DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:	:	
	:	
ROBERT W. MANCE,	:	Bar Docket No. 031-01
	:	
Respondent.	:	

REPORT AND RECOMMENDATION OF
THE BOARD ON PROFESSIONAL RESPONSIBILITY

This matter comes to the Board on Professional Responsibility (the "Board") from Hearing Committee Number Ten (the "Committee"), which concluded that Respondent violated D.C. Rules of Professional Conduct ("Rules") 1.1(a) and (b) (competent representation); 1.3(a) and (b) (zealous representation and neglect ripening into intentional violation); 1.4(a) (communication); 1.16(a)(3) (mandatory withdrawal upon discharge); and 8.4(d) (serious interference with the administration of justice). The Committee has recommended that Respondent be suspended for 30 days, the suspension to be stayed in favor of a one-year period of probation, with the following conditions: (1) that no later than a year after the final decision in this proceeding, Respondent shall be required to take continuing legal education courses, approved by Bar Counsel, including ethics and law office management, and (2) that Respondent not be the subject of any disciplinary complaint related to conduct arising between June 6, 2001, and a year after final resolution of this matter, provided that Bar Counsel files a formal Specification of Charges with respect to such a complaint within two years of the final resolution of this matter.

Neither Bar Counsel nor Respondent have taken any exceptions to the Committee's conclusions and recommendations, although Bar Counsel has suggested that we clarify the

probation recommendation. For the reasons set out below, the Board agrees with the Committee's findings of fact, its violations findings and recommends that Respondent be suspended for 30 days, stayed in favor of a one-year period of unsupervised probation with the sole condition that Respondent attend six hours of continuing legal education courses in legal ethics and law office management. Respondent should not be required to notify clients of this sanction under D.C. Bar R. XI, § 3(7).

I. Procedural History

On June 6, 2001, Bar Counsel filed with the Board a Specification of Charges and a Petition Instituting Formal Disciplinary Proceedings alleging that Respondent violated Rules 1.1(a) and (b); 1.3(a) and (b); 1.4(a); 1.16(a)(1); and 8.4(d) in connection with his representation of a criminal defendant on appeal. BX B.[1] Respondent filed an Answer in which he admitted the vast majority of the facts alleged but essentially denied that such facts constituted any violation of the Rules of Professional Conduct and/or were excused or explained by problems that arose as a result of the unexpected death of Respondent's partner in practice.

On July 27, 2001, Bar Counsel moved the Committee to amend the Specification of Charges to include an allegation that Respondent also violated Rule 1.16(a)(3). On August 9, 2001, Respondent opposed the motion, arguing that there was no factual basis to support the new charge. On August 13, 2001, the Committee, through its Chair, granted Bar Counsel's motion to amend.

This matter was heard by the Committee on October 10, 2001. Bar Counsel's Exhibits BX 1 through 12 were received in evidence without objection. Tr. at 78 (BX 12), 96 (BX 1-11). Bar Counsel's Exhibits BX A through C were not formally admitted in evidence, apparently as a

[1] For ease of reference, Bar Counsel's exhibits will be referred to as "BX." The transcript of the hearing will be referred to as "Tr." and the Hearing Committee's Report and Recommendation will be referred to as "HC Rpt."

result of an oversight, but we accept them as part of the record.[2] Respondent, who was represented by counsel, presented no exhibits. Bar Counsel called two witnesses: Ian Foreman, the complainant, *id.* at 22-71, and Mary Kennedy, Esquire, who provided expert testimony regarding criminal appellate procedure, *id.* at 77-95. Respondent testified on his own behalf on the issue of violations and mitigation of sanction. *Id.* at 126-93. He also called witnesses Jacob Stein, Esquire, and David Schertler, Esquire, both of whom testified as to Respondent's character and law practice, as well as to criminal practice in general. *Id.* at 102-25 (Stein), 194-203 (Schertler).

At the conclusion of the hearing, the Committee announced its preliminary, non-binding determination that Bar Counsel had presented evidence sufficient to support a finding of a violation of at least one of the alleged charges. Tr. at 219. Bar Counsel then offered evidence of prior discipline (two informal admonitions) in aggravation. *Id.* at 219-20.[3]

Following the hearing, the Committee Chair requested post-hearing briefs filed according to the briefing schedule prescribed by Board Rule 12.1. Tr. at 224. Bar Counsel filed proposed findings of fact, conclusions of law, and a recommendation as to sanction on November 13,

[2] The parties referred to the exhibits in their post-hearing briefs, as did the Committee in its Report. BX A is Respondent's application to the Bar. BX B is the Petition Instituting Formal Disciplinary Proceedings and Specification of Charges, and BX C is Respondent's Answer, which are already part of the record in this case. All of these exhibits were properly considered by the Committee and we now formally accept these exhibits as part of the record. *See* Board Rule 13.7. We note that, in the table of contents of Bar Counsel's exhibits submitted on July 9, 2001, there is reference to an exhibit "D," an Affidavit of Service. Such an affidavit was not included in the submission, however, and no such affidavit was ever filed with the Board Office. Thus, exhibit "D" appears to have been referred to in error; no BX D exists.

[3] Although the Committee members and counsel recognized that the informal admonitions should be identified for the record and formally admitted, and although Respondent had no objection to the admission of the informal admonitions, they were neither provided identifying exhibit numbers nor admitted into evidence. *See* Tr. at 219-24. The Hearing Committee mentioned them in their Report, however, and, therefore, they played some role, however minor, in the Committee's analysis. *See* HC Rpt. at 2, 14, 27. Because there were no objections to the admission of these informal admonitions, because the lack of a formal admission into evidence appears to have been an oversight, and because the informal admonitions properly played a role in the Committee's analysis, we consider them here, in keeping with Board Rule 13.7.

2001. Respondent filed his proposed findings of fact, conclusions of law, and recommended sanction on December 3, 2001.[4] Bar Counsel filed a reply on December 10, 2001.

The Committee issued its Report and Recommendation on October 17, 2002, finding that Respondent violated Rules 1.1(a) and (b), 1.3(a) and (b), 1.4(a), 1.16(a)(3), and 8.4(d). The Committee did not reach the issue of whether Respondent violated Rule 1.16(a)(1). *See* HC Rpt. at 21-22. The Committee recommended that Respondent be suspended for 30 days, the suspension to be stayed in favor of a period of probation conditioned on the completion of continuing legal education courses in both ethics and law office management within a year of final disposition of this matter[5] and that Respondent not be the subject of any disciplinary complaint for conduct arising between June 6, 2001, and one year after final disposition of this matter and for which Bar Counsel files a specification of charges within two years of final disposition of this matter. *Id.* at 36-37.

On October 28, 2002, Bar Counsel advised the Board that she did not except to the Committee's Report, but suggested that the Board reconsider the sanction recommendation insofar as the period of time in which Bar Counsel was to file any specification of charges relating to the second condition of probation should not exceed the period of probation, which Bar Counsel interpreted as being limited to one year. Respondent filed no exceptions. Pursuant to Board Rule 13.5, no oral argument was scheduled and the Board now takes action based upon the record.

[4] Respondent's post-hearing brief was due within ten (10) calendar days after receipt of Bar Counsel's submission. *See* Board Rule 12.1. It appears, but is not clear, that Respondent's brief was untimely filed under this rule. Bar Counsel raised no objection, however, and the Committee's Report made no mention of this issue.

[5] The Committee did not state how many hours of continuing legal education were expected.

II. Findings of Fact

The Board has reviewed and adopts the Findings of Fact made by the Committee which are set forth here with minor changes.[6]

A. Background

1. Respondent is a member of the Bar of the District of Columbia. He was admitted to practice on November 19, 1979, on motion based on his membership in the South Carolina Bar. He was assigned Bar Number 285379. BX A; HC Rpt. at 3.[7]

2. Respondent is a graduate of Howard University and of its law school. While in law school, he clerked for the law firm of Reynolds, Muriel, Mundy, & Anderson in the District of Columbia. Upon graduation from law school, he clerked for Judge Harry T. Alexander from 1969 to 1971, and then returned to South Carolina, his home State, to begin practicing law. He returned to the District of Columbia in 1980 and, in 1982, joined the firm of Mundy, Holt & Mance. That firm was primarily a litigation firm, with a heavy case load of criminal cases. Mr. Mundy was one of the leading criminal defense lawyers in the District of Columbia and he, together with Respondent, handled the bulk of the firm's criminal practice. HC Rpt. at 4.

3. Mr. Mundy died unexpectedly in 1995. Respondent assumed responsibility for Mr. Mundy's substantial case load, in addition to his own pending caseload. *Id.*

4. Since 1997, Respondent has been a solo practitioner with little administrative support. Respondent typically works long hours, frequently 12 to 13 hours a day. He has taken only two weeks of vacation since 1990. A large portion of Respondent's practice has been criminal defense work, and since many of his clients are incarcerated, Respondent has spent large

[6] Findings made by the Hearing Committee will be cited to the Hearing Committee Report. To the extent we include independent findings of fact (which we may do under Board Rule 13.7), we cite to the record before the Hearing Committee for findings made by the Board.

[7] Because the Hearing Committee did not number its findings, references are to page numbers in the HC Rpt.

amounts of time outside his office to interview them and to prepare for trial. He has also been required to provide them assistance beyond defending their criminal charges since they were not in a position to address other issues themselves, such as problems affecting their families and the condition of their incarceration at the D.C. Jail. *Id.*

5. The demands of Respondent's practice of criminal law, along with the demands of the heavy case load he inherited from Mr. Mundy, put substantial pressure on Respondent during the period when the claims in this case arose. In addition, Respondent experienced health problems during the relevant period. *Id.*

B. The Representation of Ian Foreman

6. In January or February 1998, Respondent was contacted by Ian Foreman's mother concerning the possibility of retaining Respondent to represent Mr. Foreman in a criminal proceeding in which Mr. Foreman was charged with seven counts of criminal conduct, including, *inter alia*, aggravated assault while armed, possession of a firearm during a crime of violence, mayhem while armed and carrying a pistol without a license. Respondent met with Mr. Foreman shortly thereafter, and Mr. Foreman advised Respondent that he wanted to retain him. On or about March 5, 1998, Robert Kimmerly, a friend of Mr. Foreman's family, executed a retainer agreement with Respondent to represent Mr. Foreman. The retainer was a flat fee of $5,000. HC Rpt. at 5.

7. Mr. Foreman's case was tried to a jury from June 23 to July 1, 1998, when jury deliberations commenced. Those deliberations were recessed for the July 4th weekend on July 2, 1998. On the following Monday, July 6, one of the jurors advised the Court that the juror had learned over the weekend that his son "had contact" with some of the parties. The juror felt he

could not continue to serve as a juror. The Court dismissed the juror and proceeded to allow an 11-person jury to decide Mr. Foreman's fate. *Id.*

8. The eleven-member jury returned its verdict on July 6, 1998, finding Mr. Foreman guilty on five of the seven counts. After some further unsuccessful jury deliberations, the Court declared a mistrial as to the remaining counts. *Id.* at 5-6.

9. Mr. Foreman was initially sentenced on November 30, 1998. On December 8, 1998, the Superior Court corrected his sentence, and sentenced him to 15 years to life for aggravated assault and a concurrent term of five to 15 years for possession of a firearm during a crime of violence, 15 years to life to run consecutively for mayhem while armed and a concurrent five to 15 years for possession of a firearm during a crime of violence and for carrying a pistol without a license. This sentence effectively committed Mr. Foreman to prison for a term of 30 years to life. *Id.* at 6.

10. At sentencing, the Superior Court advised Mr. Foreman of his right to appeal his conviction. At Mr. Foreman's request, Respondent agreed to note an appeal. Respondent and Mr. Foreman also discussed briefly what issues Mr. Foreman might raise on the appeal, including the Court's decision to proceed with an 11-person jury rather than declare a mistrial, which Mr. Foreman agreed should be raised on appeal. *Id.*

11. At the time, Respondent believed that Mr. Foreman wanted him to handle the appeal, and since Respondent did not take Criminal Justice Act appointments, that Mr. Foreman needed to produce the funds to pay him for the work. HC Rpt. at 6.

12. Mr. Foreman had decided not to keep Respondent as his attorney because he also wanted to include an ineffective assistance of counsel argument in his appeal. At the time,

however, Mr. Foreman did not tell Respondent that he wanted new counsel or that he wanted to raise an ineffective assistance of counsel claim. *Id.*

13. Mr. Foreman's notice of appeal was due 30 days after sentencing, *i.e.*, January 7, 1999. Respondent filed the notice of appeal on January 12, 1999, *i.e.*, four days late. *Id.* at 7. Respondent testified that he miscalculated the due date for the notice, and at the time of filing was unaware that the notice was late. Tr. at 149.

14. Respondent's retainer agreement with Mr. Kimmerly covered only the representation of Mr. Foreman at trial. Sometime prior to when Respondent filed the notice of appeal, Mr. Kimmerly advised Respondent that he did not have the funds to pay for the appeal, and therefore, Respondent did not plan to represent Mr. Foreman on appeal. Accordingly, he checked the box in the form notice of appeal requesting that the Court appoint counsel under the Criminal Justice Act to handle the appeal. HC Rpt. at 7; Tr. at 148-51.

15. Notwithstanding Respondent's request that new counsel be appointed, the District of Columbia Court of Appeals did not appoint new counsel but continued to serve Respondent as Mr. Foreman's counsel, listing him as such on its docket sheets. Respondent, however, did not notify the court that he was not Mr. Foreman's counsel. Instead, he acted on Mr. Foreman's behalf in connection with the appeal: on June 1, 1999, Respondent filed a Motion to File Docketing Statement, Designation of Record, and Statement Regarding Transcript Times Having Expired; he picked up the trial transcripts when he was notified that they were ready; he notified the court when he discovered that the delivered transcripts were incomplete, sought an extension of time to file a brief on Mr. Foreman's behalf based on the delay associated with obtaining complete transcripts; and, on July 13, 2000, he filed a brief. All of this suggested that he had been retained to handle the appeal. HC Rpt. at 7-8; BX 9.

16. While he prosecuted Mr. Foreman's appeal, Respondent's contacts with Mr. Foreman concerning the appeal were limited. As noted above, Respondent spoke briefly to Mr. Foreman after the sentencing hearing, when Mr. Foreman requested that he note an appeal. They spoke again by telephone in the spring of 1999 (after the notice of appeal was filed), regarding forms Mr. Foreman would need to complete in order to obtain trial transcripts without cost. HC Rpt. at 8.[8]

17. Mr. Foreman testified that he tried to reach Respondent several times by telephone and was unsuccessful. Mr. Foreman admitted, however, that he typically did not leave any message requesting Respondent to call him, although Mr. Foreman maintains that at times he did leave a message. *Id.*

18. Mr. Foreman was moved from one penal institution to another during the period when his appeal was pending, and it is not clear that Respondent knew where to contact him. It also appears that Respondent did not attempt to learn Mr. Foreman's whereabouts and did not return any of Mr. Foreman's calls. *Id.*

19. Thus, Respondent had only two contacts with Mr. Foreman concerning the appeal. *See* Findings 16-18, above. At some point during the appeal process, Mr. Foreman's stepfather requested copies of the transcripts. Mr. Foreman's stepfather picked up the originals from Respondent, had them copied, and returned the originals to Respondent. Respondent did not have any other contacts with Mr. Kimmerly or with other members of Mr. Foreman's family. *Id.* at 9.

[8] Respondent was acting in response to a Court order directing him to file *in forma pauperis* papers on behalf of Mr. Foreman. Subsequently, the Court vacated that order and ruled that Mr. Foreman was entitled to proceed *in forma pauperis* based on the trial court's determination of his eligibility. While Respondent maintains that he sent Mr. Foreman the *in forma pauperis* papers, his file for Mr. Foreman's case did not include any notion that he had done so nor did it include copies of those papers, either signed or in blank. HC Rpt. at 8 n.11.

20. On July 13, 2000, Respondent filed an appeal brief on Mr. Foreman's behalf. The brief addressed the 11-member jury issue discussed with Mr. Foreman immediately after his sentencing and a claim that there was insufficient evidence to support Mr. Foreman's conviction. The brief did not include an ineffective assistance of counsel claim, as Respondent was unaware that Mr. Foreman wanted to raise such an argument. *See* Finding 12, above. The brief also did not argue that the convictions on two of the counts in the indictment of Mr. Foreman merged and that therefore one of the convictions, along with possession of a firearm during the commission of a crime of violence, should have been dismissed, thereby reducing Mr. Foreman's sentence. HC Rpt. at 9.

21. Respondent never sent the brief to Mr. Foreman nor did he send a draft. He also did not provide either the brief or a draft to any member of Mr. Forman's family or to Mr. Kimmerly. *Id.*

22. On September 22, 2000, the government filed its brief in Mr. Foreman's appeal. In that brief, the government argued, *inter alia*, that the appeal should be dismissed because it was not timely filed. That brief also acknowledged that several of the counts in the indictment merged and that Mr. Foreman's sentence was incorrect. *Id.*

23. Respondent did not send a copy of the government's brief to Mr. Foreman, nor did he file a reply brief or otherwise respond to the government's argument concerning the timeliness of the notice of appeal. He also did not respond to the government's concession that Mr. Foreman's sentence was improper because of a merger of the criminal charges. *Id.* at 9-10.

24. On October 10, 2000, Mr. Foreman wrote to the District of Columbia Court of Appeals requesting information concerning the status of his appeal and that the Court appoint new counsel. When Mr. Foreman wrote to the Court, he did not know that the Court had listed

Respondent as counsel of record on appeal nor did he know that Respondent had filed a brief on his behalf. *Id.* at 10.

25. On October 13, 2000, the Court forwarded a copy of Mr. Foreman's letter to Respondent so that Respondent "may contact Mr. Foreman concerning the matter mentioned in his letter." *Id.* The Court requested that Respondent notify the Court within 20 days whether the matter had been resolved. The Court served a copy of the letter on Mr. Foreman. *Id.*

26. On October 19, 2000, Mr. Foreman wrote again to the Court, this time protesting that Respondent was handling the appeal and asserting that he had wanted new counsel. He also advised the Court that he was not aware that a brief had been filed. He requested that the Court dismiss the brief filed on his behalf and the government's brief in opposition and that the Court appoint new counsel to handle his appeal. Having received no reply to its October 13 letter to Respondent, the Court forwarded this second letter to him on November 20, 2000, noting that Respondent had not replied to its earlier letter and again directing Respondent to advise the Court within 20 days whether the matter had been resolved. HC Rpt. at 10-11.

27. Respondent never replied to either the Court's October 13 letter or its November 20 letter. *Id*. at 11.

28. On November 27, 2000, Mr. Foreman filed a "Motion to Withdraw Counsel" with the Court, again requesting that new counsel be appointed. The motion was not received by the Court until December 6. Prior to receiving Mr. Foreman's motion, however, the Court, on November 29, had issued an order requiring Mr. Foreman to show cause why his appeal should not be dismissed for lack of jurisdiction for failure to note his appeal in a timely manner. This order was served on Mr. Foreman, but not on Respondent. *Id.*; BX 10 at 142.

29. On December 10, 2000, Mr. Foreman replied to the show cause order. He advised the Court that he had asked Respondent to file a notice of appeal and argued that he should not be "held accountable" for Respondent's failure to file a timely appeal. On the same date, Mr. Foreman filed a complaint against Respondent with Bar Counsel. HC Rpt. at 11.

30. On December 15, 2000, the Court, believing Respondent was "appointed counsel," vacated the November 29 order and issued a new order to show cause why the appeal should not be dismissed for lack of jurisdiction based upon untimely filing. This order was served on Respondent. *Id.* at 11, n.12; BX 10 at 141.

31. Respondent did not respond to the December 15 order to show cause. *See* HC Rpt. at 11. On January 10, 2001, the Court of Appeals, expressly noting Mr. Foreman's *pro se* response to the earlier order, dismissed Mr. Foreman's appeal for lack of jurisdiction because the appeal was not timely noted but also ordered that "the Clerk shall transmit[] a copy of the notice of appeal . . . to the Criminal Division of the Superior Court to be filed as a motion for extension of time pursuant to D.C. App. R. 4(b)(3)." *Id.* at 11-12; BX 10 at 145. That order was sent to the Superior Court on February 1, 2001, and filed there on February 15, 2001. HC Rpt. at 11-12; BX 10 at 147.

32. Respondent was served with the order, but he did not file anything in support of the request for an extension of time to note the appeal, nor did he send a copy of the order to Mr. Foreman. Although the Court served a copy on Mr. Foreman, it was sent to an out-of-date address. It is not clear when Mr. Foreman learned that his appeal had been dismissed. HC Rpt. at 11-12.

33. On January 26, 2001, Bar Counsel notified Respondent that Mr. Foreman had filed a complaint against him with the Office of Bar Counsel and that he was in an adversary position

with respect to his client. Bar Counsel further advised Respondent that he should seek the Court's permission to withdraw as counsel. Bar Counsel stated: "Please advise us in writing, within seven days from the date of this letter whether you have moved for withdrawal and include a copy of your motion." HC Rpt. at 12. On March 8, 2001, some six weeks after Bar Counsel suggested that Respondent seek to withdraw, Respondent filed his motion to withdraw. Notwithstanding Respondent's motion to withdraw, the Court of Appeals continued to serve Respondent and to list him as counsel of record. *Id.*

34. On March 19, 2001, notwithstanding the lack of any new filing in the Superior Court by Respondent or Mr. Foreman, Judge Winfield of the Superior Court granted the motion for extension of time to file a notice of appeal. *Id.*; BX 10 at 171. Bar Counsel alerted Respondent (via letter to Respondent's counsel) to the order and the need to file a new notice of appeal. HC Rpt. at 12; BX 4. Respondent filed a new notice of appeal on Mr. Foreman's behalf on April 7, 2001. HC Rpt. at 12; BX 5.

35. Sometime thereafter, Respondent filed a second motion to withdraw and spoke to the Clerk of the Court, after which he was removed as counsel of record. New counsel was subsequently appointed and Mr. Foreman's new appeal was pending before the Court of Appeals when this matter was heard. HC Rpt. at 12-13.

C. Other Relevant Facts

36. Bar Counsel's expert witness, Ms. Kennedy, and Respondent's lawyer witnesses all testified that competent counsel at times fail to file a timely appeal in criminal cases and that there are well-established procedures to cure such a lapse. Indeed, Respondent stated that he knew what procedures to follow where an appeal was not timely filed, but contends that he was not aware that he had missed the filing date until he received the government's brief. *Id.* at 13.

37. Mr. Stein and Mr. Schertler testified as to Respondent's excellent reputation among criminal defense attorneys and among the Judges of the Superior Court. Both also attested to Respondent's dedication to his clients. *Id.*

38. Mr. Stein, a distinguished member of the District of Columbia Bar, has defended some of the more famous and infamous defendants in the District of Columbia and has served as an Independent Counsel investigating former Attorney General Edmund Meese. He has also written on legal matters and is the recipient of numerous honorary awards. Mr. Stein was originally Respondent's counsel in this matter. Mr. Stein testified that he had known Respondent for some period of time, having worked with him and with Mr. Mundy. Mr. Stein stressed the difficulty in representing criminal defendants such as Mr. Foreman, and the kinds of pressures Respondent must have faced as a sole practitioner, particularly after Mr. Mundy's death. Mr. Stein testified:

> Most of these cases you get as a criminal lawyer doing a lot of criminal work involve insoluble problems for the client. Any many times when the case is resolved, the client's [sic] dissatisfied, not infrequently makes a claim against counsel . . . It's a very difficult practice; difficult cases and demanding clients, and very leery. You have to be available night and day for these people . . .
> You're getting telephone calls from people that you don't know who try and tell you their problems. You have court engagements. When someone like Ken [Mundy] dies suddenly, their office is in chaos. You are trying to cover too many things because of an unexpected event, and the problems that arise are unforeseeable.

HC. Rpt. at 13-14 (citing Tr. at 107-08, 113).

39. Mr. Schertler is a former Chief of the Homicide Section of the United States Attorney's Office in the District of Columbia and an alumnus of the Department of Justice. He is also a partner of Respondent's current counsel. He stated that Respondent was "of the highest caliber criminal defense attorney in Superior Court. When Bob Mance was your opponent, you knew that you were going to be in for a tough, aggressive fight. . . . a fair fight and that Bob was

a straight shooter, but that he represented his clients zealously and aggressively to the fullest extent of the law." *Id.* at 14.

40. Respondent has been the subject of two informal admonitions. The first was issued in August 1996 for a violation of Rule 1.5(b) in that he undertook a matter where he did not provide his client with a written description of the basis or rate of the fee. The second informal admonition was issued in August 2000 for a violation of the same Rule 1.5(b). *Id.*

III. Analysis

A. Rule 1.1(a) (failure to provide competent representation)

Rule 1.1(a) requires that a lawyer "provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." The Comments to Rule 1.1 reiterate 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, cmnt. 5. Respondent failed to meet this standard.

There is no dispute that noting an appeal in a timely manner is part of providing competent representation and that criminal defense attorneys typically file such notices of appeal in a timely manner. While it is also clear that, at times, attorneys miss the deadline for noticing an appeal, the witnesses made clear that there are procedural vehicles by which the lapse may be cured and the defendant's appeal rights protected.

In this case, Respondent argued that Bar Counsel's complaint went too far in casting one missed deadline as an ethical violation. In doing so, Respondent failed to recognize that the essence of the ethical violation here is not merely the missed deadline, but the failure to address it. While it is clear that Respondent was initially unaware that the notice of appeal was filed late,

he became aware of the problem when he received the government's brief, which expressly raised the issue. Instead of replying to that brief or taking other action to correct his error, however, Respondent did nothing. When the Court issued its order to show cause, again bringing the untimeliness of the notice to Respondent's attention, Respondent once again did nothing.

Furthermore, Respondent's errors were not limited to the late notice of appeal. Respondent's appellate representation of Mr. Foreman ignored the fact that Mr. Foreman's sentence was improper due to the merger of the offenses. Respondent should have been aware of this possible argument and included it in his original brief. Failing that, he certainly could have taken some action to preserve this issue once the matter was brought to his attention by the government's brief, which conceded the issue. Respondent did not take any action, nor did he file a reply brief, and, thus, never presented this important argument on his client's behalf.

Respondent failed to assert and preserve his clients' rights on appeal. Such failure constitutes a violation of Rule 1.1(a). *See, e.g.*, *In re Drew*, 693 A.2d 1127 (D.C. 1997) (per curiam) (failure to file notice of appeal); *In re Sumner*, 665 A.2d 986 (D.C. 1995) (per curiam) (appended Board Report) (failure to take proper action on appeal). We agree with the Hearing Committee and conclude that Respondent violated Rule 1.1(a).

B. Rule 1.1(b) (skill and care)

Rule 1.1(b) provides that a "lawyer shall serve a client with skill and care commensurate with that generally afforded to clients by other lawyers in similar matters." Bar Counsel presented clear and convincing evidence in this case that there are corrective measures that may be and often are taken by criminal attorneys when one has missed a deadline for a notice of appeal. Neither Respondent's testimony, nor that of his lawyer witnesses contradicted this

testimony and, in many ways, it was entirely consistent with that presented by Bar Counsel's expert. Respondent failed to take the corrective actions available to him, notwithstanding at least two opportunities to do so. In light of the evidence presented, we agree that Respondent did not serve Mr. Foreman with the skill and care commensurate with that generally afforded by other lawyers in similar matters and, therefore, violated Rule 1.1(b).

C. Rule 1.3(a) (diligence and zeal)

Rule 1.3(a) provides that a "lawyer shall represent a client zealously and diligently within the bounds of the law." Violations of Rule 1.3(a) have been found where respondents have failed to take action on their clients' behalf. *See, e.g., In re Wright*, 702 A.2d 1251 (D.C. 1997) (per curiam); *In re Lewis*, 689 A.2d 561 (D.C. 1997) (per curiam); *In re Chisholm*, 679 A.2d 495 (D.C. 1996). The rule is violated even where "the failure to take action for a significant time to further a client's cause . . . [does] not [result in] prejudice to the client . . . ." *Lewis*, 689 A.2d at 564.

While Bar Counsel placed great stress on Respondent's failure to file a timely notice of appeal, the Committee found it unnecessary to reach the question of whether that failure standing alone violated Rule 1.3(a), because Respondent's failure to take any steps to protect Mr. Foreman's appeal rights once the timeliness of the notice of appeal was raised "clearly violated the rule." HC Rpt. at 17. We agree, and note in this regard that Respondent engaged in a number of failures; not only did he file the notice of appeal late, he failed to recognize that fact and take any corrective measures despite two distinct and obvious opportunities to do so. *Cf. In re Reback*, 487 A.2d 235, 238 (D.C. 1985) (per curiam) (quoting ABA Comm. on Ethics and Prof. Responsibility, Informal Op. 1273 (1973)), *aff'd in pertinent part*, 513 A.2d 226 (D.C. 1986) (en banc) ("Neglect usually involves more than a single act or omission. Neglect cannot

be found if the acts or omissions complained of were inadvertent or the result of an error of judgment made in good faith."). In addition, Respondent ignored the merger issue and had not properly communicated with his client to assure that he was aware of his client's desires regarding other matters to be raised on appeal. *See In re Bernstein*, 707 A.2d 371, 376 (D.C. 1998) (citing *In re Lyles*, 680 A.2d 408 (D.C. 1996) ("A lawyer violates the requirements of zeal and diligence when he or she fails to communicate with the client and fails to take the necessary steps to preserve the client's interests.")).

Respondent's presentation to the Hearing Committee suggested that Respondent's failures were excused or explained by the fact that he had an extremely heavy case load due to the unexpected death of his law partner, Kenneth Mundy. As noted by the Committee, however, Mr. Mundy died in 1995, several years before the events now at issue. "A lawyer's work load should be controlled so that each matter can be handled adequately." Rule 1.3, cmnt. 1. Accepting that Mr. Mundy's untimely and unexpected death did result in Respondent feeling responsible for an overwhelming number of cases, Respondent had adequate time to transfer cases he was not able to handle in the three years that passed between Mr. Mundy's death and the events at issue here. The obligation to represent a client zealously remains despite "opposition, obstruction, or personal inconvenience to the lawyer" and requires the lawyer "to take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor." *See id.* "A personal crisis does not justify an extended neglect of a pending case." *Bernstein*, 707 A.2d at 376 (citing *In re Dunietz*, 687 A.2d 206, 211-12 (D.C. 1996)).

In light of the above, we agree with the Hearing Committee that Respondent violated Rule 1.3(a).

D. Rule 1.3 (b) (intentional neglect or prejudice)

Rule 1.3(b) provides:

> A lawyer shall not intentionally (1) fail to seek the lawful objectives of a client through reasonably available means permitted by law and the disciplinary rules; or (2) prejudice or damage a client during the course of the professional relationship.

The hallmark of a Rule 1.3(b) violation is that the neglect be intentional. *See In re Reback*, 487 A.2d 235, 240 (D.C. 1985) (per curiam), *aff'd in pertinent part*, 513 A.2d 226, 229 (D.C. 1986) (en banc). Rule 1.3(b) does not require proof of intent in the usual sense of the word. "Neglect ripens into an intentional violation when the lawyer is aware of his neglect of the client matter." *Lewis*, 689 A.2d at 564. *See In re O'Donnell*, 517 A.2d 1069, 1072 (D.C. 1986) (per curiam) (appending Board Report) ("inaction . . . coupled with an awareness of [ ] obligations" constituted violation of DR 7-101(A)(1), predecessor to 1.3(b)(1)). *See also In re Robertson*, 612 A.2d 1236 (D.C. 1992); *In re Haupt*, 444 A.2d 317 (D.C. 1982) (per curiam); *In re Haupt*, 422 A.2d 768 (D.C. 1980) (per curiam); *In re Fogel*, 422 A.2d 966 (D.C. 1980) (per curiam).

In this case, Bar Counsel argued that Respondent's failure to protect Mr. Foreman's appeal rights ripened into an intentional violation after Respondent received notice in the government's brief that his notice of appeal was untimely and after the issuance of the Court's show cause order indicating that the appeal was not timely taken. The Committee concluded that these two omissions constituted the kind of knowing abandonment discussed in *Reback* and *Lewis* that violates Rule 1.3(b)(1). We agree.

However reluctantly he may have done so, Respondent took on responsibility for the appeal. He, thus, had a duty to read the government's brief and the Court's orders and take necessary action in response. Respondent's failure to take appropriate action in the face of these

clear indications of his original error constituted a knowing abandonment.[9] We therefore agree with the Hearing Committee and conclude that Respondent violated Rule 1.3(b)(1).

E. Rule 1.4 (a) (communication)

Rule 1.4 (a) provides that a "lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information." "A client is entitled to whatever information the client wishes about all aspects of the subject matter of the representation unless the client expressly consents not to have certain information passed on. The lawyer must be particularly careful to ensure that decisions of the client are made only after the client has been informed of all relevant considerations. The lawyer must initiate and maintain the consultative and decision-making process if the client does not do so and must ensure that the ongoing process is thorough and complete." Rule 1.4, cmnt. 2.

Respondent did not meet the obligations of Rule 1.4. He had only two conversations with Mr. Foreman about the appeal: one immediately after sentencing and another about obtaining trial transcripts. The sole additional contact Respondent had with Mr. Foreman or his family was when Mr. Foreman's stepfather requested the opportunity to copy the trial transcripts. Respondent did not discuss the brief with Mr. Foreman. He did not send Mr. Foreman a copy of the brief, either in draft or as filed. Nor did he send Mr. Foreman a copy of the government's brief, or notify Mr. Foreman that the Court has issued an order to show cause why the appeal should not be dismissed.

That minimal level of communication between Respondent and his client did not comply with Rule 1.4(a). *See Sumner*, 665 A.2d at 989 ("While the appeal process in many instances

[9] Indeed, had Mr. Foreman not responded himself to the show cause order, his appeal could well have been dismissed with prejudice, rather than with a direction to the Superior Court to treat the appeal as a request for an extension of time.

may not require a client to be informed of each development in the process of perfecting the appeal, surely an attorney has an obligation to alert the client as to whether he has filed a brief that is required in order to avoid jeopardizing the appeal itself."); *In re Stanton*, 470 A.2d 272, 278 (D.C. 1983) (per curiam) (appended Board Report) ("[F]ull and complete communication with the client is an essential part of the attorney's role."). Even if immediately after filing the notice of appeal, Respondent reasonably believed he was not appellate counsel, it soon was clear that the Court was looking to Respondent as counsel, and Respondent took on that role prior to the time he filed the appellate brief. Having assumed the representation, Respondent assumed the duty of communication. Indeed, had Respondent fulfilled this obligation, he would have become aware that Mr. Foreman wanted another attorney so that he could raise the ineffective assistance of counsel argument on appeal. *See* Rule 1.4, cmnt. 1 ("The client should have sufficient information to participate intelligently in decisions concerning he objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so.").

Respondent's overwork does not excuse his failure to assure that his client was consulted as to his appeal. *See In re Foster*, 581 A.2d 389, 390, 391-92 (D.C. 1990) (per curiam) (lawyer who was incapacitated by a stroke had an obligation to keep his client informed of his situation and perhaps withdraw). Nor do we think the lack of communication is excused by fact that Mr. Foreman was moved to a different facility or that he did not always leave messages when he called Respondent. As noted above, "[t]he lawyer must initiate and maintain the consultative and decision making process if the client does not do so . . . ." Rule 1.4, cmnt. 2. While this may be a more difficult task for those representing incarcerated persons, there is no exception for criminal defense attorneys. *See Stanton*, 470 A.2d at 278 ("Whether or not respondent cares to

visit the D.C. jail to communicate with his clients is immaterial. If he chooses not to visit his clients at the jail, then he has the responsibility to devise some other means of keeping them posted as to developments in their cases."). Having taken on the representation, Respondent had the duty to communicate with his client. He failed to do so and, therefore, we agree with the Hearing Committee that Respondent violated Rule 1.4(a).

F. Rule 1.16(a) (withdrawal from representation)

Rule 1.16(a) provides that "a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in violation of the rules of professional conduct or other law; or . . . (3) the lawyer is discharged." In the present case, as of October 10, 2000, Mr. Foreman made clear to the Court that he wanted counsel appointed to represent him in the appeal. Respondent became aware of this fact when he received the Court's letter, forwarding Mr. Foreman's letter, on or soon after October 13, 2000. On October 19, 2000, Mr. Foreman again wrote to the Court making it abundantly clear that he did not want Respondent representing him, going so far as to request that the brief that Respondent already filed on Mr. Foreman's behalf, be withdrawn. Respondent became aware of this request on or soon after November 20, 2000, when the Court forwarded the letter to Respondent and directed Respondent to take some action to resolve the matter within 20 days.

There is no question that, by this time, Respondent was aware that he had been terminated as counsel. Yet, Respondent did not file a motion to withdraw until March 8, 2001, *i.e.*, more than three months later. In a somewhat similar case, the client had filed a motion to have the respondent dismissed as counsel and the respondent did not respond to the Court's

orders regarding the client's request. *In re Ontell*, Bar Docket No. 228-96 at 8-10 (BPR June 11, 1998), *aff'd in relevant part,* 724 A.2d 1204 (D.C. 1999) (per curiam). The Board noted, "[c]learly, the Court wanted either some indication from Respondent that the differences had been worked out or confirmation that they were irreconcilable and that he should be allowed to withdraw. Respondent provided noting at all to the Court . . . Respondent's failure to withdraw when he took no steps to resolve the difference with the client, knowing that the client wanted a new lawyer, violated Rule 1.16." *Id.* at 13. We agree with the Hearing Committee that between November 2000 and March 2001, Respondent violated Rule 1.16(a)(3).[10]

G. Rule 8.4(d) (serious interference with the administration of justice)

Rule 8.4(d) provides that "[i]t is professional misconduct for a lawyer to . . . engage in conduct that seriously interferes with the administration of justice." To establish this violation, Bar Counsel must show by clear and convincing evidence that:

1. Respondent's conduct was improper, *i.e.*, that Respondent either acted or failed to act when he should have;
2. Respondent's conduct bore directly upon the judicial process with respect to an identifiable case or tribunal; and
3. Respondent's conduct tainted the judicial process in more than a *de minimis* way, *i.e.*, it must have potentially had an impact upon the process to a serious and adverse degree.

[10] Bar Counsel also charged Respondent with violating Rule 1.16(a)(1), arguing that Respondent should have withdrawn "when (1) he realized that he could not represent Mr. Foreman competently, or (2) when the timeliness issue was brought to his attention, if he believed that he could not raise his own neglect . . . ." Bar Counsel's Post-hearing brief at 18-19. The Hearing Committee suggested that Respondent's actions arguably fell within the purview of Rule 1.16(a)(1), but found it unnecessary to address this charge, in light of the finding of a violation of Rule 1.16(a)(3). HC Rpt. at 21-22. No party has taken exception to the Committee's Report, and we do not find clear and convincing evidence in the record to support independent findings of fact, *see* Board Rule 13.7, that Respondent knew or should have known that continued representation would, necessarily, violate the Rules of Professional Conduct or other law. *Cf. In re Starnes*, Bar Docket Nos. 269-97, 287-97 & 454-97 at 17 (BPR July 31, 2002) (attorney who began federal employment required to withdraw from private representations), *adopted*, 829 A.2d 488 (D.C. 2003) (per curiam) (appended Board Report); *In re Hager*, Bar Docket No. 031-98 at 23 (BPR July 31, 2001),*aff'd*, 812 A.2d 904 (D.C. 2002) (lawyer should have withdrawn when secret agreement with opposing party regarding fees required him to withhold information from clients); *In re Shay*, Bar Docket No. 54-96 at 27-28 (BPR May 20, 1999),*aff'd*, 749 A.2d 142 (D.C. 2000) (per curiam) (lawyer should have withdrawn when keeping one client's secret meant being dishonest with another client).

In re Hopkins, 677 A.2d 55, 60-61 (D.C. 1996).

A variety of conduct has been found to violate the rule. *See, e.g., In re L.R.*, 640 A.2d 697 (D.C. 1994) (negotiating, as attorney appointed through Criminal Justice Act, with client to file a motion in return for payment from the client); *In re Delate*, 598 A.2d 154 (D.C. 1991) (per curiam) (failing, as conservator, to appear at hearing, file required accountings, and respond to inquiries for Bar Counsel); *In re Sandground*, 542 A.2d 1242 (D.C. 1988) (per curiam) (assisting client in divorce case to conceal assets); *In re Jones*, 521 A.2d 1119 (D.C. 1986) (failing to respond to Bar Counsel's legitimate written inquiries in connection with investigation of respondent's conduct as conservator). Failure to obey a court order has been held to constitute a violation of Rule 8.4(d). *See, e.g., In re Lyles*, 680 A.2d 408 (D.C. 1996) (per curiam) (failing to obey court order). "[F]ailure to appear in court for a scheduled hearing is another common form of conduct deemed prejudicial to the administration of justice." Rule 8.4, cmnt. 4; *see Lyles*, 680 A.2d at 416.

In this case, Respondent's conduct clearly meets the first two criteria to establish a violation of Rule 8.4(d). First, his conduct was improper; he was directed by the Court to take some action in response to Mr. Foreman's October 2000 letters and he did not do so. Not only did he not contact Mr. Foreman, but he also did not respond to the Court within the time frame specified in its letters. Such indifference to a court's direction is clearly improper. Second, the conduct bore directly on an identifiable case: Mr. Foreman's appeal.

Thus, the real question here is whether the conduct "tainted" the judicial process in more than a *de minimis* way. Bar Counsel does not directly address that issue. Respondent argued before the Committee that his failure to respond to the Court's letters did not taint the judicial process because it did not have a significant adverse effect on Mr. Foreman, *i.e.*, the appeal was

ultimately preserved by the Court of Appeals' remand to the Superior Court with the direction that the untimely notice of appeal be treated as a request for an extension of time, and Mr. Foreman obtained new counsel who prosecuted the appeal. The fact that the appeal was able to continue, however, does not excuse Respondent's conduct. Rule 8.4(d) does not require proof of an impact on the *client*, but, rather proof of a more than *de minimis* impact on the *judicial process*.[11]

The Court of Appeals has made it clear that the intentional failure to appear at a court hearing and/or comply with a court order is a violation of Rule 8.4(d). We see no reason to distinguish the Court of Appeals' requests for action and information in this case merely because they were transmitted in the form of letters rather than orders. Respondent received the Court's initial letter on or about October 13, 2000, and did nothing. He received the second letter shortly after November 20 and did nothing. The fact that Respondent eventually addressed the matter months later (after Bar Counsel directed him to do so after this disciplinary matter was pending) is of little import; by that time, the violation was complete. *Cf. In re Beller*, 802 A.2d 340 (D.C. 2002) (per curiam) (failure to comply with Board order to respond to Bar Counsel's requests for information within a certain period of time constituted violation of Rule 8.4(d) notwithstanding the fact that respondent provided a response after the deadline set by the order); *In re Steinberg*, 761 A.2d 279 (D.C. 2000) (per curiam) (same). We therefore agree with the Committee and conclude that Respondent violated Rule 8.4(d).

[11] We do not mean to suggest that Mr. Foreman was not prejudiced by Respondent's conduct merely because his appeal was ultimately prosecuted. Indeed, the delay in such prosecution may well constitute some form of prejudice to Mr. Foreman and the appeal may not have been revived but for Mr. Foreman's self-help in response to the order to show cause. The focus under Rule 8.4(d), however, is not the affect on the client but, rather, the affect on the judicial process. Thus, it is possible for Bar Counsel to prove a Rule 8.4(d) violation even when there is no evidence of resulting prejudice to a client, such as in cases where attorneys fail to respond to Bar Counsel's requests for information and fail to respond to Board orders compelling such responses.

IV. Sanction

In determining the appropriate sanction, the Court has considered the seriousness of the misconduct and sanctions for comparable misconduct,[12] prior discipline, prejudice to the client, violation of other disciplinary rules, whether the conduct involved dishonesty, the respondent's attitude, and circumstances in aggravation and/or mitigation. *See In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (en banc); *see also In re Slattery*, 767 A.2d 203, 214-15 (D.C. 2001); *In re McLain*, 671 A.2d 951, 954 (D.C. 1996); *In re Jackson*, 650 A.2d 675, 678-79 (D.C. 1994) (per curiam) (appended Board Report); *In re Hill*, 619 A.2d 936, 939 (D.C. 1993) (per curiam). We treat these factors below:

A. Seriousness of the Misconduct and Sanctions for Similar Misconduct

The range of sanctions for cases involving neglect extends from public censure to disbarment. Where in that range the sanction is set depends on a number of factors, including the number of violations, whether the violations include intentional failures, whether they include dishonesty, the respondent's disciplinary history and the respondent's appreciation of and attempts to rectify his misconduct.

Suspensions of several months or more have generally been imposed in cases involving multiple clients. *See, e.g., Foster*, 699 A.2d at 1110 (respondent disbarred for three matters involving twenty-three violations, including neglect, dishonesty to court and to clients, failure to attend scheduled hearings and conferences, failure to file pleadings and comply with court deadlines and orders and failure to keep his clients informed, resulting in default judgment against a client, in addition to failing to comply with orders of the Court or the Board and refusal to participate in disciplinary proceeding); *In re Grimes*, 687 A.2d 198 (D.C. 1996) (per curiam)

[12] The Board has a duty not to recommend dispositions which would foster a tendency towards inconsistent dispositions for comparable conduct. *See* D.C. Bar R. XI, § 9(g)(1).

(one-year suspension with fitness for violations related to five clients over a six-year period, including neglect, intentional failure to seek the client's lawful objectives, intentional prejudice or damage to a client, failure to take reasonable steps to avoid foreseeable prejudice to clients (including delivering papers and property to which clients were entitled), and lack of candor with clients about the status of their matters); *Lyles*, 680 A.2d at 408 (six-month suspension with fitness for four complaints, covering a period slightly over a year, that resulted in findings of neglect in handling bankruptcy matters and conduct that seriously interfered with the administration of justice, in the respondent's failure to appear for scheduled hearings); *In re Ryan*, 670 A.2d 375 (D.C. 1996) (four-month suspension with fitness for attorney with no disciplinary history who engaged in violations in five matters over a two-year period including neglect, intentional failure to pursue a client's lawful objectives, intentional failure to fulfill a contract of employment, intentional prejudice or damage to a client, failure to return a client's files, improper imposition of a lien on a client's property, failure to keep a client informed, and failure to withdraw from representation after being terminated).

The violations at issue here spanned several years, but they involved only one client matter. Although lengthy suspensions have been imposed in cases involving one client matter, they usually involve dishonesty or a history of similar misconduct. *See, e.g.*, *Delate*, 598 A.2d at 154 (one matter that covered a period of five years involving neglect, conduct prejudicial to the administration of justice, intentional failure to achieve a client's lawful objectives, and failure to promptly pay client funds resulted in two-year suspension with fitness, consecutive to a previous six-month suspension for similar misconduct); *O'Donnell*, 517 A.2d at 1069 (one matter involving conduct prejudicial to the administration of justice, for failure to respond to Bar Counsel, neglect, and intentional failure to seek the lawful objectives of the clients resulted

in suspension of one year and a day with Court emphasizing the significant prejudice caused to the clients and previous reprimand for similar misconduct); *In re Bond*, No. 84-1774 (D.C. Mar. 25, 1985) (unpublished) (18-month suspension for misconduct occurring during a two-year period, arising from the representation of one client and involving misrepresentation, conduct prejudicial to the administration of justice, neglect, intentional failure to seek lawful objectives of client, intentional failure to carry out contract of employment, and intentional prejudice or damage to client). The charges at issue here do not involve dishonesty, nor does Respondent have a history of similar misconduct.

Public censure has been imposed in cases such as this involving failures to act on appeal. *See, e.g.*, *Hill*, 619 A.2d at 936 (failure to file an appellate brief in a criminal proceeding and ignoring Bar Counsel's inquiries). The Court has held, however, that public censure is only appropriate in cases involving failure to make filings in court and to comply with court orders when the respondents had no prior discipline and "there are not other substantial or intentional violations in the course of the misconduct." *Sumner*, 665 A.2d at 990 (appending Board Report). In this case, Respondent does have a disciplinary history (albeit unrelated) and we have found intentional violations. Thus, public censure is not appropriate in this case.

Instead, the violations at issue here appear to fall somewhere between those discussed above, both in terms of their seriousness and in terms of appropriate sanction, and may be analogized to *Sumner* in which the Court imposed a 30-day suspension for multiple neglect violations relating to a criminal appeal. A 30-day suspension was also imposed in a case involving violations virtually identical to this case. *See Lewis*, 689 A.2d 561 (30-day

suspension for violations of Rule 1.1(a) & (b), 1.3(a) & (b), 1.16(a) and 8.4(d)).[13] Similar cases of neglect under the former Code of Professional Responsibility also resulted in 30-day suspensions. *See In re Dunietz*, 687 A.2d 206 (D.C. 1996) (30-day suspension, stayed in favor of probation, for violations of DR 6-101(A)(3) (neglect of client matter), DR 7-101(A)(1) (intentional failure to seek lawful objectives of client), and Rules 1.3(a) and (c), and 1.4(a)); *In re Ontell*, 593 A.2d 1038 (30-day suspension for violations of DR 6-101(A)(3) and DR 1-102(A)(4) (misrepresentations to clients)).

B. Prior Discipline

Respondent has twice been the subject of prior discipline, in the form of informal admonitions. The first was issued in August 1996 and the second in August 2000. Both related to violations of Rule 1.5(b) in that Respondent undertook representation in matters where he did not provide his client with a written description of the basis or rate of the fee. Bar Counsel did not place any significant weight on this prior discipline before the Committee, and the Committee concluded that this prior discipline did not go to Respondent's moral character or integrity. HC Rpt. at 26-27. Overall, and especially in light of the mitigating factors discussed below, we agree that the prior discipline evidenced in this case does not act as a significant aggravating factor in the sanction analysis.

C. Prejudice to Client

Mr. Foreman's appeal was eventually prosecuted by another attorney. Such prosecution was delayed, however, and did not occur without significant action by Mr. Foreman. Indeed, had Mr. Foreman not taken independent action in response to the order to

[13] The only rule at issue here that was not discussed in *Lewis* is Rule 1.4.

show cause, his appeal may well have been dismissed with prejudice. We are thus compelled to conclude that Mr. Foreman was prejudiced by Respondent's failures in this case.

D. Violation of Other Disciplinary Rules

In light of our analysis, it is clear that Respondent violated a number of disciplinary rules.

E. Respondent's Attitude

The Committee, which was in the best position to assess Respondent's attitude, was "impressed by Respondent's candor during the hearing, in admitting the operative facts and in expressing his sincere remorse, if somewhat belatedly, over the manner in which he handled Mr. Foreman's case and his failure to respond to the Court's letters." HC Rpt. at 27. Based upon Respondent's own testimony and that of his character witnesses, the Committee accepted that Respondent's handling of this case was an aberration, far removed from the representation Respondent usually provides his clients and expects of himself. They found Respondent to be "honest and repentant." *Id.* at 29. We see no reason to disturb these conclusions.

F. Circumstances in Aggravation and/or Mitigation

Respondent is a well-respected member of the Bar who has a long history of service to the community in affording quality representation for criminal defendants. *See* HC Rpt. at 28. These factors are appropriately considered in mitigation. We agree with the Committee, however, that Mr. Mundy's death should not be given the significant weight in mitigation that was urged by Respondent.

Mr. Mundy died in 1995, and while the workload that befell Respondent as a result of Mr. Mundy's death continued for some time, Respondent did not undertake this case until 1998 – some three years later. Moreover, the appeal was not taken until 1999 and Respondent's

failures to respond to the Court of Appeals did not occur until the fall of 2000 – almost five years after Mr. Mundy's death. The Committee found it "difficult to believe" that the pressures occasioned by Mr. Mundy's death continued that long, and we see no record of evidence to suggest otherwise. *Id.* at 27.

Moreover, as set forth in our discussion of Rule 1.3, a lawyer has a duty to control his workload "so that each matter can be handled adequately." Rule 1.3, cmnt. 1. Accepting that Mr. Mundy's untimely and unexpected death did result in Respondent feeling responsible for an overwhelming number of cases, Respondent had a duty to assess the extent to which he could handle that number of cases and either (1) adjust his normal processes and procedures to assure he could meet the demands of the increased caseload and/or (2) transfer to other attorneys those cases from which he could permissibly withdraw. Respondent had three to five years to make such an assessment and take appropriate action after Mr. Mundy's death and before the violations at issue in this case. As a result, we find it virtually impossible to consider Mr. Mundy's death a mitigating factor in this case.

G. Recommended Sanction

Considering all of the above, and balancing the mitigating and aggravating factors (respondent's reputation and history of service versus the history of prior discipline), we find that a 30-day suspension is appropriate in this case. *See Lewis*, 689 A.2d 561; *Dunietz*, 687 A.2d 206; *Sumner*, 665 A.2d 986; *Ontell*, 593 A.2d 1038. We are mindful, however, of "the need for approaches to sanctions which are tailored to assure the protection of the public by addressing specifically the circumstances which brought about the misconduct through probationary conditions." *Dunietz*, 687 A.2d at 212.

Probation has been imposed in cases where the record showed disability and rehabilitation under the test of *In re Kersey*, 520 A.2d 321 (D.C. 1987), or where the record showed neglect resulting from some systemic problem in a respondent's practice which could effectively be addressed by conditions requiring remedial measures such as utilization of a practice monitor, enrollment in a Lawyers Practice Assistance Committee ("LPAC") program, consultation with experts when confronted by new practice areas, completion of legal ethics courses, and the like. *See, e.g., In re Boykins*, 748 A.2d 413 (D.C. 2000) (per curiam); *In re Pullings*, 724 A.2d 600 (D.C. 1999) (per curiam); *Dunietz*, 687 A.2d 206; *In re Stow*, 633 A.2d 782 (D.C. 1993) (per curiam). We conclude that this is such a case.

Respondent's lengthy history of an excellent reputation and lack of any prior similar discipline, coupled with the testimony regarding the difficulties associated with criminal practice and Respondent's overwhelming case load at the time of the events at issue suggest to us that the violations engaged in here may be effectively addressed by remedial measures. Further, although we have not explicitly said so in the past, we believe a lengthy history of a legal practice that provides an important and difficult public service, *i.e.*, the quality representation of criminal defendants, argues in favor of probation.

It is well-settled that the determination of an appropriate sanction requires our consideration of the needs to protect the public, the courts and the legal profession. *See Ryan*, 670 A.2d at 380; *In re Goffe*, 641 A.2d 458, 464 (D.C. 1994) (per curiam); *Hutchinson*, 534 A.2d at 924. We believe our duty in that regard includes crafting sanctions that not only protect these entities from misconduct by respondents, but also protect the public, the courts, and the legal profession from any unnecessary damage that may be caused by removing an otherwise valuable member of the bar from practice. An attorney's suspension can create

difficulties for the courts, the public, and other members of the legal profession, such as significant delay of pending cases and/or the transfer of such cases to other attorneys. There may be times when the needs of the court, the public, and the legal profession would be better served by allowing a respondent with a lengthy and well-reputed history of providing an important service to continue providing this service rather than impose a suspension that creates unnecessary difficulties. We believe, in this case, that, while a 30-day suspension is an otherwise appropriate sanction, our duty to protect the courts, the public, and the legal profession is better served by staying the suspension in favor of a period of probation that will allow Respondent to continue providing much needed high quality legal representation of criminal defendants.

Bar Counsel requested that the probationary period last two years, but we agree with the Committee that one year is appropriate. *See Dunietz*, 687 A.2d at 206; *In re Spaulding*, 635 A.2d 343 (D.C. 1993) (per curiam). Respondent has no prior history of similar misconduct and, in light of his admissions in this case and his sincere remorse, we have little fear that he will engage in similar misconduct in the future. The events at issue were, by all accounts, an aberration. Thus, we do not believe that Respondent's misconduct in this case arose from a systematic problem with his practice that would require a practice monitor. In light of the prior informal admonitions, however, and the serious nature of the violations at issue here, we think Respondent and all the other parties whose interests we must protect, would be well served by requiring Respondent to attend some continuing legal education directed to practice management and legal ethics. *See, e.g.*, *In re Joyner*, 670 A.2d 1367 (D.C. 1996) (requiring legal ethics courses).

Bar Counsel requested additional conditions, including that Respondent provide a formal apology to Mr. Foreman. There is no precedent for such a requirement. Further, in his testimony in this case, Respondent has already expressed remorse for his failures. We agree with the Committee that forcing Respondent to further apologize to Mr. Foreman would provide no benefit to the public or the profession, but would only serve to embarrass Respondent, which is not a proper purpose of a disciplinary sanction. *See* HC Rpt. at 34. Similarly, we agree with the Committee that requiring Respondent to report any missed deadline to Bar Counsel (as suggested by Bar Counsel) is unprecedented, unrealistic, and would provide little benefit or protection to the courts and the public. *See id.*

Finally, Bar Counsel requested that Respondent be subject to the condition that during the period of probation, he not be the subject of any other disciplinary complaint that results in a finding of an ethical violation. *See* Bar Counsel's Post-hearing Brief at 24. The Committee, apparently believing that this condition was unlimited in time, attempted to limit the length of time during which this condition would be imposed. *See* HC Rpt. at 35-36. In doing so, however, the Committee appears to have expanded the scope of the condition. Specifically, the Committee recommended as a condition of probation that Respondent

> not be the subject of another disciplinary complaint arising out of conduct that occurred from June 6, 2001 through one year after a final decision in this case provided that Bar Counsel files a formal Specification of Charges with respect to such a complaint no later than two years after a final decision in this case.

Id. at 37. In other words, the Committee's condition places Respondent in violation of probation when Bar Counsel chooses to file a Specification of Charges on a complaint, rather than when Respondent is found to actually have committed another rule violation (as was suggested by Bar Counsel).

We do not believe the Committee actually intended the result suggested by their language. Even if a Specification of Charges is filed, a respondent cannot be considered to have committed any alleged violations until Bar Counsel proves them by clear and convincing evidence. *See* Board Rule 11.5. Thus, we believe the appropriate condition is more in keeping with that suggested by Bar Counsel and imposed in prior cases: that if, during the period of probation,[14] Bar Counsel alleges, that another violation of the Rules of Professional Conduct has occurred, the Board shall promptly convene an evidentiary hearing before a Hearing Committee with directions to submit a report to the Board as soon as practicable. If the Board finds a violation of the Rules of Professional Conduct, the probation shall be immediately revoked and the previously stayed 30-day suspension shall be reinstated and become effective ten days after the Board submits to the Court that Respondent has violated the terms of probation. Any party may petition the Board for a stay of the order imposing the suspension and the Board's decision will be subject to review by the Court of Appeals. *See In re Baron*, Bar Docket No. 131-00 at 13-15 (BPR Mar. 6, 2002),*aff'd,* 808 A.2d 497 (D.C. 2002) (per curiam).

V. Conclusion

In light of all the above, we conclude that Respondent violated Rules 1.1(a) and (b), 1.3(a) and (b), 1.4(a), 1.16(a)(3), and 8.4(d). We recommend that Respondent be suspended for 30 days, and, further, recommend that the suspension be stayed in favor of a one-year period of unsupervised probation, with the condition that Respondent be required to attend six

[14] To the extent Bar Counsel's original request was, in fact, to condition probation on no violations during the probationary period regardless of when the charges are ultimately filed, we agree with the Committee that such a condition essentially makes the probation unlimited, and we refuse to impose such a condition. Indeed, Bar Counsel ultimately agreed that this condition "should not extend beyond the period of probation." *See* Letter from Bar Counsel to Executive Attorney, dated October 28, 2002.

hours of continuing legal education courses in ethics and law office management. We recommend that Respondent not be required to provide his clients notice of this action under D.C. Bar R. XI, § 3(a)(7). *See In re Cohen*, Bar Docket No. 280-97 (BPR May 13, 2003).

BOARD ON PROFESSIONAL RESPONSIBILITY

By: _____
Roger A. Klein

Dated: July 23, 2004

All members of the Board concur in this Report and Recommendation except Ms. Frazier, Dr. Payne and Mr. Wu, who did not participate.