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SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 00-042

IN THE MATTER OF

GILBERTO GARCIA

AN ATTORNEY AT LAW

Decision

Argued: April 13, 2000

Decided: June 12, 2000

John D. Lynch appeared on behalf of the District VI Ethics Committee.

Respondent waived appearance before the Board.

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

This matter was before us on a recommendation for discipline filed by the District VI Ethics Committee ("DEC"). The formal complaint charged respondent with conflict of interest, in violation of *RPC* 1.7 and *RPC* 1.9, and sharing a fee with a nonattorney, in violation of *RPC* 1.8 (more appropriately *RPC* 5.4).

Respondent was admitted to the New Jersey bar in 1987. He has no disciplinary history. He maintains a law office in Union City, Hudson County, New Jersey.

Many of the facts in this matter are not disputed. Respondent acknowledged that he engaged in a conflict of interest situation by representing both Fidel Fraguela (the grievant) and his wife, Amneris, in property litigation, while simultaneously representing Fidel in divorce proceedings against Amneris. Respondent, however, denied the remaining charges.

Respondent's Representation of Fidel in Divorce Proceedings

In 1990 respondent filed a breach of contract action on behalf of Fidel and Amneris, who were married at the time, against a real estate developer. The action sought the return of a $39,000 deposit. While that litigation was pending, respondent represented Fidel in divorce proceedings against Amneris. Respondent appeared in court as Fidel's attorney on June 21, 1991, when the parties' property settlement agreement was placed on the record. He also signed the property settlement agreement and a consent to the entry of the final judgment of divorce. Respondent's answer stated as follows with respect to his representation of Fidel:

> A conflict of interest existed since Respondent was representing both parties in the contract litigation at the time. The contract action was a totally unrelated matter to the matrimonial proceedings and Respondent did not obtain any confidential information during this representation that was adverse to Ms. Fraguela other than the fact that a $39,000.00 deposit had been made to secure a unit.
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> After full explanation of the circumstances to Ms. Fraguela and her attorney, William Shulman, Esq., they both agreed to Respondent's representation of Grievant. The parties further agreed, to avoid conflicting interests, they would split equally any proceeds from the contract litigation which requested rescission of the agreement and return of the deposit in the amount of $39,000.00. . . .
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> [Notwithstanding] Respondent's good faith in intending and eventually effectuating a fair and reasonable settlement for the benefit of Grievant, Respondent recognizes and admits engaging [sic] a conflict of interest in this representation. While respondent failed to recognize such conflict at the time of the representation, after extensive research on the matter in preparation for

this Complaint, Respondent admits he should not have accepted to represent Grievant in his divorce.

[Answer at 4-5]

Respondent's Representation of Amneris

Notwithstanding his representation of Fidel in the divorce, after the final judgment of divorce had been entered – from 1991 to 1994 – respondent represented Amneris, *pro bono*, in several other matters. Specifically, he (1) defended a lawsuit filed by Horizon Leasing, the lessor of an automobile leased by Amneris; (2) negotiated payment of Amneris' credit card debt; and (3) negotiated a secured debt that Amneris had incurred with the Federal Deposit Insurance Corporation. All of the above debts were later discharged in bankruptcy.

As a result of Fidel's failure to comply with the property settlement agreement, Amneris was unable to pay the maintenance fees for the cooperative apartment in which she resided with her minor daughter. In 1994 the Doric Apartment Corporation filed an action seeking possession of the property. Respondent also represented Amneris in this litigation and, in addition, filed three bankruptcy petitions in her behalf. According to respondent, the bankruptcy petitions were filed under emergent circumstances to delay the eviction because Amneris did not have the time or the money to retain bankruptcy counsel. The first petition, filed August 24, 1995, was dismissed for lack of prosecution. Respondent filed a second bankruptcy petition under Chapter 13 of the bankruptcy code, with the understanding that he would not continue to represent Amneris because the success of the Chapter 13 plan depended on the enforcement of the property settlement agreement against Fidel. Respondent recognized that he could not represent Amneris in enforcement proceedings against Fidel. He filed a third petition, this time under Chapter 7, seeking liquidation of

Amneris' debts. Respondent maintained that his actions were appropriate, particularly since he was trying to prevent the eviction of Amneris and her minor daughter. Amneris was, however, eventually evicted.

In his answer, respondent contended that his representation of Amneris did not amount to a conflict of interest:

> Under bankruptcy laws, it is not the duty of Respondent to enforce the arrears owed by Grievant since the assets is [sic] fully exempt and in most matrimonial matters, the Bankruptcy Court allows the state court to continue with jurisdiction. Therefore, the Chapter 7 petition filed on behalf of Amneris Fraguela was not adverse to the interests of Grievant and the information included in the petition regarding the arrears is a matter of public record and was not obtained during Respondent's representation of Grievant.
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> [Answer at 12]

Respondent acknowledged at the ethics hearing that Amneris' inability to pay her debts, particularly the cooperative maintenance fee, resulted from Fidel's failure to comply with the property settlement agreement. He further conceded that, at the time that he represented Amneris, he knew that Fidel and Amneris were engaged in post-judgment matrimonial litigation. Respondent, however, denied the existence of a conflict of interest, claiming that the matters were not related.

Motivated by a sincere desire to assist Amneris, respondent did not perceive the conflict inherent in the situation. He failed to foresee the possibility that Fidel would not abide by the property settlement agreement, in which case he would have compromised his ability to represent Amneris with the required degree of fidelity because of his expected loyalty to his other client, Fidel. Although respondent was well-intentioned, he obviously could not serve two masters.

On August 13, 1996 respondent filed a motion to withdraw as counsel in the *Doric Apartment* litigation, claiming that he would have to be a witness both in that litigation and

the post-judgment matrimonial proceedings between Fidel and Amneris. In his certification filed in support of the motion, respondent alleged as follows:

> The reason for my request is that, upon information and belief, I reasonably believe that Fidel Fraguela has committed a fraud upon a judicial tribunal, namely the United States Bankruptcy Court and the United States Trustee by failing to disclose certain financial information in his bankruptcy petition. This conduct can constitutes [sic] a federal crime and I feel, as an attorney and as a citizen, it is my duty to attempt to prevent it and/or remedy it.
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> * * *
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> In or about March of 1996, . . . Amneris Fraguela informed me that she could not comply with a bankruptcy plan and was left carrying the load of all the debts Fidel Fraguela had once promised to pay for. Amneris Fraguela informed me that Fidel Fraguela had filed for bankruptcy and had discharged all the debts, including his share of the maintenance payments for the Doric Apartments.
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> To my amazement, I confirmed that Fidel Fraguela had filed for bankruptcy relief under Chapter 7 of the Bankruptcy Code in April, 1994 . . . As evidenced by the copy of the petition filed by Fidel Fraguela, he discharged the debts for the very same apartments and their maintenance that he agreed to pay for under Exhibit C, a Court Order from the Honorable John J. Grossi, Jr.
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> [Exhibit G-5 at 1-2, 11]

In his certification, respondent also stated that, pursuant to the property settlement agreement, Fidel was responsible for indemnifying Amneris for the maintenance charges that she had been unable to pay, resulting in her eviction from the apartment. Respondent asserted that, in February or March 1994, after Fidel had contacted him about filing a bankruptcy petition on his behalf, he had advised Fidel of the requirement to disclose all of his assets in the bankruptcy petition, including two contingent business agreements with a potential value of $845,000, furniture, art objects, jewelry and life insurance policies. Respondent claimed that he further informed Fidel that failure to disclose all of his assets could result in Fidel's criminal prosecution.

Through other counsel, Fidel filed a bankruptcy petition and discharged his debts. Respondent alleged in the certification that Fidel committed a fraud on the bankruptcy court by failing to reveal the existence of his contingent agreements, one of which developed and had a value of more than $750,000. Respondent further asserted in the certification that, after the filing of the bankruptcy petition, Fidel had bought a luxury condominium unit in Miami Beach in the name of a third party and had leased a Mercedes-Benz automobile in his new wife's name. Respondent also contended that Fidel had received $4,800 per year in cash for rental of an apartment that he did not own. The certification further stated as follows:

> It is extremely unfortunate that Amneris Fraguela faces eviction from her apartment when Fidel Fraguela, who has agreed to pay for this debt, fails to do so and is living in a three bedroom condominium in he [sic] Galaxy Apartments, a luxury condominium complex, with a maid, driving two Mercedes-Benz automobiles and with income of at least $5,000 per week, is able to skirt his obligations to his ex-wife and his daughter by having filed a bankruptcy petition and having received a discharge exclusively as a result of his fraudulent conduct in failing to disclose assets that are sufficient to pay all his creditors, including his ex-wife Amneris Fraguela.
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> Fidel Fraguela while living a luxurious life style, continues to owe Amneris Fraguela $40,000 in back alimony and child support . . .
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> I ask this Court an [sic] all the other Courts that will be reviewing this matter not to be deceived by the appearance that Fidel Fraguela will attempt to project. He will come to court dressed in raggedy clothes and will cry poverty. He has done it successfully on previous occasions. He will also refuse to speak English. I have seen Fidel Fraguela negotiate with extremely educated and sharp businessmen and he has been as sophisticated and machiavelical [sic] as any other person I have ever known.
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> [Exhibit G-5 at 22-23]

At the DEC hearing, Fidel testified that, although he was aware that respondent represented Amneris in some matters, there were other instances of which Fidel was unaware. Fidel denied having consented in writing to respondent's representation of his former wife. He stated that, while respondent was representing Amneris in the bankruptcy

and other matters, Amneris had, through another attorney, filed a motion against him to enforce the property settlement agreement.

Amneris, in turn, testified that she and her attorney did not object to respondent's representation of Fidel in the divorce proceedings. She also contended that, at the end of the divorce proceedings, respondent proposed representing her in the car lease, credit card and *Doric Apartment* matters and that neither Fidel nor her attorney had objected. Amneris acknowledged that one of the reasons she filed for bankruptcy was Fidel's failure to pay the support payments that had been negotiated by respondent on Fidel's behalf.

Respondent's August 26, 1994 Agreement with Fidel

Respondent represented Fidel and his corporation, Spanish Buying Service, Inc., in various commercial matters. Fidel operated an advertising and public relations business.[1] Respondent assisted Fidel in the negotiation of advertising contracts with various radio and television stations. In addition, in June 1993, respondent filed a civil racketeering and breach of contract action in federal court on behalf of Adriano Garcia, a friend of Fidel, against Spanish Broadcasting System, Inc. ("SBS"), the operator of several Spanish language radio stations and against its principal, Raul Alarcon, individually. Fidel also did business with SBS.

Much of the testimony about these events was at odds. Fidel testified that he had referred Adriano to respondent and that respondent had agreed to pay Fidel ten percent of his fees for the referral and for his assistance in the case. Fidel stated that, because respondent had estimated Adriano's recovery to be $3.8 million, his fee would be $1.0

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[1] Respondent also had a business relationship with Fidel, dating back to 1991. Respondent purchased advertising from Fidel.

million dollars. Fidel, thus, expected to receive ten percent of $1.0 million, or $100,000, from respondent. Respondent, however, denied having been retained by Adriano with Fidel's assistance, having been introduced to Adriano by Fidel, claiming that he had met Adriano during a trip to Miami. Respondent also denied having promised to pay Fidel a referral fee.

It is undisputed that, at one point, Fidel learned that SBS had estimated the value of Adriano's lawsuit to be $4.0 million. In the spring of 1994, Fidel gave respondent a copy of a bond-offering memorandum issued by SBS, acknowledging an unsecured debt of $4.0 million to Adriano. bond-offering memorandum indicated that $4.0 million had been placed in escrow to satisfy that debt (Exhibit R-6). Because Adriano had considered settling the litigation for $1.5 million, the information supplied by Fidel proved to be very valuable to both respondent and Adriano. Fidel also gave Adriano other relevant information about his own business dealings with SBS.

Fidel testified that he and respondent entered into an August 26, 1994 agreement, in which respondent promised to him $90,000 for the *Adriano* referral and for his assistance in that litigation (Exhibit G-2). According to Fidel, respondent told him that, because a "split commission" was prohibited, he would "legalize" the transaction. Fidel stated that respondent paid him $10,000 as a draw against the $90,000.

The agreement contains contradictory provisions with regard to whether respondent, through his law firm, Garcia and Kricko, agreed to pay Fidel a fee or instead agreed that the client, Adriano, would compensate Fidel. The agreement provides as follows:

> Fidel Fraguela is to receive the sum of $90,000.00 (investigative compensation) from the law firm of Garcia & Kricko . . . The sum of $90,000 is unilaterally offered by Garcia & Kricko as compensation for Fraguela's aid. Garcia & Kricko is not obligated in any way nor has ever agreed to provide Fraguela with any compensation whatsoever for his aid in the prosecution of

this matter and it is clearly stated and understood by the parties that the sum stated herein is not part of any contract or fee agreement between Garcia & Kricko and Fraguela, and that such unilateral offer is contingent upon Garcia & Kricko obtaining a judgment in the amount sued upon and notwithstanding this document, such offer can be revoked at any time. . . .

While Gilberto M. Garcia recognizes that Fidel Fraguela has been an instrumental part in the aid of the prosecution of the Garcia v. SBS matter, it is not obligated to pay Fidel Fraguela any monies from the fees the law firm of Garcia & Kricko will receive from any settlement or judgment, and that any payments, if made under the provisions of this agreement, will be made, upon the agreement of Adriano Garcia, as professional fees for acting as informant and for aiding in the investigation of the allegations made in this matter. It is clearly recognized by all parties that Fidel Fraguela will not share from the fees of the law firm of Garcia and Kricko since (1) he is not entitled and (2) such practice is prohibited by the rules of professional conduct regulating the practice of law. Any fees which Fraguela may receive from any settlement or judgment proceeds will be taxed as costs to Adriano Garcia.

[Exhibit G-2]

In addition, Fidel had supplied information about SBS to a competitor, Heftel Broadcasting Company ("Heftel"), for which Heftel had paid Fidel. The August 24, 1994 agreement also provided that Fidel would act as respondent's agent in procuring performance of promises that Heftel had previously made to respondent. Presumably, Heftel had failed to honor these promises. The agreement stated that, in exchange for unspecified assistance that respondent had given Heftel, Heftel had promised respondent radio time of one hour per week on Sunday mornings for a four-year period. According to the agreement, upon the execution of a non-revocable contract between Heftel and respondent, Fidel would receive $60,000 as a public relations fee. The agreement provided that, regardless of Fidel's success in obtaining the contract for respondent's radio show from Heftel, respondent would be obligated to pay Fidel $90,000 for his assistance in the *Adriano* matter.

The following was respondent's version of the events, which differed greatly from Fidel's:

During a meeting in the summer of 1994, Fidel asked both respondent and Adriano for compensation for the information that he had supplied. Adriano told Fidel that, depending on the outcome of the case, he would consider Fidel's request. Thereafter, Fidel continually asked respondent for a written agreement by which Fidel would receive $150,000 for his assistance. According to respondent's answer, in mid-August 1994, after Fidel again requested an agreement, the following transpired:

> Respondent explained to Grievant that he agreed grievant had provided his client with a tremendous amount of help in the case when he gave Respondent and his client the document that stated money was being held to pay Respondent's client [sic] claim. While Respondent recognized Grievant's help, Respondent stated to Grievant that he could not share with Grievant from any potential legal fees he was to receive since doing so was illegal. Respondent informed Grievant that he would draft an agreement that stated that Grievant had aided, and Respondent recognized this aid. Respondent informed Grievant that he would draft a document stating that Respondent did not have any obligations to Grievant to give him anything of value notwithstanding what Grievant might believe entitled him to compensation. Respondent also informed Grievant that the document would state that if Respondent's client approved it and paid for with his own funds, Grievant would receive compensation. . . .
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> The first part of the agreement offers the Grievant, **upon the approval of Adriano Garcia and as costs to Adriano Garcia,** in the event of a settlement of the Garcia v. Spanish Broadcasting Systems, Inc., the sum of $90,000.00. The Agreement is very clear in that Respondent is not obligated to pay Grievant **anything**. Most Significantly, [sic] in the document Respondent goes to great lengths to state that Grievant **is not to share in the fees of Respondent since doing so is prohibited by the Rules of Professional Conduct**. Respondent did this because Grievant wanted Respondent to pay him without the need for Adriano Garcia to agree to the payment to Grievant to which Respondent refused since doing so constitutes unethical and criminal conduct. The Agreement clearly states it.
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> The payment was to be made, if a settlement or award was procured and more significantly, if Adriano Garcia agreed, for Grievant's input in the lawsuit as an informant. (Original emphasis).
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> [Answer at 15-17]

Respondent adamantly denied having engaged in a fee-splitting agreement with Fidel. According to respondent, he advised Fidel that, although it would be unethical for

respondent to pay him a fee, if Adriano agreed, Adriano could compensate Fidel from the litigation proceeds. Respondent acknowledged on numerous occasions, including during his testimony at the ethics hearing, that Fidel's assistance had been very valuable and that he had deserved compensation. Respondent testified that he finally "gave in" to Fidel and prepared the agreement under pressure. Respondent insisted that he tried to carefully draft the agreement to make it clear that he was not sharing his fees with Fidel. Respondent attributed to poor draftsmanship the parts of the agreement that appear to obligate his firm, not his client, to pay Fidel. Respondent asserted that he had drafted the agreement hastily, under intense pressure from Fidel. Respondent stated that, although he had signed the agreement and given it to Fidel, Fidel had refused to sign it and had taken the agreement with him for review. According to respondent, it was only at the ethics hearing that he learned that Fidel had signed the agreement. Respondent stated that, in March 1995, he had notified Fidel that he was revoking the agreement.

Although later, in April 1995, respondent settled the *Adriano* litigation for $3.5 million, Adriano chose not to compensate Fidel. Respondent received a $700,000 fee for the *Adriano Garcia* matter.

Respondent further testified that Fidel did not ask for compensation at the time that Fidel provided information to respondent, because Fidel was also making deals with Heftel. He characterized Fidel's practice as "business espionage," stating that Fidel "played on both sides of the fence." According to respondent, Heftel agreed to pay Fidel $785,000 by offering him five hours of air time per week for three years. Respondent stated that one hour

of air time sells for $1,000. Thus, respondent alleged, Fidel received free air time of five hours per week, which he was able to sell for a weekly gain of $5,000.[2]

As to his August 26, 1994 agreement to pay Fidel $60,000 as a public relations fee, respondent contended that Fidel had estimated the value of the program to be $250,000. Respondent asserted that the $60,000 represented Fidel's twenty-five percent fee for obtaining the radio program for respondent.

If the contingencies in the August 26, 1994 agreement had been met, respondent would have owed Fidel $150,000: $90,000 for the *Adriano* litigation and $60,000 as an agency fee for securing a radio program. This is the same amount that Fidel had requested from respondent as compensation for his assistance in *Adriano*.

Respondent's 1995 Agreement with Fidel

Respondent and Fidel entered into a second agreement. Although the agreement is not dated, it was executed in late May or early June 1995. The agreement provided, in part, as follows:

> Garcia and Kricko has agreed to compensate Fraguela, for his cooperation in the matter entitled Garcia v. SBS, in the aggregate amount of twenty five thousand dollars . . . . Fraguela promises to provide Garcia and Kricko, for one year, 3 commercials per week, at any times from 6:00 a.m. to 11:00 p.m. [Exhibit G-3]

Again, respondent's and Fidel's versions about this agreement are in conflict. Fidel testified that he had sued Raul Alarcon of SBS, the same individual respondent had sued on Adriano's behalf. According to Fidel, respondent agreed to represent him for a ten percent contingency fee. Fidel, thus, contended that he was to receive ten percent of respondent's

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[2] This is the agreement that, according to respondent, Fidel had failed to disclose in his bankruptcy petition.

recovery from the *Adriano Garcia v. SBS* litigation and respondent was to receive ten percent of Fidel's recovery from his lawsuit against Alarcon. Fidel further asserted that respondent agreed to pay him $25,000 toward the $90,000 owed to him, with the balance of $65,000 to be paid after his divorce was final so that Fidel's wife, Amneris, would not receive any portion of those funds.

For his part, respondent claimed that he agreed to buy advertising from Fidel for $25,000. Although respondent asserted that his contract was an arms-length transaction, he conceded that he would not have entered into the agreement if not for Fidel's assistance in the *Adriano Garcia* matter. In other words, respondent contended that, out of gratitude for Fidel's supplying information that was valuable to respondent in the *Adriano* litigation, respondent agreed to buy advertising from Fidel.

Thus, although the agreement plainly stated that respondent would compensate Fidel for his cooperation in the *Adriano* matter, respondent maintained that, in reality, he had agreed to buy advertising from Fidel:

> I know that is a bit tricky. I drafted that agreement and I have to now live by it. I wanted to let him know to the extent, as I am saying here under oath, I believe he deserved something. However, I continued to say it was not my intention to split fees with him.
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> I said look, I recognize what you've done for me. I am going to buy advertisement from you. That is what the agreement says.
> [1T141][3]

When asked why he had agreed to pay Fidel only $25,000, when he had agreed earlier that Fidel was entitled to $90,000, respondent replied that he could not pay more than $25,000. Respondent contended that, after paying his co-counsel's fee and paying taxes on his own $700,000 fee, only $300,000 was left. By contrast, respondent stated, Fidel had

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[3] 1T refers to the December 3, 1998 hearing before the DEC.

received more than $600,000 from SBS and $800,000 from Heftel, for a total of $1.4 million.

Respondent denied having advised Fidel to hide his assets from his wife during the divorce proceedings.

According to respondent, although he paid Fidel $10,000, he never received the commercials. Respondent testified that he took no action against Fidel to recover the $10,000 because he was "tired" of problems with Fidel.

* * *

The DEC found that respondent's representation of Fidel in the divorce proceeding, while the property litigation was pending, violated *RPC* 1.7 and that his representation of Amneris in the eviction proceeding violated *RPC* 1.7 and *RPC* 1.9. The DEC further found that respondent engaged in an impermissible fee-sharing arrangement when he entered into the 1995 agreement and paid Fidel $10,000 . The DEC did not address the August 26, 1994 agreement.

The DEC recommended a reprimand.

* * *

Following a *de novo* review, we are satisfied by clear and convincing evidence that respondent engaged in a conflict of interest and shared fees with a nonattorney.

Respondent conceded that, although he was not aware of it at the time, his representation of Fidel in the divorce proceeding, while representing both Fidel and Amneris

in the real estate matter, constituted a conflict of interest, in violation of *RPC* 1.7. Respondent compounded the situation when, upon conclusion of the divorce matter, he represented Amneris in collection litigation and debt negotiations and filed three bankruptcy petitions in her behalf. We are aware that respondent did not charge Amneris a fee for any of the legal services that he performed for her. We conclude from the record that respondent was motivated by an altruistic desire to help Amneris and, in particular, to prevent her eviction. Despite respondent's apparent good intentions, however, he clearly created a conflict of interest situation, in violation of *RPC* 1.9. The eviction litigation and the bankruptcy petition were related to the divorce proceedings because, according to both respondent and Amneris, Fidel's failure to comply with the property settlement agreement prevented Amneris from paying her debts, including the maintenance fee on her cooperative apartment, forcing her to file for bankruptcy protection.

Moreover, the certification that respondent filed in the *Doric Apartments* litigation was clearly adverse to Fidel, respondent's former client. In that certification, respondent alleged that Fidel had committed fraud in failing to disclose assets in his bankruptcy petition and predicted that Fidel would attempt to deceive the court by pleading poverty and refusing to speak English. In revealing these details, respondent used privileged information obtained during his prior representation of Fidel in the divorce proceedings as well as in other matters, in violation of *RPC* 1.9(2).

Respondent contended that *RPC* 1.6 required him to make the above disclosure. We disagree. *RPC* 1.6(b) requires an attorney to reveal information to prevent a client from committing an act that the attorney reasonably believes is likely to perpetrate a fraud upon a tribunal. Here, Fidel's debts had already been discharged when respondent discovered Fidel's failure to disclose assets. Respondent's certification, thus, could not have prevented

any fraud. *RPC* 1.6(c) permits, but does not require, an attorney to reveal information to rectify a client's fraudulent act in the furtherance of which the lawyer's services had been used. That subsection is not applicable because any fraud committed by Fidel did not involve respondent's services. In addition, if respondent wished to rectify Fidel's fraud for failure to disclose assets, he should have notified the bankruptcy court. Instead, respondent made the allegations in support of a motion to withdraw as counsel in the *Doric Apartments* litigation. Because *RPC* 1.6(c) does not require, but merely permits, an attorney to reveal information to rectify a client's fraudulent act, respondent was not obligated to reveal the information.

With respect to the fee-splitting charge, many of the facts presented were in conflict. Respondent represented Adriano Garcia in a federal civil racketeering and breach of contract action against SBS. It is undisputed that Fidel discovered that the defendant in that litigation valued the case at $4.0 million dollars and had set aside that sum to cover a possible settlement or judgment. It is also undisputed that Fidel shared that information with respondent and his client, Adriano. This information was valuable because Adriano had considered accepting a much lower settlement.

On August 26, 1994 respondent entered into an agreement with Fidel providing that Fidel would receive $90,000 for his assistance in the *Adriano* matter. The agreement is internally inconsistent. It provided that "Fidel Fraguela is to receive the sum of $90,000.00 (investigative compensation) from the law firm of Garcia & Kricko" and that "[t]he sum of $90,000.00 is unilaterally offered by Garcia & Kricko as compensation for Fraguela's aid." However, the agreement also stated that "Garcia & Kricko is not obligated in any way nor has ever agreed to provide Fraguela with any compensation whatsoever for his aid in the prosecution of this matter" and that respondent "is not obligated to pay Fidel Fraguela any

monies from the fees the law firm of Garcia and Kricko will receive from any settlement or judgment, and that any payments . . . will be made, upon the agreement of Adriano Garcia." The agreement specified that Fidel would not share in respondent's legal fees because he was not so entitled and because the *Rules of Professional Conduct* prohibit fee-sharing.

Fidel testified unequivocally that respondent had agreed to pay him $90,000 from his attorneys fees in the *Adriano* matter. According to Fidel, respondent had first promised to pay him ten percent of his share of the recovery and later reduced the amount to $90,000. Fidel contended that the payment was to compensate him for referring Adriano to respondent and for providing information about the case.

Respondent, in turn, denied that Fidel had referred Adriano to him, asserting that he had met Adriano while on a trip to Miami. Respondent vehemently denied that he agreed to share his fees with Fidel. Respondent stated that, after Fidel's incessant requests for an agreement, respondent had "given in" and had prepared the August 26, 1994 document. Although respondent acknowledged that the agreement was not well-drafted, he insisted that his intention was to confirm the understanding that Fidel was to receive compensation only if Adriano agreed and only from Adriano's share of any recovery.

The agreement also provided that respondent would pay Fidel a public relations fee of $60,000 upon Fidel's obtaining for respondent a contract for a radio show with Heftel Broadcasting Services. Thus, if certain contingencies had been met, under the agreement respondent would have been obligated to pay Fidel$150,000, the exact amount that Fidel had requested from respondent.

In May or June 1995 respondent and Fidel entered into a second agreement, whereby respondent agreed to pay Fidel $25,000. Although the agreement characterized the payment

as compensation for Fidel's cooperation in the *Adriano* matter, Fidel was required to obtain for respondent three radio commercials per week for one year.

The testimony about this agreement was also in conflict. Fidel stated that respondent had offered to pay him $25,000 of the $90,000 due under the August 26, 1994 agreement to hide the $65,000 balance from Amneris during the divorce proceedings. In turn, respondent contended that, out of gratitude for Fidel's help in the *Adriano* matter, he had agreed to buy radio commercials from Fidel, as he had done in the past.

Although respondent never received the radio time, he paid $10,000 to Fidel under the 1995 agreement.

As noted earlier, the DEC found that the 1995 agreement and the $10,000 payment constituted a fee-sharing arrangement, in violation of *RPC* 5.4. The DEC's finding was based on (1) the agreement's provision that payment was being made to Fidel for his assistance in the *Adriano* litigation and (2) respondent's $10,000 payment to Fidel, without receiving any radio time in exchange. The DEC did not address the 1994 agreement.

Respondent's explanation was that, because Fidel had been helpful in the *Adriano* litigation, he agreed to buy commercial radio time from him, as he had done in the past. Respondent stated that he had a business relationship with Fidel and had purchased air time from him on prior occasions. Respondent's explanation in this regard was plausible. Although the agreement stated that respondent agreed to compensate Fidel for his cooperation in the *Adriano* matter, it also required Fidel to obtain for respondent three radio commercials per week for one year.

We find that respondent violated *RPC* 5.4. Both the express language of the agreements and Fidel's testimony make it clear that respondent agreed to share his fees with

Fidel. In addition, the 1994 agreement provides Fidel with the exact amount he had requested, tending to show that respondent intended to comply with Fidel's demand.

Another issue warrants mention. As noted above, respondent testified that he had purchased air time and other advertising and public relations services from Fidel. There was no evidence, however, that respondent recommended that Fidel obtain independent counsel before entering into these business transactions. Moreover, respondent testified that he had not advised Fidel to consult with an attorney in connection with either the 1994 or the 1995 agreement. Respondent, thus, entered into business transactions with a client without following the safeguards required by *RPC* 1.8. However, because respondent was not on notice of the charge of entering into a business transaction with a client, we determined not to find a violation of *RPC* 1.8.

Ordinarily, in cases involving a conflict of interest, absent egregious circumstances or serious economic injury to the client, a reprimand constitutes sufficient discipline. *In re Berkowitz*, 136 *N.J.* 134, 147 (1994). On the other hand, in cases involving fee-sharing with a nonlawyer, discipline has ranged widely from a reprimand to a three-year suspension. In *In re Weinroth*, 100 *N.J.* 343 (1985), the attorney returned a portion of his fee to a client, knowing that the client would, in turn, give those funds to a nonlawyer who had referred the client to the attorney's law firm. Finding that the attorney violated the disciplinary rules prohibiting fee-sharing and giving something of value for recommending an attorney, the Court imposed a public reprimand.

Similarly, a public reprimand was imposed in *In re Gottesman*, 126 *N.J.* 376 (1991), for aiding the unauthorized practice of law and sharing fees with a nonlawyer. In that case, an attorney entered into an agreement to pay a personal injury investigator employed by his former law firm a percentage of his fees. In imposing a public reprimand, it was considered,

in mitigation, that the attorney was aware that his prior law firm had entered into a similar arrangement with the investigator, permitting him to perform legal services and paying him a percentage of fees. In addition, it was noted that the attorney compensated the investigator only for cases in which he had performed services, recognizing the impropriety of paying the investigator when little or no services had been provided. Finally, the attorney's unblemished career of seventeen years and the fact that the misconduct had ended eleven years earlier were also taken into account.

In *In re Bregg*, 61 *N.J.* 476 (1972), the attorney acknowledged that he split legal fees with a non-attorney who referred cases to him. Bregg accepted referrals from an individual alleged to be an attorney in Cuba, but not admitted to the bar in any jurisdiction in the United States. He paid the individual a percentage of the fee he received from each referral. In so doing, Bregg violated *DR* 3-102, which prohibited fee-splitting, and *DR* 2-103(B) and *DR* 2-103(C), which forbade attorneys from paying compensation for referrals. Because Bregg was candid and contrite, the Court imposed only a three-month suspension.

In *In re Introcaso*, 26 *N.J.* 353 (1958), the Court addressed the issue of fee-splitting, in conjunction with the use of a "runner" to solicit criminal cases. In that case, the attorney employed a runner to solicit clients, improperly divided legal fees and lacked candor in his testimony. Noting that its "immediate impulse here is to strike respondent's name from the roll of members of the bar," the Court determined to impose a three-year suspension instead, because Introcaso's behavior occurred before the Court's *Frankel* decision. *Id.* at 361. The Court also took into account Introcaso's prior unblemished reputation.

Unlike in the matters discussed above, here respondent did not enter into an agreement to share fees with a nonattorney as a course of conduct. This was an isolated occurrence, not a continuing course of conduct. In mitigation, we noted that respondent was

admitted to the New Jersey bar in 1987 and has enjoyed an unblemished reputation. We were persuaded that his conduct resulted not from venality, but from a basic misunderstanding of the rules governing conflicts of interest. Respondent placed himself in a conflict of interest situation because of a genuine interest in helping others; he was not moved by personal gain or any ill-motive. In particular, respondent wanted to prevent the eviction of Amneris and her young daughter from their apartment.

Based on the foregoing, a five-member majority determined that a reprimand is sufficient discipline for this respondent. Three members dissented, voting for a three-month suspension. One member did not participate.

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

Dated: 6/12/00

By: _____
LEE M. HYMERLING
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY

DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Gilberto Garcia
Docket No. DRB 00-042

Argued: **April 13, 2000**

Decided: **June 12, 2000**

Disposition: Reprimand

Members	Disbar	Suspension (three month)	Reprimand	Admonition	Dismiss	Disqualified	Did not Participate
Hymerling			X				
Peterson			X				
Boylan							X
Brody		X					
Lolla		X					
Maudsley			X				
O'Shaughnessy			X				
Schwartz		X					
Wissinger			X				
Total:		3	5				1

Robyn M. Hill 10/10/00
Robyn M. Hill
Chief Counsel