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:	:	
	:	
ROBERT E. CAPPELL,	:	
	:	Board Docket No. 16-ND-006
Respondent.	:	Bar Docket Nos. 2013-D391 and
	:	2016-D222
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 321265)	:	

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

I. PROCEDURAL HISTORY

This matter came before the Ad Hoc Hearing Committee on January 23, 2019 for a limited hearing on an Amended Petition for Negotiated Discipline (the "Petition"). The Office of Disciplinary Counsel was represented by Assistant Disciplinary Counsel H. Clay Smith, III. Respondent, Robert E. Cappell, appeared *pro se*.

The Hearing Committee has carefully considered the Petition, the supporting Amended Affidavit submitted by Respondent (the "Affidavit"), and the representations during the limited hearing made by Respondent and Disciplinary Counsel. The Hearing Committee also has fully considered its *in camera* review of Disciplinary Counsel's files and records and *ex parte* communications with Disciplinary Counsel. For the reasons set forth below, we approve the Petition, find the negotiated discipline of a ninety-day suspension with all but thirty days

* Consult the 'Disciplinary Decisions' tab on the Board on Professional Responsibility's website (www.dcattorneydiscipline.org) for more information about this case.

stayed in favor of probation 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. 27[1]; Affidavit ¶ 2.

3. The allegations that were brought to the attention of Disciplinary Counsel are that Respondent violated Rules 1.1(a) (competent representation), 1.1(b) (skill and care), and 1.7(b) and (c) (conflict of interest), as well as Maryland Rules 1.1 (competent representation), 1.3 (diligence and promptness), and 1.7(a)(2) and (b)(4) (conflict of interest). Petition at 5, 7.

4. Respondent has freely and voluntarily acknowledged that the material facts and misconduct reflected in the Petition are true. Tr. 11, 32; Affidavit ¶ 4. Specifically, Respondent acknowledges that:

A. Disciplinary Docket No. 2013-D391

1. On or about May 8, 2009, Respondent was retained by the family of Deborah Robinson in connection with her death while under the care of physicians at United Medical Center ("UMC").

2. On February 28, 2012, Respondent timely filed a lawsuit in the Superior Court of the District of Columbia, styled *Carol E. Robinson, Personal Representative of the Estate of Deborah Robinson v. United Medical Center*, CA No. 0001933-12, alleging medical malpractice. All pleadings and orders in the matter were to be served electronically.

[1] "Tr." refers to the transcript of the limited hearing held on January 23, 2019.

3. On or about May 8, 2012, defendant UMC filed with the court a motion to dismiss the civil action on the grounds that plaintiff did not comply with D.C. Code § 16-2802(a) which provides pertinently that: "[a]ny person who intends to file an action in the Superior Court alleging medical malpractice against a health care provider" must "notify the intended defendant of his or her action not less than ninety (90) days prior to filing the action." The statute further provides that "[a] legal action alleging medical malpractice shall not be commenced in the court unless the [90-day notice] requirement ha[s] been satisfied." *Id.* § 16-2802(c). Defendant's motion was served upon Respondent electronically.

4. Respondent did not submit a response to defendant's motion to dismiss.

5. On June 19, 2012, the court issued an order dismissing plaintiff's case because plaintiff failed to give defendant notice of the claim as is required by D.C. Code § 16-2802.

6. On or about June 29, 2012, Respondent filed with the court a motion to alter or amend judgment under D.C Super. Ct. Civ. R. 59(e) and 60(b), which permits the court to set aside an order for mistake, inadvertence, surprise or excusable neglect. In the motion, Respondent represented to the court that his client lacked actual notice of defendant's motion to dismiss and the court's order of dismissal because he "struggled with the acceptance of electronic information technology" and did not open his e-mail to discover the motion or the order.

7. On September 27, 2012, the court denied the motion to alter or amend judgment. In its order, the court did not address whether Respondent's representation about his technological shortcomings constituted a mistake, inadvertence, surprise or excusable neglect. Instead, the court determined that plaintiff's case was properly dismissed on the merits of defendant's argument that plaintiff had not complied with the notice requirements of D.C. Code § 16-2802.

8. Respondent filed a timely appeal of the court's order dismissing his client's case. Respondent accurately explained to his client the reasons that the case had been dismissed. Respondent did not tell his client of the possibility of a conflict of interest because of his role in the dismissal of the case or that his conduct might lead to his liability for legal malpractice. Respondent did not make this disclosure to his client because he did not

appreciate that there was a conflict. Respondent filed a brief and argued the appeal on behalf of his client before the District of Columbia Court of Appeals.

9. On October 4, 2013, the District of Columbia Court of Appeals issued an order affirming the trial court's dismissal of plaintiff's claim, due to plaintiff's failure to comply with the notice requirements of D.C. Code § 16-2802.

B. Disciplinary Docket No. 2016-D222

1. On August 14, 2000, Respondent was retained by Sharon D. Haddock in connection with divorce proceedings in Montgomery County, Maryland.

2. On or around August 30, 2000, Respondent filed a complaint for absolute divorce in the Circuit Court for Montgomery County, Maryland, in the matter styled *Haddock v. Haddock*, CA No. 12346, seeking, *inter alia*, division of marital assets. Respondent filed an amended complaint for divorce on or about September 26, 2000.

3. During a Master's Hearing on March 29, 2001, Respondent represented to the court his intent to submit a property settlement agreement addressing equitable distribution of the husband's military pension. The court reserved jurisdiction for consideration of any pension plans or modifications thereof.

4. On April 17, 2001, the Circuit Court of Montgomery County, Maryland issued a Judgment of Absolute Divorce. The judgment addressed the subsidiary issues of physical and legal custody of the couple's children, visitation, and child support but reserved jurisdiction for "the receipt, entry, alteration, and/or amendment by [the court] for any appropriate Order(s) pertaining to retirement benefits" pursuant to Md. Family Law Code § 8-203(b).

5. Respondent did not submit a qualified domestic relations order (QDRO) or other property settlement agreement to the court within 90 days of the Judgment of Absolute Divorce, as required by Md. Family Law Code § 8-203(a)(2)-(3). At that time, Respondent incorrectly believed that he could wait until his client's spouse retired to seek a share of his retirement benefits. Following his client's spouse's retirement, on or about February 9,

2009, Respondent filed a Motion for Award of Marital Property, asserting his client's interest in the military pension.

6. On June 18, 2009, the Court denied plaintiff's motion for an award of marital property with prejudice because the motion was untimely and it lacked jurisdiction over the matter.

7. Respondent filed a timely appeal of the court's denial.

8. On January 3, 2010, the Court of Special Appeals of Maryland issued an opinion affirming the denial of plaintiff's Motion for Award of Marital Property because no pension was identified during the divorce proceedings, and therefore no determination could be made as to what part of the pension constituted marital property.

9. Respondent filed a timely appeal of the decision of the Court of Special Appeals of Maryland, but on June 20, 2011, the Court of Appeals of Maryland denied the writ of certiorari.

10. Respondent did not tell his client of the possibility of a conflict with her because of his role in the denial of a share of her husband's pension. Respondent did not appreciate that there was a conflict.

11. Thereafter, Ms. Haddock sued Respondent for legal malpractice, and was awarded $246,109.09. Respondent has not paid the amount because he was granted protection from his creditors through bankruptcy.

Petition at 3-7.

5. Respondent is agreeing to the disposition because Respondent believes that he cannot successfully defend against discipline based on the stipulated misconduct. Tr. 24-25; Affidavit ¶ 5.

6. Disciplinary Counsel has made no promises to Respondent other than what is contained in the Petition for Negotiated Discipline. Petition at 15; Affidavit ¶ 7. Respondent confirmed during the limited hearing that there have

been no other promises or inducements other than those set forth in the Petition. Tr. 32.

7. Respondent is aware of his right to confer with counsel and is proceeding *pro se*. Tr. 19; Affidavit ¶ 1.

8. Respondent has knowingly and voluntarily acknowledged the facts and misconduct reflected in the Petition for Negotiated Discipline and agreed to the sanction set forth therein. Tr. 11, 32; Affidavit ¶ 4.

9. Respondent is not being subjected to coercion or duress. Tr. 32; Affidavit ¶ 6.

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. 20.

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 Respondent 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. 19-20, 23-24, 38-40; Affidavit ¶¶ 9-10, 12.

12. Respondent and Disciplinary Counsel have agreed that the sanction in this matter should be a ninety-day suspension, with all but thirty days stayed in favor of one year of probation with conditions. Petition at 7-8; Tr. 31.[2] Respondent understands that the conditions of his probation are that he (a) will not be found to have engaged in ethical misconduct during the term of probation; (b) meet with the D.C. Bar's Practice Management Advisory Service ("PMAS") within thirty days of the approval of the petition and, within one year, comply with and implement any of its recommendations; (c) sign a waiver permitting Disciplinary Counsel to communicate with PMAS regarding his compliance with their program; (d) agree to the appointment of a practice monitor, who will serve as a mentor to Respondent in the event he accepts any cases for which he has had little to no experience; and (e) either acquire legal malpractice insurance or advise his future clients that he lacks such insurance. Petition at 13-14; Tr. 44-46. Respondent further understands that 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. 41-43. Respondent understands that if

[2] During the limited hearing, Respondent expressed his view that the agreed-upon sanction was overly harsh, particularly with respect to the conditional fitness requirement, but affirmed that he believed that it was in his best interest to accept it. Tr. 32-33.

his probation is revoked, he will be required to prove his fitness to practice law in accord with D.C. Bar R. XI, § 16 and Board Rule 9.8 prior to being allowed to resume the practice of law. Petition at 8; Tr. 46-49. Respondent understands that the reinstatement process may delay Respondent's readmission to the Bar. Tr. 47-48.

13. The Petition provides a statement demonstrating the following circumstances in aggravation, which the Hearing Committee has taken into consideration:

> Respondent was informally admonished in 1994 for failing to promptly pay a third party from the proceeds of a settlement, in violation of Rule l.15(a). *See* Cappell/Raden; Bar Docket No. 1994-D067. Respondent also was informally admonished in 1994 for failing to surrender to his client, non-work product from the client's file subsequent to the termination of the representation in violation of Rules 1.16(d) and 1.8(i). *See* Cappell/Ford; Bar Docket No. 1993-D465. Respondent also was disbarred for intentional misappropriation, with the suspension stayed in light of the *Kersey* style mitigation presented in the matter. *See In re Cappell* 866 A.2d 784 (D.C. 2004). Respondent also has not paid the malpractice awarded to Ms. Haddock because he filed for bankruptcy.

Petition at 15 (footnotes omitted).[3]

14. The Petition provides the following circumstances in mitigation, which the Hearing Committee has taken into consideration:

> Respondent has cooperated with Disciplinary Counsel's investigation of this matter and has accepted responsibility for his misconduct. Respondent's misconduct did not involve dishonesty. Respondent unsuccessfully endeavored to resurrect his clients[']claims after their

[3] The Petition makes clear that the two informal admonitions are "arguably remote in time" and should not weigh against a probationary sanction." Petition at 15 n.5.

> cases had been dismissed, and did not mislead his clients about the circumstances of the dismissals.

Petition at 14. The Petition also states that Respondent would benefit from participating in PMAS. Petition at 14-15.

15. Although there were no complainants in this matter, Disciplinary Counsel provided notice of the hearing to three individuals central to its investigation—Alan Fishbein, Bertha Cabbagestalk, and Carol Robinson—but none of those individuals appeared or provided any written comments. Tr. 16-17.

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. 11, 32. Respondent understands the implications and consequences of entering into this negotiated discipline. Tr. 19-20, 23-24, 38-40.

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 there are no other promises or inducements that have been made to him. Tr. 32; Affidavit ¶ 7.

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 admission(s) 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. 24-25; Affidavit ¶ 5.

With regard to the second factor, the Petition states that, in the Robinson matter, Respondent violated D.C. Rules of Professional Conduct 1.1(a) and (b), in that he failed to provide his client with competent representation and failed to serve his client with the skill and care commensurate with that generally afforded to clients by other lawyers in similar matters. The evidence supports Respondent's admission that he violated Rules 1.1(a) and (b) in that the stipulated facts make clear that Respondent initiated a lawsuit against a health care provider without

complying with the pre-filing notice requirements of D.C. Code §16-2802(c) and subsequently failed to respond to the defendant's motion to dismiss. Petition at 3.

The Petition further states that, in the Robinson matter, Respondent violated D.C. Rules of Professional Conduct 1.7(b) and (c), in that he had a personal conflict of interest with his client, but failed to disclose it. The evidence supports Respondent's admission that he violated Rules 1.7(b) and (c) because the stipulated facts assert that after becoming aware that the medical malpractice lawsuit had been dismissed, Respondent appealed the judgment to the District of Columbia Court of Appeals, without notifying his client of the possibility of a conflict of interest because of his role in the dismissal of the case, or that he might be liable to her for legal malpractice. Petition at 4.

The Petition states that, in the Haddock matter, Respondent violated Maryland Rule of Professional Conduct 1.1, in that he failed to provide competent representation to the client using the requisite legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. The evidence supports Respondent's admission that he violated Maryland Rule 1.1 because the stipulated facts describe Respondent's failure to submit a qualified domestic relations order or other property settlement agreement to the court within 90 days of the Judgment of Absolute Divorce, as required by Md. Family Law Code § 8-203(a)(2)-(3). Petition at 6.

The Petition further states that, in the Haddock matter, Respondent violated Maryland Rule of Professional Conduct 1.3, in that he failed to act with reasonable

diligence and promptness in representing the client. The evidence supports Respondent's admission that he violated Maryland Rule of Professional Conduct 1.3 because the stipulated facts establish that Respondent filed a Motion for Award of Marital Property, asserting his client's interest in her former spouse's military pension, on or about February 9, 2009. The motion was denied as untimely on June 18, 2009, because the court had lost jurisdiction over the divorce several years prior to Respondent's filing. Petition at 6.

The Petition further states that, in the Haddock matter, Respondent violated Maryland Rules of Professional Conduct 1.7(a)(2) and (b)(4), in that he had a personal conflict of interest posing a significant risk to the representation but continued to represent the client and failed to obtain informed consent, confirmed in writing, from the client. The evidence supports Respondent's admission that he violated Maryland Rules of Professional Conduct 1.7(a)(2) and (b)(4) because the stipulated facts describe Respondent's unsuccessful efforts to appeal the denial of the Motion for an Award of Marital Property, first to the Court of Special Appeals and ultimately to the Court of Appeals of Maryland, without appreciating the existence of a conflict of interest or attempting to obtain informed and written consent. Petition at 6.

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); *In re Johnson*, 984 A.2d 176, 181 (D.C. 2009) (per

curiam) (providing that a negotiated sanction may not be "unduly lenient"). Based on the record as a whole, 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.

In both of the cases at issue here, Respondent failed to perform a basic task essential to the preservation of his clients' rights. In the Robinson matter, Respondent did not comply with the District of Columbia requirement that health care providers be given pre-filing notice of a malpractice claim. Tr. 8-11, 27-28. In the Maryland matter, Respondent failed to file documents needed to secure his client's right to her former spouse's military pension. Tr. 13-15, 29-30. Following these errors, Respondent sought to resurrect his clients' claims through appeal, but did so without awareness that his role in the creation of the problem gave rise to a conflict of interest, and that he had a duty to so inform his clients. Tr. 14, 29-31. Taken together, the facts of these cases clearly demonstrate that Respondent failed to competently represent his clients or provide the requisite level of skill and care, and that he failed to perceive a patent conflict of interest. Respondent's prior discipline, although somewhat remote in time, plays a role in the aggravation of his sanction, along with the fact that he committed similar misconduct in two cases. Accordingly, a suspension from the practice of law, and a requirement that Respondent work with practice management and mentorship resources, is justified.

Further, the agreed-upon sanction is not unduly lenient. Sanctions ranging from informal admonition to 30-day suspensions have been issued for failure to represent clients with competence, skill and care, and for conflicts of interest. *See, e.g.*, *In re Butterfield*, 851 A.2d 513, 514 (D.C. 2004) (per curiam) (30-day suspension for a single conflict of interest and failure to withdraw upon learning of the conflict); *In re Sofaer*, 728 A.2d 625, 629-630 (D.C. 1999) (informal admonition for accepting employment in a substantially related matter in which the respondent participated as a public officer); *In re Shelnutt*, 719 A.2d 96 (D.C. 1998) (per curiam) (public censure for failure to serve a client with skill and care, failure to act with reasonable promptness, and failure to explain matters to a client); *see also In re Nwadike*, 905 A.2d 221, 232 (D.C. 2006) (informal admonition for a single failure to serve a client with skill and care); *In re Long*, 902 A.2d 1168, 1169, 1172 (D.C. 2006) (per curiam) (30-day suspension, stayed in favor of probation with conditions, for failure to provide competent representation or skill and care, a conflict of interest, and failure to explain the basis or rate of fees).

Lengthier suspensions have been imposed for lack of competence and conflicts of interest aggravated by prior discipline. *See, e.g.*, *In re Evans*, 902 A.2d 56, 58-59, 75-76 (D.C. 2006) (per curiam) (appended Board Report) (six-month suspension with CLE, with 90 days stayed in favor of one year of probation, for lack of competence, skill and care, conflict of interest, and serious interference with the administration of justice, where the respondent had received a prior

informal admonition for failure to supervise an associate and a suspension for negligent misappropriation, further aggravated by prejudice and lack of remorse). Accordingly, the stipulated sanction is not unduly lenient.

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 ninety-day suspension, with all but thirty days stayed in favor of one year of probation with the conditions that he (a) will not be found to have engaged in ethical misconduct during the term of probation; (b) meet with the D.C. Bar's Practice Management Advisory Service ("PMAS") within thirty days of the approval of the petition and, within one year, comply with and implement any of its recommendations; (c) sign a waiver permitting Disciplinary Counsel to communicate with PMAS regarding his compliance with their program; (d) agree to the appointment of a practice monitor, who will serve as a mentor to Respondent in the event he accepts any cases for which he has had little to no experience; and (e) either acquire legal malpractice insurance or advise his future clients that he lacks such insurance, with a violation of the terms of probation resulting in Respondent serving the full ninety-day suspension with a fitness requirement.

AD HOC HEARING COMMITTEE

Kathleen Wach, Esquire
Chair

Marcia Carter
Public Member

Charles Davant, IV, Esquire
Attorney Member