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

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

REPORT AND RECOMMENDATION OF THE AD HOC HEARING COMMITTEE

Respondent, Douglas B. Evans, Sr., is charged with violating D.C. Rules of Professional Conduct ("Rules") 1.1(a) (competent representation), 1.1(b) (skill and care), 1.3(a) (diligence and zeal), 1.3(c) (reasonable promptness), 1.4(a) (communication), 1.4(b) (failure to explain matter to client), 1.16(d) (termination of representation), and 8.4(d) (serious interference with the administration of justice), arising from his representation of a client in a criminal appellate matter. Bar Counsel contends that Respondent committed all of the charged violations, and should be suspended for six months with a fitness requirement, stayed in favor of one year of supervised probation with conditions. Respondent admits to each of the alleged facts and rule violations and agrees with the sanction recommended by Bar Counsel.

As set forth below, the Hearing Committee finds clear and convincing evidence of the violations charged by Bar Counsel except for Rule 8.4(d). The Hearing Committee recommends that Respondent be suspended for 30 days, stayed in favor of one year of supervised probation, with the conditions recommended by Bar Counsel.

I. PROCEDURAL HISTORY

On March 24, 2014, Bar Counsel served Respondent with a Specification of Charges ("Specification"). The Specification alleges that in 2011, in connection with his representation of Henry E. Wilson in a criminal appellate matter, Respondent violated the following rules:

- Rules 1.1(a) and (b), by failing to provide competent representation to his client and failing to serve his client with skill and care commensurate with that generally afforded to clients by other lawyers in similar matters;
- Rules 1.3(a) and (c), by failing to represent his client with diligence and zeal within legal bounds and failing to act with reasonable promptness;
- Rules 1.4(a) and (b), by failing to keep his client reasonably informed about the status of the matter and failing to explain the matter to the extent reasonably necessary to permit his client to make informed decisions regarding the representation;
- Rule 1.16(d), by failing to take timely steps to the extent reasonably practicable to protect his client's interests upon termination of the representation, such as giving reasonable notice, allowing time for employment of other counsel, surrendering papers and property, and refunding unearned fees; and
- Rule 8.4(d), by engaging in conduct that seriously interfered with the administration of justice.

Respondent filed an answer on April 21, 2014. On April 10, 2015, the parties filed joint Stipulations ("Stip."), which included stipulations as to the alleged facts and violations charged by Bar Counsel. A hearing was held on June 23, 2015, before this Ad Hoc Hearing Committee (the "Hearing Committee"). Bar Counsel was represented at the hearing by Deputy Bar Counsel Elizabeth A. Herman, Esquire. Respondent was represented by James T. Maloney, Esquire.

Prior to the hearing, Bar Counsel submitted Bar Exhibits ("BX") A through D and 1 through 5. Bar Counsel's exhibits were received into evidence without objection. Transcript of Proceedings ("Tr.") 12. Bar Counsel did not call any witnesses. During the hearing, Bar Counsel introduced BX E through G, copies of three letters of Informal Admonition issued to Respondent, in aggravation of sanction.

Also prior to the hearing, Respondent submitted exhibits ("RX") 1 through 3. All of Respondent's exhibits were received into evidence without objection. Tr. 15. During the hearing, Respondent testified on his own behalf in mitigation of sanction, but did not call any other witnesses. Tr. 17. The Hearing Committee held the record open to permit Respondent to submit additional exhibits showing that he had refunded the legal fee paid by his client. *See* Tr. 45. On July 1, 2015, Respondent filed Supplemental Exhibits ("SRX") 1 and 2, showing the refund payments, which are accepted into evidence.[1]

Proposed Findings of Fact, Conclusions of Law, and Recommendation as to Sanction were filed by Bar Counsel on July 13, 2015, and by Respondent on August 12, 2015.

II. FINDINGS OF FACT

The following findings of fact are based on the Stipulations of the parties and those facts established by clear and convincing evidence at the hearing. *See* Board Rule 11.5.

A. The Misconduct

1. Respondent was admitted to the Bar of the District of Columbia Court of Appeals on April 16, 1990, and assigned Bar number 423496. Stip. ¶ 1; BX A.

2. On or about March 7, 2011, Henry E. Wilson retained Respondent for a total of $4,000 to represent him on appeal of his criminal conviction and to file a Rule 35 motion for reduction of sentence. Stip. ¶ 2; BX 5 at 2.

3. Respondent and Mr. Wilson disagree about the exact amount of the legal fee Mr. Wilson and his family paid Respondent. Stip. ¶ 3. Respondent maintained that he was paid

[1] SRX 1 is a statement signed by Marilyn Wilson acknowledging receipt of a refund of Respondent's legal fee in the form of four money orders, totaling $3,000. SRX 2 includes copies of the four money orders.

$500 for an initial consultation and $2,000 of his $4,000 fee for filing an appeal, Tr. 19-20, but conceded that he failed to keep records of the payments, as he was required. Stip. ¶ 3; Tr. 29.

4. On or about April 21, 2011, Respondent entered his appearance on behalf of Mr. Wilson before the District of Columbia Court of Appeals in *Wilson v. United States*, 11-CF-174. On May 5, 2011, the Court vacated the appointment of previous counsel and ordered Respondent to file a brief and appendix within 40 days. Stip. ¶ 4; BX 4 at 1.

5. On June 20, 2011, Respondent filed a motion to extend the time to file the brief until July 6, 2011. Stip. ¶ 5; BX 4 at 9-10. Respondent filed the brief, without an appendix, on July 28, 2011, after the filing deadline had passed. Stip. ¶ 5; BX 4 at 19-27. That same date, the Court accepted the brief for filing and ordered Respondent to file the appendix within 15 days of the date of the order, with a motion for leave to late-file. Stip. ¶ 5; BX 4 at 11-12. Respondent failed to file the appendix or to request an extension of time to do so. Stip. ¶ 5; Tr. 21-23.

6. On October 5, 2011, the Court dismissed the appeal based upon Respondent's failure to file the appendix or respond to the Court's July 28, 2011 order. Stip. ¶ 6; BX 4 at 13.

7. Respondent failed to inform his client, Mr. Wilson, that the appeal had been dismissed. Mr. Wilson learned of the dismissal directly from the Court. Stip. ¶ 7; BX 2 at 1.

8. On October 27, 2011, Mr. Wilson wrote to the Court to request that his appeal be reinstated. Stip. ¶ 8; BX 4 at 14. On November 8, 2011, the Court reinstated the appeal and appointed successor counsel to represent Mr. Wilson. Stip. ¶ 8; BX 1 at 1.

9. Respondent took no action to reinstate Mr. Wilson's appeal. Respondent testified that he did not know the case had been dismissed until "much later on," speculating that he may not have received the order directing that he file the appendix (and presumably the Court's order

of dismissal) because of mail problems in his office.[2] Tr. 21-22, 25. Respondent conceded that he could have kept up to date on the status of the appeal by calling the Court or checking the Court's docket sheet, but he did not do so. Tr. 26-27.

10. Respondent never filed the Rule 35 motion for reduction of sentence for Mr. Wilson, as he had agreed.[3] Tr. 28-29.

11. After the Court dismissed the case and Respondent's representation ended, Respondent failed to refund any of the legal fees paid to him by or on behalf of Mr. Wilson. Stip. ¶ 9; Tr. 23-24.

12. Mr. Wilson filed an application for reimbursement of his legal fee with the D.C. Bar's Attorney/Client Arbitration Board (the "ACAB"). The Board awarded Mr. Wilson a partial refund of $1,500, which Respondent paid to Mr. Wilson on or about January 30, 2014. Stip. ¶¶ 10-11; Tr. 23-24.

13. On June 23, 2015, Respondent provided an additional refund of $3,000 to Mr. Wilson through Marilyn Wilson. SRX 1-2.

14. Successor counsel filed her own brief on behalf of Mr. Wilson, with the required appendix, and the case was resolved by the Court. BX 4; Tr. 23.

B. Findings in Mitigation

15. During the time that Respondent represented Mr. Wilson, between March 2011 and October 2011, he had significant health problems. RX 1-3. We credit Respondent's testimony that he developed asthma, which impaired his breathing, and that he had to be taken to

[2] Respondent testified that the mail problems included break-ins and mail strewn outside his office. Tr. 21-22.

[3] Bar Counsel did not charge Respondent with misconduct in connection with his failure to file the Rule 35 motion.

a hospital by ambulance, had to visit several doctors, and to return to the hospital before he "learn[ed] to live with it." Tr. 20, 39-40.

16. Respondent has significantly reduced his caseload and has taken steps to ensure coverage of his cases if he has further health problems. Tr. 32-34.

17. Respondent has acknowledged and taken full responsibility for his misconduct, testifying credibly that he "felt really bad" about his failure to properly represent Mr. Wilson. Tr. 41.

III. CONCLUSIONS OF LAW

The parties stipulated that Respondent violated each of the disciplinary rules charged by Bar Counsel.[4] We find seven of these violations have been proven by clear and convincing evidence, as explained below.

A. Respondent Violated Rules 1.1(a) and (b).

Rule 1.1 provides that:

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

[4] Notwithstanding Respondent's stipulations to the charged misconduct, Bar Counsel maintains the burden of proving the alleged violations by clear and convincing evidence. *See, e.g.*, *In re Verra*, Bar Docket No. 166-02 at 16 (BPR July 20, 2006), *recommendation approved*, 932 A.2d 503 (D.C. 2007) ("Notwithstanding Respondent's concessions, the Board has a duty to determine whether the evidence presented proves the violations charged."); *see also In re Howes*, Bar Docket No. 131-02 at 21-22 (HC Rpt. Aug. 19, 2009) (analyzing the elements of each alleged violation notwithstanding the respondent's stipulation to each alleged Rule violation); *In re Merritt-Bagwell*, Bar Docket No. 2011-D186 at 21 (HC Rpt. May 28, 2014) (same). One could argue that this rule is hallowed by time rather than logic. With Respondent having stipulated to all of the charges and the sanction, certainly the efficient outcome would be a simple one-page acceptance of those stipulations. As we are bound by the Board's precedent, we of course do so herein. The fact that we do not find that Bar Counsel has proved all the alleged charges may or may not be seen as a justification for making comprehensive findings, notwithstanding a respondent's stipulations. Given that the participants in Bar proceedings are inherently sophisticated parties, were it up to us, we would err on the side of efficiency.

> (b) A lawyer shall serve a client with skill and care commensurate with that generally afforded to clients by other lawyers in similar matters.

The Court has determined that competent representation requires the "legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." *See In re Drew*, 693 A.2d 1127, 1132 (D.C. 1997) (per curiam) (lawyer who has requisite skill and knowledge, but who does not apply it for particular client, violates obligations under Rule 1.1(a)). Rule 1.1(b) mandates that "a lawyer shall serve a client with skill and care commensurate with that generally afforded to clients by other lawyers in similar matters." The comments to Rule 1.1 state that competent representation includes "adequate preparation, and continuing attention to the needs of the representation to assure that there is no neglect of such needs." Comment [5] to Rule 1.1. In *In re Evans,* the Court explained that

> [t]o prove a violation [of Rule 1.1(a)], Bar Counsel must not only show that the attorney failed to apply his or her skill and knowledge, but that this failure constituted a serious deficiency in the representation. . . . The determination of what constitutes a "serious deficiency" is fact specific. It has generally been found in cases where the attorney makes an error that prejudices or could have prejudiced a client and the error was caused by a lack of competence. . . . Mere careless errors do not rise to the level of incompetence.

902 A.2d 56, 69-70 (D.C. 2006) (per curiam) (appended Board Report); *see also In re Ford*, 797 A2d 1231, 1231 (D.C. 2002) (per curiam) (Rule 1.1(a) violation requires proof of "serious deficiency" in attorney's competence). Although the Board referred to Rule 1.1(a) only, the "serious deficiency" requirement applies equally to 1.1(b). *See In re Yelverton*, 105 A.3d 413, 421-22 (D.C. 2014). To prove a "serious deficiency," Bar Counsel must prove that the conduct "prejudices or could have prejudiced the client." *Id.* at 422.

With respect to Rule 1.1(b), expert testimony is not required to establish a violation in cases where "conduct is so obviously lacking that expert testimony showing what other lawyers generally would do is unnecessary." *In re Nwadike*, Bar Docket No. 371-00 (BPR July 30,

2004), *aff'd*, 905 A.2d 221 (D.C. 2006) (determining, without expert testimony, that the respondent violated 1.1(b) where she placed her clients' case in jeopardy by failing to adhere to a court-imposed deadline for filing a Rule 26(b)(4) statement); *see also In re Ontell*, Bar Docket No. 228-96 (BPR June 11, 1998), *aff'd*, 724 A.2d 1204 (D.C. 1999) ("While there are some types of cases in which the lapses of a respondent might not be apparent to a hearing committee without expert testimony, this is not one of them."); *In re Schlemmer*, Bar Docket Nos. 444-99 & 66-00 at 12-13 (BPR Dec. 27, 2002), *remanded on other grounds*, 840 A.2d 657 (D.C. 2004), *reprimand ordered*, Bar Docket Nos. 444-99 & 66-00 (June 16, 2004) (expressly rejecting Hearing Committee suggestion that Bar Counsel must necessarily provide evidence of the practice of other attorneys in order to establish a 1.1(b) violation).

Based on the above Findings of Fact, Respondent violated the duty to represent his client with competence, skill and care when he failed to attend to the basic obligations of both an attorney and an officer of the court in furthering the appeal in which he was retained and where he entered an appearance. As a result of Respondent's failure to file an appendix to the brief, his client's appeal was dismissed. We have no pause in finding that clear and convincing evidence shows that Respondent violated Rules 1.1(a) and (b). *See In re Mance*, 869 A.2d 339, 340 (D.C. 2005).

B. Respondent Violated Rules 1.3(a) and (c).

Rule 1.3 provides, in relevant part that:

> (a) A lawyer shall represent a client zealously and diligently within the bounds of the law. . . .
>
> (c) A lawyer shall act with reasonable promptness in representing a client.

In *In re Reback,* the Court defined neglect as:

> indifference and a consistent failure to carry out the obligations which the lawyer

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

In re Reback, 487 A.2d 235, 238 (D.C. 1985), *adopted in relevant part*, 513 A.2d 226 (D.C. 1986) (en banc); *see also In re Chapman*, 962 A.2d 922, 926 (D.C. 2009) (per curiam) (discussing sanctions for simple neglect); *In re Douglass*, 859 A.2d 1069, 1081 (D.C. 2004) (per curiam) (violations of 1.1(a) and (b) and 1.3(a) and (c) in representation of single client); *In re Wright*, 702 A.2d 1251, 1255 (D.C. 1997) (per curiam) (violations of 1.3(a) and (c) and 1.4(a) with respect to single client). Comment [8] to Rule 1.3 provides that "[e]ven when the client's interests are not affected in substance, . . . unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness," making it a "very serious violation."

Even assuming that the Court's order directing Respondent to file the appendix was lost in the mail, as Respondent suggested, he had an affirmative obligation to monitor the status of Mr. Wilson's appeal. Had he done so, he would have known that something was amiss, when the government did not file a responsive brief. Respondent's failure to follow up and file the appendix reflects the "indifference and consistent failure" to carry out the obligations to a client that is emblematic of neglect. We thus have no pause in accepting Respondent's stipulation and finding that there is clear and convincing evidence that he violated Rules 1.3(a) and (c).

C. Respondent Violated Rules 1.4(a) and (b).

Rule 1.4 provides, in relevant part:

> (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
>
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Under Rule 1.4(a), an attorney must not only respond to client inquiries, but must also

initiate contact to provide information when needed. *See In re Bernstein*, 707 A.2d 371, 376 (D.C. 1998). The purpose of this Rule is to enable clients to "participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued." Comment [1] to Rule 1.4(a). "The guiding principle for evaluating conduct under Rule 1.4(a) is whether the lawyer fulfilled the client's reasonable expectations for information." *In re Hallmark*, 831 A.2d 366, 374 (D.C. 2003) (appended Board Report) (finding a Rule 1.4(a) violation); *cf. In re Edwards*, 990 A.2d 501, 522-23 (D.C. 2010) (appended Board Report) (no Rule 1.4(a) violation found where the Hearing Committee determined that the respondent's level of communication was not unreasonable, given the nature of the case and the client's behavior).

Rule 1.4(b) provides that the attorney "must be particularly careful to ensure that decisions of the client are made only after the client has been informed of all relevant considerations." Comment [2] to Rule 1.4. The Rule places the burden on the attorney to "initiate and maintain the consultative and decision-making process if the client does not do so and [to] ensure that the ongoing process is thorough and complete." *Id*. In determining whether Bar Counsel has established a violation of Rules 1.4(a) and (b), the question is whether Respondent fulfilled his client's reasonable expectations for information. *See In re Schoeneman*, 777 A.2d 259, 264 (D.C. 2001). In addition to responding to client inquiries, a lawyer must initiate communications when necessary. *See Hallmark*, 831 A.2d at 374.

Respondent's failure to keep abreast of Mr. Wilson's case resulted in the dismissal of his appeal, crucial information that should have been communicated to Mr. Wilson. *See Mance*, 869 A.2d at 340. Had Respondent kept Mr. Wilson reasonably informed about the status of his appeal, he would have been able to make an informed decision whether to keep Respondent as his attorney or to retain or seek the appointment of substitute counsel. We thus have no pause in

accepting Respondent's stipulation and finding that there is clear and convincing evidence that he violated Rules 1.4(a) and (b).

D. Respondent Violated Rule 1.16(d).

Rule 1.16(d) provides that:

> In connection with any termination of representation, a lawyer shall take timely steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by Rule 1.8(i).

Here, the Rule 1.16(d) violation is based solely on the allegation that Respondent failed to refund an unearned fee. *See, e.g.*, *In re Samad*, 51 A.3d 486, 497 (D.C. 2012) (per curiam) (finding a violation where the respondent claimed that he did some work on the case, but did not "suggest that he earned the entire flat fee or that he returned any portion of the fee"); *In re Carter*, 11 A.3d 1219, 1223 (D.C. 2011) (per curiam) (finding a violation of Rule 1.16(d) where the attorney failed to pay an ACAB award for unearned fees); *In re Kanu*, 5 A.3d 1, 10 (D.C. 2010) (finding a violation of Rule 1.16(d) where the attorney failed to abide by a clause in her retainer agreement promising a refund if she failed to meet her clients' objectives).

Bar Counsel maintains that Respondent was not entitled to any of the fee paid to him in the Wilson case, notwithstanding the fact that he filed a brief, and the ACAB awarded Mr. Wilson only a portion of the fee ($1,500). It is unnecessary, however, for the Hearing Committee to resolve this question, since even assuming Respondent was entitled to a portion of the fee, he waited until January 2014, nearly 28 months after Mr. Wilson's case was dismissed, to return any portion of the fee to Mr. Wilson. This delay violated Rule 1.16's requirement of a "timely" refund of unearned fees. *See, e.g.*, *In re Hallmark*, Bar Docket Nos. 77-96 *et al.*, at 30

(BPR May 31, 2001) (violation of Rule 1.16(d) based on 29-month delay in issuing refund for unearned fee), *findings and recommendation adopted in relevant part*, 831 A.2d 366, 371 (D.C. 2003). We thus have no pause in accepting Respondent's stipulation and finding clear and convincing evidence that he violated Rule 1.16(d).

E. Respondent Did Not Violate Rule 8.4(d).

Rule 8.4(d) provides that "[i]t is professional misconduct for a lawyer to . . . engage in conduct that seriously interferes with the administration of justice." To establish a violation of Rule 8.4(d), Bar Counsel must demonstrate by clear and convincing evidence that: (i) Respondent's conduct was improper, *i.e.*, that Respondent either acted or failed to act when she 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). The prohibition of Rule 8.4(d) applies not only to activities which may cause a tribunal to reach an incorrect decision, but also to conduct which taints the decision making process. *In re Keiler*, 380 A.2d 119, 125 (D.C. 1977). Furthermore, Rule 8.4(d) is violated if the attorney's conduct causes the unnecessary expenditure of time and resources in a judicial proceeding. *In re Cole*, 967 A.2d 1264, 1266 (D.C. 2009).

The Court has held that "improper" conduct is not limited to that "prohibited by a statute, court rule or procedure, or other disciplinary rule." Improper conduct also includes that which, "considering all the circumstances in a given situation, the attorney should know that he or she would reasonably be expected to act in such a way as to avert any serious interference with the administration of justice." *Ukwu*, 926 A.2d at 1144 (appended Board report) (quoting *Hopkins*,

677 A.2d at 60-61). In *In re Askew*, the respondent violated Rule 8.4(d) when she "ignored the Court's orders to file [an appellate] brief thereby forcing the appointment of a new attorney" and "ignored an order to timely turn over her client's file to successor counsel thereby delaying successor counsel in commencing his work." Bar Docket No. 2011-D393 at 22-23 (BPR May 22, 2013) (citing *In re Toppelberg*, 906 A.2d 881 (D.C. 2006)), *recommendation adopted in relevant part*, 96 A.3d 52, 58 (D.C. 2014) (per curiam).

We take as our point of departure that Rule 8.4(d) is intended not simply as an additional charge which could accompany any other Rule violation, but is intended to reach a rule violation which has had an impact above and beyond that which would typically result from a violation of the other rules. We believe this to be the gist of the Court's admonition that a violation of Rule 8.4(d) requires a showing of a "serious interference with the administration of justice." *Ukwu*, 926 A.2d at 1144. We believe the Court's teaching is that there needs to be a "plus" factor – such as interference with the appointment of successor counsel – that we simply do not find here. Accordingly, we do not find a violation of Rule 8.4(d).

IV. RECOMMENDATION AS TO SANCTION

The appropriate sanction is what is necessary to protect the public and the courts, maintain the integrity of the profession, and "deter other attorneys from engaging in similar misconduct." *In re Kline*, 113 A.3d 202, 215 n.9 (D.C. 2015) (citing *In re Reback*, 513 A.2d 226, 231 (D.C. 1986) (en banc)). The determination of an appropriate disciplinary sanction is based on consideration of the following factors: the nature and seriousness of the misconduct, the presence of misrepresentation or dishonesty, the respondent's attitude toward the underlying misconduct, prior misconduct, prejudice to the client, and circumstances in aggravation and mitigation. *Id.* (citing *In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (en banc)). Under D.C.

Bar R. XI, § 9(h), the sanction imposed also must be consistent with cases involving comparable misconduct.

Bar Counsel and Respondent agree that Respondent should be suspended for six months with a fitness requirement, stayed in favor of one year of probation with the conditions that Respondent: (1) make arrangements to attend a two-day basic training course taught by the D.C. Bar's Practice Management Advisory Service within 30 days of the Court's order imposing discipline; (2) attend the course within seven months of the start of the period of probation, and present proof of attendance within 10 days of having completed the course; (3) commit no further disciplinary rule violations; and (4) take three hours of Continuing Legal Education course(s), pre-approved by Bar Counsel, and present proof of attendance within ten days of completing the course(s).[5] For the reasons that follow, we recommend that Respondent be suspended for 30 days and that the suspension be stayed in favor of a one-year period of probation, with the conditions recommended by the parties.

A. The Nature and Seriousness of the Misconduct

Respondent's misconduct showed a lack of competence, skill and care and a violation of the duty of zealous representation. Respondent, however, did not entirely drop the ball in his client's case. He filed a brief, but then failed to follow through by filing the appendix with the Court, notwithstanding a Court order directing him to do so, resulting in the dismissal of the

[5] The parties also agree that if Respondent violates any of the above-stated conditions of probation, Bar Counsel may petition the Court to impose the stayed suspension and the fitness requirement. This stipulation is contrary to Board Rule 18.3(a), which provides that "[w]here Bar Counsel has probable cause to believe that respondent has violated the terms or conditions of probation, Bar Counsel may file with the Court a verified motion to show cause why the matter should not be referred to a Hearing Committee for an evidentiary hearing to determine whether respondent has violated the terms or conditions of probation and, if so, whether the probation should be revoked, extended or modified. . . ." Thus, we do not include this term in our recommended conditions of probation. *See* page 22, *infra*.

appeal. Respondent's neglect, however, was not intentional and his conduct was not mendacious.

B. Whether the Conduct Involved Dishonesty or Misrepresentation

There are no allegations that Respondent was dishonest or engaged in misrepresentation.

C. Respondent's Attitude

Respondent stipulated to the alleged violations and the sanction, including a requirement to prove fitness as a condition of reinstatement should he violate the conditions of practice. He also testified credibly at the hearing that he has "learned from this incident" and has restructured his office procedures to avoid future misconduct. Tr. 33-36. Respondent also testified credibly that he "felt really bad" about his failure to properly represent his client. Tr. 41.

D. Violation of Other Disciplinary Rules

No other violations of the disciplinary rules have been alleged.

E. Prior Misconduct

Respondent has three prior informal admonitions. The first two Informal Admonitions, issued in 2001, concerned Respondent's representation in a single criminal appeal. The first was based on violations of Rules 1.4(a) and 1.5(b) (written statement of basis or rate of fee). BX E. The second Informal Admonition found additional violations of Rules 1.1(a) and (b) (competence, skill and care) and 1.16(d) (termination of representation). *See* BX F. Respondent received a third Informal Admonition in 2010 for violating Rules 1.4(a) and 1.5(b) based on his failure to put his fee agreement in writing and to communicate to the client that there was no basis to pursue her case. *See* BX G.

F. Other Circumstances in Aggravation and Mitigation

Respondent attributed his neglect of Mr. Wilson's appeal to mail problems and poor health. First, as we have found, Respondent should have checked the status of Mr. Wilson's appeal, regardless of any mail problems. Further, he has failed to establish, with any degree of particularity, a causal relationship between his health problems and the misconduct. *Cf. In re Peek*, 565 A.2d 627, 633 (D.C. 1989) (mitigating explanation must have a "causal nexus" with the misconduct to warrant mitigation of sanction). We thus have not considered these factors in mitigation.

We have considered, as suggested by Bar Counsel, that the misconduct occurred over a short period of time, concerned one and not multiple clients, and that Respondent testified (credibly, we believe), that he has significantly reduced his caseload and plans to call on others for assistance, if necessary.

G. The Mandate to Achieve Consistency

We have carefully considered the question of the appropriate sanction, and specifically whether the stipulated suspension of six months, stayed in favor of probation, meets the consistency requirement of D.C. Bar R. XI, § 9(h). We conclude that it does not.

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

The Court has imposed 30-day suspensions in cases of neglect of criminal appeals, aggravated by related misconduct. Thus, in *In re Sumner*, 665 A.2d 986, 988-89 (D.C. 1995) (per curiam) (appended Board Report), the Court imposed a 30-day suspension where the respondent "dropp[ed] . . . the ball" in pursuing the criminal appeal of his incarcerated client "through unexcused failure to make required filings," conduct aggravated by his failure to communicate with the client, misrepresentations, and the failure to provide files to successor counsel or refund his legal fee until months after he was replaced by the Court and disciplinary proceedings had begun. Similarly, in *In re Mance*, 869 A.2d 339 (D.C. 2005) (per curiam), the Court imposed a 30-day suspension, stayed during a one-year period of unsupervised probation, for the intentional neglect of an appeal and the failure to pursue a reduction of sentence. 869 A.2d at 339. The respondent also failed to communicate with his client about his appeal, disregarded inquiries and directives from the Court concerning his client's complaints and requests for a new attorney and delayed moving to withdraw after learning his client sought to terminate his services and had filed a Bar complaint. *Id.* at 340. The Court concluded that the respondent's "nearly complete abdication of his responsibilities to his client" were but a single "aberration" in the career of an attorney with an "excellent reputation" and "lengthy history" as a criminal practitioner. *Id*. at 342.

The Court has imposed lengthier suspensions for cases involving serious neglect and multiple failures to represent clients. *See In re Bradley*, 70 A.3d 1189, 1195 (D.C. 2013) (per curiam) (citing *In re Lyles*, 680 A.2d 408, 418 (D.C. 1996) (collecting cases)). For example, in *In re Whitehead*, 883 A.2d 153, 153-54 (D.C. 2005) (per curiam), the Court imposed a 60-day suspension, stayed in favor of two years of probation based on evidence of disability in mitigation, where the respondent ignored court orders to file briefs, failed to file motions for

extension, and failed to turn over client files to successor counsel in four court-appointed criminal appeals. More recently, in *Askew*, the Court imposed a six-month suspension with 60 days stayed and a one-year period of supervised probation for the neglect of the criminal appeal of an incarcerated indigent client, which was "serious, 'substantial[,] and intentional.'" 96 A.2d at 59 (quoting Board Report). The respondent failed to communicate with her client for about 15 months, despite his persistent efforts to reach her and those of his family, including communications from the client forwarded by the Court. *Id.* She also failed to file a brief, instead filing nine motions for extension of time until her appointment was vacated. *Id.* As the Court noted, the respondent's disregard of the client was "so complete," she was unaware that she had been removed as counsel for two months. *Id.* In addition, the respondent ignored her client and his family. *Id.* The Court found that the respondent's "belated realization" at the hearing that her client was indigent, incarcerated and vulnerable, "suggests a more fundamental failure to understand her duties as court-appointed counsel." *Id.* at 61. The Court also noted that it had vacated the respondent's CJA appointment in at least one other criminal case where she had failed to file a brief or respond to a Court order. *Id.*; *see also In re Murdter*, Board Docket No. 13-BD-093 (BPR Feb. 24, 2015) (recommending six-month suspension, with 60 days stayed and one year of probation for the intentional neglect of five CJA criminal appeals, including two counts of criminal contempt for the failure to respond to the Court's briefing orders), *pending appeal*, D.C. App. No. 15-BG-213.

In contrast to *Askew*, Respondent did not completely abandon his client, nor was his neglect intentional. He filed a brief, but failed to follow through by filing the appendix, and then failed to respond to the Court's order directing him to do so. Nor does Respondent's misconduct rise to the level of that in *Whitehead*, which involved the abandonment of four court-appointed

clients. Respondent has a record of three Informal Admonitions, two issued in 2001 relating to one case, and the other in 2010. Two of those informal admonitions involved the failure to communicate, but none involved neglect. Thus, the neglect at the heart of Respondent's misconduct appears to be an aberration for Respondent, but his failure to communicate does show more of a pattern.

In addition, Respondent has established substantial mitigation, which is uncontested by Bar Counsel. He testified credibly that he has significantly reduced his caseload and taken steps to address coverage of his cases if he has health problems. He cooperated in these disciplinary proceedings, including entering into stipulations as to the facts and violations, and agreed to a severe disciplinary sanction. He also credibly expressed his remorse, testifying that he "felt really bad" about his failure to properly represent his client.

Given the above, we find the six-month suspension stipulated by the parties is unduly harsh and inconsistent with the requirement to recommend a consistent standard for comparable misconduct under D.C. Bar R. XI, § 9(h)(1). We instead recommend a 30-day suspension, which more closely meets the consistency requirement, is commensurate with the seriousness of the misconduct and gives appropriate weight to the mitigating factors. We further recommend that the suspension be stayed on condition that Respondent is placed on one year of supervised probation, with the conditions recommended by the parties.

H. The Fitness Requirement

The parties stipulated that if Respondent violates the conditions of probation, he should be required to prove his fitness to practice as a condition of reinstatement. A fitness showing is a substantial undertaking. *In re Cater*, 887 A.2d 1, 20 (D.C. 2005). 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.

We find that notwithstanding the parties' stipulation, the record lacks the necessary clear and convincing evidence that casts a serious doubt on Respondent's continuing fitness to practice, for the following reasons. First, Bar Counsel did not even brief the fitness question. The Hearing Committee is hard-pressed to find, in the absence of Bar Counsel's explanation or rationale for recommending a fitness condition, that Bar Counsel has established clear and convincing evidence that Respondent poses such a risk to the public that a fitness condition is necessary.

Second, the evidence itself does not suggest, let alone show by clear and convincing evidence, that Respondent will engage in similar conduct in the future. The evidence is to the contrary. Respondent has acknowledged the misconduct, sincerely expressed his remorse, and taken steps to address the problems that led to the misconduct. Moreover, while the Hearing Committee recognizes that the fitness determination is individual, and does not rest on a comparative analysis, *Cater*, 887 A.2d at 21, the injustice of imposing a fitness requirement on this record, as compared to *Askew*, where no fitness requirement was imposed, is self-evident.

V. CONCLUSION

For the foregoing reasons, the Committee finds that Respondent violated Rules 1.1(a), 1.1(b), 1.3(a), 1.3(c), 1.4(a), 1.4(b), and 1.16(d) and should receive the sanction of a 30-day suspension, stayed in favor of one year of supervised probation, with the conditions that Respondent: (1) make arrangements to attend the two-day basic training course taught by the D.C. Bar's Practice Management Advisory Service within 30 days of the Court's order imposing discipline; (2) attend the course within seven months of the start of the period of probation, and present proof of attendance within 10 days of having completed the course; (3) commit no further disciplinary rule violations; and (4) take three hours of Continuing Legal Education

course(s), pre-approved by Bar Counsel, and present proof of attendance within 10 days of having completed the course(s). Respondent must accept the terms of the probation within 30 days of the date of a Court order imposing probation, pursuant to Board Rule 18.1(a).[6] If Bar Counsel has probable cause to believe that Respondent has violated any of the terms of probation, Bar Counsel may seek to revoke Respondent's probation, pursuant to Board Rule 18.3.

AD HOC HEARING COMMITTEE

/MJH/
Matthew J. Herrington, Chair

/LHS/
Leslie H. Spiegel, Attorney Member

/OE/
Octave Ellis, Public Member

Dated: October 13, 2015

[6] Board Rule 18.1(a) provides that "Respondent shall accept the terms of the probation within thirty days of the date of the Court order imposing the probation either by (i) filing a statement with the Board on a form prepared by the Executive Attorney, or (ii) countersigning the Board order implementing the probation."