DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:	)	
	)	
DONALD L. SCHLEMMER,	)	Bar Docket Nos. 444-99 & 066-00
	)	
Respondent.	)	

ORDER OF THE
BOARD ON PROFESSIONAL RESPONSIBILITY

This matter is before the Board on Professional Responsibility (the "Board") on remand from the District of Columbia Court of Appeals (the "Court") in *In re Schlemmer*, 840 A.2d 657 (D.C. 2004).

Bar Counsel filed a Specification of Charges against Respondent Donald L. Schlemmer ("Respondent") based on his representation of two clients in matters involving immigration law, his area of specialty. The Hearing Committee found violations of Rules 1.1(a), 1.3(a) and 1.4(a) of the D.C. Rules of Professional Conduct as to one client, and recommended a sanction of informal admonition. The Board believed that it was a close question whether Respondent had engaged in intentional neglect, in violation of Rule 1.3(b) (intentional failure to seek client objectives), but agreed with the Hearing Committee, based on the Committee's conclusion that Respondent honestly misunderstood his obligation to his client, that the evidence did not support a violation of Rule 1.3(b). Based on its evaluation of Respondent's conduct, the Board recommended the sanction of public censure.

The Hearing Committee Report did not refer to any informal admonitions previously issued by Bar Counsel, but distinguished the cases relied upon by Bar Counsel to support public censure. Neither Bar Counsel nor Respondent filed exceptions before the Board.

Respondent filed an exception to the Board's sanction recommendation, contending that public censure was not warranted. In his reply brief filed with the Court, Respondent brought to the Court's attention *In re Cohen*, Bar Docket No. 042-98 (BC Mar. 4, 2003), an informal admonition issued by Bar Counsel after Respondent had filed his brief. This informal admonition had not been issued at the time of the Board's consideration of this matter.

The Court remanded this matter to the Board for reconsideration of the sanction in light of the informal admonitions in *Cohen* and in *In re Uriarte*, Bar Docket No. 380-02 (BC May 30, 2003), both issued after briefing before the Court was complete, and in *In re Allen*, Bar Docket No. 234-96 (BC May 7, 2001). None of these informal admonitions had previously been presented to the Board; two had not been issued as of the date of the Board's report. The Court observed:

> Unfortunately, the Board does not appear to have considered these informal admonition cases when it recommended that Respondent receive a public censure. Therefore, without some clarification as to why *Uriarte*, *Cohen*, *and Allen* are distinguishable from the case at bar, or a reasoned explanation of why the Board believes their sanction to have been too lenient[;] [w]e are concerned that accepting the Board's recommended sanction would "foster a tendency toward inconsistent dispositions for comparable conduct." D.C. Bar R. XI, § 9(g)(1)(2001).
>
> We emphasize that the Board is not bound by Bar Counsel's informal admonition letters in recommending an appropriate sanction. Exercising its own judgment the Board may conclude that, in a given case, that sanction is too lenient for conduct that, after all, can result in forfeiture of a vital client right. We require only that the Board give reasoned consideration to such admonitions that are brought to its attention, in order to avoid inconsistent dispositions for similar conduct. Accordingly, we remand this matter to the Board for further consideration of an appropriate sanction in light of this opinion.

Schlemmer, 840 A.2d at 664.

First, we will outline the relevant facts. Next, we will describe the Court's opinion. Then we will review the three informal admonition cases, as well as other cases we find instructive, and present our determination as to sanction.

Summary of Facts

Respondent is a solo practitioner in the field of immigration law; he estimated he has handled "probably thousands" of asylum cases like those in this disciplinary matter. Hearing Committee Report ("H.C. Rpt.") at 2. Admitted to the D.C. Bar in 1988, Respondent had an unblemished record; this was his first disciplinary matter, and his career has included, in the words of the Hearing Committee, "extraordinary efforts in voluntary, *pro bono* service to the immigrant community in the Washington area." *Id*. at 28.

Since his clients generally did not speak English, and he was unable to communicate with them in their native languages, Respondent engaged independent translators. One translator, Julio Salamon Gagnon, a non-lawyer, operates a company providing consulting services for immigration matters called "Immigration Consultants," which Mr. Gagnon describes as "an independent paralegal company". *Id*.

The violations arose in connection with Respondent's representation of Fidel Iraheta, a construction worker from El Salvador, who understood little spoken English, could not read English and was not proficient at reading Spanish. Mr. Iraheta retained Immigration Consultants to secure a work permit and prepare a request for asylum. Immigration Consultants referred Mr. Iraheta to Respondent when Mr. Iraheta's case got scheduled for a hearing before the Immigration Court.

Respondent represented Mr. Iraheta at the hearing, at which Mr. Iraheta sought asylum, the withholding of deportation, and, as an alternative, voluntary departure. At the end of the

hearing, the Immigration Court denied the requests for asylum and withholding of deportation but granted the alternative relief of voluntary departure.

After the hearing, there were discussions of the fee required for an appeal. Respondent and Mr. Iraheta had different understandings of the agreement that was reached. Respondent understood that the fee would be $1,500 plus a $110 filing fee, with the filing fee and a $625 payment paid up front. Mr. Iraheta and Mr. Gagnon, the founder of Immigration Consultants, understood the total fee would be $630, with $325 required as a down payment.

Mr. Iraheta delivered to Immigration Consultants $320 in cash thirteen days before the appeal deadline. He was given a receipt labeled "Appeal" in Spanish. Respondent was aware of this payment shortly after it was made. He requested that Immigration Consultants contact Mr. Iraheta. Attempts to reach Mr. Iraheta by telephone failed. The Hearing Committee stated that these efforts "can only be regarded as inadequate." H.C. Rpt. at 19.

Because he had only received $320 from Mr. Iraheta, Respondent did not file the notice of appeal. The Hearing Committee found that Mr. Iraheta reasonably believed that payment of the $320 would be sufficient to obtain the filing of the appeal, and that payment of that amount was sufficient to communicate to Respondent that Mr. Iraheta intended for him to file an appeal.

Respondent made no efforts to communicate with Mr. Iraheta after the appeal deadline passed. Respondent did not return the $320 until Mr. Iraheta's new lawyer wrote asserting that a malpractice claim would be filed. Since a motion for leave to file a late appeal, filed on Mr. Iraheta's behalf by another lawyer, was granted, Respondent's failure to appeal did not result in serious prejudice to Mr. Iraheta.

The Hearing Committee found, in addition to the absence of any disciplinary record, that Respondent had devoted "extraordinary efforts" in voluntary *pro bono* service to the immigrant

community. Respondent's brief on sanction was supported by six letters from charitable organizations representing immigrants of several nationalities, all praising his *pro bono* service to their members, including travel to Haiti on *pro bono* projects during times of danger.

The Court's Opinion

The Court found the Board's reliance on *In re Bland*, 714 A.2d 787 (D.C. 1998) (per curiam), and *In re Hill*, 619 A.2d 936 (D.C. 1993) (per curiam), to be misplaced, because, in its view, those cases involved aggravating circumstances not present here. *Schlemmer*, 840 A.2d at 661-62.

Further, the Court concluded that the Board failed to consider three "ostensibly comparable" cases which resulted in informal admonitions being issued by Bar Counsel.[1] The Court ruled that informal admonitions should be considered in evaluating sanctions when they contain sufficient detail to allow a reliable comparison.[2] *Id*. at 662-63.

The Court acknowledged Bar Counsel's concerns at oral argument that informal admonitions are issued without complete fact-finding and often do not reveal all mitigation taken into consideration, but concluded nonetheless that informal admonitions will be referred to in the future in review of sanction recommendations. *Id.* at 662. The Court stated:

> In light of our determination that informal admonition letters are relevant to the issue of disciplinary consistency, we suggest that Bar Counsel include as much

[1] Two of these informal admonitions (*Cohen*, Bar Docket No. 042-98 and *Uriarte*, Bar Docket No. 380-02) were issued subsequent to the Board's report.

[2] The Court referred to *In re Confidential (J.E.S.)*, 670 A.2d 1343 (D.C. 1996), as reflecting the Court's prior reliance on informal admonitions in assessing an appropriate sanction. *Schlemmer*, 840 A.2d at 662. In that case, the respondent was found to have violated Rule 1.5(e)(2), which mandates that to share a fee, the attorneys must inform the client in writing of particular aspects of the arrangement. The Court affirmed the Board's conclusion that "some minimal sanction, namely admonition, should be imposed." *Confidential*, 670 A.2d at 1346. In arriving at this conclusion, the Board had pointed to the fact that informal admonitions had been issued in numerous cases involving Rule 1.5(a), which requires written fee agreements for newly engaged clients.

> information as possible in informal admonition letters so that adequate factual comparisons may be made.[3]

Id.

The Three Informal Admonition Cases

We next address the three cases identified by the Court as involving conduct comparable to Respondent's. As will be seen, we conclude that these cases, as described in Bar Counsel's letters of informal admonition, present somewhat less serious instances of misconduct.

In re Uriarte, Bar Docket No. 380-02 (BC May 30, 2003). This was also an immigration case. The respondent timely noted an appeal to the Board of Immigration Appeals (the "BIA") but failed to file a brief in support of the appeal and failed to respond to the Immigration and Naturalization Service's memorandum in opposition. The appeal was dismissed as a result of his omissions. Bar Counsel's letter recited an affidavit from the respondent's paralegal, which stated that he failed to follow the normal office practice of posting court dates and deadlines on a "main calendar board accessible to all office employees." *Uriarte*, Bar Docket No. 380-02 at 1. In addition, apparently, the information about the deadline was "somehow deleted or erased from the database by mistake." *Id.* at 2.

The respondent met with his client after discovering that he had missed the deadline, evidently at a time when he could have either filed a motion to reopen the appeal or filed an appeal from the BIA decision in federal court. The respondent took neither action, apparently based on his conclusion that nothing effective could be done without new evidence and that the appeal itself had little likelihood of success. The client then retained new counsel, who filed a motion to reopen based upon ineffective assistance of counsel. Bar Counsel's letter of informal admonition finds violations of Rules 1.1(a) and (b), 1.3(a) and 1.4(b) based on the respondent's

[3] In addition, the Board suggests that Bar Counsel's letters of admonition make a showing that the informal admonition is not inconsistent with sanctions in cases of comparable misconduct.

failure to respond to the INS opposition and his failure to adequately explain to his client the options available to seek to reopen the proceedings.

The Court noted that the respondent in *Uriarte* violated four rules, not two as here, and that there appeared to be no mitigating circumstances. In his brief to the Board on remand, Respondent argued that Uriarte's misconduct was "substantially more than incompetence and neglect." Respondent's Brief to Board in Response to Remand ("Resp. Brief") at 3. Bar Counsel emphasized in briefing that the misconduct in *Uriarte* involved a breakdown in office procedures and was the product of incompetence and neglect. Brief of Bar Counsel In Response to Board on Professional Responsibility's January 23, 2004 Order ("BC Brief") at 5.

In our view, *Uriarte* involved somewhat less serious misconduct than that here. The respondent's failure to file the brief with the BIA resulted from a breakdown in office procedures. When the respondent became aware of the problem, he consulted with his client. Here, Respondent affirmatively decided not to file an appeal, notwithstanding his knowledge that attempts to advise his client that the $320 was insufficient had been unsuccessful. Respondent could have preserved his client's rights by simply noting the appeal – a clerical step – and paying the $110 filing fee, acts for which the $320 was clearly sufficient, but was concerned that the BIA might not let him withdraw later.

In re Cohen, Bar Docket No. 042-98 (BC Mar. 4, 2003). In this case, another immigration asylum matter, Bar Counsel found that the respondent had provided incompetent representation in failing to ensure proper certification of documents to be admitted in an Immigration Court hearing and in choosing to file a motion to reopen/reconsider an adverse Immigration Court decision rather than a notice of appeal. Bar Counsel concluded that the respondent had mistakenly believed that a motion to reconsider/reopen would stay the time for

noting an appeal. Bar Counsel found this to be a product of the respondent's ignorance, concluding that there was no basis to find that the respondent "deliberately advocated" the option that was disfavored. *Cohen*, Bar Docket No. 042-98 at 7. There was no prejudice to the client from the lack of proper certification, and the client engaged successor counsel three days before the appeal deadline.

The Court saw the prejudice in *Cohen* as arguably more serious than that here in light of the fact that the client faced imminent deportation. The Court noted that Bar Counsel did not mention any prejudice to the client, and suggested that the client in *Cohen*, who was facing deportation, may have been more seriously prejudiced than Respondent's client. As stated above, the letter of informal admonition reveals that the client had retained successor counsel before the appeal deadline, so there is a possibility that an appeal was timely filed.[4] (This lack of clarity on the question of prejudice may suggest that this letter of admonition is not sufficiently detailed to be reliable for comparison purposes.)

Bar Counsel on remand states:

> Cohen violated the Rules requiring competent representation based upon her lack of a thorough knowledge of the law not because she made a financially-based, intentional decision to forego the client's rights.

BC Brief at 6. Respondent on remand disputes Bar Counsel's portrayal of the facts. Resp. Brief at 5-6.

Again, in our view, Respondent's misconduct was more serious; it was not the product of ignorance or negligence, but rather was deliberate, and would have constituted intentional neglect except for his mistaken belief that he had adequately communicated his fee requirements to Mr. Iraheta.

[4] According to the respondent, the client called the respondent, advising he had new representation and retrieved his file three days before the deadline. Successor counsel contacted the respondent "in an effort to expedite filing a pleading to assist [the client]." *Cohen*, Bar Docket No. 042-98 at 5.

In re Allen, Bar Docket No. 234-96 (BC May 7, 2001). In this, yet another immigration case, the respondent's client's husband, a U.S. citizen, had filed a petition for residency, with his wife – the respondent's client – as beneficiary. Thereafter, the respondent's client filed for divorce; under INS procedures, the proper procedure was for the respondent then to file a petition for waiver of the joint petition requirement so that the petition could go forward without the husband's participation. Initially unaware that such a petition could be filed *prior* to a final divorce, the respondent did not promptly file this petition.

In addition, the respondent failed to appear at a hearing on the matter before the Immigration Court; this resulted from the failure of a temporary intern in his office to properly distribute the notice of hearing when it was received. When the respondent learned that he had missed the hearing, he filed a motion to reopen, which the Immigration Court denied. The respondent then missed the deadline to note an appeal. Thereafter, the respondent filed a second motion to reopen, an appeal and a request to stay deportation. When the respondent's client was later detained by the INS, he wrote the director of the INS, filed another motion for reconsideration, contacted his client's congressional representative, and cooperated with his client's new counsel. Bar Counsel found violations of Rule 1.3(a) (zealous and diligent representation) in failure to file the waiver application and failure to notice an appeal; Rule 1.4(a) (client to be reasonably informed regarding status of matter) and Rule 1.4(b) (basis or rate of fee communicated in writing to client who is not regularly represented). As to the Rule 1.3(a) violation, Bar Counsel noted that the failure to note the appeal was "not a considered decision but the result of negligence." *Allen*, Bar Docket No. 234-96 at 2.

Bar Counsel on remand stressed that the respondent's actions in *Allen* were not "intentional or financially motivated." BC Brief at 4. Respondent argues that Respondent and Allen are alike in that their failures to act were the result of negligence. Resp. Brief at 5-6.

In contrast with *Allen*, however, Respondent's decision not to note the appeal was not the result of negligence but was instead deliberate. Respondent knew that his client had put up $320; he knew that attempts to reach the client had been unsuccessful; and he decided not to use the $320 to pay the filing fee and notice the appeal out of concern that he might not later be allowed to withdraw.

Sanction Analysis

Each case presents a unique set of facts and it is always a challenge to make comparisons for purposes of sanction recommendations. This one is particularly difficult. It is not a garden variety neglect case, where for one reason or other an attorney fails to provide diligent or competent representation to his or her client. Nor is it a case where an attorney has been dishonest, has engaged in a conflict of interest, or has overreached in dealing with a client. In reviewing this matter, we have looked beyond *Bland* and *Hill* in an effort to find guidance in other cases involving somewhat analogous circumstances.

At the outset, we acknowledge that *Bland* and *Hill* present somewhat more serious misconduct than present here. In *Bland*, as recognized by the Court, the respondent violated ten Rules of Professional Conduct. 714 A.2d at 787. The respondent, whose practice was located in Petersburg, Virginia, agreed to handle a workers' compensation case in the District of Columbia. He neglected the case over a period of several years to the serious prejudice of his client. Nonetheless, the misconduct there boiled down to simple neglect by the respondent of a single matter; the "violations found reduce to facets of neglect in the course of a single representation

and to use of a misleading letterhead." *Id.* The Board commented that the respondent's inaction "was more a product of respondent's wishful thinking or bad judgment than a disregard of his client's interest." *Id.* The Court upheld the Board's recommendation of public censure, noting that a "more severe sanction may not have been unreasonable."[5] *Id*. at 788.

In *Hill*, the respondent "persistently neglected" a criminal appeal to which he had been appointed. 619 A.2d at 936. In addition, he failed to respond to numerous disciplinary inquiries from Bar Counsel. The Court approved the Board's recommendation to increase the sanction to a public censure from the informal admonition that had been recommended by the Hearing Committee. The *Hill* misconduct was considerably more serious than Respondent's, and the sanction in *Hill* appears to be less than might be imposed, *i.e.*, it might well be considered inconsistent with sanctions imposed in other cases of serious neglect and failure to cooperate with Bar Counsel. *See, e.g., In re Wright*, 702 A.2d 1251 (D.C. 1997) (per curiam) (30-day suspension with fitness and restitution); *In re Steele*, 630 A.2d 196 (D.C. 1993) (60-day suspension with fitness and restitution).

Here, both the Hearing Committee and the Board rejected Bar Counsel's charge against Respondent of intentional neglect in violation of Rule 1.3(b). Cases of intentional neglect usually result in suspension. *See, e.g., In re Foster*, 581 A.2d 389, 389 (D.C. 1990) (per curiam). The example closest factually to this case is *In re Fowler*, 642 A.2d 1327 (D.C. 1994), where the respondent received a 30-day suspension for failing to file an appeal due to the fact that he had not received the full amount of the fee that he demanded be paid in advance.[6] Clearly, however,

[5] The Court referred to the rule that, in the absence of exceptions, its review of Board sanction recommendations is "especially deferential," citing *In re Delaney*, 697 A.2d 1212, 1214 (D.C. 1997).

[6] Unlike this case, the record in *Fowler* did not contain findings that the respondent believed he had clearly communicated his fee requirements to the client.

in light of the conclusion that the respondent believed he had adequately communicated his fee requirements, this case presents less serious misconduct than cases involving intentional neglect.

The issue is where this case falls along the spectrum from *Bland* and *Hill* to *Uriarte*, *Cohen* and *Allen*. Other cases provide some guidance. As will be seen, the Court has frequently imposed public censure in first time neglect cases.[7] In *In re Shelnutt*, 719 A.2d 96 (D.C. 1998) (per curiam), the respondent, appointed to represent an incarcerated defendant, failed to promptly file a bond reduction motion, with the result that the client spent several days more in jail. The Board recommended public censure and the Court agreed, stating:

> Our case law suggests public censure is an appropriate sanction in cases involving neglect of this kind. *In re Lyles*, 680 A.2d 408, 418 (D.C. 1996). When reviewing neglect by an attorney who has no history of discipline, we have held that "a period of suspension ordinarily is not imposed." *In re Sumner*, 665 A.2d 986, 990 (D.C. 1995). Respondent has no disciplinary history. While his neglect was serious, when compared to other cases involving neglect, it does not appear to warrant a sanction greater than censure.

Id. at 97.[8]

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[7] This is not always the case. The Court has imposed a 30-day suspension for neglect by a respondent with no prior disciplinary history. In *In re Dory*, 528 A.2d 1247 (D.C. 1987) (per curiam), the respondent had promised to file a motion for new trial or notice of appeal in a personal injury case. Notwithstanding that he received $500 as a retainer fee for the appeal, the respondent failed either to move for a new trial or notice an appeal. Like Respondent here, he had no prior discipline. The Hearing Committee recommended a six-month suspension; the Board recommended a 30-day suspension, which the Court adopted, stating:

> Recognizing that respondent has no prior disciplinary history, and that the instant violations stem from a single case, we adopt the Board's recommendation of a 30-day suspension.

Id. at 1248; *see also In re Lewis*, 689 A.2d 561 (D.C. 1997) (per curiam); *In re Sumner*, 665 A.2d 986 (D.C. 1995) (per curiam).

[8] The Court in *Shelnutt* cited a portion of the Board Report in *In re Lyles*, 680 A.2d 408 (D.C. 1996), where the respondent received a six-month suspension plus fitness for neglect of four clients whose complaints were consolidated into one proceeding. The relevant portion of the Board Report states:

> A first, single instance of neglect, even coupled with conduct prejudicial to the administration of justice but without prior discipline, has resulted in a public reprimand. *In re Hill*, 619 A.2d 936 (D.C. 1993); *In re Jones*, 521 A.2d 1119 (D.C. 1986); *In re Taylor*, 511 A.2d 386 (D.C. 1986).

In *Hill* and *Jones*, the actual sanction was public censure; in *Taylor*, it was a Board reprimand.

In *In re Stow*, 633 A.2d 782 (D.C. 1993) (per curiam), where the respondent was guilty of neglect of a single client, there was a dispute as to the scope of the respondent's engagement. Bar Counsel alleged he had been retained to represent a criminal defendant on all aspects of an appeal from a conviction where he was represented by another lawyer. The respondent contended that he was retained simply to advise his client whether there was a basis to raise ineffective assistance of counsel as an issue on appeal. The Hearing Committee agreed with the scope of representation as described by the respondent but found that he had failed to promptly perform even this more limited task. The Hearing Committee and the Board found that this misconduct would ordinarily warrant a public censure, but concluded – and the Court agreed – that due to the respondent's lack of organization in his practice – there was a need for a suspension of 30 days, stayed with probation and a practice monitor in order to prevent recurrence.

In re Margulies, No. 88-1032 (D.C. Jan. 26, 1989), involved a respondent who failed to file a brief after he had noted an appeal from a conviction, where he served as court-appointed counsel. He failed to respond to orders of the Court seeking reasons (a) for his failure to file the brief, and (b) why the Court should not vacate his appointment as counsel and refer the matter to Bar Counsel. The respondent also engaged in misrepresentation and deceit in falsely claiming that he had notified the Court of a change of his address. The Board, observing that while the respondent had no prior discipline, his failure to file the brief was attended by dishonesty, recommended public censure, which the Court imposed.

In re Mitchell, 727 A.2d 308 (D.C. 1999), did not involve neglect or failure to file a brief on appeal. We find it instructive, however, in that it also involved a public censure for conduct more serious than involved here. The respondent, the chief financial officer of his firm, had

failed to promptly pay two clients funds to which they were entitled. His firm's escrow account was attached as a result of a judgment against it obtained by its landlord and, subsequently, the firm initiated bankruptcy proceedings. When the clients demanded the money the respondent's firm was holding, he failed to advise them about the bankruptcy proceedings. The Court upheld the Board's findings that the respondent violated Rules 1.15(b) (failure to promptly deliver funds); 1.16(d) (failure to take steps to protect client's interest upon termination of representation); and 8.4(c) (misrepresentation). In discussing sanction, the Court stated:

> We have imposed a sanction of public censure for a wide range of attorney misconduct, including neglect of a legal matter, conduct prejudicial to the administration of justice, and inadequate maintenance of client records and accounts. *See In re Dunietz*, 687 A.2d 206, 212 n. 6 (D.C. 1996) (citing *In re Jones*, 521 A.2d 1119 (D.C. 1986)). In *In re Austern*, 524 A.2d 680 (D.C. 1987), we adopted a Board recommendation for public censure in a case involving dishonesty and misrepresentation on the part of an attorney. *See id.* at 684. The Board in *Austern* considered the fact that the respondent had no prior disciplinary record and had made "notable contributions in the area of legal ethics" as being persuasive in imposing a sanction lighter than suspension. *Id.* at 683. Likewise, respondent here has no prior disciplinary record and has been recognized for his contributions to the D.C. Street Law program. In addition, the Board in *Austern* "also took into account the fact that respondent's conduct was not motivated by the desire for personal gain." *Id.* The Hearing Committee, in declining to find a violation of Rule 8.4(c), found persuasive the fact that respondent acted with the express purpose of obtaining the return of Steinberg's money.

Id. at 315-16 (footnote omitted).

Respondent's misconduct does appear less serious than that for which public censure has been imposed in the foregoing cases. On the other hand, although we agree that Bar Counsel failed to prove a violation of Rule 1.3(b) (intentional failure to pursue client's lawful objectives), there is an element of intentionality in Respondent's conduct that is not seen in the informal admonition cases of *Uriarte, Allen*, and *Cohen*, where the misconduct resulted from breakdowns in office procedures, incomplete or erroneous understanding of appeal procedures, and/or negligence. Respondent knew that Mr. Iraheta had deposited $320, and he knew that efforts to

reach Mr. Iraheta to advise that the $320 was insufficient had not been successful. He affirmatively decided not to note the appeal, notwithstanding that $320 would cover his time and the filing fee, apparently because of concerns that he might not later be allowed to withdraw if Mr. Iraheta failed to make additional payment. As noted by Bar Counsel, in this regard Respondent was acting in his own personal financial interest.

We have also looked for analogous cases in which the sanction has been a Board reprimand. The most recent is *In re Karr*, Bar Docket No. 322-89 (BPR May 10, 1999), in which the Board issued a reprimand after lengthy litigation of Bar Counsel's charges of neglect and violations relating to the respondent's use of his law firm name and letterhead. The Court, in remanding the case to the Board, had found that much of the conduct underlying the charges did not constitute neglect. *In re Karr*, 722 A.2d 16 (D.C. 1998). The Board was influenced by the respondent's remorse and testimonials – such as present here – to his reputation as "a highly skilled and devoted advocate of the poor" during his many years of practice. *Id*. at 10.

In re Gregory, Bar Docket No. 218-86 (BPR Apr. 7, 1988), involved neglect and conduct prejudicial to the administration of justice. In *Gregory*, the respondent failed to appear at three court hearings. The Board concluded that the respondent's violations did not evidence "a continuing pattern of neglect." *Id.* at 6. In deciding to issue a reprimand rather than recommending public censure or a short suspension, the Board relied most heavily on the respondent's attitude. The Board noted that he was "genuinely regretful of his conduct" and had changed his calendaring practices. *Id.*

In the third case, *In re Duvall*, Bar Docket No. 42-86 (BPR Feb. 12, 1987), the respondent had failed to file a brief with the Court despite several orders from the Court. The

respondent stated that she had been overwhelmed by financial problems and other work commitments. Relying on prior decisions, the Board imposed a reprimand.

Given our conclusion that Respondent's culpability may be less than in the public censure cases set out above, we have determined that a Board reprimand is the appropriate sanction. It may seem anomalous to treat Respondent's failure to take action, where he believed he was not obligated to act, as more serious than situations involving neglect or incompetence such as found in *Uriarte*, *Cohen*, and *Allen*, where there is no question that the obligation exists. But there are other considerations present here. In our original analysis of this matter, we wrestled with the question of whether Respondent's conduct constituted intentional neglect under Rule 1.3(b); while we did not find intentional neglect, we did emphasize the obligation of D.C. attorneys to ensure that their fee arrangements are understood by their clients. We quote our prior report:

> In our view, it is a close question whether *Fowler* nonetheless compels a conclusion that Respondent violated Rule 1.3(b) when he failed to file notice of his client's appeal. Our case law, particularly *Fowler*, puts the burden on a lawyer to render legal services in circumstances where the client reasonably believes the lawyer has agreed to undertake an engagement. In such a situation, the attorney is taken to be aware of his or her obligation to the client. This conclusion is reinforced in cases like this one, as well as *Fowler* and *Lawrence*, where the lawyer's failure to act is deliberate, *i.e.*, the lawyer makes an affirmative decision not to perform an act – such as filing a notice of appeal – necessary to protect the client's interest. In light of the need to protect clients, who may be as unsophisticated as Iraheta was here, any doubts in the attorney's mind as to his or her duty must be resolved in favor of the client.
>
> We believe, however, that this strong need to protect clients' interests is adequately served by the finding of a violation of Rule 1.3(a). Thus, we conclude that Respondent's admittedly deliberate action in failing to file notice of the appeal does not satisfy the intentionality requirement of Rule 1.3(b) in circumstances where a Hearing Committee believes that he acted on a sincere but mistaken belief that he had adequately communicated with his or her client and was not required to act.

In re Schlemmer, Bar Docket Nos. 444-99 & 066-00 at 20-21 (BPR Dec. 27, 2002).

We think the sanction here should also reinforce the message that members of our Bar must take pains to be clear in their communications on fees, and should "tread lightly" when considering a refusal to act to protect a client's interests due to questions about payment of fees. *Cf*. Rule 1.16.

We appreciate the Court's decision to remand this case rather than simply revise the sanction, as was its prerogative. *See In re Fair*, 780 A.2d 1106, 1115 (D.C. 2001). For the reasons stated above, however, we conclude that, notwithstanding his unblemished disciplinary record and exemplary record of *pro bono* work, Respondent should not be given the lowest level of sanction allowed in our system. Mindful that the purpose of a sanction is not to punish an attorney but rather to promote the protection of the public, we believe the conduct in this case merits a reprimand by the Board.

Conclusion

Accordingly, for the reasons set out herein, the Board hereby reprimands Respondent.

BOARD ON PROFESSIONAL RESPONSIBILITY

By: _____
Timothy J. Bloomfield
Chair

Dated: June 16, 2004

All members of the Board concur in this Report and Recommendation, except Mr. Wu, who did not participate.