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

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| In the Matter of: | : | |
| | : | |
| ROBERT W. MANCE, III, | : | |
| | : | Board Docket Nos. 11-BD-039 & 11-ND-006 |
| Respondent. | : | |
| | : | Bar Docket Nos. 2009-D247, 2009-D369, |
| A Member of the Bar of the District of | : | 2010-D025, and 2011-D219 |
| Columbia Court of Appeals | : | |
| (Bar Membership No. 285379) | : | |

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 September 26, 2011, for a limited hearing on a Petition for Negotiated Discipline (the "Petition"). The members of the Hearing Committee are Dr. Janet Stern Solomon, Erik Koons, and Michael Zoeller. The Office of Bar Counsel was represented by Deputy Bar Counsel Elizabeth A. Herman. Respondent, Robert W. Mance, III, was represented by Jacob A. Stein, Esquire, and was present throughout the limited hearing.

The Hearing Committee has carefully considered the Petition for Negotiated Discipline signed by Bar Counsel, Respondent and Respondent's counsel, the supporting affidavit submitted by Respondent (the "Affidavit"), and the representations during the limited hearing made by Respondent, Respondent's counsel and Bar Counsel. The Hearing Committee also has fully considered the written statement submitted by one of the complainants, the oral statements made during the limited hearing by two complainants, its *in camera* review of Bar Counsel's files and records, and *ex parte* communications with Bar Counsel. For the reasons set forth

below, we approve the Petition, find the negotiated discipline of six months suspension with a fitness requirement 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.[1]

2. Respondent is aware that there is currently pending against him three Petitions Instituting Formal Disciplinary Proceedings and an investigation involving allegations of misconduct. Tr. at 26; Affidavit at ¶ 2.

3. The allegations that were brought to the attention of Bar Counsel are that he violated Rule 1.1(a) (failure to provide competent representation), Rule 1.1(b) (failure to serve a client with skill and care), Rule 1.3(a) (failure to provide zealous and diligent representation), Rule 1.5(b) (failure to provide client with writing stating the rate or basis of fee), Rule 1.7(b) (representing client at a time when his professional judgment may have been affected by his own interest), Rule 1.8 (business transaction with client), and Rule 1.16(d) (failure to timely surrender client's papers upon termination of the representation. Petition at ¶¶ 18, 32, 42.

4. Respondent has knowingly and voluntarily acknowledged that the material facts and misconduct reflected in the Petition are true. Tr. at 27**;** Affidavit at ¶ 4. Specifically, Respondent acknowledges the following facts regarding the three counts of the Petition:

[1] The Affidavit states that Respondent is proceeding *pro se*, although he has been represented by counsel throughout these proceedings. Respondent corrected this statement at the limited hearing. Tr. at 21.

As to Bar Docket No. 2009-D247 (Garrett):

a. On June 7, 2001, the Department of Employment Services ("DOES") issued an advance notice of a proposal ("Notice") to remove Leonard Garrett from his employment at DOES. Mr. Garrett was an investigator at DOES and he had held his position for five years. The Notice was based upon an allegation of sexual harassment. In response to this notice, Mr. Garrett retained James O'Dea, Esquire, to defend him.

b. On November 29, 2001, the Hearing Officer at DOES submitted a written decision finding in Mr. Garrett's favor and recommending that the matter be dismissed. However, on February 7, 2002, the Deciding Official at DOES rejected the report of the Hearing Officer and ordered Mr. Garrett removed from his position. On March 5, 2001, Mr. Garrett noted an appeal of this decision to the Office of Employee Appeals ("OEA"). Mr. Garrett noted the appeal *pro se* because his counsel, Mr. O'Dea, had become too ill to represent him.

c. On or about August 20, 2003, Mr. Garrett retained Respondent, who then entered his appearance in the matter before the OEA. Mr. Garrett paid Respondent approximately $1,500 in cash and another $3,000 by cashier's check for the representation. Respondent failed to provide Mr. Garrett a receipt for the legal fees. Respondent failed to provide Mr. Garrett a written retainer agreement or a writing stating the rate or basis of his fee.

d. On or about November 17, 2003, Respondent filed a brief with the OEA on behalf of Mr. Garrett. On December 1, 2003, the employer filed a

response. On June 28, 2004, the OEA issued its decision upholding the decision of DOES to remove Mr. Garrett.

e. Mr. Garrett wished to bring the case before the District of Columbia Superior Court ("Superior Court" or "Court"). On August 2, 2004, Respondent filed a petition in the Court to review the agency decision. The case was styled *Garrett v. Department of Employment Services*, 2004 CA 000019. On November 5, 2004, the Court ordered Mr. Garrett to file a brief by January 7, 2005. On or about January 7, 2005, Respondent filed a brief on behalf of Mr. Garrett. OEA had not as yet submitted the record in the case to the Court.

f. On February 24, 2005, Respondent filed a motion to join a party, which was granted on March 22, 2005. On July 13, 2006, the Court scheduled a status hearing for October 13, 2006. On October 13, 2006, the status hearing was held and the Court ordered Mr. Garrett to file a brief by December 1, 2006, presumably a brief which would address the OEA record. On December 14, 2006, Respondent filed a motion to revise the briefing schedule. On December 18, 2006, the Court denied, without prejudice, Respondent's motion.

g. On December 29, 2006, the case was transferred to another judge in the Superior Court. The Court scheduled a status conference for January 22, 2007. On January 22, 2007, the status hearing was held. On February 2, 2007, the Court ordered Mr. Garrett to file his brief by March 19, 2007.

h. Respondent failed to file a brief on behalf of Mr. Garrett or to request an extension of time to do so. On April 6, 2007, the Court issued an Order stating that the case would be dismissed for want of prosecution unless, by April 18, 2007, "the petitioner [Mr. Garrett] shows cause why the court should not enter such a dismissal." Respondent failed to respond to this Order.

i. On April 25, 2007, the Court dismissed the case for want of prosecution. Respondent took no further action to protect Mr. Garrett's interests after the dismissal of the case.

j. After Mr. Garrett learned of the status of his case, he confronted Respondent who agreed to take legal actions to protect Mr. Garrett's interests, such as filing a motion to reopen or appealing the dismissal order. However, Respondent failed to take any further action to pursue or protect Mr. Garrett's legal interests.

k. After dismissal of the case, Mr. Garrett filed a complaint with the Office of Bar Counsel.

l. On May 8, 2009, Mr. Garrett filed a complaint with the Office of Bar Counsel. On June 15, 2009, Bar Counsel sent a letter to Respondent notifying him of the complaint and requesting a written response to the allegations of misconduct by June 25, 2009, to which Respondent responded.

m. On or about June 15, 2009, Mr. Garrett, at Respondent's request, met with Respondent. At Respondent's request, and pursuant to multiple promises

made to Mr. Garrett, Mr. Garrett sent a letter to Bar Counsel requesting that his complaint concerning Respondent be withdrawn and the investigation be stopped.

n. On August 25, 2009, Mr. Garrett and Respondent entered into a written agreement whereby Respondent agreed to pay Mr. Garrett $4,500 (the retainer fee) plus an additional $15,000, within 15 months as a settlement of "any issues or differences between them." Respondent failed to advise Mr. Garrett to obtain the advice of an independent attorney and failed to provide sufficient information for Mr. Garrett to provide an informed consent. Respondent failed to obtain from Mr. Garrett an informed consent in writing.

o. After signing the agreement, Respondent provided two payments to Mr. Garrett in 2009, one for $400 and one for $500. Thereafter, Respondent made no further payments to Mr. Garrett and stopped communicating with him.

p. On April 13, 2010, Mr. Garrett requested that Bar Counsel re-open its investigation, which Bar Counsel did.

As to Bar Docket No. 2009-D369 (Riley):

q. In or about March or April 2006, Wilmer Riley retained Respondent to represent him in a matter involving encroachment and damage to his property in the District of Columbia.

r. On May 4, 2006, Respondent filed a complaint on behalf of Mr. Riley in the Superior Court in a matter styled *Riley v. Metro New ULLC*

*("Metro"), District of Columbia, Clark/Vermont Ave, LLC ("Clark"), VIKA, Inc. ("VIKA"), Greenhourne & O'Mara, Inc.("Greenhourne"),* 2006 CA 003446. The complaint alleged both physical damage to his house and decreased property value as a result of both physical damage and encroachment resulting from building on the property next to his house. Defendant Clark thereafter filed a third-party complaint against Defendant VIKA, a land surveyor.

s. Between May 4, 2006 (the date the civil complaint was filed) and September 19, 2008 (the date the Court granted summary judgment or dismissal of the remaining defendant), the Court held scheduling conferences, supervised discovery, and ruled on motions.

t. On March 13, 2008, Defendant Clark filed a motion to compel Mr. Riley to respond to his second request for production of documents, *i.e.*, tax returns. Respondent failed to respond to this motion on behalf of Mr. Riley. On April 24, 2008, the Court granted Defendant Clark's motion to compel a response from Respondent's client, Mr. Riley. The Court ordered Mr. Riley to respond to Defendant Clark's production demand, execute responses, produce financing and mortgage information, and file the Joint Pretrial Statement — all by May 23, 2008. The Joint Pretrial Statement was filed on May 30, 2008. Respondent failed to respond to the other parts of the Court's April 24, 2008 order.

u. On June 3, 2008, the Court held a pretrial conference. Mr. Riley attended the pretrial conference. The Court, *inter alia*, ordered Mr. Riley to respond to the Court's previous order of April 24, 2008, no later than June 6, 2008. The case was continued for trial for December 8, 2008.

v. On June 5, 2008. Mr. Riley telephoned Respondent and informed him that he had all of the documents responsive to the Court's order. Respondent told Mr. Riley to bring the documents to his office, which Mr. Riley did on June 6, 2008. Respondent did not deliver the documents to the attorney for Defendant Clark as ordered by the Court by the due date.

w. On June 9, 2008, Defendant Clark filed a motion for sanctions based upon Mr. Riley's failure to comply with the Court's April 24 and June 3, 2008 orders. Respondent failed to respond to the motion for sanctions.

x. On July 8, 2008, the Court granted Defendant Clark's motion for sanctions. As the sanction against Mr. Riley for failure to comply with the Court's orders, the Court precluded Mr. Riley from testifying at trial or presenting any evidence as to damages or presenting any exhibits at all in the trial.

y. Respondent failed to file a motion to vacate or reconsider the Court's July 8, 2008 order.

z. On August 15, 2008, Defendant VIKA filed a motion to dismiss or in the alternative for summary judgment. Respondent failed to respond to this

motion, which the Court granted on September 19, 2008. Also, on September 19, 2008, the Court dismissed all remaining defendants and vacated the trial date.

aa. On October 20, 2008, Respondent filed a notice of appeal. Respondent represented Mr. Riley on appeal although the issue on appeal involved his own failure to act on Mr. Riley's behalf and to adequately protect Mr. Riley's interests. Respondent failed to advise Mr. Riley of Respondent's potential or actual conflict of interest or of the need to seek independent counsel before, during or after the period that Respondent represented Mr. Riley on appeal.

bb. Respondent asserted in his brief to the Court of Appeals that he produced the discovery documents to Defendant Clark's attorney on June 10, 2008. However, Respondent also asserted in his Emergency Motion to Vacate This Court's July 8, 2008 Order Imposing Sanction Against Plaintiff, that the documents were hand-delivered on June 11, 2008. Respondent's Emergency Motion was never filed with the trial court but was provided to Bar Counsel by Respondent. In any event, Respondent neither obtained a receipt for the purported document production nor did he file a certificate of discovery or inform the trial Court of his compliance with its order.

cc. On February 16, 2010, the Court of Appeals vacated the lower Court's order for sanctions and decision to grant Defendant VIKA's motion for summary judgment and remanded the matter for further factual

findings. Upon remand, the trial court vacated the sanctions previously imposed.

As to Bar Docket No. 2010-D025 (Randolph):

dd. Between on or about July 7, 2007 and May 12, 2009, Respondent represented Sedley D. Randolph in his criminal case, *United States v. Randolph*, 2007-CR1-015792, filed in the Superior Court of the District of Columbia.

ee. After Mr. Randolph was convicted, Respondent filed the notice of appeal. On May 27, 2009, Craig Moore, Esquire, was appointed to represent Mr. Randolph on appeal.

ff. On or about May 26, 2009, Mr. Randolph wrote Respondent requesting a copy of his "case materials." Respondent did not respond to this request. On or about August 16, 2009, Mr. Randolph again requested his file. Respondent did not respond to Mr. Randolph's request.

gg. On or about October 23, 2009, Mr. Randolph wrote to the District of Columbia Bar requesting assistance to obtain his file from Respondent. The Bar forwarded Mr. Randolph's letter to Bar Counsel.

hh. On December 4, 2009, Bar Counsel wrote Respondent requesting that he state in writing his position on Mr. Randolph's request for his file and reminding him of his obligation under the Rules to release client files and papers once the representation has terminated.

ii. Respondent failed to respond to Bar Counsel's letter of December 4, 2009.

jj. On January 22, 2010, Bar Counsel opened an investigation of Mr. Randolph's complaint and requested a response from Respondent within 10 days of the date of the letter.

kk. On February 11, 2010, Respondent responded to Mr. Randolph's allegations of misconduct. Respondent acknowledged that Mr. Randolph had requested the file and he agreed to forward it to him. Respondent did not attempt to forward the file to Mr. Randolph until on or about the beginning of April 2010.

ll. On or about April 7, 2010, the file was returned to Respondent because Respondent failed to ascertain the rules of the federal correctional center where Mr. Randolph was housed as to mailing packages. On May 17, 2010, Respondent filled out the form required by the institution and re-sent the files to Mr. Randolph.

Petition at 2-9, ¶¶ 2-41; Tr. at 27.

5. Respondent is agreeing to the disposition because Respondent believes that he cannot successfully defend against discipline based on the stipulated misconduct. Tr. at 30-31; Affidavit at ¶ 5.

6. Bar Counsel has made no promises to Respondent other than what is contained in the Petition for Negotiated Discipline. Affidavit at ¶ 7. Specifically, Bar Counsel has agreed to not pursue any additional charges arising out of the conduct in the client matters described above (BDN 2009-247, BDN 2009-369, and BDN 2010-D025), including the additional charges in the Specification of Charges pending against Respondent and executed by Bar Counsel filed on June 14, 2011. Petition at 10-11.

Based upon the facts revealed in Bar Counsel's investigation of these matters, Bar Counsel is not aware of any additional charges that could be brought, other than those set out in the Specification of Charges, which Bar Counsel will not pursue. Petition at 10. In particular, Bar Counsel stated:

a. In [BDN 2009-247] (Garrett), Bar Counsel did not include in the Petition, violations of Rules 1.3(b)(1), 1.3(b)(2) and 1.4(a) and 1.4(b). The first two Rules require Bar Counsel to show that Respondent's misconduct was intentional. Respondent denies specific intent in this Count. The third rule, Rule 1.4 (communication) also was charged in the Specification in this Count but is not in the Petition.

b. In [BDN 2009-369] (Riley), Bar Counsel again did not include in the Petition the intentional violations, Rules 1.3(b)(1), 1.3(b)(2) or the communication charges, 1.4(a) and 1.4(b). Bar Counsel also did not include in the Petition, Rule 8.4(c) (dishonesty). Respondent denies making dishonest statements to his client. Because suspension with a fitness requirement is a part of the agreed upon sanction in this matter, we do not believe it necessary to include all charges previously filed in this negotiated disposition. *See* Confidential Appendix.

c. Bar Counsel further agrees to dismiss the following case, as part of this Negotiated Disposition which has been docketed for investigation and as to which Respondent has previously been given notice: 2011-D219 Mance/Bar Counsel. This case, Mance/Bar Counsel, concerns conduct similar to that in Count I (Garrett), that is, failure to represent with skill

and care and failure to represent zealously. Bar Counsel reserves the right to present the facts and circumstances of these unadjudicated acts of misconduct in connection with any petition for reinstatement.

7. Respondent stated during the limited hearing that there have been no other promises or inducements other than those set forth in the Petition. Tr. at 31-33.

8. Respondent has conferred with his counsel regarding his decision to enter into this negotiated discipline. Tr. at 21, 44.

9. 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. at 27-34**;** Affidavit at ¶ 6.

10. Respondent is not being subjected to coercion or duress. Tr. at 34, 44; Affidavit at ¶ 6.

11. Respondent is competent and not under the influence of any substance or medication. Tr. at 22.

12. 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 Bar 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;

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. at 36-38; Affidavit at ¶ 9.

13. Respondent and Bar Counsel have agreed that the sanction in this matter should be a six-month suspension with a fitness requirement. Petition at § IV; Tr. at 31.

a) 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. at 39-40**;** Affidavit at ¶ 14.

b) Respondent understands that he will be required to prove his fitness to practice law in accordance with D.C. Bar R. XI, § 16 and Board Rule 9.8 prior to being allowed to resume the practice of law;

Tr. at 41-43; Affidavit at ¶ 13.

c) Respondent understands that components of this fitness requirement will be restitution to his clients or the Clients' Security Fund, and voluntarily taking Continuing Legal Education classes; and

Tr. at 40-41; Affidavit at ¶ 13.

d) Respondent understands that the reinstatement process may delay Respondent's readmission to the Bar.

Tr. at 42.

14. Bar Counsel has provided a statement demonstrating the following circumstances in aggravation, which the Hearing Committee has taken into consideration:

> Aggravating factors include prejudice to Respondent's clients, particularly Mr. Garrett and Mr. Riley, whose matters were dismissed

> or compromised because of Respondent's incompetence and/or neglect. A further aggravating factor is Respondent's past discipline. Respondent received a public censure (2009), a stayed suspension with probation (2005), an Informal Admonition (2000), and another Informal Admonition (1996). The 2009 public censure involved commingling and failure to promptly return a fee. *In re Mance*, 980 A.2d 1196 (D.C. 2009). The 2005 stayed suspension involved violations of Rules 1.1(a) and (b), 1.3(a) and (b), 1.4(a), 1.16(a)(3) and 8.4(d), in a criminal appellate matter. *In re Mance*, 869 A.2d 339 (D.C. 2005). The two Informal Admonitions involved violations of Rule 1.5(a) (failure to provide a writing stating the rate or basis of the fee), which is one of the violations here in Count I).

Petition at 12.

15. In mitigation, Respondent has acknowledged that he engaged in the misconduct described in the Petition, and Respondent has accepted responsibility for his actions, which the Hearing Committee has taken into consideration. Petition at 13**;** Affidavit at ¶ 15; Tr. at 36.

16. All complainants were notified of the limited hearing. Mr. Riley, the complainant in 2009-D369, submitted a written statement, and appeared and made a statement during the limited hearing along with his daughter, Soleil Hockaday, pursuant to Board Rule 17.4(a). Mr. Garrett, the complainant in 2009-D247, also appeared and made a statement at the limited hearing, pursuant to Board Rule 17.4(a). Tr. at 44-51.

17. Mr. Riley opposed the imposition of only a six-month suspension and urged the Court to disbar Respondent based upon his prior disciplinary history and the dismissal of his civil action caused by Respondent's failure to comply with Court orders. Tr. at 45-50. Mr. Garrett supported the agreed sanction, stating that he had known Respondent for 40 years and believed he had done more good than harm, and that a six-month suspension was a very severe sanction. Tr. at 51. The Hearing Committee has taken the Complainants' written and oral statements into consideration.

18. Bar Counsel and Respondent have submitted the following statement of relevant precedent in support of the agreed upon sanction: "The range of sanctions for neglect, and conflict of interest range from non-suspensory sanctions to disbarment. Where, as here, multiple clients are involved, a suspensory sanction is warranted." Petition at 11-12 (citing *In re Beane*, 6 A.3d 261 (D.C. 2010); *In re Wright*, 885 A.2d 315 (D.C. 2005); *In re Shay*, 749 A.2d 142 (D.C. 2000); and *In re Ryan*, 670 A.2d 375 (D.C. 1996)).

## 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 Knowingly Agreed to the Negotiated Discipline

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. at 22, 27-31. Respondent testified that any and all promises that have been made to him by Bar 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. at 31-34; Affidavit at ¶ 6. Respondent understands the implications and consequences of entering into this negotiated discipline. Tr. at 37-44. 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. at 30; Affidavit at ¶ 5. During the limited hearing, Respondent spoke firmly and without reservation, and was assisted throughout the hearing by counsel. Consequently, the Hearing Committee finds Respondent's statements that he knowingly and voluntarily acknowledges the facts, misconduct and proposed sanction set forth in the Petition for Negotiated Discipline to be credible. Therefore, with regard to the first factor, this Hearing Committee finds that Respondent has knowingly and voluntarily acknowledged the facts and misconduct reflected in the Petition and has agreed to the sanction therein.

B. The Facts Support the Admission of Misconduct and Agreed Sanction

The Hearing Committee has carefully reviewed the Petition, accompanying Affidavit and the evidence submitted at the hearing with respect to each of the alleged violations of the Rules of Professional Conduct.

1. The Petition states that Respondent violated Rule 1.1(a) (failure to provide competent representation). The evidence supports Respondent's admission that he violated Rule 1.1(a) in that the stipulated facts describe that Respondent did not provide competent representation to Mr. Garrett or Mr. Riley.

2. The Petition states that Respondent violated Rule 1.1(b) (failure to serve client with requisite skill and care). The evidence supports Respondent's admission that he violated Rule 1.1(b) in that the stipulated facts describe that Respondent did not serve Mr. Garrett or Mr. Riley with the skill and care

commensurate with that generally afforded to clients by other lawyers in similar matters.

3. The Petition states that Respondent violated Rule 1.3(a) (failure to zealously and diligently represent client). The evidence supports Respondent's admission that he violated Rule 1.3(a) in that the stipulated facts describe that Respondent did not represent Mr. Garrett or Mr. Riley zealously and diligently within the bounds of the law.

4. The Petition states that Respondent violated Rule 1.5(b) (failure to provide client with writing stating the basis of his fee).[2] The evidence supports Respondent's admission that he violated Rule 1.5(b) in that the stipulated facts describe that Respondent did not provide Mr. Garrett with a writing stating the rate or basis of his fee.

5. The Petition states that Respondent violated Rule 1.7(b) (conflict of interest). The evidence supports Respondent's admission that he violated Rule 1.7(b) in that the stipulated facts describe that Respondent represented Mr. Riley at a time when his professional judgment on behalf of Mr. Riley would be or reasonably may have been affected by his responsibilities to or interests in his own financial, business, property or personal interests.

6. The Petition states that Respondent violated Rule 1.8 (entering into business transaction with client). The evidence supports Respondent's admission that he violated Rule 1.8 in that the stipulated facts describe that Respondent

[2] Rule 1.5(b) was amended on Feb. 1, 2007. Because Mr. Garrett retained Respondent in 2003, this violation is based upon the prior rule.

entered into a business transaction with Mr. Garrett which did not come within any of the exceptions to the Rule 1.8 prohibition.

7. The Petition states that Respondent violated Rule 1.16(d) (failure to surrender papers after termination of representation). The evidence supports Respondent's admission that he violated Rule 1.16(d) in that the stipulated facts describe that Respondent failed to take timely steps upon termination of the representation, to the extent reasonably practicable, to protect Mr. Randolph's interests, such as surrendering papers and property to which Mr. Randolph was entitled.

Therefore, with regard to the second factor, this Hearing Committee finds that the facts set forth in the Petition and established during the hearing support the admissions of misconduct and the agreed upon sanction.

C. The Agreed Sanction is Justified

In determining whether the agreed upon sanction is justified, the Hearing Committee is to "tak[e] into consideration the record as a whole, including the nature of the misconduct, any charges or investigations that Bar Counsel has agreed not to pursue, any circumstances in aggravation and mitigation, and relevant precedent." Board Rule 17.5(a)(iii). In determining whether the sanction is justified, the Hearing Committee may give some consideration to "what charges might have been brought, but only to ensure that Bar Counsel is not offering an unduly lenient sanction – the ultimate focus must be on the propriety of the sanction itself." *In re Johnson*, 984 A.2d 176, 181 (D.C. 2009) (per curiam).

The range of sanctions for the violations to which Respondent has admitted is large – from non-suspensory sanctions to disbarment. Within that broad range, a suspension is clearly

warranted due to Respondent's history of prior similar misconduct, the multiple complainants and violations at issue, the period of time over which the violations occurred, and the harm caused to two clients.[3] The Court has imposed non-suspensory sanctions, stayed suspension in favor of a year's probation and imposed brief suspensions in disciplinary cases involving neglect, conflict of interest and improper business relationship with a client in an single matter. *See, e.g.*, *In re Avery*, 926 A.2d 719 (D.C. 2007) (per curiam) (public censure imposed for violating of Rules 1.1(a), 1.3(a) and (c), 1.4(a) and (b), 1.5(c) and (e) and 1.16(d) with respect to representation of single client); *In re Evans*, 902 A.2d 56 (D.C. 2006) (per curiam) (six-month suspension with final ninety days stayed in favor of a year probation for violating Rules 1.1(a) and (b), 1.7(b)(4) and 8.4(d)); *In re Boykins*, 748 A.2d 413 (D.C. 2000) (per curiam) (30-day suspension stayed in favor of one-year probation with conditions for violating Rules 1.1(a) and (b), 1.3(a) and (c), 1.5(b), 1.7(b), and 8.4(d) with respect to single representation). Where the misconduct at issue arises in multiple matters or there is prior similar misconduct, suggesting that non-suspensory sanctions have failed to correct the misconduct, the Court has typically imposed a significant suspension of a year or less. *See, e.g., In re Douglass*, 859 A.2d 1069, 1086 (D.C. 2004) (per curiam) (adopting Board's recommendation sanction of 90 day suspension for neglect, incompetence, conflict of interest, and refusal to return client files in light of prior discipline); *In re Tinsely*, 582 A.2d 1192 (D.C. 1990) (one-year suspension with proof of fitness imposed for a pattern of carelessness and indifference to obligations to courts and to clients, together with failure to respond to Bar Counsel's inquiries, with respect to six separate client

[3] The Hearing Committee's recommendation herein relies in part on confidential material disclosed during the Hearing Committee's *in camera* review of Bar Counsel's investigative file and *ex parte* meeting with Deputy Bar Counsel Herman, pursuant to D.C. Bar Rule XI, § 12.1(c) and Board Rule 17.4(h). The Hearing Committee's evaluation of this confidential information is set forth in a Confidential Appendix filed under seal. *See* Board Rule 17.6.

matters); *In re Banks*, 709 A.2d 1181, 1182 (D.C. 1998) (per curiam) (imposing suspension of 90 days with final 30 days stayed during one-year probation for violating Rules 1.3(a) and (c), 1.4(a) and 1.5(b) based, in part, on similar disciplinary history).

A suspension is clearly warranted here in light of Respondent's history of neglecting clients, the two years over which the misconduct at issue took place, the multiple clients involved and the injury to both Mr. Garrett and Mr. Riley resulting from Respondent's neglect.[4] Although a suspension of six months is on the shorter end of potential suspensions, the length of the agreed suspension is appropriate because this matter does not involve misappropriation, dishonesty or intentional misconduct. *See, e.g.*, *In re Steele*, 868 A.2d 146, 153 (D.C. 2005) (three-year suspension with fitness requirement for pattern of intentional neglect and dishonesty spanning several years and five clients). While a suspension of six months may seem relatively short, it is a significant sanction. Respondent's counsel highlighted the severity of the sanction by questioning whether Respondent will be able to put together a practice again after a suspension of six months. Tr. at 58.

The agreed upon sanction includes a requirement that Respondent demonstrate his fitness to practice law before he can be reinstated. The appropriateness of a fitness requirement is not based on a comparison to other cases, but instead is imposed where the record contains "clear and convincing evidence that casts a serious doubt upon the attorney's continuing fitness to practice law." *In re Cater*, 887 A.2d 1, 6 (D.C. 2005). In determining whether there is a serious doubt regarding the attorney's fitness to practice law, the Hearing Committee must consider the five factors for reinstatement set forth in *In re Roundtree*, 503 A.2d 1215, 1217 (D.C. 1985):

[4] Although Respondent's misconduct resulted in injury to his clients, this injury is mitigated in part by having restitution as a component of the fitness requirement.

(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.

As noted above, the nature and circumstances of the neglect at issue here warrant a suspensory sanction, but may not, by itself, necessarily warrant imposition of a fitness requirement. The Hearing Committee received no evidence of Respondent's present character or Respondent's conduct since discipline was imposed. Respondent accepted responsibility for his misconduct and agrees to imposition of a significant sanction, so there is evidence to support a finding that Respondent recognizes the seriousness of the misconduct.

A fitness requirement is appropriate in this case because Respondent's history of similar misconduct, the number of matters involved, and the length of time over which the misconduct occurred raise questions about Respondent's competence to practice law. To be clear, there is no evidence in the record of the matters before this Hearing Committee that casts doubt on Respondent's ability to be a forceful and effective advocate for his clients. Being competent to practice law, however, requires much more than having the necessary legal acumen and advocacy skills. An attorney must be able to, among other things, communicate effectively with clients, manage cases, maintain records, keep schedules, and prioritize workloads. Depending on the attorney's practice, these skills can be nearly as important as writing a persuasive brief. At any reinstatement proceeding, Respondent will need to establish that he has developed these skills, and obtained tools to assist him with these obligations.

Accordingly, upon consideration of the entire record in this matter including the circumstances in aggravation and mitigation and the relevant precedent, we conclude that the

agreed upon negotiated discipline of a six-month suspension with a fitness requirement is justified.

## IV. Conclusion and Recommendation

It is the conclusion of the Hearing Committee that the discipline negotiated in this matter is appropriate. For the reasons stated above, it is the recommendation of this Hearing Committee that the negotiated discipline be approved and that the Court suspend Respondent for six months with a requirement that he prove that he is fit to practice as a condition of reinstatement.

AD HOC HEARING COMMITTEE

/MZ/
Michael Zoeller
Chair

/JSS/
Dr. Janet Stern Solomon
Public Member

/EK/
Erik Koons
Attorney Member

Dated: October 26, 2011