DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:	:	
	:	
DOUGLAS B. EVANS, SR.,	:	
	:	**Board Docket No. 14-BD-030**
Respondent.	:	**Bar Docket No. 2011-D437**
	:	
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 423496)	:	

REPORT AND RECOMMENDATION OF THE BOARD ON PROFESSIONAL RESPONSIBILITY

I. INTRODUCTION

Before the Board is the Report and Recommendation of an Ad Hoc Hearing Committee ("Hearing Committee"), filed on October 13, 2015. This matter involves Respondent Douglas Evans' alleged mishandling of an appeal from his client's conviction in a criminal case. Respondent failed to file an appendix to an appellate brief and was replaced by successor counsel after the appeal was dismissed. Respondent also failed to communicate to his client that the appeal was dismissed and to file a motion for a reduction in sentence pursuant to D.C. Superior Court Criminal Rule 35. The Hearing Committee concluded that Respondent's conduct violated D.C. Rules of Professional Conduct 1.1(a) (failure to provide competent representation); 1.1(b) (failure to serve client with commensurate skill and care); 1.3(a) (failure to represent the client with diligence and zeal within legal bounds); 1.3(c) (failure to act with reasonable promptness); 1.4(a) (failure to keep the client reasonably informed about the status of the matter); 1.4(b) (failure to explain the matter to the extent necessary to permit the client to make informed decisions regarding the representation); and 1.16(d) (failure to take timely steps to the extent reasonably practicable to protect the client's interests upon termination of the representation). The Hearing Committee did

not find a violation of one additional charge brought by Disciplinary Counsel[1]: Rule 8.4(d) (engaging in conduct that seriously interferes with the administration of justice).

The Hearing Committee recommended suspending Respondent for a period of thirty days, stayed in favor of one year of supervised probation with the conditions that Respondent: (1) make arrangements to attend the two-day basic training course taught by the D.C. Bar's Practice Management Advisory Service within thirty days of the Court's order imposing discipline; (2) attend the course within seven months of the start of the period of probation and present proof of attendance within ten days of having completed the course; (3) commit no further disciplinary rule violations; and (4) take three hours of Continuing Legal Education course(s), pre-approved by Disciplinary Counsel and present proof of attendance within ten days of having completed the course(s). As part of the recommended sanction, the Hearing Committee also specified that the Respondent must accept the terms of the probation within thirty days of the date of a Court order imposing probation, pursuant to Board Rule 18.1(a), and that Disciplinary Counsel could seek to revoke Respondent's probation if it had probable cause to believe that Respondent had violated any of the probation terms.

Disciplinary Counsel filed exceptions to the Hearing Committee's failure to find a violation of Rule 8.4(d) and to its recommended sanction. Instead, Disciplinary Counsel recommended the sanction to which the parties had stipulated—a six-month suspension with fitness, stayed in favor of probation with conditions. Respondent filed no exceptions, but suggested that the Board adopt the findings of fact, conclusions of law, and recommended sanction that Disciplinary Counsel submitted to the Hearing Committee.

[1] The Specification of Charges was filed by the Office of Bar Counsel. The District of Columbia Court of Appeals changed the title of Bar Counsel to Disciplinary Counsel, effective December 19, 2015. We use the current title herein.

Based on our review of the record, we adopt and incorporate the Hearing Committee's findings of fact, which are supported by substantial evidence in the record as a whole. We also adopt the Hearing Committee's conclusions of law, with the exception that the Board finds that Disciplinary Counsel proved a violation of Rule 8.4(d) by clear and convincing evidence. Finally, the Board adopts the Hearing Committee's recommended sanction of a thirty-day suspension, stayed in favor of one year of probation, but with different conditions, described below.

II. PROCEDURAL HISTORY

A. Specification of Charges

This matter commenced on March 19, 2014, when Disciplinary Counsel filed a Specification of Charges ("Specification") against Respondent. Disciplinary Counsel alleged that Respondent violated the eight disciplinary rules noted above. Respondent filed an answer on April 21, 2014. On April 10, 2015, the parties filed joint stipulations ("Stip.") to the alleged facts and violations.

B. Pre-Hearing Conference and Hearing

A pre-hearing conference was held on June 9, 2014. A second pre-hearing conference was held on March 20, 2015, after which the Hearing Committee issued an April 6, 2015 Scheduling Order. The hearing was held on June 23, 2015, during which Respondent testified in his own behalf in mitigation of sanction.

III. FINDINGS OF FACT

The Board adopts the Hearing Committee's findings of fact, as supported by substantial evidence in the record. *See* Board Rule 13.7.[2] The relevant facts are set forth below.

[2] Board Rule 13.7 provides, in pertinent part, "[u]pon conclusion of the oral argument or its waiver, the Board may affirm, modify, or expand the findings and recommendation of the Hearing Committee. . . . When reviewing the findings of a Hearing Committee, the Board shall employ a 'substantial evidence on the record as a whole' test."

On or about March 7, 2011, Henry E. Wilson retained Respondent, for a total of $4,000, to represent him on appeal of his criminal conviction and to file a Rule 35 motion for reduction of sentence. FF 2.[3]

On or about April 21, 2011, Respondent entered his appearance on behalf of Mr. Wilson before the District of Columbia Court of Appeals in *Wilson v. United States*, 11-CF-174. On May 5, 2011, the Court vacated the appointment of previous counsel and ordered Respondent to file a brief and appendix within 40 days. FF 4.

On June 20, 2011, Respondent filed a motion to extend the time to file the brief until July 6, 2011. Respondent filed the brief, without an appendix on July 28, 2011, after the filing deadline had passed. That same date, the Court accepted the brief for filing and ordered Respondent to file the appendix within 15 days of the date of the order, with a motion for leave to late-file. Respondent failed to file the appendix or to request an extension of time to do so. FF 4.

On October 5, 2011, the Court dismissed the appeal based upon Respondent's failure to file the appendix or respond to the Court's July 28, 2011 order. FF 6.

Respondent failed to inform his client, Mr. Wilson, that the appeal had been dismissed. Mr. Wilson learned of the dismissal directly from the Court. FF 7.

On October 27, 2011, Mr. Wilson wrote to the Court to request that his appeal be reinstated. On November 8, 2011, the Court reinstated the appeal and appointed successor counsel to represent Mr. Wilson. FF 8.

Respondent took no action to reinstate Mr. Wilson's appeal. Respondent testified that he did not know the case had been dismissed until "much later on," speculating that he may not have

[3] References to the Hearing Committee's Report and Recommendation and its findings of fact are referenced, respectively, as "H.C. Rpt. at __" and "FF __." Citations to Disciplinary Counsel's exhibits and the hearing transcript are referenced, respectively, as "BX __" and Tr. __."

received the order directing that he file the appendix (and presumably the Court's order of dismissal) because of mail problems in his office. Respondent conceded that he could have kept up to date on the status of the appeal by calling the Court or checking the Court's docket sheet, but he did not do so. FF 9.

Although Respondent had agreed to file a Rule 35 motion for Mr. Wilson, Respondent never did so. FF 10. After the Court dismissed the case and Respondent was replaced as counsel Respondent failed to refund any of the legal fees paid to him by or on behalf of Mr. Wilson. FF 11.

Mr. Wilson filed an application for reimbursement of his legal fee with the D.C. Bar's Attorney/Client Arbitration Board ("the ACAB"). The ACAB awarded Mr. Wilson a partial refund of $1,500, which Respondent paid to Mr. Wilson on or about January 30, 2014. FF 12.

On June 23, 2015, Respondent provided an additional refund of $3,000 to Mr. Wilson through Marilyn Wilson. FF 13.

During the time that Respondent represented Mr. Wilson, between March 2011 and October 2011, Respondent had significant health problems. He developed asthma which impaired his breathing and he had to be taken to a hospital by ambulance, had to visit several doctors, and to return to the hospital before he "learn[ed] to live with it." FF 15. Respondent provided this information in mitigation of his misconduct in Mr. Wilson's case.

IV. CONCLUSIONS OF LAW

The Board agrees with the Hearing Committee that Disciplinary Counsel established by clear and convincing evidence that Respondent violated Rules 1.1(a) and (b), 1.3(a) and (c), 1.4(a) and (b), and 1.16(d). However, the Board disagrees with the Hearing Committee's finding that Disciplinary Counsel did not establish by clear and convincing evidence that Respondent violated Rule 8.4(d). The Hearing Committee's unanimous findings of fact, summarized above, are well-

reasoned and supported by substantial record evidence. The Board adopts them except as set forth below.

The Board owes no deference to the Hearing Committee's proposed conclusions of law, and we review them *de novo*. *See In re Bradley*, 70 A.3d 1189, 1194 (D.C. 2013) (per curiam); *In re Anderson*, 778 A.2d 330, 339 n.5 (D.C. 2001).

Throughout its Brief on Exception to the Report of the Hearing Committee ("Brief on Exception"), Disciplinary Counsel relies heavily on the fact that Respondent and Disciplinary Counsel stipulated to the Rule 8.4(d) violation and the sanction. *See, e.g.*, Brief on Exception at 1-7. Disciplinary Counsel argues that the Hearing Committee improperly "second-guessed the sanction that the parties believed would be appropriate and necessary to deter, would reflect consistency and be warranted in the particular circumstances of the case." *Id.* at 6. Instead, Disciplinary Counsel argues that the Board should defer to the "parties' agreement, as long as it lies within the wide range of sanctions for the misconduct." *Id*. Similarly, while acknowledging that the Hearing Committee did not find one of the violations to which Respondent and Disciplinary Counsel stipulated, which the Hearing Committee considered to be a justification for making "comprehensive findings, notwithstanding the respondent's stipulations," Disciplinary Counsel argues that the Hearing Committee should have "err[ed] on the side of efficiency" and issued a "simple one-page acceptance of [violations and sanctions] stipulations." *Id.* at 3 n.2 (quoting H.C. Rpt. at 6 n.4). The fact that the parties may agree, however, is not the basis for finding any specific Rule violations, imposing a disciplinary sanction, or for the Board or the Hearing Committee to abdicate their responsibilities to determine the appropriate sanction consistent with applicable precedent. *See, e.g., In re Murdter*, 131 A.3d 355, 358 (D.C. 2016)

(per curiam) (Court adopts Board recommendation of sanction more severe than sanction to which respondent and Disciplinary Counsel stipulated).

A. Respondent Failed to Represent his Client with Competence, Skill, and Care, in Violation of Rules 1.1(a) and (b).

To prove a violation of Rule 1.1(a), "[Disciplinary] Counsel must not only show that the attorney failed to apply his or her skill and knowledge, but that this failure constituted a serious deficiency in the representation . . . . [A serious deficiency] has generally been found in cases where the attorney makes an error that prejudices or could have prejudiced a client and the error was caused by a lack of competence." *In re Evans*, 902 A.2d 56, 69-70 (D.C. 2006) (per curiam) (appended Board Report) (citations omitted); *see also In re Ford*, 797 A.2d 1231, 1231 (D.C. 2002) (per curiam) (Rule 1.1(a) violation requires proof of serious deficiency in the representation). Competent representation requires the "legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." *See In re Drew*, 693 A.2d 1127, 1132 (D.C. 1997) (per curiam) (appended Board Report).

Rule 1.1(b) requires that a lawyer serve the client with the "skill and care commensurate with that generally afforded to clients by other lawyers in similar matters." Rule 1.1(b) is "better tailored [than Rule 1.1(a)] to address the situation in which a lawyer capable to handle a representation walks away from it for reasons unrelated to his competence in that area of practice." *In re Lewis*, 689 A.2d 561, 564 (D.C. 1997) (per curiam) (appended Board Report). With respect to Rule 1.1(b), a Hearing Committee may find a violation of the standard of care established through expert testimony or without expert testimony when an attorney's "conduct is so obviously lacking that expert testimony showing what other lawyers generally would do is unnecessary." *In re Nwadike*, Bar Docket No. 371-00 at 28 (BPR July 30, 2004), *findings and recommendation adopted*, 905 A.2d 221, 227, 232 (D.C. 2006); *see In re Schlemmer*, Bar Docket Nos. 444-99 &

66-00 at 13 (BPR Dec. 27, 2002) (noting that Disciplinary Counsel need not "necessarily produce evidence of practices of other attorneys in order to establish a Rule 1.1(b) violation"). The "serious deficiency" requirement of Rule 1.1(a) applies equally to Rule 1.1(b). *See In re Yelverton*, 105 A.3d 413, 421-22 (D.C. 2014). The Court has found violations of Rule 1.1 "only [for] conduct that is truly incompetent, fraudulent, or negligent and that prejudices or could have prejudiced the client." *Id.* at 422.

The Board agrees with the Hearing Committee and finds that Respondent "violated the duty to represent his client with competence, skill and care." H.C. Rpt. at 8. Respondent did not file an appendix to the appellate brief despite being given every opportunity and, in fact, being ordered to do so. As a result, the client's appeal was dismissed. Respondent also never filed, and made no effort to file, the Rule 35 motion.

B. Respondent Failed to Act with Diligence, Zeal, and Reasonable Promptness, in Violation of Rules 1.3(a) and (c).

Rule 1.3(a) requires a lawyer to "represent a client zealously and diligently within the bounds of the law." Rule 1.3(c) requires a lawyer to "act with reasonable promptness in representing a client." The Court has held that the failure to take action to further a client's cause for a significant amount of time, whether or not prejudice to the client results, violates Rule 1.3(c). In *In re Reback*, the Court defined neglect as:

> indifference and a consistent failure to carry out the obligations which the lawyer has assumed to his client or a conscious disregard for the responsibility owed to the client. The concept of ordinary negligence is different. Neglect usually involves more than a single act or omission. Neglect cannot be found if the acts or omissions complained of were inadvertent or the result of an error of judgment made in good faith.

487 A.2d 235, 238 (D.C. 1985) (per curiam) (quoting ABA Comm'n on Ethics and Prof'l Responsibility, Informal Op. 1273 (1973)), *adopted in relevant part*, 513 A.2d 226 (D.C. 1986)

(en banc); *see also In re Douglass*, 859 A.2d 1069, 1081 (D.C. 2004) (per curiam) (appended Board Report) (violations of 1.1(a) and (b) and 1.3(a) and (c) in representation of single client).

Comment [8] to Rule 1.3 provides that "[e]ven when the client's interests are not affected in substance, . . . unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness," making it a very serious violation.

The Board agrees with the Hearing Committee and finds that Respondent violated Rules 1.3(a) and (c). Notwithstanding his failure to file the appendix, if Respondent had kept himself informed of and monitored the status of the appeal, he would have realized that the appeal was in jeopardy because of his failure to file the appendix. Later, albeit too late to remedy his failure, he would have realized that the appeal had been dismissed and resurrecting the appeal might not have fallen solely to Mr. Wilson. Finally, Respondent completely neglected to do anything in connection with filing a Rule 35 motion.

C. Respondent Failed to Keep the Client Reasonably Informed About the Status of the Matter and Explain the Matter to the Extent Necessary to Permit the Client to Make Informed Decisions, in Violation of Rules 1.4(a) and (b).

Rule 1.4(a) requires a lawyer to "keep a client reasonably informed about the status of a matter." To fulfill his obligations under Rule 1.4(a), a lawyer must "initiate and maintain the consultative and decision-making process if the client does not do so and [to] ensure that the ongoing process is thorough and complete." Rule 1.4, cmt. [2]; *see In re Bernstein*, 707 A.2d 371, 376 (D.C. 1998). "The guiding principle for evaluating conduct under Rule 1.4(a) 'is whether the lawyer fulfilled the client's reasonable expectations for information.'" *In re Hallmark*, 831 A.2d 366, 374 (D.C. 2003) (quoting *In re Schoeneman*, 777 A.2d 259, 264 (D.C. 2001)). The purpose of Rule 1.4(a), which directly impacts Rule 1.4(b), is so that the client can "participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued." Rule 1.4, cmt. [1]. Rule 1.4(b) provides that a lawyer "shall explain a matter to the extent

reasonably necessary to permit the client to make informed decisions regarding the representation" and thus requires a lawyer to "be particularly careful to ensure that decisions of the client are made only after the client has been informed of all relevant considerations." Rule 1.4, cmt. [2].

The Board agrees with the Hearing Committee and finds that Respondent violated Rules 1.4(a) and (b). Respondent never informed Mr. Wilson about the dismissal of his appeal (due to Respondent's misconduct) or the overall status of the representation. By having no communication with his client, Respondent deprived Mr. Wilson of any information with which to make an informed decision about his deficient appeal, the lack of a Rule 35 motion, and Respondent's overall inadequate legal representation.

D. Respondent Failed to Refund Unearned Fees in a Timely Manner, in Violation of Rule 1.16(d).

Rule 1.16(d) provides that when a representation is terminated, the lawyer must take timely and reasonable steps to protect the client, including "surrendering papers and property to which the client is entitled, and refunding any advance payment of fee or expense that has not been earned or incurred." The sole question for determining if Respondent violated Rule 1.16(d) is whether he fulfilled the "timely" requirement for refunding any unearned fees. Respondent was retained to represent Mr. Wilson in an appeal and file a Rule 35 motion. Although he filed a brief, he did not file an appendix, and the appeal was dismissed. He never filed the Rule 35 motion. Respondent was paid $4,000 in legal fees and returned $4,500 in legal fees to Mr. Wilson ($1,500 on or about January 30, 2014, and $3,000 on June 23, 2015), but only after Mr. Wilson filed an application with the ACAB and was awarded a $1,500 reimbursement.

The Board agrees with the Hearing Committee's conclusion that Respondent violated Rule 1.16(d) when he failed to refund any portion of his fees until over two years after his client's appeal was dismissed, as this was not a "timely" refund. *See, e.g.*, *In re Hallmark*, Bar Docket Nos. 77-

96 *et al.* at 30 (BPR May 31, 2001) (violation of Rule 1.16(d) based on twenty-nine-month delay in issuing refund for unearned fee), *findings and recommendation adopted in relevant part*, 831 A.2d at 371. The fact that Respondent refunded $500 more than he was paid and more than the ACAB awarded is not relevant to Respondent's violation based on the delay in payment. The Board finds that Respondent violated Rule 1.16(d) by not timely refunding his unearned fees to Mr. Wilson.

E. Respondent Engaged in Conduct that Seriously Interfered with the Administration of Justice, in Violation of Rule 8.4(d).

Rule 8.4(d) provides that "[i]t is professional misconduct for a lawyer to . . . [e]ngage in conduct that seriously interferes with the administration of justice." To establish a violation of Rule 8.4(d), Disciplinary Counsel must establish that the conduct (i) was improper; (ii) bears directly on the judicial process with respect to an identifiable case or tribunal; and (iii) taints the judicial process in more than a *de minimis* way. *See In re Hopkins*, 677 A.2d 55, 57, 60-61 (D.C. 1996). The prohibition of Rule 8.4(d) applies not only to activities that may cause a tribunal to reach an incorrect decision, but also to conduct that "potentially impact[s] upon the process to a serious and adverse degree." *Id.* at 61. A lawyer also violates Rule 8.4(d) if his conduct causes an unnecessary expenditure of time and resources in a judicial proceeding. *In re Cole*, 967 A.2d 1264, 1266 (D.C. 2009).

Disciplinary Counsel argues in its Brief that the Hearing Committee failed to follow Rule 8.4(d) case law when it found that Disciplinary Counsel did not prove a Rule 8.4(d) violation because it failed to prove a "plus factor," that is, that Respondent's conduct "had an impact above and beyond that which would typically result from a violation of the other rules." H.C. Rpt. at 13. The Board agrees with Disciplinary Counsel that the Hearing Committee should not have required

proof of a "plus factor" as a necessary element of a Rule 8.4(d) violation, and the Board does not consider such an analysis appropriate under case precedent.

As the Court noted in *Yelverton*, 105 A.3d at 426, violations of Rule 8.4(d) "generally involve misleading the court or misusing or obstructing proceedings in a specific case or interfering with [Disciplinary] Counsel's efforts to investigate attorney misconduct." As Comment [2] to Rule 8.4 clarifies, section (d) is also intended to reach failure to appear in court for a scheduled hearing and failure to obey court orders, as well as other listed conduct. Repeated failures to respond to court orders have been found to violate Rule 8.4(d). *See, e.g.*, *In re Carter*, 11 A.3d 1219, 1223 (D.C. 2011) (per curiam).

It is undisputed that Respondent's failure to obey court orders satisfied the first two elements of the *Hopkins* test: Respondent's conduct was improper and it bore directly on the judicial process with respect to an identifiable case, his client's criminal appeal. *See* Rule 8.4, cmt. [2]; *see also In re Askew*, 96 A.3d 52, 57-58 (D.C. 2014) (per curiam); *In re Ukwu*, 926 A.2d 1106, 1144 (D.C. 2007) (appended Board Report). We must determine whether Respondent's conduct tainted the judicial process in more than a *de minimis* way; that is, following *Cole*, did Respondent's conduct cause an *unnecessary* expenditure of judicial time and resources.

Respondent filed an appearance on behalf of his client in the Court of Appeals on April 21, 2011. On May 5, 2011, the Court vacated the appointment of previous counsel and ordered Respondent to file his brief and appendix by June 14, 2011. Instead, on June 20, 2011, he filed an untimely motion to extend the filing date until July 6, 2011. The Court granted his motion, but Respondent also missed this deadline. Ultimately, on July 28, 2011, he filed a brief, but he did not file an appendix as required. The brief was accepted, but later that day, the Court ordered Respondent to file the appendix by August 12, 2011 and to accompany that filing with a motion

to late-file. Respondent failed to comply with that order. As a consequence of Respondent's failure to file the appendix, the Court dismissed the appeal on October 5, 2011. When Respondent's client learned of the dismissal, he wrote to the Court *pro se*, requesting that his appeal be reinstated. On November 8, 2011, the Court reinstated the appeal and appointed new counsel to replace Respondent.

In *Askew*, 96 A.3d at 54-58, the respondent was counsel in a criminal appeal for fifteen months, during which she sought nine extensions of time to file a brief, ignored two court orders—issued after her last request for additional time—that she file the brief, and ignored her client so thoroughly that he had to write to the court several times to determine the status of his case. The Court noted that the respondent "failed to do the work [the Court] ordered her to do on [her client's] behalf – file a brief with this court." *Id.* at 59. Because she never filed a brief, she was removed as counsel. *Id.* After her removal, she failed to provide the file to successor counsel, which caused further delay in the case because he had to request additional time to write and file the brief. *Id.* As the Hearing Committee noted, Respondent ignored the Court's orders, thus delaying the Court's consideration of her client's appeal. *In re Askew*, Bar Docket No. 2011-D393 at 22-23 (H.C. Rpt. May 22, 2013) (appended Hearing Committee report), *findings and recommendation adopted*, Bar Docket No. 2011-D393 at 3 (BPR July 31, 2013).

In *Murdter*, 131 A.3d at 356, the respondent failed to file briefs in five criminal appeals. He was appointed to these cases between September 2009 and April 2010, and he was removed as counsel in all of them in November 2010. *Id.* In these cases, the respondent ignored "numerous" court orders and ultimately pleaded guilty to contempt for failure to file briefs in two of these cases. *Id.* at 356 & n.1.

In both *Askew* and *Murdter*, the Court found that the respondents violated Rule 8.4(d). In both cases, the Court was required to repeatedly issue orders directing the respondents to file briefs in their clients' cases. In *Askew*, the delay in the appellate case consisted of the fifteen months in which the respondent failed to act and the extended time necessary for successor counsel to write and file a brief because the respondent failed to comply with the court order to turn over the client's file. 96 A.3d at 59. In *Murdter*, the respondent failed to comply with a continuous stream of court orders in five cases, which caused delay in each of these cases of between seven and fourteen months. 131 A.3d at 359 (appended Board Report). In the instant case, Respondent violated three court orders. Two of these orders required him to file the brief by a set date. In the first instance, Respondent requested a continuance out of time, and in the second instance, Respondent filed the brief (but not the appendix) out of time. The third order required him to file the appendix,[4] but he did not do so.

In both *Askew* and *Murdter*—as in the instant case—because of the respondents' inaction, the Court vacated their appointment and appointed substitute counsel. In both *Askew* and *Murdter*—*unlike* the instant case—the courts were required to take additional action. *See Murdter*, 131 A.3d at 359 (appended Board Report) (the Superior Court addressed additional contempt proceedings); *Askew*, 96 A.3d at 59 (additional Court action required because the respondent did not provide the file to substitute counsel). The Court did not need to take additional action in this case. On the other hand, in neither *Askew* nor *Murdter* did the Court dismiss the client's case, as it

[4] Respondent testified that he did not receive the July 28 order, citing problems with the mail delivery in his office (Tr. 21-22), and there was no evidence to the contrary. However, whether or not he received this Order, Respondent well understood that the appendix should be filed, since this instruction was part of the Court's prior orders. BX 4 at 5 (order confirming Respondent's appearance as counsel requires that the brief and limited appendix be filed within 40 days); Tr. 27. He also could have—and should have—kept abreast of the Court's actions by checking the docket sheet in this case. *See In re W.E.T.*, 793 A.2d 471, 474 (D.C. 2002) (providing that attorneys have a "well established" duty to "keep apprised of docket entries").

did here. Thus, the effort expended by the Court was less in the instant case, but the effect on the client's case was greater.

In analyzing Respondent's case, the Board also considered the case law addressing the circumstances when attorneys failed to appear for a scheduled hearing. In *In re Shepherd*, the respondent failed to appear at a single hearing: an initial conference in a civil case. Bar Docket Nos. 313-98 & 83-99 at 2 (BPR Dec. 10, 2003). The Board found that this failure caused the client's case to be dismissed and resulted in a string of proceedings. *Id.* at 14. Specifically, the Board found that "[t]he judicial process was then burdened by [respondent's] motion to set aside the dismissal, his appeal from the denial, the remand to the trial court, and the subsequent reinstatement of the appeal, in which [r]espondent failed to file any supplemental brief." *Id.* at 18. In reviewing the effect of the respondent's failure to appear in court, the Board considered the dismissal of his client's case *and* all of the subsequent proceedings together to determine the burden on the judicial process. *Id.* The Board then recommended that the Court find that the respondent had violated Rule 8.4(d), and the Court agreed without further analysis. *In re Shepherd*, 870 A.2d 67, 70 (D.C. 2005) (per curiam). In the instant case, Respondent missed several deadlines, which resulted in dismissal of his appeal, but the Court's involvement in the aftermath of Respondent's improper conduct was less than in *Shepherd*.[5]

In *In re Mance*, 869 A.2d 339, 340 (D.C. 2005) (per curiam), the Court found a violation of Rule 8.4(d), where the respondent filed an untimely notice of appeal and then ignored a court

[5] We note that in *Schoeneman*, 891 A.2d at 287 (appended Board Report), the Board and the Court found that the respondent had violated Rule 8.4(d) by missing a status conference in one civil case and failing to perfect service of process in another civil case, both of which resulted in dismissal of the cases, but none of them discussed the impact this had on the judicial process or provided any analysis. In both cases, the respondent compounded the problem caused by his conduct by lying to his clients, thus creating more complications for the Court when they sought to undue the harm caused by respondent. *Id.* at 289 (appended Board Report).

order to show cause why the appeal should not be dismissed. These circumstances are similar to those in the instant case: Respondent did not file the appendix, even though the Court explicitly ordered him to do so. Determining the applicability of the analysis relevant to the Rule 8.4(d) charge is not simple, however, because the effect of the respondent's misconduct on the judicial process was greater in *Mance* than here. There, although *Mance* involved the violation of a few orders—like here—the respondent in *Mance* also failed to communicate with his client about his appeal, disregarded inquiries and directives from this court concerning his client's complaints and requests for new counsel, and delayed moving to withdraw from the case after learning that his client had sought to terminate his engagement and had filed a bar complaint against him. *Id.*

We find that the case law has not crisply defined what actions constitute more than a "*de minimis*" effect on the judicial process when, as here, the misconduct did not require the sustained judicial intervention reflected in the cases described above. Although these facts present a close question, and this case involves fewer Court orders and subsequent court actions than the cases previously considered by the Court, we have concluded that Disciplinary Counsel has met its burden of proving more than a *de minimis* interference with the administration of justice because his failure to comply with Court orders required the Court to (1) order Respondent to file the appendix omitted from his initial filing; (2) dismiss the appeal; (3) review the client's letter seeking reinstatement; and (4) reinstate the appeal and appoint new counsel. Thus, we conclude that Respondent violated Rule 8.4(d) because his improper conduct tainted the judicial process in more than a *de minimis* way. *See Hopkins*, 677 A.2d at 57, 60-61. We note that whether or not we find that Respondent violated Rule 8.4(d), it would not affect our sanction recommendation.

V. RECOMMENDED SANCTION

A. Standard of Review

The sanction imposed in an attorney disciplinary matter is one that is necessary to protect the public and the courts, maintain the integrity of the legal profession, and deter the respondent-attorney and other attorneys from engaging in similar misconduct. *See, e.g.*, *In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (en banc); *In re Kline*, 113 A.3d 202, 215 n.9 (D.C. 2015); *In re Martin*, 67 A.3d 1032, 1053 (D.C. 2013). "In all cases, [the] purpose in imposing discipline is to serve the public and professional interests . . . rather than to visit punishment upon an attorney." *In re Reback*, 513 A.2d 226, 231 (D.C. 1986) (en banc) (citations omitted); *see also In re Goffe*, 641 A.2d 458, 464 (D.C. 1994). The sanction also must not "foster a tendency toward inconsistent dispositions for comparable conduct or . . . otherwise be unwarranted." D.C. Bar R. XI, § 9(h)(1); *see, e.g.*, *Hutchinson*, 534 A.2d at 923-24; *Martin*, 67 A.3d at 1053 (citing *In re Elgin*, 918 A.2d 362, 376 (D.C. 2007)); *In re Berryman*, 764 A.2d 760, 766 (D.C. 2000).

In determining the appropriate sanction, the Court of Appeals considers a number of factors, including: (1) the seriousness of the conduct at issue; (2) the prejudice, if any, to the client that resulted from the conduct; (3) whether the conduct involved dishonesty; (4) the presence or absence of violations of other provisions of the disciplinary rules; (5) whether the attorney has a previous disciplinary history; (6) whether the attorney has acknowledged his wrongful conduct; and (7) circumstances in mitigation or aggravation. *See, e.g.*, *Martin*, 67 A.3d at 1053 (citing *Elgin*, 918 A.2d at 376). The Court also considers "'the moral fitness of the attorney' and the 'need to protect the public, the courts, and the legal profession . . . .'" *In re Rodriguez-Quesada*, 122 A.3d 913, 921 (D.C. 2015) (per curiam) (quoting *In re Howes*, 52 A.3d 1, 15 (D.C. 2012)).

B. Application of the Sanction Factors

1. The Seriousness of the Misconduct

The Board agrees with the Hearing Committee that Respondent's conduct "was not intentional and . . . was not mendacious." H.C. Rpt. at 15. However, considering that Mr. Wilson, an incarcerated criminal defendant, might have lost his right of appeal because of Respondent's failure, Respondent's misconduct was serious.

2. Prejudice to the Client

Respondent's actions resulted in the dismissal of Mr. Wilson's appeal, and it was only through Mr. Wilson's efforts, not Respondent's, that the appeal was reinstated. Although there eventually was no actual prejudice to Mr. Wilson, there was prejudice for the period of time that the appeal was dismissed and the potential for permanent prejudice, remedied only by the client's request that the appeal be reinstated. In addition, Mr. Wilson had to file a claim with the ACAB to obtain a refund of his legal fee from Respondent.

3. Presence of Dishonesty or Misrepresentation

There are no allegations or evidence in the record to suggest that Respondent was dishonest or engaged in any misrepresentation.

4. Violations of other Disciplinary Rules and Previous Disciplinary History

The Board has found violations of Rules 1.1(a) and (b), 1.3(a) and (c), 1.4(a) and (b), 1.16(d), and 8.4(d). The Board has given some weight to Respondent's multiple rule violations in this matter in determining the appropriate sanction.

Respondent has three prior informal admonitions. The first two were issued in 2001, related to a single criminal appeal, and collectively were based on violations of Rules 1.1(a), 1.1(b), 1.4(a) 1.5(b) (written statement of basis or rate of fee), and 1.16(d). Respondent received a third informal

admonition in June 2010 for violations of Rules 1.4(a) and 1.5(b). H.C. Rpt. at 15. The June 2010 informal admonition was contingent upon Respondent's "completion of the District of Columbia Bar's Basic Training Seminar offered by the Practice Management Advisory Service within six months." BX G at 2.

5. Failure to Acknowledge Wrongful Conduct

Respondent acknowledged his wrongful conduct and the Hearing Committee found that he "testified credibly that 'he felt really bad' about his failure to properly represent his client." H.C. Rpt. at 15. Respondent already has "restructured his office procedures to avoid future misconduct." *Id*.

6. Other Circumstances in Aggravation and Mitigation

At the hearing, Respondent testified in mitigation of sanction that he developed asthma while representing Mr. Wilson. The Board agrees with the Hearing Committee that Respondent's health issues did not prevent him from fulfilling the duties of his representation. The record also provides no evidentiary support for Respondent's claim of mitigation. At a minimum, Respondent could have kept informed regarding the progress of Mr. Wilson's appeal through checking the docket. The Board finds that Respondent's health is not a factor that mitigates the sanction.

C. Sanctions Imposed for Comparable Misconduct

The Board agrees with the Hearing Committee that a stayed thirty-day suspension is consistent with sanctions imposed for comparable misconduct, and not the stayed six-month suspension recommended by the parties. The gravamen of this case is the neglect of a single criminal appeal involving a single client, where the respondent filed the appellate brief but did not follow through and file the appendix or respond to the Court's order directing him to do so. Generally, a reprimand or censure might have been an appropriate sanction, had this been

Respondent's first brush with the disciplinary system, but Respondent's history of prior discipline and companion violations call for some period of suspension.

Based on case precedent, the Board finds that thirty days is an appropriate period under such circumstances. As the Hearing Committee noted:

> The Court has held that "[g]enerally, absent aggravating factors, a first instance of neglect of a single client matter warrants a reprimand or public censure." *In re Chapman*, 962 A.2d 922, 926 (D.C. 2009) (citing *In re Schlemmer*, 870 A.2d 76, 82 (D.C. 2005) and *In re Bland*, 714 A.2d 787, 788 (D.C. 1998)). However, "in cases where there are aggravating factors or the respondent has a prior disciplinary history, a 30-day suspension has severally been imposed." *Id.* (citations omitted); *see also In re Hill*, 619 A.2d 936, 936 (D.C. 2006) (per curiam) (public censure for failure to file criminal appellate brief).

H.C. Rpt. at 16.

Disciplinary Counsel argues that the Hearing Committee should not have "second-guessed the sanction the parties believed would be appropriate and necessary to deter, would reflect consistency and be warranted in the particular circumstances of this case." Brief on Exception at 6. The Court, however, rejected such an approach in *Murdter*, and instead of the public censure jointly recommended by the parties, imposed a sanction that "balanced[ed] the competing considerations" and conformed to the consistency requirement of D.C. Bar R. XI, § 9(h). 131 A.3d at 358. We have attempted to do the same here.

We thus have concluded that the sanction to which the parties stipulated—a six-month suspension stayed in favor of probation, with a fitness requirement in the event of a probation violation—would be unduly harsh.[6] First, a six-month suspension is consistent with more serious

[6] The Board agrees with Disciplinary Counsel that "the disciplinary system should encourage stipulations and agreements between the parties that meet of the goals of the discipline system, conserve it resources and cut delay." Brief on Exception at 5-6. However, the Board has an obligation to recommend a sanction consistent with the applicable legal standards, regardless of the stipulation of the parties or whether the stipulated sanction is unduly harsh or lenient. *See Murdter*, 131 A.3d at 358.

instances of neglect, reflecting the complete abandonment of the representation and often involving multiple clients and multiple matters over an extended period of time. *See Murdter,* 131 A.3d at 362-63 (appended Board Report). In *Askew*, a six-month suspension, stayed in part in favor of probation, was imposed for the neglect of a single court-appointed criminal appeal, but the misconduct was much more egregious than the misconduct at issue in this case. 96 A.2d at 59 (describing the neglect as "serious, 'substantial[,] and intentional'"). Here, Respondent's misconduct occurred during an approximately three-month period of time, after he initially fulfilled his duties to his client by filing the brief, but then failed to file the appendix, failed to notify his client that the appeal had been dismissed, and failed to file a Rule 35 motion for a reduction in sentence. Moreover, Respondent has acknowledged his misconduct and taken steps to remedy it and ensure that it will not happen in the future.

Disciplinary Counsel argues that a six-month suspension is not unduly harsh because the sanction would be executed only *if* Respondent violates probation. *See* Brief on Exception at 8 ("Violating the terms of the probation would sufficiently aggravate the original misconduct to justify the six month suspension."). But the Board must recommend a sanction based on the misconduct before us, not on an unspecified violation of probation that might occur at some point in the future. The misconduct before us, considered in light of the various sanction factors and the applicable precedent, supports the thirty-day suspension recommended by the Hearing Committee.

D. The Fitness Requirement

The Board agrees with the Hearing Committee that the evidence does not support the imposition of a fitness requirement. A fitness showing is imposed when the Court cannot be "'reasonably assured' of the respondent's fitness to engage in the practice of law otherwise." *In re Cater*, 887 A.2d 1, 20 (D.C. 2005) (quoting *In re Steele*, 630 A.2d 196, 201 (D.C. 1993)). It "is

intended to be an appropriate response to serious concerns about whether the attorney will act ethically and competently in the future, after the period of suspension has run." *Id.* at 22. To determine whether a fitness requirement is warranted, it is necessary to consider whether the evidence and testimony in the record "contain[s] clear and convincing evidence that casts a serious doubt upon [Respondent's] continuing fitness to practice law." *Id.* at 24 (quoting Board Report). In determining whether there is a serious doubt as to an attorney's fitness, the Court has looked to the following five factors: (1) the nature and circumstances of the misconduct for which the attorney was disciplined; (2) whether the attorney recognizes the seriousness of the misconduct; (3) the attorney's conduct since discipline was imposed, including the steps taken to remedy past wrongs and prevent future ones; (4) the attorney's present character; and (5) the attorney's present qualifications and competence to practice law. *Id.* at 21 (citing *In re Roundtree*, 503 A.2d 1215, 1217 (D.C. 1985)).

As with our suspension recommendation, our obligation is to apply the applicable legal standard in determining whether a fitness requirement is appropriate—here, the standard for imposing fitness set forth in *Cater*. As the Court noted in *Cater*, a fitness requirement is a serious undertaking. *Id.* at 22. "Serious doubt" about an attorney's continuing fitness to practice law means "real skepticism, not 'just a lack of certainty,'" and "proof of a violation of the Rules that merits even a substantial period of suspension is not necessarily sufficient to justify a fitness requirement." *Id.* at 22, 24 (quoting Board Report).

We find the proof insufficient here to support a fitness condition. Given the work Respondent did for the client, his acknowledgement of his failure to complete the job, sincere expressions of remorse, refund of his legal fee, and steps he has taken to prevent future violations,

we find the record insufficient to support a finding of a serious doubt about Respondent's continuing fitness to practice.

We recognize that Disciplinary Counsel seeks a fitness requirement only *if* Respondent fails to satisfy the terms of probation, and that the Court has imposed conditional fitness requirements in a few limited circumstances. In those cases, the misconduct itself and/or a clearly identified concern about the respondent's ability to practice ethically supported the conditional fitness showing. For instance, in *In re Bettis*, 855 A.2d 282, 284-86 (D.C. 2004), a respondent, previously disbarred on consent, failed to deposit a settlement into a trust account and failed to pay a third-party medical provider its share of the settlement. The Court imposed a public censure with supervised probation and, if the respondent failed to accept the terms of probation or pay restitution, a thirty-day suspension with a fitness requirement. *Id.* at 290. In *In re Fox*, 66 A.3d 548, 550-51 (D.C. 2013), the respondent did not prosecute a personal injury case (resulting in its dismissal), failed to keep his clients informed of the status of the case, and when questioned by one client, misrepresented the case status. In a second matter, the respondent settled the case without his client's consent, failed to consult with his client about the status of the case, and could not account for approximately fifty insurance checks sent to the respondent but never negotiated. *Id.* at 551-52. The Board recommended, and the Court agreed, that probation under the oversight of a practice monitor would offer the respondent an opportunity to correct prior errors. *Id.* at 555. However, because the respondent had been reluctant to accept full responsibility for his misconduct, and was callous in dealing with his clients about the status of the case, the Board recommended that the respondent be required to prove fitness if he violated probation, reasoning that such a violation would show that he was "unable or unwilling to correct his ways." *In re Fox*, Board Docket No. 2010-D529 at 21 (BPR May 8, 2012), *recommendation adopted*, 66 A.3d at

555. Similarly, in *In re Edwards*, 870 A.2d 90, 98-99 (D.C. 2005), a negligent misappropriation case, the Court suspended the respondent for six months and, because it appeared that the respondent was confused about the current status of her operating and escrow accounts and had not adopted procedures to safeguard entrusted funds, the Court placed her on six months of probation under the oversight of a financial monitor in lieu of requiring her to prove fitness prior to reinstatement. However, given the concern that she did not understand how to handle her accounts, a failure to cooperate with the monitor would violate her probation and would require her to prove fitness prior to reinstatement. *Id.* at 99.

Thus, while we recognize that, in certain cases, it is appropriate to recommend fitness *if* a respondent violates probation in the future, we disagree with Disciplinary Counsel's categorical argument that "a lawyer who cannot or will not conform his behavior to the requirements of the probationary terms has *demonstrated* the need for a fitness requirement." Brief on Exception at 6 (emphasis in original). Rather, Disciplinary Counsel should be required to demonstrate serious misconduct or a disciplinary history that raises a serious question of fitness if the respondent does not comply with probation, as in *Bettis*, *Fox*, and *Edwards.* Given that Respondent has acknowledged his wrongdoing, expressed remorse, refunded the fees, and taken steps to prevent future wrongdoing, we cannot find that failure to satisfy the terms of probation would meet the high bar set forth in *Cater* for imposing fitness: clear and convincing evidence of a serious doubt as to Respondent's fitness to practice. The record thus does not support the imposition of a conditional fitness requirement.

It does, however, support the imposition of a period of probation. Because Respondent already attended the Bar's Basic Training Seminar as a condition of his prior Informal

Admonition,[7] we do not adopt the recommendation of the Hearing Committee that attendance at the seminar should be imposed as a condition of probation. Instead, we recommend that as a condition of probation, Respondent undergo an assessment by the D.C. Bar's Assistant Director for Practice Management Advisory Service ("PMAS"), to ensure that Respondent has the systems in place to avoid the lapses that resulted in his misconduct. Respondent should be required to implement any recommendations PMAS may make and sign a limited waiver permitting that program to confirm compliance with this condition and cooperation with the assessment process. *See Askew*, 96 A.3d at 62 n.15.

VI. CONCLUSION

For the foregoing reasons, the Board finds that Respondent violated Rules 1.1(a), 1.1(b), 1.3(a), 1.3(c), 1.4(a), 1.4(b), 1.16(d), and 8.4(d). The Board recommends that the Court impose a sanction of a thirty-day suspension, stayed in favor of one year of unsupervised probation, with the conditions that Respondent: (1) make arrangements to undergo an assessment by the D.C. Bar's Assistant Director for Practice Management Advisory Service, or his designee, within thirty days of the Court's order imposing discipline; (2) undergo the assessment within seven months of the start of the probation period; (3) implement any recommendations made following the assessment and sign a limited waiver permitting that program to confirm compliance with this condition and cooperation with the assessment process; (4) commit no further disciplinary rule violations; and (5) take three hours of Continuing Legal Education course(s), pre-approved by Disciplinary Counsel, and present proof of attendance within ten days of having completed the courses(s). Pursuant to D.C. Bar R. XI, § 3(a)(7), we recommend that Respondent be required to provide

[7] The record is silent as to whether Respondent attended the Basic Training Seminar in 2010. However, because the June 2010 informal admonition was contingent on him attending the seminar and Disciplinary Counsel did not withdraw the informal admonition, we infer that Respondent attended the Basic Training Seminar.

written notice of the probation to existing clients at the beginning of the period of probation, and to clients who retain Respondent during the period of probation. Respondent must accept the terms of the probation within thirty days of the date of the Court order imposing probation, pursuant to Board Rule 18.1(a).

BOARD ON PROFESSIONAL RESPONSIBILITY

By: /PGB/
Patricia G. Butler

Dated: November 16, 2016

All members of the Board concur in this Report and Recommendation, except Mr. Carter, who is recused.