SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 07-338
District Docket Nos. IIA-2004-003E

IN THE MATTER OF	
THOMAS A. GIAMANCO	
AN ATTORNEY AT LAW	

Decision

Argued: January 17, 2008

Decided: March 4, 2008

David Lafferty appeared on behalf of the District IIB Ethics Committee.

Respondent appeared pro se.

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

This matter came before us on a recommendation for discipline (six-month suspension) filed by the District IIA Ethics Committee (DEC). The charges stemmed from respondent's representation of a partnership consisting of fourteen physicians who retained him to convert their office building into an office condominium.

The complaint charged violations of RPC 1.1(a) (gross neglect), RPC 1.1(b) (pattern of neglect), RPC 1.3 (lack of

diligence), RPC 1.4, presumably (b) (failure to keep the client reasonably informed about the status of the matter and to comply with the client's reasonable requests for information), RPC 1.16(d) (failure to protect the client's interests on termination of the representation), RPC 8.1(b) (failure to cooperate with disciplinary authorities), and RPC 8.4(d) (conduct prejudicial to the administration of justice). We agree with the DEC that a six-month suspension is the appropriate measure of discipline.

Respondent was admitted to the New Jersey bar in 1983. In 1999, he was reprimanded (on a motion for discipline by consent) for gross neglect, lack of diligence, failure to communicate with the client, and misrepresentation to the client about the status of the matter. Specifically, for a period of seven years, respondent took no action to reinstate a case that had been dismissed. In re Giamanco, 161 N.J. 724 (1999).

On October 5, 2005, respondent was censured for lack of diligence, conflict of interest, misrepresentation to the client, and conduct prejudicial to the administration of justice. There, respondent did not file a bankruptcy petition until fifteen months after he was retained, and then only after the client filed a suit against him. In addition, respondent continued to represent the client after he was discharged from

the representation; counseled the client to withdraw the suit against him; misrepresented to the client that the suit was illegal because it was precluded by the fee arbitration process; and threatened to "countersue" the client, to inform the bankruptcy court that the client had committed fraud, and to subpoena witnesses to discuss the client's personal problems. In re Giamanco, 185 N.J. 174 (2005).

On November 17, 2006, respondent was suspended for three months for negligent misappropriation of client funds, recordkeeping violations, and failure to cooperate with disciplinary authorities. That matter proceeded on a default basis. Respondent remains suspended to date. In re Giamanco, 188 N.J. 494 (2006).

Currently, there are two default matters pending with the Court. In both, we found violations of RPC 1.3, RPC 1.4(b), and RPC 8.1(b). In one of the cases, respondent failed to record a deed after a closing, failed to reply to the client's voice-mail messages, and failed to provide the client with the closing documents. In the other, respondent failed to reduce to writing the terms of a pendente lite agreement, failed to appear for a scheduled court proceeding, allowed a default judgment to be entered against the client, took no action to compel the client's husband to make support payments, and failed to reply

to the client's numerous telephone calls over a three-month period. In both instances, respondent failed to cooperate with disciplinary authorities. For the totality of respondent's conduct, we voted to suspend him for one year. In the Matters of Thomas A. Giamanco, DRB 07-165 and DRB 07-166.

The facts of this matter are as follows:

In August 2001, a partnership known as the Medical Arts Center of Ridgewood & Company (MACRC), comprised of fourteen physicians, hired respondent to convert the partnership agreement into a condominium association agreement and the office building into an office condominium. The retainer agreement listed **CONVERSION OF BUILDING TO OFFICE CONDOMINIUM** as the legal services to be provided and called for the payment of a $7,500 flat fee, "regardless of the amount of time actually spent on the case." The partnership was responsible for the payment of costs and expenses, which respondent estimated at $9,000. In December 2001, John P. Mudry, M.D., MACRC's managing partner, paid the $7,500 fee.

Also in December 2001, Dr. Mudry called a meeting of the partners to discuss the intended agreement. Respondent attended that meeting.

On June 11, 2002, respondent faxed a letter to MACRC, indicating that there was a "delay in obtaining Title Searches

due to discrepancies with the address of your building . . . ." Respondent assured MACRC, however, that the title work would be completed that week and that he "expect[ed] this to be wrapped up within a week of the survey, meaning two to three weeks tops."

On April 23, 2003, respondent sent another fax to MACRC, stating that the title binder would be faxed to his office on the following day, that he would complete the necessary paperwork for the final conversion, and that the process would be completed by May 2, 2003.

By fax dated April 24, 2003, respondent sent a "follow up to [his] letter regarding the status of the conversion." Respondent indicated that one of the partners, Dr. Edward Ewald, was objecting to the condominium conversion and had engaged an attorney. Respondent informed MACRC, however, that "[t]his will not cause any further delay in the final preparation of all the documents which will be concluded by next Friday, May 2, 2003, as I indicated earlier."

One of the partners, Dr. James Yuppa, who was also a member of a management committee, testified that respondent's statement about no delays had assured him that the "conversion documents would go through."

Despite respondent's assurance, not only did he not

finalize the documents by May 2, 2003, but he never finalized them at all.

On November 13, 2003, Dr. Mudry wrote a letter to respondent, asking how he could reach him. The letter stated: "Is there any way that I can get in touch with you? I have called frequently, and our members of our partnership have called. Your answering machine states that you are not available and I am not sure what that means." When respondent did not reply to that letter, Dr. Yuppa and another member of the management committee, Dr. William Carney, wrote to him, on January 10, 2004, complaining about his lack of communication with MACRC. Dr. Yuppa and several other partners had left numerous messages for respondent, who failed to reply to them. The letter also requested the return of the $7,500 fee. The letter stated:

> Despite numerous telephone messages left by the management committee . . . we have yet to hear from you or to see one iota of your work that you were hired to complete.
>
> As a matter of review, you were hired . . . about two years ago to replace our partnership Agreement with a Condominium Association Agreement. On December 7, 2001, an advance payment in the amount of $7500 was made to you by our Partnership.
>
> While listening to your repeated promises from one month to the next that the documents would be ready for signature shortly, we patiently waited for more than a

> reasonable length of time for the work to be completed. Since there is no evidence that you have done what you were hired to do, and since all efforts at communication with you have failed, we request that our $7500 deposit be refunded.
>
> In the event that our request is not honored within two weeks of receipt of this letter, a second letter will be mailed to the New Jersey Bar Association detailing the facts of this matter and requesting a review by the ethics committee and any other committee that The Bar [sic] feels is appropriate to deal with your conduct.
>
> [Ex.P-7.]

Respondent never provided MACRC with the results of any work performed on behalf of the partnership and never gave MACRC the legal documents necessary for the conversion of the building into a condominium. Dr. Yuppa's understanding was that respondent would not be entitled to keep the flat fee simply for signing the retainer agreement and performing no work.

On January 27, 2004, Drs. Yuppa and Carney, on behalf of MACRC, reported to the Bergen County Bar Association what they viewed as respondent's "unconscionable behavior." They noted that respondent's "arrogance and contempt [had been] capped by his failing to answer [their January 10, 2004] certified letter,

which offered him a last chance to redeem himself."[1]

On August 20, 2004, respondent sent a letter to MACRC, enclosing a $5,240 bill for professional services rendered, as well as a refund check for $4,500. Respondent indicated that he had "applied a 'Flat Discount Rate' in the amount of $3,000.00, thereby issuing a credit in the amount of $2,240.00." The letter went on to state: "I realize as a result of my accident I could not pay proper attention to this matter. I, therefore, am extending the credit as a professional client courtesy for the timely inconvenience." As seen below, respondent claimed that he had been injured in a car accident in June 2003.

Respondent's "compromise" was unacceptable to MACRC. According to Dr. Yuppa,

> any work that Mr. Giamanco had done or was listed in the invoice that he had sent was of no value to us at all because except for the survey part of it that I had indicated previously and that couldn't be used by any attorney who would subsequently do the work for us [sic].
>
> [T22-11 to 17.][2]

On September 1, 2004, Drs. Yuppa and Carney complained to

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[1] The Office of Attorney Ethics' records indicate that the DEC docketed a grievance on February 6, 2004.

[2] T denotes the transcript of the DEC hearing on September 21, 2006.

respondent about

> the slippery means which you are willing to use to achieve your ends. It was of interest to note your latest contrivance and attempt to retain the balance of the $7500.00 refund that you owe the Partnership. Your conduct in this matter continues to be characterized by audacity and gross unprofessionalism.
>
> [Ex.P-9].

The letter warned respondent that the case would be turned over to the Ridgewood Prosecutor's Office if the $3,000 balance were not paid in full by the time the DEC investigator issued a report on respondent's conduct. Respondent never refunded the $3,000.

In early 2004, MACRC retained another attorney, Michael Liberti, who completed the paperwork in seven to nine months. Liberti charged $5,000 for his services. Ultimately, however, not all of MACRC's partners agreed to sign the documents.

For his part, respondent testified that some of the delay in the case had been the result of the need to obtain a new survey and MACRC's inability to provide him with the deed. In addition, he claimed, he had become "embroiled in the two partners' fight" and had spent a lot of time interacting with their attorneys.

At the DEC hearing, respondent attempted to justify his

inaction by contending that an ongoing disagreement between two of the doctors, Drs. Ewald and White, would have prevented the condominium conversion from going through. Dr. Yuppa, however, clarified that the doctors' dispute concerned "one buying out the other" and, as such, it would not have affected the condominium conversion.

Respondent further alleged that serious injuries from a June 2003 car accident had precluded him from devoting more time to MACRC's matter. The injuries, he claimed, had necessitated reconstructive surgery and rehabilitation and had caused him to be out of work for about a month. At that time, he had just started working for a new firm. He had returned to work on a limited basis because he was still undergoing rehabilitation. In September 2003, he had left the firm and moved back to his Ridgewood office.

All the while, he claimed, he had been in considerable pain. In 2005, he had discovered that his ankle was "dying on the inside," a condition that had required further surgery, in February 2005. He testified that, as of the date of the DEC hearing (September 21, 2006), he was practicing law on a "minimum [basis] at best," with only five to ten active files.[3]

[3] In evidence are medical notes from respondent's orthopedist and a letter from him attesting to respondent's ankle surgery and
(footnote cont'd on next page)

As to the condominium conversion documents, respondent testified that he had printed from his computer several forms that he was ready to "adapt." Asked if he had provided final documents to MACRC, respondent replied, "No, I was never asked for them." He added that he had "offered them to the succeeding attorney," who had declined the offer.

Finally, respondent testified that, aware of the MACRC partners' desire not to incur a large legal fee, he had "tried not to do much." Respondent explained that, in light of the two partners' bitter dispute, which he described as "worse than a divorce," it would have been fruitless for him to perform a lot of work: "I'd be giving them paper that they couldn't use just as Mr. Liberti apparently did." At this juncture, the panel chair asked respondent:

> Do you think it might have been prudent at that point in time when you were reaching that conclusion that your goal was to spend their money carefully, to send them a letter saying you've provided me with $7500, our initial agreement was that I was supposed to do X, Y and Z, I haven't done that, I'm going to forebear on doing that now because I think for reasons X, Y and Z it's not prudent for me to proceed with this. If you feel differently and if you feel I'm not acting in accordance with what our initial agreement was and what your expectation is

(footnote cont'd)
post-operative care, which included medication for "persistent pain."

pursuant to my retainer agreement, please let me know.

[T151-2 to 15.]

After replying, "That's what I did with Dr. Mudry," respondent asked for an opportunity to present Dr. Mudry as a witness on his behalf. The hearing panel granted his request and scheduled a continuation of the hearing for September 27, 2006. The hearing was further adjourned to May 31, 2007, due to Dr. Mudry's unavailability to appear on September 27, 2006. On the rescheduled date, however, neither respondent nor Dr. Mudry appeared.

As to the computation of his fee, respondent contended that it had been a fair representation of the services rendered and that, in fact, it had "understated" the hours spent on the case. In his view, "the retainer said I could have kept the whole thing."

With regard to the charge of failure to communicate with his clients, respondent maintained that he was in touch with Dr. Mudry "anything from once a month to once a week."

The final area explored below was the charge that respondent failed to cooperate with disciplinary authorities. The complaint alleged that he did not reply to the DEC investigator's requests for information about the grievance. In

his answer, respondent alleged that he thought that the grievance had been withdrawn.

In addition, respondent failed to comply with a subpoena duces tecum issued by the DEC and served on him in November 2004, demanding the production of the MACRC file. Respondent turned over the file to the DEC only in October 2005, following a letter from John J. Janasie, First Assistant Counsel at the Office of Attorney Ethics (OAE), warning him that his failure to produce the file within ten days of the letter would cause the OAE to file a motion for his temporary suspension.

At the DEC hearing, respondent claimed that he had assumed, from emails from a DEC member, that the file was no longer needed. He conceded, however, that he had not received formal notification from the DEC that the grievance had been withdrawn.

The DEC found that respondent's inactivity for a period of three years constituted gross neglect (RPC 1.1(a)), as well as a pattern of neglect (RPC 1.1(b)), as evidenced by respondent's conduct in his prior disciplinary matters. The DEC further found violations of RPC 1.3 (lack of diligence), RPC 1.4(a) and (b) (lack of communication with the client), RPC 1.16(d) (failure to protect client's interests upon termination of the representation, based on his retention of an unearned fee), and

RPC 8.1(b) (failure to cooperate with disciplinary authorities).[4]

The DEC considered, as an aggravating factor, respondent's lack of "remorse for any possible wrongdoing or lapses in judgment." As mentioned above, the DEC recommended a six-month suspension.

Following a de novo review of the record, we find that, with one exception, the DEC's findings that respondent's conduct was unethical are fully supported by clear and convincing evidence.

After being retained, in December 2001, to accomplish a condominium conversion, respondent allegedly encountered some roadblocks, such as the need to order an updated survey and discrepancies with the building's address, a problem that allegedly affected the title searches and, therefore, the issuance of a title report. After those problems were cleared up, respondent assured MACRC's partners, in April 2003, that, notwithstanding an ongoing dispute between two of the partners, there would be no delays in his final preparation of the documents, which he had projected for May 2, 2003. Justifiably, the partners relied on respondent's assurance that the documents would be ready by that date. They were not, however. In fact,

[4] The hearing panel report makes no reference to the RPC 8.4(d) charge. Presumably, the DEC did not find a violation of that rule.

respondent never finalized the required paperwork.

Although respondent raised, as a mitigating factor, his serious injuries stemming from a car accident, that accident took place in June 2003, one month after his estimated date for the completion of the documents. Therefore, respondent cannot blame his inaction on his physical condition.

Similarly, respondent's contention that he was trying to keep MACRC's legal expenses to a minimum does not excuse or explain his failure to provide the legal services for which he was retained. In fact, it sounds hollow. As the hearing panel chair properly remarked, if respondent had been truly moved by such altruistic motives, then why had he not divulged them to his client to enable the client to make an informed decision about the proposed course of the representation?

Respondent claimed that he had so informed Dr. Mudry. This claim, however, does not pass muster for two reasons: first, MACRC's designated contacts with respondent appear to have been Drs. Yuppa and Carney, as shown by the letters in the record; and second, Dr. Mudry himself was attempting to establish communication with respondent, as demonstrated by his letter to respondent asking how he could be reached.

Like the DEC, thus, we find that respondent failed to act with diligence and grossly neglected the client's matter,

violations of RPC 1.3 and RPC 1.1(a).

We find also that respondent violated RPC 1.4(a) and (b). As mentioned above, the doctors did not know where to contact respondent; Drs. Yuppa and Carney's January 10, 2003 letter to respondent complained about his failure to reply to their numerous telephone messages; and respondent did not keep MACRC informed of the progress of the legal work that he was hired to perform.

That respondent violated RPC 8.1(b) has also been demonstrated by clear and convincing evidence. He did not comply with the DEC's requests for information about the grievance and for the production of the file, having gone as far as ignoring a subpoena duces tecum issued by the DEC. Only after he was warned that he could be temporarily suspended did he turn over the file to the DEC. Here, too, his explanations deserve no consideration. Had the grievance been withdrawn, he would have been notified of that important action. We, therefore, agree with the DEC that respondent knowingly disregarded its attempts to conduct a full investigation of the grievance.

Finally, the DEC properly found that respondent's failure to refund the fee to MACRC violated RPC 1.16(d). Despite respondent's contention that his calculation of the fee on a quantum meruit basis was fair, the fact remains that he did not

perform the legal services that would have entitled him to the $7,500 flat fee, that is, the condominium conversion. There was no provision in the retainer agreement for the computation of the fee on an hourly basis. Respondent would have been entitled to the flat fee only if he had finalized the condominium conversion documents, which he failed to do. Consequently, his retention of any amount of the fee was a violation of RPC 1.16(d).

On the other hand, we are unable to agree with the DEC's conclusion that respondent violated RPC 1.1(b). At least three instances of neglect are required to form a pattern of neglect. In the Matter of Donald M. Rohan, DRB 05-062 (June 8, 2005) (slip op. at 12-16). A review of respondent's past disciplinary matters shows that only the matter that led to his 1999 reprimand contained a finding of neglect. When that violation is combined with the gross neglect present in this case, only two instances of neglect have been established. We, therefore, dismiss the charged violation of RPC 1.1(b).

In sum, respondent violated RPC 1.1(a), RPC 1.3, RPC 1.4(a) and (b), RPC 1.16(d), and RPC 8.1(b).

In assessing the suitable degree of sanction that respondent deserves, we must consider not only the nature of his conduct, but also his extensive disciplinary record.

Ordinarily, conduct similar to respondent's results in either an admonition or a reprimand. See, e.g., In the Matter of Jack D. Berson, DRB 96-356 (November 26, 1996) (admonition for gross neglect, lack of diligence, failure to reply to client's reasonable requests for information about the case, and failure to refund an unearned retainer); In the Matter of Howard M. Dorian, DRB 95-216 (August 1, 1995) (admonition by consent for attorney who did not inform his client that her case had been mistakenly dismissed as settled, took no action to restore it, did not reply to her inquiries about the matter, failed to withdraw as counsel, and delayed the return of her file for almost five months; the attorney also failed to cooperate with the investigation of the grievance); In the Matter of Richard J. Carroll, DRB 95-017 (June 26, 1995) (admonition for attorney who lacked diligence in handling a personal injury action, failed to properly communicate with the client, and failed to comply with the new lawyer's numerous requests for the return of the file; the attorney also failed to reply to the grievance); In re Nichols, 182 N.J. 433 (2005) (reprimand for attorney who, in two matters, demonstrated gross neglect, lack of diligence, failure to communicate with clients, and failure to memorialize the rate or basis of his fee; in one of the matters, the attorney also failed to refund an unearned fee); In re Gavin, 167 N.J. 606

(2001) (in a default matter, reprimand imposed for lack of diligence, gross neglect, failure to comply with client's reasonable requests for information about the case, failure to refund an unearned retainer, and failure to cooperate with disciplinary authorities; prior reprimand); In re King, 152 N.J. 380 (1998) (reprimand for attorney who, in a series of three matters, displayed gross neglect, lack of diligence, failure to communicate with clients, failure to return an unearned fee, and failure to turn over a file); and In re Clark, 118 N.J. 563 (1990) (attorney reprimanded for, in four matters, exhibiting lack of diligence and failure to communicate with clients; in a fifth matter, the attorney failed to return an unearned retainer; his failure to cooperate with disciplinary authorities was viewed as an aggravating factor).

Absent his ethics history, respondent would probably receive either an admonition or a reprimand. But his prior encounters with the disciplinary system warrant stronger discipline. The question is how strong. The following considerations, which require a foray into the nature, extent, and timing of respondent's prior ethics transgressions, are helpful in fashioning the appropriate level of discipline in this instance.

In 1999, respondent received a reprimand for gross neglect;

lack of diligence; failure to communicate with the client; and misrepresentation to the client about the status of the case. In 2005, he received a censure for lack of diligence; misrepresentations to the client; conflict of interest (continuing to represent the client after he was relieved as counsel); and threats to sue the client, to report to the court that the client had committed fraud, and to subpoena witnesses to discuss the client's personal problems. In determining that a censure was appropriate in that case, we took into account, as an aggravating factor, respondent's 1999 reprimand. In other words, we considered that respondent had not learned from his prior mistakes.

In 2006, respondent was suspended for three months, this time for recordkeeping violations and negligent misappropriation. Although the threshold form of discipline for such infractions is a reprimand, respondent received a three-month suspension because of his ethics history and because the matter proceeded as a default. Inasmuch as respondent's conduct in that matter was confined to the non-observance of the rules governing his attorney records, as opposed to the mismanagement of a client case, we could not have found that he was still refusing to learn from similar mistakes.

In the two cases before the Court, DRB 07-165 and DRB 07-

166 (the Foley and the Franken matters), respondent's misconduct occurred after his misconduct in the present matter. In Foley, respondent's transgressions took place between January and November 2005. In Franken, they occurred between December 2004 and August 2006. Here, respondent's infractions stretched from December 2001 to September 2004. Because they pre-dated the violations in both Foley and Franken, we cannot say that respondent failed to learn from the mistakes that he made in the Foley and Franken matters, but only from the mistakes that he made in the matters that led to his 1999 reprimand and 2005 censure.

Certainly, the matters before the Court may be viewed as indicative of respondent's "penchant" for violating the rules of the profession, but they do not constitute two additional instances of failure to learn from past mistakes. Otherwise stated, we do not believe that our recommendation for a one-year suspension currently before the Court warrants, under the principle of progressive discipline, that the sanction in this case be higher than a one-year suspension.

With the above considerations in mind, we conclude that respondent's record of final discipline -- a reprimand, a censure, and a three-month suspension -- requires that the benchmark admonition or reprimand for the current violations be

elevated to a six-month suspension, as recommended by the DEC. See, e.g., In re Kearns, 187 N.J. 250 (2006) (six-month suspension for attorney who grossly neglected a case by accepting a retainer and failing to perform any legal services, failing to keep the client informed of the status of the case, failing to comply with a fee arbitration award directing to refund the balance of the unearned retainer, and failing to cooperate with disciplinary authorities; the attorney's ethics record included a temporary suspension, a reprimand, and a three-month suspension; default case) and In re Annenko, 166 N.J. 603 (2001) (attorney suspended for six months for gross neglect, lack of diligence, failure to communicate with client, failure to return an unearned retainer, and failure to cooperate with disciplinary authorities; the attorney had received two private reprimands (now admonitions), a six-month suspension, and a three-month suspension; she had also been temporarily suspended).

Vice-Chair Pashman and members Stanton and Frost determined that the six-month suspension should run consecutively to whatever term of suspension the Court imposes in DRB 07-165 and DRB 07-166. Members Boylan and Wissinger would have made the suspension concurrent with any term of suspension that the Court imposes in the above two matters.

Chair O'Shaughnessy and members Lolla, Neuwirth, and Baugh 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, Esq.

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

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Thomas A. Giamanco
Docket No. DRB 07-338

Argued: January 17, 2008

Decided: March 4, 2008

Disposition: Six-month suspension

Members	Six-month Consecutive Suspension	Six-month Concurrent	Dismiss	Disqualified	Did not participate
O'Shaughnessy					X
Pashman	X				
Baugh					X
Boylan		X			
Frost	X				
Lolla					X
Neuwirth					X
Stanton	X				
Wissinger		X			
Total:	3	2			4

Julianne K. DeCore
Julianne K. DeCore
Chief Counsel