THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*

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

In the Matter of:	:	
	:	
BRENDA C. WAGNER,	:	
	:	Board Docket No. 20-BD-059
Respondent.	:	Disc. Docket No. 2016-D082
	:	
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 267385)	:	

SUPPLEMENTAL REPORT AND RECOMMENDATION
OF THE AD HOC HEARING COMMITTEE

I. INTRODUCTION

This matter is before the Ad Hoc Hearing Committee following the Board's May 8, 2023 remand order. The Board determined that Respondent violated Rule 4.2(a) when she communicated with a represented ward of the court, M.D., in a guardianship matter while she was representing M.D.'s brothers in that same matter. The Board directed that this Hearing Committee conduct further proceedings to accept evidence in aggravation and mitigation of sanction and to make a sanction recommendation. Having concluded these proceedings, the Ad Hoc Hearing Committee recommends that Respondent be publicly censured by the Court. *See* D.C. Bar Rule XI, § 3(a)(3).

* Consult the 'Disciplinary Decisions' tab on the Board on Professional Responsibility's website (www.dcattorneydiscipline.org) to view any subsequent decisions in this case.

II. PROCEDURAL HISTORY

Disciplinary Counsel filed the Specification of Charges on November 12, 2020, charging that Respondent violated Rule 4.2(a) when she knowingly communicated with a represented party in a matter without the prior consent of the lawyer and without being authorized by law or the court to do so. Specification at ¶ 37(a). On March 3, 2021, Respondent filed her Answer denying that she violated the Rule.

An Ad Hoc Hearing Committee, composed of Theodore Hirt, Esq., Chair, Mr. David Bernstein, and Leonard Marsico, Esq., held an evidentiary hearing on June 1 and 2, 2021. On February 24, 2022, the Hearing Committee issued a Report and Recommendation (the "Report") in which it determined that Disciplinary Counsel had not met its burden in proving by clear and convincing evidence that Respondent violated Rule 4.2(a). Both parties took exceptions to the Hearing Committee's Report.

On May 8, 2023, the Board issued an order determining that "the record evidence establishes by clear and convincing evidence that Respondent knowingly communicated with a represented Party in violation of Rule 4.2(a)" and remanded this matter to provide the parties with the opportunity to present evidence in aggravation or mitigation of sanction. Order of Remand at 1.

On July 17, 2023, the Hearing Committee held a hearing to accept evidence in aggravation or mitigation of sanction. Respondent did not testify, but the parties presented argument before the Hearing Committee concerning their proffered

exhibits and presented arguments concerning the pertinent legal issues. Neither party offered witness testimony. The following exhibits were admitted into evidence: DX 45 (Respondent's December 28, 2004 Informal Admonition) and DX 46 (Respondent's June 16, 2016 Informal Admonition). [1] The following exhibits were excluded from evidence: RX 32, 38, 40-43, 45-47, 49-56.[2]

The parties submitted post-hearing briefs addressing the appropriate sanction in this matter. Disciplinary Counsel argues that Respondent should be publicly censured. Respondent urges this Hearing Committee to recommend that this matter be dismissed. The Hearing Committee first addresses Respondent's arguments for dismissal of the proceeding.

III. RESPONDENT'S ARGUMENTS FOR DISMISSAL

Respondent contends that dismissal is appropriate in this matter because (i) there is no clear and convincing evidence that she violated Rule 4.2(a); (ii) Disciplinary Counsel violated her due process rights by engaging in selective

[1] "DX" refers to Disciplinary Counsel's exhibits. "RX" refers to Respondent's exhibits. "Tr." refers to the transcript of the hearing held on July 17, 2023.

[2] The Hearing Committee sustained Disciplinary Counsel's objections to Respondent's exhibits insofar as Respondent failed to show how the exhibits were relevant to mitigation of the sanction. The Hearing Committee reaffirms that ruling and, in its Order issued contemporaneously herewith, also denies Respondent's related Motion to Append Copies of Documents, Incorporated by Reference, to Respondent's Brief on Sanctions.

prosecution and discriminatory practices; and (iii) Disciplinary Counsel delayed in its prosecution against her. Respondent's Brief on Sanction at 3-8.

First, the Board has already determined that Respondent violated Rule 4.2(a). *See* Order of Remand at 13 ("We find that Respondent violated the Rule because the evidence in this matter is both clear and convincing that Mr. Cohen represented M.D. on April 16, 2016 and May 4, 2016, and that Respondent was well aware of that fact."). The scope of the current proceedings before the Hearing Committee is limited to the issue of the appropriate sanction, in light of evidence in aggravation and mitigation. Second, with respect to Respondent's contention that the Office of Disciplinary Counsel has engaged in selective prosecution and discriminatory practices, the Hearing Committee agrees that Respondent has offered only speculation in support of these claims.[3]

Nor is Respondent's claim that this matter should be dismissed on account of the delay in prosecution any more persuasive. The Court of Appeals has held that "undue delay in prosecution is not in itself a proper ground for dismissal of charges of attorney misconduct." *In re Williams*, 513 A.2d 793, 796 (D.C. 1986). However, "[a] delay coupled with actual prejudice could result in a due process violation" that could compel the Court to conclude that misconduct had not been shown. *Id*. at 797. Respondent has failed to identify any prejudice that has resulted from any delay in the prosecution against her. Thus, the Hearing Committee recommends that the Board deny her request that this matter be dismissed. *See* Board Rule 7.16(a).

---

[3] *See* Disciplinary Counsel's Reply Brief on Sanction at 4.

IV. SANCTION

A. Standard

The sanction imposed in an attorney disciplinary matter is one that is necessary to protect the public and the courts, maintain the integrity of the legal profession, and deter the respondent and other attorneys from engaging in similar misconduct. *See, e.g.*, *In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (en banc); *In re Martin*, 67 A.3d 1032, 1053 (D.C. 2013); *In re Cater*, 887 A.2d 1, 17 (D.C. 2005). "In all cases, [the] purpose in imposing discipline is to serve the public and professional interests . . . rather than to visit punishment upon an attorney." *In re Reback*, 513 A.2d 226, 231 (D.C. 1986) (en banc) (citations omitted); *see also In re Goffe*, 641 A.2d 458, 464 (D.C. 1994) (per curiam). The sanction also must not "foster a tendency toward inconsistent dispositions for comparable conduct or . . . otherwise be unwarranted." D.C. Bar R. XI, § 9(h)(1); *see, e.g.*, *Hutchinson*, 534 A.2d at 923-24; *In re Berryman*, 764 A.2d 760, 766 (D.C. 2000).

In determining the appropriate sanction, the Court considers a number of factors, including: (1) the seriousness of the conduct at issue; (2) the prejudice, if any, to the client which resulted from the conduct; (3) whether the conduct involved dishonesty; (4) the presence or absence of violations of other provisions of the disciplinary rules; (5) whether the attorney has a previous disciplinary history; (6) whether the attorney has acknowledged his or her wrongful conduct; and (7) circumstances in mitigation or aggravation. *See, e.g.*, *Martin*, 67 A.3d at 1053 (citing *In re Elgin*, 918 A.2d 362, 376 (D.C. 2007)).

The Court also considers "'the moral fitness of the attorney' and 'the need to protect the public, the courts, and the legal profession . . . .'" *In re Rodriguez-Quesada*, 122 A.3d 913, 921 (D.C. 2015) (per curiam) (quoting *In re Howes*, 52 A.3d 1, 15 (D.C. 2012)). Ultimately, the "imposition of a sanction is not "an exact science," and it is impossible to "match" all factors in different disciplinary cases." *In re Yelverton*, 105 A.3d 413, 429 (D.C. 2014).

B. Application of the Sanction Factors

1. The Seriousness of the Misconduct

Rule 4.2 – commonly referred to as the "no contact rule" – "helps prevent the inadvertent disclosure of privileged information and has 'preserved the proper functioning of the legal system' by protecting the integrity of the lawyer-client relationship." D.C. Legal Ethics Op. 258 (September 20, 1995) (citations omitted). As the Board observed, "[b]y communicating with M.D. without the permission of his counsel, Respondent placed any such privileged communications at risk." Order of Remand at 15. The Hearing Committee finds that this misconduct was serious.

2. Prejudice to the Client

There is no record evidence that Respondent prejudiced her clients, M.D.'s brothers.

3. Dishonesty

Disciplinary Counsel does not allege that Respondent engaged in dishonesty in this matter and the Hearing Committee is aware of no such evidence.

4. Violations of Other Disciplinary Rules

This matter solely involves violations of Rule 4.2(a).

5. Previous Disciplinary History

Respondent's disciplinary history includes two prior informal admonitions. The first was issued eighteen years ago and the second just seven years ago.

In its December 28, 2004 informal admonition, the then-Office of Bar Counsel concluded that Respondent's conduct had reflected a "disregard of certain ethical standards." That admonition arose out of Respondent's failure to adhere to court-ordered deadlines in two court cases. Taken together, Respondent had violated three disciplinary Rules. The Office of Bar Counsel determined that the ethical violations in the matter before it had been serious, but, by way of mitigation, the Office noted that Respondent recognized the seriousness of her misconduct and she had stated that she had decided to cease practicing law.

In its June 16, 2016 informal admonition, the Office of Bar Counsel found that Respondent had failed to appear at three consecutive court-scheduled hearings. Those failures constituted a violation of Rule 8.4(d), *i.e.,* conduct that seriously interfered with the administration of justice. The Office noted that it had proceeded with a letter of informal admonition, rather than instituting formal disciplinary charges against Respondent, because Respondent had cooperated with the investigation, had acknowledged her misconduct, and had refunded the fees to the client. Finally, the Office of Bar Counsel found that Respondent had been dealing with considerable stress due to personal matters and had agreed to consult with the

Practice Management Advisory Service about her administrative systems in order to prevent similar incidents in the future.

The Hearing Committee acknowledges that, because the first informal admonition issued to Respondent occurred almost twenty years ago, the Committee gives it limited weight in this proceeding. But the 2016 informal admonition is more recent, and that disciplinary decision reflects a second, serious example of Respondent's disregard for court rules. This matter before the Hearing Committee therefore is the third time in which Respondent has violated disciplinary rules, calling into question her professional conduct. This factor weighs in aggravation of sanction.[4]

6. Acknowledgement of Wrongful Conduct

Respondent has presented a troubling picture before this Hearing Committee, the sum of which ultimately serves as a heavily aggravating factor. As the Court explained in *Yelverton*, "an attorney has a right to defend [herself] and we expect that most lawyers will do so vigorously, to protect their reputation and license to practice law. But even a claim of innocence does not relieve an attorney from

[4] Respondent has sought to challenge the validity of her prior discipline in these proceedings and contends that she only accepted the informal admonitions "because of time." Tr. 413-14. Disciplinary Counsel contends that her attempt to collaterally attack her prior discipline, notwithstanding that she had the opportunity to reject them when issued, should serve to further aggravate her sanction. Disciplinary Counsel's Brief on Sanction at 10. Disciplinary Counsel cites no authority for this assertion. While this Hearing Committee does not agree that Respondent's position concerning her prior discipline is independently aggravating, Respondent's position further evinces her refusal to accept responsibility even when she has previously done so.

recognizing the seriousness of the misconduct that led to disciplinary proceedings." 105 A.3d at 430. *See also In re Sabo*, 49 A.3d 1219, 1225 (D.C. 2012) (observing that if the respondent does not acknowledge the seriousness of his or her misconduct, "it is difficult to be confident that similar misconduct will not occur in the future") (citations omitted). Respondent has failed to strike this critical balance.

On the one hand, the Hearing Committee has no basis to question her contention that she acted in good faith and was motivated by her interest in helping M.D. when she contacted him. *See* Tr. 423. On the other hand, Respondent appears not to recognize that this does not — and indeed cannot — serve as a defense to this Rule violation. To the contrary, she attempts to justify her misconduct by contending that she had no other choice and she has flatly denied having remorse. *See* Tr. 428. She has refused to appreciate the seriousness of the misconduct at issue in this matter. Rather than doing so, Respondent has remained obstinate and persists in making allegations against the Office of Disciplinary Counsel. This necessarily serves as a factor in aggravation of sanction. *See In re Pearson*, 228 A.3d 417, 429 (D.C. 2020) (considering in aggravation that the respondent lacked remorse and "fail[ed] to acknowledge the wrongfulness of his conduct"); *see also In re Lattimer*, 223 A.3d 437, 453 (D.C. 2020) (considering the respondent's "adamant refusal to accept responsibility" and seeking to blame others as aggravating factors compelling a fitness requirement).

7. Evidence in Mitigation

The Hearing Committee also observes that Respondent offered no evidence in support of mitigation of discipline. Nor did Respondent identify any prior professional conduct on her part — or any other factors — that would be in mitigation of a sanction for her violation of Rule 4.2.

Instead, Respondent devoted her arguments on remand to re-arguing that her conduct did not violate Rule 4.2(a).[5] Respondent proceeded in disregard of two successive orders by the Hearing Committee that directed her to proffer evidence concerning aggravation or mitigation, not the merits of the Board's May 8, 2023 decision.[6] In this context, the Hearing Committee agrees with the Office of Disciplinary Counsel that Respondent's "failure to acknowledge or express any understanding of her misconduct" supports issuance of a public censure.[7]

C. Sanctions Imposed for Comparable Misconduct

Generally, Rule 4.2(a) violations (without accompanying misconduct) have resulted in informal admonitions. *See, e.g.*, *In re Hovis*, Bar Docket No. 2005-D329 (Letter of Informal Admonition July 13, 2011); *In re Roxborough*, Bar Docket No. 2008-D262 (Letter of Informal Admonition May 12, 2011). More severe sanctions

---

[5] *See, e.g.*, Respondent's Reply to Disciplinary Counsel's Opposition to Motion to Append Documents, Incorporated by Reference, to Respondent's Sanctions Brief, Aug. 28, 2023 at 2.

[6] *See, e.g.*, June 8, 2023 Hearing Committee Order; July 28, 2023 Hearing Committee Order.

[7] *See* Disciplinary Counsel's Reply Brief on Sanction at 3 (citations omitted).

have been imposed in matters where aggravating factors were present, including dishonesty or violations of other disciplinary Rules. *See In re Rogers*, 112 A.3d 923, 924 (D.C. 2015) (per curiam) (imposing a 90-day suspension, plus fitness for a Rule 4.2(a) violation compounded by the respondent's Rule 8.4(c) dishonesty); *In re Jones-Terrell*, 712 A.2d 496, 497, 499 (D.C. 1998) (imposing 60-day suspension where the respondent violated Rules 4.2(a), 8.4(d) (serious interference with the administration of justice, 1.8(a) (conflict of interest—prohibited business transactions with a client), 7.1(b)(3) (contact with incapacitated person regarding potential employment), 1.7(b) (conflict of interest—adverse interests), and 8.4(c) (dishonesty, fraud, deceit, or misrepresentation)); *In re Roxborough*, 692 A.2d 1379, 1379 (D.C. 1997) (per curiam) (imposing a 60-day suspension with a fitness requirement for violations of Rules 4.2(a), 1.7(a) (representing clients with adverse positions creating an actual conflict of interest), 1.6(a)(2) (misuse of client confidences), 5.3(a) and (c) (failure to reasonably manage assistant and failure to mitigate) and 1.16(a)(3) (failure to withdraw from representation after being discharged)).

While significantly aggravating factors are present here that were not present in *Hovis* or *Roxborough*, there is but a single Rule violation at issue in this matter and Respondent is not alleged to have engaged in dishonesty. Thus, her misconduct is not as serious as that presented in *Rogers*, *Jones-Terrell*, or *Roxborough*.

V. CONCLUSION

For the foregoing reasons, the Hearing Committee finds that a public censure by the Court is consistent with cases involving comparable misconduct.[8] The Hearing Committee concludes that a public censure will serve to protect the integrity of the Bar and to deter future misconduct.

AD HOC HEARING COMMITTEE

Theodore Hirt

Theodore C. Hirt, Chair

David Bernstein

David Bernstein, Public Member

Leonard J Marsico

Leonard J. Marsico, Attorney Member

[8] D.C. Bar Rule XI, § 3 generally permits imposition of three lesser sanctions than disbarment or suspension: censure by the court (public censure), reprimand by the Board, and informal admonition by Disciplinary Counsel. Rule XI, § 3(3), (4), and (5). Although these lesser sanctions are similar in that they all involve some degree of public disclosure, they nevertheless reflect a descending order of severity from public censure to informal admonition. *In re Schlemmer*, 870 A.2d 76, 80 (D.C. 2005).