

FILED

November 16, 2017

Board on Professional  
Responsibility

**REPORT AND RECOMMENDATION OF THE AD HOC HEARING  
COMMITTEE APPROVING PETITION FOR NEGOTIATED DISCIPLINE**

The Hearing Committee has carefully considered the Petition for Negotiated Discipline signed by Disciplinary Counsel, Respondent, and Respondent's counsel, the supporting affidavit submitted by Respondent (the "Affidavit"), the supplemental documents filed by Disciplinary Counsel on June 19 and September 25, 2017, respectively, and the representations during the limited hearing made by

Respondent, Respondent's counsel, and Disciplinary Counsel. The Hearing Committee also has fully considered the Hearing Committee Chair's *in camera* review of Disciplinary Counsel's files and records, and her *ex parte* communications with Disciplinary Counsel. The Hearing Committee has also considered the statement of Gretchen Giannelli, Respondent's former client, at the limited hearing. For the reasons set forth below, we approve the Petition, find the negotiated discipline of a stayed thirty-day suspension with conditions is justified, and recommend that it be imposed by the Court.

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

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

1. The Petition and Affidavit are full, complete, and in proper order.
2. Respondent is aware that there is currently pending against him an investigation into allegations of misconduct. Tr. 22-23<sup>1</sup>; Affidavit ¶ 6.
3. The allegations that were brought to the attention of Disciplinary Counsel are that Respondent violated D.C. Rules of Professional Conduct ("Rules") 1.1 (competent representation and skill and care), 1.3(a) (diligence and zeal), 1.4(a) (communication), and 1.15(a) (commingling). Petition at 3.<sup>2</sup>

---

<sup>1</sup> "Tr." refers to the transcript of the limited hearing held on September 29, 2017.

<sup>2</sup> The choice of law provision of Rule 8.5(b)(2) states that, for alleged misconduct in a matter pending before a tribunal, we should apply the disciplinary rules of the jurisdiction in which the tribunal sits. On September 26, 2017, Disciplinary Counsel filed a statement asserting that, consistent with the Petition, the D.C. Rules should apply, rather than those of the U.S. Patent and Trademark Office ("P.T.O."), because at all relevant times in this case, the P.T.O. was not acting as a "tribunal." See Rule 1.0(n) (defining a tribunal as, *inter alia*, an "administrative agency, or

4. Respondent has freely and voluntarily acknowledged that the material facts and misconduct reflected in the Petition are true. Tr. 24; Affidavit ¶ 7.

Specifically, Respondent acknowledges that:

(a) Gretchen and Vincenzo Giannelli retained Respondent in May of 2015 to assist them in obtaining patent protection for a razor cover. Yorz for Razors, Inc. had not yet been formed. Ultimately the clients decided to file three patent applications: (1) a U.S. utility patent application; (2) an international patent application; and (3) a design patent. Respondent filed the utility patent application on July 21, 2015 and sent an invoice to the Giannellis, which they paid. The invoice included filing fees as costs. Respondent deposited the legal fees and costs the Giannellis paid in an operating account in which he held other funds.

(b) Respondent did not pay the filing fee for the utility patent, and the U.S. Patent and Trademark Office treated it as abandoned. He filed the international patent application on August 3, 2015, but again failed to pay the filing fee, and that application was treated as abandoned as well.<sup>3</sup> Respondent did not file the design patent application. For several months, the Giannellis were unable to contact Respondent, which caused them to seek alternative counsel. When they did contact Respondent in May 2016, he admitted that he had not paid the filing fees and attributed his failure to depression. The Giannellis discharged Respondent, and Respondent worked with successor counsel to revive the utility patent application<sup>4</sup>, including paying part of the filing fee with his own funds. He maintained sufficient funds in his operating

---

other body acting in an *adjudicative* capacity” (emphasis added)). We agree with Disciplinary Counsel’s position.

<sup>3</sup> The Petition erroneously states that Respondent did not file the international patent application. On September 25, 2017, Disciplinary Counsel filed a Supplemental Memorandum in Support of Petition for Negotiated Discipline stating that the Petition contained this factual error and that, in fact, Respondent filed the international patent application, but then failed to pay the required fees, resulting in the application being withdrawn. The parties confirmed this change on the record during the limited hearing. Tr. 6, 12.

<sup>4</sup> There are no stipulations as to whether Respondent worked with successor counsel to revive the international patent application. As noted above, the fact that Respondent filed the international patent application was not brought to light until Disciplinary Counsel filed its Supplemental Memorandum.

account to repay all the payments made by the Giannellis and has offered to repay them. Because of possible litigation by the Giannellis, this offer has not yet been accepted.

(c) Respondent was diagnosed with severe sleep apnea in 2014. He began to suffer from insomnia for which he sought treatment by a psychiatrist. In early 2015, he also began to consult a psychologist, for depression. In June 2015, Respondent's father died. He went to Boston to be with his mother and stopped receiving treatment. He became depressed again and began drinking to excess. In June 2016, he began receiving treatment again from the psychologist and also from a psychiatrist. He stopped drinking and attends Alcoholics Anonymous meetings.

*See* Petition at 2; Disciplinary Counsel's Supplemental Memorandum in Support of Petition for Negotiated Discipline.

5. Respondent is agreeing to the disposition because Respondent believes that he cannot successfully defend against discipline based on the stipulated misconduct. Tr. 22; Affidavit ¶ 8.

6. Disciplinary Counsel has made no promises to Respondent other than what is contained in the Petition for Negotiated Discipline. Affidavit ¶ 5. That promise is to consent to the mitigation of the sanction because of Respondent's mental illness and alcohol abuse,<sup>5</sup> which substantially caused his misconduct, and for which he is substantially rehabilitated. Petition at 3. Respondent confirmed during the limited hearing that there have been no other promises or inducements other than those set forth in the Petition. Tr. 29.

---

<sup>5</sup> During the limited hearing, Disciplinary Counsel confirmed that Respondent's depression was sufficient to satisfy the factors set forth in *In re Kersey*, 520 A.2d 321, 326 (D.C. 1987) for disability mitigation. Tr. 31-32; *see infra*, page 13 for a discussion of *Kersey* factors. Disciplinary Counsel and Respondent agree, however, that Respondent's mental illness caused alcohol abuse which contributed to Respondent's misconduct. *Id.*

7. Respondent has conferred with his counsel. Tr. 17; Affidavit ¶ 2.
8. Respondent has knowingly and voluntarily acknowledged the facts and misconduct reflected in the Petition for Negotiated Discipline and agreed to the sanction set forth therein. Tr. 29-30; Affidavit ¶ 7.
9. Respondent is not being subjected to coercion or duress. Tr. 29-30; Affidavit ¶ 3.
10. Respondent is competent and was not under the influence of any substance or medication that would affect his participation at the limited hearing. Tr. 17.
11. Respondent is fully aware of the implications of the disposition being entered into, including, but not limited to, the following:
  - (a) he has the right to assistance of counsel if he is unable to afford counsel;
  - (b) he will waive his right to cross-examine adverse witnesses and to compel witnesses to appear on his behalf;
  - (c) he will waive his right to have Disciplinary Counsel prove each and every charge by clear and convincing evidence;
  - (d) he will waive his right to file exceptions to reports and recommendations filed with the Board and with the Court;
  - (e) the negotiated disposition, if approved, may affect his present and future ability to practice law;
  - (f) the negotiated disposition, if approved, may affect his Bar memberships in other jurisdictions; and
  - (g) any sworn statement by Respondent in his affidavit or any statements made by Respondent during the proceeding may be used to impeach his testimony if there is a subsequent hearing on the merits.

Tr. 20-21, 33-35; Affidavit ¶ 4.

12. Respondent and Disciplinary Counsel have agreed that the sanction in this matter should be a thirty-day suspension, stayed, with three years of probation with the following conditions:

1. Respondent shall not commit any other violations of the D.C. Rules of Professional Conduct or the disciplinary rules of any other jurisdiction. Reciprocal discipline imposed for these violations in another jurisdiction shall not constitute a probation violation.

2. Respondent shall continue to remain in individual therapy with his treating psychologist during the period of probation. Respondent will execute and maintain the necessary waiver or consent to permit the psychologist to inform the Lawyer Assistance Program of the D.C. Bar ("LAP") if Respondent ceases treatment or fails to comply with the obligation to attend Alcoholics Anonymous ("AA") meetings as set forth below. If Respondent seeks treatment from a different psychologist, he must notify Disciplinary Counsel and LAP and obtain the necessary waiver from the new psychologist.

3. Respondent shall continue to stay on whatever psychotropic medicine his psychiatrist prescribes and shall meet with the psychiatrist every three months during the period of probation. Respondent will execute and maintain the necessary waiver or consent to permit the psychiatrist to inform LAP if Respondent ceases treatment. If Respondent seeks treatment from a different psychiatrist, he must notify Disciplinary Counsel and LAP and obtain the necessary waiver from the new psychiatrist.

4. Respondent shall attend AA meetings at least twice a week for the period of probation. Respondent will provide proof of attendance to his psychologist and, as set forth above, will execute and maintain the necessary waiver or consent to permit the psychologist to notify LAP if he fails to comply.

5. Respondent authorizes LAP to report to Disciplinary Counsel, at least quarterly, if he ceases treatment with his psychologist or psychiatrist or if he ceases to attend regular AA meetings. Respondent agrees that if he revokes his waiver or consent permitting

LAP to make such reports to Disciplinary Counsel, LAP is authorized to inform Disciplinary Counsel of such revocation.

6. Respondent shall advise his employer in writing, with a copy to the Office of Disciplinary Counsel, of these terms of probation. He shall not be required to notify his clients.

If Disciplinary Counsel has probable cause to believe that Respondent has violated any of the terms of his probation, Disciplinary Counsel may seek to revoke Respondent's probation, pursuant to Board Rule 18.3.

Petition at 4-6; Tr. 26-29. Respondent further understands that if his probation is revoked and he is ultimately suspended, he must file with the Court an affidavit pursuant to D.C. Bar R. XI, § 14(g) in order for his suspension to be deemed effective for purposes of reinstatement. Tr. 35-36.

13. The Hearing Committee has taken into consideration the parties' agreement that, in mitigation of sanction, Respondent suffered from depression and engaged in alcohol abuse at the time of the misconduct and is now substantially rehabilitated. Petition at 3; Affidavit ¶ 9. The Committee has considered the Supplement to Petition for Negotiated Discipline, which contains reports from Respondent's treating psychiatrist and psychologist supporting the parties' agreement as to mitigation.

14. The complainant, Ms. Giannelli, was present at the hearing and made a brief statement pursuant to Board Rule 17.4(a), which the Hearing Committee has taken into consideration. Tr. 37-39. Ms. Giannelli summarized Respondent's misconduct and discussed the harm it caused her, but she did not state whether she supported or objected to the proposed discipline. *Id.*

### III. DISCUSSION

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

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

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

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

The Hearing Committee finds that Respondent has knowingly and voluntarily acknowledged the facts and misconduct reflected in the Petition and agreed to the sanction therein. Respondent, after being placed under oath, admitted the stipulated facts and charges set forth in the Petition and denied that he is under duress or has been coerced into entering into this disposition. Tr. 24, 29-30. Respondent understands the implications and consequences of entering into this negotiated discipline. Tr. 33-35.

Respondent has acknowledged that any and all promises that have been made to him by Disciplinary Counsel as part of this negotiated discipline are set forth in writing in the Petition and that no other promises or inducements have been made to him. Tr. 29; Affidavit ¶ 5.



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

The Hearing Committee has carefully reviewed the facts set forth in the Petition and established during the hearing, and we conclude that they support the admissions of misconduct and the agreed-upon sanction. Moreover, Respondent is agreeing to this negotiated discipline because he believes that he could not successfully defend against the misconduct described in the Petition. Tr. 22; Affidavit ¶ 8.

With regard to the second factor, the Petition states that Respondent violated Rule of Professional Conduct 1.1. Rule 1.1(a) requires a lawyer to “provide competent representation to a client.” 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.” Rule 1.1, cmt. [5]. The stipulated facts support Respondent’s admission that he violated Rule 1.1 in that they describe Respondent’s failure to pay the filing fees for the utility and international patents and his failure to file the design patent application despite having agreed to do so and accepted fees to do so. Respondent failed to provide “continuing attention to the needs of the representation.” *See id.*

The Petition also states that Respondent violated Rule of Professional Conduct 1.3(a), which states that an attorney “shall represent a client zealously and diligently within the bounds of the law.” This sort of neglect “has been defined as

indifference and a consistent failure to carry out the obligations that the lawyer has assumed to the client or a conscious disregard of the responsibilities owed to the client.” *In re Wright*, 702 A.2d 1251, 1255 (D.C. 1997) (per curiam) (appended Board Report) (citing *In re Reback*, 487 A.2d 235, 238 (D.C. 1985), *adopted in relevant part*, 513 A.2d 226 (D.C. 1986) (en banc)). The stipulated facts support Respondent’s admission that he violated Rule 1.3(a) in that, as noted above, they describe Respondent’s failure to pay the filing fee for the utility and international patents and his failure to file the design patent application, as well as his failure to communicate with his clients for several months, although they tried to contact him. The stipulated facts state that the clients retained Respondent to assist them in obtaining patent protections for a particular product, which entailed, among other things, filing applications (with their corresponding fees) and keeping the client apprised of the status of those applications. Respondent’s failures to pay the filing fee for the utility and international patent applications and file the design patent application constitute neglect of his obligations.

The Petition also states that Respondent violated Rule of Professional Conduct 1.4(a), which provides that “[a] lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.” 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.” Rule 1.4, cmt. [1]. The stipulated facts support Respondent’s admission that he violated Rule 1.4(a) by failing to communicate with his clients at all for several months despite their efforts to contact him. The stipulated facts also state that, in particular, Respondent failed to notify his clients that he did not pay the filing fee for the utility and international patent applications.

Finally, the Petition states that Respondent violated Rule of Professional Conduct 1.15(a), which provides, in pertinent part, that “[a] lawyer shall hold property of clients or third persons that is in the lawyer’s possession in connection with a representation separate from the lawyer’s own property.” “The rule against commingling has three principal objectives: to preserve the identity of client funds, to eliminate the risk that client funds might be taken by the attorney’s creditors, and most importantly, to prevent lawyers from misusing/misappropriating client funds, whether intentionally or inadvertently.” *In re Rivlin*, 856 A.2d 1086, 1095 (D.C. 2004) (per curiam) (appended Board Report). The stipulated facts support Respondent’s admission that he violated Rule 1.15(a) in that they state that Respondent placed the unearned legal fees he received from the Giannellis in his operating account (in which he held other funds) rather than in his trust account.

C. The Agreed-Upon Sanction Is Justified.

The third and most complicated factor the Hearing Committee must consider is whether the sanction agreed upon is justified. *See* D.C. Bar R. XI, § 12.1(c); Board Rule 17.5(a)(iii). Based on the record as a whole, including the stipulated

circumstances in mitigation, the Hearing Committee Chair's *in camera* review of Disciplinary Counsel's investigative file and *ex parte* discussion with Disciplinary Counsel, and our review of relevant precedent, we conclude that the agreed-upon sanction is justified and not unduly lenient. The agreed-upon sanction appropriately takes into account the nature of the Respondent's misconduct, Respondent's disciplinary history and conduct during the investigation, and factors that should be considered in mitigation.

Respondent's misconduct in the representation was significant. His failure to pay the filing fee for the utility and international patent applications, file the design patent application, or communicate with his clients about the matter forced his clients to seek additional counsel and unnecessarily delayed their work, and the former client suggested that Respondent's misconduct also may have affected their interests in the international patent. Petition at 2, 4 (noting "prejudice to the clients"); Tr. 38 (Giannelli statement). A brief suspension from practice is appropriate. *See, e.g., In re Dory*, 528 A.2d 1247, 1248 (D.C. 1987).

The negotiated discipline is based on Respondent's failure in a single representation. According to the Petition, Respondent fully cooperated with Disciplinary Counsel during the investigation, and Disciplinary Counsel is not aware of any other misconduct by the Respondent in his over 25 years of practice. Petition at 3. There is no suggestion in the record that Disciplinary Counsel agreed not to pursue other charges as a condition of this discipline. Petition at 3 ("Disciplinary Counsel has made no promises or inducements to Respondent, other than to consent

to mitigation of the sanction because of Respondent's mental illness and alcohol abuse . . . ."). Respondent has expressed remorse for his misconduct. Affidavit ¶ 10. Those considerations suggest that an extended period of suspension is not required. *See Dory*, 528 A.2d at 1248 ("Recognizing that respondent has no prior disciplinary history, and that the instant violations stem from a single case, we adopt the Board's recommendation of a thirty-day suspension.").

The parties have stipulated that Respondent was severely depressed at the time of his misconduct and that his depression was the proximate cause of the misconduct. Tr. 7-8, 12, 31-32. They have also stipulated that he is substantially rehabilitated. Tr. 32. Accordingly, they have stipulated that the *Kersey* factors for disability mitigation are satisfied.<sup>6</sup> *See, e.g., In re Cappell*, 866 A.2d 784, 784-85 (D.C. 2004) (per curiam) (applying *Kersey* mitigation based on depression). The proposed probation conditions are likely to diminish the possibility of future misconduct by Respondent. Among other requirements, Respondent is required to continue treatment for his depression and to attend AA meetings at least twice a week during the three-year period of probation. Petition at 4-5.

The negotiated discipline is not unduly lenient compared to discipline imposed for comparable misconduct, particularly in light of the stipulated factors in

---

<sup>6</sup> In *Kersey*, 520 A.2d at 326, the Court held that where a respondent's ethical misconduct would not have occurred but for a qualifying disability or addiction, a hearing committee may recommend a mitigated sanction. To qualify for *Kersey* mitigation, a respondent must prove: (1) that the respondent suffered from a disability or addiction at the time of the misconduct; (2) that disability or addiction substantially caused the misconduct; and (3) that the respondent has been substantially rehabilitated. *See In re Stanback*, 681 A.2d 1109, 1111-15 (D.C. 1996); *see also* Board Rule 11.13(a).

mitigation. See *In re Chapman*, 962 A.2d 922, 927 (D.C. 2009) (per curiam) (imposing sixty-day suspension with thirty days stayed for a single neglect matter “in light of [an attorney’s] lack of candor at the hearing, his lack of remorse, and the prejudice he caused his client balanced against his minor disciplinary history”); *In re Bland*, 714 A.2d 787, 787-88 (D.C. 1998) (per curiam) (publicly censuring an attorney for neglect and other misconduct in a single matter while noting the attorney’s “previously unblemished record”); *In re Lewis*, 689 A.2d 561, 565 (D.C. 1997) (per curiam) (appended Board Report) (noting that “[i]t is unusual for a suspension to be imposed for a first violation that sounds largely in neglect, with no proven violations involving dishonesty” and imposing a thirty-day suspension on an attorney who intentionally abandoned a client in a criminal matter); *In re Banks*, 577 A.2d 316, 319 (D.C. 1990) (per curiam) (imposing a thirty-day suspension on an attorney with a previous history of discipline who neglected a client’s matter until the statute of limitations on the client’s claim had run); *Dory*, 528 A.2d at 1248.

#### IV. CONCLUSION AND RECOMMENDATION

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

For the reasons stated above, it is the recommendation of this Hearing Committee that the negotiated discipline be approved and that the Court impose a thirty-day suspension, stayed, with three years of probation with the conditions listed in paragraph 12, *supra*.

#### AD HOC HEARING COMMITTEE

/LHS/

Leslie H. Spiegel, Esquire  
Chair

/DJL/

Darryl J. Lesesne  
Public Member

/AEG/

Amy E. Garber, Esquire  
Attorney Member