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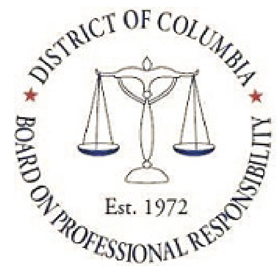

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

Issued
February 4, 2022

In the Matter of:	:
EDUARDO JUSTO DE POMAR,	: D.C. App. No. 21-BG-327 : Board Docket No. 20-ND-002 : Disciplinary Docket Nos. 2016-D290
Respondent.	: & 2017-D168
A Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 492823)	:

REPORT AND RECOMMENDATION OF THE
BOARD ON PROFESSIONAL RESPONSIBILITY

I. INTRODUCTION

This negotiated discipline matter is currently pending before the Board on remand from the Court of Appeals to consider "the appropriateness of the recommended sanction in light of th[e] court's precedent." Order, *In re Justo de Pomar*, No. 21-BG-327 (D.C. June 17, 2021); *see* D.C. Bar R. XI, § 12.1(d). As a result of Respondent's extensive misconduct while representing clients in two immigration matters, an Ad Hoc Hearing Committee recommended that the Court approve an Amended Petition for Negotiated Discipline ("the Petition") which would suspend Respondent for nine-months with 120 days stayed on the condition that Respondent not engage in any misconduct within one year of his reinstatement. In its Report issued on May 11, 2021, the Hearing Committee concluded that the

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* Consult the 'Disciplinary Decisions' tab on the Board on Professional Responsibility's website (www.dcattorneydiscipline.org) to view any prior or subsequent decisions in this case.

agreed-upon sanction was justified, in part for reasons it provided in a Confidential Appendix.

On September 30, 2021, the Board remanded the case to the Hearing Committee, ordering it to submit a more detailed Supplemental Confidential Appendix that would include references to specific Rule violations and more clearly detail the information it relied on to support its recommendation to approve the Petition. The Hearing Committee issued its Supplemental Confidential Appendix on October 20, 2021.

For the reasons discussed below, the Board concludes that the agreed-upon sanction is appropriate in light of the Court's precedent and recommends that the Petition be approved.

II. FACTUAL BACKGROUND

The Petition is based on Respondent's representation of two clients in immigration matters. In the first matter (Zapata-Espinal), the parties agree that Respondent did not provide a formal retainer but instead, provided a handwritten note, which quoted a price of $3,000, but permitted him to charge extra for "appeals, waivers, changes, filing costs." Ultimately, Respondent collected nearly $4,000 that the client paid in several installments, all of which he placed in his business account instead of a trust account. After filing an asylum application, Respondent moved to postpone his client's "credible fear" interview. The client did not receive notice of the rescheduled date and did not attend the interview because the scheduling notice was sent to an old address. After the client completed a rescheduled interview,

Respondent incorrectly told her she was eligible to apply for employment authorization and collected a $465 filing fee. Respondent filed the application, but did not pay a filing fee because it was not required. However, he did not return the filing fee to the client. The application was denied because the asylum case had been administratively closed when the client failed to appear for the initial interview. Respondent then filed a second application, which was denied as premature. The client terminated the representation and hired successor counsel, who requested the client's file on her behalf. Even though Respondent knew his former client was represented by a new attorney, Respondent communicated directly with the client instead of her counsel. The parties agree that Respondent's conduct violated D.C. Rules 1.1(a) (lack of competence), 1.1(b) (skill and care), 1.3(a) (diligence and zeal), 1.3(b)(1) (intentional failure to seek client's lawful objectives), 1.4(b) (failure to explain matter to client), 1.5(a) (unreasonable fee), 1.5(b) (failure to provide written retainer agreement), 1.15(a) and (e) (commingling), 1.15(b) (failure to maintain a trust account), and 1.16(d) (failure to return unearned fee).

In the second matter (Macario), the parties agree that Respondent was hired to represent a foreign national who had been arrested and detained to request the foreign national's release on bond. The client's friend hired Respondent on the client's behalf and paid Respondent a $1,500 legal fee, which Respondent again placed in his business account instead of a trust account. Respondent did not provide a written retainer agreement to the client or friend. The friend requested that Respondent meet with the client personally to discuss the case, but Respondent

failed to do so. Respondent appeared at the client's removal hearing the following month and told the judge that his client was not eligible for relief and that he would voluntarily return to his native country. The judge accepted the offer of voluntary departure.

Unhappy with the outcome, the client asked the judge for other relief, and Respondent falsely told the judge he was unaware of his client's position. When Respondent refused to provide any further representation, the client filed a *pro se* request to reopen his case and complained to Respondent that he had accepted a full fee without completing the representation. After successor counsel filed a disciplinary complaint, Respondent falsely represented to Disciplinary Counsel that (1) he had waived his fee to appear in court and argue the case, and (2) he had completed the representation by appearing in court on the same day he received his fee. The parties agree that Respondent's conduct violated D.C. Rules 1.1(a) (lack of competence), 1.1(b) (skill and care), 1.3(a) (diligence and zeal), 1.3(b)(1) (intentional failure to seek client's lawful objectives), 1.3(b)(2) (intentional prejudice or damage to client), 1.4(b) (failure to explain matter to client), 1.5(b) (failure to provide written retainer agreement), 1.15(a) and (e) (commingling), 1.15(b) (failure to maintain a trust account), 3.3(a)(1) (knowing false statement to a tribunal), and 8.1(a) (knowing false statement to Disciplinary Counsel).

III. THE AGREED-UPON SANCTION IS JUSTIFIED

A. The Legal Standard

Rule XI, Section 12.1(c) provides that a petition for negotiated discipline will be approved if: (1) The attorney has knowingly and voluntarily acknowledged the facts and misconduct reflected in the petition and agreed to the sanction set forth therein; (2) The facts set forth in the petition or as shown at the hearing support the admission of misconduct and the agreed upon sanction; and (3) The sanction agreed upon is justified.

Board Rule 17.5(a) further provides that, in determining whether the agreed-upon sanction is justified, hearing committees should take into consideration "the record as a whole, including the nature of the misconduct, any charges or investigations that Disciplinary Counsel has agreed not to pursue, the strengths or weaknesses of Disciplinary Counsel's evidence, any circumstances in aggravation and mitigation (including respondent's cooperation with Disciplinary Counsel and acceptance of responsibility), and relevant precedent."

The Court has explained that a "justified" sanction may be more lenient than the sanction that might have been imposed in a fully litigated contested case; it just cannot be *unduly* lenient. *See In re Johnson*, 984 A.2d 176, 180-81 (D.C. 2009) (per curiam). This standard for evaluating whether a sanction is justified differs from the standard in contested cases, in which a sanction must not "foster a tendency toward inconsistent dispositions for comparable conduct" or "otherwise be unwarranted." *See* D.C. Bar Rule XI, § 9(h); Board Rule 17.5(a)(iii) (providing that an agreed-upon

sanction "does not have to comply with the sanction appropriate under the comparability standard set forth in D.C. Bar R. XI, § 9(h)"). Nevertheless, the Court often looks to the range of sanctions imposed in similar contested cases as a frame of reference before considering whether a sanction in a negotiated discipline case is justified. *See, e.g.*, *In re Brammer*, 243 A.3d 863, 864 (D.C. 2021) (per curiam) (finding that the agreed-upon sanction was "not unduly lenient or inconsistent with dispositions imposed for comparable professional misconduct"); *In re Brown*, 200 A.3d 229, 230 (D.C. 2019) (per curiam) (finding that the agreed-upon sanction was "not unduly lenient considering the existence of mitigating factors and the discipline imposed by this court for similar actions").

More recently, in *In re Mensah*, the Court confirmed that a negotiated sanction may fall outside the range of sanctions that might be imposed in contested cases. 262 A.3d 1100, 1103-04 (D.C. 2021) (per curiam). In approving the Petition for Negotiated Discipline in that case, the Court cited three "structural features" indicating that "some additional flexibility" is permitted in determining an appropriate sanction in a negotiated discipline case: (1) the "justified" standard; (2) the "considerable deference" owed to negotiated discipline recommendations; and (3) the prohibition on citing negotiated discipline decisions as precedent in contested cases. *Id.* at 1104. On the other hand, the Court cautioned that sanctions in negotiated discipline cases should not become "completely unmoored" from the range of sanctions that might otherwise be imposed. *Id.* Within that framework, the Court concluded that the next-most-serious sanction below disbarment – the sanction

that would have been imposed for the reckless misappropriation at issue in that case – was not unduly lenient. *Id.* at 1105.

B. Relevant Precedent

In this case, the Court's order cites five cases with sanctions in parentheticals, including three cases that the Hearing Committee relied upon in determining the most severe sanctions imposed for comparable misconduct: *In re Rodriguez-Quesada*, 122 A.3d 913 (D.C. 2015) (two-year suspension with fitness and restitution for lack of competence, neglect, failure to communicate, failure to refund an unearned fee, dishonesty, and serious interference with the administration of justice, in four immigration matters involving vulnerable clients facing deportation, aggravated by false testimony to the hearing committee and lack of remorse); *In re Vohra*, 68 A.3d 766 (D.C. 2013) (three-year suspension with fitness for multiple rule violations in a single matter including "sustained neglect" in an immigration matter, criminal conduct (forging clients' signatures), and dishonesty, in addition to lack of competence, failure to communicate, and serious interference with the administration of justice, aggravated by two instances of prior discipline and an attitude that fluctuated between expressions of remorse and blaming his clients for his misconduct); and, *In re Ukwu*, 926 A.2d 1106 (D.C. 2007) (two-year suspension with fitness and restitution where immigration attorney neglected five immigration matters, testified falsely to the Hearing Committee, misrepresented facts to Board of

Immigration Appeals, and assured a client that she "need not worry" about submitting a false immigration document).[1]

When defining the lower end of the range of sanctions imposed for comparable misconduct, the Hearing Committee cited four additional cases: *In re Cole*, 967 A.2d 1264 (D.C. 2009) (thirty-day suspension where the attorney intentionally neglected an immigration matter, lied to his client that he had filed an asylum application, lied about the application's status, and seriously interfered with the administration of justice); *In re Schoeneman*, 891 A.2d 279 (D.C. 2006) (per curiam) (four-month suspension where the attorney neglected three client matters, lied to the clients about the status of their cases, concealed his suspension from the practice of law, and engaged in the unauthorized practice of law); *In re Perez*, 828 A.2d 206 (D.C. 2003) (per curiam) (sixty-day suspension with fitness and restitution where the attorney engaged in "protracted neglect and intentional conduct" that resulted in prejudice to a vulnerable client in an immigration matter); and, *In re Ryan*, 670 A.2d 375 (D.C. 1996) (four-month suspension with fitness and restitution where the attorney engaged in a pattern of neglect in five immigration matters and subsequently made misrepresentations to Disciplinary Counsel). The Court's Order also identifies *In re Hallmark*, 831 A.2d 366 (D.C. 2003) (ninety-day suspension with fitness for failure to communicate with two clients, failure to promptly return

[1] The Board believes that *In re Hines*, 482 A.2d 378 (D.C. 1984) (per curiam), which the Court cites in its Order, is not a comparable case because the misconduct at issue involved reckless misappropriation, which is not present in this case, and the Court in *Hines* declared that disbarment would ordinarily be the sanction for all non-negligent misappropriation going forward. *See id.* at 386-87.

unearned fees to two other clients after termination of the representation, and failure to respond to requests for information during Disciplinary Counsel's investigation), which falls on the lower end of the range of relevant sanctions.

Finally, the Board finds the facts in the negotiated matter *In re Anderson*, 184 A.3d 846 (D.C. 2018) (per curiam), are a useful comparison in this negotiated case. In *Anderson*, the Court imposed a one-year suspension with fitness and restitution requirements for lack of competence, neglect, failure to communicate, failure to refund an unearned fee, unauthorized practice of law, and dishonesty in two client matters, followed by an initial refusal to cooperate with Disciplinary Counsel. And the respondent's conduct was aggravated by prior discipline involving similar misconduct, but mitigated by the respondent's acceptance of responsibility, remorse, health and family problems at the time of the misconduct, and by the fact the respondent had an established mental health support system. *Id.* at 847. The Court's decision in *Anderson* relied in part on *In re Carter*, 11 A.3d 1219 (D.C. 2011) (per curiam) (eighteen-month suspension with fitness and restitution for lack of competence, neglect, failure to communicate, and failure to return unearned fees in two matters, dishonesty to a court and Disciplinary Counsel and failure to respond to Disciplinary Counsel's inquiries, where there were several aggravating factors) and *Schoeneman*, 891 A.2d at 280. *See id.* at 847 n.2.

C. The Confidential Appendix

After discussing comparable cases, the Hearing Committee noted that its decision was also based in part on a Confidential Appendix, which described in a

single paragraph the Hearing Committee Chair's *ex parte* conversation with Disciplinary Counsel.

The Board in its September 30, 2021 Order concluded that the Confidential Appendix lacked a "sufficiently detailed description of the nature of the issues raised and a description of how the information the Hearing Committee learned in its *in camera* review of Disciplinary Counsel's investigative file and *ex parte* meeting with Disciplinary Counsel factored into its determination that the agreed-upon sanction was justified." The Board therefore remanded the case to the Hearing Committee for the limited purpose of submitting a Supplemental Confidential Appendix which would, if applicable, include references to specific Rule violations at issue and explain how the concerns discussed therein factored into the Hearing Committee's conclusion.

The substance of the Hearing Committee's Confidential Appendix and Supplemental Confidential Appendix are discussed in the Confidential Appendix to this Report and Recommendation.

D. <u>Discussion</u>

Based on the cases cited in Part III.B, *supra*, the Board believes that if this case were to proceed to a contested hearing, and every charge were proven, Respondent would likely receive a sanction more serious than the agreed-upon partially stayed nine-month suspension. Broadly speaking, we agree with the Hearing Committee that this sanction is "within the range of sanctions that have been imposed for comparable misconduct in other immigration matters," but that does not

end our inquiry because those sanctions range from thirty-day suspensions to disbarment. *See* HC Rpt. at 20-22. On closer examination, we do not find the facts of this case to be as serious as those presented in *Rodriguez-Quesada*, 122 A.3d 913, *Vohra*, 68 A.3d 766, or *Ukwu*, 926 A.2d 1106, which involved patterns of dishonesty or fraud and resulted in two- and three-year suspensions with fitness requirements. Though the misconduct here is more extensive than that involved in comparable cases resulting in brief suspensions—*Hallmark*, 831 A.2d 336, *Cole*, 967 A.2d 1264, *Schoeneman*, 891 A.2d 279, and *Perez*, 828 A.2d 206—those cases did share some of the most troubling aspects of Respondent's misconduct: intentional harm to vulnerable clients and dishonesty.

We find that this case is most comparable to *Ryan*, 670 A.2d 375, and *Anderson*, 184 A.3d 846, both of which involved serious neglect of vulnerable clients and related misconduct in multiple cases, followed by dishonesty to Disciplinary Counsel. Though the lengths of their suspensions differed—both served four months and one year, respectively and both respondents were required to prove fitness before reinstatement. *See generally In re Cater*, 887 A.2d 1, 23 (D.C. 2005) (explaining that a fitness requirement may be imposed where the period of suspension "may not be enough by itself to protect the public, the courts and the integrity of the legal profession"). In *Ryan*, the fitness requirement was based on "the gravity and pervasiveness of [the respondent's] conduct affecting several clients over an extended period of time," whereas in *Anderson*, the respondent had three instances of prior discipline, including a public censure that involved the same

misconduct at issue in that case. *See In re Anderson*, Board Docket No. 17-ND-010 at 7, ¶ 13 (HC Rpt. Apr. 2, 2018). While a fitness requirement is not necessarily warranted in this case, it is notable that, on the other extreme, Respondent is not even required to complete a term of probation in exchange for a stay of nearly half of his suspension; the only condition of Respondent's stayed suspension is that he refrain from committing additional misconduct for one year. Because it does not require any further action from Respondent, for purposes of comparison, the agreed-upon sanction is effectively a five-month served suspension.

Accordingly, we find that the agreed-upon sanction is lenient, and it is a close question whether it is *unduly* lenient or nevertheless justified. But pursuant to Board Rule 17.5(a)(iii), we must consider other factors in addition to the Court's precedent, namely:

> the record as a whole, including the nature of the misconduct, any charges or investigations that Disciplinary Counsel has agreed not to pursue, the strengths or weaknesses of Disciplinary Counsel's evidence, any circumstances in aggravation and mitigation (including respondent's cooperation with Disciplinary Counsel and acceptance of responsibility), and relevant precedent.

The Hearing Committee addressed some of these factors in its Supplemental Confidential Appendix because Disciplinary Counsel discussed its analysis of them *ex parte*. Board Rule 17.5(a) does not articulate a standard for hearing committees to apply to their review of Disciplinary Counsel's subjective assessments of any of the factors set forth therein. We do so now.

We begin by observing that Disciplinary Counsel's decisions are subject to review, unlike the criminal justice system where, barring some constitutionally

impermissible reason for a decision, the prosecutor generally has sole discretion on charging decisions. *See Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978). This review occurs initially when a Contact Member must approve Disciplinary Counsel's dispositions of docketed investigations, which includes reviewing Disciplinary Counsel's file, and, if the Contact Member determines necessary, discussing the matter with Disciplinary Counsel. Board Rule 2.12. Then, as this case demonstrates, hearing committees must review petitions for negotiated discipline to include scrutinizing the evidence in *ex parte* meetings with Disciplinary Counsel and by *in camera* reviews of Disciplinary Counsel's files. *See generally Mensah*, 262 A.3d at 1104 (describing the "numerous procedural constraints intended to ensure the bottom-line requirement that any sanction imposed be 'justified'").

When, as here, Disciplinary Counsel's subjective assessments of factors are at issue, we believe the hearing committee must not only have a robust *ex parte* discussion with Disciplinary Counsel to fully understand its case evaluation, but the hearing committee must also review Disciplinary Counsel's file to determine if its understanding of the case bears out based on its evidence. Then the hearing committee must determine whether Disciplinary Counsel's analysis is objectively reasonable, considering Disciplinary Counsel's expertise in prosecuting disciplinary cases and its responsibility "to allocate the investigative and prosecutorial resources of Disciplinary Counsel's office." Board Rule 2.12 (addressing Contact Member review). This review must not be a "rubber stamp," but instead, a thorough,

objective analysis of Disciplinary Counsel's evaluation. We believe that this analysis acknowledges that negotiated dispositions in the Disciplinary System, as in the criminal justice system, are generally mutually advantageous to respondents, Disciplinary Counsel and the other constituents this process is designed to protect – clients and the community, since each party may have "reasons for wanting to avoid trial." *See Bordenkircher*, 434 U.S. at 363 (citing *Brady v. United States*, 397 U.S. 742, 752 (1970)). Our approach honors the procedural requirements of overseeing disciplinary decisions.

We apply that standard to the facts of this case in the Confidential Appendix to this Report and Recommendation and conclude that the Hearing Committee's Supplemental Confidential Appendix weighs in favor of approving the Petition.

IV. CONCLUSION

As discussed above, we are more skeptical than the Hearing Committee as to whether the agreed-upon sanction is justified based solely on a comparison to the Court's precedent in contested cases. That narrow question is a close one; though Respondent would likely receive a lengthier suspension if every charge were proven in a contested case, a nine-month suspension with five months served is not "completely unmoored" from that range of sanctions. *See Mensah*, 262 A.3d at 1104. On balance, taking into consideration the factors discussed in our Confidential Appendix, we are persuaded that the agreed-upon sanction is justified and not unduly lenient.

Accordingly, the Board recommends that the Court approve the Petition and impose a nine-month suspension with 120 days stayed on the condition that Respondent not engage in any misconduct within one year of his reinstatement.

BOARD ON PROFESSIONAL RESPONSIBILITY

By: Margaret M. Cassidy
Margaret M. Cassidy

All members of the Board concur in this Report and Recommendation.