DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:	:	
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FREDERIC W. SCHWARTZ, JR., ESQUIRE,	:	
	:	Board Docket No. 13-BD-052
Respondent.	:	Bar Docket No. 2009-D148
	:	
A Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 197137)	:	

ORDER OF THE
BOARD ON PROFESSIONAL RESPONSIBILITY

This matter concerns Respondent's representation of Dr. Jun Chen, a Chinese national who retained Respondent to seek an adjustment of his immigration status. The Ad Hoc Hearing Committee found by clear and convincing evidence that Respondent violated Rule 1.4(a), by not keeping his client "reasonably informed about the status of his case." HC Rpt. at 5.[1] The Hearing Committee recommended that Respondent receive an informal admonition. Both Respondent and Disciplinary Counsel excepted to the Hearing

[1] References to the Hearing Committee's Report and Recommendation are designated "HC Rpt. at __" and references to the Report's factual findings are designated as "FF __ ." Citations to the hearing transcript are noted as "Tr. __." Disciplinary Counsel's and Respondent's Briefs in Support of their Exceptions are designated as "ODC Br." and "Resp. Br." respectively. Respondent's Reply Brief to the Board is designated as "Resp. Reply Br." Disciplinary Counsel's and Respondent's Proposed Findings of Fact, Conclusions of Law, and Recommended Sanction before the Hearing Committee are designated as "ODC PFF" and "Resp. PFF" respectively. Respondent's Response to Disciplinary Counsel's Proposed Findings of Fact, Conclusions of Law, and Recommended Sanction is designated as "Resp. Response to ODC PFF."

Committee's recommended sanction. Disciplinary Counsel argues that Respondent should receive a public censure. ODC Br. at 1. Respondent urges that "this matter be remanded to Disciplinary Counsel to determine an appropriate private sanction for his misconduct." Resp. Br. at 9.

Having reviewed the record and the arguments of the parties, the Board concurs with the Hearing Committee's factual findings, as supported by substantial evidence in the record, with its conclusions of law, as supported by clear and convincing evidence, and with its recommended sanction. The Board incorporates and adopts the Hearing Committee report, which is attached hereto.

A. Respondent's Exception

It is undisputed that Respondent violated Rule 1.4(a). Indeed, Respondent conceded this violation in the hearing, in his post-hearing briefs, and in his brief to the Board. Respondent excepts to the sanction recommendation of the Hearing Committee and seeks a private sanction.[2] In doing so, however, Respondent argues for a sanction that is not available in the District of Columbia. In his briefs, Respondent repeatedly asserts that the Board has the authority to impose a private sanction, but does not provide any statutory, rule, or case support for this

[2] Respondent seeks a private sanction because of his concern that potential clients can see public sanction information on the D.C. Bar website under an attorney's disciplinary history. Resp. Br. at 5 & Ex. 1. However, this has been a public proceeding since the Specification of Charges was filed, and it would be incongruous to cite the public's ease of access to Court decisions, and Board and Hearing Committee reports, as a basis to issue private discipline, and thus prevent the public from learning about the conclusion of this public proceeding.

proposition.[3] Respondent asserts that the Hearing Committee and the Board are "authorized to remand [cases] to the Disciplinary Counsel to determine private sanctions such as continuing education courses in law office management or legal ethics." Resp. Reply Br. at 5; *see also* Resp. PFF at 16. This is not correct.

Attorney discipline in the District of Columbia is the responsibility of the D.C. Court of Appeals. *See* D.C. Bar R. XI, § 1(a). The Court has established the grounds for discipline and the available sanctions, as well as the process and procedure to be followed. Section 3(a) sets forth a list of all of the available types of discipline that may be imposed, ranging from informal admonitions to disbarment—all of which are public. *See also* D.C. Bar R. XI, § 17(a) (disciplinary proceedings are public once a Petition has been filed under § 8(c) or an informal admonition has issued). Through Rule XI, the Court has conferred on the Board the authority to adjudicate cases of attorney misconduct and disability, as well as the

[3] At oral argument, when asked on what authority he relies for his position, Respondent asserted that there were three bases. First, he referenced the Board's "charter." Rule XI provides the Board's authority, duties, and powers—and as discussed herein, it does not, however, provide authority for the Board or Hearing Committee to impose a private sanction. Second, Respondent cited *In re Kline*, 113 A.3d 202 (D.C. 2015), as authority for a private sanction. This is incorrect. In *Kline*, the Court found that the respondent had violated Rule 3.8, but the comment to Rule 3.8(e) had "created a great deal of confusion," such that although the respondent's understanding of his obligations was wrong, it was not unreasonable. *Id.* at 215. Thus, the Court determined that it would not impose a sanction given the unique circumstances, but warned that it would do so in subsequent cases, now that it had clarified a prosecutor's duties under Rule 3.8(e). *Id.* at 216. We note that this decision is public. In fact, even if *Kline* had led to a dismissal by a Hearing Committee, Board, or the Court, the dismissal decision would be available on the D.C. Bar website. Finally, Respondent argued that the Board could provide the sanction he seeks because the Court has not forbidden us to do so. We read Rule XI as explicitly defining and establishing the limits of the Board's powers and duties—therefore, not allowing us to be inventive beyond the sanctions provided.

responsibility to administer the disciplinary system. *Id.* at § 4. This is not unfettered, however.

As set forth in Rule XI, the Board may impose a Board reprimand and may direct Disciplinary Counsel to issue an informal admonition, both of which are public. *Id.* at § 4(e)(8).

In contrast, the Court has established that Disciplinary Counsel has "the power and duty . . . to dispose of all matters involving alleged misconduct by an attorney subject to the disciplinary jurisdiction of the Court, by dismissal or informal admonition or by referral of charges; or upon prior approval of a member of the Board on Professional Responsibility, by diversion; or by negotiated discipline." D.C. Bar R. XI, § 6(a)(3). Respondent asserts that the Hearing Committee and the Board are "authorized to remand [cases] to the Disciplinary Counsel to determine private sanctions such as continuing education courses in law office management or legal ethics." Resp. Reply Br. at 5; *see also* Resp. PFF at 16 (requesting remand to Disciplinary Counsel for a private sanction of a continuing education course). This is not correct.

Despite Respondent's assertion that there *should* be private discipline, there is none.[4] *See In re Dunietz*, 687 A.2d 206, 210-11 (D.C. 1996) (private sanction

[4] This has been the case since January 1, 1995, when the Court amended Rule XI, § 17(a). *See* Order, M-190-94 (D.C. Nov. 10, 1994) (attached) (amending Rule XI, § 17(a) to provide that "except as otherwise provided in this rule or as the Court may otherwise order, all proceedings involving allegations of misconduct by an attorney shall be kept confidential until either a petition has been filed under section 8(c) or an informal admonition has been issued"). At oral argument, Respondent noted that making both informal admonitions and censures public has

"would be contrary to the public interest," and once petition filed or informal admonition has been issued, "promoting confidence in the discipline system counsels against confidential discipline").

In cases involving allegations of minor misconduct, Disciplinary Counsel may offer a respondent a confidential "diversion" program designed to remedy the alleged misconduct. D.C. Bar R. XI, § 8.1. Diversion is offered "in Disciplinary Counsel's *sole* discretion." D.C. Bar R. XI, § 8.1(c) (emphasis added) (Disciplinary Counsel may, in its "sole discretion, offer to any attorney being investigated for misconduct the option of entering a diversion program in lieu of other procedures available to Disciplinary Counsel."). Neither hearing committees nor the Board—nor even the Court—has the authority to require Disciplinary Counsel to offer diversion to any respondent.[5] Thus, because Respondent requests that the Board take an action that it cannot do, the Board rejects Respondent's request.

"merged" them and asserted that this gives the Board "additional authority" to differentiate between them by providing for a private sanction. Respondent's "merger" argument appears to rest on the notion that all non-suspensory sanctions are essentially equal because all are published on the D.C. Bar website, and none provide for a period of suspension. This provides no support for the argument that the Board may decide to impose a private sanction. Again, we find that we do not have this authority, as explained *supra* at n. 3.

[5] Respondent cites extensively to the *ABA Standards for Imposing Lawyer Discipline* and its provisions that allow for some discipline to be confidential. Resp. Br. at 1-4. Respondent laments the change in Rule XI, § 17 that made discipline public, and seeks to persuade the Board that it should ignore the current Rules. We decline to do so.

B. Disciplinary Counsel's Exception

Disciplinary Counsel excepts to the Hearing Committee's recommended sanction and requests a sanction greater than that recommended by the Hearing Committee. Disciplinary Counsel asserts that Respondent should be publicly censured "given the circumstances of this case." ODC Br. at 5. Although Respondent's client, Dr. Chen, filed his complaint in order to obtain a refund of the fee he had paid, Disciplinary Counsel charged Respondent with a violation of Rule 1.4(a) only, based on Respondent's failure to communicate with Dr. Chen. Tr. 115-16; Specification of Charges, ¶ 11. As background, we note that at the beginning of the hearing, Disciplinary Counsel told the Hearing Committee that it was not contending that "Respondent incompetently handled the substance of Dr. Chen's case." Tr. 9-10. At the end of the hearing, Disciplinary Counsel made clear that it "does not at all contest whether the Respondent did the work. [Its] theory is that he may have done all the work in the world [but] the client was completely unaware of what that was." Tr. 174. During the sanctions phase of the hearing, Disciplinary Counsel also stated, "[W]e have no evidence in aggravation" and the sanction recommendation would be provided in post-hearing briefing to the Committee. Tr. 177.

Disciplinary Counsel asserts that Respondent should receive a public censure because there is "a laundry list of aggravating factors" in this case. ODC Br. at 7. Disciplinary Counsel argues that Respondent "deliberately withheld work product he claimed was critical to Dr. Chen's case when he represented him, [and] refused to surrender them when discharged, despite having received $2000 for

whatever work he made purportedly performed . . . ." *Id*. at 7. Before the Hearing Committee, Disciplinary Counsel argued that "[a]lthough this disciplinary matter involves only one client's case, Respondent has not shown he appreciates the need to communicate effectively with his clients, and to date has refused to recompense Dr. Chen for the fee that yielded him no benefit." ODC PFF at 20.

We note that Disciplinary Counsel did not charge Respondent with any Rule violations that would encompass these assertions.[6] Nonetheless, Disciplinary Counsel cites to cases in its sanction analysis that involve a failure to refund and failure to promptly return client funds, to support its argument that public censure is a more appropriate sanction than an informal admonition. *See* ODC Br. at 9 (citing *In re Martin*, 67 A.3d 1032 (D.C. 2013) and *In re Mance*, 980 A.2d 1196 (D.C. 2009)). We recognize that "an attorney can only be sanctioned for those disciplinary violations enumerated in formal charges." *In re Austin*, 858 A.2d 969, 976 (D.C. 2004); *In re Smith*, 403 A.2d 296, 300 (D.C. 1979). Because due process prevents the Hearing Committee from finding additional uncharged rule violations, increasing the typical sanction for a single Rule 1.4(a) violation from informal admonition to public censure, as advanced by Disciplinary Counsel, equally raises questions of due process. *See, e.g*., *In re Ruffalo*, 390 U.S. 544, 549-551 (1968) (procedural due process requires that disciplinary proceedings should not become a

[6] For example, a lawyer's failing to surrender "papers and property to which the client is entitled," when he has been terminated as counsel, could constitute a violation of Rule 1.16(d). Charging an unreasonable fee could constitute a violation of Rule 1.5. No such violations were charged here.

trap where attorney's testimony is used to amend the charges); *In re Winstead*, 69 A.3d 390, 397 (D.C. 2013) (respondent should be given notice of the specific rules she allegedly violated, as well as notice of the conduct underlying the alleged violations).

We need not resolve the due process question in this case, however, because we find that Disciplinary Counsel has failed to prove the alleged factors offered in aggravation by clear and convincing evidence. By analogy to evidence used to establish a fitness requirement or dishonesty, uncharged misconduct considered in aggravation of the sanction would have to be proven by clear and convincing evidence. *See, e.g.*, *In re Downey*, No. 18-BG-1160, slip op. at 14 (D.C. June 29, 2017) ("we are not persuaded that Disciplinary Counsel proved [uncharged] dishonesty as an aggravating factor by clear and convincing evidence"); *In re Boykins*, 999 A.2d 166, 175 (D.C. 2010) (to justify the enhanced sanction of a fitness requirement upon reinstatement, Disciplinary Counsel must prove the facts by clear and convincing evidence); *In re Cater*, 887 A.2d 1, 25 (D.C. 2005) (same).

First, as to the Hearing Committee's determination that Respondent acknowledged his misconduct, we adopt the Committee's conclusion. *See* HC Rpt. at 23 (citing Resp. PFF at 34). Respondent testified that he "did not communicate with [Dr. Chen] as [he] should have." FF 34. Respondent further admitted that "there came a time when the system essentially crumbled." FF 24. Moreover, in his briefing Respondent admitted that his conduct violated Rule 1.4 for the period after

his assistant left in January 2007 through the aftermath of Dr. Chen's termination of his representation, and he recognizes what he should have done.[7] Resp. Response to ODC PFF at 28; *see also* Resp. Br. at 6 ("Respondent has always agreed that he should be sanctioned; the issue is whether it should be a public sanction or a private sanction with accompanying remedial requirements."). Accordingly, Disciplinary Counsel has not proven the aggravating factor of lack of remorse or lack of acknowledgement of wrongdoing.

Disciplinary Counsel faults Respondent for not returning the $2,000 fee he collected from his client. ODC Br. at 4. Respondent argues that he is entitled to retain this fee because of the amount of work he expended in this case. *See* FF 37.[8] The Hearing Committee found that the retainer agreement provided for a total fee of $4,000 to adjust Dr. Chen's immigration status, with a "$2,000 'non-refundable'

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[7] Disciplinary Counsel's point of contention appears to be that Respondent does not as clearly take responsibility for any personal failure to communicate with Dr. Chen between his retention in October 2005 and January 2007, as he does for the period after January 2007. Respondent notes that he communicated with his clients through his Chinese-speaking assistant, since Respondent's language skills are limited to English. *See, e.g.*, Resp. Response to ODC PFF at 3; Resp. Reply Br. at 3-4. Disciplinary Counsel concedes that Dr. Chen was much more comfortable communicating in Chinese than in English, but asserts that he should have known that Dr. Chen did not have a full understanding of the process Respondent would undertake to file his application. *See, e.g.*, ODC PFF at 4-10; ODC Br. at 2-3. The Hearing Committee found that Respondent should have initiated personal contact with Dr. Chen, even when his assistant was handling communications with the client. HC Rpt. at 20. However, like Respondent, the Hearing Committee's legal analysis focuses on the period after Respondent's assistant departed. *Id.* at 20 (noting that Respondent should have informed Dr. Chen that the file was missing in 2007). We do not find that Respondent's acknowledgement of his errors is so limited that this constitutes an aggravating factor.

[8] Respondent testified that he earned the $2,000 by reviewing materials, preparing the file, and discussing what he would do for Dr. Chen. FF 37.

upfront fee." FF 9. Because Disciplinary Counsel questioned Respondent extensively about the fee, the Hearing Committee asked Disciplinary Counsel to clarify the relevance of this issue. Tr. 173. Disciplinary Counsel, however, assured the Hearing Committee that this case was only about Respondent's failure to communicate with his client, including whether he adequately explained the fee to Dr. Chen and whether Dr. Chen was aware of the work he was performing. Tr. 174-76. The Hearing Committee was not asked to determine whether Respondent *should* have returned the fee to his client or whether Respondent's retention of the fee was improper—and it did not do so. *See* FF 37, 39. Accordingly, we do not find that Disciplinary Counsel proved this potentially aggravating factor by clear and convincing evidence. Thus, it would be inappropriate for us to rely on the failure to return a fee as an aggravating factor.[9]

Disciplinary Counsel also asserts that Respondent "refused to show Dr. Chen documents critical to his case." ODC Br. at 4. These documents were drafted to be part of the application to be filed by Respondent for Dr. Chen. *See* FF 4-6. However, when Dr. Chen asked to see the documents, he had abandoned his efforts to obtain a green card through a national interest waiver and had already filed an application to obtain a green card through the EB-IB process, a different green card process. *See* FF 35-36. Thus, the documents prepared by Respondent were not at

[9] A respondent's voluntary return of a fee to a client who complains about the respondent's representation may be a mitigating factor in the analysis of the appropriate sanction, but we do not find that failure to return a fee is an aggravating factor when there is *no* evidence that the Respondent did not earn it and no violation of Rule 1.5 is found.

all relevant to Respondent's subsequent efforts to change his immigration status. We do not find this to be an aggravating factor supported by clear and convincing evidence.

In support of its argument for a public censure, Disciplinary Counsel noted that generally "a first instance of *neglect* of a single client matter warrants a reprimand or public censure." ODC PFF at 20 (quoting *In re Chapman*, 962 A.2d 922, 926 (D.C. 2009) (citation omitted) (emphasis added)) and relied almost exclusively on *In re Geno*, 997 A.2d 692 (D.C. 2010). Disciplinary Counsel asserts that Dr. Chen was prejudiced by Respondent's conduct, focusing on his request for all of Respondent's work product and Respondent's failure to return the fee, but there was no neglect alleged or proven by clear and convincing evidence here. Thus, the Hearing Committee found that Disciplinary Counsel's reliance on *Geno* was "misplaced," because that case involved conduct that was much more serious than Respondent's conduct here, it involved violations of more than a single Rule, and the prejudice to the client was much greater. HC Rpt. at 21-22. We agree.[10]

The Hearing Committee found that the cases cited by Respondent—*In re Dix*, Bar Docket No. 133-00 (Letter of Informal Admonition, Sept. 7, 2004) and *In*

[10] At oral argument, Disciplinary Counsel asserted that the Hearing Committee did not analyze prejudice to the client. This is incorrect; the Hearing Committee did conduct this analysis (HC Rpt. at 22-23), but found the prejudice to be less than that in *Geno*, and thus not a factor that should increase the sanction from an informal admonition. HC Rpt. at 21-22. We agree. Indeed, we note that the prejudice asserted by Disciplinary Counsel (failure to show Dr. Chen what he had done and failure to return the fee) is not prejudice arising from Respondent's violation of Rule 1.4(a), but—at most—from the uncharged conduct asserted by Disciplinary Counsel but not found by clear and convincing evidence by the Hearing Committee.

re Steinberg, Bar Docket No. 203-98 (Letter of Informal Admonition, Mar. 26, 2001)—were more analogous because they involved a sole violation of Rule 1.4(a).[11] In addition to *Dix* and *Steinberg*, Disciplinary Counsel has now disclosed several other cases involving attorneys' failure to communicate with their clients as the single rule violation, with each resulting in an informal admonition being imposed as the sanction.[12] *See In re Bryant*, Bar Docket No. 2013-D241 (Letter of Informal Admonition, Jan. 3, 2014) (attorney sent a single letter to incarcerated client, which he did not receive, but attorney believed that this was "sufficient to fulfill [her] responsibility to communicate with [her client]")[13]; *In re Howard*, Bar

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[11] Disciplinary Counsel argues that *Dix* and *Steinberg* are not analogous. We disagree. Disciplinary Counsel argues that the respondent's conduct in *Dix* was less egregious because "there was no evidence that the attorney refused to surrender work product that her client had paid for or that she *neglected* the substantive matter – as Respondent did here." As discussed herein, we do not find by clear and convincing evidence that Respondent improperly failed to give Dr. Chen his work product. Disciplinary Counsel's efforts to distinguish *Steinberg* are also unpersuasive. In *Steinberg,* the respondent failed to send a court order to her client, which caused her ex-husband to call the police and accuse her of violating the terms of the order. Contrary to Disciplinary Counsel's assertions here, there was no finding in *Steinberg* that this did not constitute "prejudice" to the client. Further, there, the respondent failed to cooperate with Disciplinary Counsel, to such an extent that her conduct resulted in an additional disciplinary proceeding in which she received a thirty-day suspension. We do not find that an informal admonition was more appropriate in *Steinberg* than here.

[12] On October 4, 2013, Respondent filed a written request for discovery of "all determinations, resolutions, and discipline issued or agreed to by Bar Counsel, informally or formally, where there was a single infraction of Rule 1.4(a)" and which have not been published on the internet by Disciplinary Counsel. *See* Respondent's Response to the Chair's Request at 2. On January 13, 2014, the Chair of the Hearing Committee issued an Order denying the motion for production of documents. Respondent asks us to revisit the Chair's decision, but we decline to do so and deny his renewed request to the Board.

[13] We find that the facts in *Bryant* were similar to those here, and weigh in favor of the imposition of an informal admonition. In deciding to issue an informal admonition in *Bryant*, rather than a more serious sanction, Disciplinary Counsel took into consideration the fact that the violation did not involve dishonesty and the respondent took the matter seriously, did not have

Docket No. 2005-D025 (Letter of Informal Admonition, Dec. 27, 2005) (attorney communicated with client only once between February 2003 and December 2015, and only provided information after disciplinary complaint filed)[14]; *In re Malyszek*, Bar Docket No. 299-96 (Letter of Informal Admonition, Sept. 29, 1998); *In re Cawley*, Bar Docket No. 80-97 (Letter of Informal Admonition, July 21, 1997). We find the facts and the surrounding circumstances of these cases to be more analogous to the instant case than those in *Geno*, and they only confirm that the appropriate sanction is an informal admonition.

Finally, Disciplinary Counsel cites *In re Askew*, 96 A.3d 52, 54 (D.C. 2014) for its proposition that the Hearing Committee relied too heavily on a need for an analogous or comparable sanction, overlooking the discipline system's goal of protecting the public. *See* ODC Br. at 6. In *Askew*, the Court imposed a greater sanction than that recommended by the Board and Hearing Committee, but while discussing the need to protect the public and deter others, the Court did not ever suggest that public safety outweighed the principle of consistency of sanction when

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any prior disciplinary history, expressed remorse, and intended to cease the practice of law. Here, Respondent has taken this matter seriously, he does not have a prior disciplinary history, and the Committee found "no evidence of dishonesty or misrepresentation in this case." *See* HC Rpt. at 23. As noted *supra*, the Hearing Committee found that he has acknowledged his misconduct. HC Rpt. at 23; *see also* Resp. Opp. to ODC PFF at 1, 6. Finally, although Respondent intends to continue to practice law, he has taken steps to prevent recurrence of this issue by not taking "new immigration clients" after his legal assistant left. Resp. PFF at 33.

[14] In addition to his failure to communicate with his client, the respondent in *Howard* also failed to respond to Disciplinary Counsel's attempts to obtain information. Disciplinary Counsel cited the respondent's lack of disciplinary history as a factor in its decision to impose an informal admonition, rather than a more serious sanction.

imposing a sanction for comparable conduct. In fact, the Court noted: "all of these factors lead us to conclude that more is warranted in this case . . . . This conclusion is reinforced by our examination of other cases and our determination that the Board's recommended discipline would 'foster a tendency toward inconsistent dispositions for comparable conduct.'" *Askew*, 96 A.3d at 61 (quoting *In re Cleaver-Bascombe*, 986 A.2d 1191, 1194 (D.C. 2010) (per curiam)).

CONCLUSION

Having determined that the Hearing Committee's factual findings are supported by substantial evidence in the record and that its conclusions of law—including its recommended sanction—are supported by clear and convincing evidence, and having determined Disciplinary Counsel did not prove uncharged misconduct by clear and convincing evidence, we adopt the recommendation of the Hearing Committee and recommend that Respondent receive an informal admonition.

BOARD ON PROFESSIONAL RESPONSIBILITY

By: _____

Robert C. Bernius
Chair

Dated: JULY 31, 2017

All members of the Board concur in this Order, except Mr. Kaiser, who did not participate.

This Order was prepared by Ms. Soller.

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

In the Matter of:	:	
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FREDERIC W. SCHWARTZ, JR.,	:	
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Respondent.	:	Board Docket No. 13-BD-052
	:	Bar Docket No. 2009-D148
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 197137)	:	

REPORT AND RECOMMENDATION OF AD HOC HEARING COMMITTEE

I. INTRODUCTION

On June 5, 2013, Disciplinary Counsel[1] filed a Specification of Charges against Respondent, Frederic W. Schwartz, Jr., Esquire. Respondent is charged with violating Rule 1.4(a) of the District of Columbia Rules of Professional Conduct in his representation of Dr. Jun Chen, a Chinese national, who sought employment-based permanent residency status in the United States. The Ad Hoc Hearing Committee finds clear and convincing evidence that Respondent violated Rule 1.4(a) and recommends that Respondent receive an informal admonition.

[1] The Petition Instituting Formal Disciplinary Proceedings and the Specification of Charges were filed by the Office of Bar Counsel. The District of Columbia Court of Appeals changed the title of Bar Counsel to Disciplinary Counsel, effective December 19, 2015. We use the current title herein, except we do not modify the title of Disciplinary Counsel's filed documents.

II. PROCEDURAL HISTORY

On June 7, 2013, Disciplinary Counsel served the Specification of Charges and Petition Instituting Formal Disciplinary Proceedings on Respondent by personal service. BX D.[2] The Specification alleged a single violation of Rule 1.4(a) (failure to communicate). BX B. Respondent filed an Answer on July 30, 2013. BX C.

On September 5, 2013, a telephonic pre-hearing conference was held before the Chair of the Ad Hoc Hearing Committee, Erik T. Koons, Esquire, Respondent (appearing *pro se*), and Assistant Disciplinary Counsel Traci M. Tait, Esquire. On September 27, 2013, a second telephonic pre-hearing conference was held. The parties filed stipulations as a joint exhibit on October 8, 2013. On October 22, 2013, the Chair granted Disciplinary Counsel's unopposed motion to present Dr. Chen's testimony by video transmission.[3]

[2] "BX" refers to Disciplinary Counsel's exhibits which were filed as "Bar Counsel's Exhibits." (BX A-D and 1-5 were filed on October 16, 2013; BX 6 was filed on January 15, 2014.) "RX" refers to Respondent exhibits. (RX 1-4 were filed on October 22, 2013; RX 5-6 were filed on January 15, 2014.) "Stip." refers to the Stipulations Between Disciplinary Counsel and Respondent, dated October 8, 2013. "Tr." refers to the transcript of the hearing on January 15 and February 11, 2014. "Preh. Tr." refers to the transcript of the telephonic prehearing conference on January 13, 2014.

[3] On October 23, 2013, Disciplinary Counsel filed a motion to dismiss the Specification of Charges and Petition based on the unavailability of Disciplinary Counsel's sole witness. On October 31, 2013, the Hearing Committee referred Disciplinary Counsel's motion to dismiss to the Executive Attorney for review by a Contact Member, pursuant to Board Rule 7.16(b), and cancelled the previously scheduled November 5 disciplinary hearing on November 4, 2013. On November 18, 2013, a Contact Member denied the motion to dismiss on the basis that Disciplinary Counsel's witness had become available through video testimony.

On November 21, 2013, the Chair was joined by Committee members Jean S. Kapp, public member, and Rudolph F. Pierce, Esquire, attorney member, for a telephonic prehearing conference for scheduling purposes with Respondent and Assistant Disciplinary Counsel Tait. On January 13, 2014, the Chair held another telephonic prehearing conference with Assistant Disciplinary Counsel and Respondent, and the Chair denied Respondent's request for production of unpublished disciplinary decisions involving a violation of a single Rule 1.4(a) charge (*i.e.,* not joined with another separate Rule violation). *See* Preh. Tr. 115-17. In an order issued that same day, the Chair formally denied Respondent's request, but at the same time ordered Disciplinary Counsel to produce to Respondent and the Hearing Committee any unpublished authority, including adverse authority, upon which it would rely in its sanction recommendation.

The hearing was held before the three members of the Ad Hoc Hearing Committee on January 15 and February 11, 2014.[4] Disciplinary Counsel called Dr. Chen as the only witness in its case-in-chief. Dr. Chen chose to testify in Mandarin with the assistance of a sworn interpreter. Tr. 8. Disciplinary Counsel offered Bar Counsel Exhibits BX A-D and 1 through 6, all of which were admitted without objection. Tr. 55. Respondent testified on his own behalf and called no other

[4] A telephonic prehearing conference took place on January 17, 2014 for the purpose of scheduling the second day of hearing testimony.

witnesses. Tr. 57. Respondent submitted six exhibits, RX 1-6, all of which were admitted without objection. Tr. 80-81. At the conclusion of witness testimony, the Hearing Committee made a preliminary non-binding determination that Respondent had committed a Rule violation. Tr. 176.

By order on February 21, 2014, the Hearing Committee left the record open for evidence on sanction and directed Respondent to submit documentary mitigation evidence by February 27, 2014. In a March 20, 2014 motion, Respondent requested permission to present his arguments in mitigation of sanction in his brief, relying on evidence already submitted. The Hearing Committee granted Respondent's motion on March 27, 2014.

Disciplinary Counsel filed its Proposed Findings of Fact, Conclusions of Law, and Recommended Sanction ("PFF") on March 12, 2014. Respondent filed both his Proposed Findings of Fact, Conclusions of Law, and Recommended Sanction and a Response to Bar Counsel's PFF on April 24, 2014. Disciplinary Counsel filed a Reply Brief on May 5 and a Corrected Reply Brief on May 6, 2014. On May 15, 2014, Respondent filed a motion to strike Disciplinary Counsel's Reply Brief or, in the alternative, to permit Respondent an opportunity to reply.[5] After determining

[5] Respondent argued that Disciplinary Counsel accused Respondent of dishonesty for the first time in its Reply Brief and incorrectly suggested that Respondent altered an exhibit. *See* Corrected Reply of Bar Counsel's to Respondent's Post-hearing Submissions at 8 n.5; Respondent's Non-Consent Motion to Strike or Permit Reply at 4.

that no cause existed to strike Disciplinary Counsel's brief and that no further submissions were warranted, the Chair denied Respondent's motion on June 20, 2014.

III. FINDINGS OF FACT

1. Frederick W. Schwartz, Jr., is a member of the District of Columbia Bar, having been admitted on April 1, 1972, and assigned Bar number 197137. BX A (Registration Statement).

2. In 2005, Dr. Jun Chen was a post-doctoral student with a Ph.D. in medicinal chemistry and was working in the chemistry laboratories of the University of Pittsburgh. Tr. 15-16.

3. Dr. Chen speaks English but communicates most comfortably in Mandarin. Tr. 28. Respondent does not speak Mandarin. Tr. 64, 133; *see* Tr. 28.

4. A friend of Dr. Chen's referred him to Respondent for help in changing his U.S. immigration status to "lawful permanent resident" (to obtain a green card) and to draft the cover letter and recommendation letter that was necessary for a successful national interest waiver application.[6] Tr. 16-17. Dr. Chen chose

[6]A national interest waiver is an option for those seeking employment-based immigration in the EB-2 category. Employment-based petitions pursuant to 8 U.S.C. § 1153(b)(2) (known as EB-2) are available for aliens of exceptional ability who are members of professions with advanced degrees, but the petitions must include a permanent job offer and certification from the Department of Labor. 8 C.F.R. § 204.5(k). Pursuant to 8 U.S.C. § 1153(b)(2)(B)(i), however, the INS can waive the job offer and labor certification requirements if such a waiver is found to be in the "national interest." *Liu v. INS, et al.*, 274 F.3d 533, 534 (D.C. Cir. 2001).

Respondent even though Respondent's office is located in the District of Columbia, and, at the time, Dr. Chen lived in Pittsburgh, Pennsylvania. Tr. 17; Stip. ¶ 2.

5. Respondent testified that two categories of green card authority exist; one is based on marriage to a U.S. citizen or legal permanent resident and the other is employment-based. Tr. 57-58. In Respondent's legal practice, 90-95 percent of the Chinese clients are seeking a "national interest waiver." Tr. 60. Respondent explained that an applicant does not need to be employed to apply for a "national interest waiver." Tr. 61.

6. Respondent explained that in 1998, the former Immigration and Naturalization Service (INS) issued a decision that it was no longer a matter of working for the national interest, but an applicant needed to demonstrate that the national interest would be harmed if he or she did not receive a green card. Tr. 61-62. This change made it more difficult to obtain a national interest waiver. Tr. 62.

7. In August 2005, Dr. Chen contacted Respondent about representing him to adjust his immigration status. BX 1A at 7; Tr. 33-34. From about August 21, 2005 through October 4, 2005 (before Dr. Chen formally retained Respondent), Dr. Chen and Respondent's Mandarin-speaking office assistant, June Miyata, exchanged at least two e-mail messages and spoke on the telephone. Tr. 33-36, 157. The purpose of the communication was to address important information about Dr. Chen's curriculum vitae and publications. *Id*. Respondent did not speak with Dr.

Chen between the sending and the signing of the retainer. Dr. Chen only spoke with Ms. Miyata. Tr. 18.

8. Once Respondent decided to take Dr. Chen's case, Ms. Miyata e-mailed a retainer agreement for Dr. Chen's signature on or about October 4, 2005. Tr. 36. Dr. Chen signed the retainer agreement in October 2005, and Respondent agreed to pursue an employment-based adjustment of status through a national interest waiver. Stip. ¶ 2.

9. The retainer agreement provided for a total fee of $4,000 for all services to adjust Dr. Chen's status. BX 1 at 5; Tr. 17, 65; Stip. ¶ 3. The retainer agreement described a $2,000 "non-refundable" upfront fee, additional amounts of $1,000 to be due when the I-140 was approved, and that $1,000 would be due prior to the filing of the adjustment status or I-485. Stip. ¶ 3.[7]

10. The retainer agreement also included a provision that if Dr. Chen "unilaterally terminate[d] this agreement with no good reason," Respondent could charge the full fee if the I-140 had been submitted or, if not yet submitted, he could charge an hourly rate specified in the retainer agreement for services actually performed. Stip. ¶ 3.

[7]A Form I-140 Immigration Petition for Alien Worker is to be submitted to the United States Citizenship and Immigration Service (USCIS) in conjunction with the national interest waiver petition. *See* 8 C.F.R. § 204.5(a). The Form I-485 Application to Adjust Status is the subsequent form used to get a green card (permanent resident status). *See* 8 U.S.C. § 1255.

11. Dr. Chen testified that the way he understood it, for $2,000, Respondent would draft the letters necessary for a successful national interest waiver application. Tr. 25 ("he should be working on preparing the cover letter and recommendation letters").

12. Respondent admitted that he never spoke with Dr. Chen or emailed him prior to the signing of the retainer agreement. He, instead, assumed that Dr. Chen understood the terms in the retainer, because it was Ms. Miyata's "job to answer" a client's questions. Tr. 120-22. Respondent testified that Ms. Miyata was "fully capable of explaining everything that needed to be explained about the retainer" and he delegated the tasks to her, which "freed [him] up to do the letters." Tr. 70-71. When confronted with the absence of any record or documentation of the communications between Ms. Miyata and Dr. Chen, Respondent stated that "her job wasn't to document everything," and his office did not document conversations or keep records of hours, "because we did not charge by the hour." Tr. 158-59.

13. Before Dr. Chen signed the retainer agreement, Respondent failed to explain to Dr. Chen that he would not be able to start work on his case for some time. In fact, his office had a "queue." According to Respondent, his immigration clients had to wait until those already "in the line" had gotten his attention. Tr. 92. Dr.

Chen was not initially told that his case would be placed in that queue. *See* Tr. 26-27.[8]

14. Dr. Chen made his initial $2,000 payment in October 2005. Stip. ¶ 4. After Respondent received payment, Respondent provided him with a "check list of items Respondent would need to proceed." *Id*.

15. At the end of October, Dr. Chen and Respondent's assistant, Ms. Miyata, had a telephone conversation, to discuss the e-mail she had sent which listed the items needed. Tr. 38-39. Dr. Chen began compiling the documents. Tr. 21. In the next six months, Dr. Chen turned over to Respondent most of the materials needed to proceed. Stip. ¶ 4.

16. On or about March 28, 2006, Dr. Chen e-mailed Respondent's office with concerns about a former professor who refused to provide a letter of support for his immigration application; Ms. Miyata contacted Dr. Chen to address the problem. Tr. 39-41. Dr. Chen acknowledged that he and Ms. Miyata spoke by telephone after he sent his e-mail request for advice. Tr. 41-42 ("I believe she did contact me").[9]

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[8] In his briefing, Respondent acknowledges that "Dr. Chen's reference and cover letters remained in the queue at least until late March 2007." Respondent's Response to Bar Counsel's PFF at 12.

[9] In its Reply Brief, Disciplinary Counsel suggests that RX 6 (e-mail dated March 28, 2006) improperly includes a handwritten notation "answered by phone 3/28/2006" when the copy of the e-mail sent earlier to Disciplinary Counsel (BX 1A at 11) did not include this notation. The Committee notes that Dr. Chen himself believed he spoke to Ms. Miyata after he sent the March 28, 2006 e-mail. *See* FF 17. If Disciplinary Counsel is asserting dishonesty on the part of

17. Because Dr. Chen had a professional conference in the District of Columbia in early April 2006, he made an appointment to meet with Respondent at his office in order to give him certain documents for his immigration application. Tr. 22.

18. On April 6, 2006, Dr. Chen met with Respondent and turned over the materials he had compiled. Tr. 21-22. The meeting lasted between 20 and 30 minutes. Tr. 23, 88. Respondent admitted that this was the only meeting he had with Dr. Chen during the entire period of representation. Tr. 116.

19. Dr. Chen believed he had submitted all the necessary materials, and that Respondent would "work on the cover letter and the recommendation letter" which were necessary to submit the application. Tr. 23-24.

20. Over the ensuing year, however, Respondent did not write Dr. Chen about the status of his case, did not telephone Dr. Chen with updates, or e-mail him regarding what, if any, progress Respondent was making to advance Dr. Chen's interests. Tr. 23-24.

21. In January 2007, Ms. Miyata received a notification from United States Citizenship and Immigration Services stating that her work permit had been denied

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Respondent in his production of documents or is challenging the weight to be given to RX 6, the Committee does not have evidence to support a finding of dishonesty and finds that RX 6 is consistent with Dr. Chen's own testimony. Moreover, because Dr. Chen met with Respondent the following week, the exact timing of the response from Ms. Miyata is less relevant. *See* FF 17.

and that she was required to leave the country within 30 days. Tr. 66.

22. Respondent testified he had a series of legal assistants before Ms. Miyata. They handled the bulk of the work for the immigration matters, which made up about 50 percent of his practice, in a "very cost effective" manner. Tr. 63-64. For "national interest waiver" cases like Dr. Chen's, the assistant was "in charge of getting the material together" and communicating with the client, while Respondent prepared the drafts of letters for the applications of the clients next up in the "queue." Tr. 64-65, 163.

23. After Ms. Miyata left, Respondent did not hire a replacement because he "could not find somebody else . . . who charged a reasonable fee." Tr. 67-68. As a result, Respondent "reached the determination that [he] would take no new clients, starting maybe a month after she left, and that [he] would just deal with the clients that [he] had." Tr. 68.

24. Respondent also admitted that "there came a time when the system essentially crumbled." Tr. 164. Respondent admitted: "For a three-month period, four-month period, in fact I did not communicate with [Dr. Chen] as a I should have . . . because I could not find the file . . . ." Tr. 70.

25. Respondent claimed that the lack of progress in Dr. Chen's application was due to deficiencies in the references or reference letters provided by Dr. Chen. Tr. 83, 95-96. Respondent testified that he never telephoned Dr. Chen to inform him

about these concerns because he did not speak Chinese. Tr. 97 (Dr. Chen's "best language was Chinese and so . . . . they would not be successful communications, unless somebody spoke Chinese to make those calls.").

26. Respondent had no recollection of ever sending a letter to Dr. Chen. Tr. 86. Respondent stipulated that he and his office "only occasionally communicated with Dr. Chen regarding the progress of his case, and then only to indicate that initial work had been performed but that different references from the ones Dr. Chen had already provided were necessary to complete the process." Stip. ¶ 9.

27. Respondent acknowledged that from reviewing an initial e-mail sent by Dr. Chen to his office, he knew that the timing was important to Dr. Chen: "he said that [time] was a concern before he signed the retainer." Tr. 88. Respondent testified that he "specifically advised" Dr. Chen about the queue when they met in April 2006, six months after the retainer had been signed. Tr. 163.

28. Between April 2006 and February 2007, Dr. Chen inquired twice by e-mail about what was happening in his case. Tr. 24-26. He wanted to know exactly where his application was and why he had not seen it yet. Tr. 92. A total of six contacts occurred from November 2005 to February 2007 between Dr. Chen and either Ms. Miyata or Respondent. *See* BX 1A at 11 (Dr. Chen's March 28, 2006 e-mail seeking help); Tr. 39-42 (Miyata's telephone call in response shortly

thereafter); Tr. 42 (Respondent's in-person meeting with Dr. Chen in early April 2006); Tr. 44-45 (a telephone conversation in which Ms. Miyata informed Dr. Chen she was leaving Respondent's office); and Tr. 24-25 (two e-mails in February 2007).

29. Dr. Chen sent a second e-mail request for a status report on February 20, 2007. *See* Tr. 25-26; BX 6A at 5-6. He wrote:

> Dear Mr. Schwartz, One week has passed again. Could you drop me some lines and let us know the status of our case in your hand? We[10] have been waiting for it for almost one year. If it was not an emergency one year ago, we think it is urgent enough now.
>
> Thanks! Jun

BX 6A at 5-6. Respondent replied with a brief e-mail, only saying: "I am working on an emergency deportation case and will reply in several days." BX 6A at 6.[11]

30. When he still did not hear back from Respondent, Dr. Chen followed up with the following e-mail message of March 1, 2007:

> Time flied quickly as we are waiting for your information about our application. It is already March - we have provided you all necessary materials for 11 months without receiving any responses about the progress! You can imagine how disappointed and anxious we are. You should let us know that you could not handle our case in an effiecient [sic] way when we signed the contract. If you are still not working on our case now, we may have to find a solution - we are at the edge of patience. Hope this email can call your attention.

[10] Dr. Chen was married and living with his wife Liying Ren, and the "we" refers to him and his wife. Tr. 16.

[11] Respondent believes that this was his first e-mail to Dr. Chen was in February 2007. *See* Respondent's Response to Disciplinary Counsel's Proposed Findings of Fact, Conclusions of Law, and Recommended Sanctions at 13.

BX 6A at 4. Respondent again did not reply.

31. In the five weeks after February 20, 2007, Dr. Chen sent Respondent a total of seven e-mails without ever receiving an answer. BX 6A at 2-5. Dr. Chen expressed his confusion and consternation with the lack of any response from Respondent or his office. *Id.*

32. Respondent claimed that sometime in March 2007, he relayed a message to Dr. Chen through an associate of Dr. Chen's (Yajuan) who had also retained Respondent and visited Respondent's office. According to Respondent, his message to Yajuan informed Dr. Chen that "a cover letter and reference letters have to be done." Tr. 52, 86-87. However, Dr. Chen specifically wrote to Respondent on March 20, 2007, to ask if Yajuan was correct when she told Dr. Chen that his case was "almost done except the cover letter. Is this true?" BX 6A at 2. Respondent did not call or e-mail a reply to Dr. Chen to clarify or confirm. *See id.* (March 27, 2007 e-mail message from Dr. Chen: "We have to say that we are now very angry about your attitude and behavior. You ignore our requests and did not answer our emails.").

33. Dr. Chen terminated Respondent's representation by e-mail on June 4, 2007, followed by at least one telephone call to Respondent's office to confirm that he did not intend to continue with Respondent's services. Stip. ¶ 6. Upon being fired, Respondent did not offer to provide his file or any work product, documents,

or any information at all to his former client's successor representatives. Tr. 30-33. Respondent acknowledged during the hearing that when Dr. Chen terminated the representation, Respondent had not made "significant" progress on drafting those letters. Tr. 149, 165.

34. Respondent testified that after Ms. Miyata left the office in early 2007, for a three to four-month period, he "did not communicate with [Dr. Chen] as I should have" because the relevant portion of Dr. Chen's file had been misplaced. BX 6B; Tr. 69-70. However, it was not until around February 2008 that Respondent telephoned Dr. Chen to tell him that his file "had been 'misplaced' following the departure of his legal assistant." Stip. ¶ 7. Approximately one or two weeks later in 2008 (at this point, several months after having been fired by Dr. Chen), Respondent located Dr. Chen's file and notified Dr. Chen. *Id*.

35. Dr. Chen testified that, in February 2008, he did not need the cover letter and reference letters from Respondent because a different application had already been sent by university staff by that time.[12] Tr. 52.

36. In October 2008, Dr. Chen obtained a change of status with the University of Pittsburgh's sponsorship in a different green card category. Stip. ¶ 9. The university's immigration specialists, who were not lawyers, used the EB-1B

[12] After Dr. Chen fired Respondent on June 4, 2007, the University of Pittsburgh Division of Student Affairs Office of International Services submitted an EB-1 application on Dr. Chen's behalf in late July 2007. Tr. 30-31; BX 2 at 1.

category to assist Dr. Chen. Tr. 32-33, 48. Dr. Chen testified that the EB-1B category required sponsorship with the university. *Id*. He paid $1,000 to the University of Pittsburgh for the assistance. *Id*. at 33, 49.

37. Dr. Chen testified that he filed the complaint with the Office of Disciplinary Counsel because he believed Respondent did not do his work: "I already paid the $2,000, but he didn't do anything." Tr. 53. Respondent, however, claimed he had "earned that $2,000" by reviewing materials and preparing the file, and talked about what he had planned to do for Dr. Chen. Tr. 82-83, 139-41.

38. Respondent stipulated that he "never presented Dr. Chen with either an immigration petition for his review and signature, or other evidence that he had performed work on Dr. Chen's immigration petition justifying the $2,000 paid." Stip. ¶ 8; *see also* Tr. 86-87, 116-18. Respondent testified that he refused to show draft letters to Dr. Chen because Dr. Chen was not entitled to see them. Tr. 30-31, 155. He was not entitled because "he had not paid for it." Tr. 170.

39. At the time of the hearing, Respondent had not refunded the $2,000 he was paid in response to Dr. Chen's demand for restitution. Tr. 53; BX 1 at 4.

40. Respondent contends that Dr. Chen had only asked about the "progress" but not the "status" of his case, and that "Dr. Chen was not interested in the status of the case." Tr. 148, 151. In Respondent's view, "progress" referred to the client's position in his "queue," *i.e*., the amount of time the client still must wait to get his

attention, and Respondent was not obliged to tell his clients about their "progress." Tr. 149-51. Respondent testified that the "status" of Dr. Chen's case did not change between his office visit in April, 2006 and when Dr. Chen wrote in February, 2007 so he had no obligation to communicate with Dr. Chen. Tr. 149 (Respondent) ("The status of the case had not changed. . . . I had not completed the application and the cover letter and the referee letters and sent it in. That is the status.")

IV. LEGAL CONCLUSIONS

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." As Comment [1] to Rule 1.4 explains, a lawyer must provide the client with "sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued . . . ." Rule 1.4, cmt [1]. Comment [2] adds that "[t]he lawyer must be particularly careful to ensure that decisions of the client are made only after the client has been informed of all relevant considerations," and that the lawyer must "initiate and maintain the consultative and decision-making process" even in the absence of requests for information from a client. Rule 1.4, cmt [2]. Finally, "[a] lawyer may not withhold information to serve the lawyer's own interests or convenience." Rule 1.4, cmt [5].

At the inception of the case, including the signing of the retainer, Respondent did not take basic measures to ensure that Dr. Chen understood the meaning of the retainer or what to expect from the representation. FF 9-13. From their only meeting on April 6, 2006 until June 4, 2007 (when Dr. Chen fired Respondent), Dr. Chen was unable to obtain any substantive information about what Respondent was doing to advance his immigration application despite his repeated requests for information (in English and by e-mail). FF 27-31. According to Respondent, "providing 'complicated and nuanced information' and responding to questions about that information, required the highest degree of communications skills including, on occasion, the need to provide an explanation in [Mandarin,] Dr. Chen's native language." Respondent's Response to Bar Counsel's PFF at 6. In Respondent's view, this posed a problem because he did not speak Mandarin.

The Committee finds that Respondent did not keep Dr. Chen "reasonably informed about the status" of his case. *See* Rule 1.4(a). After Dr. Chen signed and e-mailed Respondent's retainer agreement in October 2005, Respondent met with Dr. Chen only one time. FF 17-18. On this single occasion, on April 6, 2006, Respondent met with Dr. Chen for about 20-30 minutes. FF 18. Respondent's first e-mail to Dr. Chen was sent in February 2007 after Dr. Chen complained about not knowing the status of his case, and, in it, Respondent only stated that he was busy working on an "emergency deportation case" but would reply in several days – which

he did not do. FF 29. Respondent did not recall ever sending Dr. Chen a letter, even after receiving the signed retainer agreement. FF 26.

The evidence is incontrovertible that Respondent did not "promptly comply with reasonable requests for information." *See* Rule 1.4(a); *see also In re Edwards*, 990 A.2d 501, 523 (D.C. 2010) (client is "entitled to whatever information [he] wishes about all aspects of the subject matter of the representation"). Despite Dr. Chen's repeated and urgent e-mails asking for information about his immigration matter, Respondent did not e-mail, telephone, or write a letter in response. FF 26, 28-31. Respondent acknowledged that he knew that the timing was important to Dr. Chen even before he received the signed retainer agreement from Dr. Chen in October 2005. FF 27. Despite this expressed concern by his client, Respondent did not ever respond to Dr. Chen's February 20, 2007 request for a status update or provide any information on what was causing the delay. FF 29-31. After Dr. Chen asked (in a March 20, 2007 email to Respondent) whether it was true that his application was "almost done except the cover letter" as his associate Yajuan had relayed, Respondent again did not write or call Dr. Chen to confirm or clarify (even though Respondent claimed at the time of the hearing that he could not complete the work because he needed additional reference letters). *See* FF 32.

"[A] lawyer not only must respond to client inquiries but also must initiate communications to provide information when needed." *In re Hallmark*, 831 A.2d

366, 374 (D.C. 2003) (citing Rule 1.4(a), cmt [1]). Here, the record shows that the attorney-client communications were initiated by Dr. Chen, even when Ms. Miyata was still working for Respondent. Nor did Respondent's obligations to Dr. Chen cease following the departure of his assistant. Respondent never initiated contact when he should have notified Dr. Chen that he was not going to hire a replacement for Ms. Miyata and how that would cause additional delays (as his system had "essentially crumbled"); and he should have informed Dr. Chen that the file was missing well before February 18, 2008, as he noticed it missing in early 2007. *See* FF 22-24, 34.

Accordingly, the Hearing Committee finds by clear and convincing evidence that Respondent violated Rule 1.4(a).

V. RECOMMENDED SANCTION

The discipline imposed in a matter should serve to maintain the integrity of the legal profession, protect the public and the courts, and deter similar misconduct by the respondent-lawyer and other lawyers. *In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (en banc). A disciplinary sanction should be comparable to those imposed in similar cases. D.C. Bar Rule XI, § 9(h)(1) (Court seeks to avoid "inconsistent dispositions for comparable conduct").

A Hearing Committee should take into consideration the following factors when determining an appropriate sanction: (1) seriousness of the misconduct; (2)

prejudice, if any, to the client; (3) whether the conduct involves dishonesty and/or misrepresentation; (4) violations of any other disciplinary rules; (5) whether the attorney had a previous disciplinary history; (6) whether the attorney acknowledges the wrongful conduct; and (7) circumstances in mitigation and aggravation. *In re Martin*, 67 A.3d 1032, 1053 (D.C. 2013); *In re Vohra*, 68 A.3d 766, 771 (D.C. 2013)

Respondent argues that, if the evidence supports a finding of a rule violation, the appropriate sanction is an informal admonition given his lack of any prior discipline in more than 40 years of being a member of the D.C. Bar, the absence of severe prejudice to the client, and the finding of a single rule violation. Disciplinary Counsel, however, recommends that Respondent be sanctioned with public censure for his violation of Rule 1.4(a). In making its recommendation, Disciplinary Counsel relies chiefly on the public censure that was ordered in *In re Geno*, 997 A.2d 692 (D.C. 2010). *See* Bar Counsel's PFF at 20-22.

In *Geno*, however, Respondent was found to have violated Rule 1.3(c) (failure to act with reasonable promptness) in addition to Rule 1.4(a). In *Geno*, the prejudice to the client was also much more severe than the circumstances here. The client in *Geno* had been seeking political asylum and because respondent never notified his client of an important immigration court hearing (and because respondent went to the wrong immigration court that day), a deportation order issued *in absentia*. 997 A.2d at 692-93. The respondent in *Geno* then demanded additional money from the

client and when the client refused to make additional payments, the respondent continued to refuse to move to vacate the order so that the deportation order was still in effect at the time of the disciplinary proceedings. *Id*. at 693.

Disciplinary Counsel's reliance on *Geno* is misplaced because, here, Respondent's misconduct was less serious (did not involve a failure to give notice or failure to appear in court on behalf of his client), involved a single rule violation, and his client suffered less prejudice than the order of deportation in *Geno*.

The Ad Hoc Hearing Committee, instead, finds that the facts and circumstances described in the informal admonition letters cited by Respondent are more analogous. *See e.g.*, *In re Dix*, Bar Docket No. 133-00 at 2 (Letter of Informal Admonition, Sept. 7, 2004) (Office of Disciplinary Counsel admonishing that after taking of the client's retainer fee, attorney "had an affirmative obligation to initiate contact with her… [and] failed to communicate with [the client] notwithstanding her repeated attempts to contact [the attorney] concerning the status of her case"); and *In re Steinberg*, Bar Docket No. 203-98 (Letter of Information Admonition, Mar. 26, 2001) (Rule 1.4(a) violation for failing to send important court documents despite client's numerous requests).

At the same time, the Hearing Committee notes that the prejudice suffered by Dr. Chen was not *de minimis*, because (1) he had to pay an additional $1,000 to the University of Pittsburgh for their assistance in filing the appropriate paperwork for

a green card (FF 37); (2) Respondent did not return the $2,000 retainer fee (FF 40); and (3) Respondent knew that time was of the essence for Dr. Chen (FF 28). We, accordingly, do not agree with Respondent's position on that point. *Compare* Respondent's Response to Bar Counsel's PFF at 29 (arguing lack of prejudice) *with In re Quinn*, Bar Docket No. 209-02 (Letter of Informal Admonition, Aug. 1, 2002) (after misplacement of client's file, Rule 1.4(a) violation for failing to communicate with client in connection with application for citizenship before the INS, even though attorney admitted failure to file the application and returned client's file, retainer fee, and citizen application fee).

Aside from the misconduct itself, Disciplinary Counsel offered no evidence in aggravation of the sanction. There is no evidence of dishonesty or misrepresentation in this case and the parties do not dispute that Respondent has no prior disciplinary history. Finally, Respondent acknowledges his misconduct. *See* Respondent's PFF at 34. Because the facts and circumstances in the instant case are comparable to those imposed in similar cases where Disciplinary Counsel has issued Informal Admonition letters, we recommend the same sanction for Respondent's misconduct. *In re Winstead*, 69 A.3d 390, 399 (D.C. 2013) (Board and Court of Appeals may rely on Informal Admonition letters issued by the Office of Disciplinary Counsel when considering the appropriate range of sanctions) (citing *In re Schlemmer*, 840 A.2d 657, 662 (D.C. 2004)).

VI. CONCLUSION

Based on the foregoing clear and convincing evidence and conclusions of law, the Ad Hoc Hearing Committee finds that Respondent violated of Rule 1.4(a) in his representation of Dr. Jun Chen, and recommends that he be sanctioned with the imposition of an informal admonition.

AD HOC HEARING COMMITTEE

/ETK/
Erik T. Koons, Esq., Chair

/JSK/
Jean S. Kapp, Public Member

/RFP/
Rudolph F. Pierce, Esq., Attorney Member

Dated: April 24, 2017

District of Columbia
Court of Appeals

M-190-94

BEFORE: Wagner, Chief Judge, and Ferren, Terry, Steadman, Schwelb, Farrell, King and Sullivan, Associate Judges.

O R D E R

It is ORDERED by the Court that the Rules Governing the Bar are amended as hereinafter set forth, effective January 1, 1995.[1]

Rule XI, section 3 (c) is amended to read as follows:

(c) *Temporary suspension or probation.*

(1) On petition of the Board authorized by its Chairperson or Vice Chairperson, supported by an affidavit showing that an attorney appears to ~~be causing great public harm by misappropriating funds, or by other actions~~ *pose a substantial threat of serious harm to the public,* the Court may issue an order, with such notice as the court may prescribe, temporarily suspending the attorney or imposing temporary conditions of probation on the attorney, or both. Any order of temporary suspension or probation which restricts the attorney's maintenance or use of a trust account shall, when served on any bank maintaining an

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[1]The Court will consider further the procedure for appointment of Bar Counsel. *See* Rule XI, § 4(e)(2).

account against which the attorney may make withdrawals, serve as an injunction barring the bank from making further payment from the account on any obligation except in accordance with restrictions imposed by the Court. An order of temporary suspension issued under this subsection shall preclude the attorney from accepting any new cases or other legal matters, but shall not preclude the attorney from continuing to represent existing clients during the thirty-day period after issuance of the order; however, any fees tendered to the attorney during that thirty-day period or at any time thereafter while the temporary suspension is in effect shall be deposited in a trust account, from which withdrawals may be made only as directed by the Court.

(2) *Where issues of fact appear to be presented by the Board's petition or by any response of the attorney, the Court may appoint a special master to preside at a hearing at which evidence will be presented concerning the petition. The master shall prepare a report summarizing the evidence presented and make recommended findings of fact which, together with the record, shall be filed with the Court within fifteen days of the Court's order of appointment.*

Rule XI, section 8 (b) is amended to read as follows:

(b) *Disposition of investigations.* Upon the conclusion of an investigation, Bar Counsel may, with the prior approval of a Contact Member, dismiss the complaint, informally admonish the attorney under investigation, or institute formal charges*; or may, with the prior approval of a member of the Board on Professional Responsibility, enter into a diversion agreement.* An attorney who receives an informal admonition may request a formal hearing before a Hearing Committee, in which event the admonition shall be vacated and Bar Counsel shall institute formal charges.

Rule XI, section 9 (g) is amended to read as follows:

(g) *Proceedings before the Court.*

(1) Upon the filing of exceptions under subsection (e) or subsection (f) *of this section, and in all cases arising under section 8 in which the Board's recommended sanction includes a requirement that the attorney make a showing of fitness before reinstatement,* the Court shall schedule the matter for consideration in accordance with ~~the general rules governing civil appeals~~ *applicable court procedures.* If the matter has come before the Court under subsection (f) *of this section,* the Court may order the Board to file a report setting forth its findings of fact and the

reasons for its decision. Upon conclusion of the proceedings, or upon consideration of the report if no exceptions are filed, the Court shall enter an appropriate order as soon as the business of the Court permits. In determining the appropriate order, the Court shall accept the findings of fact made by the Board unless they are unsupported by substantial evidence of record, and shall adopt the recommended disposition of the Board unless to do so would foster a tendency toward inconsistent dispositions for comparable conduct or would otherwise be unwarranted. Unpublished opinions in disciplinary cases decided on or after April 1, 1991, shall not be deemed binding precedent by the Court except as to appropriateness of sanctions.

(2) When no exceptions are filed (save for cases arising under section 8 in which the Board's recommended sanction includes a requirement that the attorney make a showing of fitness before reinstatement, and save for any case in which the Court directs otherwise), the Court will enter an order imposing the discipline recommended by the Board upon the expiration of the time permitted for filing exceptions.

Rule XI, section 11 (f) is amended to read as follows:

(f) *Action by the Court.*

(1) When no opposition to the recommendation of the Board has been timely filed, and when the Court does not direct that the matter be considered under paragraph (2) of this subsection, the Court will enter an order imposing the discipline recommended by the Board upon the expiration of the time permitted for filing an opposition.

(2) In matters not falling under paragraph (1) of this subsection, the ~~*The*~~ Court shall impose the identical discipline unless the attorney demonstrates, or the Court finds on the face of the record on which the discipline is predicated, by clear and convincing evidence, that one or more of the grounds set forth in subsection (b) of this section exists. If the Court determines that the identical discipline should not be imposed, it shall enter such order as it deems appropriate, including referral of the matter to the Board for its further consideration and recommendation.

The current subsection (e) of Rule XI, section 14 is hereby redesignated as subsection (f) and is amended to read as follows:

(f) *Effective date of discipline.* Except as provided in sections 10, 11, and 13 of this rule *and in subsection (e) of this section,* an order of disbarment or suspension shall be effective thirty days after entry unless the Court directs otherwise. The disbarred or suspended attorney, after entry of the order, shall not accept any new retainer or engage as attorney for another in any new case or legal matter of any nature. However, during the period between the date of entry of the order and its effective date, the attorney may conclude other work on behalf of an client on any matters which were pending on the date of entry. If such work cannot be concluded, the attorney shall so advise the client so that the client may make other arrangements.

A new subsection (e) is hereby added to Rule XI, section 14, to read as follows:

(e) *Imposition of discipline pendente lite. The Court, sua sponte or on motion, may order that the discipline recommended by the Board shall take effect pending the Court's determination of the merits of the case.*

The current subsections (f) and (g) of Rule XI, section 14 are hereby redesignated as subsections (g) and (h),

respectively. References to these subsections in section 16 (a) and section 16 (c) shall be changed accordingly.

Rule XI, section 17 (a) is amended to read as follows:

(a) *Disciplinary proceedings.* Except as otherwise provided in this rule *or as the Court may otherwise order,* all proceedings involving allegations of misconduct by an attorney shall be kept confidential until ~~the Hearing Committee has made a recommendation to the Board that discipline be imposed, unless the attorney requests that the proceedings be opened to the public at an earlier stage. Upon the filing with the Board of a recommendation for discipline by the Hearing Committee, the findings and recommendation of the Hearing Committee shall be available for public inspection at the Office of Bar Counsel. All proceedings thereafter before the Board shall be open to the public. A Board proceeding following a recommendation by the Hearing Committee for dismissal of a complaint shall not be open to the public.~~ *either a petition has been filed under section 8 (c) or an informal admonition has been issued. All proceedings before the Hearing Committee and the Board shall be open to the public, and the petition, together with any exhibits introduced into evidence, shall be available for public inspection. If*

an informal admonition is issued, the correspondence from Bar Counsel informing the attorney of the grounds for the admonition shall be available for public inspection. Bar Counsel's files and records, however, shall not be available for public inspection except to the extent that portions thereof are introduced into evidence in a proceeding before the Hearing Committee.

Rule XI, section 17 (c) is amended to read as follows:

(c) *Informal admonitions.* ~~**All proceedings resulting in informal admonitions shall be kept confidential, and access to such proceedings shall not be allowed except as follows:**~~

~~**(1) Every complainant in a matter resulting in an informal admonition shall be given a copy of the letter of informal admonition.**~~

~~**(2) Records of proceedings resulting in informal admonitions which are admitted as evidence of prior discipline in a subsequent disciplinary proceeding shall become part of that record, and shall cease to be confidential if the subsequent disciplinary proceeding in which they are admitted into evidence results in a recommendation by a Hearing Committee for public discipline.**~~

~~**(3)**~~ **Bar Counsel may disclose information**

pertaining to proceedings resulting in informal admonitions to any court, to any other judicial tribunal or disciplinary agency, to any duly authorized law enforcement officer or agency conducting an investigation, to any representative of a public agency considering an attorney for judicial or public employment or appointment, or to any representative of another bar considering the application of an attorney for admission to such bar. Bar Counsel may also make such disclosure to a duly authorized representative of the District of Columbia Bar with respect to any person whom the Bar is considering for possible employment, appointment to a Bar position related to attorney discipline or legal ethics, or recommendation to this Court for appointment to any board, committee, or other body.

A new section 8.1 is hereby added to Rule XI, to read as follows:

Section 8.1. Diversion.

(a) *Availability of diversion.* Subject to the limitations herein, diversion may be offered by Bar Counsel to an attorney under investigation for a disciplinary violation.

(b) *Limitations on diversion.* Diversion shall be available in cases of alleged minor misconduct, but shall not be available where:

(1) the alleged misconduct resulted in, or is likely to result in, prejudice to a client or another person;

(2) discipline previously has been imposed or diversion previously has been offered and accepted, unless Bar Counsel finds the presence of exceptional circumstances justifying a waiver of this limitation;

(3) the alleged misconduct involves fraud, dishonesty, deceit, misappropriation or conversion of client funds or other things of value, or misrepresentation; or

(4) the alleged misconduct constitutes a criminal offense under applicable law.

(c) *Procedures for diversion.* At the conclusion of an investigation, Bar Counsel may, in Bar Counsel's sole discretion, offer to an attorney being investigated for misconduct the option of entering a diversion program in lieu of other procedures available to Bar Counsel. The attorney shall be free to accept or reject the offer of diversion. If the attorney

accepts diversion, a written diversion agreement shall be entered into by both parties including, *inter alia*, the time of commencement and completion of the diversion program, the content of the program, and the criteria by which successful completion of the program will be measured. The diversion agreement shall state that it is subject to review by a member of the Board, to whom it shall be submitted for review and approval after execution by Bar Counsel and the attorney.

(d) *Content of diversion program.* The diversion program shall be designed to remedy the alleged misconduct of the attorney. It may include participation in formal courses of education sponsored by the Bar, a law school, or another organization; completion of an individualized program of instruction specified in the agreement or supervised by another Bar entity; or any other arrangement agreed to by the parties which is designed to improve the ability of the attorney to practice in accordance with the Rules of Professional Conduct.

(e) *Proceedings after completion or termination of diversion program.* Except as provided in subsection (b) (2) of this section, if the attorney successfully

completes a diversion program, Bar Counsel's investigation shall be closed, and the attorney shall have no record of misconduct resulting therefrom. If the attorney does not successfully complete the diversion program, Bar Counsel shall take such other action as is authorized and prescribed under section 8 (b).

Current Rules XIII and XIV are hereby redesignated as Rules XIV and XV, respectively.

A new Rule XIII is hereby added, to read as follows:

Rule XIII. Arbitration

(a) An attorney subject to the disciplinary jurisdiction of this Court shall be deemed to have agreed to arbitrate disputes over fees for legal services and disbursements related thereto when such arbitration is requested by a present or former client, if such client was a resident of the District of Columbia when the services of the attorney were engaged, or if a substantial portion of the services were performed by the attorney in the District of Columbia, or if the services included representation before a District of Columbia court or a District of Columbia government agency.

(b) The arbitration provided under this rule shall be final and binding on the parties according to applicable law, and shall be enforceable in the Superior Court and in any other court having jurisdiction. Unless the attorney and client agree otherwise, the arbitration shall be before the Attorney-Client Arbitration Board of the District of Columbia Bar, and shall be pursuant to such reasonable rules and regulations (including those relating to fees for arbitration services) as may be promulgated from time to time by the District of Columbia Bar and the Attorney-Client Arbitration Board.

FOR THE COURT:

WILLIAM H. NG
Clerk of the Court

To: Legal Staff
From: Gene Slipp
Re: IOLTA

DISTRICT OF COLUMBIA COURT OF APPEALS

APPENDIX B
INTEREST ON LAWYERS TRUST ACCOUNTS PROGRAM
(See Rule X, Rules of Professional Conduct)

(a) Unless an election not to do so is submitted in accordance with the procedure set forth in section (f) of this appendix, a lawyer or firm with which the lawyer is associated who receives client funds shall maintain a pooled interest-bearing depository account for deposit of client funds that are nominal for a short period of time. Such an account shall comply with the following provisions:

(1) The account shall include only clients' funds which are nominal in amount or are expected to be held for a short period of time.

(2) No interest from such an account shall be made available to a lawyer or law firm.

(3) The determination of whether clients' funds are nominal in amount or to be held for a short period of time rests in the sound judgment of each attorney or law firm.

(4) Notification to clients whose funds are nominal in amount or to be held for a short period of time is not required.

(b) Any interest-bearing trust account established pursuant to section (a) of this appendix may be established with any financial institution which is authorized by federal, District of Columbia, or state law to do business in the District of Columbia or the state in which the lawyer's or law firm's office is situated and which is a member of the Federal Deposit Insurance Corporation, or the Federal Savings and Loan Insurance Corporation, or successor agencies. Funds deposited in such accounts shall be subject to withdrawal upon request and without delay.

(c) Lawyers or law firms depositing client funds which are nominal in amount or to be held for a short period of time in an interest-bearing depository account under section (a) of this appendix shall direct the depository institution:

(1) to remit interest or dividends, net of any service charges or fees, on the average monthly balance in the account, or as otherwise computed in accordance with the institution's standard accounting practice for other depositors, at least quarterly, to the District of Columbia Bar Foundation.

(2) to transmit with each remittance to the District of Columbia Bar Foundation a statement showing the name of the lawyer or law firm for whom the remittance is sent and the rate of interest applied.

(d) The District of Columbia Bar Foundation shall maintain records of each remittance and statement received from depository institutions for a period of at least three years and shall, upon request, promptly make available to a lawyer or law firm the records and statements pertaining to that lawyer's or law firm's account.

(e) All interest transmitted to the District of Columbia Bar Foundation shall, after deduction for the necessary and reasonable administrative expenses of the Bar Foundation for operation of the IOLTA program, be distributed by that entity for the following purposes: (1) at least eighty-five percent for the support of legal assistance programs providing legal and related assistance to poor persons in the District of Columbia who would otherwise be unable to obtain legal assistance; and (2) up to fifteen percent for those programs in the District of Columbia as are specifically approved from time to time by this court.

(f) (1) A lawyer or law firm that elects to decline to maintain accounts described in section (a) of this appendix for the twelve months beginning March 1, 1985, shall submit a Notice of Declination in writing, on a form provided by the clerk, to the Chief Judge of this court or the Chief Judge's designee, on or before ~~July 1, 1985~~ November 1, 1985. Any such submission need not be renewed for any ensuing year.

(2) Any lawyer or law firm that has not filed a Notice of Declaration on or before July 1, 1985, may elect to decline to participate in any ensuing year by filing a Notice of Declination with the Chief Judge or the Chief Judge's designee, within a thirty-one day period commencing on the first day of March of each year.

(3) Notwithstanding the foregoing, any lawyer or law firm may petition the court at any time and, for good cause shown, may be granted leave to file a Notice of Declination at a time other than those specified above. An election to decline participation may be revoked at any time by filing with the Chief Judge or the Chief Judge's designee a request for enrollment in the program.

(4) A lawyer or law firm that does not file with the Chief Judge or the Chief Judge's designee a Notice of Declination in accordance with the provisions of this appendix shall be required to maintain accounts in accordance with section (a) of this appendix.