THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY
AD HOC HEARING COMMITTEE

In the Matter of:	:	
	:	
DANA A. PAUL,	:	
	:	
Respondent.	:	Board Docket No. 19-BD-063
	:	Disc. Docket No. 2019-D199
An Administratively Suspended Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 490142)	:	

REPORT AND RECOMMENDATION
OF THE AD HOC HEARING COMMITTEE

Respondent, Dana A. Paul, is charged with violating Rules 1.6(a) and 8.4(d) of the District of Columbia Rules of Professional Conduct (the "Rules" or "Rules of Professional Conduct"), arising from disclosures Respondent made to Disciplinary Counsel in 2018 concerning a lawyer who previously filed a complaint against him, based on Respondent's representation of the lawyer and her husband. Disciplinary Counsel contends that Respondent committed both of the charged violations and should be suspended for one year with a fitness requirement as a sanction for his misconduct. Respondent contends that he is immune from prosecution for conduct arising from his disciplinary complaint, but that if he is found to have violated a Rule, he should receive no more than an informal admonition.

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

As set forth below, the Hearing Committee finds that Disciplinary Counsel has proven violations of both Rules 1.6(a) and 8.4(d) by clear and convincing evidence and recommends that Respondent be suspended for a period of 90 days.

I. PROCEDURAL HISTORY

On October 3, 2019, Disciplinary Counsel served Respondent with a Specification of Charges ("Specification"), alleging that Respondent violated Rule 1.6(a), by revealing client confidences and secrets, and Rule 8.4(d), by engaging in conduct that seriously interferes with the administration of justice. Specification ¶ 9.

On October 21, 2019, Respondent filed an Answer and a Motion to Dismiss, which is addressed *infra*.[1] The Board issued a protective order on December 30, 2019, in order to maintain the confidentiality of the client confidences and secrets at issue in the case. In accordance with the protective order, the Hearing Committee directed the parties to submit their exhibits under seal and file redacted versions of the exhibits and transcript for the public record. All discussion of information that remains under seal is included in a "Confidential Appendix to Report and Recommendation of the Ad Hoc Hearing Committee" (hereinafter, "Confidential Appendix") that is filed under seal concurrently with and as part of this Report and Recommendation.

[1] Pursuant to Board Rule 7.16(a), the Hearing Committee is not authorized to rule on the motion, but instead makes a recommended disposition of the motion to the Board in this Report and Recommendation.

A hearing was held on March 4, 2020, and the transcript was placed under seal as provided by the December 30, 2019 protective order. Disciplinary Counsel Hamilton P. Fox, III, appeared on behalf of the Office of Disciplinary Counsel, and Respondent appeared *pro se*. The following exhibits were received in evidence: DX 1-18 and RX 1-4.[2] Tr. 83, 93. Disciplinary Counsel called only Respondent as a witness. Respondent provided testimony through Disciplinary Counsel's direct examination and did not otherwise testify or call any additional witnesses.

Upon conclusion of the hearing, the Hearing Committee made a preliminary non-binding determination that Disciplinary Counsel had proven at least one of the ethical violations set forth in the Specification. Tr. 95; *see* Board Rule 11.11. In the sanctions phase of the hearing, Disciplinary Counsel submitted DX 19 through 20, which were admitted into evidence. Tr. 96. Respondent did not present evidence in mitigation of sanction.

Disciplinary Counsel submitted its Proposed Findings of Fact, Conclusions of Law, and Recommendation as to Sanction ("ODC Br.") under seal on March 30, 2020, and Respondent filed his Proposed Findings of Fact and Conclusions of Law ("R. Br.") on April 17, 2020. Disciplinary Counsel filed its Reply on April 27, 2020.

II. FINDINGS OF FACT

The following findings of fact are based on the testimony and documentary evidence admitted at the hearing and have been established by clear and convincing

[2] "DX" Refers to Disciplinary Counsel's exhibits. "RX" refers to Respondent's exhibits. "Tr." refers to the transcript of the hearing held on March 4, 2020.

evidence. *See* Board Rule 11.6; *In re Cater*, 887 A.2d 1, 24 (D.C. 2005) ("clear and convincing evidence" is more than a preponderance of the evidence, it is "evidence that will produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established").

1. Respondent is a member of the Bar of the District of Columbia Court of Appeals, having been admitted by motion on November 12, 2004, and assigned Bar number 490142. DX 1. He was admitted in Maryland in June 2001. Tr. 44.

2. In 2014 and 2015, Respondent represented a client, N.E.[3], and her husband on a matter in the Circuit Court for Anne Arundel County, Maryland. *See* Tr. 44; DX 8 at 42. Both N.E. and her husband are law school graduates; N.E. is a member of the District of Columbia Bar. DX 5.

3. In September 2017, N.E. and her husband engaged Respondent again to represent them in a case they had filed *pro se* in the Circuit Court for Prince George's County, Maryland against RE/MAX and others arising from a failed real estate transaction. Tr. 45-46.

4. By December 2017, Respondent and his clients had come to disagree about aspects of the RE/MAX litigation. According to N.E. and her husband, Respondent improperly retained an expert witness, failed to properly communicate with them, failed to timely withdraw from the representation, and committed other

[3] In accordance with the Board's protective order, in order to protect client confidences and secrets and the contents of disciplinary complaints that were ultimately dismissed, this Report and Recommendation uses N. E.'s initials instead of using her full name. *See also* Tr. 8-9; Confidential Appendix.

improper acts. DX 5; *see* Confidential Appendix. In January 2018, the Circuit Court approved Respondent's request to withdraw from the representation. Tr. 46-47; DX 12 at 60.

5. In April 2018, N.E. and her husband filed a complaint against Respondent with the Attorney Grievance Commission (AGC) of Maryland. By letter dated April 16, 2018, N.E. and her husband filed a complaint with the D.C. Office of Disciplinary Counsel and attached to it the letter of complaint they had filed in Maryland. DX 5; Tr. 47-48.

6. In their complaints, N.E. and her husband alleged that Respondent did not follow their instructions, that he took actions that prejudiced their lawsuit, and that he improperly stopped communicating with them while still representing them. N.E. and her husband set forth the bases of their allegations against Respondent in first-person narrative fashion in a 13-page, single-spaced letter. They cited their own legal educations and their respective bar admissions. DX 5; Tr. 65-66.

7. Respondent filed an answer to N.E.'s complaint with the Maryland AGC on May 7, 2018. RX 3; *see* Confidential Appendix. Respondent also later provided Disciplinary Counsel with the entire N.E. case file and all the correspondence to the Maryland AGC. *See* Tr. 51.

8. By letter dated May 4, 2018, the Office of Disciplinary Counsel forwarded the complaint that N.E. and her husband had filed in the District of Columbia to Respondent and asked him to provide a substantive written response. DX 6; Tr. 48-49.

9. By letter dated May 8, 2018, Respondent responded to Disciplinary Counsel's May 4 letter. He argued that N.E. and her husband were not credible, that their allegations against him were unsupported, and that, since none of the alleged conduct occurred in the District of Columbia, the conduct was outside the jurisdiction of Disciplinary Counsel. DX 7; Tr. 49. Respondent provided Disciplinary Counsel with the letter he had sent to the Maryland AGC in response to the complaint filed against him there. DX 17; RX 3 at unnumbered page 5; Tr. 51. He offered witnesses who he claimed would agree with his assessment of N.E.'s character and her lack of credibility. DX 7.

10. On August 16, 2018, while Disciplinary Counsel was investigating the complaint filed by N.E. and her husband, Respondent filed a document, dated August 13, 2018, that he titled "New Complaint against [N.E.]." DX 8 at 41. He addressed this "New Complaint" to the Office of Disciplinary Counsel. *See* Confidential Appendix.

11. Respondent's August 2018 letter included details related to the Prince George's County lawsuit. *See* Confidential Appendix.

12. Respondent told Disciplinary Counsel in writing that he filed the August complaint against N.E. because she had filed her complaint against him. DX 12 at 61 ("I am only filing this grievance because of the grievance [N.E.] filed against me."). After Disciplinary Counsel had questioned the propriety of Respondent's disclosures, he wrote in a July 22, 2019 letter, "I did not file a grievance against [N.E.] because she filed a grievance against me. . . . I filed a

grievance with your office against [N.E.] for the reasons I stated, ..." DX 17; *see* Confidential Appendix. At the hearing, he testified that he filed the complaint against N.E. because N.E. had filed a contempt motion against him. Tr. 53.

13. As a result of the August 16, 2018 complaint that Respondent filed against N.E., Disciplinary Counsel docketed a new case and forwarded Respondent's letter of complaint to her for a response. DX 9.

14. N.E. engaged counsel, who responded on her behalf on September 24, 2018. DX 10.

15. Disciplinary Counsel forwarded the September 24 response from N.E. to Respondent and asked him to respond. DX 11.

16. Respondent sent a response letter to Disciplinary Counsel dated October 10, 2018. DX 12. Respondent disagreed with the substance of N.E.'s response to the complaint filed against her. To support his position, Respondent made several factual statements that, if true, derived from his attorney-client relationship with N.E. *See* Confidential Appendix.

17. Respondent's October 2018 letter included details related to the Anne Arundel County lawsuit. *See* Confidential Appendix.

18. Respondent's October 2018 letter included attachments. *See* Confidential Appendix.

19. Respondent testified regarding the disclosures he made in his October 2018 letter. *See* Confidential Appendix.

20. Respondent further testified that his submissions were in response to N.E.'s grievance and that permitted him to file his grievance against N.E. because the disclosures were an integral part of Respondent's defense as to why he stopped communicating with N.E. over the telephone. *See* Tr. 72; *see* Confidential Appendix.

III. CONCLUSIONS OF LAW

Disciplinary Counsel contends that Respondent violated Rule 1.6(a) by revealing confidences and secrets of his clients, N.E. and her husband, and that he violated Rule 8.4(d) by engaging in conduct that seriously interferes with the administration of justice, by retaliating against N.E. after she made a complaint against him to Disciplinary Counsel. Respondent denies violating either Rule and contends that he is immune from disciplinary action.

A. Applicable Law

Respondent argues that Maryland law should apply to this case, including his motion to dismiss. Tr. 15-16; R. Br. at 7-8. The Committee disagrees.

Rule 8.5(b)(2)(ii) provides as follows: "If the lawyer is licensed to practice in this and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct."

The conduct at issue consists of communications that Respondent directed to the Office of Disciplinary Counsel in the District of Columbia. Maryland is where the underlying representations took place, but the representations are not what is at issue in this case.

It is apparent to the Hearing Committee that the "conduct clearly has its predominant effect" here, not in Maryland. As such, D.C. Rules and case law should apply.

B. Respondent's Immunity Argument and Motion to Dismiss

In Respondent's Motion to Dismiss and his Brief to the Hearing Committee, Respondent contends that his complaints to the Maryland AGC[4] and Disciplinary Counsel were privileged and that he is immune from attorney discipline for making them. R. Br. at 7-13. For support he relies on D.C. Bar Rule XI, Section 19(a), which provides as follows:

> Section 19. Miscellaneous Matters
>
> (a) Immunity. Complaints submitted to the Board or Disciplinary Counsel shall be absolutely privileged, and no claim or action predicated thereon may be instituted or maintained. Members of the Board, its employees, members of Hearing Committees, Disciplinary Counsel, and all assistants and employees of Disciplinary Counsel, all persons engaged in counseling, evaluating or monitoring other attorneys pursuant to a Board or Court order or a diversion agreement, and all assistants or employees of persons engaged in such counseling, evaluating or monitoring shall be immune from disciplinary complaint

[4] Disciplinary Counsel does not contend that Respondent's disclosures to the Maryland AGC violated any of the charged Rules; therefore, this section will focus on his purported immunity under D.C. law.

> under this rule and from civil suit for any conduct in the course of their official duties.

D.C. Bar R. XI, § 19(a).

According to Respondent, this rule afforded him complete legal and professional immunity for filing his complaint against N.E., effectively barring not only a civil lawsuit but also the application to him of the Rules of Professional Conduct.

Disciplinary Counsel opposes Respondent's Motion. It argues that the privilege described in Rule XI, Section 19(a) did not exempt Respondent from the Rules of Professional Conduct with respect to filing the complaint. Disciplinary Counsel argues that Rule XI, Section 19(a) merely shields complainants from civil liability, similar to the so-called litigation privilege.

This Hearing Committee agrees with Disciplinary Counsel's arguments. Rule XI, Section 19(a) does not privilege lawyers to violate the commands of the Rules of Professional Conduct when they file disciplinary complaints against other lawyers.

First, Disciplinary Counsel correctly observes that the Rules of Professional Conduct, by their own terms, envision that lawyers may violate ethical obligations by the act of filing a disciplinary complaint against another lawyer. Rule 8.4(g) provides that "[i]t is professional misconduct for a lawyer to: . . . [s]eek or threaten to seek criminal charges *or disciplinary charges* solely to obtain an advantage in a civil matter." (emphasis added). It would be anomalous for the Court of Appeals to simultaneously make the filing of a complaint immune from application of the Rules

of Professional Conduct and also make the filing of such a complaint an express violation of the Rules of Professional Conduct.

Second, the text of the rule itself lends support to Disciplinary Counsel's position. The first sentence of Rule XI, Section 19(a) speaks to the filer of a complaint (like Respondent) and states that the filing of a complaint "to the Board or Disciplinary Counsel shall be absolutely privileged, and no claim or action predicated thereon may be instituted or maintained." The second sentence speaks to all the various lawyers who are or may become involved with the disciplinary process, and it provides *them* an "immunity" to civil suit for actions taken in their official capacities *and* from any disciplinary proceedings. That the Court of Appeals expressly provided for "immunity" from disciplinary proceedings for the latter group but did not provide such immunity for filers may be read to suggest the Court did not intend for Rule XI, Section 19(a) to provide such an immunity for filers.

Third, Disciplinary Counsel persuasively argues that adoption of Respondent's position would lead to anomalous results. Rule 1.6(e)(3) permits a lawyer a *limited* right to disclose a client's confidences or secrets to defend himself from accusations of wrongdoing. Such disclosures "should be no greater than the lawyer reasonably believes is necessary to vindicate [his or her] innocence." Rule 1.6, cmt. [25]. Adoption of Respondent's position would grant him carte blanche to disclose *any and all confidences or secrets* he learned during his representation of N.E. if he filed his own complaint against her, but could make only limited

revelations in defense of the complaint N.E. filed against him. This asymmetric treatment of client confidences and secrets is illogical.

Respondent's legal argument relies on snippets of language from Court of Appeals decisions instead of the text of Rule XI, Section 19(a) and the actual holdings in those decisions. Consequently, Respondent does not have persuasive answers to Disciplinary Counsel's arguments.

In sum, it appears to this Committee that Rule XI, Section 19(a) was intended to remove a barrier to the filing of disciplinary complaints, to insulate those who might file a complaint from the prospect of retaliatory litigation for defamation or other torts. We do not understand Rule XI, Section 19(a) to go further and exempt lawyers from the Rules of Professional Conduct to disclose client confidences or secrets that Rule 1.6 would otherwise bar them from disclosing.

Accordingly, the Committee recommends that Respondent's motion be denied.

C. Respondent Violated Rule 1.6(a) by Revealing Client Confidences and Secrets.

Rule 1.6(a)(1) prohibits a lawyer from "knowingly . . . reveal[ing] a confidence or secret of the lawyer's client." "'Knowingly' . . . denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." Rule 1.0(f). Rule 1.6(b) defines a "confidence" as "information protected by the attorney-client privilege under applicable law" and a "secret" as "other information gained in the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing, or

would be likely to be detrimental, to the client." In discussing the definition of "secret" under Rule 1.6(b), the Court has stated:

> . . . there can be no doubt that the information about [the attorney's client] disclosed by [the attorney] was so "gained." If there had been no professional relationship, then the alleged facts of which [the attorney] complained—[the client's] non-payment of her fees, her lack of cooperation, and her misrepresentation—would not have existed, and [the attorney] would [not] have known them . . . .

In re Gonzalez, 773 A.2d 1026, 1030 (D.C. 2001).

1. Respondent knowingly revealed client confidences and secrets.

The first step of our analysis is to determine whether Respondent knowingly revealed client confidences or secrets. We conclude that he did.

The charged conduct concerns letters and other materials that Respondent directly provided to Disciplinary Counsel. Respondent does not dispute that he intended for Disciplinary Counsel to know about the information contained therein. Thus, we find that he acted intentionally.

The information and materials that Respondent disclosed are set forth in the Confidential Appendix, Findings of Fact ¶¶ 7, 11, 16-20, *infra*. Respondent does not dispute that he came to know about all of them by dint of his representation of N.E. and her husband. Thus, we find that the information he disclosed to Disciplinary Counsel was "gained in the professional relationship."

As discussed in more detail in the Confidential Appendix, the Committee finds that they were, at a minimum, "secrets" because "the disclosure of [them] would be embarrassing, or would be likely to be detrimental, to the client." Certain

information was also protected by attorney-client privilege, thus meeting the definition of "confidences."

2. The disclosures were not permitted under Rule 1.6(d)(1).

Rule 1.6(d)(1) provides:

> When a client has used or is using a lawyer's services to further a crime or fraud, the lawyer may reveal client confidences and secrets, to the extent reasonably necessary . . . to prevent the client from committing the crime or fraud if it is reasonably certain to result in substantial injury to the financial interests or property of another . . . .

We reject Respondent's argument that his disclosures were warranted under this Rule, for the reasons set forth in the Confidential Appendix, *infra*.

3. Application of Rule 1.6(e)(3) to the disclosures made by Respondent.

Rule 1.6(e)(3) provides, in relevant part, that:

> A lawyer may use or reveal client confidences or secrets . . . to the extent reasonably necessary to establish a defense to a . . . disciplinary charge . . . formally instituted against the lawyer, based upon conduct in which the client was involved, or to the extent reasonably necessary to respond to specific allegations by the client concerning the lawyer's representation of the client . . . .

Such a disclosure, however, should be "no greater than the lawyer reasonably believes is necessary to vindicate innocence," and it should be made "in a manner that limits access to the information to the tribunal or other persons having a need to know it," including through protective orders where appropriate. Rule 1.6, cmt. [25].

Respondent argues that his disclosures were permitted under this Rule. We agree as to the disclosures he made in response to the complaint that N.E. filed

against him and to which he responded on May 8, 2018 (DX 7). We disagree as to the disclosures he made in his other correspondence (DX 8 and DX 12).

a. Analysis of the disclosures Respondent made on May 8, 2018 in defense of the complaint N.E. filed against him.

We first address the disclosures Respondent made on May 8, 2018 in defending against the complaint filed by N.E. and her husband against him. DX 7.[5]

N.E. and her husband accused Respondent of ethical violations in the course of his representation of them in the RE/MAX action. While they provided documents, their complaint was principally based on a lengthy narrative that purported to set forth the facts underlying Respondent's alleged misconduct.

The letter to the Maryland AGC (upon which the D.C. disciplinary complaint relied)[6] began with a statement by N.E. and her husband that they "believe we are obligated to report Mr. Paul's misconduct under our ethical obligations as members of the bar." DX 5 at 15. They then identified the law schools from which they had graduated and identified the states in which they were admitted to practice law. *Id.*

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[5] The Specification does not make clear whether Disciplinary Counsel was charging Respondent with violating Rule 1.6 by his original response on May 8, 2018 (DX 7) or only for his later correspondence. At the hearing, the Committee asked Mr. Fox to clarify whether the Office of Disciplinary Counsel was charging Respondent for his May 8, 2018 letter. Tr. 35. His answer indicated that his office was *not* charging Respondent for the May 8, 2018 letter but only for the later correspondence. Tr. 36. Nevertheless, Disciplinary Counsel's post-hearing brief suggests it is still pursuing charges for the May 8, 2018 letter. *See* ODC Br. at 10. Accordingly, the Committee will address the May 8 letter.

[6] The complaint letter that N.E. and her husband filed with Disciplinary Counsel was brief. It relied entirely by reference on the earlier letter they previously filed with the Maryland AGC. Accordingly, we will focus on that earlier letter.

The letter was written in narrative fashion, 13 pages long, single-spaced, and with footnotes. It was written in the plural first person, as their joint story of the basis for their complaint to the AGC. They set forth in the narrative the alleged facts that underlay their assertion that Respondent violated his professional obligations. DX 5.

Disciplinary Counsel asked Respondent to comment on these allegations, and Respondent did so in the May 8 letter. In addition to making legal arguments, Respondent challenged the credibility of N.E. and her husband, the people who wrote the letter against him. His letter argued that they were not credible people and that Disciplinary Counsel should not believe what they wrote. His letter set forth facts that—if true—would tend to corroborate that argument. Some of those facts were "secrets." *See* Confidential Appendix, *infra*.

The question to be answered here is whether Respondent's disclosure of those secrets was "reasonably necessary to establish a defense to a . . . disciplinary charge . . . formally instituted against the lawyer, based upon conduct in which the client was involved," or was "reasonably necessary to respond to specific allegations by the client concerning the lawyer's representation of the client . . . ." Rule 1.6(e)(3). Comment 25 further explains that a lawyer should not disclose more "than the lawyer reasonably believes is necessary to vindicate innocence," and he should make any disclosure "in a manner that limits access to the information to the tribunal or other persons having a need to know it," including through protective orders where appropriate. Rule 1.6, cmt. [25].

The test in the Rule (and comment) focuses on whether Respondent himself reasonably believed the disclosure of these secrets or confidences was necessary to vindicate himself against the disciplinary complaint that N.E and her husband filed against him. We conclude that it was.

Given that the complaint filed by N.E. rested on the credibility of the narrators, and those narrators emphasized their credibility by citation to their legal education, we cannot say it was "unreasonable" for Respondent to believe it was necessary to challenge the credibility of N.E. and her husband. Clearly N.E. and her husband put into issue the facts of their own legal training and their admissions to the Bar. And their richly detailed allegations of alleged misfeasance, set forth in their letter, were largely substantiated by the complainants' own assertion that these were the true facts. Their complaint did not rest on writings or other documents but more on their own recitation of the facts.

If it was reasonable for Respondent to believe he had to challenge the credibility of N.E. and her husband to vindicate himself from their complaint against him, the question remains whether it was reasonable for him to make the disclosures he made in the May 8 letter to support that argument. We believe that it was reasonable because the "secrets" were reasonably germane to the credibility of N.E. and her husband.

Nothing in the record suggests that Respondent sent his May 8 letter to anyone other than the Disciplinary Counsel lawyer who was investigating the complaint

against him. As such, we believe Respondent's May 8, 2018 disclosures were protected under Rule 1.6(e)(3).

b. Analysis of the disclosures Respondent made in support of his complaint against N.E. and thereafter

By contrast, the Committee believes Respondent may not rely on Rule 1.6(e)(3) to privilege the disclosures he made in connection with his letters of August 16, 2018 (DX 8) or October 10, 2018 (DX 12). The Committee interprets those letters as being *offensive* in nature, as supporting Respondent's call for Disciplinary Counsel to pursue discipline against N.E. While Respondent included at the top of the letters a citation to the case number of the complaint filed against him, he elsewhere clearly states that he has sent the letters to justify a new complaint against N.E.

Respondent did not send those letters solely to defend against the complaint filed against him. The Committee therefore does not believe that Rule 1.6(e)(3) provides him any possible defense for the disclosures of client secrets that he made in those letters.

4. The disclosures were not permitted under Rule 8.3(a).

Rule 8.3(a) provides that "[a] lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, shall inform the appropriate professional authority."

Respondent argues that his disclosures were permissible because they were designed to challenge N.E.'s fitness as a member of the Bar. As such, he seeks refuge under Rule 8.3(a), which sets forth a mandatory command.

Respondent's argument is undone two subsections later. Subsection (c) reads as follows: "This rule does not require disclosure of information otherwise protected by Rule 1.6 or other law." Subsection (c) negates the command of subsection (a) when the information to be disclosed is subject to Rule 1.6.

The disclosures about N.E. that Respondent made in this case were all subject to Rule 1.6 as at least secrets. Thus, Rule 8.3(a) did not compel Respondent to make his disclosures because that rule was rendered inapplicable by Rule 8.3(c).

Respondent nonetheless argues that subsection (c) still privileged Respondent to make the disclosure, because it merely retracted the *compulsion* for him to do so. He argues the rule still left him with the option to disclose—or not to disclose—as he himself saw fit.

We reject Respondent's argument that Rule 8.3 gives lawyers *an option* to disclose secrets or confidences, even though it does not compel their disclosure. That is not what Rule 8.3 says.

D. Respondent Violated Rule 8.4(d) by Seriously Interfering with the Administration of Justice.

Rule 8.4(d) provides that it 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 demonstrate by clear and convincing evidence that: (i) Respondent's conduct was improper, *i.e.*, that

Respondent either acted when he should not have or failed to act when he should have; (ii) Respondent's conduct bore directly upon the judicial process with respect to an identifiable case or tribunal; and (iii) Respondent's conduct tainted the judicial process in more than a de minimis way, i.e., it must have potentially had an impact upon the process to a serious and adverse degree. *In re Hopkins*, 677 A.2d 55, 60-61 (D.C. 1996).

We agree with Disciplinary Counsel that Respondent violated Rule 8.4(d) by filing a retaliatory complaint against N.E. on August 16, 2018 and thereafter pursuing it. DX 8.

1. Respondent's conduct was improper.

As described above, Respondent violated Rule 1.6 by disclosing secrets of N.E. and her husband in the course of filing a disciplinary complaint against N.E. Conduct that itself violates the Rules of Professional Conduct must by definition be deemed improper.

Moreover, Respondent did this in a retaliatory manner. In his October 2018 letter to Disciplinary Counsel, Respondent wrote that he filed the complaint because N.E. had filed her complaint against him. DX 12 at 61 ("I am only filing this grievance because of the grievance [N.E.] filed against me."). While Respondent later disclaimed that motive (DX 17 at 79), we do not find his disavowal credible. Respondent changed his explanation only after he learned it might form the basis for a disciplinary complaint against him. Further, at the hearing Respondent testified that he filed the complaint against N.E. because N.E. had filed a contempt motion

against him, something not previously mentioned (but retaliatory itself). Tr. 53. Regardless of how Respondent characterizes his actions, it is apparent that the August 2018 complaint that he filed against N.E. was filed for retaliatory purposes.

The Court of Appeals has previously ruled that lawyers violate Rule 8.4(d) if they act to induce their clients to withdraw disciplinary complaints filed against them. *E.g.*, *In re Martin*, 67 A.3d 1032, 1051 (D.C. 2013) ("It is well-settled that an attorney who enters into an agreement with a client which requires the client either to refrain from filing or to seek dismissal of a bar complaint violates Rule 8.4(d)."); *In re Green*, Board Docket No. 13-BD-020, at 18-20 (BPR, Aug. 5, 2015), *recommendation adopted*, 136 A.3d 699 (D.C. 2016) (per curiam) (finding that lawyer violated Rule 8.4(d) by conditioning settlement with former clients on their agreement not to file disciplinary complaints).

The rationale cited in those decisions seems to have equal applicability here. As the Board discussed in the *Green* decision, a lawyer's efforts to prevent a disciplinary charge from being filed or to induce the withdrawal of a charge frustrate the disciplinary process, by impeding the ability of Disciplinary Counsel and the Board to investigate or adjudicate possible ethical violations. *In re Green*, Board Docket No. 13-BD-020 at 19-20. It impedes the filing of charges by imposing an extra cost on those who might file a charge.

Respondent's retaliatory filing of a disciplinary complaint against N.E. impeded N.E.'s ability to complain about Respondent's conduct as her lawyer because it imposed a cost on her for doing so. The Court of Appeals has held that

the filing of a lawsuit against a client who filed a disciplinary complaint against the lawyer violated Rule 8.4(d). *In re Spikes*, 881 A.2d 1118, 1126-27 (D.C. 2005).

By the same logic employed in the *Martin* and *Spikes* decisions, the Committee believes Respondent's retaliatory filing of a complaint against N.E. was improper within the meaning of Rule 8.4(d).

2. Respondent's conduct bore upon the judicial process.

Comment 2 to Rule 8.4 speaks to how Rule 8.4(d) should be interpreted. It identifies numerous acts as constituting improper conduct by a lawyer, and it specifically includes proceedings initiated by Disciplinary Counsel. For example, Comment 2 condemns the "failure to cooperate with Disciplinary Counsel," the "failure to respond to Disciplinary Counsel's inquiries or subpoenas," and the "failure to abide by agreements made with Disciplinary Counsel."

Comment 2 further provides that "Paragraph (d) is to be interpreted flexibly and includes any improper behavior of an analogous nature to these examples."

It appears to the Committee that Respondent's conduct bore directly upon the judicial process with respect to an identifiable case or tribunal. The case initiated by N.E., by filing a complaint with Disciplinary Counsel, qualifies as an identifiable case and the system of attorney discipline established by the Court of Appeals qualifies as a tribunal. Respondent's act of filing a disciplinary complaint against N.E. in retaliation for her complaint certainly bore upon that process.

3. Respondent's conduct tainted the judicial process in more than a de minimis way.

The last element in the Rule 8.4(d) analysis requires that the act "at least potentially impacted upon the process to a serious and adverse degree." *In re White*, 11 A.3d 1226, 1230 (D.C. 2011) (internal quotation and citation omitted).

Disciplinary Counsel argues that Respondent's retaliatory filing meets this requirement:

> Here, Mr. Paul improperly disclosed client confidences and secrets after his clients had complained about his conduct to Disciplinary Counsel. Had his disclosures achieved their objective, NE might have had to litigate disciplinary charges. Disciplinary Counsel docketed a matter and called for a response from NE. DX 9. NE was forced to retain counsel to respond.

ODC Br. at 17.

The Committee agrees. The effect of Respondent's filing of a disciplinary complaint against N.E. was not just "potential" but "actual." It "actually" caused a new disciplinary action to be docketed and required N.E. to retain counsel to respond to the complaint. Just as with the line of cases concerning lawsuits filed against clients for having filed disciplinary complaints, Respondent's action had a tangible effect on N.E. Because Respondent set this in motion in retaliation for the disciplinary complaint that N.E. filed against Respondent, the Committee believes this meets the standard for impacting the process to a serious and adverse degree.

IV. RECOMMENDED SANCTION

In this case, Disciplinary Counsel has asked the Hearing Committee to recommend the sanction of a one-year suspension with a fitness requirement.

Respondent has requested that the Hearing Committee recommend no more than an informal admonition. For the reasons described below, we recommend a 90-day license suspension.

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 and other attorneys from engaging in similar misconduct. *See, e.g.*, *In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (en banc); *Martin*, 67 A.3d at 1053; *Cater*, 887 A.2d at 17. "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) (per curiam).

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; *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 which 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 In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (en banc); *In re Wilson*, 241 A.3d 309, 312 (D.C. 2020) (per curiam) (citing *In re Fay*, 111 A.3d 1025, 1031 (D.C. 2015) (per curiam)). The Court also considers "'the moral fitness of the attorney and the need to protect the legal profession, the courts, and the public.'" *In re Harris-Lindsey*, 242 A.3d 613, 625 (D.C. 2020) (quoting *In re Samad*, 51 A.3d 486, 499 (D.C. 2012) (per curiam)).

B. Application of the Sanction Factors

1. The Seriousness of the Misconduct

Respondent's misconduct was serious. The improper disclosure of client secrets attacks the heart of the attorney-client relationship. Likewise, improper retaliation against a client who exercises her right to file a complaint with Disciplinary Counsel attacks the foundation of the regulation of attorneys in the District of Columbia.

2. Prejudice to the Client

Respondent's misconduct prejudiced N.E. in two ways. First, it resulted in the disclosure of secrets that N.E. expected to be kept confidential. Respondent revealed those secrets to the Office of Disciplinary Counsel and, as a consequence, they have been revealed to this Hearing Committee. These entities have taken steps to prevent the secrets from being further disseminated but those are secrets that should never have been revealed to anyone. Second, Respondent's filing of the complaint against N.E. resulted in N.E. having to hire counsel to defend against a

complaint that should never have been filed, or certainly not filed years after the fact as a means of retaliation. Accordingly, it appears to the Committee that N.E. was significantly prejudiced by Respondent's acts of misconduct.

3. Dishonesty

The underlying misconduct that Respondent is charged with—the August and October 2018 letters—did not concern dishonesty. Disciplinary Counsel argues that Respondent's testimony "approached if it did not cross the line" into dishonesty. *See* ODC Br. at 19. As stated above, the Committee does not accept Respondent's argument (to which he testified) that he filed his August 2018 complaint against N.E. for non-retaliatory purposes. Respondent's argument seems to contradict his own, contemporaneous written explanation that freely conceded that N.E.'s complaint was the direct cause of him filing his own complaint. Indeed, Respondent's proposed findings of fact include this statement:

> Respondent did not file a grievance against N.E. in retaliation because she filed a grievance against Respondent. Respondent filed a grievance with the ODC against N.E. in defense of why he stopped communication with N.E. via the telephone (See ODC Ex. No. DX 17, p. 79; and Tr., p. 66, 76) because he believed N.E.'s actions needed to be reported.

Resp.'s Proposed Finding of Fact #24.

The Committee finds that Respondent filed his complaint in retaliation for N.E. filing a complaint against him. While Respondent disagrees with the use of the word "retaliation," he does admit that N.E.'s complaint was the "but for" cause of him filing his own complaint, and admits that he would not have filed his own complaint against N.E. if she had not first filed one against him. The dispute thus

comes down to Respondent's subjective motivation in filing his complaint, which is not necessarily a material issue in determining whether he violated the Rules. Leaving aside whether his subjective motivation for filing is material, we agree with Disciplinary Counsel that Respondent's shifting explanations indicate that he has not been honest about it.

4. Violations of Other Disciplinary Rules

Respondent was charged with violating two Rules of Professional Conduct, for different aspects of his acts of misconduct. He was charged with violating Rule 1.6 for knowingly revealing client secrets and charged with violating Rule 8.4(d) for filing a retaliatory disciplinary complaint against N.E. As discussed above, this Hearing Committee has found that Disciplinary Counsel proved both Rule violations by clear and convincing evidence.

5. Previous Disciplinary History

Respondent has a record of discipline imposed against him.

First, Disciplinary Counsel cites *Attorney Grievance Commission of Maryland v. Paul*, 31 A.3d 512 (Md. 2011) (DX 19). In this matter, Respondent was charged in Maryland with forging a stipulation of dismissal and filing the forged document with a court. The Maryland Court of Appeals found a violation of Maryland Rule 8.4(d) for conduct prejudicial to the administration of justice. The court ordered a public reprimand.

Second, Disciplinary Counsel cites *Attorney Grievance Commission of Maryland v. Paul*, 187 A.3d 625 (Md. 2018) (DX 20). In that matter, the Maryland

Court of Appeals suspended Respondent for 30 days for violations of Maryland Rules 8.4(a) (violating the Maryland Rules of Professional Conduct), 8.4(b) (committing a criminal act that reflected adversely on his fitness) and 8.4(d) (conduct prejudicial to the administration of justice).

As Disciplinary Counsel notes, in both of those cases there was evidence of Respondent engaging in misconduct in retaliation: out of pique to opposing counsel in the first case (DX 19 at 83) and in the second, negligent driving and leaving the scene of an accident resulting from criminal road rage that resulted in his arrest and imprisonment (DX 20 at 98-99).

This case also involves Mr. Paul retaliating against someone who angered him, namely his former client, N.E.

6. Acknowledgement of Wrongful Conduct

Respondent has not acknowledged that he did anything wrong. This factor is mitigated to some degree by the next factor.

7. Other Circumstances in Aggravation and Mitigation

The Committee considers in mitigation of sanction that Respondent's lack of remorse does appear to be grounded in his misunderstanding of the law, rather than a failure to come to terms with his actions. The Committee believes this to be true based on Respondent's course of argument throughout this matter, from the time of his first written correspondence with Disciplinary Counsel up through his arguments to this Committee. The factual issues in this case are fairly clear; the issue is whether those facts constitute a violation of the Rules.

B. Sanctions Imposed for Comparable Misconduct

Cases involving Rule 1.6(a) violations encompass a wide range of sanctions, from non-suspensory sanctions to disbarment.

Neither of those two extremes should apply here. Pointing to a number of informal admonition letters, which are not binding precedent, Respondent urges us to recommend (at most) the same. R. Br. at 23-24, 28. But several of those matters rested in part on the respondent's lack of prior discipline. *See In re Baron*, Bar Docket No. 2013-D032, at 2 (Letter of Informal Admonition Sept. 5, 2013); *In re Baylor*, Bar Docket No. 2009-D520, at 3 (Letter of Informal Admonition Aug. 11, 2010); *In re Friends*, Bar Docket No. 2010-D029, at 3 (Letter of Informal Admonition July 22, 2010); *In re Lunsford*, Bar Docket No. 379-01, at 6 (Letter of Informal Admonition Jan. 31, 2006); *In re Quinn*, Bar Docket No. 113-02, at 3 (Letter of Informal Admonition Aug. 1, 2002).

In contrast, Respondent not only has prior discipline from two separate matters, but Respondent's misconduct of retaliation here tracks this prior misconduct, which distinguishes Respondent's other informal admonition cases from the case here. *E.g.*, *In re Ellis*, Bar Docket No. 2010-D469, at 2 (Letter of Informal Admonition June 28, 2011) (acknowledging that neither the then-current suspension resulting from a reciprocal matter, nor the prior informal admonition stemmed from a 1.6 violation, and issuing an informal admonition based on the respondent's cooperation with the investigation); *In re Butler*, Bar Docket No. 2010-D442, at 2 (Letter of Informal Admonition May 12, 2011) (noting the respondent

had been issued a previous Informal Admonition involving "another Rule violation," and that the respondent accepted responsibility, cooperated with the investigation, and agreed to take a Practice Management Course); *see also In re Shuler*, Bar Docket No. 2012-D315, at 2 (Letter of Informal Admonition, July 23, 2013) (considering the respondent's client was not prejudiced by the respondent's misconduct, and that the respondent was dealing with "financial, emotional, and other issues" during the time of the misconduct).

On the other end of the spectrum, both parties agree that the disbarment cases involving Rule 1.6 are inapposite. Both *In re Baber* and *In re Frison* encompass far more serious and voluminous conduct—the former noting protracted dishonesty to the client, to the court, and to Disciplinary Counsel; the latter outlining roughly 20 Rule violations, in part from falsified billing records and a fabricated joint pretrial statement. *In re Baber*, 106 A.3d 1072 (D.C. 2015) (per curiam); *In re Frison*, 89 A.3d 516 (D.C. 2014) (per curiam).

This leaves assessing an appropriate length of suspension. In *In re Wemhoff*, the Court imposed a 30-day stayed suspension for multiple violations of Rule 1.6(a), as well as violations of Rules 3.4(c) and 8.4(d). *In re Wemhoff*, Board Docket No. 14-BD-056 (BPR Nov. 20, 2015), appended HC Rpt. at 8-9, 15 (finding the respondent made improper disclosures in a Motion to Withdraw, and a Motion for Reconsideration), *recommendation adopted where no exceptions filed*, 142 A.3d 573 (D.C. 2016) (per curiam). But the Hearing Committee elaborated on extensive mitigation, including no prior discipline, and that the client did not "appear to have

suffered significant prejudice from [the respondent's] conduct." *Wemhoff*, Board Docket No. 14-BD-054, appended HC Rpt. at 19-20. Indeed, the Committee was convinced that the respondent would not "improperly disclos[e] client secrets and disparag[e] the client . . . if he again finds himself in a difficult representation." *Id.* at 18. Those mitigating factors are not present here; thus, we are thus guided to a higher recommended sanction.

In re Charles involved a 30-day suspension with fitness in two consolidated matters consisting of Rule 1.6(a)(1), 1.1(a), 1.3(c), 8.1, and 8.4(d) violations. 855 A.2d 1114 (D.C. 2004) (per curiam) (amended opinion). The respondent's prior informal admonition was considered as an aggravating factor, and the Board acknowledged that "some of the conduct for which Respondent was previously admonished is similar to that at issue here." *In re Charles*, Bar Docket Nos. 002-98 & 177-00, at 21-22 (BPR July 30, 2003), *recommendation adopted where no exceptions filed*, 885 A.2d 1114. But this was balanced against mitigating circumstances not present here—"financial and emotional problems," coupled with findings that the respondent was forthcoming during the hearing, and "was clearly motivated by a desire to assist her client." *Id.* at 22.

In *In re Koeck*, which both parties cite to in their Briefs, the Hearing Committee initially recommended a 30-day suspension, with fitness, for one 1.6(a) violation. *In re Koeck*, Board Docket No. 14-BD-061 (HC Rpt. Jan 11, 2017). The Board disagreed, finding three additional Rule 1.6(a) violations, which "significantly increase[d] the seriousness of [the respondent's] misconduct, the

prejudice to [the client], and the number of rule violations." *In re Koeck*, Board Docket No. 14-BD-061, at 36-37 (BPR Aug. 30, 2017). The Board thus recommended a 60-day suspension, with fitness, which the Court adopted after no exceptions were filed. 178 A.3d 463 (D.C. 2018) (per curiam). Notably, Koeck did not have prior discipline, much less repeat misconduct through retaliation. *Koeck*, Board Docket No. 14-BD-061, at 32 (HC Rpt.) (noting that "this is Koeck's first offense").

Finally, the Court in *In re Rosen* ordered a six-month suspension for violations of several Rules, including a previous version of Rule 1.6. 470 A.2d 292 (D.C. 1983). But in its sanction analysis, the Court focused primarily on other violations, namely the respondent's neglect and his intentional failure to seek the lawful objectives of his client. It further emphasized the respondent's prior discipline—an informal admonition and a public reprimand. *Id.* at 300-02. On balance, we believe this case most closely resembles *Koeck*, and while we do not recommend a fitness requirement, we believe the additional aggravating factors present here—retaliation, prior discipline, and Respondent's failure to testify truthfully as to his motivation—warrant an upward departure from the 60-day suspension imposed there.

C. Fitness

A fitness showing is a substantial undertaking. *Cater*, 887 A.2d at 20. Thus, in *Cater*, the Court held that "to justify requiring a suspended attorney to prove fitness as a condition of reinstatement, the record in the disciplinary proceeding must contain clear and convincing evidence that casts a serious doubt upon the attorney's

continuing fitness to practice law." *Id*. at 6. Proof of a "serious doubt" involves "more than 'no confidence that a Respondent will not engage in similar conduct in the future.'" *In re Guberman*, 978 A.2d 200, 213 (D.C. 2009). It connotes "'real skepticism, not just a lack of certainty.'" *Id.* (quoting *Cater*, 887 A.2d at 24).

In articulating this standard, the Court observed that the reason for conditioning reinstatement on proof of fitness was "conceptually different" from the basis for imposing a suspension. As the Court explained:

> The fixed period of suspension is intended to serve as the commensurate response to the attorney's past ethical misconduct. In contrast, the open-ended fitness requirement 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. . . .
>
> . . . [P]roof of a violation of the Rules that merits even a substantial period of suspension is not necessarily sufficient to justify a fitness requirement . . . .

Cater, 887 A.2d at 22.

In addition, the Court found that the five factors for reinstatement set forth in *In re Roundtree*, 503 A.2d 1215, 1217 (D.C. 1985), should be used in applying the *Cater* fitness standard. They include:

(a) the nature and circumstances of the misconduct for which the attorney was disciplined;

(b) whether the attorney recognizes the seriousness of the misconduct;

(c) the attorney's conduct since discipline was imposed, including the steps taken to remedy past wrongs and prevent future ones;

(d) the attorney's present character; and

(e) the attorney's present qualifications and competence to practice law.

Cater, 887 A.2d at 21, 25.

Disciplinary Counsel contends that a fitness requirement is necessary in this case based on Respondent's refusal to acknowledge wrongdoing and accept responsibility and his pattern of "striking out at people with whom he was angry or upset." *See* ODC Br. at 21-22.

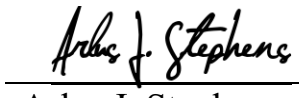
We find that a fitness requirement is not warranted in this case. Applying the *Cater* factors, we do not believe that Disciplinary Counsel has proved by clear and convincing evidence that a fitness examination is needed at the end of Respondent's suspension. Respondent did not act to prejudice N.E. in the course of representing her; rather, his acts all occurred after the end of his representation of her. Furthermore, Respondent acted under the impression—which we believe to have been incorrect—that his acts were legally privileged. He did not reveal N.E.'s secrets or confidences to anyone beyond Disciplinary Counsel. We agree with Disciplinary Counsel that Respondent has previously exhibited some anger-management issues; yet, we must also acknowledge that Respondent is hardly alone as a practicing lawyer who is sometimes driven by anger.

We have recommended a 90-day suspension of Respondent's license to practice law. That is a significantly greater sanction than has ever been levied against Respondent. We believe that this greater sanction should be enough to correct Respondent's behavior going forward. For that reason, we disagree with Disciplinary Counsel's request for the imposition of a fitness requirement.

V. CONCLUSION

For the foregoing reasons, the Committee finds that Respondent violated Rules 1.6(a) and 8.4(d), and should receive the sanction of a 90-day suspension. We further recommend that Respondent's attention be directed to the requirements of D.C. Bar Rule XI, Section 14, and their effect on eligibility for reinstatement. *See* D.C. Bar R. XI, § 16(c).

AD HOC HEARING COMMITTEE



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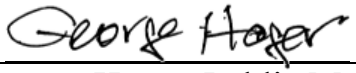

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