DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY
HEARING COMMITTEE NUMBER FOUR

In the Matter of:	:	
	:	
BRIAN S. BROWN,	:	
	:	Board Docket No. 18-ND-001
Respondent.	:	Disciplinary Docket No. 2014-D386
	:	
A Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 399542)	:	

REPORT AND RECOMMENDATION OF HEARING COMMITTEE NUMBER FOUR APPROVING PETITION FOR NEGOTIATED DISCIPLINE

I. PROCEDURAL HISTORY

This matter came before Hearing Committee Number Four on August 22, 2018, for a limited hearing on an Amended Petition for Negotiated Discipline (the "Petition" or "Am. Pet."). The Office of Disciplinary Counsel was represented by Assistant Disciplinary Counsel Joseph C. Perry. Respondent, Brian S. Brown, was represented by Barry Bach.

The Hearing Committee has carefully considered the Petition for Negotiated Discipline signed by Disciplinary Counsel, Respondent, and Respondent's counsel, the supporting amended affidavit submitted by Respondent (the "Affidavit"), and the representations during the limited hearing made by Respondent, Respondent's counsel, and Disciplinary Counsel. The Hearing Committee also has fully considered the written statement submitted by the complainant, its *in camera* review of Disciplinary Counsel's files and records, and *ex parte* communications with

Disciplinary Counsel. For the reasons set forth below, we approve the Petition, find the negotiated discipline of a thirty-day suspension, fully stayed in favor of six months of unsupervised probation with conditions, is justified and recommend that it be imposed by the Court.

II. FINDINGS PURSUANT TO D.C. BAR R. XI, § 12.1(c) AND BOARD RULE 17.5

The Hearing Committee, after full and careful consideration, finds that:

1. The Petition and Affidavit are full, complete, and in proper order.

2. Respondent is aware that there is currently pending against him an investigation into allegations of misconduct. Tr. 16-17[1]; Affidavit ¶ 2.

3. The allegation(s) that were brought to the attention of Disciplinary Counsel are that Respondent violated Rules 1.1(b) (skill and care), 1.3(a) (diligence and zeal), 1.3(b)(1) (intentional failure to pursue clients' lawful objectives), 1.4(a) (failure to communicate), and 1.4(b) (failure to explain matter to clients). Am. Pet. at 6.

4. Respondent has freely and voluntarily acknowledged that the material facts and misconduct reflected in the Petition are true. Tr. 20-21; Affidavit ¶ 4. Specifically, Respondent acknowledges that:

> 1) Respondent is a member of the Bar of the District of Columbia Court of Appeals, having been admitted by motion on May 23, 1986, and assigned Bar number 399542.
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> 2) In 2002, Respondent joined the law firm of Saul E. Kerpelman and Associates, P.A. (the "Firm" or the "law firm"), which specialized in lead paint litigation. At all times Respondent was an Associate and not a partner

[1] "Tr." refers to the transcript of the limited hearing held on August 22, 2018.

or member of the law firm. The Firm's primary office was in Baltimore, Maryland, and Respondent worked primarily at that location. There were several other attorneys employed at the Baltimore location.

3) The Firm had a satellite office in Washington D.C. Only one attorney, Jason Kerpelman, was based out of this office, and he left his employment with the Firm sometime in the summer of 2008. The D.C. office was closed sometime in the summer of 2008 and the D.C. office phone number was rerouted to the Baltimore office.

4) After the D.C. office closed, the extant D.C. cases were reviewed by multiple attorneys from the Baltimore office, including Respondent. Thereafter, the files were transported to the Baltimore office or assigned to outside counsel.

5) One of the cases that was transferred to and retained by the Baltimore office was *Minor v. Springfield Baptist Church*, which had been filed in D.C. Superior Court in 2000. In 2006, Jason Kerpelman won a $100,000 verdict on behalf of the plaintiffs, Ms. Delantae Thomas, and her then-minor son, Mr. William Minor III. The file, after being transferred to the Baltimore office, was the responsibility of the Respondent.

6) Ms. Thomas was not notified that Jason Kerpelman was no longer involved with the file after he left the Firm and the file was transferred to the Baltimore office. At the time, Ms. Thomas was aware of the jury verdict and that the Firm was pursuing an appeal on her behalf.

7) At the time the file was transferred to the Baltimore office in the summer of 2008, which, as noted above was when the D.C. office closed and after Jason Kerpelman left the Firm, the case was still in the midst of the appeals process and pending argument before the District of Columbia Court of Appeals, based on plaintiffs appeal of the lower court's denial of a Rule 60(b) motion. Jason Kerpelman had filed a brief on behalf of the appellants. Oral argument before the Court of Appeals was scheduled for November 25, 2008.

8) Respondent did not appear for oral argument before the Court of Appeals.

9) On January 29, 2009, the DCCA remanded the case, for the trial judge to apply the proper factors in deciding the Rule 60(b) motion, including, if appropriate, reconsidering her denial of the motion.

10) On or around March 31, 2010, the Superior Court issued an order applying the proper factors and reaffirming its denial of the Rule 60 motion.

11) On or around May 12, 2010, Respondent had a conversation with opposing counsel in *Minor*. Thereafter, opposing counsel sent Respondent a letter in which she indicated that it was her understanding that Respondent was now responsible for the case. The letter also reflected that opposing counsel wanted to issue the judgment check as soon as possible, and suggested that either a guardianship be created so that a guardian could receive funds on behalf of the minor client, or that the parties agree upon a structured payout. Counsel stated she looked forward to hearing from Respondent at his earliest convenience.

12) Opposing counsel sent two follow-up letters in June 2010, reflecting that she had not yet heard back from Respondent.

13) Respondent asserts that he does not have a recall or record of having received or seen the letters, which are not in the law firm's files.

14) In August 2010, opposing counsel filed with the Superior Court a motion for interpleader and a motion to mark the judgment as paid upon deposit into the court registry. The motion detailed opposing counsel's unsuccessful efforts to reach Respondent about the judgment and attached the three letters referenced in ¶¶ 11-13. The motion reflects that opposing counsel served Respondent at the Maryland office and Respondent does not deny he was served with the motion.

15) In January 2011, the trial court granted the motion and ordered Respondent and his firm to file a proposed order appointing a guardian to the minor client.

16) For approximately three years, Respondent did not take any action in the *Minor* matter. He did not file a proposed order appointing a guardian to his minor client. He did not inform his clients that the funds were available, or otherwise advise them of the developments in ¶¶ 7-15. He did not otherwise make any effort to collect the judgment proceeds in the court registry.

17) Ms. Thomas asserts that sometime in the Spring of 2013, she called Respondent to inquire when she would receive the judgment proceeds. Ms. Thomas also asserts that in that initial conversation, Respondent informed Ms. Thomas that he would look into the matter. Thereafter, Ms. Thomas was

unable to reach Respondent until the Fall of 2013. At that time, Respondent informed Ms. Thomas he would file to release the funds from the registry and that she would have her money by Christmas 2013. Respondent does not recall these conversations but does not deny that they occurred.

18) After the calls, Respondent still took no action to collect the funds. Ms. Thomas retained other counsel, Daniel Kozma, Esq., to represent her. Successor counsel successfully filed to release the judgment proceeds.

19) Ms. Thomas and Mr. Minor also filed a malpractice action against Respondent and his firm. The malpractice action settled on or around January 4, 2016. In connection with the settlement, the insurance carrier and the Firm paid a cumulative amount of $200,000, which was in addition to the $100,000 judgment proceeds that were received, from which no attorney's fees or expenses associated with the underlying case were deducted. In connection with the $200,000 settlement, Respondent's law firm contributed $100,000 of the settlement amount, which the Firm recouped, in addition to the attorney's fees and expenses it did not receive out of the judgment proceeds in the underlying case, from Respondent.

20) As a result of Respondent's conduct, Mr. Minor suffered prejudice in that there was a delay of over three years before he received the proceeds of the $100,000 judgment.

5. Respondent is agreeing to the disposition because Respondent believes that he cannot successfully defend against discipline based on the stipulated misconduct. Tr. 16; Affidavit ¶ 5.

6. Disciplinary Counsel has made no promises to Respondent other than what is contained in the Petition. Affidavit ¶ 7. The only promise stated in the Petition is that Disciplinary Counsel agrees not to pursue any charges or sanctions arising out of the conduct described in the Petition other than those set forth in the Petition. Am. Pet. at 7. Respondent confirmed during the limited hearing that there have been no other promises or inducements other than those set forth in the Petition. Tr. 20.

7. Respondent has conferred with his counsel. Tr. 11; Affidavit ¶ 1.

8. Respondent has knowingly and voluntarily acknowledged the facts and misconduct reflected in the Petition for Negotiated Discipline and agreed to the sanction set forth therein. Tr. 19-21; Affidavit ¶¶ 4, 6.

9. Respondent is not being subjected to coercion or duress. Affidavit ¶ 6.

10. Respondent is competent and was not under the influence of any substance or medication that would affect his participation at the limited hearing. Tr. 12-13.

11. Respondent is fully aware of the implications of the disposition being entered into, including, but not limited to, the following:

a) he will waive his right to cross-examine adverse witnesses and to compel witnesses to appear on his behalf;

b) he will waive his right to have Disciplinary Counsel prove each and every charge by clear and convincing evidence;

c) he will waive his right to file exceptions to reports and recommendations filed with the Board and with the Court;

d) the negotiated disposition, if approved, may affect his present and future ability to practice law;

e) the negotiated disposition, if approved, may affect his bar memberships in other jurisdictions; and

f) any sworn statement by Respondent in his affidavit or any statements made by Respondent during the proceeding may be used to impeach his testimony if there is a subsequent hearing on the merits.

Tr. 14-15, 23-25; Affidavit ¶¶ 9-10, 12.

12. Respondent and Disciplinary Counsel have agreed that the sanction in this matter should be a thirty-day suspension, stayed in favor of six months of

unsupervised probation, with the conditions that within the first thirty days of the probationary period, Respondent shall consult with the D.C. Bar Practice Management Advisory Service about his firm's case management system and provide Disciplinary Counsel with written confirmation of such consultation, and that during the six-month period of probation, Respondent shall not be found to have engaged in any misconduct in this or any other jurisdiction. If Respondent's probation is revoked, he may be required to serve the entire suspension and demonstrate fitness prior to reinstatement. Tr. 27; Petition at 7-8. In the event that his probation is revoked:

a) Respondent further understands that he must file with the Court an affidavit pursuant to D.C. Bar R. XI, § 14(g) in order for his suspension to be deemed effective for purposes of reinstatement. Tr. 26.

b) Respondent understands that he will be required to prove his fitness to practice law in accord with D.C. Bar R. XI, § 16 and Chapter 9 of the Board Rules prior to being allowed to resume the practice of law. Tr. 28-29.

c) Respondent understands that the reinstatement process may delay Respondent's readmission to the Bar. Tr. 28.

13. The parties are aware of no factors in aggravation of sanction. Tr. 22-23.

14. In mitigation of sanction, the parties agree that Respondent (1) has acknowledged his misconduct and the harm it has caused his clients; (2) has

contributed to the settlement of the malpractice action with his own funds; (3) has cooperated fully with Disciplinary Counsel; (4) has expressed and demonstrated remorse through all the actions discussed; and (5) has no prior discipline in this or any other jurisdiction. Am. Pet. at 10. The parties stipulated to these mitigating factors at the limited hearing. Tr. 21-22.

15. The complainant submitted a written comment pursuant to Board Rule 17.4(a), which the Hearing Committee has taken into consideration. Tr. 30-36.

III. DISCUSSION

The Hearing Committee shall approve an agreed negotiated discipline if it finds:

> a) that the attorney has knowingly and voluntarily acknowledged the facts and misconduct reflected in the Petition and agreed to the sanction therein;
>
> b) that the facts set forth in the Petition or as shown during the limited hearing support the attorney's admission of misconduct and the agreed upon sanction; and
>
> c) that the agreed sanction is justified.

D.C. Bar R. XI, § 12.1(c); Board Rule 17.5(a)(i)-(iii).

A. Respondent Has Knowingly and Voluntarily Acknowledged the Facts and Misconduct and Agreed to the Stipulated Sanction.

The Hearing Committee finds that Respondent has knowingly and voluntarily acknowledged the facts and misconduct reflected in the Petition and agreed to the sanction therein. Respondent, after being placed under oath, admitted the stipulated facts and charges set forth in the Petition, and denied that he is under duress or has

been coerced into entering into this disposition. Tr. 17, 20-21. Respondent understands the implications and consequences of entering into this negotiated discipline. Tr. 23-26.

Respondent has acknowledged that any and all promises that have been made to him/her by Disciplinary Counsel as part of this negotiated discipline are set forth in writing in the Petition and that there are no other promises or inducements that have been made to him. Tr. 20; Affidavit ¶ 7.

B. The Stipulated Facts Support the Admissions of Misconduct and the Agreed-Upon Sanction.

The Hearing Committee has carefully reviewed the facts set forth in the Petition and established during the hearing, and we conclude that they support the admission(s) of misconduct and the agreed upon sanction. Moreover, Respondent is agreeing to this negotiated discipline because he believes that he could not successfully defend against the misconduct described in the Petition. Tr. 16; Affidavit ¶ 5.

With regard to the second factor, the Petition states that Respondent violated Rule of Professional Conduct 1.1(b), in that he failed to serve his clients with skill and care commensurate with that generally afforded to clients by other lawyers in similar matters. The evidence supports Respondent's admission that he violated Rule 1.1(b) in that the stipulated facts describe Respondent's failure to respond to communications from opposing counsel; his failure to comply with instructions from the Superior Court; and his failure to make efforts to collect the funds from his

client's court judgment. Affidavit ¶ 4 (affirming facts set forth in Am. Petition); Am. Pet. ¶¶ 11-17.

The Petition further states that Respondent violated Rule of Professional Conduct 1.3(a), in that he failed to represent his clients zealously and diligently within the bounds of the law. The evidence supports Respondent's admission that he violated Rule 1.3(a) in that the stipulated facts describe Respondent's failure to take action in the *Minor* matter for approximately three years, including failing to inform his clients that the funds were available and failing to take steps to collect the judgment proceeds. Affidavit ¶ 4 (affirming facts set forth in Am. Petition); Am. Pet. ¶¶11, 16-17. Respondent also failed to seek appointment of a guardian for the minor client as instructed by the Superior Court. Affidavit ¶ 4 (affirming facts set forth in Am. Petition); Am. Pet. ¶¶ 15-16.

The Petition further states that Respondent violated Rule of Professional Conduct 1.3(b)(1), in that he intentionally failed to seek the lawful objectives of his clients as the term "intentionally" has been interpreted by the applicable case law.[2] The evidence supports Respondent's admission that he violated Rule 1.3(b)(1) in that the stipulated facts describe Respondent's failure to seek release of the funds in the registry even after Ms. Thomas inquired about the funds. Affidavit ¶ 4 (affirming facts set forth in Am. Petition); Am. Pet. ¶¶ 16-18. Respondent also failed to pursue

[2] Intent for the purposes of Rule 1.3(b)(1) has been found where "a lawyer's inaction coexists with an awareness of his obligations to his client," including where the neglect is "so pervasive that [the lawyer] must be aware of [his neglect]." *See In re Ukwu*, 926 A.2d 1106, 1116 (D.C. 2007) (alterations in original) (citations omitted).

his clients' objectives by not following up on his communication with opposing counsel in the *Minor* case regarding payment of the judgment and not responding to opposing counsel's motion for interpleader or the court's order to seek appointment of a guardian for the minor client. Affidavit ¶ 4 (affirming facts set forth in Am. Petition); Am. Pet. ¶¶ 11-15.

The Petition further states that Respondent violated Rules of Professional Conduct 1.4(a) and (b), in that he failed to keep his clients reasonably informed about the status of the matter and failed to explain the matter to the extent reasonably necessary to permit his clients to make informed decisions regarding the representation. The evidence supports Respondent's admission that he violated Rules 1.4(a) and (b) in that the stipulated facts describe Respondent's failure to inform his clients of the status of the judgment proceeds and his failure to advise them of developments in the case, including his communication with opposing counsel and the court's order to seek appointment of a guardian. Affidavit ¶ 4 (affirming facts set forth in Am. Petition); Am. Pet. ¶¶ 11-18.

C. The Agreed-Upon Sanction Is Justified.

The third and most complicated factor the Hearing Committee must consider is whether the sanction agreed upon is justified. *See* D.C. Bar R. XI, § 12.1(c); Board Rule 17.5(a)(iii); *In re Johnson*, 984 A.2d 176, 181 (D.C. 2009) (per curiam) (providing that a negotiated sanction may not be "unduly lenient"). Based on the record as a whole, including the stipulated circumstances in mitigation, the Hearing Committee Chair's *in camera* review of Disciplinary Counsel's investigative file

and *ex parte* discussion with Disciplinary Counsel, and our review of relevant precedent, we conclude that the agreed-upon sanction is justified and not unduly lenient, for the following reasons:

Respondent's misconduct in the representation was significant. Respondent failed to communicate with his clients or take other steps in the matter for several years. His failure to follow up with opposing counsel, comply with the Superior Court's order to seek appointment of a guardian, or take steps to procure the available funds for his clients unnecessarily delayed the minor client's receipt of those funds. Affidavit ¶ 4 (affirming facts set forth in Am. Petition); Am. Pet. ¶ 20.

The negotiated discipline is based on Respondent's failure in a single representation. According to the Petition, Respondent fully cooperated with Disciplinary Counsel during the investigation, and Disciplinary Counsel is not aware of any other misconduct by the Respondent since his admission to practice in 1986.[3] Am. Pet. at 10; Tr. 8, 21-22. Respondent has acknowledged his misconduct and the harm it caused, and he has expressed remorse for his misconduct. Am. Pet. at 10; Tr. 8, 21-22. The clients have received compensation for the results of the misconduct through the settlement of the malpractice suit, and Respondent contributed his own funds to that settlement. Affidavit ¶ 4 (affirming facts set forth in Am. Petition); Am. Pet. ¶ 19 (describing malpractice suit settlement); Tr. 21-22. The only promise Disciplinary Counsel has made to Respondent in connection with the Petition is an agreement not to pursue other charges or sanctions arising out of

[3] *See* Confidential Appendix.

the conduct the Petition describes. Am. Pet. at 7; Tr. 20. Those considerations suggest that an extended period of suspension is not required. *See In re Dory*, 528 A.2d 1247 (D.C. 1987) (per curiam) ("Recognizing that respondent has no prior disciplinary history, and that the instant violations stem from a single case, we adopt the Board's recommendation of a thirty-day suspension.").

The proposed conditions are also justified and likely to reduce a risk of future misconduct. Under the agreed-upon sanction, Respondent will have a six-month probationary period and will consult with the D.C. Bar Practice Management Advisory Service about his firm's case management system. Am. Pet. at 7.

The negotiated discipline is not unduly lenient compared to discipline imposed for comparable misconduct, particularly in light of the stipulated factors in mitigation. *See In re Mance*, 869 A.2d 339 (D.C. 2005) (per curiam) (imposing a thirty-day stayed suspension with probation for incompetence, neglect, intentional failure to pursue a client's matter, failure to communicate, and other violations); *In re Baron*, 808 A.2d 497 (D.C. 2002) (per curiam) (imposing a thirty-day stayed suspension with probation for failing to communicate and failure to comply with court order to contact a client); *In re Vohra*, 762 A.2d 544 (D.C. 2000) (per curiam) (imposing a thirty-day stayed suspension with probation for neglect and misrepresentations about incomplete work among other violations when lawyer was suffering from depression); *In re Lewis*, 689 A.2d 561, 561-63, 565 (D.C. 1997) (per curiam) (appended Board Report) ("It is unusual for a suspension to be imposed for a first violation that sounds largely in neglect, with no proven violations involving

dishonesty"; imposing a thirty-day suspension on an attorney who intentionally abandoned a client in a criminal matter).

IV. CONCLUSION AND RECOMMENDATION

It is the conclusion of the Hearing Committee that the discipline negotiated in this matter is appropriate.

For the reasons stated above, it is the recommendation of this Hearing Committee that the negotiated discipline be approved and that the Court impose a thirty-day suspension, stayed in favor of six months of unsupervised probation, with the conditions listed in Paragraph 12, *supra*.

HEARING COMMITTEE NUMBER FOUR

Leslie H. Spiegel
Chair

Darryl J. Lesesne
Public Member

Benjamin M. Lee
Attorney Member