DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the matter of:	:	
	:	
CARY CLENNON,	:	Board Docket No. 16-BD-078
	:	Bar Docket No. 2015-D236
Respondent.	:	
	:	
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 366816)	:	

REPORT AND RECOMMENDATION OF THE
BOARD ON PROFESSIONAL RESPONSIBILITY

Disciplinary Counsel charged Respondent Cary Clennon with violating Rules 1.3(a), 1.3(c), 1.4(a), 1.4(b), 3.3(a)(1), 8.4(c) and 8.4(d) in connection with his court-appointed representation of a criminal defendant. Before the Hearing Committee, Respondent conceded each of the charged Rule violations; he also expressed regret and remorse for his misconduct, and confidence that it would not happen again.

The Hearing Committee found that Respondent violated each of the charged Rule violations, and recommended a sixty-day suspension, stayed in favor of probation for one year with the following conditions:

> 1. Within 30 days of the imposition of the Court's order imposing discipline, Respondent must make arrangements to attend the two-day ("Basic Training") course taught by Dan Mills of the D.C. Bar Practice Management Advisory Service, attend the course within seven months of the start of the period of probation, and present proof of attendance within 10 days of having completed the course;
>
> 2. Respondent must commit no further disciplinary Rule violations;

3. Respondent must take 3 hours of Continuing Legal Education course(s), pre-approved by Disciplinary Counsel, and show proof of attendance within 10 days of having completed the course(s);

4. Respondent is not required to notify his clients of the probation; and

5. If Respondent violates any of the above-stated conditions of probation, Disciplinary Counsel may petition the Court to impose the stayed suspension.

Neither Disciplinary Counsel nor Respondent has taken exception to the Hearing Committee Report and Recommendation. The Board, having reviewed the record, and considering Respondent's concessions and the failure of either party to file exceptions, concurs with the Hearing Committee's factual findings as supported by substantial evidence in the record, with its conclusions of law, and with the recommended sanction. For the reasons set forth in the attached Hearing Committee Report, the Board recommends that the Court determine that Respondent violated Rules 1.3(a), 1.3(c), 1.4(a), 1.4(b), 3.3(a)(1), 8.4(c) and 8.4(d), and suspend him for sixty days, with that suspension stayed in favor of one year of probation with the conditions discussed above.

BOARD ON PROFESSIONAL RESPONSIBILITY

By: 

Robert C. Bernius
Chair

All members of the Board concur in this Report and Recommendation, except Mr. Carter and Mr. Kaiser, who are recused.

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

In the Matter of:	:	
	:	
CARY CLENNON,	:	
	:	
Respondent.	:	Board Docket No. 16-BD-078
	:	Bar Docket No. 2015-D236
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 366816)	:	

REPORT AND RECOMMENDATION OF
AD HOC HEARING COMMITTEE

Respondent, Cary Clennon, Esquire, is charged with violating Rules 1.3(a), 1.3(c), 1.4(a), 1.4(b), 3.3(a)(1), 8.4(c), and 8.4(d) of the District of Columbia Rules of Professional Conduct (the "Rules"), arising from his court-appointed representation of a criminal defendant, Michael Thompson (aka Jason Thompson). Disciplinary Counsel contends that Respondent committed each of the charged violations and should be sanctioned with a sixty-day suspension with a fitness requirement, with both the suspension and fitness requirement stayed for a one-year supervised[1] probation with conditions. Respondent concedes each Rule violation and accepts Disciplinary Counsel's proposed sanction.

[1] Although Disciplinary Counsel describes the probation as "supervised," none of the recommended conditions involve counseling, treatment, supervision, or monitoring by a practice monitor, financial monitor, or treatment monitor, so the recommended sanction is actually unsupervised probation, as discussed below. *See* Board Rule 18.2(a).

As set forth below, the Ad Hoc Hearing Committee finds that Disciplinary Counsel has proven each charged Rule violation by clear and convincing evidence and recommends that Respondent be sanctioned as recommended by Disciplinary Counsel, except without any fitness requirement.

I. PROCEDURAL HISTORY

On November 28, 2016, Disciplinary Counsel served Respondent via his counsel with a Specification of Charges ("Specification"). DX C.[2] The Specification alleges that Respondent, in connection with his representation of one client, Mr. Thompson, violated the following Rules:

- Rule 1.3(a), by failing to represent a client zealously and diligently;
- Rule 1.3(c), by failing to act with reasonable promptness;
- Rule 1.4(a), by failing to keep his client reasonably informed about the status of a matter and not promptly complying with reasonable requests for information;
- Rule 1.4(b), by failing to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation;
- Rule 3.3(a)(1), by knowingly making a false statement of fact to a tribunal;
- Rule 8.4(c), by engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; and

[2] "DX" refers to Disciplinary Counsel's exhibits. "Tr." refers to the transcript of the hearing held on July 17, 2017. "Stip." refers to the parties' written Stipulations. "FF" refers to the Committee's numbered factual findings, set forth herein.

- Rule 8.4(d), by engaging in conduct that seriously interfered with the administration of justice.

Specification ¶¶ 12(a)-(g).

Respondent filed an Answer on December 19, 2016, in which he did not dispute any of Disciplinary Counsel's factual allegations. DX D. On June 2, 2017, a prehearing conference was held with Chair Daniel I. Weiner, Esquire, presiding. The Office of Disciplinary Counsel was represented by Deputy Disciplinary Counsel Elizabeth Herman, Esquire. Respondent was present at the prehearing conference and represented by David Carr, Esquire, who participated telephonically.

On June 29, 2017, the Stipulations of the Parties was filed, which included Respondent's agreement that his conduct violated each of the charged Rule violations except for Rule 8.4(d).

A hearing was held on July 17, 2017, before this Ad Hoc Hearing Committee (the "Hearing Committee") composed of Mr. Weiner, the Chair; Sara Blumenthal, Public Member; and Douglas J. Behr, Esquire, Attorney Member. Disciplinary Counsel was represented at the hearing by Ms. Herman, and Respondent (who was present) was represented by Mr. Carr. Prior to the hearing, Disciplinary Counsel submitted DX A through D and DX 1 through 8. All of Disciplinary Counsel's exhibits were received into evidence without objection. Tr. 13.

During the hearing, Disciplinary Counsel did not call any witnesses but relied on the Stipulations and its exhibits. The Hearing Committee made a preliminary non-binding determination that Disciplinary Counsel had proven at least one of the Rule violations set forth in the Specification of Charges. Tr. 15; *see* Board Rule

11.11. The hearing then proceeded to the sanctions phase with Respondent testifying on direct and cross-examination.

Disciplinary Counsel submitted its Proposed Findings of Fact, Conclusions of Law, and Recommendation as to Sanction on August 15, 2017 ("ODC PFF"), and Respondent filed his Brief in Reply on August 30, 2017 ("R Br."). Respondent's Brief accepted all of Disciplinary Counsel's proposed factual findings, conclusions of law, and recommendations for sanction. *See* R Br. at 1. Accordingly, Respondent is no longer contesting the alleged Rule 8.4(d) violation.

II. FINDINGS OF FACT

The following findings of fact are based on the testimony and documentary evidence admitted at the hearing, and these findings of facts are established by clear and convincing evidence. *See* Board Rule 11.6.

1. Respondent was admitted to the Bar of the District of Columbia Court of Appeals on December 13, 1982 and assigned Bar number 366816. Stip. 1.

2. At the time this matter arose, Respondent was an experienced criminal defense attorney who practiced criminal law exclusively. Tr. 25. Respondent had practiced criminal law since he was a law student. Tr. 25-26.

3. Respondent is a solo practitioner. He has no prior disciplinary violations. Tr. 25, 27.

Respondent's Appointment to Represent Mr. Thompson

4. On March 28, 2014, Jenifer Wicks, Esquire, Mr. Thompson's previous counsel in the case of *United States v. Thompson* in the Superior Court of the District

of Columbia, filed a "Motion to Substitute Counsel." DX 1 at 9-10. Ms. Wicks had to withdraw from the representation for health reasons. *Id.*

5. On April 2, 2014, the Superior Court of the District of Columbia appointed Respondent to represent Mr. Thompson in the aforementioned case under the Criminal Justice Act ("CJA"). DX 1 at 9, 12; Stip. 2. Ms. Wicks suggested that Respondent be appointed to take over the case because she had already discussed the representation with him. DX 1 at 9.

6. Ms. Wicks provided her file to Respondent soon after he was appointed to the case. Stip. 7. Because the direct appeal of his conviction and sentence was unsuccessful, Mr. Thompson wished to pursue a collateral attack of his criminal conviction. The file contained many letters from Mr. Thompson that showed: 1) he was anxious to proceed with his collateral attack; 2) he wished to be kept informed of the status of his case; and 3) he wanted to communicate about the issues and theories of the case. *Id.*

7. Before Respondent was appointed to the case, Ms. Wicks had drafted a nearly complete D.C. Code § 23-110 motion (collateral attack motion). Ms. Wicks agreed to provide this draft motion to Respondent when he was appointed to the case. However, the draft motion was not in the file when it was transferred to Respondent. Stip. 10; Tr. 31, 50.

8. Although Respondent knew the draft motion was not in the file, he did not request it from Ms. Wicks. Stip. 10.

Mr. Thompson's Initial Attempts to Contact Respondent

9. On April 3, 2014, Ms. Wicks wrote Mr. Thompson (with a copy sent to Respondent) and informed him that she had "primarily drafted the 23-110 [motion] that new counsel can review, file and litigate." DX 1 at 13. After receiving this letter, Mr. Thompson wrote Respondent requesting a copy of the draft motion and a telephone call with him. DX 5 at 1. In the letter, which is undated, Mr. Thompson also wrote that he had received the order indicating Respondent's court-appointment, yet had not received any correspondence from Respondent. *Id.* Mr. Thompson complained that he had "attempted to contact you [Respondent] by phone several times," and he added, "I hope that you understand I would like to have a conversation with you as soon as possible." *Id.* This letter, like all of Mr. Thompson's subsequent written correspondence to Respondent, was polite and coherent. *See generally* DX 5.

10. On July 24, 2014, Mr. Thompson wrote Respondent again requesting that he contact him and requesting a copy of the draft motion. DX 5 at 3. In the July 24 letter, Mr. Thompson summarized what Ms. Wicks had told him about the status of the motion and asked that Respondent confirm that it was true. *Id.* Mr. Thompson noted that he had yet to hear from Respondent "after almost 4 months." *Id.*

11. On August 20, 2014, Mr. Thompson wrote the court expressing his frustration that Respondent had not contacted him. DX 3 at 13. On August 29, 2014, the court forwarded the letter from Mr. Thompson to Respondent. DX 1 at 14.

12. During the time Respondent represented Mr. Thompson, Mr. Thompson wrote three or four letters to the court, which the court forwarded to Respondent. In each letter, Mr. Thompson complained of a lack of communication with Respondent. Stip. 8.

Respondent's Misrepresentations to Mr. Thompson

13. On October 9, 2014 (six months after his appointment), Respondent finally sent Mr. Thompson a letter. DX 1 at 15; DX 6; Stip. 3. In the letter, Respondent told Mr. Thompson:

> Ms. Wicks has not supplied a first draft petition as she indicated she could do, nor have we had the chance for a detailed discussion of her views of your case, although we have had preliminary discussions. I am prepared to begin working on your matter without such a draft, although that step would have likely speeded up the process a little. You and I both relied on that representation, but at this point we need to move forward without further waiting.

DX 6 at 1. Respondent acknowledged to Mr. Thompson that Respondent had not yet had time (prior to sending the October 9, 2014 letter) to read the record of the case. *Id.*

14. On November 4, 2014, Mr. Thompson wrote Respondent again and requested that Respondent call him. DX 5 at 7 (handwritten letter dated 11/4/14); *see also* DX 5 at 9 (postage stamped on Nov. 5, 2014).

15. Respondent spoke with Mr. Thompson by telephone on November 4. Stip. 4. Respondent again falsely told Mr. Thompson that he wanted to see the draft motion but that Ms. Wicks had failed to provide it to him, creating the impression that Respondent had requested it from Ms. Wicks. Respondent advised Mr.

Thompson that he should try to obtain the draft motion directly from Ms. Wicks. Stip. 12, 13.

16. After November 4, 2014, Respondent did not communicate with Mr. Thompson again, even though the court did not vacate his appointment until July 10, 2015. Stip. 6.

17. Mr. Thompson continued to regularly write to Respondent attempting to obtain information from him and discuss what Respondent was doing in the case. DX 5 at 10-24.

18. On December 21, 2014, Mr. Thompson wrote Respondent and told him that he had written to Ms. Wicks, as Respondent requested, and asked her to send Respondent a copy of the draft motion. DX 5 at 14. He also told Respondent that he had complained about Ms. Wicks to the "Bar Association." *Id.*

19. After being told that Mr. Thompson had contacted Ms. Wicks, Respondent sent Ms. Wicks an email on December 30, 2014. In that email, Respondent told Ms. Wicks that he had informed Mr. Thompson that "a draft petition would be helpful, but it would also not mean much to me until I had reviewed the entire file and I would not request of you such a draft until after that point." DX 1 at 16. Respondent testified that he told her not to forward the motion because he did not wish to see her draft until after he had reviewed the trial transcripts. Tr. 36; *see also* Stip. 11. After this email, Respondent never asked Ms. Wicks for a copy of the draft motion. Stip. 11.

20. On January 14, 2015, Ms. Wicks wrote to Mr. Thompson (with a copy to Respondent). In her letter, Ms. Wicks told Mr. Thompson about the email she had received from Respondent. Ms. Wicks stated that Respondent had not requested the draft motion. Tr. 37-39.

21. On January 21, 2015, Mr. Thompson wrote Respondent telling him that Ms. Wicks claimed Respondent had not requested the draft motion. DX 5 at 21. Mr. Thompson stated, "I will assume that Ms. Wicks is once again lying." *Id.* Respondent did nothing to correct Mr. Thompson's mistaken assumption that Ms. Wicks was lying. Mr. Thompson also stated, "I request for you to obtain from Ms. Wicks the 23-110 [motion] which she is withholding and forward to me a copy of it ASAP." *Id.*

22. In sum, Respondent put Mr. Thompson in the position of not knowing which lawyer was telling him the truth. Stip. 14; Tr. 38.

Respondent's Failure to Litigate Mr. Thompson's Case

23. On March 1, 2015, Ms. Wicks emailed a copy of the draft motion to Respondent. DX 5 at 26; Tr. 41.

24. Respondent never discussed with Mr. Thompson Respondent's theory of the case, what issues Respondent believed had merit, if any, or what issues Respondent intended to address as part of the collateral attack. Stip. 5.

25. Between the date of Respondent's appointment (April 2, 2014) and the date of Respondent's removal from the case (July 10, 2015), Respondent did little to advance Mr. Thompson's case or pursue his legal interests. Stip. 9. Respondent

testified that he put the case on the "backburner" and "neglected to prosecute the matter." Tr. 20-21. Respondent explained that he was "devoting more time to pressing trial matters," including a three-week murder trial that required months of preparation. Tr. 23, 39.

26. Respondent testified that there was little he could have done for Mr. Thompson because he did not identify any meritorious issues to raise. Tr. 22. However, Respondent acknowledged that he (1) never read the transcripts, (2) never did an "in depth" analysis, and (3) never investigated the case. Tr. 36, 43, 53-54, 56.

27. On March 15, 2015, Mr. Thompson filed a complaint with the Office of Disciplinary Counsel. DX 1. Mr. Thompson expressed his frustration at the lack of communication from Respondent and his difficulty obtaining a copy of the draft § 23-110 motion. *Id.*

28. Apart from asking Respondent to pursue his collateral attack, Mr. Thompson also asked Respondent in an October 17, 2014 letter to file a motion to have him transferred to an institution closer to the Superior Court. DX 5 at 4. Respondent did not file a motion to have Mr. Thompson transferred. Tr. 24, 32-33.

Respondent's Misrepresentations to the Court

29. On April 2, 2015, Mr. Thompson wrote the court again expressing his frustration with Respondent's failure to communicate with him. DX 3 at 19, 21-22. On May 6, 2015, the court forwarded this letter to Respondent. DX 3 at 25. On May 29, 2015, Mr. Thompson wrote to the court and requested that another lawyer represent him. DX 3 at 26-28.

30. Because Mr. Thompson had requested the court appoint new counsel, on July 10, 2015, the court held a hearing to determine whether Respondent should continue to represent Mr. Thompson. DX 8; Stip. 15. At this hearing, Respondent misled the court by stating that he and Mr. Thompson were waiting for Ms. Wicks to forward a draft of the motion. DX 8 at 4 ("both of us were waiting for her [Ms. Wicks] to complete a draft, 23-110 petition . . . ."). This was an attempt to excuse his failure to appropriately advance Mr. Thompson's cause. Stip. 15; Tr. 22. Respondent has since acknowledged that this was "misleading" and an attempt to "justify [his] lack of action in the case." Tr. 22, 44.

31. On July 13, 2015, the court vacated Respondent's appointment and appointed a successor attorney to represent Mr. Thompson. DX 3 at 29.

***

32. Respondent's failure to work on Mr. Thompson's case caused delay in the matter, as well as anxiety and frustration for his client, as described above. It also required the court to handle correspondence from Mr. Thompson and undertake a second reappointment process. Stip. 17.

33. On September 18, 2015, Respondent responded to the complaint Mr. Thompson filed with the Office of Disciplinary Counsel. Respondent stated, "There is nothing in my email of December 30 to prior counsel that contradicts or misrepresents anything I told Mr. Thompson. He encouraged me to pursue obtaining the draft petition from prior counsel, which I did." DX 2 at 2.

34. Respondent now admits that he did not "pursue obtaining the draft petition from prior counsel," but in fact told her not to forward it to him. Tr. 36; Stip. 11.

35. Respondent stipulated that his conduct violated all of the charged violations except for Rule 8.4(d). Stip. 18. Respondent subsequently conceded that he also violated Rule 8.4(d) in his post-hearing brief. R Br. at 1.

36. At the hearing Respondent acknowledged neglect and failure to communicate, and that he misled the court and his client. Tr. 22, 38, 44. Respondent also expressed regret, remorse, and confidence that this would not occur again. Tr. 46.

37. Respondent has stopped taking "Felony 1" cases.[3] Tr. 49. He also has stopped taking as many court-appointed cases to better manage the cases that he is assigned. Tr. 50. He has not requested any payment from the court (CJA voucher) for Mr. Thompson's representation. Tr. 63-64. The Hearing Committee credited Respondent's testimony concerning these assertions. *See also* ODC PFF at 15 (Disciplinary Counsel crediting testimony).

III. CONCLUSIONS OF LAW

Disciplinary Counsel and Respondent agree that Respondent committed the Rule violations charged in the Specification of Charges. Based on our independent review of Respondent's testimony at his disciplinary hearing and other evidence in

[3] Respondent referred to "Felony 1" cases in his testimony but did not elaborate further as to the meaning of "Felony 1." We understand this to refer to the most serious felony cases prosecuted in the D.C. Superior Court.

the record, we likewise conclude that Respondent committed the charged Rule violations.

A. Rules 1.3(a) and 1.3(c)

Respondent's failure to take the steps necessary to advance Mr. Thompson's case during the 15 months he represented Mr. Thompson violated Rules 1.3(a) and 1.3(c).

Rule 1.3(a) provides that that an attorney "shall represent a client zealously and diligently within the bounds of the law." "Neglect has been defined as indifference and a consistent failure to carry out the obligations that the lawyer has assumed to the client or a conscious disregard of the responsibilities owed to the client." *In re Wright*, 702 A.2d 1251, 1255 (D.C. 1997) (per curiam) (appended Board Report) (citing *In re Reback*, 487 A.2d 235, 238 (D.C. 1985), *adopted in relevant part*, 513 A.2d 226 (D.C. 1986) (en banc) ("*Reback II*")). Rule 1.3(a) "does not require proof of intent, but only that the attorney has not taken action necessary to further the client's interests, whether or not legal prejudice arises from such inaction." *In re Bradley*, Bar Docket Nos. 2004-D240 & 2004-D302 at 17 (BPR July 31, 2012), *adopted in relevant part*, 70 A.3d 1189, 1191 (D.C. 2013) (per curiam); *see also In re Lewis*, 689 A.2d 561, 564 (D.C. 1997) (per curiam) (appended Board Report) (same).

Rule 1.3(c) provides that an attorney "shall act with reasonable promptness in representing a client." "Perhaps no professional shortcoming is more widely resented by clients than procrastination[,]" and "in extreme instances, as when a

lawyer overlooks a statute of limitations, the client's legal position may be destroyed." Rule 1.3, cmt. [8]. The Court of Appeals has held that failure to take action for a significant time to further a client's cause, whether or not prejudice to the client results, violates Rule 1.3(c). *In re Dietz*, 633 A.2d 850, 850 (D.C. 1993) (per curiam). Comment [8] to Rule 1.3 provides that "[e]ven when the client's interests are not affected in substance . . . unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness[,]" making such delay a "serious violation."

Here, Respondent conceded that, from his appointment on April 2, 2014 to his removal on July 10, 2015, he did not take any steps necessary "to advance Mr. Thompson's case or pursue his legal interests." Stip. 9. As he admitted in his testimony, he put the case on a "backburner" and neglected it. FF 25. These admissions are consistent with Rule 1.3(a) and 1.3(c) violations. *See In re Chapman*, Bar Docket No. 055-02, at 19-20 (BPR July 30, 2007) (respondent violated Rule 1.3(a) where he did not perform any work on the client's case during the eight-month term of the representation), *recommendation adopted*, 962 A.2d 922, 923-24 (D.C. 2009) (per curiam); *Bradley*, Bar Docket Nos. 2004-D240 & 2004-D302, at 21 (respondent violated Rule 1.3(c) where she failed to respond to request for nursing home transfer for elderly client for whom she acted as guardian), *adopted in relevant part*, 70 A.3d at 1191. Disciplinary Counsel has therefore met its burden of proof.

B. Rules 1.4(a) and 1.4(b)

Respondent violated Rules 1.4(a) and 1.4(b) by initiating, over the entire course of his representation of Mr. Thompson, only one substantive and two non-substantive communications with his client, while ignoring Mr. Thompson's repeated attempts to contact him.

Rule 1.4(a) provides that "[a] lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information." Under Rule 1.4(a), an attorney must not only respond to client inquiries, but must also initiate contact to provide information when needed. *In re Bernstein*, 707 A.2d 371, 376 (D.C. 1998). The purpose of this Rule is to enable clients "to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued[.]" Rule 1.4(a), cmt. [1].

Similarly, Rule 1.4(b) states that an attorney "shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." This Rule provides that the attorney "must be particularly careful to ensure that decisions of the client are made only after the client has been informed of all relevant considerations." Rule 1.4, cmt. [2]. The Rule places the burden on the attorney to "initiate and maintain the consultative and decision-making process if the client does not do so and [to] ensure that the ongoing process is thorough and complete." *Id.*

Ultimately, the key question is whether Respondent fulfilled his client's reasonable expectations for information by responding to client inquiries and initiating communications when necessary. *See In re Hallmark*, 831 A.2d 366, 374 (D.C. 2003); *In re Schoeneman*, 777 A.2d 259, 264 (D.C. 2001).

Respondent clearly did not do so. He admits that he failed to communicate with Mr. Thompson until six months after his court-appointment, never discussed with Mr. Thompson his theory of the case, and did not promptly respond to Mr. Thompson's many requests for information about the status of the § 23-110 motion. FF 9-17, 24-26. Accordingly, Disciplinary Counsel has proven the violations of Rules 1.4(a) and 1.4(b).

C. Rule 8.4(c)

Respondent's misrepresentations to Mr. Thompson and the court regarding his supposed efforts to obtain the draft § 23-110 motion from Ms. Wicks violated Rule 8.4(c).

Rule 8.4(c) provides that it is professional misconduct for a lawyer to "[e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation[.]" Misrepresentation is a "statement . . . that a thing is in fact a particular way, when it is not so[.]" *In re Shorter*, 570 A.2d 760, 767 n.12 (D.C. 1990) (per curiam) (citation omitted). Misrepresentation requires active deception or a positive falsehood. *See id.* at 768. Even in the absence of an active misrepresentation, however, it is still possible to violate Rule 8.4(c) through dishonesty, which includes "fraudulent, deceitful, or misrepresentative behavior [and] conduct evincing a lack of honesty,

probity or integrity in principle" or "[a] lack of fairness and straightforwardness." *Id.* at 767-68 (internal quotation marks and citations omitted). Conduct that "may not legally be characterized as an act of fraud, deceit or misrepresentation may still evince dishonesty." *Id.* at 768; *see also In re Scanio*, 919 A.2d 1137, 1142-43 (D.C. 2007).

Here, Respondent has conceded that he falsely told both his client and the court that he had attempted to obtain the § 23-110 motion from Ms. Wicks when, in fact, he had told Ms. Wicks not to send it to him. Stip. 11, 12. Such conduct constitutes a misrepresentation in violation of Rule 8.4(c). Even if that were not the case, Respondent's conduct would in the very least constitute dishonesty for purposes of the Rule. Disciplinary Counsel has therefore met its burden of proof.

D. Rule 3.3(a)(1)

Respondent's misrepresentation to the court also violated Rule 3.3(a)(1).

Rule 3.3(a)(1) provides that a lawyer shall not knowingly "[m]ake a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer, unless correction would require disclosure of information that is prohibited by Rule 1.6[.]" The obligation under Rule 3.3 to speak truthfully to a tribunal is one of a lawyer's "fundamental obligations." *In re Ukwu*, 926 A.2d 1106, 1140 (D.C. 2007) (appended Board Report).

Respondent admits that he falsely told the court that "both of us [Mr. Thompson and Respondent] were waiting for her [Ms. Wicks] to complete a draft,

23-110 petition," when in fact Respondent had told Ms. Wicks not to send him the draft, and thus knew that his statement to the court was false. FF 30. This establishes a violation of Rule 3.3(a)(1).

E. Rule 8.4(d)

Finally, Respondent's overall neglect of Mr. Thompson's case and misrepresentations to his client and the court violated Rule 8.4(d).

Rule 8.4(d) provides that it is professional misconduct for a lawyer to "[e]ngage in conduct that seriously interferes with the administration of justice[.]" To establish a violation of Rule 8.4(d), Disciplinary Counsel must demonstrate by clear and convincing evidence that: (i) Respondent's conduct was improper, *i.e.*, that Respondent either acted or failed to act when he should have; (ii) Respondent's conduct bore directly upon the judicial process with respect to an identifiable case or tribunal; and (iii) Respondent's conduct tainted the judicial process in more than a *de minimis* way, *i.e.*, it must have potentially had an impact upon the process to a serious and adverse degree. *In re Hopkins*, 677 A.2d 55, 60-61 (D.C. 1996). The third prong of this test can be satisfied by showing, *inter alia*, that the attorney's conduct caused the unnecessary expenditure of time and resources in a judicial proceeding. *See In re Cole*, 967 A.2d 1264, 1266 (D.C. 2009).

Respondent did not stipulate to having violated this Rule, but later admitted to doing so in his post-hearing brief. *See* R Br. at 1. We agree. Respondent's neglect of Mr. Thompson's case, his failure to communicate with Mr. Thompson, and his misrepresentations to both Mr. Thompson and the court were clearly improper and

bore directly on an identifiable case. *See supra*. Moreover, this misconduct resulted in Mr. Thompson writing several complaint letters directly to the court that had to be processed, in the court having to schedule a hearing to remove Respondent from the case, and in the court ultimately having to appoint new counsel. *See* FF 11-12, 30-32. The entirety of Respondent's misconduct caused an unnecessary expenditure of time and resources in the judicial system that tainted the process to a serious degree. *See* FF 11-12, 28-32; *see also, e.g.*, *Cole*, 967 A.2d at 1266. Accordingly, Disciplinary Counsel has proven a violation of Rule 8.4(d).

IV. RECOMMENDED SANCTION

Disciplinary Counsel recommends the following sanction (which Respondent accepts) for the charged misconduct:

> (1) a 60-day suspension **with** a fitness requirement, **stayed**, and (2) one year of **supervised** probation with conditions. The conditions of probation would be:
>
> > 1. Within 30 days of the imposition of the Court's order imposing discipline, Respondent must make arrangements to attend the two-day ("Basic Training") course taught by Dan Mills of the D.C. Bar Practice Management Advisory Service, attend the course within seven months of the start of the period of probation, and present proof of attendance within 10 days of having completed the course; and
> >
> > 2. Respondent must commit no further disciplinary Rule violations; and
> >
> > 3. Respondent must take 3 hours of Continuing Legal Education course(s), pre-approved by Disciplinary Counsel, and show proof of attendance within 10 days of having completed the course(s).

> 4. If Respondent violates any of the above-stated conditions of probation, Disciplinary Counsel may petition the Court to impose the stayed suspension and the fitness requirement.

ODC PFF at 17 (emphasis in original).

At the outset, although Disciplinary Counsel describes the probation as "supervised," none of the recommended conditions involve counseling, treatment, supervision, or monitoring. *See* Board Rule 18.2(a). Accordingly, the sanction described is actually "unsupervised probation," where a monitor is not appointed but "Disciplinary Counsel shall monitor respondent's compliance *vel non* with the terms and conditions of probation." *See* Board Rule 18.2(b).

In addition, Disciplinary Counsel cites no authority supporting the imposition of a fitness requirement stayed in favor of probation. We recognize that a fitness requirement can be included as a consequence for a respondent's failure to comply with probation ("conditional fitness"), *see, e.g.*, *In re Fox*, 66 A.3d 548, 555-56 (D.C. 2013) (*Fox II*), but we are unaware of a sanction of "stayed fitness." Since Disciplinary Counsel has not even argued—let alone established—that "a serious doubt" about the respondent's ability to practice law currently exists, *see In re Cater*, 887 A.2d 1, 24 (D.C. 2005), we believe Disciplinary Counsel intended to recommend "conditional fitness."

In sum, we interpret Disciplinary Counsel's recommendation as a sixty-day suspension, stayed in favor of one year of unsupervised probation, with the condition that if probation is not completed successfully, reinstatement would require proof of fitness to practice law.

Respondent agrees with the recommended sanction. We largely do as well, except that we do not find that the record supports imposition of a conditional fitness requirement upon non-completion of probation, as explained *infra* in section IV-D. Therefore, we recommend a sixty-day suspension, stayed for one-year of probation with the conditions described by Disciplinary Counsel, but *excluding* the conditional fitness. Accordingly, the final condition of probation would be: "If Respondent violates any of the above-stated conditions of probation, Disciplinary Counsel may petition the Court to impose the stayed suspension."

A. Governing Standards

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); *Cater*, 887 A.2d at 17. "In all cases, [the] purpose in imposing discipline is to serve the public and professional interests . . . rather than to visit punishment upon an attorney." *Reback II*, 513 A.2d at 231 (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; *Martin*, 67 A.3d at 1053 (citing *In re Elgin*, 918 A.2d 362, 376 (D.C. 2007)); *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 or her wrongful conduct; and (7) circumstances in mitigation or aggravation. *See, e.g.*, *Martin*, 67 A.3d at 1053 (citing *Elgin*, 918 A.2d at 376). The Court of Appeals also weighs "'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)) (internal quotation marks omitted).

Finally, in cases where a suspension is warranted, the Court of Appeals has held that it may be appropriate to stay the suspension in favor of probation where misconduct resulted from an attorney's disability or another "systemic problem in a respondent's practice which could effectively be addressed by conditions requiring remedial measures." *In re Mance*, 869 A.2d 339, 341-42 (D.C. 2005) (citation omitted). In recommending stayed suspensions, the Board (with Court approval) has been mindful "that a sanction should be designed to protect the courts, the public, and the legal profession not only from a respondent's misconduct but also from any unnecessary damage that may be caused by removing an otherwise valuable member of the bar from practice." *Id.* at 342 (internal quotation marks omitted).

B. Application of the Sanction Factors and Other Considerations

Seriousness of the Misconduct: Respondent's misconduct involved neglect, failure to communicate, dishonesty, and knowingly making a false statement to the court. Although the representation involved only one matter, the Rule violations are serious.

Prejudice to the Client: Respondent's misconduct caused prejudice to his client Mr. Thompson in the form of additional delay and anxiety. Mr. Thompson's prior counsel had already delayed for more than four years in filing his § 23-110 motion. Respondent caused more than a year of additional delay. FF 25, 33; Stip. 9. Mr. Thompson was also prejudiced by Respondent's failure to request that Mr. Thompson be transferred to a correctional institution closer to the Superior Court, as Mr. Thompson had asked him to do. FF 28; Tr. 56-57. These failures caused Mr. Thompson anxiety, as did Respondent's misrepresentations, which put Mr. Thompson in the position of not knowing which of his lawyers was telling him the truth. FF 22. While the record is insufficient to show that Respondent's misconduct prejudiced Mr. Thompson's ability to prevail on his case, the additional delay and anxiety caused by his conduct is more than sufficient to show prejudice.

Dishonesty: Respondent has admitted to being dishonest with his client and the court with respect to why he had not proceeded with Mr. Thompson's case, attributing this failure to prior counsel, Ms. Wicks, not sending him the draft § 23-110 motion when in fact he had told her not to send the draft. FF 19. He also initially repeated this misrepresentation to Disciplinary Counsel (although Disciplinary

Counsel represents that he subsequently cooperated in full with the disciplinary system). FF 33; ODC PFF at 16.

Violations of Other Disciplinary Rules: Respondent violated each of the charged Rule violations.

Prior Disciplinary History: Respondent has had no prior discipline since he became a member of the D.C. Bar in 1982.

Acknowledgement of Wrongful Conduct: Respondent stipulated to the violations of Rules 1.3(a), 1.3(c), 1.4(a), 1.4(b), 3.3(a)(1), and 8.4(c), *see* Stip. 18, and ultimately agreed to Disciplinary Counsel's proposed sanction recommendation, as well as the Rule 8.4(d) violation. *See* R Br. at 1. Disciplinary Counsel has noted that Respondent both acknowledges the misconduct and has expressed remorse. ODC PFF at 16.

Other Circumstances in Aggravation and Mitigation: Disciplinary Counsel suggests that a factor in aggravation is that Mr. Thompson was an "incarcerated and vulnerable client." *See* ODC PFF at 15. We agree. However, like Disciplinary Counsel, we believe the mitigating factors in Respondent's favor are equally significant. *See id.* (Disciplinary Counsel noting that "[w]hile it is difficult to predict future behavior or to calculate the degree of any attorney's remorse, the fact that Respondent has no prior discipline and has been practicing a long time is a strong factor in his favor."). Also in mitigation, Respondent no longer takes "Felony 1" cases, *see* note 3, has reduced the number of court-appointed cases he accepts to

better manage his caseload, and did not request or accept any payment from the court for the representation of Mr. Thompson. FF 37.

Moral Fitness of the Attorney: Respondent has admitted to neglecting his client's case and dishonesty towards both his client and the court. However, he has also accepted responsibility for his actions, testified forthrightly to the Hearing Committee, is committed to remedial measures, and has generally cooperated with Disciplinary Counsel (except for one initial misrepresentation). FF 35-37. Given that Respondent has no other disciplinary violations in his record over 35 years of practice, the Committee finds—notwithstanding the serious misconduct that is the subject of this matter—that Respondent remains morally fit to practice law.

Need to Protect the Courts, the Public, and the Legal Profession: While Respondent's misconduct was serious, his lack of any prior disciplinary violations, acceptance of responsibility, and commitment to taking remedial measures leads the Committee to conclude that his continued practice is unlikely to pose a danger to the courts, the public, or the legal profession.

C. Sanctions Imposed for Comparable Misconduct

Generally, the Court of Appeals has imposed discipline ranging from a suspension of thirty days to six months (with or without a conditional stay in favor of probation) for conduct involving neglect, failure to communicate, and/or dishonesty. Among the most relevant decisions are the following:

- *In re Francis*, 137 A.3d 187 (D.C. 2016) (per curiam): Respondent received a thirty-day suspension stayed in favor of six months of unsupervised

probation for, *inter alia*, failure to seek his client's lawful objectives, failure to communicate, and intentional prejudice to his client's case. *Id.* at 189, 193.

- *In re Murdter*, 131 A.3d 355 (D.C. 2016) (per curiam) (appended Board Report): Respondent received a six-month suspension with all but sixty days stayed and one year of probation for serious neglect of five CJA cases, failing both to file appellate briefs and to respond to numerous court orders, which caused serious interference with the administration of justice resulting in respondent being found guilty of criminal contempt. *Id.* at 359-60.
- *In re Askew*, 96 A.3d 52 (D.C. 2014) (per curiam): Respondent received a six-month suspension, with all but sixty days stayed, supervised probation of one year, and removal from all CJA panel lists for "egregious neglect" of an indigent incarcerated defendant—including failing to file an appellate brief and failing to forward the client's file to the client's successor counsel, thereby further impeding the client's appeal. *Id.* at 54-57, 62. The Court of Appeals also noted the lack of any mitigating circumstances and that the respondent's testimony to the hearing committee had in some respects been dishonest. *Id.* at 60.
- *In re Fox*, 35 A.3d 441 (D.C. 2012) (per curiam) (*Fox I*)*:* Respondent, who was already suspended pending a determination on whether reciprocal discipline should be imposed arising out of his disbarment in Maryland, received a forty-five-day suspension for failing to take steps to file a lawsuit, making false communications to a client, and other violations. 35 A.3d at 441-42.

- *Cole*: Respondent received a thirty-day suspension for, *inter alia*, neglect of his client's asylum case that resulted in issuance of a deportation order, lying to his client, and serious interference with the administration of justice. 967 A.2d at 1264-65, 1267, 1269.
- *Mance*: Respondent received a thirty-day suspension, conditionally stayed in favor of one-year unsupervised probation (with no requirement that respondent notify clients of probation) for filing an untimely notice of appeal, neglecting to have his client's sentence reduced for merger of convictions, and ignoring both the client's inquiries and a court order to show cause, resulting in serious interference with the administration of justice. 869 A.2d at 340, 342-43. The Board attributed the respondent's misconduct to the high volume of his case load at the time, and also took into account the respondent's "excellent reputation," "lengthy history" as a criminal practitioner, and the "absence of any prior similar discipline in his record[.]" *Id.* at 342.
- *In re Baron*, 808 A.2d 497 (D.C. 2002) (per curiam): Respondent received a thirty-day suspension, conditionally stayed in favor of one-year supervised probation, for failing to communicate with her client during the entire pendency of his appeal. *Id.* at 498-99. Respondent presented evidence in mitigation that she was solely responsible for the care of a mentally and physically disabled child at the time of the misconduct. *Id.*
- *In re Vohra*, 762 A.2d 544 (D.C. 2000) (per curiam): Respondent received a thirty-day suspension, stayed in favor of two years of supervised probation,

for neglect, misrepresentations to his client, and allowing his firm to seek fees for work that had not been performed. In mitigation, the Board found he had been suffering from major depression at the time the misconduct occurred. *Id.*

- *In re Pullings*, 724 A.2d 600 (1999) (per curiam): Respondent received a sixty-day suspension, stayed in favor of one year of supervised probation for, *inter alia*, neglect of two matters, failure to keep a client informed, and serious interference with the administration of justice.
- *In re Stow*, 633 A.2d 782 (D.C. 1993) (per curiam) (appended Board Report): Respondent, who had a record of prior discipline, received a thirty-day suspension, stayed in favor of supervised probation, for neglect of a criminal case. The Board attributed the misconduct to the disorganization of respondent's practice. *Id.* at 785.

D. Recommended Sanction

Having reviewed the case law and the record, the Committee finds that Respondent's misconduct is closer to that at issue in cases like *Francis*, *Mance*, *Vohra, Baron*, and *Stow* than it is to the more severe misconduct at issue in *Murdter* and *Askew*. *Murdter* involved neglect of multiple cases resulting in a conviction for criminal contempt. 131 A.3d at 359-60 (appended Board Report). *Askew* involved only one case, but the neglect was egregious, and the respondent's behavior during disciplinary proceedings led the Court of Appeals to question her moral fitness. 96 A.3d at 60. Moreover, unlike the respondent in *Fox I*, Respondent has no prior misconduct in his record. 35 A.3d at 441-42.

On the other hand, although Respondent had attributed some of his neglect of Mr. Thompson's to his case load (including his involvement in a three-week trial), FF 26, he has not shown that his misconduct was caused by the sort of "overwhelming case load" to which the Board attributed the violations at issue in *Mance*. 869 A.3d at 342. Nor has he pointed to another extenuating circumstance like the respondent in *Baron*. 808 A.2d at 498. Finally, Respondent's dishonesty to a tribunal warrants a more severe sanction than that received by the respondent in *Francis*. *See* 137 A.3d at 193; ODC PFF at 16.

Weighing all of these considerations, the Committee believes that the sanction to which both sides agree, a sixty-day suspension, stayed in favor of probation under the conditions recommended by Disciplinary Counsel, is consistent with the sanctions imposed in other cases involving comparable misconduct, except that we decline to recommend a conditional fitness requirement.

In order for the Hearing Committee to recommend a fitness requirement, "the record in the disciplinary proceeding must contain clear and convincing evidence that casts a serious doubt upon the attorney's continuing fitness to practice law." *Cater*, 887 A.2d at 24. Proof of a serious doubt involves "more than 'no confidence that a Respondent will not engage in similar conduct in the future.'" *In re Guberman*, 978 A.2d 200, 213 (D.C. 2009).

In this case, Respondent has no discipline history since becoming a member of the D.C. Bar in 1982. The misconduct at issue involved a single client during a fifteen-month period. Moreover, Disciplinary Counsel has not alleged that

Respondent engaged in subsequent misconduct that prejudiced Mr. Thompson or interfered with successor counsel's ability to represent him. Nor has Disciplinary Counsel alleged that Respondent has previously been removed from court-appointed CJA cases.

Under these circumstances, the record does not establish a pattern of neglect or dishonest behavior that raises serious questions as to Respondent's character or his continuing fitness to practice law, even in the event that he fails to complete probation. In this respect, Respondent's case is a far cry from *Fox II*, where disbarment had been ordered in Maryland based on the respondent's neglect of three clients to the point of abandonment, including failures to respond to motion practice and forward a settlement check. 66 A.3d at 550-52. The Maryland Circuit Court had also emphasized that the respondent was not remorseful and did not cooperate with the Maryland Disciplinary Counsel. *Id.* at 552; *see also, e.g.*, *In re Bettis*, 855 A.2d 282, 290 (D.C. 2004) (imposing conditional fitness requirement based on respondent's prior disbarment for misuse of client funds).

The Committee acknowledges that Respondent has raised no objection to Disciplinary Counsel's conditional fitness recommendation. However, as explained *supra*, we believe conditional fitness is not warranted on the record before us, and we are mindful of our responsibility to recommend a sanction "to serve the public and professional interests . . . rather than to visit punishment upon an attorney."

Reback II, 513 A.2d at 231.[4] The Committee therefore declines to recommend conditional fitness here. If Respondent does not complete the probation term successfully, he will be subject only to serving the previously stayed sixty-day suspension.

Accordingly, we recommend that Respondent be sanctioned with a sixty-day period of suspension, stayed in favor of probation under the conditions recommended by Disciplinary Counsel, except for the conditional fitness requirement. In addition, we do not believe it is necessary to for Respondent to be required to affirmatively notify his clients of his probation. *See* D.C. Bar R. XI, § 3(a)(7).[5]

V. CONCLUSION

For the foregoing reasons, the Committee finds that Respondent violated Rules 1.3(a), 1.3(c), 1.4(a), 1.4(b), 3.3(a)(1), 8.4(c), and 8.4(d), and should receive the sanction of a sixty-day suspension, stayed in favor of probation for one year with the following conditions:

> 1. Within 30 days of the imposition of the Court's order imposing discipline, Respondent must make arrangements to attend the two-day

[4] In addition, while we recognize that the decision to impose a fitness requirement should be an individualized determination as to whether a "serious doubt" exists as to the attorney's fitness to practice law, we also believe a conditional fitness requirement for Respondent's conduct would "foster a tendency toward" an inconsistent disposition in this instance. *See* D.C. Bar XI, § 9(h)(1).

[5] Disciplinary Counsel did not provide a recommendation as to notification and there is little case law discussing when notification is warranted for an attorney on probation. In general, however, it appears the Court of Appeals does not customarily require notification in cases where a suspension is stayed in favor of probation. *See, e.g.*, *Mance*, 869 A.2d at 342-43 (finding that recommended sanction, which included probation without a notification requirement, was neither an inconsistent disposition for comparable conduct nor otherwise unwarranted).

("Basic Training") course taught by Dan Mills of the D.C. Bar Practice Management Advisory Service, attend the course within seven months of the start of the period of probation, and present proof of attendance within 10 days of having completed the course; and

2. Respondent must commit no further disciplinary Rule violations;

3. Respondent must take 3 hours of Continuing Legal Education course(s), pre-approved by Disciplinary Counsel, and show proof of attendance within 10 days of having completed the course(s);

4. Respondent is not required to notify his clients of the probation; and

5. If Respondent violates any of the above-stated conditions of probation, Disciplinary Counsel may petition the Court to impose the stayed suspension.

Should Respondent violate these terms or conditions, he will be suspended for the sixty days. For purposes of reinstatement, the suspension shall be deemed to commence from the date Respondent files the affidavit required by D.C. Bar R. XI, § 14(g).

AD HOC HEARING COMMITTEE

/DIW/
Daniel I. Weiner, Chair

/SB/
Sara Blumenthal, Public Member

/DJB/
Douglas J. Behr, Attorney Member