

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



FILED

September 19, 2018  
Board on Professional  
Responsibility

In the Matter of:

TILMAN L. GERALD,

Respondent.

A Member of the Bar of the  
District of Columbia Court of Appeals  
(Bar Registration No. 928796)

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Board Docket No. 18-ND-002  
Disciplinary Docket No. 2015-D056

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

I. PROCEDURAL HISTORY

This Petition for Negotiated Discipline is based on Respondent's representation of a client who hired him to investigate possible civil claims arising out of her husband's death. The original retainer agreement provided for a \$1,500 fee, which Respondent did not explain to the client. The scope of the representation was later expanded to include probate of the husband's estate and filing a medical malpractice suit. Respondent did not provide a new retainer agreement or explain his revised fee, and the client only understood that Respondent would collect some sort of contingency fee. Respondent filed a probate petition that neglected to list a house owned by the client and her deceased husband. Respondent then filed a medical malpractice suit, and the defendant hospital filed a motion to dismiss due to expiration of the statute of limitations, which the court later construed as a motion for summary judgment. Respondent failed to file an opposition to the motion for summary judgment by the deadline set by the court, but he did so after the court granted him an extension. The court ultimately granted the defendant hospital's motion for summary judgment.

Respondent neither informed his client of the decision nor filed an appeal, and the time to do so expired.

The Petition was assigned to this Ad Hoc Hearing Committee, which conducted an *in camera* review of Disciplinary Counsel's investigative file and met with Disciplinary Counsel *ex parte*.<sup>1</sup> The parties filed an Amended Petition for Negotiated Discipline on July 5, 2018, and it is that Amended Petition that this Committee will address.

A limited hearing was held before the Hearing Committee on August 16, 2018. The members of the Hearing Committee are Christian S. White, Esq., Chair; William V. Hindle, public member; and Dwaune L. Dupree, Esq., attorney member. The Office of Disciplinary Counsel was represented by Assistant Disciplinary Counsel Jelani C. Lowery, Esq. and Hendrick deBoer, Esq. Respondent was represented by Robert C. Cooper, Esq. Respondent and his counsel were present throughout the limited hearing.

The Hearing Committee has carefully considered the Amended Petition for Negotiated Discipline, which is signed by Disciplinary Counsel, Respondent, and Respondent's counsel; the Affidavit submitted by Respondent; and Respondent's and Disciplinary Counsel's representations during the limited hearing. 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 below, we recommend that the Court of Appeals approve the Petition.

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<sup>1</sup> In *In re Rigas*, Bar Docket No. 148-06, at 12 n.6 (BPR Mar. 11, 2009), the Board recognized that although Board Rule 17.4(c) precludes a Hearing Committee assigned to a contested matter from hearing a petition for negotiated discipline in that same case, the rule is intended to "ensure that the admissions and *ex parte* access that accompany a negotiated discipline do not taint subsequent fact-finding if the petition is rejected" and the case returned to a contested hearing. *Id.* But where, as here, a petition for negotiated discipline is submitted when the contested hearing has yet to begin, the Board concluded that there is "no reason that [the] Hearing Committee should not instead hear the petition for negotiated discipline" and the case assigned to a new Hearing Committee if the petition is rejected. *Id.*

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

The Hearing Committee 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 a proceeding involving allegations of misconduct. Aff. ¶ 2; Limited Hearing Transcript (“Tr.”) 17.<sup>2</sup>
3. The allegations against Respondent are contained in the Stipulation of Facts and Rule Violations, Pet. 2-5. In the Petition, Respondent acknowledges that he violated eight D.C. Rules of Professional Conduct:
  - a) Rule 1.1(a), by failing to provide competent representation to his client;
  - b) Rule 1.1(b), by failing to serve his client with skill and care commensurate with that generally afforded clients by other lawyers in similar matters;
  - c) Rule 1.3(a), by failing to represent his client zealously and diligently within the bounds of the law;
  - d) Rule 1.3(c), in that Respondent failed to act with reasonable promptness in representing his client;
  - e) Rule 1.4(a), failed to keep his client reasonably informed about the status of a matter and promptly comply with reasonable requests for information;
  - f) Rule 1.4(b) by failing to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation;
  - g) Rules 1.5(b) and (c), by failing to communicate to the client in writing the basis or rate of the contingent fee, the scope of the lawyer’s representation, and the expenses for which the

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<sup>2</sup> References to the transcript of the August 16, 2018 Limited Hearing are in the form “Tr. \_\_\_”; references to the Amended Petition for Negotiated Discipline and the Affidavit of Negotiated Discipline are in the form “Pet. \_\_\_” and “Aff. \_\_\_,” respectively.

client would be responsible before or within a reasonable time after modifying the scope of the representation.

4. Respondent has knowingly and voluntarily acknowledged that the material facts and misconduct reflected in the Petition are true and support the stipulated misconduct and the agreed-upon sanction. Aff. ¶ 4; Tr. 17-18, 22-23.

Respondent acknowledges (Tr. 17-18) the following facts:

5. Respondent is a member of the Bar of the District of Columbia Court of Appeals, having been admitted by exam on July 10, 1978, and assigned Bar number 928796.

6. On June 16, 2009, Mr. Barry Haywood died.

7. In August 2009, Mr. Haywood's widow, Ms. Elnora Haywood, retained Respondent to represent her in connection with potential civil claims arising out of her husband's death. Ms. Haywood and Respondent executed a retainer agreement providing that she would pay \$1,500 for Respondent to investigate Mr. Haywood's death including obtaining and receiving medical records from Howard University Hospital.

8. Respondent did not discuss or explain the \$1,500 fee to Ms. Haywood.

9. Before April 2011, the scope of the representation expanded to include not only investigating and obtaining medical records but also representing Ms. Haywood in the probate of her husband's estate and filing suit against Howard University Hospital for medical malpractice. Respondent did not execute a new retainer with Ms. Haywood, or otherwise explain to her the basis or rate of his fee for the additional services he provided. Ms. Haywood only understood that Respondent would be paid on a contingency basis; everything else, including the percentage of any recovery that Respondent would be entitled to, remained unclear.

10. On April 8, 2011, Respondent filed a Petition to Probate the estate of Barry Haywood on Ms. Haywood's behalf. In the petition, Respondent did not list Mr. and Ms. Haywood's real property, a house located at 1409 Buchanan Street, N.W. Washington, D.C., 20011.

11. On October 10, 2013, Respondent filed a complaint for medical malpractice on behalf of the Estate of Barry Haywood against Howard University Hospital in the D.C. Superior Court, case number 2013-CA-006917.

12. On December 18, 2013, Howard University Hospital filed a motion to dismiss the case alleging that the statute of limitations had expired.

13. On January 9, 2014, Respondent filed an opposition to the motion to dismiss arguing that the statute of limitations had not expired.

14. On January 17, 2014, Howard University Hospital filed a reply.

15. On May 15, 2014, the court ordered that the motion to dismiss would be construed as a motion for summary judgment and that each party would be given an opportunity to supplement their arguments with an additional round of motions. The court ordered Howard University Hospital to file its supplement by June 16, 2014 and Respondent to file an opposition by July 16, 2014.

16. On June 16, 2014, Howard University Hospital filed a supplement to its motion for summary judgment.

17. Respondent did not file an opposition to the supplemented motion for summary judgment by the July 16, 2014 deadline, nor did he request additional time to do so.

18. On October 24, 2014, the court held a status conference during which Respondent informed the court that he had not filed an opposition for personal reasons. The court granted him an extension until October 31, 2014 to file his opposition.

19. Respondent filed the opposition on October 31, 2014.

20. Howard University Hospital filed a reply on November 13, 2014.

21. On December 31, 2014, the court granted the Motion for Summary Judgment and entered judgment in favor of Howard University Hospital against the Estate of Barry Haywood. The court found that the statute of limitations began to accrue on the date of Mr. Haywood's death, June 16, 2009.

22. Respondent did not inform Ms. Haywood of the dismissal. He did not discuss with her the possibility of appealing the decision.

23. Respondent did not file a notice of appeal, and the time period to do so expired.

### III. STATEMENT OF PROMISES MADE BY DISCIPLINARY COUNSEL

In connection with this Petition for Negotiated Disposition, Disciplinary Counsel has agreed not to pursue any charges arising out of the conduct described in Section II, *supra*, other than those set forth above, or any sanction other than that set forth below. Pet. 5.

### IV. AGREED-UPON SANCTION

Disciplinary Counsel and Respondent agree that: (1) the sanction to be imposed in this matter is a 90-day suspension beginning 30 days after the Court issues its Order, with 60 days stayed in favor of a one-year period of unsupervised probation; (2) the Court's order should include a condition that if probation is revoked, Respondent will be required to serve the remainder of the 90-day suspension; (3) during the 30-day served suspension and the ensuing one-year probation, Respondent shall not engage in any misconduct in this or any other jurisdiction; (4) Respondent shall complete nine hours of CLE courses pre-approved by Disciplinary Counsel; and (5) Respondent shall also complete the *Basic Training and Beyond* course provided by the D.C. Bar.

Respondent and Disciplinary Counsel have further agreed that if Disciplinary Counsel has probable cause to believe that Respondent has violated the terms of his probation,

Disciplinary Counsel may seek to revoke Respondent's probation pursuant to D.C. Bar R. XI, § 3 and Board Rule 18.3, and request that Respondent be required to serve the remaining 60 days of suspension.

Respondent and Disciplinary Counsel have agreed that there are no additional conditions attached to this negotiated disposition that are not expressly agreed to in writing in this Petition.

Disciplinary Counsel and Respondent have submitted the following statement of relevant precedent in support of the agreed-upon sanction:

The agreed-upon sanction in a negotiated discipline case must, *inter alia*, be supported by relevant precedent under D.C. R. XI § 12.1 . . . and justified when taking into consideration the record as a whole under Board Rule 17.5(a)(iii). As set forth below, the agreed-upon sanction in this matter is appropriate given the range of sanctions in cases involving incompetence, failure to communicate, failure to provide a client with a writing setting forth the basis and rate of a fee, and failure to protect a client's interests, as well as the aggravating and mitigating factors present. Similar cases have resulted in sanctions ranging from Informal Admonitions to short suspensions.

The cases that have resulted in Informal Admonitions involve substantial mitigation such as the attorney's: lack of disciplinary history, prompt communication about the outcome of the case, acceptance of responsibility for the misconduct, payment of restitution to the client, informing the client that he or she may have a malpractice claim and providing the client with the attorney's malpractice insurance carrier, and taking steps to protect or salvage the client's legal interests in order to lessen the effect of the misconduct. See *[In re] Isadore B. Katz Esquire*, BDN 2008-D484 (July 8, 2009) (attorney violated Rules 1.1(a), 1.1(b), 1.3(a), and 1.3(c) by failing to file malpractice claim before statute of limitations expired); *In re Dharma Devarajan, Esquire*, BDN 2006-D113 (May 24, 2007) (attorney with no disciplinary history violated Rules 1.1 (a), 1.1(b), and 1.3(a) by failing to file personal injury lawsuit but immediately notified professional liability insurance carrier of the incident and advised client).

The cases that have resulted in short suspensions, involve, *inter alia*, aggravating factors such as failure to accept responsibility during disciplinary proceedings, and failure to inform the client of court decisions. See *In re Outlaw*, 917 A.2d 684 (D.C. 2007) (60-day suspension for attorney who failed to file personal injury action before expiration of statute of limitations); *In re Ontell*, 593 A.2d 1038 (D.C. 1991) (30-day suspension where attorney neglected two cases,

allowing default judgement in one and dismissal in another – but was candid in disciplinary proceedings and voluntarily compensated one client financially for damages resulting from his misconduct); *In re Cole*, 967 A.2d 1264 (D.C. 2009) (30-day suspension for attorney who failed to file asylum application for client and lied to client about status of the application but later made restitution and assisted successor counsel); *In re Banks*, 577 A.2d 316 (D.C. 1990) (60-day suspension with all but 30-days stayed in favor of one-year probation where attorney failed to file personal injury complaint before statute of limitations expired and had prior disciplinary history).

This case merits a short suspension because Respondent did not immediately inform [Ms.] Haywood about the court’s dismissal, Respondent took no steps to otherwise assist [Ms.] Haywood or protect her legal interests once the [representation ended], and Respondent has prior discipline – two informal admonitions.

## V. DISCUSSION

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

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

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

### A. Knowing and Voluntary Acknowledgment of Facts and Conduct, and Agreement to Sanction

The 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. Tr. 17-18, 18-22; Aff. ¶ 6. 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, 17-18, 18-23; Aff. ¶ 6. Respondent is competent and was not under the influence of any substance or medication that would affect his participation



at the limited hearing. Tr. 12-13. Respondent understands the implications<sup>3</sup> and consequences of entering into this negotiated discipline. Tr. 26-29; Aff. ¶ 9.

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. 22; Aff. ¶ 7.

B. Facts Supporting the Admissions of Misconduct and Sanction

The Hearing Committee has carefully reviewed the facts set forth in the Petition and established during the hearing. We conclude that they support Respondent's 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. 16; Aff. ¶ 5. More specifically:

**Rules 1.1(a), 1.1(b), 1.3(a), 1.3(c), 1.4(a), and 1.4(b):** The Petition states that Respondent violated Rules of Professional Conduct—Rules 1.1(a), 1.1(b), 1.3(a), and 1.4(a)—that have been described as the “adequate representation rules.” *In re Ukwu*, 926 A.2d 1106, 1135 (D.C. 2007)

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<sup>3</sup> These implications include that:

- a) he will waive his right to cross-examine adverse witnesses and to compel witnesses to appear on his behalf;
- b) he will waive his right to have Disciplinary Counsel prove each and every charge by clear and convincing evidence;
- c) he will waive his right to file exceptions to reports and recommendations filed with the Board and with the Court;
- d) the negotiated disposition, if approved, may affect his present and future ability to practice law;
- e) the negotiated disposition, if approved, may affect his bar memberships in other jurisdictions; and
- f) 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.

Aff. ¶¶ 9, 10, 12; Tr. 26-29.

(appended Board Report). “The first three rules require that a lawyer represent his clients with competence, that is, with ‘legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation’ (Rule 1.1(a)), with ‘skill and care’ (Rule 1.1(b)) and with zeal and diligence (Rule 1.3(a)).” *Id.* “The fourth (Rule 1.4(a)) enjoins the lawyer to ‘keep [his] client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.’” *Id.* (alteration in original) (citation omitted). The Petition also states that Respondent violated Rule 1.3(c), which requires attorneys to “act with reasonable promptness in representing a client,” and Rule 1.4(b), which requires attorneys to explain matters “to the extent reasonably necessary to permit the clients to make informed decisions regarding the representation.”

**Rule 1.5(b) and (c):** The Petition states that Respondent failed to communicate to the client in writing the basis or rate of the contingent fee, the scope of the lawyer’s representation, and the expenses for which the client would be responsible before or within a reasonable time after modifying the scope of the representation.

The evidence supports Respondent’s admission that he violated these rules. The stipulated facts describe a failure to provide competent or diligent representation, to employ the skill and care required for the matters, to keep his clients informed about their matters, to act with reasonable promptness, and to explain matters to his clients, including information about his fee. In particular, Respondent did not adequately apprise his client of the basis for his fees, both at the outset of the representation and later when the representation broadened to include the filing of a wrongful death action against the hospital. When he filed a petition for probate in April 2011, he failed to list Mr. and Ms. Haywood’s real property. In the medical malpractice case, he failed to respond to a motion for summary judgment or request an extension by the deadline, though he did ultimately file a

response. More importantly, Respondent did not file that action before the statute of limitations had run. When Respondent's arguments on the statute of limitations were rejected by the court, Respondent failed to advise his clients, and their opportunity to appeal that decision was lost.

C. Sanction

The third factor the Hearing Committee must consider is whether the sanction agreed to in the Petition is justified.

Having considered the entire record in this case, including the circumstances in aggravation and mitigation and the relevant precedent, we conclude that the agreed-upon negotiated discipline of a 90-day suspension with 60 days suspended in favor of a one-year period of unsupervised probation is justified. The agreed-to sanction further provides that the Court should include in its order a condition that if probation is revoked, Respondent will be required to serve the remainder of the 90-day suspension, and that during the 30-day served suspension and the ensuing one-year of probation Respondent shall not engage in any misconduct in this or any other jurisdiction. Respondent also must complete nine hours of CLE courses prescribed by Disciplinary Counsel and complete the *Basic Training and Beyond* course provided by the D.C. Bar.

Respondent's misconduct is serious. He failed to file the wrongful death action before the statute of limitations had run. When his arguments about the statute of limitations were rejected by the court, he failed to advise his clients and their opportunity to appeal that ruling was lost.

Although Respondent received informal admonitions in 1998 and 2009, those involved unrelated misconduct (violations of Rule 1.15(a) and Rules 1.15(b) and 1.16(d), respectively), and

there is no allegation of dishonesty in this case. Respondent has cooperated with the Disciplinary Counsel inquiry and taken full responsibility for his actions.<sup>4</sup>

Based on the cases cited by the parties, as well as further research, it appears that brief suspensions have been imposed for comparable misconduct in contested cases. *See, e.g., In re Fox*, 35 A.3d 441, 441-42 (D.C. 2012) (per curiam) (forty-five-day suspension for failure to pursue a claim after drafting a complaint and failure to communicate with the client, in violation of Rules 1.1(a) and (b), 1.3(a) and (c), and 1.4(a) and (b)); *In re Thai*, 987 A.2d 428, 429 (D.C. 2009) (per curiam) (sixty-day suspension with thirty days stayed in favor of probation for failure to provide diligent and competent representation to a client in connection with an immigration hearing, failure to communicate, and delay in returning the client's file, in violation of Rules 1.1(a) and (b), 1.3(a) and (c), 1.4(a), and 1.16(d)); *In re Boykins*, 748 A.2d 413, 413-14 (D.C. 2000) (per curiam) (thirty-day suspension stayed in favor of probation for failure to provide a written fee agreement, failure to advise a client with respect to the fees she was entitled to as conservator, failure to comply with duties as counsel to a conservator, failure to withdraw, failure to prevent a conflict between the conservator and heirs, and failure to comply with a court order to repay the estate, in violation of Rules 1.1(a) and (b), 1.3(a) and (c), 1.5(b), 1.7(b), and 8.4(d)); *In re Banks*, 709 A.2d 1181, 1181-82 (D.C. 1998) (per curiam) (ninety-day suspension with thirty days stayed in favor of probation for neglect and failure to communicate with a client in a pro bono divorce matter and failure to provide a written fee agreement in an unrelated administrative grievance proceeding, in violation of Rules 1.3(a) and (c), 1.4(a), and 1.5(b)); *In re Sumner*, 665 A.2d 986, 986-87 (D.C. 1995) (per

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<sup>4</sup> The petition cites as a mitigating factor that Respondent has “integrated a new practice management software that will assist with managing his caseload and billings.” Pet. 8. The Committee notes that while such software may be appropriate it does not seem to be an important mitigating factor.

curiam) (appended Board Report) (thirty-day suspension for mishandling of a criminal appeal, failure to provide a written fee agreement, failure to communicate, failure to return client property, and making a false statement of fact, in violation of Rules 1.1(a) and (b), 1.4(a), 1.16(d), 1.5(b), and 4.1(a)). Comparable negotiated discipline cases have also resulted in brief, stayed suspensions with probation. *See, e.g., In re Bah*, 999 A.2d 21, 21 (D.C. 2010) (per curiam) (thirty-day suspension stayed in favor of probation for failure to provide a written fee agreement, filing a deficient immigration appeal, failure to inform the client of its rejection, and missing the deadline to file an appeal, in violation of Rules 1.1(a) and (b), 1.3(a) and (c), 1.4(a) and (b), and 1.5(b)).

Because this is a negotiated discipline case, both our authority to make findings and our ability to draw conclusions of law are more limited than in a contested case. *See In re Johnson*, 984 A.2d 176, 181 (D.C. 2009) (per curiam). The “ultimate focus” of our review “must be on the propriety of the sanction,” and in particular “to ensure that [Disciplinary] Counsel is not offering an unduly lenient sanction.” *Id.* We are persuaded that the sanction in this case is justified and not unduly lenient. As described above, the proposed brief suspension is consistent with sanctions imposed in comparable cases.

We conclude that a ninety-day suspension, with 60 days stayed in favor of a one-year period of unsupervised probation, is justified. The negotiated sanction further requires Respondent to complete nine hours of CLE courses pre-approved by Disciplinary Counsel and complete the *Basic Training and Beyond* course provided by the D.C. Bar.

## VI. CONCLUSION AND RECOMMENDATION

For the reasons set forth above, the Hearing Committee concludes that the discipline negotiated in this matter is appropriate and recommends that it be approved: that the Court suspend Respondent from the practice of law for 90 days beginning 30 days after the Court issues its Order, with 60 days stayed in favor of a one-year period of unsupervised probation. The Court’s order

should include: (1) a condition that if probation is revoked, Respondent will be required to serve the remainder of the 90-day suspension; (2) a condition that during the 30-day served suspension and the ensuing one-year probation, Respondent shall not engage in any misconduct in this or any other jurisdiction; (3) a requirement that Respondent complete nine hours of CLE courses pre-approved by Disciplinary Counsel; and (4) a requirement that Respondent complete the *Basic Training and Beyond* course provided by the D.C. Bar.

If Disciplinary Counsel has probable cause to believe that Respondent has violated the terms of his probation, Disciplinary Counsel may seek to revoke Respondent's probation pursuant to D.C. Bar R. XI, § 3 and Board Rule 18.3, and request that Respondent be required to serve the remaining 60 days of suspension previously stayed herein.

AD HOC HEARING COMMITTEE

*Christian S. White*

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Christian S. White, Esq.  
Chair

*William V. Hindle*

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William V. Hindle, M.D.  
Public Member

*Dwaune L. Dupree*

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Dwaune L. Dupree, Esq.  
Attorney Member