflict of interest exists" with respect to his representation of Fondacaro in a matter arising out of criminal complaints that Metcar and MAJN had filed against Fondacaro. Nevertheless, respondent continued to represent Fondacaro in the criminal matter.

In June 2003, Smith filed suit against Fondacaro seeking specific performance under the agreement (the Metcar v. ADKS matter). Apparently, notwithstanding the assignment, if the deal did not go through, the escrow monies were to be returned to McGill. If the deal went through, then Metcar would pay the balance due under the contract. Respondent represented Fondacaro in the specific performance action.

Also during the month of June 2003, Smith and respondent exchanged several letters on the issue of McGill's claim that respondent had engaged in a conflict of interest. The issue was not resolved.

On July 14, 2003, McGill wrote to respondent and asked him to remove himself from the liquor license matter because he "felt that what was gone [sic] on wasn't fair to me. I hired him to work for me, not to work for Mr. Fondacaro." When asked whether he understood that the July 2001 waiver had entitled

respondent to represent Fondacaro, McGill answered: "I was under the impression that Mr. Olivo was going to handle a one liner as far as that waiver was concerned. He would just handle that one part of the contract and then he would go on to work with me, but that's not what happened."

In August 2003, the court entered an order in the Fondacaro v. McGill matter, vacating the April 9, 2003 order, requiring that the $7500 released to Fondacaro in April be placed into respondent's trust account, and dismissing the case with prejudice. The order also provided that all "further issues" would be resolved in the Metcar v. ADKS matter. This matter was then settled by stipulation in November 2003. Respondent signed the stipulation on behalf of ADKS.

Following the settlement, disputes arose over compliance with its terms. Respondent represented Fondacaro in the negotiations that followed. Smith represented McGill.

McGill testified that MAJN/Jantus never obtained the license. Moreover, by 2003, McGill had lost interest in the transfer. Ultimately, Fondacaro sold the license to an attorney named Charles Indyg. Respondent represented Fondacaro in the transaction. It is not clear whether the $7500 was returned to McGill.

Smith, who represented McGill in both state court actions, testified that Fondacaro and McGill "were absolutely adverse parties" in the two lawsuits. Fondacaro wanted to terminate the contract with McGill so that he could sell the license to a different party, while at the same time claiming that he wanted specific performance.

Smith stated that McGill never waived the conflict. To the contrary, he "continually demanded" that Smith "present it," which Smith did "a couple of times," although he never filed a motion. In any event, respondent never terminated his representation of Fondacaro.

Respondent outright denied that he had ever represented McGill or any of his companies. Respondent testified that he billed Fondacaro on a periodic basis. In this case, he never sent the McGills a bill because he "never did anything for them beyond the initial work that I did" and because he had "no agreement to provide legal services with Mr. and Mrs. McGill." Indeed, he added, between the July 2001 letter and November 2003, McGill was represented by several attorneys.

While respondent maintained that he never represented any of McGill's companies, he also admitted: "To the extent I

accepted money from Mr. McGill, yes, that would be a representation."

Respondent conceded that McGill had requested his withdrawal from the Fondacaro representation, but explained that he "didn't think there was a conflict of interest." He did not believe that there was a conflict in the Metcar litigation against Fondacaro because Metcar should not have been a named plaintiff. By the time of the settlement conference, respondent explained, McGill no longer had an interest in the liquor license because he had assigned his rights to Jantus and MAJN.

Respondent admitted that an attorney cannot "represent someone typically on both sides of the transaction." Moreover, he conceded that McGill and Fondacaro had "competing interests" when Fondacaro filed his pro se lawsuit against McGill.

The DEC found that respondent represented McGill. Although the formal ethics complaint did not allege a violation of RPC 1.5(b), the DEC found that respondent violated that rule by failing to provide McGill with a fee agreement.

The DEC also determined that respondent engaged in a concurrent conflict of interest when he represented both McGill and Fondacaro with respect to the transfer of the liquor license, inasmuch as Fondacaro/ADKS did not own the liquor

license and, therefore, the two clients' "legal interests were not in common." Despite this conclusion, the DEC found no violation of RPC 1.7 because respondent had obtained a waiver of the conflict from each client.

The DEC concluded, however, that respondent did violate RPC 1.7 when he represented Fondacaro in the litigation with McGill. The DEC found that the waiver signed by McGill was not broad enough to encompass "an adversarial position to Mr. McGill in litigation involving the subject matter." The DEC deemed McGill's assignment of Metcar's right under the agreement to MAJN irrelevant to a finding of conflict of interest because Metcar continued to have an interest in the performance of the agreement. Having found that McGill continued to be respondent's client during the litigation, the DEC concluded that respondent violated RPC 1.7 when he represented Fondacaro in the litigation with McGill.

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

RPC 1.5(b) provides: "When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated in writing to the client before or within a

reasonable time after commencing the representation." That McGill was a client is unquestionable. Despite respondent's protestations to the contrary, he did ultimately admit that, in fact, he had represented McGill. Indeed, McGill paid respondent $500 at their first meeting and then later an additional $800. Respondent's explanation concerning what the $800 represented was not plausible, particularly because he speculated that it was payment required by an agreement that was not reached until thirteen days later. Moreover, in January 2002, respondent wrote to McGill and expressly stated that he could "no longer render" legal services to him.

Because respondent had never represented McGill prior to their first meeting, on May 18, 2001, RPC 1.5(b) required him to provide McGill with a written fee agreement. As the DEC correctly found, respondent's failure to do so violated RPC 1.5(b).

The DEC also correctly determined that respondent improperly represented Fondacaro in the litigation with McGill. However, the DEC mistakenly concluded that, in doing so, respondent violated RPC 1.7. The rule governs conflicts of interest between existing clients. Here, however, respondent ended McGill's representation prior to the litigation, in a

letter dated January 18, 2002. In that letter, respondent clearly stated: "I must respectfully decline any representation on your behalf." At this point, whether McGill liked it or not, he had become respondent's former client. RPC 1.9, thus, is the controlling rule. That rule provides, in pertinent part:

> (a) A lawyer who has represented a client in a matter shall not thereafter:
>
> (1) represent another client in the same or a substantially related matter in which that client's interests are materially adverse to the interests of the former client unless the former client consents after a full disclosure of the circumstances and consultation with the former client[.]

Here, as the DEC found, the litigation involved a substantially-related matter, inasmuch as the lawsuit sought to establish the rights of the parties under the agreement. As such, the interests of Fondacaro (respondent's current client) were "materially adverse" to McGill's (his former client). Respondent never sought McGill's consent to this adverse representation. Accordingly, he violated RPC 1.9(a) when he undertook Fondacaro's representation.

As the DEC also found, the July 2001 waiver signed by McGill did not waive all conflicts as to all time. It was clearly limited to any conflict that would arise with respect to

the "liquor license transfers," which first included the transfer of the license to ADKS, the ownership of which Fondacaro had misrepresented in the agreement.

To conclude, respondent violated RPC 1.5(b) and RPC 1.9(a)(1). There remains for determination the quantum of discipline to be imposed for these ethics breaches.

Since 1994, it has been a well-established principle that a reprimand is the measure of discipline imposed on an attorney who engages in a conflict of interest. In re Berkowitz, 136 N.J. 148 (1994). Accord In re Mott, 186 N.J. 367 (2006) (reprimand for conflict of interest imposed on attorney who prepared, on behalf of buyers, real estate agreements that provided for the purchase of title insurance from a title company that he owned; notwithstanding the disclosure of his interest in the company to the buyers, the attorney did not advise buyers of the desirability of seeking, or give them the opportunity to seek, independent counsel, and did not obtain a written waiver of the conflict of interest from them); and In re Poling, 184 N.J. 297 (2005) (reprimand imposed on attorney who engaged in conflict of interest when he prepared, on behalf of buyers, real estate agreements that pre-provided for the purchase of title insurance from a title company that he owned –

a fact that he did not disclose to the buyers, in addition to his failure to disclose that title insurance could be purchased elsewhere).

If the conflict involves "egregious circumstances" or results in "serious economic injury to the clients involved," then discipline greater than a reprimand is warranted. Berkowitz, supra, 136 N.J. at 148. See also In re Guidone, 139 N.J. 272, 277 (1994) (reiterating Berkowitz and noting that, when an attorney's conflict of interest causes economic injury, discipline greater than a reprimand is imposed; 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 (1) fully explain to the Club the various risks involved with the representation and (2) obtain the Club's consent to the representation; the attorney received a three-month suspension because the conflict of interest "was both pecuniary and undisclosed").

In special situations, we have imposed admonitions on attorneys who have violated the conflict of interest rules post-Berkowitz and Guidone. See, e.g., In the Matter of Cory J.

Gilman, 184 N.J. 298 (2005) (attorney admonished for an imputed conflict of interest (RPC 1.10(b)), among other violations, based upon his preparation of real estate contracts for buyers requiring the purchase of title insurance from a company owned by his supervising partner; in imposing only an admonition, we noted the following "compelling mitigating factors": this was his "first brush with the ethics system; he cooperated fully with the OAE's investigation, and, more importantly, he was a new attorney at the time (three years at the bar) and only an associate"); In the Matter of Frank Fusco, DRB 04-442 (February 22, 2005) (in admonition by consent matter for violation of RPC 1.7(a), we noted that the attorney, who represented the buyer and seller in a real estate transaction without their consent, "did not technically engage in a conflict of interest situation" because no conflict ever arose between the parties to the contract; special circumstances were (1) the attorney did not negotiate the terms of the contract but merely memorialized them; (2) the parties wanted a quick closing "without lawyer involvement on either side;" (3) the attorney was motivated by a desire to help friends; (4) neither party was adversely affected by his misconduct; (5) the attorney did not receive a fee for his services; and (6) he had no disciplinary record);

In the Matter of Carolyn Fleming-Sawyerr, DRB 04-017 (March 23, 2004) (attorney admonished for, among other things, engaging in a conflict of interest (RPC 1.7(b)) when she collected a real estate commission upon her sale of a client's house; in mitigation, we considered the attorney's unblemished fifteen-year career, her unawareness that she could not act simultaneously as an attorney and collect a real estate fee, thus negating any intent on her part to take advantage of the client, and the passage of six years since the ethics infraction); In the Matter of Andrys S. Gomez, DRB 03-203 (September 23, 2003) (admonition for attorney who, among other things, engaged in a conflict of interest (RPC 1.7(b), RPC 1.9(a)(1)) when he represented both driver and passengers in a motor vehicle accident; we noted "as mitigating circumstances the significant measures" taken by the attorney "to improve the quality of [his] practice"); In the Matter of R. Tyler Tomlinson, DRB 01-284 (November 2, 2001) (admonition for violation of RPC 1.7(b) when attorney, who represented the plaintiffs in a contract matter, did not discuss defendant's settlement offer with clients and conditioned resolution of the matter on the defendant's parents' withdrawal of a grievance that had been filed against the attorney, thus preventing

settlement from being reached; in mitigation, we considered the client's affidavit stating that she would not have settled the case in any event if the grievance were not dismissed and that the attorney had discussed the case with her on several occasions); In the Matter of Victor J. Horowitz, DRB 01-091 (June 29, 2001) (upon motion for discipline by consent, attorney admonished for representing both driver and passengers in an automobile accident, a violation of RPC 1.7; we considered, in mitigation, the attorney's unblemished nineteen-year career); In the Matter of Juan A. Lopez, Jr., DRB 00-340 (January 11, 2001) (admonition imposed on attorney, who also was a Jersey City assistant municipal prosecutor, for representing from 1997 through 1999 a client charged with drug possession, in violation of N.J. Advisory Comm. On Prof'l Ethics Opinion 239, 95 N.J.L.J. 481 (May 18, 1972); in mitigation, we acknowledged that the attorney had been unaware of Opinion 239 and that, after having been made aware of its contents, acknowledged his wrongdoing; we also considered the attorney's sixteen-year unblemished disciplinary record); In the Matter of Sanford Oxfeld, DRB 01-145 (July 3, 2001) (admonition imposed on attorney who engaged in a conflict of interest by imputation (RPC 1.10(a)) when he entered an appearance on behalf of the New Jersey Education

Association (NJEA) and the Glen Ridge School Personnel Association (GRSPA) in a New Jersey Public Employment Relations Commission (PERC) hearing arising out of charges filed by a former client of the attorney's partner, whom the NJEA previously had appointed to represent in a grievance proceeding; the former client called the attorney's partner to testify at the PERC hearing, and, after the partner did so, she assisted the attorney at the PERC hearing, participated in settlement discussions, and, then, based upon her former attorney-client relationship with the petitioner, expressed her opinion about the possibilities of settlement); In the Matter of Anton Muschal, DRB 99-381 (February 4, 2000) (admonition imposed on attorney who represented a client in the incorporation of a business and renewal of a liquor license and then filed a suit against her on behalf of another client, a violation of RPC 1.7 and RPC 1.9(a)(1); in imposing only an admonition, we noted the attorney's unblemished twenty-four-year career); and In the Matter of Jeffrey E. Jenkins, DRB 97-384 (December 2, 1997) (admonition for attorney who engaged in a concurrent non-litigation conflict of interest by continuing to represent husband and wife in a bankruptcy matter after the parties had developed marital problems and had retained their own

matrimonial lawyers; in imposing an admonition, we noted the attorney's lack of malice, the lack of a pattern of improper conduct, his thirteen-year untarnished disciplinary record, and his cooperation with disciplinary authorities).

In the face of our admonitions over the years, we were reminded by the Court, just one year ago, that Berkowitz is alive and well and that, absent strong mitigation, a reprimand is the lowest degree of discipline for a conflict of interest. In re Fitchett, 184 N.J. 289 (2005). In that case, we were divided on the appropriate measure of discipline for the attorney's multiple conflicts of interest that arose when he (1) continued to represent a public entity in litigation with the defendant, Kemi Laboratories, Inc. (Kemi), after he had become employed by Kemi's law firm and (2) filed a suit on behalf of Kemi against the public entity. The majority believed that a reprimand was appropriate because there was insufficient evidence that respondent's misconduct caused the claimed economic injury to Kemi. The dissenting minority believed that a three-month suspension was the proper measure of discipline to be imposed for the conflicts because "respondent's overall conduct reflected an extreme indifference to Kemi's interests and to our Rules of Professional Conduct." In addition, the

dissenting members considered as an aggravating factor the testimony that Kemi lost over $1 million.

The Supreme Court agreed with the dissenting members and imposed a three-month suspension upon the attorney. In re Fitchett, supra, 184 N.J. at 290. In its order, the Court cited Berkowitz and noted that "a suspension has been required when a conflict of interest visits serious economic injury on the client or when the circumstances are egregious." In Fitchett, the attorney was suspended because the "circumstances of [his] conflict of interest [were] egregious" and his misconduct was "blatant and gross." Id. at 290-91.

Thus, Fitchett's pronouncement that the circumstances underlying the attorney's misconduct were "egregious" and constituted a "blatant and gross ethical breach" worthy of a suspension once again reaffirmed the Court's original pronouncement in Berkowitz: absent egregious circumstances or serious economic injury, a reprimand is the minimum measure of discipline to be imposed for a conflict of interest. Yet, compelling circumstances may reduce the threshold measure of discipline to an admonition, although not in this case. This is not the case of an attorney who violates the conflict of interest rules because of unfamiliarity with them. Here,

respondent's knowledge of the rules was evident from the beginning, when he prepared a written waiver for McGill and Fondacaro to sign. Later, he was certainly mindful of McGill's claim that he was immersed in conflict of interest situations. Nevertheless, respondent persisted in his representation of Fondacaro. In that sense, his conduct differed from the attorney in Muschal. In that matter, nothing in the letter of admonition alludes to the attorney's refusal to bow out from the representation of a party with interests inimical to those of the other client, as here. An admonition thus, is inadequate in this case.

The additional violation arising out of respondent's failure to provide McGill with a written fee agreement does not necessarily warrant an increase in the discipline. Ordinarily, a single violation of RPC 1.5(b) results in an admonition. See, e.g., In the Matter of Louis W. Childress, Jr., DRB 02-395 (January 6, 2003), and In the Matter of Joseph Taboada, Jr., DRB 01-453 (March 15, 2002). An admonition may result even if the violation is accompanied by other, non-serious infractions. See, e.g., In the Matter of John S. Giava, DRB 01-455 (March 15, 2002) (attorney violated RPC 1.5(b), failed to communicate with the client, and failed to abide by the client's decision

concerning the objectives of the representation); and In the Matter of William J. McDonnell, DRB 02-131 (June 21, 2002) (attorney failed to provide a written fee agreement and submit billings to his client for legal fees removed from trust account funds).

For respondent's conflict of interest and failure to provide a written fee agreement to his client, we determine that a reprimand is the appropriate degree of discipline.

Members Boylan, Stanton, and Wissinger did not participate.

We further require respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Disciplinary Review Board
William J. O'Shaughnessy
Chair

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

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Frank G. Olivo
Docket No. DRB 06-212

Argued: September 21, 2006

Decided: November 16, 2006

Disposition: Reprimand

Members	Disbar	Suspension	Censure	Reprimand	Admonition	Did not participate
O'Shaughnessy				X		
Pashman				X		
Baugh				X		
Boylan						X
Frost				X		
Lolla				X		
Pashman				X		
Stanton						X
Wissinger						X
Total:				6		3

Julianne K. DeCore
Julianne K. DeCore
Chief Counsel