THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY
HEARING COMMITTEE NUMBER FOUR

In the Matter of:	:	
	:	
ALLISON C. DIERCKS,	:	
	:	Board Docket No. 20-ND-001
Respondent.	:	Disc. Docket No. 2019-D043
	:	
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 208762)	:	

REPORT AND RECOMMENDATION OF HEARING COMMITTEE NUMBER FOUR APPROVING PETITION FOR NEGOTIATED DISCIPLINE

I. PROCEDURAL HISTORY

This matter came before Hearing Committee Number Four on August 4, 2020, for a limited hearing on a Petition for Negotiated Discipline (the "Petition"). The members of the Hearing Committee are Rebecca C. Smith, Chair, Dr. William Hindle, Public Member, and Heidi Murdy-Michael, Attorney Member. The Office of Disciplinary Counsel was represented by Disciplinary Counsel Hamilton P. Fox, III. Respondent, Allison C. Diercks, was represented by Ari Wilkenfeld.

The Hearing Committee has carefully considered the Petition for Negotiated Discipline signed by Disciplinary Counsel, Respondent, and Respondent's counsel, the supporting affidavit submitted by Respondent (the "Affidavit"), and the representations during the limited hearing made by Respondent, Respondent's counsel, and Disciplinary Counsel. The Hearing Committee also has fully considered the Chair's *in camera* review of Disciplinary Counsel's files and records,

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

and the Chair's *ex parte* communications with Disciplinary Counsel. For the reasons set forth below, we approve the Petition, find the negotiated discipline of an eighteen-month suspension with reinstatement conditioned on Respondent proving her fitness to practice law is justified, and recommend that it be imposed by the Court.

II. FINDINGS PURSUANT TO D.C. BAR R. XI, § 12.1(c) AND BOARD RULE 17.5

The Hearing Committee, after full and careful consideration, finds that:

1. The Petition and Affidavit are full, complete, and in proper order.

2. Respondent is aware that there is currently pending against her an investigation into allegations of misconduct. Tr. 17-18[1]; Affidavit ¶ 2.

3. The allegation(s) that were brought to the attention of Disciplinary Counsel are that Respondent violated D.C. Rule of Professional Conduct 1.3(b)(2) (intentionally prejudicing or damaging a client during the course of the professional relationship), Rule 1.6(a) (knowingly revealing a confidence or secret of a client), and Rule 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation). Petition at 5-6.[2]

[1] "Tr." refers to the transcript of the limited hearing held on August 4, 2020.

[2] With respect to the Rule 8.4(c) charge, the Petition mistakenly notes the word "conduct" as "client," and the Tr. mistakenly notes this charge as Rule 8.4(d). *Compare* Petition at 5-6, *with* Tr. 8-9.

4. Respondent has freely and voluntarily acknowledged that the material facts and misconduct reflected in the Petition are true. Tr. 12-14, 18-20; Affidavit ¶¶ 4, 6. Specifically, Respondent acknowledges the following stipulated facts:

> (1) Ms. Diercks[3] is a member of the Bar of the District of Columbia Court of Appeals, having been admitted on November 3, 2017 and assigned Bar number 208762.
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> (2) On October 15, 2018, Ms. Diercks began employment with Law Firm[4] in the District of Columbia.
>
> (3) Immediately prior to her employment, on October 12, 2018, Ms. Diercks certified that she had "carefully read" Law Firm's "Policy Statement Regarding Confidentiality of Client Information, Improper Use of Material Non-Public Information, and Trading in Securities of Publicly Held Companies" and that she would comply with "all provisions and procedures" set forth in that Policy Statement.
>
> (4) The Policy Statement required all Law Firm lawyers to "preserve and protect confidential information of or concerning the Firm's clients, including information protected by the attorney-client privilege and other information the disclosure of which might be embarrassing or detrimental to the client."
>
> (5) Law Firm was conducting a confidential investigation of conduct by Company's employees. Ms. Diercks was assigned to work on the confidential investigation, primarily reviewing documents.
>
> (6) Many witnesses whom Law Firm interviewed were reluctant to talk. Law Firm emphasized the confidentiality of the investigation. The matter was given a code name. Law Firm lawyers not involved in the investigation did not have access to the documents or files generated in the course of the investigation. Lawyers involved in the investigation

[3] The facts in the Petition mistakenly spell Respondent's name as "Ms. Dierks." These misspellings are corrected in subparagraphs (1) to (19).

[4] The Petition uses the generic terms "Law Firm," "Company," and "News Media" in order to avoid further public disclosure of the client confidences and secrets at issue in this case.

were instructed not to discuss it with other Law Firm lawyers who were not involved.

(7) As a lawyer participating in the investigation, Ms. Diercks had access to the confidential investigative files and materials.

(8) In October 2018, Ms. Diercks initiated contact with a reporter for "News Media." She began to furnish the reporter with confidential information developed in the investigation.

(9) In December 2018, Ms. Diercks allowed a reporter for News Media to read at least one work-product document containing client confidences and secrets, including the names of witnesses.

(10) Shortly thereafter, News Media published a detailed account of Law Firm's investigation, including information from confidential work product that Ms. Diercks had disclosed. Reporters from News Media began to approach some of the witnesses for interviews.

(11) Law Firm conducted an internal investigation of the source of the leaks to News Media, employing its own lawyers as well as outside counsel and forensic investigators.

(12) The investigators interviewed Ms. Diercks. She falsely denied that she had been in contact with any reporters for News Media. Based on its assessment of Ms. Diercks's interview responses, Law Firm suspended her and took custody of her firm laptop and desk top computers. Law Firm also took custody of Ms. Diercks's personal cell phone, but she would not permit the contents of her cell phone to be examined.

(13) Law Firm interviewed Ms. Diercks a second time. She continued to falsely deny any knowledge of the leaks to reporters for News Media. She also refused permission for Law Firm to examine the contents of her cell phone.

(14) Law Firm interviewed Ms. Diercks for a third time. Although she continued to falsely deny knowledge of who had leaked materials to reporters for News Media, she did grant Law Firm permission to examine the contents of her cell phone.

> (15) The examination of Ms. Diercks's cell phone disclosed that she had been in contact with reporters for News Media and that she had provided them with confidential documents.
>
> (16) Ms. Diercks resigned from her employment at Law Firm. When a Law Firm lawyer investigating the leaks spoke to her by telephone, she denied that she had any confidential documents in her possession and said that she was not going to admit that she had ever[] had any.
>
> (17) On February 7, 2019, Law Firm filed its complaint against Ms. Diercks with the Office of Disciplinary Counsel. In order to preserve its client's confidences and secrets, Law Firm did not name its client, referring to it as "Client A," and did not name News Media.
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> (18) By letter dated February 25, 2019, the Office of Disciplinary Counsel forwarded Law Firm's complaint to Ms. Diercks. She replied in a letter dated [early March], 2019.[5] The letter and its attachments identified Company and News Media.
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> (19) In her [early March], 2019 letter, Ms. Diercks admitted, "I am responsible for leaking the information" to News Media.

Petition at 2-5.

5. Respondent is agreeing to the disposition because Respondent believes that she cannot successfully defend against discipline based on the stipulated misconduct. Tr. 17; Affidavit ¶ 5.

6. Disciplinary Counsel has made no promises to Respondent other than what is contained in the Petition. Affidavit ¶ 7. The Petition notes that Disciplinary Counsel has made no promises to Respondent, other than not to pursue a sanction different than that set forth below. Petition at 6; *see also infra* Paragraph 12.

[5] It is unclear whether Ms. Diercks's letter was dated March 2, 2019 or March 3, 2019. Disciplinary Counsel acknowledged the discrepancy between the dates in Petition ¶¶ 18-19 at the hearing: "I have two different dates on the petition. The day is March 2, actually but also March 6th. She admitted that she had been the person who leaked this information to [News] Media." Tr. 8.

Respondent confirmed during the limited hearing that there have been no other promises or inducements other than the one set forth in the Petition. Tr. 20.

7. Respondent has conferred with her counsel. Tr. 12; Affidavit ¶ 1.

8. Respondent has knowingly and voluntarily acknowledged the facts and misconduct reflected in the Petition for Negotiated Discipline and agreed to the sanction set forth therein. Tr. 12-14, 18-20; Affidavit ¶¶ 4, 6.

9. Respondent is not being subjected to coercion or duress. Tr. 12-14; Affidavit ¶ 6.

10. Respondent is competent and was not under the influence of any substance or medication that would affect her ability to make informed decisions at the limited hearing. Tr. 12-14.

11. Respondent is fully aware of the implications of the disposition being entered into, including, but not limited to, the following:

a) she has the right to assistance of counsel;

b) she will waive her right to cross-examine adverse witnesses and to compel witnesses to appear on her behalf;

c) she will waive her right to have Disciplinary Counsel prove each and every charge by clear and convincing evidence;

d) she will waive her right to file exceptions to reports and recommendations filed with the Board and with the Court;

e) the negotiated disposition, if approved, may affect her present and future ability to practice law;

f) the negotiated disposition, if approved, may affect her bar memberships in other jurisdictions; and

g) any sworn statement by Respondent in her affidavit or any statements made by Respondent during the proceeding may be used to impeach her testimony if there is a subsequent hearing on the merits.

Tr. 16, 24-28; Affidavit ¶¶ 1, 9-10, 12.

12. Respondent and Disciplinary Counsel have agreed that the sanction in this matter should be an eighteen-month suspension, with reinstatement conditioned on Respondent proving her fitness to practice law. Petition at 6; Tr. 20.

a) Respondent further understands that she must file with the Court an affidavit pursuant to D.C. Bar R. XI, § 14(g) in order for her suspension to be deemed effective for purposes of reinstatement. Tr. 26; Affidavit ¶ 14.

b) Respondent understands that she will be required to prove her fitness to practice law in accordance with D.C. Bar R. XI, § 16 and Board Rule 9 prior to being allowed to resume the practice of law; and

c) Respondent understands that the reinstatement process may delay Respondent's readmission to the Bar. Tr. 27-28; *see* Affidavit ¶13.

13. Disciplinary Counsel has provided a statement demonstrating the following circumstances in aggravation, which the Hearing Committee has taken into consideration: Respondent harmed the client, Company. By leaking information to News Media, Respondent deprived her client of the opportunity to make that decision and brought about unfavorable publicity that Company was hoping to avoid. In addition, Law Firm spent substantial resources, including the engagement of outside counsel and forensic investigators, that cost it $1 million in fees. Petition at 8-9.

14. Respondent has provided the following circumstances in mitigation, which the Hearing Committee has taken into consideration: Respondent is remorseful. She met with and candidly admitted her misconduct to Disciplinary Counsel shortly after Disciplinary Counsel began its investigation, and further admitted her misconduct in these proceedings. Respondent is also a new lawyer who was caught up in an exciting investigation of enormous public interest who succumbed to the temptation to talk to a reporter. Petition at 8.

15. The complainant was notified of and appeared during the limited hearing, but did not wish to submit a statement. Tr. 9-10.

III. DISCUSSION

The Hearing Committee shall approve an agreed negotiated discipline if it finds:

> a) that the attorney has knowingly and voluntarily acknowledged the facts and misconduct reflected in the Petition and agreed to the sanction therein;
>
> b) that the facts set forth in the Petition or as shown during the limited hearing support the attorney's admission of misconduct and the agreed upon sanction; and
>
> c) that the agreed sanction is justified.

D.C. Bar R. XI, § 12.1(c); Board Rule 17.5(a)(i)-(iii).

A. Respondent Has Knowingly and Voluntarily Acknowledged the Facts and Misconduct and Agreed to the Stipulated Sanction.

The Hearing Committee finds that Respondent has knowingly and voluntarily acknowledged the facts and misconduct reflected in the Petition and agreed to the

sanction therein. Respondent, after being placed under oath, admitted the stipulated facts and charges set forth in the Petition, and denied that she is under duress or has been coerced into entering into this disposition. *See supra* Paragraphs 4, 8-9. Respondent understands the implications and consequences of entering into this negotiated discipline. *See supra* Paragraph 11.

Respondent has acknowledged that any and all promises that have been made to her by Disciplinary Counsel as part of this negotiated discipline are set forth in writing in the Petition and that there are no other promises or inducements that have been made to her. *See supra* Paragraph 6.

B. The Stipulated Facts Support the Admissions of Misconduct and the Agreed-Upon Sanction.

The Hearing Committee has carefully reviewed the facts set forth in the Petition and established during the hearing and we conclude that they support the admissions of misconduct and the agreed-upon sanction. Moreover, Respondent is agreeing to this negotiated discipline because she believes that she could not successfully defend against the misconduct described in the Petition. *See supra* Paragraph 5.

A cornerstone of the attorney-client relationship is that the power to decide whether (and if so, how) to reveal confidential information rests with the client, not the attorney. *See* Rule 1.6, cmt. [7] ("The attorney-client privilege is that of the client and not of the lawyer. . . . [T]he client has a reasonable expectation that information relating to the client will not be voluntarily disclosed."); *see also In re Gonzalez*, 773 A.2d 1026, 1030 (D.C. 2001) ("The broad commitment of the lawyer

to respect confidences reposed in him is his talisman. Touching the very soul of lawyering, it rests upon a 'privilege' which is that of the client, not that of the lawyer." (quoting *Fred Weber, Inc. v. Shell Oil Co.*, 566 F.2d 602, 607 (8th Cir. 1977), *cert. denied*, 436 U.S. 905 (1978))).

The Petition states that Respondent violated Rule 1.3(b)(2) (intentionally prejudicing or damaging a client during the course of the professional relationship). The stipulated facts support Respondent's admission that she violated this Rule. Respondent initiated contact with News Media and then revealed client confidences to News Media on multiple occasions. Using information she disclosed, News Media published a detailed account of Law Firm's investigation. The disclosure of this information brought unfavorable publicity to Company. By her intentional actions, Respondent prejudiced and damaged Company in violation of Rule 1.3(b)(2).

The Petition next states that Respondent violated Rule 1.6(a) (knowingly revealing a confidence or secret of a client). Respondent certified that she read and would comply with the Policy Statement and its provisions and procedures requiring that she "preserve and protect confidential information of or concerning the Firm's clients, including information protected by the attorney-client privilege and other information the disclosure of which might be embarrassing or detrimental to the client." *See supra* Paragraph 4(3)-(4). But shortly thereafter, Respondent initiated contact with News Media, and, as discussed above, then divulged confidential client information to News Media. In her explanation to Disciplinary Counsel, Respondent

stated that "she thought that the public interest in knowing this information outweighed the obligation to secrecy." Tr. 8-9; *see also* Petition at 8. By these actions, Respondent violated Rule 1.6(a).

Lastly, the Petition states that Respondent violated Rule 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation). The stipulated facts support Respondent's admission that she violated this Rule. As Law Firm's internal investigation progressed, the investigators interviewed Respondent on three separate occasions. And each time, Respondent either falsely denied that she had been in contact with any reporters for News Media, or falsely denied any knowledge of the leaks to these reporters. We find Respondent was dishonest in violation of Rule 8.4(c).

C. The Agreed-Upon Sanction Is Justified and Not Unduly Lenient.

The third and most complicated factor the Hearing Committee must consider is whether the sanction agreed upon is justified. *See* D.C. Bar R. XI, § 12.1(c); Board Rule 17.5(a)(iii); *In re Johnson*, 984 A.2d 176, 181 (D.C. 2009) (per curiam) (providing that a negotiated sanction may not be "unduly lenient"). Based on the record as a whole, including the stipulated circumstances in mitigation, the Hearing Committee Chair's *in camera* review of Disciplinary Counsel's investigative file and *ex parte* discussion with Disciplinary Counsel, and our review of relevant

precedent, we conclude that the agreed-upon sanction is justified and not unduly lenient.

This complaint involves a single instance of misconduct by Respondent. As discussed, shortly after being hired by Law Firm to work on a confidential matter, Respondent initiated contact with News Media, began revealing client confidences and secrets, and within two months, allowed News Media access to sensitive work product. Her actions were motivated not by personal gain, but by her belief that the public's interest outweighed her obligation to maintain confidentiality.

The disclosures resulted in negative publicity and harm to Company and substantial expense to Law Firm in conducting an investigation into the leaks. Only during the disciplinary proceeding did Respondent admit her misconduct and express remorse. Her conduct evidenced a misunderstanding of her role as a lawyer and a misapprehension of her commitment to protect client secrets and confidences.

There are few cases analogous to the facts in this matter. The parties identify *In re Robinson*, 207 A.3d 169 (D.C. 2019) (per curiam) as the Court's most recent relevant decision. *Robinson* also involved a negotiated discipline where the respondent stipulated that she disclosed client information that was embarrassing and/or detrimental to her client, which was later disclosed to the news media. *See In re Robinson*, Board Docket No. 18-ND-004, at 4, 10-11 (HC Rpt. Jan 22, 2019). The Court found that the eighteen-month suspension with a fitness requirement was not unduly lenient. *Robinson*, 207 A.3d at 169. While as a negotiated discipline case, *Robinson* is non-precedential for future contested cases, the fact that the Court

approved identical discipline in such a similar case is relevant in assessing the appropriateness of this negotiated discipline.

The parties also cite *In re Koeck,* 178 A.3d 463 (D.C. 2018) (per curiam), *In re Baber*, 106 A.3d 1072 (D.C. 2015) (per curiam), and *In re Frison*, 89 A.3d 516 (D.C. 2014) (per curiam) as relevant precedent. In *Koeck*, the respondent also disclosed the confidences and secrets of her former employer. The Court determined that a 60-day suspension with reinstatement subject to a showing of fitness was reasonable in light of the facts at issue. 178 A.3d at 464. However, that matter did not involve intentional harm to a client or dishonesty, both of which are significant aggravating factors in this matter.

On the opposite end of the spectrum are *Baber* and *Frison*. In both cases, the respondent engaged in extensive misconduct in addition to disclosing confidential information, which warranted a sanction of disbarment. In *Baber*, the Court determined that the respondent

> failed to competently represent his client; lied to the court; pressured his client to pay an excessive fee that she had not agreed to pay; improperly used confidential information from his client to make knowingly false accusations of fraud against his client in several pleadings; reiterated those false accusations during the disciplinary process; and failed to show remorse during the disciplinary process.

106 A.3d at 1076-77. In *Frison*, the respondent

> filed several frivolous and inflammatory motions, failed to appear at a deposition of an important witness [in his client's case], neglected to file certain motions which effectively prevented [his client] from presenting evidence for her retaliation claims, introduced [his client's] confidential medical records into the public record, and sought and

> received a six month postponement of [his client's] trial without her consent.

89 A.3d at 516.

We conclude that *Robinson* is the most analogous case and that the sanction of an eighteen-month suspension with a fitness requirement is justified and not unduly lenient. Given the more limited misconduct involved in this matter, the more severe sanction of disbarment as found in the *Baber* and *Frison* cases does not appear to be warranted.

IV. CONCLUSION AND RECOMMENDATION

It is the conclusion of the Hearing Committee that the discipline negotiated in this matter is appropriate.

For the reasons stated above, it is the recommendation of this Hearing Committee that the negotiated discipline be approved and that the Court suspend Respondent for eighteen months, and condition Respondent's reinstatement on proof of fitness. We further recommend that Respondent be directed to the requirements of D.C. Bar R. XI, § 14, and their effect on eligibility for reinstatement. *See* D.C. Bar R. XI, § 16(c).

HEARING COMMITTEE NUMBER FOUR

Rebecca C. Smith
Chair

Dr. William Hindle
Public Member

Heidi Murdy-Michael
Attorney Member