THE FOLLOWING INFORMAL ADMONITION WAS ISSUED
BY BAR COUNSEL ON
February 6, 2006

J.B. Dorsey, III, Esquire
c/o Samuel McClendon, Esquire
1225 Tuckerman Street, N.W.
Washington, D.C. 20011

Re: ***In re J. B. Dorsey, III, Esquire***
Bar Docket No. 003-00

Dear Mr. Dorsey:

This office has completed its investigation of the above-referenced matter. We find that your conduct reflected a disregard of certain ethical standards under the District of Columbia Rules of Professional Conduct (the Rules). We are, therefore, issuing you this Informal Admonition pursuant to Rule XI, Sections 3, 6, and 8 of the District of Columbia Court of Appeals' Rules Governing the Bar.

Background

We docketed this matter for investigation based on a disciplinary complaint filed by Sharlene E. Williams, Esquire. She asserts that you engaged in unethical conduct during your handling of her interests in several litigated cases. At the time Ms. Williams filed her ethics complaint, you and she were litigating against each other and you requested that the matter be deferred given that many of the issues she alleged in the disciplinary complaint were also asserted in a legal malpractice action against you. We agreed. The litigation between you went to non-binding arbitration, after which you elected to proceed with a trial *de novo*. Before trial, you and Ms. Williams settled the case. We reactivated our investigation in May 2002 and you denied the allegations of misconduct leveled by Ms. Williams.

Of the statements she makes in her disciplinary complaint, we find clear and convincing evidence that you failed in a timely manner to provide Ms. Williams and another client a writing setting forth the basis or rate of your fee, engaged in a conflict of interest, failed to communicate adequately, rendered incompetent representation, and ultimately provided retainer agreements containing a provision impermissibly broadening the scope of your representation.

Findings of Fact and Legal Analysis

Based on the following factual findings, we conclude that you violated (1) Rule 1.5(b) (fees); (2) Rules 1.7(b)(3) and 1.7(c) (conflict of interest); (3) Rule 1.4(b) (communication); (4) Rule 1.1(a) (competence); and (5) Rule 1.2(a) (scope of representation).

1. You violated Rule 1.5(b) on a number of occasions.

> **When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation.**

a. *The Car Accident Case*

Ms. Williams's daughter, Karin Marie Carr, was involved in a car accident on or about March 16, 1996. Three months later, on June 13, 1996, Karin Carr, who suffered from mental illness, checked herself into a psychiatric facility. On June 16, 1996, Ms. Carr died of injuries relating to her attempted suicide while in the psychiatric facility. Ms. Carr had a son, Kenneth (Tony) Carr, Jr., who was 13 years old at the time of her death. He was visiting his paternal grandmother, Phyllis Carr, in Pennsylvania for the summer at the time Karin Carr died. Tony continued to live with Phyllis Carr, who obtained joint physical custody of him in 1996 along with Tony's father, Kenneth Carr, Sr.

In March 1997, Karin Carr's mother, Sharlene Williams, was appointed personal representative of Karin Carr's estate in Charles County, Maryland, where Ms. Carr had resided. She initiated an action on behalf of the estate to pursue the car accident case that her daughter had initiated through another law firm in Maryland before her death. Ms. Williams reports that she discharged the law firm that had been handling the case and retained you as her co-counsel to file the action shortly after she was appointed personal representative. You did not provide Ms. Williams a written fee agreement or other writing setting forth the basis or rate of your fee in the car accident case. You contend that you informed Ms. Williams that you would agree to employ the same terms and conditions as set forth in the fee agreement that Karin Carr had established with the law firm that had undertaken to represent her before she died. Ms. Williams denies that you and she arrived at such an agreement. Because you failed to provide Ms. Williams a writing setting forth the basis or rate of your fee in the car accident case, you violated Rule 1.5(b).

b. *The Wrongful Death/Survivorship Case*

On June 10, 1997, within one year of her daughter's death, Ms. Williams filed in District of Columbia Superior Court a wrongful death and survivorship suit, individually and in her capacity as personal representative of the estate. She named as defendants the psychiatric facility and her daughter's treating doctor. In October 1997, Ms. Williams retained you as her co-counsel in that action and over the course of the representation, advanced you more than $52,000 to defray litigation costs.

When Ms. Williams retained you in October 1997, you both agreed verbally to split the attorneys' fees from any recovery in the wrongful death/survivorship action, with 60% of the fee for you and the remainder to her. It is undisputed that the attorneys' fees would be a contingent fee calculated as some percentage of the overall recovery, but Ms. Williams was unclear what the percentage would be:

> In exchange for [Ms.] Williams paying all litigation costs, and for sharing legal representation in the two cases, Mr. Dorsey suggested, and [Ms.] Williams agreed, to a 60/40 fee split agreement with Mr. Dorsey taking 60% of ***whatever contingency fee resulted*** from the [wrongful death/survivorship] case, and [Ms.] Williams taking 40%.

Disciplinary complaint by Sharlene Williams, Esquire, at page 2 n.4 (emphasis added.)

Two and one half years after the verbal agreement, you provided Ms. Williams a retainer agreement at a time when settlement negotiations with the parties were nearly concluded.[1] In a new client-lawyer relationship, an understanding as to the fee should be promptly established. Rule 1.5, Comment [1]. We conclude that two and one half years to provide Ms. Williams a retainer agreement does not constitute "a reasonable time after commencing the representation" within the meaning of the Rule and you breached Rule 1.5(b) in the wrongful death/survivorship case.

c. *The Declaratory Judgment Case*

As a result of the wrongful death/survivorship suit, the insurance carriers that covered Karin Carr's treating doctor, Legion Insurance Company and Psychiatrists' Risk Retention Group, Inc. (collectively referred to as "Legion"), attempted to rescind coverage for the treating doctor. On September 30, 1997, Legion filed a declaratory judgment action

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[1] In the contingency fee agreement, you were to take as your fee 24% of the gross recovery (which is equal to a 60% share of 40% of the proceeds).

in D.C. Superior Court and named as defendants Karin Carr's treating doctor, as well as Sharlene Williams, individually and as personal representative of her daughter's estate. With the exception of assisting with her answer to the complaint, for the next two years, Ms. Williams handled the Legion declaratory judgment action *pro se* until a three day bench trial during which you represented her.

Trial occurred from November 1 through 3, 1999; you served as trial counsel because Ms. Williams was not only a party but a witness. You formally entered your appearance in the Legion case a few days before trial on October 28, 1999.[2] However, you did not memorialize your fee regarding the declaratory judgment case until nearly three weeks *after* trial had occurred in that case, at which time you charged Ms. Williams almost $43,000 for the three day trial.[3]

Because you failed before trial to provide Ms. Williams a writing setting forth the basis or rate of your fee in the declaratory judgment case, she was surprised by your substantial and, to her, surprisingly high fee to handle that litigation. She refused to pay, contending that the previous verbal agreement between you contemplating a 60%-40% split of attorneys' fees encompassed not only the wrongful death/survivorship action but the declaratory judgment action because the second action arose out of the first. "A written statement concerning the fee, required to be furnished *in advance* in most cases [under this Rule], reduces the possibility of misunderstanding." Rule 1.5, Comment [2] (emphasis added). Your failure to memorialize your fee to handle the declaratory judgment case until after conclusion of the trial violated Rule 1.5(b).

d. *A Second Wrongful Death Case*

The wrongful death/survivorship action filed by Sharlene Williams settled in December 1999. Bar Counsel's investigation has revealed that six months earlier, you filed in D.C. Superior Court another wrongful death action arising from Karin Carr's death. You did not file this new action in Ms. Williams's name, as personal representative of

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[2] On December 17, 1999, you moved to withdraw your appearance as co-counsel. Ultimately, in response to a consent motion, the Superior Court – by orders dated December 5, 2000 and January 9, 2001 – dismissed Ms. Williams as a defendant from the declaratory judgment action. By this time, Ms. Williams had retained successor counsel after terminating your services.

[3] Your retainer agreement states that you would charge Ms. Williams $300 per hour.

Karin Carr's estate, but in the name of Phyllis Carr, Tony's other grandmother, who resided in Pennsylvania. You did not provide Ms. Carr a writing setting forth the basis or rate of the fee in connection with that representation in violation of Rule 1.5(b).

2. You violated Rules 1.7(b)(3) and 1.7(c). Rule 1.7(b)(3) provides:

> **Except as permitted by paragraph (c) below, a lawyer shall not represent a client with respect to a matter if[] representation of another client will be or is likely to be adversely affected by such representation[.]**

Rule 1.7(c) provides:

> **A lawyer may represent a client with respect to a matter in the circumstances described in paragraph (b) above if each potentially affected client provides consent to such representation after full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation.**

On June 15, 1999, in D.C. Superior Court you sued the treating nurse in Phyllis Carr's name "on behalf of" Tony Carr without the prior knowledge or consent of Ms. Carr, even though she was the putative guardian of your purported client.[4] When you filed the new wrongful death law suit alleging the nurse's civil liability in Karin Carr's death, you did not notify Karin Carr's mother, Ms. Williams – the personal representative – even though you filed the new case in the same court as the first wrongful death/survivorship action. She states that she was unaware of this case or of its dismissal until she later brought a legal malpractice suit against you.[5]

In the first wrongful death/survivorship action filed on June 10, 1997, Ms. Williams had not alleged that the treating nurse was civilly liable, but instead named the psychiatric facility and the treating doctor to the exclusion of all others. Although you entered your appearance in the case on October 20, 1997, you failed to amend the civil complaint to

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[4] Ms. Carr later ratified your action after you informed her about it on June 18, 1999, the morning that she was to finish her deposition in the first wrongful death/survivorship action filed by Ms. Williams.

[5] You failed to pursue the action you filed in Phyllis Carr's name and in August 1999, the D.C. Superior Court dismissed it for want of prosecution.

name the treating nurse, thereby continuing Ms. Williams's initial theory of the case that the nurse was not civilly liable.

Yet, on June 15, 1999, two years after Ms. Williams filed the first wrongful death/survivorship action, you undertook to represent Phyllis Carr on her grandson's behalf by filing a second wrongful death action in Phyllis Carr's name based on Karin Carr's death. You did not move to join the nurse in the pending wrongful death/survivorship action filed by Sharlene Williams or move to consolidate the second wrongful death action with the first, even though it was based on the same set of operative facts.

Under D.C. Superior Court Civil Rule 19(a), a person must be joined as a party in the action if in the person's absence, complete relief cannot be accorded among those already parties. One purpose of requiring joinder of a person needed for just adjudication – *i.e.*, an indispensable party – is *"to avoid multiple suits concerning the same dispute*[.]" *Capital City Corp. v. Johnson*, 646 A.2d 325, 329 (D.C. 1994) (emphasis added). Joinder furthers "the public interest in the complete, consistent, and efficient settlement of controversies[,]" and "the public stake in settling disputes by wholes, whenever possible[.]" *Provident Bank v. Patterson*, 390 U.S. 102, 111 (1968). Thus, if an indispensable party is not joined in a pending action, "the action must be dismissed[.]" *Capital City Corp. v. Johnson*, 646 A.2d at 329 (internal punctuation and citation omitted).

By filing a second wrongful death action based on the same set of operative facts as the first action, you jeopardized the viability of Ms. Williams's case against the psychiatric facility and treating doctor. If the suit against the nurse were valid, then the nurse should have been joined as a party to the first action; your failure to join the nurse subjected Ms. Williams's action to dismissal under D.C. Superior Court Civil Rule 19(a). Indeed, dismissal was mandated under the case law – that is, Sharlene Williams's case was "likely to be adversely affected" by your representation of Phyllis Carr in the second wrongful death case, in violation of Rule 1.7(b)(3).

Moreover, because you did not inform either Ms. Williams or Ms. Carr that you intended to file the second wrongful death action, or in whose name you intended to file it, neither of your clients was informed of the potential conflict of interest between your pursuing one wrongful death action on Ms. Williams's behalf and a pursuing a second, separate wrongful death action on Ms. Carr's behalf, when both actions arose from the

same injury to Karin Carr.[6] As a result, neither grandmother was in a position to provide you a knowing waiver, *i.e.*, after full disclosure of the possible adverse consequences in violation of Rule 1.7(c).

3. You violated Rule 1. 4(b).

> **A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.**

By failing to inform Sharlene Williams that you had filed a second wrongful death suit in Phyllis Carr's name or of the potential consequences to her own law suit, you violated this Rule.

4. You violated Rule 1.1(a).

> **A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation**.

Although "the District's wrongful death statute does not create a right of action in anyone but the personal representative," *Group Health Ass'n, Inc. v. Gatlin*, 463 A.2d 700, 701 (D.C. 1983); D.C. Code § 16-2702, you filed the second wrongful death lawsuit against the treating nurse in the name of Phyllis Carr rather than the personal representative of Karin Carr's estate, her mother, Sharlene Williams. You have failed to disclose on what basis Phyllis Carr had any standing to bring such an action in her name on Tony's behalf, given that she was not the personal representative.[7]

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[6] You contend that you did notify Sharlene Williams that you intended to file the action in Phyllis Carr's name on Tony's behalf; however, Ms. Williams denies that you did so. There is no correspondence from you to either Ms. Williams or Ms. Carr memorializing your intent. In addition, Ms. Carr testified during her deposition in the first wrongful death/survivorship action that she was unaware you intended to file the second wrongful death action (in her name) even though you were her putative attorney. Consequently, we credit Ms. Williams when she states that you failed to inform her, as well.

[7] "An action pursuant to this chapter [negligence causing death] shall be brought by and in the name of the personal representative of the deceased person. . . ."
(continued...)

Although you named the wrong party in the second wrongful death case, you could have moved to substitute the appropriate party, Sharlene Williams, under Super.Ct.Civ.R. 17(a), which states in part:

> No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

See Duckett v. District of Columbia, 654 A.2d 1288, 1290 (D.C. 1995). However, you did not substitute Ms. Williams for Ms. Carr.

Further, as noted, Karin Carr died on June 16, 1996. Under the District of Columbia's wrongful death statute, the statute of limitations to bring an action expired one year after Karin Carr's death, *i.e.*, in June 1997 – two years *before* you filed the action in Phyllis Carr's name. D.C. Code § 16-2702 ("An action pursuant to this chapter [negligence causing death] shall be brought by and in the name of the personal representative of the deceased person, and within one year after the death of the person injured."). *See also*, *Huang v. D'Albora*, 644 A.2d 1, 2 n.2 (D.C. 1994) ("The District's Wrongful Death Act is subject to a one-year statute of limitations.").

Further, because you failed to join the nurse in the pending wrongful death/survivorship matter filed by Sharlene Williams, you subjected that case to dismissal. Such a lack of thoroughness and/or skill was also a violation of Rule 1.1(a).

5. You violated Rule 1.2(a).

> **A lawyer shall abide by a client's decisions concerning the objectives of representation, . . . and shall consult with the client as to the means by which they are to be pursued.** ***A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. . . .***

(Emphasis added).

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[7](...continued)
D.C. Code § 16-2702.

Although "the client may not be asked . . . to surrender . . . the right to settle litigation that the lawyer might wish to continue," every retainer agreement that you belatedly provided to Sharlene Williams contained the following language: "Lastly, it is understood and agreed by both [the client] and the Firm that neither will settle any claim arising out of this accident without obtaining the express consent of the other." Through this provision, you inappropriately arrogated to yourself (and your law firm), the authority to veto any settlement offer your client was willing to accept in derogation of the plain language of Rule 1.2(a). The same is true with respect to the retainer agreement you provided Phyllis Carr.

Conclusion

Based on the foregoing, we conclude that you violated your ethical obligations to Sharlene Williams and Phyllis Carr in violation of Rules 1.5(b), Rules 1.7(b)(3) and 1.7(c), Rule 1.4(b), Rule 1.1(a), and 1.2(a). We have conducted a thorough investigation of all allegations made by Ms. Williams but do not believe that we could persuade a Hearing Committee of further violations by clear and convincing evidence. We have chosen to issue you an informal admonition because you have cooperated with our investigation and agreed to take a continuing legal education course within six months of the date of this letter.

This letter constitutes an Informal Admonition pursuant to D.C. Bar Rule XI, §§ 3, 6, and 8 and is public when issued. Please refer to the attachment to this letter of Informal Admonition for a statement of its effect and your right to have it vacated and have a formal hearing before a Hearing Committee.

If you would like to have a formal hearing, you must submit a written request for a hearing within 14 days of the date of this letter to the Office of Bar Counsel, with a copy to the Board on Professional Responsibility, unless Bar Counsel grants an extension of time. If a hearing is requested, this Informal Admonition will be vacated and Bar Counsel will institute formal charges pursuant to D.C. Bar R. XI, § 8 (b). The case will then be assigned to a Hearing Committee and a hearing will be scheduled by the Executive Attorney for the Board on Professional Responsibility pursuant to D.C. Bar R. XI, § 8 (c). Such a hearing could result in a recommendation to dismiss the charges against you or a recommendation for a finding of culpability, in which case the sanction recommended by the Hearing Committee is not limited to an Informal Admonition.

Sincerely,

Wallace E. Shipp, Jr.
Bar Counsel

Encl.: Attachment to Letter of
Informal Admonition

Sent Regular and Certified Mail No. 7160 3901 9844 1904 5115

cc: Sharlene E. Williams, Esquire
WES:TMT:RLH:tsm