SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket Nos. DRB 09-270 and DRB 09-271
District Docket Nos. VA-2007-0009E
and VA-2007-0008E

IN THE MATTERS OF

HERBERT J. TAN

AN ATTORNEY AT LAW

Decision

Argued: November 19, 2009

Decided: December 15, 2009

Irvin Freilich appeared on behalf of the District VA Ethics Committee.

Respondent appeared pro se.

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

These two matters were consolidated for hearing at the DEC level. The first involved respondent's conduct toward his adversary and the other party in a lawsuit that respondent was handling for a client. The second involved respondent's alleged mishandling of a client matter. The DEC recommended an admonition for the first matter and a reprimand for the second

matter. We determine to impose one form of discipline for both, a reprimand.

Respondent was admitted to the New Jersey bar in 1998 and to the District of Columbia bar in 2006. He maintains a law office in Newark, New Jersey.

On October 17, 2006, respondent received a reprimand for violating RPC 8.1(a) (knowingly making a false statement of material fact in connection with a bar admission application) and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) for falsely stating, on his bar application, that he had earned a bachelor's degree, when he was one course shy of that degree. In determining that a reprimand was sufficient discipline, we considered that respondent and his fiancée were facing health problems at the time, that he twice attempted to rectify the problem -- although he failed to follow through for fear of discovery -- that his misrepresentations were the result of poor judgment and inexperience, and that the offense had occurred more than eight years earlier. In re Tan, 188 N.J. 389 (2006).

DRB 09-270; District Docket No. VA-2007-0009E (ADMONITION)

This matter came before us on a recommendation for an admonition filed by the District VA Ethics Committee ("DEC").

The complaint charged respondent with violating RPC 3.4(g) (threatening to present criminal charges to obtain an improper advantage in a civil matter) and RPC 8.1(b) (failure to reply to a lawful demand for information from a disciplinary authority).

The grievance in this matter arose from civil litigation pending in Essex County, in which respondent represented plaintiff Bartolome Tan (of no relation) ("Tan") in connection with a claim for wrongful termination of employment against Tender Touch Health Care Services ("Tender Touch"). At the relevant time, Sally Howe, a partner in the labor employment department of the Fox Rothschild law firm, was the trial attorney representing Tender Touch. Howe is no longer affiliated with Fox Rothschild. Tender Touch was a client of Fox Rothschild partner Jonathan Weiner, the grievant in this matter.[1]

According to Howe, respondent filed a claim against Tender Touch under the Conscientious Employee Protection Act ("CEPA"), known as "the Whistleblower Act," as well as other common law claims, alleging that Tan had been discharged in retaliation for having complained to Tender Touch about its allegedly fraudulent billing practices to Medicare.

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[1] Weiner submitted to us exceptions to the hearing panel report. He also filed with the OAE a response to the report. Exceptions may be filed by the parties to the proceedings, that is, the presenter and the respondent (or the respondent's counsel).

The controversy surrounding this disciplinary matter centers around a September 20, 2006 email that respondent sent to Howe. The email stated as follows:

> After conversing with my client, he is willing to accept $150,000 to settle this matter. As you are aware, Mr. Tan has lost approximately $20,000.00 annually in salary and benefits over the past 4 years. Furthermore, Ms. Ko [another Tender Touch employee] will corroborate your clients [sic] practice of "padding their bills". Finally, I have counseled my client not to begin any communications with OIG [the Office of the Inspector General, United States Department of Health and Human Services], until this matter is settled.
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> [Ex.1.]

At the time that respondent sent the email, litigation was pending and settlement negotiations had just begun.

According to Howe, when she first read the email, she was "shocked." She understood the email "to be a threat," that is, if Tender Touch did not settle the matter, Tan would contact the OIG to start an investigation that might lead to the filing of criminal charges against Tender Touch. Howe believed that Tan's allegations were without merit.

The contents of the email angered Tender Touch. It, therefore, refused to settle the case. Tender Touch informed Howe that it had not been contacted by the OIG in connection with any investigation.

Howe replied to respondent's email later that day:

> We demand that your September 20, 2006 email, below, be withdrawn immediately. Your settlement is nothing more than an explicit threat and an ethical violation. We will not respond to same.
> If you do not retract it immediately, we will proceed with a complaint to the District Ethics Committee for Essex County.
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> [Ex.2.]

Respondent replied to Howe's email the evening of September 20, 2006: "Based on YOUR review of the offer, rather than debate such with you, I will withdraw our offer below. With that said, my client requests a settlement of $175,000." Respondent explained that the increase in the settlement demand had been prompted by Tan's incensed reaction to Howe's email and by Tan's belief that Tender Touch was dragging its feet, "sand bagging him on this case." Tan wanted respondent to increase his settlement demand to show Tender Touch that he was serious about his case. Respondent did so in the second email to Howe, requesting an additional $25,000.

Respondent acknowledged that, in retrospect, Howe could have interpreted his email as a threat, but he insisted that was not his intent. He believed that Howe had overreacted to his email.

In his reply to the grievance, respondent explained to the DEC investigator the intent behind his email to Howe:

[T]he Plaintiff's wife, Mary Glenn Tan, who is also a physical therapist, had already filed a claim with the Office of Inspector General regarding Tender Touch's practice of padding the bills. When I was informed of such, I was concerned that my client would become too talkative. I advised the Plaintiff not to talk to anybody regarding his claim until we either settled the case or took the matter to trial. I had no dealings with his wife's separate charge against Tender Touch. Therefore, the statement is factual, in that I advised my client not to communicate with OIG until after the conclusion of the case.
Ms[.] Howe's reading of the statement as a threat actually shocked me since it was never intended in that manner.

[Ex.4.]

Respondent stated that, although both Tans had worked together and the wife, also a physical therapist, "knew the billing practices," he did not know whether the wife had worked at Tender Touch.

Howe testified that she had no knowledge of the filing of an OIG complaint by Tan's wife and that, as Tender Touch's trial counsel, the filing would have come to her attention, had there been one. Howe added that, if the wife had, in fact, filed an OIG complaint, that would have been irrelevant because the wife was not involved in Tan's litigation.

As of the date of the DEC hearing, Howe's impression of respondent's email had not changed, that is, if she did not agree to

the settlement, Tan would contact the OIG and a possible consequence would be a criminal investigation and/or charge.

At the DEC hearing, respondent reiterated that he never intended to make a threat in his email to Howe. According to respondent, Tan had told him that his wife either planned to or had filed a complaint with the OIG. He had then instructed Tan not to talk to anyone about his claim because Tan's litigation was already pending and he did not want Tan "to make a misstatement," a circumstance that could hurt his case. Respondent did not contact the OIG on Tan's behalf.

Respondent testified that he had discussed with Tan the possibility of filing a qui tam case, which, respondent explained, is civil in nature and puts the government on notice of suspected fraudulent activity.[2] As to fraudulent Medicare

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[2] "The FCA [False Claims Act] establishes a scheme that permits either the Attorney General . . . or a private party . . . to initiate a civil action alleging fraud on the Government. A private enforcement action under the FCA is called a *qui tam* action, with the private party referred to as the 'relator' [citation omitted] . . . . If the United States intervenes, the relator has 'the right to continue as a party to the action,' but the United States acquires the 'primary responsibility for prosecuting the action' . . . . If the United States declines to intervene, the relator retains 'the right to conduct the action' . . . . The United States is thereafter limited to exercising only specific rights during the proceeding. These rights include requesting service of pleadings and deposition transcripts . . . seeking to stay discovery that 'would interfere with the Government's investigation or prosecution of

(Footnote cont'd on next page)

claims, respondent asserted that, once a qui tam case is filed, it is sealed, pending the government's investigation of whether there is merit to the claim; if the claim has merit, the government can pursue either civil remedies or criminal charges.

According to respondent, he neither encouraged Tan to file a criminal complaint nor discussed a qui tam case or criminal prosecution with Tan's wife.

Asked by the presenter if allegations of "padding" Medicare bills could also be brought to the attention of the OIG, respondent replied, "You could also file a Complaint, absolutely." When the presenter asked what the "upshot" would be if the OIG's investigation revealed that the allegations were true, respondent answered, "The upshot [is that] there would be a criminal prosecution against them."

Respondent claimed that his email reference to the OIG was the result of his belief that, during Tan's deposition on September 15, 2006, Tan had mentioned contacting the OIG. Respondent, therefore, wanted Howe to know that his client "was considering that option." Later in his testimony, however,

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(Footnote cont'd)

a criminal or civil matter arising out of the same facts' . . . and vetoing a relator's decision to voluntarily dismiss the action . . . ." United States ex rel. Eisenstein v. City of New York, 129 S. Ct. 2230, 2234 (2009).

respondent recalled that, at Tan's deposition, Tan had testified that he was planning to file a claim with a third party, without specifically mentioning the OIG:

> [Panel Chair] And you stated it's your understanding at the deposition your client provided testimony regarding a potential filing with --
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> [Respondent] He made a reference to it.
>
> [Panel Chair] -- with OIG?
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> [Respondent] Not with OIG. I think Miss Howe had asked were you planning on filing a claim with a third party or something to that reference and that he said he had not yet made the filing at that time but I believe he was contemplating, that's how I remember it to be.
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> [1T37-9 to 21.][3]

The hearing panel's review of Tan's deposition transcript uncovered no reference to Tan's contacting OIG. The following exchange took place between Howe and Tan, at the deposition:

> Q. Had at any point and I mean either while you were employed by Tender Touch or at any point afterwards, did you ever report this billing policy that we've been talking about to any outside agency whether it's a federal agency, a state agency, Medicare,
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> A. Not yet, no.
>
> Q. Why didn't you do that?
>
> A. Because I have a lawsuit.

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[3] 1T refers to the transcript of the January 16, 2009 DEC hearing.

> Q. And what about having a lawsuit made you not go to an outside agency to report this policy?
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> A. I think this will take care – this will take care of it and the fact like at times when I have to go back through it, it gives me a bad feeling.
>
> . . . .
>
> A. Sometimes I would just like to forget about it.
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> [Ex.10-150 to 151.]

Respondent's post-hearing submission to the DEC provided an overview of the False Claims Act, 31 U.S.C. § 3729 et seq., and qui tam actions. There, respondent conceded that the New Jersey Inspector General has the authority to refer a matter to the proper authorities for, among other things, a criminal action. He argued, however, that the OIG does not deal solely with criminal matters and that his statement could not be considered a threat because qui tam litigation is purely civil in nature and "can be effectuated in the State of New Jersey through a complaint with the Office of the Inspector General . . . ." Respondent also argued that, notwithstanding Howe's admission that she was not familiar with qui tam actions, as a partner in a major employment defense firm she should have known that his email was "referring factually" to a qui tam matter.

Respondent finally argued that, because he never had a conversation with Howe regarding any possible criminal charges and because most of their conversations were "congenial," her

immediate reaction to the email "had no factual basis and was clearly an overreaction to an email." He added that, if his intent had been to threaten criminal charges, he would have referred the matter to the "District Attorney" or to a "similar institution."

Following respondent's second email to Howe, in which he increased the settlement demand, discovery in the litigation proceeded. On the eve of trial, Tender Touch filed a motion for summary judgment, which was denied in January 2007. On February 15, 2007, four days before the scheduled trial date, Tender Touch relieved the firm of Fox Rothschild as its counsel. Soon after Fox Rothschild's discharge from the case, respondent reached a settlement with Tender Touch's new counsel.

As to the charge of failure to cooperate with the ethics investigation, although respondent replied to the grievance by letter dated May 3, 2007, he failed to produce his entire files relating to this and to a companion disciplinary matter (Lopez - District Docket No. VA-2007-0008E, also part of this decision) and to let the investigator know when he would be available to be interviewed, as requested by the investigator on three occasions, June 27, August 8, and September 5, 2007. The letters related to both disciplinary matters. The investigator, therefore, served respondent with a subpoena for the files.

Respondent produced the requested files prior to the January 16, 2009 DEC hearing.

By way of explanation for his initial lack of cooperation with the ethics investigator, respondent stated that both grievances had come on the heels of two other disciplinary matters that we had ultimately dismissed and that, upon receiving the grievances, he felt ready to "give up" practicing law:

> [I]n regards to the production of the files, I think one has to also understand the context of the timing. [The investigator/presenter] had, in fact, whether or not we had just concluded or there was a prior Complaint that I had dealt with [the investigator/presenter] on, which made actually to the . . . disciplinary review board . . . .
> Then I received these complaints again and in all honesty at that point I had really -- I just wanted to give up, I mean I thought I had finished with the other issues, I dealt with it as a pro se matter, certainly didn't have enough money to again hire counsel. I have a small office and I was simply overwhelmed at that point. I know I didn't communicate it to him but there was no subpoena requested or issued in this case prior to then, I mean, I guess that's really a secondary issue, I guess it was more my state of mind at the time. In all honesty I wanted to quit at that point. I didn't even want to - - I didn't want to continue practicing. It was just too much for me.
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> [1T29-17 to 1T30-19.]

Respondent explained further that he and his wife were going through a difficult time, that, in January 2007, his wife

began to suffer from post-partum depression, and that, as a result, he had to stay home often to deal with a newborn [their third child] and "a wife whose frame of mind was outside of anything I have ever dealt with."

Respondent submitted a reply to the grievances on May 3, 2007, and produced the subpoenaed files on December 29, 2008.

In determining whether respondent's email violated the ethics rules, the DEC broke down the rule into three prongs: Was the email a threat? Was it a threat involving criminal charges? Was the threat made to obtain an improper advantage in a civil matter? The DEC concluded that the evidence had satisfied the first and the third prongs, but not the second.

Specifically, the DEC concluded that the email was a threat (1) because respondent could not provide a credible explanation for sending the email, in light of his claim that he had relied on Tan's deposition testimony that the unlawful conduct had already been reported to an outside agency; (2) because of "the quick timing of the email string" after Tan's deposition;[4] and (3) because of the absence in Tan's deposition of any discussion about a filing.

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[4] By "string" the DEC meant respondent's two emails to Howe and Howe's response to him.

The DEC did not find, however, clear and convincing evidence that respondent threatened to file criminal charges, presumably because of respondent's argument that his client intended to file a qui tam litigation, which is purely civil in nature, and is accomplished by filing a complaint with the OIG. The DEC also considered respondent's argument that, because Howe was a partner in a major employment defense firm, he assumed that she had knowledge of qui tam litigation and, therefore, "'would have known that [he] was referring factually to a qui tam matter' particularly because the subject lawsuit concerned a whistleblower action."

The DEC concluded that, although respondent was "seeking to use this threat to obtain an improper advantage in a civil matter, particularly because he withdrew the $150,000 demand and then demanded $175,000," there was no clear and convincing evidence that the threat included criminal charges.

As to the RPC 8.1(b) charge, the DEC found that respondent knowingly failed to reply to a lawful demand for information when he failed to reply to the investigator's three letters asking for the production of his files and for dates when respondent would be available to meet with him. The DEC noted, however, that respondent ultimately produced the subpoenaed documentation. The DEC found that, notwithstanding respondent's

testimony that he encountered problems with his wife, that he was frustrated over the numerous ethics charges against him, and that he considered completely withdrawing from the practice of law, respondent had violated RPC 8.1(b) and, therefore, deserved to be admonished.

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

We agree with the DEC's analytical approach taken as to the elements of the ethics offense contemplated by RPC 3.4(g) and also agree that the second prong of the test has not been satisfied.

RPC 3.4(g) states, in relevant part, that a lawyer shall not "threaten to present criminal charges to obtain an improper advantage in a civil matter." Like the DEC, we do not find clear and convincing evidence that respondent's email constituted a threat of criminal charges against Tender Touch, were Tender Touch to reject Tan's settlement demand.

Although respondent admitted, in his written closing statement to the DEC, that, after the OIG conducts an investigation, it may "refer matters for further civil, criminal and administrative action to appropriate authorities" [emphasis

added], we find no clear and convincing evidence that respondent's reference to the OIG was intended as a threat of criminal prosecution, as opposed to a possible civil action. We, therefore, dismiss the charged violation of RPC 3.4(g). Compare respondent's conduct with that of attorneys who, by clear and convincing evidence, were found guilty of having made threats of criminal action. See, e.g., In re Hutchins, 177 N.J. 520 (2003) (reprimand for attorney who, in fourteen instances, overstepped the bounds of permissible advocacy by sending letters on behalf of his clients/creditors to debtors; in one instance the letter asked the debtor to make good on a bounced check and advised the debtor, a seventy-three year old woman, that she had committed the crime of issuing a fraudulent check and that his client had the right to file a criminal record; the debtor thought that the attorney would send her to jail if she did not pay the amount sought); In re McDermott, 142 N.J. 634 (1995) (reprimand for attorney who filed criminal charges for theft of services against a client and her parents after the client stopped payment on a check for legal fees; the charges were dismissed on motion of the prosecutor, who contended that the claim was civil, not criminal, in nature); In re Krieger, 48 N.J. 186 (1966) (three-month suspension for attorney who initiated criminal process against a witness in a civil action in the hope

that an indictment would make it difficult for the court to rely upon the witness' testimony in deciding the case); and In re Dworkin, 16 N.J. 455 (1954) (attorney suspended for one year for sending a letter threatening criminal prosecution against an individual who allegedly forged a signature on the attorney's client's check, unless the individual reimbursed the client and paid the attorney's legal fee).

As to the RPC 8.1(b) charge, although respondent did reply to the grievance, he admittedly failed to cooperate with the investigator's three written requests for the files, necessitating the issuance of a subpoena. Respondent presented a number of reasons for his inaction, urging that they be considered in mitigation. Ultimately, he supplied the subpoenaed documents to the investigator and participated at the DEC hearing. As seen below, his conduct, thus, was not as serious as that of attorneys who completely ignore disciplinary authorities' efforts to investigate and adjudicate charges of unethical conduct.

We will address the issue of discipline at the conclusion of our review of the other disciplinary matter, also a part of this decision.

DRB 09-271; District Docket No. VA-2007-0008E (REPRIMAND)

This matter came before us on a recommendation for discipline (reprimand) filed by the District VA Ethics Committee ("DEC"). The complaint charged respondent with violating RPC 1.1(a) (gross neglect), RPC 1.1(b) (pattern of neglect), RPC 1.3 (lack of diligence), RPC 1.4(b) (failure to keep a client reasonably informed about the status of the matter or to comply with reasonable requests for information), RPC 1.4(c) (failure to explain a matter to the extent reasonably necessary to permit the client to make informed decisions about the representation), and RPC 8.1(b) (failure to reply to requests for information from a disciplinary authority). The charges stem from respondent's representation of a client in connection with the termination of her employment.

On October 26, 2009, the presenter made a motion to us to supplement the record with a workers' compensation determination involving the grievant in this matter. For the reasons expressed below, we deny the presenter's motion.

The presenter sought to supplement the record to include a September 25, 2009 decision of the New York State Workers' Compensation Board ("the Workers' Compensation Board") regarding the grievant, which was not available at the time of the DEC hearing. The presenter argued that the findings of that Board

demonstrate the continuing injuries that grievant Ida Lopez suffered as a consequence of respondent's conduct. The presenter highlighted that the Workers' Compensation Board relied, in part, on the fact that, after a three-step disciplinary process, Lopez' employment was terminated for cause and that, even though she had the opportunity to appeal the determination, she did not pursue the appeal process. Respondent did not represent Lopez in the workers' compensation proceeding.

The Workers' Compensation Board found that, after Lopez provoked a co-worker, he choked her. Each was subjected to a mandatory thirty-day suspension. Before the expiration of the suspension, Lopez was invited to return to work. Lopez did not respond to the offer or attend a Step I disciplinary hearing. Lopez had not yet retained respondent. The co-worker voluntarily resigned and did not return to work, after the assault.

The Worker's Compensation Board found insufficient evidence that Lopez' neck injury caused her any disability and also found that any treatment that Lopez received to her arm or shoulder was unrelated to the incident. Furthermore, the Workers' Compensation Board found no support for a finding of disability due to anxiety or a finding that the anxiety prevented Lopez from working at her job. The Workers' Compensation Board noted that, although Lopez' doctor had recommended that she not return

to work at the prior location for fear that she would be working with the assailant, the assailant had been suspended and had voluntarily resigned from his position.

We, therefore, deny the presenter's motion for two reasons: first, respondent did not represent Lopez in that matter and, second, the Workers' Compensation Board denied Lopez' claim for lack of evidence that she suffered a work-related disability. That decision, therefore, has no bearing on this disciplinary case.

Because of a language barrier, and notwithstanding the presence of an interpreter, Lopez' testimony was very difficult to understand. As a result, the much-needed background was taken from the complaint and exhibits.

Ida Lopez, a registered nurse, was employed by the Lincoln Medical and Mental Health Center ("Lincoln"), from September 21, 1992 until the termination of her employment, in October 2004, for an alleged altercation, on August 1, 2004, with another nurse, Charles Edusei.

On August 2, 2004, Lincoln relieved Lopez of her duties, pending a disciplinary hearing. By letter dated August 10, 2004,

Lincoln notified Lopez of the disciplinary charges against her and scheduled a hearing for September 16, 2004.[5]

By letter dated August 25, 2004, Lincoln instructed Lopez to report for duty. Lopez did not return to work, alleging that she feared returning to the same hospital where she had been attacked by the other employee. It was Lopez' wish to be transferred to another facility, but her union representative had failed to arrange for that transfer. Because Lopez failed to report to work, the charges against her were amended to include a third charge of being absent without leave.

The Step I hearing and determination took place before Lopez retained respondent. Lopez refused to attend the Step I hearing, despite the union's insistence that she do so. The hearing proceeded in Lopez' absence. The hearing officer considered the merits of the case, as well as Lopez' disciplinary record.[6] On October 6, 2004, the hearing officer recommended the termination of Lopez' employment.

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[5] The charges consisted of conduct unbecoming an HHC employee (inappropriately ripping off the identification card from another employee) and unprofessional and inappropriate conduct (speaking to another HHC employee in an inappropriate manner).

[6] Lopez's disciplinary record included a 1995 counseling session for acting in an inappropriate and unprofessional manner in the presence of patients, a 1996 Warning Notice for rude and inappropriate behavior, and a 1996 ten-day suspension for engaging in a loud argument in the presence of patients.

On October 20, 2004, with her union's assistance (the New York State Nurses Association), Lopez filed a grievance against Lincoln, alleging a violation of the collective bargaining agreement. Lopez sought to be made "whole in every way."

Because Lopez believed that the union was not being cooperative, she retained respondent on March 30, 2005. Lopez, who is Filipino, had seen respondent's advertisement in a newspaper, The Filipino Reporter, as specializing in the representation of employees' rights.

Lopez paid respondent a $2,000 retainer. She claimed that she did not read the retainer agreement, but simply relied on respondent to represent her interests in all legal issues arising from the August 2004 incident. She expected respondent to help clear her employment record and to ensure that she would not get a bad reference from Lincoln, so that she could find future employment.

Lopez also understood that respondent would file a claim with the National Labor Relations Board ("NLRB"). She believed that Lincoln had discriminated against her, because the other employee was "just let go" and she was being disciplined. Lopez did not know if racial discrimination was involved, but she noted that the co-worker (Edusei), her union representative, her labor relations officer, her "ADL," the hospital police officer,

her supervisor, and her employee benefits representative were all African-Americans. She relied on respondent to determine whether she had a discrimination claim.

Respondent did not believe that Lopez had a viable discrimination claim and believed that he had so informed her. Moreover, he denied that he had been retained to pursue a discrimination claim. He stated that he used different retainer agreements in those matters, for which he charged significantly more. Respondent's retainer agreement with Lopez provided, in relevant part:

> 1. LEGAL SERVICES TO BE PROVIDED: You hereby agree that the Law Firm will represent you with respect to the matter of:
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> HANDLING OF YOUR CHARGES AGAINST YOUR EMPLOYER AND UNION BY FILING CHARGES WITH THE NATIONAL LABOR RELATIONS BOARD; AND ASSISTING CLIENT REGARDING CHARGES FILED AGAINST CO-WORKER ARISING OUT OF AN INCIDENT OF AUGUST 1, 2004.
>
> Said legal work to be provided to you includes all necessary court appearances, research, investigation, correspondence, preparation and drafting of pleadings and other legal documents, trial preparation, conferences in person and by telephone with you and any other person and related work to properly represent you in the above matter.
>
> 2. OTHER LEGAL SERVICES: You and the Law Firm further agree to make any additional agreements to provide legal services not covered in this Agreement. Without such agreements, the Law Firm is **not required to do any of the following:**

a. Provide any legal services after the judgment of the trial court.

b. Appeal any decisions of the trial court.

c. Enforce any judgments or order of the trial court. Represent you in any other court for any other matter.

[Ex.3.]

On May 10, 2005, respondent attended a brief meeting with Lopez and with her union representative. According to respondent, Lopez had retained him to pursue arbitration. The union explained Lopez' option to both her and respondent. Respondent filled out the election of rights and irrevocable waiver form and had Lopez sign it. He explained to Lopez that, in order to proceed to arbitration, she had to choose the "Contractual Grievance Procedure" and waive her rights to other available remedies ("to accept the recommendation of the Informal Conference Recommendation or to have her case litigated before a State Court Judge"). According to Lopez, she signed the waiver, trusting that respondent knew how to handle her matter. She claimed that respondent had told her that the grievance process was the only way to proceed.

Lopez was unavailable for subsequent disciplinary hearings because, on May 15, 2005, she left for a job in Texas and, sometime thereafter, moved to California.

By letter dated May 11, 2005, the union filed an appeal of Lopez' (Step I) termination of employment. The appeal request

contained a private attorney waiver form, indicating that respondent would be representing Lopez. That form stated that Lopez' private attorney would "assist the New York State Nurses Association including legal counsel in representing" the employee with the grievance. The form, titled "ROLE OF PRIVATE ATTORNEYS DURING GRIEVANCES AND ARBITRATION PROCEDURES," stated, in relevant part:

> The role of the private attorney does not replace that of the NYSNA staff or attorney in grievance meetings or arbitrations, and is subject to Association policy. Private attorneys may not attend arbitrations as observers or non-participants. NYSNA attorneys must attend all pre-arb meetings.
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> [CEx.A.][7]

According to respondent, who purportedly has handled employment cases since 1998, the employers' actions have always been "rubber stamp[ed]" during the Step I, II, and III hearings. He has never seen a situation where the employer who presided over the hearing has changed its mind. All the cases that he handled (approximately fifteen) proceeded to the arbitration process. He explained that he handled Lopez' case as he did all internal grievances, that is, to let it go through Steps I, II and III. He claimed that he was not required to attend the Step

[7] C refers to the formal ethics complaint in District Docket No. VA-2007-0009E.

II hearing and that he had explained to Lopez that they had to get through the process, in order to get to arbitration. He believed that he had made that clear to her, but conceded that she had difficulty understanding the process. He chose not to attend Lopez' Step II hearing because it was a "waste of time for all people."

Lopez complained that, during the course of the representation, respondent never sent her copies of any documents or letters that he had sent out on her behalf. She stated that she had never seen the document that he had filed with the NLRB against the union, on April 25, 2005. That document stated:

> Ms. Lopez was assaulted in the workplace and was traumatized. The employer terminated her as a result of the medical care she sought as a result of the assault – which caused her to miss work. A hearing was held in absentia and she was terminated. Ms. Lopez had requested that the hearing not occur at the same office where she was assaulted.
>
> [Ex.8A.]

Lopez noted that, at the time that respondent sent that letter, she was living in Texas, but complained that he could have faxed a copy to her, as he knew how to contact her. She did not believe that she was entitled to relief from the NLRB and thought that respondent had wasted his time in filing that claim.

Respondent testified that, because there had been a change in venue for the Step hearings (presumably Steps II and III), the NLRB claim had become moot. He, therefore, had withdrawn it. He produced no evidence, however, that the NLRB claim had ever been filed or withdrawn.[8]

With the union and respondent's assent, Lincoln scheduled the Step II hearing. In August 2005, Lopez requested that respondent inform her of the status of her case, because she had received no information from him. She wanted some type of assurance that he was doing something on her behalf.

By letter dated September 27, 2005, the union notified both Lopez and respondent of the Step II hearing scheduled for October 26, 2005 and of its re-scheduling for November 2, 2005. Lopez was in Texas at the time and available to testify by telephone. Respondent claimed that he had her available, in the event that Lincoln changed its mind and made a settlement offer. Both the union, on Lopez' behalf, and the employer's representative were present at the hearing. Respondent did not

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[8] The presenter noted that New York City employees are excluded from NLRB coverage, under the National Labor Relations Act, 29 U.S.C. §152(2), and, that, in any event, claims must be filed within six months of the date of the incident. 29 U.S.C. 151. By the time Lopez retained respondent, she was already time-barred from filing an NLRB claim (presenter's brief at 3).

appear, however, and did not contact the Office of Labor Relations ("OLR") to notify it that neither he nor Lopez would be appearing. He "believed" that he had notified Lopez that he would not be attending the hearing. The union attempted to contact Lopez and respondent, to no avail.

Lopez' testimony confirmed respondent's recollection. She testified that she had telephoned respondent and had learned that he would not be attending the hearing because he did not think it was important; he was waiting for arbitration.

Because Lopez and respondent had received ample notice of the hearing, it proceeded in their absence, over the union's objections. The reviewing officer upheld Lopez' termination of employment, based on her abandonment of the matter and on the merits of the case, namely, Lopez had failed to report to work, when instructed to do so, and had engaged in unprofessional and inappropriate behavior.

Lopez claimed that, from November 2, 2005, the date of the Step II hearing, to March 6, 2006, the date of the amended decision (approximately three months), she had not spoken to respondent and did not know what, if anything, he had done to prepare for the hearing. She claimed that she had spoken to someone about the upcoming hearing, but was not clear if it had been with the union or with respondent. In any event, she

claimed, she had not been given sufficient notice to make arrangements to attend it. She admitted that she had not answered correspondence from the union and had refused to communicate with its representatives. She also claimed that she had tried to communicate with respondent, but that he would not return her telephone calls or write to her. To corroborate her testimony, she submitted one document purporting to be an undated fax from her to respondent. The fax did not bear any evidence of having been sent.

Respondent, in turn, contended that either he or someone from his office did communicate with Lopez. He submitted a copy of the letter scheduling the Step II hearing, bearing his handwritten notation that Lopez would be available for the hearing "telephonically," in response to her October 17, 2005 telephone call.

By letter dated March 21, 2006, the union, in accordance with its contractual agreement, filed an appeal of the amended Step II decision, seeking a Step III review. Although both Lopez and respondent were copied on the letter, Lopez claimed that she did not timely receive it. By letter of April 13, 2006 to Lopez, with a copy to respondent, the Step III hearing was scheduled for May 24, 2006. The post office forwarded the notice to Lopez, who was then residing in California. An April 18, 2006 letter

rescheduled the time of the hearing for 11:00 a.m. Neither Lopez nor respondent appeared at the Step III hearing. Lopez' grievance was, therefore, dismissed. Lopez did not recall communicating with respondent afterwards.

According to respondent, he had spoken to Lopez on the day of the Step III hearing, at which time she had made it clear to him that she wanted him to appear on her behalf. He claimed that he had contacted the union representative, Leanora Gilmore, to notify her that he would be late for the hearing. In his May 16, 2007 reply to the disciplinary grievance against him, respondent alleged that he had appeared at the hearing thirty minutes late and had been notified that representatives from Lincoln had already left and that he would have to call to reschedule the hearing. Respondent stated that, when he had contacted the union representative, she had informed him that Lincoln's position was to "maintain the termination" and that the union would contact him with further instructions "as to the next step towards arbitration." At the DEC hearing, respondent made a similar statement:

> [Gilmore] told me that she would give us a status as to what had occurred but she told me specifically that there was really no change in mind [sic] on their end . . . that's how I knew that was going to happen anyway. These steps are officiated by employees or contracted through the employer, they are employees of HHC,

> employees of the hospitals, they never ever change the decisions.
>
> . . . .
>
> I asked the union to inform me . . . keep me abreast as to when something is going to occur.
>
> [2T174-17 to 2T175-6.][9]

Respondent explained that, after a Step III hearing, it could take up to one year to schedule an arbitration, depending on the employer. He testified that, when he called to find out whether Lopez' Step III decision had been rendered, he was told that there was no decision yet and that, once it was rendered, he would be notified. He did not specify when that call was made nor did he corroborate it with any other evidence.

The OLR sent a Step III reply letter to Gilmore, the union representative, stamped as received on June 1, 2006, but dated June 2, 2006. A footnote on that document read "Note to Union: failure by the Union to proceed to arbitration within 15 days shall be deemed a waiver and abandonment by the Union of its right to proceed to arbitration." Gilmore forwarded the document only to Lopez (respondent was not copied on either the document or the letter), under cover letter dated June 13, 2006. The letter instructed Lopez to contact Gilmore immediately to

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[9] 2T refers to the transcript of the January 16, 2009 DEC hearing.

discuss the case. By the time Lopez received a copy of the letter, however, the fifteen-day period had already expired.

Respondent maintained that, although the bulk of Lopez' retainer was earmarked for the arbitration, he had no control over the union's failure to notify him of the Step III decision or failing to file for arbitration.

By letter dated July 10, 2008, a union associate director notified Lopez that, among other things, Gilmore had written to her informing her of the Step III reply letter on June 2, 2006, and that the union was contractually time-barred from pursuing the case further.[10] The letter added that Gilmore had a made a diligent effort to "satisfactorily" represent Lopez.

In his May 16, 2007 reply to the disciplinary grievance (approximately ten months after the Step III reply letter), respondent stated:

> Over the past year, my office has contacted [the union] multiple times regarding Ms. Lopez' request for arbitration. I was informed by [the union] that they would take care of setting up a time for her arbitration but have yet been given any firm dates. I have explained my frustration to Ms. Lopez over this entire process. However, with my past experiences with [this] process as a whole, akin to the normal judicial system, it can take years before one is able

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[10] As indicated above, the union's cover letter to Lopez was dated June 13, 2006, not June 2, 2006.

> to get a date before an arbitrator. At this point, I cannot proceed until [the union] procures a date with Lincoln Hospital for the arbitration.
>
> [Ex.34.]

Respondent added that, because Lopez' right to proceed to arbitration had expired in 2006, without proper notice to him, he was "the one left holding the bag on this."

Lopez complained that the end result was that she had lost her job and benefits and had ended up with a mark on her Lincoln employment record. She claimed that, because of her anxiety disorder, she cannot find full-time, only part-time, employment.

Respondent, in turn, testified that, even though he was retained as private counsel for Lopez, he did not make the decisions as to how the case would proceed. It is the union's responsibility to file for and schedule the arbitration hearings. "Contractually," there is a fifteen-day window, from the written decision, in which to file for arbitration. Respondent added that private attorneys do not replace the union staff or attorneys in grievance meetings or arbitrations and that the private attorneys are subject to union policies. He stated that, had he known that the decision had been rendered, he would have requested that the union file for arbitration or would have filed for it himself. He explained that, after the Step III determination, the employee must wait until the union

and the employer choose a time for the arbitration and that there is no "contractual requirement" for a deadline for the issuance of the decision. Respondent testified that things fell apart when the union failed to notify him about the determination. He contended that, after the Step III hearing, he had made telephone calls to the union. He could not, however, substantiate those calls with a telephone log.

Respondent's position was that failure to attend a Step II and III hearings does not constitute an abandonment of a claim, if the grievant/counsel continues to communicate with the union. He stated that most of his communications with the union were by telephone, for which he did not maintain a log. He contended that there is no guarantee that a case will proceed to arbitration and that the decision ultimately rests with the union.

After Lopez filed the ethics grievance against respondent, she wrote to him, on June 3, 2007, stating that the DEC had suggested that she file a malpractice action against him, but that she did not want to make him "look like a bad person and expose [his] malpractice to the court;" she simply wanted him to refund her unearned retainer. By letter dated June 8, 2007, respondent attempted to settle the grievance, by having Lopez withdraw it. Lopez refused to meet with respondent and again

asked him to refund her retainer. On June 21, 2007, respondent replied:

> While I understand your refusal to meet with me, I feel it is best that I speak with you regarding this unfortunate situation. In no uncertain terms do I intend to withhold payment to you as you requested. I, however, need to be assured that the charges you have initiated be permanently withdrawn. For these reasons, it is imperative that we have, at the very least, a phone conference to settle this matter once and for all.
>
> [Ex.25.]

On August 26, 2007, Lopez sent respondent a letter, noting that, although he had been too busy to respond to her attempts to contact him during the pendency of her matter, he was eager to meet with her to discuss settling her grievance. Respondent replied, on September 4, 2007, that he was still interested in meeting with her, at her convenience.

At the DEC hearing, respondent objected to the introduction of these letters into evidence. At first, the DEC determined that the rules prohibited their consideration because they related to a settlement of the grievance. Later, the DEC admitted them into the record, finding them relevant to respondent's alleged lack of communication with Lopez.

The presenter offered the same letters to respondent, that were presented in DRB 09-280, dated June 27, August 7, and September 5, 2007, asking for the file and for dates on which

respondent would be available to be interviewed. Respondent did not timely reply to those requests. As noted in DRB 09-270, respondent turned over the requested information after the DEC issued a subpoena.

In mitigation, respondent offered, in his post-hearing brief, that he ultimately turned over the requested information to the DEC, that he was suffering from personal problems at the time, and that he had entertained thoughts of ending his legal career because of his inability to cope with the ethics grievances filed against him.

The DEC found that, although Lopez believed that respondent would represent her in connection with all claims arising from the August 1, 2004 incident, the scope of the representation set forth in the retainer agreement was more limited.

As to any NLRB claim, the DEC determined that, by the time Lopez had retained respondent, any claim she might have had was time-barred, as it had to be filed within six months of the date of the event or conduct that was the subject of the charge.

The DEC found that, when respondent appeared with Lopez at the May 10, 2005 meeting and advised her to proceed with the contractual grievance process that would lead to an arbitration of her claim, respondent failed to fully explain her options to her. The DEC found that Lopez did not fully understand the

consequences of her decision or of the contractual grievance procedure. Moreover, the DEC noted, respondent himself admitted that the language barrier might have prevented Lopez from understanding the consequences of her choice.

The DEC also determined that the letters relating to respondent's offer of settlement were evidence of respondent's failure to communicate with Lopez, during the course of the representation.

In all, the DEC found that respondent engaged in gross neglect, lack of diligence, failure to properly communicate with Lopez, and failure to respond to a lawful demand for information from a disciplinary authority.

The DEC considered the harm sustained by Lopez as a result of respondent's conduct: no reinstatement, a negative employment record, difficulty obtaining other employment, forced move to obtain employment, and monetary and personal damages. Based on the foregoing considerations, the DEC recommended that respondent be reprimanded.

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

We note that, although the complaint charged respondent with a pattern of neglect, the hearing panel report did not address this charge. Neither is there evidence of such a violation. Generally, three or more instances of neglect are required for a finding of a violation of RPC 1.1(b). In the Matter of Donald M. Rohan, DRB 05-062 (June 8, 2005) (slip op. at 12-16). We, therefore, dismiss this charge.

As to the remaining allegations, respondent unequivocally testified that his strategy was to ignore the Step II and Step III hearings because they were merely the employer's "rubber stamps" of the employer's former actions. Perhaps respondent's strategy would have been successful, had he received notice of the Step III reply letter. That document, however, was sent directly to Gilmore, Lopez' union representative. It was stamped as received on June 1, 2006 (but dated June 2, 2006). Notwithstanding a footnote at the bottom of the notice, warning the union of the fifteen-day window in which to file for arbitration, which was the union's responsibility, Gilmore did not send the decision to Lopez until June 13, 2006. Undoubtedly, Lopez did not receive it until after her right to seek arbitration had expired. In addition, Lopez stated that she did not communicate with the union or with respondent, after she received that decision. Therefore, neither Lopez nor Gilmore

sent a copy of the decision to respondent. It cannot be said, thus, that respondent acted unethically in any way in this context.

The record does not disclose why Gilmore failed to take the necessary steps to proceed to arbitration, when she had appealed all of the employer's earlier actions, and why she failed to copy respondent on this critical document, the Step III reply, when she had copied him on prior correspondence. Also absent from the record is any explanation for Gilmore's late mailing of the Step III decision to Lopez, a circumstance that precluded Lopez from filing for arbitration.

We find that Lopez knew from the outset that respondent's strategy was to proceed by way of arbitration. Without notice from either the union or Lopez, respondent was truly "left holding the bag," as he contended. Had he been notified, in a timely manner, of the Step III reply, the outcome might have been different. Because, however, the union and Lopez failed to notify him of that important decision, we cannot find that he is guilty of gross neglect. We, thus, dismiss the charged violation of RPC 1.1(a).

On the other hand, we find that respondent lacked diligence, a violation of RPC 1.3. He produced no evidence to corroborate his claim that, after the Step III hearing, he had

contacted the union, on multiple occasions, to find out about the decision. Because respondent knew when the hearing took place, he should have been more vigilant in determining whether a decision had been rendered.

As to the RPC 1.4(b) charge, the record supports a finding that respondent did have some communication with Lopez, although not to the extent that she desired. Lopez was aware of respondent's strategy in the case early on; they attended a May 10, 2005 meeting with the union; she knew that respondent was not planning to attend the Step II hearing; and she spoke with him, prior the Step III hearing, to urge him to attend it, which he did, but only after it had concluded, and either respondent or someone from his office spoke with Lopez to have her available, via telephone, for the hearings.

As to Lopez' claims that respondent failed to reply to her telephone calls, letters or faxes, we note that she submitted only one undated copy of a fax to him, with no indication that it had been sent. The only other documents presented were Lopez' letters to respondent, created after she had filed the grievance against him. Contrary to the DEC's determination, we find that the letters are not clear and convincing proof that respondent failed to communicate with Lopez. Lopez offered no letters

drafted contemporaneously with respondent's alleged failure to communicate with her.

Clearly, though, respondent violated RPC 1.4(c). Lopez did not understand the scope of the representation and did not seem to understand the consequences of her choice to proceed based on the contractual grievance procedure. Respondent admitted that her misunderstanding could have resulted from a language barrier. Therefore, he should have taken extra cautionary steps to ensure Lopez' full understanding of the ramifications of her decision to opt for the contractual grievance procedure.

Finally, as in DRB 09-270, respondent did not cooperate fully with the DEC's investigation. He replied to the initial grievance, but ignored the investigator's three letters asking for the Tan and Lopez files and for dates when he would be available for interviews. As indicated earlier, after the DEC served respondent with a subpoena, he turned over the requested information, filed an answer to the ethics complaint, and participated at the DEC hearing. We find that respondent's belated cooperation, personal circumstances at the time, and thoughts of giving up his profession because of his inability to cope with the successive ethics grievance filed against him mitigate the nature of this offense.

The only issue left for our determination is the proper quantum of discipline for respondent's violations of RPC 1.3, RPC 1.4(c) and RPC 8.1(b) (the latter for both DRB 09-270 and DRB 09-271).

Violations of RPC 1.3 and RPC 1.4 generally result in an admonition. See, e.g., In the Matter of Jonathan Saint-Preux, DRB 04-174 (July 19, 2004) (in two immigration matters, attorney failed to appear at the hearings, thereby causing orders of deportation to be entered against the clients, and failed to apprise the clients of these developments); In the Matter of Susan R. Dargay, DRB 02-276 (October 25, 2002) (failure to promptly submit to the court a final judgment of divorce in one matter and failure to reply to the client's letters and phone calls in another matter); In the Matter of Mark W. Ford, DRB 02-280 (October 22, 2002) (the attorney failed to file a workers' compensation claim and to reasonably communicate with the client about the status of the case); and In the Matter of W. Randolph Kraft, DRB 01-051 (May 22, 2001) (attorney failed to prosecute a case diligently and failed to communicate with the client; the lack of communication included the attorney's failure to notify the client that the complaint had been dismissed for lack of prosecution). But see In re McCoy, 193 N.J. 477 (2008) (reprimand for attorney who, in an employment discrimination

matter, violated RPC 1.3 by conducting inadequate discovery and not opposing one of the defendants' motion to dismiss certain claims; the attorney also violated RPC 1.4(c), when she voluntarily dismissed with prejudice the surviving claim against one of the defendants without the client's knowledge or authorization, and RPC 1.4(b), when, for three months, she failed to notify the client that his case against another defendant had been dismissed; aggravating factors were a prior admonition, the client's loss of appeal rights, and the attorney's failure to withdraw from the case because of her lack of expertise in the area).

For failure to cooperate with disciplinary authorities, admonitions are typically imposed. See, e.g., In re Ventura, 183 N.J. 226 (2005) (attorney did not comply with ethics investigator's repeated requests for a reply to the grievance; default case); In the Matter of Kevin R. Shannon, DRB 04-512 (June 22, 2004) (attorney did not promptly reply to the district ethics committee's investigator's requests for information about the grievance); In the Matter of Keith O. D. Moses, DRB 02-248 (October 23, 2002) (attorney failed to reply to district ethics committee's requests for information about two grievances); In the Matter of Jon Steiger, DRB 02-199 (July 22, 2002) (attorney did not reply to the district ethics committee's numerous

communications regarding a grievance); and In the Matter of Grafton E. Beckles, II, DRB 01-395 (December 21, 2001) (attorney did not cooperate with disciplinary authorities during the investigation and hearing of a grievance).

If the attorney has been disciplined before, but the ethics record is not serious, then reprimands have been imposed. See, e.g., In re Wood, 175 N.J. 586 (2003) (attorney failed to cooperate with disciplinary authorities; prior admonition for similar conduct); In re DeBosh, 174 N.J. 336 (2002) (failure to cooperate with disciplinary authorities; prior three-month suspension); and In re Williamson, 152 N.J. 489 (1998) (attorney failed to cooperate with disciplinary authorities; prior private reprimand for failure to carry out a contract of employment with a client in a matrimonial matter and failure to surrender the client's file to a new attorney).

Here, respondent's failure to cooperate with disciplinary authorities was not as serious as that of other attorneys found guilty of this violation. He did reply to the initial grievance. Later, he ignored three letters from the investigator. He ultimately turned over the requested information to the investigator, although only after a subpoena was issued.

For respondent's failure to fully cooperate with the simultaneous ethics investigation of the two grievances, lack of

diligence in the Lopez matter, and failure to explain to Lopez, in detail, her options and the consequences stemming therefrom, so that she could make an informed decision about the representation, we believe that a reprimand is sufficient discipline. We are aware that respondent has been disciplined before and that, almost invariably, the existence of a disciplinary record justifies the imposition of a sanction more severe than what would have been appropriate for the ethics offenses under review. We note, however, that the cause for respondent's prior discipline was his misrepresentation in a bar admission application, not the mishandling of a client matter. Without minimizing the seriousness of that conduct, we considered here that it did not stem from the mishandling of a client matter, as in this instance. Therefore, it cannot be said that respondent did not learn from past, similar mistakes. Hence our belief that a reprimand is adequate discipline for the totality of respondent's conduct in both matters, viewed in the context of his ethics record.

Member Clark did not participate.

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

Disciplinary Review Board
Louis Pashman, Chair

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

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

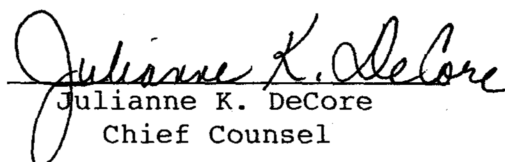
In the Matters of Herbert J. Tan
Docket Nos. DRB 09-270 and DRB 09-271

Argued: November 19, 2009

Decided: December 15, 2009

Disposition: Reprimand

Members	Disbar	Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Pashman			X			
Frost			X			
Baugh			X			
Clark						X
Doremus			X			
Stanton			X			
Wissinger			X			
Yamner			X			
Zmirich			X			
Total:			8			1



Julianne K. DeCore
Chief Counsel