THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

Issued
March 18, 2024

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)	:	

REPORT AND RECOMMENDATION OF THE
BOARD ON PROFESSIONAL RESPONSIBILITY AS TO SANCTION

INTRODUCTION

This matter comes before the Board for a second time following a remand to the Ad Hoc Hearing Committee. The Board previously disagreed with the Hearing Committee's determination that Disciplinary Counsel had failed to meet its burden in proving that Respondent violated Rule 4.2(a) (communication between lawyer and person represented by counsel) of the District of Columbia Rules of Professional Conduct and with its recommendation that this matter be dismissed. The Board concluded "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)." Order of Remand at 1, appended hereto. Disciplinary Counsel had asked that the Board recommend that the Court issue an informal admonition. However, because the parties did not have the opportunity to present evidence in

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

mitigation or aggravation, *see* Board Rule 11.11, "we remand[ed] this matter to the Ad Hoc Hearing Committee for proceedings consistent with [our] decision." Order of Remand at 15.[1]

On remand, the Hearing Committee held a hearing to accept evidence in aggravation or mitigation of sanction. Neither party offered witness testimony during the hearing but the Hearing Committee accepted into evidence exhibits establishing that Respondent had received two prior informal admonitions (dated December 28, 2004 and June 16, 2016, respectively). Respondent offered no evidence relevant to mitigation of sanction.[2] Following the hearing, the Hearing Committee issued its Supplemental Report and Recommendation ("Supp. Rpt."), recommending that Respondent be publicly censured by the Court.

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[1] The Board originally heard oral argument in this matter on June 9, 2022. It remanded the matter to the Hearing Committee on May 8, 2023. D.C. Bar Rule XI, § 4(d) provides that "[s]ix members of the Board shall constitute a quorum for deciding cases." However, only five of the Board members who heard oral argument on June 9, 2022 remain on the Board.

Because there is no longer a quorum of Board members who participated in the consideration of the May 8, 2023 Remand Order, the current Board has treated the Remand Order as the Board's final recommendation to the Court regarding facts and the Rule violation. The only question before the current Board is the sanction to be imposed for Respondent's misconduct. These two recommendations are submitted to the Court pursuant to D.C. Bar R. XI, § 4(e)(7) (requiring the Board "[t]o review the findings and recommendations of Hearing Committees submitted to the Board, and to prepare and forward its own findings and recommendations, together with the record of proceedings before the Hearing Committee and the Board, to the Court.").

[2] The Hearing Committee excluded Respondent's proffered exhibits on grounds that she failed to demonstrate that the exhibits were relevant to mitigation of the sanction.

Respondent then filed a notice objecting to the Supplemental Report and requesting that she be permitted to submit an additional brief and to present oral argument in support of her objections. We granted Respondent's request to brief her objections to the report and ordered that "the parties' briefs shall be strictly limited to the issue of sanction," consistent with our Remand Order. We denied Respondent's request to present oral argument to the Board on grounds that it did not appear that oral argument would aid in the Board's consideration of the matter, given that the Board had already determined that Respondent violated Rule 4.2(a) and that the narrow issue presented here was the appropriate sanction as defined by prior cases involving comparable misconduct considering aggravation and mitigation evidence.

Respondent subsequently filed an opening and reply brief with the Board. Despite our Remand Order, directing the parties to address the issue of sanction, Respondent did not limit her briefs to the issue of sanction. To the contrary, she argued that the matter should be dismissed because Disciplinary Counsel had engaged in selective prosecution and other prosecutorial misconduct.[3] *See*

[3] Respondent argues that she was denied due process during the proceedings before the Hearing Committee. She contends that Disciplinary Counsel asserted "vague and constantly changing" new factual theories after the hearing, and that it abandoned a factual contention contained in the Specification of Charges. Respondent's Br. at 2. But Respondent points to no specific shift in Disciplinary Counsel's theory of prosecution, or evidence that she lacked adequate notice or the opportunity to respond. *See In re Schwartz*, 221 A.3d 925, 930 n.2 (D.C. 2019) (per curiam) (due process requirements are satisfied in disciplinary proceedings upon "adequate notice of the charges and a meaningful opportunity to be heard" (quoting *In re Fay*, 111 A.3d 1025, 1031 (D.C. 2015))); *In re Austin*, 858 A.2d 969, 976 (D.C.

Respondent's Br. at 2-3, 5-6, 8. She challenged the determination that she violated Rule 4.2(a) and contended that Disciplinary Counsel's pursuit of the increased sanction of a public censure was retaliatory. Respondent's Br. at 3, 7-8. Disciplinary Counsel's Brief asked that the Board adopt the Hearing Committee's recommended sanction. Disciplinary Counsel's Br. at 1.

For the reasons detailed below, we recommend that the Court publicly censure Respondent.

SANCTION

The sanction imposed in an attorney disciplinary matter must 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

2004) (concluding that "the specification of charges and post-hearing filings fairly put respondent on notice of the fraud charges against him"); *In re Slattery*, 767 A.2d 203, 208–09 (D.C. 2001) (determining that the Specification of Charges listing "theft" as an alleged violation fairly put Slattery on notice that "theft by conversion and misappropriation" was the alleged misconduct). *Cf. In re Morten*, Board Docket No. 18-BD-027 (BPR May 7, 2021) (Board dismissed charges against the respondent where Disciplinary Counsel failed to prove a Rule violation and the respondent did not receive fair notice of its theory of misappropriation, which was not disclosed until closing arguments). Having considered Respondent's arguments in this matter, we discern no due process violation here.

(D.C. 1994) (per curiam). The sanction 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; *Martin*, 67 A.3d at 1053; *In re Berryman*, 764 A.2d 760, 766 (D.C. 2000).

In determining the appropriate sanction, the Court of Appeals 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 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)).

In recommending that Respondent be publicly censured by the Court, the Hearing Committee thoroughly considered each of the above-referenced factors. It found that Respondent's misconduct was serious, having agreed with the Board that "[b]y communicating with M.D. without the permission of his counsel, Respondent placed any [] privileged communications at risk." Supp. Rpt. at 6.

The Hearing Committee considered the evidence of Respondent's prior disciplinary history, concluding that it should be considered in aggravation of

sanction. Respondent's December 28, 2004 informal admonition arose out of her failure to adhere to court-ordered deadlines in two cases, in violation of Rules 1.1 (competence), 1.3 (a) (diligence and zeal) and (c) (reasonable promptness), and 8.4(d) (serious interference with the administration of justice). *See* DCX 45. In her June 16, 2016 informal admonition, Respondent failed to appear at three consecutive court-scheduled hearings, in violation of Rules 1.1(b) (competence), 1.3(a) (diligence and zeal) and (c) (reasonable promptness), 1.4(a) (communication), and 8.4(d) (serious interference with the administration of justice). *See* DCX 46.[4] We agree with the Hearing Committee's determination that these informal admonitions are aggravating factors. Though this matter does not involve the same conduct at issue in the prior matters, it nonetheless serves as "the third time in which Respondent has violated disciplinary rules, calling into question her professional conduct." Supp. Rpt. at 7.

The Hearing Committee also considered, in aggravation, Respondent's lack of remorse. The Committee recognized that while Respondent has a right to defend herself in these proceedings, she must still acknowledge the seriousness of the misconduct that led to them. *See In re Yelverton*, 105 A.3d 413, 430 (D.C. 2014); *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").

[4] For reasons that are unclear, the Hearing Committee addressed only the violation of Rule 8.4(d) discussed in the June 16, 2016 informal admonition. *See* Supp. Rpt. at 7.

Though the Hearing Committee found "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[,]" it also concluded that Respondent

> attempts to justify her misconduct by contending that she had no other choice and she has flatly denied having remorse. . . . 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.

Supp. Rpt. at 9. We agree with the Hearing Committee's conclusion that this necessarily serves as a factor in aggravation of sanction. *See In re Pearson*, 228 A.3d 417, 429 (D.C. 2020) (per curiam) (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) (per curiam) (considering the respondent's "adamant refusal to accept responsibility" and seeking to blame others as aggravating factors compelling a fitness requirement). Indeed, before the Board, Respondent continues to point the finger at Disciplinary Counsel's alleged failure to pursue charges against other members of the Bar, all the while declining to address her own failures at issue here.

Finally, the Hearing Committee observed that "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." Supp. Rpt. at 10. Respondent has continued this pattern before the Board. Despite our very clear order directing that "the parties' briefs shall be strictly limited to the issue of sanction," Respondent declined to avail herself of

the opportunity to present argument in mitigation of sanction. Instead, she continued to litigate the presence or absence of a Rule violation in this case.

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 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 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)).

We agree with the Hearing Committee that Respondent's misconduct is not as serious as that at issue in *In re Rogers*, *In re Jones-Terrell*, or *In re Roxborough*. There is no contention or finding that Respondent engaged in dishonesty and this matter involves a single Rule violation. But the aggravating factors presented here are serious and we are bound to consider them. Ultimately, we conclude that a public censure falls within the range of sanctions for cases involving comparable misconduct.

CONCLUSION

For the foregoing reasons, the Board finds that Respondent violated Rule 4.2(a), and recommends that she receive the sanction of public censure.[5]

BOARD ON PROFESSIONAL RESPONSIBILITY

By: Margaret M. Cassidy
Margaret M. Cassidy

All members of the Board concur in this Report and Recommendation.

[5] As stated by the Court in *In re Schlemmer,* 870 A.2d 76, 80 (D.C. 2005):

> 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.

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	:	Board Docket No. 20-BD-059
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A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 267385)	:	

ORDER OF REMAND

I. INTRODUCTION

This disciplinary matter arose from Respondent's communication with a represented party in a guardianship matter where she represented other parties in the matter. The Ad Hoc Hearing Committee determined that Disciplinary Counsel failed to meet its burden in proving that Respondent violated Rule 4.2(a) when she communicated with a party for whom the court had previously appointed counsel in the matter. The Hearing Committee recommended that the matter be dismissed. Both parties filed exceptions to the Hearing Committee Report. For the reasons detailed below, we find 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, therefore, we remand this matter for a determination on sanction.

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II. FINDINGS OF FACT

On August 31, 2015, a representative of Adult Protective Services ("APS") petitioned the probate division of the Superior Court of the District of Columbia for the appointment of a general guardian and conservator for a ward, referenced herein as M.D., because M.D.'s cognitive functioning was impaired and he was unable to handle his finances, living arrangements, or medical care. FF 2. He suffered from diabetes, hypertension, high cholesterol, and delusional disorder. *Id.* At the time of the petition, M.D. was the sole owner of a property located in northwest D.C. and was residing there. FF 4. Although M.D. had brothers who had assisted him in the past, he had become suspicious of them, believed that they were trying to exploit him, and would not permit them to enter into his home. FF 3.

On September 3, 2015, the probate court scheduled a hearing for September 30, 2015. The court appointed Brett E. Cohen, Esq., as counsel for M.D. FF 5. The court also appointed Richard Tappan, Esq., as guardian *ad litem*, given M.D.'s physical and mental health issues. FF 6. The day before the hearing, Mr. Cohen visited M.D. at his home. FF 8.

Mr. Cohen, Mr. Tappan, a representative from APS, a court-appointed examiner, and two of M.D.'s brothers appeared in court on the hearing date while M.D. participated by telephone. M.D. agreed to have someone appointed to assist him with his finances and his medications but expressed concerns that his brothers wanted to take his house. FF 9. His brothers informed the probate court that they would be willing to serve as co-guardians, but acknowledged that M.D. believed

they were trying to take advantage of him and had recently called the police to have them removed from his home. FF 10.

The court determined that it was appropriate to appoint a guardian and conservator for M.D. and scheduled another hearing to evaluate whether M.D. might regain trust in his brothers, such that they could assume responsibility for his care, or whether a more permanent arrangement using a court-appointed guardian and conservator would be necessary. FF 11. Though not made explicit on the transcript, it was understood by those participating in the hearing that Mr. Cohen would continue as M.D.'s counsel given that the court discussed with Mr. Cohen his availability for the next hearing. FF 12.

On September 30, 2015, the probate court filed the order appointing Mr. Tappan as general guardian and conservator for M.D. FF 14. The order memorialized that Mr. Cohen was present at the hearing as M.D.'s attorney and identified him as M.D.'s attorney on the attached distribution list. It did not state whether his appointment was continued or terminated after the hearing. FF 15. The corresponding court docket entry concerning the hearing contained conflicting entries. One entry, which appeared at the top of the entries, stated that Mr. Cohen had been dismissed as attorney for M.D. FF 16. However, a more detailed entry, which appeared below that entry, indicated that Mr. Cohen would remain in place as M.D.'s attorney until the continued status hearing date. FF 17.

The court also ordered that M.D. not be moved to a location outside of the District of Columbia "without prior court approval." FF 18. Notwithstanding the

court's order, Mr. Tappan moved M.D. to an assisted living facility in Maryland called Raphael House in or around March 2016. FF 20. M.D.'s brothers were not provided with M.D.'s contact information or his whereabouts. *See* FF 28. By the next status hearing on April 11, 2016, all of M.D.'s belongings had been removed from his home. Mr. Tappan did not file an itemized inventory or appraisal of any of M.D.'s belongings. FF 22-23. When M.D.'s brothers learned that Mr. Tappan was disposing of the contents of M.D.'s home, they attempted to contact him to address the issue but were unsuccessful. FF 24. They contacted Respondent for assistance. FF 27.

Respondent had been M.D.'s neighbor and had checked on him from time to time. FF 25. Both M.D. and his brothers knew that Respondent was an attorney. FF 26. On April 5, 2016, M.D.'s brothers asked Respondent to assist them in connection with their brother's case. FF 26-27. That same day, Respondent reached out to Mr. Tappan to determine how her new clients might reach their brother. FF 28. Mr. Tappan advised Respondent that he would need to confirm whether M.D. was willing to speak with his brothers before providing her with the information. FF 29. While Respondent awaited Mr. Tappan's further response, the brothers located M.D. and asked Respondent to visit him to determine whether he was aware that the contents of the house were being removed. FF 30. The brothers asked Respondent to file petitions for them to participate in the proceedings and also to remove Mr. Tappan as conservator and guardian. FF 31.

Respondent first visited M.D. at Raphael House on April 8, 2016 and discussed removing Mr. Tappan from the case. FF 32. When Respondent visited Raphael House, she identified herself to the staff and M.D. as M.D.'s neighbor, not as an attorney for his brothers. *See* FF 57. She visited him two days later and again discussed removing Mr. Tappan. FF 34. M.D. told Respondent that he wanted to remain in his home with assistance. When he learned that Mr. Tappan had disposed of his belongings, he explained to Respondent that he either wanted his property returned or to receive damages in the alternative. FF 31, 35. Both M.D. and his brothers wanted Mr. Tappan's appointment terminated. FF 38. There is no dispute that Respondent was unaware that Mr. Cohen had been appointed to represent M.D. at this point in her representation of his brothers. *See* FF 33.

Prior to the April 11, 2016 hearing, Respondent prepared a Petition to Terminate Mr. Tappan's appointments, along with an attached proposed order for the appointment of an attorney for M.D. FF 40. Before the hearing began, Respondent located Mr. Tappan and handed him a courtesy copy of the petition. FF 41. While Respondent was speaking with Mr. Tappan, Mr. Cohen introduced himself to her as M.D.'s court-appointed attorney. FF 43. Respondent explained that she was not aware that M.D. had counsel and asked that he provide her with a copy of the appointment order. FF 43. Mr. Cohen agreed to do so. There is no dispute that he never ultimately did so.

During the hearing at which Respondent was present, Mr. Cohen identified himself as the court-appointed attorney for M.D. on the record and the court

addressed him as such. FF 44. Respondent informed the court that she was appearing on behalf of M.D.'s brothers. FF 45. When Mr. Cohen sought to waive M.D.'s appearance, Respondent objected and the court reminded her that she had not yet been permitted to participate in the proceedings. FF 46. Mr. Tappan explained to the court that M.D. did not want his brothers visiting him because he was frightened that they would hurt him or steal from him. FF 47. The court, Mr. Tappan, and Mr. Cohen agreed that the next hearing would be held at the Raphael House to permit M.D. to participate when the court addressed the Petitions to Participate and to Terminate Mr. Tappan's appointment. FF 48. The court asked Mr. Cohen to confirm that he would be available for the next hearing. FF 49. Following the hearing, Respondent and M.D.'s brothers went to the Clerk's office, reviewed the docket, and printed out the entries. FF 50. Respondent concluded that Mr. Cohen had been dismissed as counsel for M.D. and that there was no order designating him as ongoing counsel. FF 50. That same day, Mr. Tappan filed a complaint with the Office of Disciplinary Counsel complaining that Respondent had visited M.D. twice without the consent of counsel. FF 51. The complaint did not mention whether he spoke to Respondent about this issue.

On April 13, 2016, Respondent e-filed with the probate court the Petitions for Permission to Participate on behalf of M.D.'s brothers. She served them on M.D., Mr. Tappan, and Mr. Cohen. FF 52. The certificates of service included Mr. Cohen's name but did not identify him as M.D.'s counsel. That same day, Respondent also e-filed the Petition to Terminate Appointment of Conservator and

Guardian, Richard Tappan. FF 54. Again, Respondent served M.D., Mr. Tappan, and Mr. Cohen with the Petition, but the certificate of service appended to this petition identified Mr. Cohen as "Attorney of Record for the Ward." FF 55. It also included a proposed Order for the court's appointment of an attorney for M.D. FF 55. Respondent admitted that by the time she filed the petitions, she had accepted that Mr. Cohen was M.D.'s counsel. HC Rpt. at 24.

Three days later on April 16, 2016, Respondent again visited M.D. at Raphael House. FF 56. She described her visit as a social one but brought with her the copies of the petitions that she had filed. She recited the contents of the petition line by line to M.D. to ensure that what she had filed was consistent with what he wanted to say. FF 56. On May 4, 2016, Respondent visited M.D. again, delivered health care items to him, and discussed the upcoming court hearing. FF 60.

On May 13, 2016, Mr. Cohen went to Raphael House to visit M.D. and learned that Respondent had been visiting M.D. without his consent. FF 63. Later that day, he sent Respondent an email asserting that she had never sought his permission to visit M.D., demanding that she stop visiting him, and asking that she provide him with any work product from her visits. FF 64. In her reply to him, Respondent insisted that the record in the case indicated that he was no longer M.D.'s attorney and that she need not seek his consent to communicate with M.D. FF 65.

On May 18, 2016, Mr. Cohen filed a motion to strike Respondent's appearance on grounds that she appeared to be representing an interest that diverged from M.D.'s interests, particularly since M.D. had ongoing issues with his brothers.

FF 66. Respondent opposed the motion, contending that Mr. Cohen did not have a current order of appointment. Respondent argued that based on her understanding of Rule 305 of the D.C. Superior Court Rules for the Probate Division[1], "[t]here was no legally defined role for an attorney to play between September 30, 2015, and the filing of the April 2016 petition to terminate the conservator/guardian." FF 68.

The court held the next hearing on June 1, 2016, and addressed the pending motion to strike Respondent's appearance. FF 71. The court asked Respondent why she had not investigated whether M.D. had counsel. FF 73. Respondent explained that she did not expect M.D. to have counsel because, in her experience, appointed counsel would generally be terminated after the initial hearing. FF 73. The court told her that did not happen in every case, and that this was a case in which the attorney's appointment was extended for subsequent hearings. FF 73. The court declined to remove Mr. Tappan as the guardian or conservator. FF 76. Before the hearing concluded, the court clarified that Mr. Cohen remained M.D.'s counsel. FF 79. Respondent regarded the court's clarification as a court order that Mr. Cohen was M.D.'s attorney. FF 81. On June 2, 2016, the court denied Mr. Cohen's motion to strike Respondent's appearance and referred the matter to Disciplinary Counsel. FF 82. The court ultimately ended Mr. Cohen's appointment on January 24, 2017. FF 84.

[1] Rule 305(c) provides that "[t]he appearance of counsel for the subject of an intervention proceeding shall terminate upon the disposition of the petition for which counsel's appearance was entered, unless otherwise ordered by the Court."

III. DISCUSSION

Disciplinary Counsel bears the burden of proving the alleged Rule violations by clear and convincing evidence, which is "evidence that will produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established." *In re Cater*, 887 A.2d 1, 24 (D.C. 2005) (internal citations omitted). In determining whether Disciplinary Counsel has carried this burden, we are required to accept the Hearing Committee's factual findings that are supported by substantial evidence in the record as a whole, even where the evidence may support a contrary view as well. *In re Robbins*, 192 A.3d 558, 564 (D.C. 2018) (per curiam); *In re Martin*, 67 A.3d 1032, 1039 (D.C. 2013). "Substantial evidence means enough evidence for a reasonable mind to find sufficient to support the conclusion reached." *In re Thompson*, 583 A.2d 1006, 1008 (D.C. 1990) (per curiam). Existence of contrary evidence does not preclude a determination that there is "substantial evidence." *In re Szymkowicz*, 124 A.3d 1078, 1084 (D.C. 2015) (per curiam).

We review *de novo* the Hearing Committee's legal conclusions and its determination of "ultimate facts," that is, those facts that have "a clear legal consequence." *In re Klayman*, 228 A.3d 713, 717 (D.C. 2020) (per curiam) ("The Board . . . owe[s] no deference to the Hearing Committee's determination of 'ultimate facts,' which are really conclusions of law and thus are reviewed *de novo*." (quoting *In re Bradley*, 70 A.3d 1189, 1194 (D.C. 2013) (per curiam))); *see also In re Krame*, 284 A.3d 745, 752 (D.C. 2022) (explaining that the Board and the Court must defer to "subsidiary fact[s]," such as credibility findings, when they are

supported by substantial evidence, even if they bear on an ultimate fact that is reviewed *de novo*). When making our own findings of fact, the Board employs a "clear and convincing evidence" standard. *See* Board Rule 13.7. We have reviewed the Hearing Committee's Report and the complete record. We incorporate and adopt the Hearing Committee's findings of fact.

Rule 4.2(a) provides that, while "representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a [party] known to be represented by another lawyer in the matter" without prior consent of the lawyer representing such other party or unless authorized by law or a court order to do so. The term "known" denotes "actual knowledge of the fact in question," *see* Rule 1.0(f), which "may be inferred from circumstances." *Id*. "[T]his rule is primarily focused on protecting represented persons unschooled in the law from direct communications from counsel for an adverse person. . . ." Rule 4.2, cmt. [5]. "This rule applies even though the represented person initiates or consents to the communication." *Id.*, cmt. [8].

The Hearing Committee found that Disciplinary Counsel did not prove, by clear and convincing evidence, that Respondent had actual knowledge that M.D. was represented by Mr. Cohen when she visited him on any occasion. It based its conclusion on "the lack of a post-September 2015 order identifying Mr. Cohen as M.D.'s counsel, Mr. Cohen's failure to produce an order of appointment, despite his promise to do so, the language of Probate Rule 305(c), and the inconsistent docket entries. . . ." HC Rpt. at 26-27.

Respondent does not dispute that she was representing M.D.'s brothers when she communicated with M.D. about the subject of the representation. Nor does she dispute that she did so without Mr. Cohen's permission on multiple occasions, even though she knew that by April 13, 2016, Mr. Cohen represented M.D. FF 53, 55. Instead, Respondent argues that Mr. Cohen was not M.D.'s attorney when she met with M.D. for a number of reasons.

She contends that D.C. Superior Court Probate Rule 305(c) operated to terminate Mr. Cohen's appointment after the initial hearing. Resp. Br. at 27. She also argues that Mr. Cohen was not actively providing legal services for M.D. *See* Resp. Br. at 43. Additionally, she states that M.D. understood that she – not Mr. Cohen – was his attorney. *See* Resp. Br. at 42. Finally, she argues that the spirit of the Rule did not prohibit her conduct because her clients did not have interests that were adverse to M.D. and they intended only to advocate for him. Resp. Br. at 21.[2]

For its part, Disciplinary Counsel contends that the Hearing Committee's conclusion that Respondent did not have actual knowledge of Mr. Cohen's role when

[2] Respondent argues for the first time before the Board that she – not Mr. Cohen – was representing M.D. and that M.D. advised Mr. Cohen of the same. *See* Resp. Br. at 40 ("It was [] Cohen who violated Rule 4.2(a) when he interfered with the attorney-client relationship between M.D. and the Respondent."); Resp. Br. at 41-42 ("Brett Cohen, Esq. knew he was not the court appointed attorney of M.D., either as a matter of law or as a matter of fact, because M.D. told him in no uncertain terms who his lawyer was. (DCX # 25 at pg. 3. ¶ 13 (M.D. told Cohen "Ms. Wagner is working for [M.D.] in this case.")"). While M.D. may have been under this impression at some point after she began visiting him, this assertion does not otherwise appear to be supported by the record evidence. Respondent specifically advised the court that she represented M.D.'s brothers and she served M.D. with the motion to terminate Mr. Tappan – an action that would not be appropriate if M.D.

she visited him the third and fourth times is not grounded in the evidence. According to Disciplinary Counsel, Respondent's belief that Mr. Cohen's appointment had expired is irrelevant since the expiration of an appointment relates only to the origin of the representation and possibly the means of compensation – not whether the attorney-client relationship is ongoing. Disciplinary Counsel also argues that, since Respondent admitted knowing by April 13, 2016 that Mr. Cohen represented M.D., her continuing knowledge may be "inferred from the circumstances." *See* Rule 1.0(f).

Whether an attorney-client relationship exists must be determined by the fact-finder based on the circumstances of each case. *In re Bernstein*, 707 A.2d 371, 375 (D.C. 1998). "It is well established that neither a written agreement nor the payment of fees is necessary to create an attorney-client relationship." *See In re Lieber*, 442 A.2d 153, 156 (D.C. 1982); *see, e.g.*, *In re Fogel*, 422 A.2d 966, 966-67 (D.C. 1980) (finding the existence of an attorney-client relationship without the payment of fees); *see also, e.g.*, *Modiri v. 1342 Rest. Group*, *Inc.*, 904 A.2d 391, 397 n.5 (D.C. 2006) (finding the existence of an attorney-client relationship without a retainer agreement). Furthermore, "it is not necessary for an attorney to take substantive action and give legal advice in order to establish such a relationship." *Lieber*, 442 A.2d at 156 (finding that an attorney-client relationship existed where an attorney placed his name on a roster of attorneys available to assist inmates in *pro se* civil

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was her client. In any event, the issue is not relevant to whether Respondent knew that Mr. Cohen was M.D.'s counsel when she visited him.

actions, and was subsequently assigned to represent an inmate, but failed to enter his appearance or to notify the court that he did not plan to represent the inmate). Courts will also find that an attorney-client relationship exists where the client "was seeking professional advice and assistance" and the attorney "held herself out as an attorney in delivering her advice and services[.]" *In re Shay*, 756 A.2d 465, 474 (D.C. 2000) (finding that an attorney who used her law firm's letterhead and resources for her work "held herself out as an attorney" in delivering the legal advice and services at issue). Moreover, "a client's perception of an attorney as his counsel is a consideration in determining whether a relationship exists," *Lieber*, 442 A.2d at 156, but "the attorney-client relationship does not rest on the client's view of the matter . . . ." *In re Fay*, 111 A.3d 1025, 1030 (D.C. 2015) (attorney-client relationship existed where, *inter alia*, the "respondent represented to the court, through his filings, that an attorney-client relationship existed," despite the fact that the client did not know and had never met the respondent).

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.

First, irrespective of the operation of Rule 305(c), the evidence establishes that Mr. Cohen served as M.D.'s court-appointed counsel at all relevant times in this case. Mr. Cohen appeared in court as M.D's attorney, representing M.D.'s interests at hearings. The parties, the court itself, and Mr. Cohen regarded Mr. Cohen as M.D.'s attorney. Indeed, Respondent recognized as much when she included Mr.

Cohen's name on the certificates of service appended to her clients' petitions which she filed days before visiting M.D. Taken together, these facts establish not only that Mr. Cohen was M.D.'s lawyer, but also that Respondent considered Mr. Cohen M.D.'s lawyer. Respondent's argument that Mr. Cohen's representation was lacking in quality does not alter the fact that Mr. Cohen was M.D.'s lawyer.

Respondent's argument that her clients' interests were not adverse to M.D.'s interests is equally unpersuasive. Respondent correctly notes that the rule prohibiting communications with represented parties is primarily focused on protecting represented persons unschooled in the law from direct communications from counsel for an adverse person. *See* Rule 4.2, cmt. [5]. Here, M.D. is not only unschooled in the law but had court-appointed counsel and a guardian because of his diminished capacity. Further, M.D. clearly believed that his brothers had interests adverse to his own. He repeatedly expressed concerns that Respondent's clients sought to take advantage of him or were going to steal from him or otherwise harm him. Whether his concerns were well-founded or not, they cannot be ignored. The fact that Respondent, when visiting M.D. at Raphael House, announced herself as M.D.'s neighbor – and not as an attorney representing his brothers – demonstrates that Respondent was aware of M.D.'s concerns which evidence adversity between M.D. and Respondent's clients.

Further, adversity between parties is not the Rule's sole concern, nor must it be proven to establish a violation of Rule 4.2. Rule 4.2 also seeks to protect unsuspecting lay persons from the inadvertent disclosure of privileged information.

See D.C. Bar Ethics Opinion 258 (Sept 1, 1995) ("Courts also have observed that Rule 4.2 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."). By communicating with M.D. without the permission of his counsel, Respondent placed any such privileged communications at risk.

IV. REMAND

Disciplinary Counsel asks that the Board "recommend to the Court the sanction of the issuance of an informal admonition." ODC Reply Br. at 19. However, because the Hearing Committee did not reach a preliminary, non-binding determination that Respondent violated Rule 4.2(a), the parties did not have the opportunity to present evidence at the hearing in mitigation or aggravation. *See* Board Rule 11.11. Thus, we remand this matter to the Ad Hoc Hearing Committee for proceedings consistent with this decision. *See* D.C. Bar Rule XI, § 9(c); Board Rule 13.7.

BOARD ON PROFESSIONAL RESPONSIBILITY

By: 

Lucy Pittman
Chair

All members of the Board concur in this Report and Recommendation except Ms. Preheim and Mr. Gilbertsen, who are recused.