DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:	)	
	)	
DONALD L. SCHLEMMER,	)	Bar Docket Nos. 444-99 & 66-00
	)	
Respondent.	)	

REPORT AND RECOMMENDATION OF THE BOARD ON PROFESSIONAL RESPONSIBILITY

This matter comes to the Board on Professional Responsibility (the "Board") on review of the Report of an Ad Hoc Hearing Committee (the "Hearing Committee") which concluded that Respondent had violated Rules 1.1(a), 1.3(a), and 1.4(a) of the D.C. Rules of Professional Conduct (the "Rules"), and recommended an informal admonition by Bar Counsel. We concur with the violation findings with the exception of the Rule 1.1(a) finding, but not the recommended sanction. For reasons outlined herein, we believe public censure is the appropriate sanction.

This matter arose as a result of complaints filed on behalf of two clients whom Respondent represented with regard to immigration matters. Bar Counsel charged that Respondent had violated Rules 1.1(a) and (b), 1.3(a) and (b), 1.4(a), 1.5(b) and 5.3.

I. Procedural Background

Bar Counsel filed a petition initiating formal disciplinary proceedings and Specification of Charges on September 18, 2000. A hearing was held on January 9 and 10, 2001. Bar Counsel was represented by Elizabeth A. Herman, Esquire; Respondent was represented by Herbert A. Dubin, Esquire. Bar Counsel called three witnesses, the complainants Fidel A. Iraheta and Juan Antonio Argueta Sorto, and their attorney, Vernon Gutjahr, Esquire, and offered bar exhibits A-D and 1-12. Respondent testified and called three witnesses – Rosa Delia Santiago, Julio Cesar Santiago-Gonzalez and Julio Salaman Gagnon and offered exhibits.

At the conclusion of the evidence, the Hearing Committee deferred presentation of matters in aggravation or mitigation and requested briefs and proposed findings of fact and conclusions of law with regard to the violations charged. Subsequently, on March 28, 2001, the Hearing Committee issued an order announcing that it had reached a preliminary, non-binding determination that Respondent had violated Rules 1.1 and 1.3, and directed the parties to make submissions relevant to sanction.

The Hearing Committee issued its report on September 26, 2001. Neither Bar Counsel nor Respondent filed any exception to the report. After careful review of the record, the Board concludes that the Hearing Committee's analysis was correct as to violations with the exception of the Rule 1.1(a) finding, but recommends public censure as the sanction.

I. Findings of Fact

The Hearing Committee's report contains detailed findings of fact, which we adopt. The findings will be summarized here for convenient reference.

Respondent's Practice. Respondent is a member of the District of Columbia Bar, having been admitted on July 15, 1988. Respondent is a solo practitioner who practices in the field of immigration law. He estimates that he has handled "probably thousands" of immigration cases, many of which have been asylum cases. Tr. II at 133, 138.[1]

Since his clients generally do not speak English, and because Respondent cannot communicate with them in their native tongues, he engages independent translators. This case involves one such translator, Julio Salaman Gagnon, a non-lawyer who operates a consulting service for immigration matters. This service is called "Immigration Consultants" which Gagnon described as "an independent paralegal company." Tr. at 74.

As in the case of the two complainants, Respondent often meets with Spanish-speaking clients in the Arlington, Virginia office of Immigration Consultants. Two members of Gagnon's staff who were involved in this case are Julio Cesar Santiago-Gonzalez[2] and his wife Rosa Santiago.

At the time the complaints were submitted to Bar Counsel, the complainants were seeking to have orders deporting them from the United States set aside by the

[1] The transcript of the hearing of January 9, 2001 is designated as "Tr. I" and the transcript of the hearing of January 10, 2001 is designated as "Tr. II."

[2] The Hearing Committee refers to Julio Cesar Santiago-Gonzalez as "Santiago," noting he was almost always referred to in the transcript as "Julio Santiago" or "Mr. Santiago." Accordingly, he will be referred to herein as "Santiago."

Board of Immigration Appeals on the ground that Respondent had not provided them with effective assistance of counsel.

Count I: Iraheta, Bar Docket No. 444-99

Fidel A. Iraheta is a construction worker from El Salvador. His native language is Spanish and he testified through a translator. He understands little spoken English; he cannot read English; and he is not proficient at reading Spanish.

In 1993, Iraheta retained Gagnon (Immigration Consultants) to prepare a request for asylum under immigration law and to secure a work permit. The request was filed with the Immigration & Naturalization Service ("INS"), and in 1998, Iraheta was called for an interview at the INS. Gagnon assigned Santiago to serve as a translator for the interview on July 26, 1998. The next day, Iraheta received a Referral Notice advising that his asylum request was being referred to the Immigration Court, and also, the Immigration Court issued a notice requiring him to appear before an immigration judge on October 8, 1998. At that time, Santiago recommended that Respondent be engaged as counsel for Iraheta.

On the day before the October 8, 1998 hearing, Santiago contacted Respondent to represent Iraheta at the hearing. As per a written fee agreement signed on October 8, 1998, Iraheta was to pay Respondent an initial retainer of $500 and another $500 prior to the hearing on the merits. The fee was paid as agreed in two $500 installments. Iraheta made the payments to Immigration Consultants and not directly to Respondent.

Respondent appeared at the hearing on October 8, 1998, at which time the hearing was scheduled on the merits of Iraheta's application for asylum. After the

hearing, Respondent and Santiago met with Iraheta in the offices of Immigration Consultants for approximately two and a half hours. After the meeting, Santiago, as instructed by Respondent, prepared a new application for asylum which Iraheta signed on October 29, 1998. It was filed with the INS on November 6, 1998.

An Immigration Court hearing on the merits of Iraheta's application was held on August 10, 1999. At the hearing, Iraheta sought three forms of relief; he requested asylum, the withholding of deportation, and as an alternative, he requested voluntary departure. Iraheta gave testimony at the hearing. At the end of the hearing, the immigration judge denied the requests for withholding of departure and for asylum, but did grant a request for voluntary departure. Iraheta alleges that Respondent did not adequately prepare him. There is a conflict in the testimony on this point. Respondent testified that he had met with Iraheta and had prepared Iraheta to testify. Santiago testified that he, Iraheta and Respondent met for about 40 minutes outside the courtroom to discuss Iraheta's case.

Following the hearing, Respondent and Santiago took Iraheta to the offices of Immigration Consultants, where it is agreed that they discussed payment of the $500 bond necessary for voluntary departure and the fee for Respondent to handle an appeal from the Immigration Court decision.

Four witnesses testified about this meeting, and their testimony conflicted in certain respects. Iraheta testified that there was an agreement that the appeal would cost $630; that he paid $325 on that day, and that the remaining $305 would need to be paid at a later date which was not established. He testified that Santiago told him the appeal would be filed. He also testified that neither Gagnon,

Santiago or Respondent ever told him that Respondent would not file the appeal. In contrast, Santiago testified that Respondent told Iraheta that the appeal would cost $1,500 plus a $110 filing fee. According to Santiago, Iraheta said he could not pay that amount and there was further negotiation. Santiago stated that he was out of the room during such negotiation. Gagnon testified that Respondent advised that the cost for the appeal would be $1,500 plus the filing fee; that Iraheta said he could not afford that; and that further negotiations brought the fee down to a little under half of the $1,500 plus the filing fee. There was much confusion in the testimony; the Hearing Committee found that Gagnon's testimony tended to support Iraheta's belief that the total amount of the fee would be $630.

Respondent testified that he demanded a fee of $1,500 for the appeal plus the $110 filing fee, and that he wanted $750 up front. He testified that he later came to a figure of $625 as a down payment. He testified that he told Iraheta that he would not file an appeal unless he made the deposit of $625 plus the $110 filing fee.

On August 27, 1999, thirteen days before the appeal deadline, Iraheta delivered to the receptionist at Immigration Consultants $320 in cash, for which he was given a receipt labeled "Appeal" in Spanish. Iraheta paid no more money for his appeal. In a letter to Bar Counsel, Respondent claimed that because he had only received $320 from Iraheta, he understood that he was not retained to file the appeal and therefore did not do so.

Iraheta did not request the money back and at some point after the appeal deadline had passed went to the office of Immigration Consultants to determine the status of his appeal. Gagnon apparently told him that there was

nothing that could be done, whereupon Iraheta contacted Vernon Gutjahr, Esquire. On November 2, 1999, Respondent complied with a request to mail Iraheta's file to Gutjahr's law partner. Respondent did not return the $320 payment until December 7, 1999, after Iraheta's new lawyer advised him that a malpractice claim would be filed. As explanation for his delay in refunding the money, Respondent testified that he did not know what Iraheta was doing in connection with his voluntary departure and that he, Respondent, had been out of the country.

Respondent acknowledged that he had become aware that Iraheta had paid $320 for his appeal shortly after the payment had been made to Immigration Consultants. At his request, Santiago tried unsuccessfully by telephone to contact Iraheta between that time and the appeal deadline of September 9, 1999. Although the testimony was that Iraheta lived right by the Immigration Consultants office, there is no evidence that any further effort was made to contact him.

The Hearing Committee found that the terms upon which Respondent testified he conditioned his filing of an appeal were not communicated to Iraheta with sufficient clarity. As found by the Hearing Committee, Iraheta reasonably believed that Respondent would file an appeal in his case after he paid the $320 to Immigration Consultants. As also concluded by the Hearing Committee, the payment of that $320 in the circumstances was sufficient to communicate to Respondent that Iraheta intended for him to file an appeal. Respondent acknowledged that he could think of no reason other than the appeal for Iraheta to pay him the $320.

Count II – Sorto, Bar Docket No. 66-00

Juan Antonio Argueta Sorto is a carpenter who is a native and citizen of El Salvador. He speaks little English and cannot read English.

In May 1994, the INS issued an order stating that Sorto was subject to deportation and ordering him to show cause before an immigration judge as to why he should not be deported. He appeared *pro se* before the Immigration Court in November 1994 and was advised of his right to retain a lawyer. He then contacted Gagnon of Immigration Consultants who recommended Respondent. Respondent met with Sorto on February 1, 1995 and agreed to represent Sorto in pursuing an asylum application for a fee of $1,000.

The hearing on the merits of Sorto's asylum application was held on November 27, 1995. Mr. Sorto testified about conditions he faced in El Salvador; the immigration judge denied his application for asylum or withholding of deportation but granted voluntary departure. Respondent filed an appeal from the Immigration Court's ruling.

On October 9, 1997, the Board of Immigration Appeals dismissed the appeal and provided that Sorto could depart voluntarily within 30 days but otherwise would be deported. Sorto did not leave as required, and was later arrested and deported.

There was a serious conflict in the testimony with regard to Respondent's representation of Sorto. Sorto testified that he had no personal contact with Respondent from the time he retained him in February 1995 through his arrest in late 1997. He testified that neither Respondent nor Gagnon ever told him that his appeal had been unsuccessful or that he had to leave the country voluntarily in

order to avoid deportation in 1997. He testified that he never learned what happened to his appeal, that he never saw the decision denying his appeal, that he was never advised either by Respondent or Gagnon of the consequences of an unsuccessful appeal, and that he did not know that a deportation order had been issued against him in 1997.

Gagnon testified that he had translated for Respondent and Sorto, assisted in filling out the asylum application, and translated for a meeting between Respondent and Sorto prior to the hearing in November 1995. He testified that at the meeting, Respondent went over the asylum application with Sorto and confirmed the dates that Sorto was in the United States and why he had come to the United States. Gagnon testified that when Sorto's appeal was dismissed, Respondent had asked Gagnon to contact Sorto about what happened and to advise Sorto of the decision and that he had 30 days to depart voluntarily. According to Gagnon, Sorto came to Gagnon's office for that meeting and at that point Gagnon called Respondent and they discussed Sorto's options on the phone.

Respondent testified consistently with Gagnon. He testified that he did not need much time to prepare for the hearing because he was familiar with these types of proceedings and that he had done numerous asylum cases for people from El Salvador. He testified that after the appeal was dismissed, he called Gagnon who arranged for Sorto to meet at Gagnon's office. At that meeting, Gagnon telephoned Respondent and they discussed options with Sorto. Sorto apparently became defiant and insisted that he did not intend to return to El Salvador.

Respondent counseled against staying in the United States in the face of a deportation order.

III. Discussion

The Hearing Committee found that Respondent violated Rules 1.1(a), 1.3(a) and 1.4(a) in his representation of Iraheta but found that Bar Counsel had not established violations of Rules 1.1(b), 1.3(b), 1.5(b) or 5.3. The Hearing Committee found that Bar Counsel had not established any violations with regard to Respondent's representation of Sorto. We will deal first with Iraheta's complaint and next with Sorto's. Then, we will address Bar Counsel's charge of a Rule 5.3 violation, which is not particular either to Iraheta or Sorto.

Iraheta. The Hearing Committee's findings of violations of Rules 1.1(a), 1.3(a) and 1.4(a) here are predicated on Respondent's failure to file an appeal from the Immigration Court's rulings on August 10, 1999.

Rule 1.1. This rule, entitled "Competence," provides as follows:

> (a) A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.
>
> (b) A lawyer shall serve a client with skill and care commensurate with that generally afforded to clients by other lawyers in similar matters.

The Hearing Committee concluded that there was no question about Respondent having the requisite knowledge and skill. The Hearing Committee also found that he had adequately prepared for the Immigration Court hearing. Its conclusions on these points are fully supported by the record.

The Hearing Committee found a lack of thoroughness, however, due to Respondent's failure to file the appeal after he learned that Iraheta had made the $320 payment on August 27, 1999, thirteen days before the deadline for filing an

appeal. While we agree that Respondent's failure to file the appeal constituted misconduct, we do not believe it comes fairly within the scope of Rule 1.1(a). *See In re Ford*, 797 A.2d 1231 (D.C. 2002) (per curiam). Rule 1.1(a) has generally been applied in situations where attorney mistakes are caused by a lack of competence, *e.g.*, *In re Vohra*, 762 A.2d 544 (D.C. 2000) (per curiam); *In re Summer*, 665 A.2d 986 (D.C. 1995) (per curiam), or in cases of neglect, where respondent's neglect shows a lack of competence or lack of thoroughness and preparation. *In re Bland*, 714 A.2d 787 (D.C. 1998) (per curiam); *In re Shorter*, 707 A.2d 1305 (D.C. 1998) (per curiam); *Summer*, 665 A.2d at 986. We acknowledge that the same conduct by an attorney may violate more than one rule, *In re Drew*, 693 A.2d 1127, 1132 (D.C. 1997) (per curiam) (Board Report attached and incorporated by reference), but we conclude that Respondent's failure to file an appeal in the circumstances of this case is not a reflection of incompetence or lack of thoroughness but rather is a result of misconduct contemplated by Rule 1.3. As the Board concluded in *In re Lewis*, 689 A.2d 561, 564 (D.C. 1997) (Board Report attached), "Rule 1.1(b) and 1.3 violations are better tailored to address the situation in which a lawyer capable to handle a representation walks away from it for reasons unrelated to his competence in that area of practice."

As to Rule 1.1(b), which requires lawyers to serve their clients with the skill and care generally afforded clients by other lawyers in similar matters, the Hearing Committee found that Bar Counsel had not established a violation because she had not presented evidence of the practices of other lawyers in similar matters. We concur that a violation was not established, since we believe that Rule 1.3 better

addresses this situation. We do not agree, however, that Bar Counsel must necessarily produce evidence of practices of other attorneys in order to establish a Rule 1.1(b) violation. *Cf. Lewis*, 689 A.2d at 564; (Rule 1.1(b) violation based on abandonment of client in criminal case).

Rule 1.3. This rule, entitled "Diligence and Zeal," provides as follows:

> (a) A lawyer shall represent a client zealously and diligently within the bounds of the law.
> (b) 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 Hearing Committee found a violation of Rule 1.3(a) but not of Rule 1.3(b) based on Respondent's failure to appeal the Immigration Court's ruling. Again, the Hearing Committee found no violation in Respondent's representation of Iraheta before the Immigration Court. We agree with this conclusion.

We also agree with the Hearing Committee that Respondent's failure to file an appeal from the Immigration Court's decision constituted neglect in violation of Rule 1.3(a). The critical issue here is whether an attorney-client relationship existed between Respondent and Iraheta as to the appeal. The Hearing Committee Report contains a thorough and authoritative analysis of this point. Noting that the Rules do not define "client," the Hearing Committee looked to the common law:

> An attorney-client relationship ordinarily rests on contract, but it is not necessary that the contract be express or that a retainer be requested or paid. The contract may be implied from conduct of the parties. The relationship is created when (1) a person seeks advice or assistance from an attorney, (2) the advice or assistance

> sought pertains to matters within the attorney's professional competence, and (3) the attorney expressly or impliedly agrees to give or actually gives the desired advice or assistance. In appropriate cases the third element may be established by proof of detrimental reliance, *when the person seeking legal services reasonably relies on the attorney to provide them and the attorney, aware of such reliance, does nothing to negate it*.

Kurtenbach v. TeKippe, 260 N.W.2d 53, 56 (Iowa 1977) (citations omitted) (emphasis added). The Hearing Committee also relied upon the Restatement of the Law Governing Lawyers, which makes it the lawyer's duty to resolve any ambiguities about whether an attorney-client relationship has been established:

> A relationship of client and lawyer arises when. . . person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and . . . the lawyer fails to manifest lack of consent to do so, and. . . the lawyer knows *or reasonably should know* that the person reasonably relies on the lawyer to provide the services. . .

Restatement (Third) of the Law Governing Lawyers § 14 (2000) (emphasis added). As the Board noted in *In re Fowler*, BDN 393-88 (BPR July 26, 1991), *aff'd in pertinent part*, 642 A.2d 1327 (D.C. 1994) (citing *In re Chopivsky*, BDN 228-84, *et al.* (BPR July 16, 1986) and *In re Confidential*, BDN 150-85 (BPR Feb. 5, 1987)), when a lawyer does not make the conditions of his retention clear, the client's view of the creation of an attorney-client relationship will prevail. *See also In re Bernstein*, 707 A.2d 371, 375 (D.C. 1998); *In re Lieber*, 442 A.2d 153, 156 (D.C. 1982).

The Hearing Committee reviewed the salient facts in the record and concluded that Respondent did not make it sufficiently clear to Iraheta that no appeal would be filed unless he had received the $625 plus $110 filing fee in advance. We agree that the record supports the Hearing Committee's conclusions

that under the circumstances, Iraheta reasonably believed that the appeal would be filed when he paid the $320, received a receipt indicating that the payment was made for an appeal, and heard nothing from Respondent to the effect that the appeal would not be filed. Respondent had no explanation for Iraheta's payment of the $320 other than his (Iraheta's) intent that the appeal be filed. Respondent recognized the need to contact Iraheta to advise him that the appeal would not be filed, thereby evidencing his own concern about ambiguities in the communications regarding the fee. However, he himself made no effort to contact his client, and Santiago's efforts, as noted by the Hearing Committee, were inadequate.

Under the circumstances, Iraheta was Respondent's client as to the appeal, and Respondent's failure to pursue the appeal violated his obligations under Rule 1.3(a) to represent his client with diligence and zeal. *See Drew*, 693 A.2d at 1133.

The Hearing Committee found a violation of Rule 1.3(a), but concluded that Respondent had not violated Rule 1.3(b), which prohibits the *intentional* failure to seek a client's lawful objectives. As noted by the Hearing Committee, the hallmark of Rule 1.3(b) is that the neglect be intentional. The Hearing Committee cited *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*) and a series of other neglect cases where intent has been found when respondents failed to act in circumstances where they were aware or were deemed to be aware of their obligations to their clients.[3]

[3] *Lewis*, 689 A.2d at 564 ("[n]eglect ripens into an intentional violation when the lawyer is aware of his neglect of the client matter"); *In re Robertson*, 612 A.2d 1236 (D.C. 1992); *In re O'Donnell*, 517 A.2d 1069, 1072 (D.C. 1986) (per curiam) (Board Report appended) ("inaction . . . coupled with an awareness of [ ] obligations" constituted DR 7-101(A)(1) (predecessor to 1.3(b)(1)) violation); *In re*

As Bar Counsel argued before the Hearing Committee, deliberate neglect in the face of a need for action may ripen into an intentional violation. *In re Chisholm*, 679 A.2d 495 (D.C. 1996); *In re Ryan*, 670 A.2d 375 (D.C. 1996). The element of intent may be inferred from the circumstances. *Reback*, 487 A.2d at 241. Respondent's action in not filing the appeal was intentional in the standard meaning of the word, as the Hearing Committee observed. HC Rpt. at 24. He knew about the appeal deadline and deliberately failed to file the appeal notice because he had not received the full down payment he had demanded.

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).

All that was required to preserve Iraheta's right was a notice of appeal. Tr. II at 226. Respondent was aware that Iraheta had made a $320 payment shortly after it was received, before the appeal deadline. *Id*. at 220. When asked why he did not use $110 of the $320 paid by Iraheta as a filing fee and file the notice of appeal, Respondent stated that he did not want to enter his appearance because he was not sure he would be allowed later to withdraw his appearance. *Id*. at 228-29.

The Hearing Committee, however, found the element of intent lacking because Respondent, feeling that he had adequately communicated his fee requirements to Iraheta, was not "aware" of his obligations to his client. HC Rpt. at 24. The Hearing Committee credited Respondent's testimony on this issue, and we are not in a position to second-guess the Hearing Committee's fact-finding in this regard. *See In re Arneja*, 790 A.2d 552, 555 (D.C. 2002 (citing *In re Micheel*, 610 A.2d 231, 234 (D.C. 1992)).

Bar Counsel cited *Fowler*, 642 A.2d at 1328 and *In re Lawrence*, 526 A.2d 931 (D.C. 1986) (per curiam) for her position that Respondent's failure to file the appeal constituted intentional neglect. In both cases, the Board, later affirmed by the Court, found intentional failure of a respondent to take action which he had agreed to do.

In *Lawrence*, the respondent failed to file a complaint by the statute of limitations deadline after having executed a written fee agreement and having received $600 of the specified $1,800 retainer fee. The Hearing Committee rejected the respondent's contention that he had concluded, based on events subsequent to execution of the fee agreement, that the client had decided to forego the claim. The

Board also rejected the respondent's contentions and accepted the Hearing Committee conclusion that the client had "reasonably believed that respondent would file suit." 526 A.2d at 932. Based on the foregoing, the Court concluded:

> Since filing the complaint was a lawful objective and since an employment contract between [the client] and respondent had been entered into, respondent's actions constitute violations of DR 7-101(A)(1) and (2).[4]

Id. Since the Board and the Hearing Committee had rejected the respondent's contentions as to his state of mind, the Court did not consider the situation where, as here, the respondent has an honest but mistaken perception of his obligations to this client.

Fowler is factually more similar to our case than *Lawrence.* There, the Court upheld the Board's finding of intentional neglect based on the respondent's failure to file a motion for a new trial after having been retained to do so. The Board Report details the facts, which show that the respondent failed to file the motion because he had not received the full amount of the advance fee in cash that he had demanded as a precondition to filing the motion. The motion deadline was October 12, 1988. The respondent received a check on October 10, 1988. When he tried to cash the check on October 11, 1988, he learned that there were insufficient funds in the bank. He spoke with the client's friend, Gloria Brooks, who had provided the check, and was informed that money would be transferred into the account. The next day, October 12, 1988, he spoke again with Ms. Brooks, who

[4] DR 7-101(A)(1) is the predecessor to Rule 1.3(b)(1).

assured him that she had transferred the funds.[5] The respondent testified that he did not file the motion because Ms. Brooks' check did not clear her bank on October 12, 1988.

The Board found that because the respondent had not told Ms. Brooks or his client that he would not perform work until he had actually received payment in cash, there was an attorney-client relationship before the deadline for the motion, and that the respondent had intentionally failed to file the motion for a new trial. The Board's analysis was as follows:

> Because there was no specific demand by Respondent for cash or successful negotiation of a check as a precondition and there was reasonable reliance on the part of Mr. Jackson and Ms. Brooks, the Board finds there was an attorney-client relationship sufficiently before the expiration of the New Trial Motion deadline. Since Respondent did not make his precondition clear to Mr. Jackson and/or Ms. Brooks, it is the client's view of the creation of the attorney-client relationship which will prevail. *In re Chopivsky*, D.N. 228-84 (Bd. Prof. Resp. July 22, 1986), p.9; *In re Confidential*, D.N. 150-85 (Bd. Prof. Resp. February 15, 1989) p. 9-10.
>
> Since there was a valid attorney-client relationship before the expiration of the motion's time period and Respondent intentionally failed to file the motion, we find there is substantial evidence to support the Hearing Committee's finding of a violation of DR 7-101(A)(1).

Fowler, BDN 393-88. Again, in contrast to this case, *Fowler* does not include any finding that the respondent thought he had clearly communicated his fee requirements to the client.

[5] The Respondent cashed the check the next day, October 13, 1988, and he entered his appearance for the client dated October 14, 1988.

The Hearing Committee credited Respondent's testimony that he had thought that he had made the condition upon which he would file the appeal clear to Iraheta. Therefore, according to the Hearing Committee, he was not aware, although he should have been, of his obligation to file the appeal, and thus did not act intentionally within the meaning of Rule 1.3(b).

We note that cases where intentional neglect has been found have generally involved more extreme misconduct than present here. *Robertson*, 612 A.2d at 1236 (failure to complete client tax returns for five years); *In re Foster*, 581 A.2d 389 (D.C. 1990) (per curiam) (failure to pursue client's claim for child support); *O'Donnell*, 517 A.2d at 1069 (failure to take action to form a corporation needed by client to retain a lease).

In our view, it is a close question whether *Fowler* nonetheless compels a conclusion that Respondent violated Rule 1.3(b) when he failed to file notice of his client's appeal. Our case law, particularly *Fowler*, puts the burden on a lawyer to render legal services in circumstances where the client reasonably believes the lawyer has agreed to undertake an engagement. In such a situation, the attorney is taken to be aware of his or her obligation to the client. This conclusion is reinforced in cases like this one, as well as *Fowler* and *Lawrence*, where the lawyer's failure to act is deliberate, *i.e.*, the lawyer makes an affirmative decision not to perform an act – such as filing a notice of appeal – necessary to protect the client's interest. In light of the need to protect clients, who may be as unsophisticated as Iraheta was here, any doubts in the attorney's mind as to his or her duty must be resolved in favor of the client.

We believe, however, that this strong need to protect clients' interests is adequately served by the finding of a violation of Rule 1.3(a). Thus, we conclude that Respondent's admittedly deliberate action in failing to file notice of the appeal does not satisfy the intentionality requirement of Rule 1.3(b) in circumstances where a Hearing Committee believes that he acted on a sincere but mistaken belief that he had adequately communicated with his or her client and was not required to act. Under the case law relied upon by the Hearing Committee, Respondent cannot be found to have been aware of his duty to file the notice of appeal, and thus Bar Counsel did not establish that his failure to act was intentional as required for a violation of Rule 1.3(b).

Rule 1.4(a). This rule, entitled "Communication," provides as follows:

> (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

Iraheta did not learn about the status of his appeal, *i.e.*, that it had not been filed, until he went to Gagnon's office to make inquiries. The Hearing Committee found that Respondent violated this rule when he failed to communicate anything about the appeal, including not only his unwillingness to file notice of the appeal without additional payment but also the fact that the appeal had not been filed. We conclude that the Hearing Committee's conclusion in this regard was fully supported by the record.

Rule 1.5(b). This rule, entitled "Fees," provides as follows:

> (b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the

> client, in writing, before or within a reasonable time after commencing the representation.

Bar Counsel's Specification of Charges alleged that there was no writing stating the rate or basis for the representation as to the appeal. Specification of Charges (BX B) at ¶ 5. There was a written fee agreement with regard to Respondent's representation of Iraheta before the Immigration Court. Bar Counsel in her Proposed Findings of Fact asserted that the receipt which Iraheta received for the money tendered for the appeal did not comply with the requirements of the rule.

The Hearing Committee found no violation here because the rule, in specifying that the writing must be "before or within a reasonable time after commencing the representation," does not require the writing *before* the representation is commenced. We agree, but observe, as did the Hearing Committee, that a writing setting out the results of the discussions between Respondent and his client would have removed any uncertainty as to the amounts Iraheta needed to pay in order for Respondent to handle the appeal.

Sorto. The Hearing Committee found no violations in Respondent's representation of Sorto. We find that the record supports its conclusion.

As detailed in the Hearing Committee's findings and summarized above, the testimony by Sorto was contradicted by the testimony of Respondent and Gagnon. The Hearing Committee found that Sorto's accusations of incompetence (Rule 1.1), lack of diligence and zeal (Rule 1.3(a)), intentional failure to pursue lawful objectives (Rule 1.3(b)), and failure to communicate (Rule 1.4(a)), were all uncorroborated. The Hearing Committee also made a credibility determination

based upon Sorto's incentive to show misconduct by Respondent. It found significance, as do we, in the fact that both Sorto and Iraheta were seeking relief from deportation orders based on ineffective assistance of counsel. The complainant here was Vernon Gutjahr, Esquire, attorney for Sorto and Iraheta, who testified that, under immigration case law, this contention will be considered only if a compliant has been filed with disciplinary authorities.

Rule 5.3. This rule, entitled "Responsibilities Regarding Nonlawyer Assistants," provides as follows:

> (a) A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
>
> (b) A lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer;

Bar Counsel contended that Respondent allowed Immigration Consultants to "usurp his role as advisor and counselor." Bar Counsel's Proposed Findings of Fact and Conclusions of Law at 20. The Hearing Committee rejected this contention, which, as Bar Counsel acknowledged, was based on testimony of Iraheta and Sorto – contradicted by Respondent, Gagnon and Santiago – that they communicated only with Gagnon or Santiago "without Respondent's participation or presence." *Id.*; HC Rpt. at 26-27. As the Hearing Committee found, the testimony of Iraheta and Sorto was compromised by their incentive to establish a disciplinary violation. As the finder of fact, the Hearing Committee's function was to evaluate the testimony of Iraheta and Sorto, balance it against the admittedly self-interested contrary

testimony of Respondent, Gagnon and Santiago, and reach a conclusion. The Hearing Committee did this and we find no basis to set aside its conclusion that Bar Counsel did not carry her burden of establishing a violation of Rule 5.3 by clear and convincing evidence.

IV. Sanction

The Hearing Committee recommends that the sanction be an informal admonition by Bar Counsel. The Hearing Committee characterizes the misconduct here as a "single instance of poor judgment" in a career that has been otherwise exemplary, and has included "extraordinary efforts in voluntary, *pro bono* service to the immigrant community in the Washington area." HC Rpt. at 28-29. The record before the Hearing Committee included six letters from charitable organizations attesting to Respondent's *pro bono* efforts to assist immigrants from several countries, including Ireland, Haiti, Vietnam, Peru, and Nicaragua.

Based upon the mitigating factors of Respondent's unblemished disciplinary record and his *pro bono* contributions to the immigrant community, the Hearing Committee declined to follow Bar Counsel's recommendation of a public censure.[6] Bar Counsel's contention was based in large part upon *Fowler*, 642 A.2d at 1327 (30-day suspension for failure to file motion for new trial) and *Drew*, 526 A.2d at 1127 (60-day suspension for failure to note appeals in two criminal cases). We agree that, particularly in light of the mitigating circumstances, the appropriate sanction here should be less than those in *Drew* and *Fowler*, where the respondents

[6] Bar Counsel, based on its contentions as to violations in both the Iraheta and Sorto matters, argued that a short suspension should be imposed, but recommended public censure in the event that the Hearing Committee found violations based only on the failure to file the appeal for Iraheta.

were found to have acted intentionally. For instance, the Hearing Committee in *Fowler*, noted that the respondent's "pursuit of money in this case demonstrate[d] a callous disregard for his obligation to his client." *In re Fowler*, BDN 393-88 (HC Jan. 3, 1990) (Bar Counsel's Brief on Sanction, Attachment A). In contrast, it has been conclusively determined that Respondent here acted on the belief that he had not been retained to pursue the appeal, and therefore his culpability is less than the respondents in *Fowler* and *Drew*.

Bar Counsel's recommendation for public censure was predicated on sanctions ordered in *In re Bland*, 714 A.2d 787 (D.C. 1998) (per curiam) (public censure for neglect violations with no prior disciplinary record) and *In re Hill*, 619 A.2d 936 (D.C. 1993) (public censure for primarily neglect violations with no prior disciplinary record). While we believe that Respondent's misconduct here was quite serious in that it was clearly prejudicial to the client's interest and violated several of the Rules of Professional Conduct, we agree that, taking the mitigating factors into account, a public censure will adequately serve the interest of the disciplinary system.

V. Conclusion

The Board recommends that the Court find that Respondent violated Rules 1.3(a) and 1.4(a) in his representation of Fidel A. Iraheta in Bar Docket No. 444-99 and recommends that he receive a public censure by the Court.

BOARD ON PROFESSIONAL RESPONSIBILITY

By: Timothy J. Bloomfield

Dated: December 27, 2002

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