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

In the Matter of:	:	
	:	
ERNEST P. FRANCIS,	:	
	:	
Respondent.	:	Board Docket No. 13-BD-089
	:	Bar Docket No. 2011-D423
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 439894)	:	

REPORT AND RECOMMENDATION OF AD HOC HEARING COMMITTEE

INTRODUCTION

Bar Counsel charged Respondent, Ernest Francis ("Respondent"), with several violations of the District of Columbia Rules of Professional Conduct, all pertaining to Respondent's representation of a plaintiff in a civil lawsuit filed before the U.S. District Court for the District of Columbia in 2009. Specifically, Respondent is charged with violating Rule 1.3(b)(1) (intentionally failing to seek the lawful objectives of a client through reasonably available means permitted by law and the ethical rules); Rule 1.3(b)(2) (intentionally prejudicing or damaging a client during the course of a professional relationship); Rule 1.4(a) (failing to keep the client reasonably informed about the status of the matter); and Rule 1.4(b) (failing to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation).

This matter concerns Respondent's role as local counsel in a civil action (employment case) where Respondent understood that his involvement was limited; the lead attorney was an attorney licensed in New Jersey who would provide the substantive work and communication

with the client. Respondent understood his role as limited to reviewing the substantive briefs for compliance with Rule 11 of the Federal Rules of Civil Procedure and local rules prior to filing the briefs with the U.S. District Court. BX 16 at 131.[1]

The defendant in the civil action filed a motion to dismiss the lawsuit and neither the lead counsel nor Respondent prepared an opposition by the deadline.[2] A motion for an extension of the deadline was not filed and the deadline lapsed without a response by the plaintiff. Two months later, the district court dismissed the case, treating the motion to dismiss as conceded because a response was not filed.

The charges against Respondent arise from his actions or inactions related to that litigation and specifically related to the non-response to the motion to dismiss and lack of communication with the client. Based on our findings of fact and for the reasons set forth below, we conclude that Respondent violated the Rules as charged. For the reasons further explained below, we recommend a sanction of a Board reprimand.

PROCEDURAL HISTORY

Bar Counsel filed the Specification of Charges on October 3, 2013. BX B. It was served on Respondent personally on October 7, 2013. BX D. Respondent filed an Answer to the Specification of Charges on October 28, 2013. BX C.

Respondent filed a motion to dismiss petition on November 4, 2013. Bar Counsel filed an opposition to the motion on November 7, 2013. A prehearing conference was held on

[1] "BX" refers to Bar Counsel's exhibits. "RX" refers to Respondent's exhibits. "Tr." refers to the transcript of Hearing on February 25, 2014. "FF" refers to numbered Findings of Fact, set forth herein.

[2] The motion to dismiss was a "renewed" motion; the first motion to dismiss filed by the defendant was denied after Respondent filed an amended complaint.

December 4, 2013, where the parties agreed to a schedule for submitting exhibits, witness lists, and stipulations, and the hearing was set for February 25, 2014. Two orders of this Committee followed on December 6, 2013; the first set forth the pre-hearing schedule and the second deferred ruling on the motion to dismiss in accordance with Board Rule 7.16(a). A hearing committee is not authorized to rule on a motion to dismiss, but instead must include a recommended disposition of the motion in its Report and Recommendation to the Board on Professional Responsibility ("Board") after hearing all the evidence. *See In re Ontell*, 593 A.2d 1038, 1040 (D.C. 1991).

Stipulations of fact were filed on February 11, 2014, and both parties filed witness lists and exhibits the same day. Respondent filed objections to Bar Counsel's exhibits on February 18, 2014. The objections were overruled as noted below; the exhibits offered by each party during the hearing were admitted. Tr. 19-20.

The hearing took place on February 25, 2014, before Lucy Pittman, Esquire, Chair; Darryl Lesesne; and Elissa Preheim, Esquire. Assistant Bar Counsel H. Clay Smith, III, appeared for Bar Counsel; Respondent appeared *pro se*. Tr. 5-6. Both sides presented documentary evidence and testimony. Bar Counsel offered BX A-D; 1-11; 13-17 and RX 9, all of which were admitted. Tr. 139. Bar Counsel called two witnesses: Cenny Norris, the plaintiff in the district court case that underlies the charges here, and John Interrante, an attorney with the United States Department of Justice who represented the defendant federal government agency before the district court. Tr. 32-34, 106, 116. Respondent offered RX 1-18, all of which were admitted.[3] Tr. 148-151, 153-156, 158-160. Respondent testified on his own behalf. Tr. 142.

[3] Respondent's exhibit 9 was already offered and entered into evidence by Bar Counsel. Respondent's exhibits filed on February 11, 2014, included RX 1-16. He filed a Motion to Add Exhibit on February 24, 2014, seeking to add RX 17. Bar Counsel did not object to the

Footnote continued on the next page.

At the close of the first phase of the hearing, the Committee made a preliminary non-binding determination that Respondent violated a disciplinary rule. Tr. 213-14. The hearing continued to the sanctions phase and the parties were asked for evidence in aggravation and mitigation of sanction. Tr. 214, Bd. R. 11.11. Bar Counsel did not provide any evidence in aggravation. Tr. 214. Respondent addressed mitigation through argument.[4] Tr. 214-222.

At the end of the hearing, the Committee, with the consent of the parties, ordered Bar Counsel to file and serve a post-hearing brief to include proposed findings of fact and conclusions of law by March 26, 2014, ordered Respondent to file and serve a responsive brief by April 25, 2014, and ordered Bar Counsel to file and serve a reply by May 9, 2014. Tr. 225-26. Respondent sought, by motion filed on April 25, 2014, a short extension to file his responsive brief. By order dated May 2, 2014, the Committee accepted Respondent's brief as filed on April 29, 2014, and likewise modified the due date for Bar Counsel's reply until May 13, 2014. Bar Counsel timely filed its reply brief.

RECOMMENDED DISPOSITION OF MOTION TO DISMISS

Pursuant to Board Rule 7.16(a), we turn to Respondent's motion to dismiss. Respondent moved to dismiss the Specification of Charges on the grounds that the Specification was not made under oath as required by D.C. Bar R. XI, § 8(c) and D.C. Code § 11-2503(b), and it fails to provide adequate notice of the alleged conduct underlying the charged rule violations. Respondent's post-hearing brief reiterated his argument that the charges did not afford him due

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admission. RX 18 was added at the request for the Committee, which is a transcript from a proceeding in New Jersey that Respondent was relying upon and reading into the record at the hearing during the cross-examination of Ms. Norris. Bar Counsel did not object to the admission of RX 18, which was filed on March 11, 2014. Tr. 95, 223.

[4] Bar Counsel noted that Respondent's "mitigation" was more akin to a closing argument. The Committee allowed Respondent to continue. Tr. 219-220.

process because it did not provide adequate notice. Bar Counsel opposed the motion. The Hearing Committee recommends that the Board deny the motion to dismiss.

A. Oath

Charges against an attorney are required to be under oath.

> Formal disciplinary proceedings before a Hearing Committee shall be instituted by Bar Counsel by the filing of a petition under oath with the Executive Attorney. A copy of the petition shall be served upon the attorney, and another copy shall be sent to the Clerk of the Court. The petition shall be sufficiently clear and specific to inform the attorney of the alleged misconduct. . . .

D.C. Bar R. XI § 8(c); *see also* D.C. Code § 11-2503(b) ("[A] member of the bar may not be censured, suspended, or expelled under this chapter until written charges, under oath, against that member have been presented to the court, stating distinctly the grounds of the complaint.").

In this matter, the charges included the following verification signed by Assistant Bar Counsel, H. Clay Smith, III: "I do affirm that I verily believe the facts stated in the Specification of Charges to be true." BX B. This language is identical to the language used by the Office of Bar Counsel in *In re Morrell*, where the D.C. Court of Appeals held that the language was sufficient to comply with the oath requirements. The oath requirement

> envisions that it is enough for Bar Counsel (or an Assistant Bar Counsel) to file the petition under oath based on information and belief. Such an oath satisfies the need at the charging stage to assure that Bar Counsel, an officer of the court, has investigated the complaint and has sound reason to believe the charges are well founded.

In re Morrell, 684 A.2d 361, 367 (D.C. 1996). Respondent does not provide any authority for this Committee to reach a conclusion that differs from the Court in *Morrell*.

B. Adequacy of the charges

D.C. Bar R. XI § 8(c) provides that the "petition shall be sufficiently clear and specific to inform the attorney of the alleged misconduct." Respondent claims that the charges in this matter failed to provide adequate notice of the charges against him. The charges in this matter consist of 18 numbered paragraphs, 17 of which contain factual allegations or statements and the 18th paragraph provides the four specific rules that Bar Counsel alleges were violated.

Respondent argues that the charges are not sufficiently clear and specific because the four rules referred to in paragraph 18 did not specifically reference or identify the facts from paragraphs 1 through 17 that underlie each alleged violation. Respondent claims that as written the charges require him to guess which facts support the violations identified in the charges.

Respondent is correct that "[a]n attorney has the right to procedural due process in a disciplinary procedure." *In re Maxwell*, 798 A.2d 525, 530 (D.C. 2002). This right is satisfied "when the disciplinary proceeding provides adequate notice [of the charges of misconduct] and a meaningful opportunity to be heard." *Id*. (brackets in original); *see also In re Cloud*, 939 A.2d 653, 662 (D.C. 2007).

Respondent, however, is incorrect that the charges in this matter fail to provide him with adequate notice or a meaningful opportunity to be heard. The Specification of Charges is straightforward and provides Respondent with clear notice that this matter involves his representation of Ms. Norris and the failure to file an opposition by the district court deadline or to seek an extension of the deadline resulting in her case being dismissed. Specification ¶¶ 4, 7-9. In addition, the Specification of Charges clearly alleges that Respondent failed to communicate with Ms. Norris concerning the risk that her case would be dismissed. Specification ¶¶ 10-12.

Respondent does not provide any authority in support of his argument that each alleged rule violation must specifically identify the fact(s) in support. Nor does he provide an example of how the Specification of Charges prevented him from understanding the charges against him or prevented him from defending against those charges.

The Specification of Charges provided Respondent with sufficient notice of the allegations in this matter.[5] Therefore, the Committee recommends that Respondent's motion to dismiss be denied.

FINDINGS OF FACT

Bar Counsel bears the burden of proving a violation of the Rules by clear and convincing evidence. *See In re Williams*, 464 A.2d 115, 119 (D.C. 1983); Board Rule 11.6. The majority of the relevant facts in this matter are undisputed. We find the following facts by clear and convincing evidence in the record.

A. Filings before the United States District Court

1. Respondent is a member of the District of Columbia Bar, having been admitted by examination on December 6, 1993. BX A; JX ¶ 1.

2. Clifford Stewart is an attorney licensed to practice in the state of New Jersey, but not licensed to practice in the District of Columbia. JX ¶ 2; BX 17.

3. In or about March 2006, Cenny Norris retained Mr. Stewart to represent her in an employment action before the Equal Employment Opportunity Commission (EEOC) against her

[5] Both Bar Counsel and Respondent refer to an informal admonition issued to Respondent, dated October 11, 2012. Pursuant to D.C. Bar Rule XI, § 8(b), Respondent requested a hearing, thus vacating the informal admonition. Bar Counsel argues that the informal admonition provided "a detailed and specific account of the facts that gave rise to the Rule violations," and thus placed Respondent "on notice of the charges filed against him." Bar Counsel's Reply Brief at 4. The Committee finds that the Specification of Charges was sufficient notice and does not consider the informal admonition attached to Bar Counsel's reply brief.

former employer, the Commission of Fine Arts (a federal agency). Tr. 32-34; 46. An administrative judge entered summary judgment against Ms. Norris, which the Department of Interior adopted on January 10, 2007. RX 15 (*Norris v. Salazar,* 885 F. Supp. 2d 402, 408 (D.D.C. 2012)). Ms. Norris filed an administrative appeal on February 15, 2007, which was denied as untimely on February 27, 2009. *Id.* at 408-09.

4. On June 2, 2009, Ms. Norris filed a *pro se* civil complaint in the United States District Court for the District of Columbia against the Department of Interior styled *Norris v. Salazar*, civil action no. 09-cv-1042. Tr. 64-65; JX ¶ 3, BX 2. Mr. Stewart prepared the complaint for Ms. Norris. Tr. 64-65.

5. On or about June 9, 2009, Ms. Norris executed a retainer agreement with Mr. Stewart to represent her in *Norris v. Salazar.* Tr. 52, BX 1/RX 8.[6] Although Mr. Stewart is not a member of the D.C. Bar, he used a D.C. address on the retainer agreement. BX 1.

6. In or about January 2010, Mr. Stewart hired Respondent to serve as local counsel in the *Norris v. Salazar* matter. JX ¶ 5; BX 13.

7. Respondent had served as local counsel for Mr. Stewart in other matters. He understood, based on that prior experience, that Mr. Stewart was responsible for drafting all court filings and submitting the filings to Respondent 48 hours before the respective due date. Respondent would review the filings and revise them to comply with Federal Rule of Civil Procedure 11. Tr. 144, 170-175; JX 5; BX 9, 13, 15. The understanding between Mr. Stewart and Respondent was not in writing. Tr. 170.

8. All of the filings and orders in the *Norris v. Salazar* matter were filed and served on counsel of record through the district court's electronic case filing system. Respondent, as

[6] Bar Counsel's exhibit 1 and Respondent's exhibit 8 are the same document – a copy of the retainer agreement signed by Ms. Norris.

counsel of record, received notice of the filings electronically. Mr. Stewart, because he was not counsel of record, did not receive the filings or orders from the district court. Rather, Respondent was responsible for forwarding them to Mr. Stewart. Tr. 178-179.

9. On January 12, 2010, the defendant government filed a motion for partial dismissal of Ms. Norris's complaint. BX 2.

10. On February 3, 2010, Respondent filed a motion for extension of time to oppose the motion for partial dismissal. BX 2. The motion for extension stated that Respondent was recently retained by Ms. Norris to "serve as counsel of record for this action" and that he needed additional time to become familiar with the file to prepare a response. BX 3.

11. Respondent and Mr. Stewart discussed Mr. Stewart entering his appearance in the *Norris v. Salazar* matter through a *pro hac vice* motion/application. However, the *pro hac vice* application was not filed. Tr. 163; BX 2; BX 15.

12. On March 3, 2010, Respondent filed, on behalf of Ms. Norris, an opposition to defendant government's motion to dismiss and a motion to amend the complaint. BX 2. It is not clear from the record if Respondent or Mr. Stewart prepared the motion. On September 30, 2010, the district court denied the motion to dismiss without prejudice and granted Ms. Norris's request to amend the complaint. BX 2.

13. In November 2010, government counsel contacted Respondent to seek consent for an extension to file a renewed motion to dismiss. Tr. 119; BX 13. Respondent consented to the extension but asked that the motion also include an extended due date for the opposition to avoid a due date during the upcoming holidays. Tr. 119; BX 13. Counsel for the government filed the consent motion for an extension on December 6, 2010, which was granted by the district court in a minute order dated December 8, 2010. The minute order provided the briefing schedule for the

proposed renewed motion to dismiss, which provided Ms. Norris until January 14, 2011, to file an opposition. BX 2.

14. Government counsel filed the renewed motion to dismiss on December 13, 2010. BX 2; Tr. 120; JX ¶ 6. Respondent did not email a copy of the renewed motion to Mr. Stewart at this time because Mr. Stewart wanted to receive a hard copy of it when they met in person. Tr. 182.

15. A month later, on January 12, 2011, Respondent emailed Mr. Stewart requesting that Mr. Stewart call him to discuss the opposition to the renewed motion to dismiss which was due in two days. Respondent noted that he had a busy schedule and the government would likely consent to an extension to file an opposition. BX 15; Tr. 176-177.

16. Mr. Stewart replied that he did not have a copy of the motion to dismiss and he would need at least 30 days. Tr. 177; BX 15. It is not clear why Mr. Stewart had not received a copy of the renewed motion by this time.

17. On January 14, 2011, Respondent filed a motion for extension to file opposition; the motion sought until February 14, 2011, to file the opposition. The basis of the motion was (1) consent from the government, (2) Respondent (referred to in the motion as local counsel) was replacing his computer system at his office, (3) "other counsel" needed more time to review and generate a response, and (4) the holidays. BX 4; JX ¶7; Tr. 181. The district court granted the extension in a minute order dated January 19, 2011. BX 2.

18. Respondent gave the renewed motion to dismiss to Mr. Stewart on January 21, 2011 when they met in person. Tr. 180-181; BX 9.

19. On February 10, 2011, Mr. Stewart, by email, asked Respondent to pursue an additional extension to file the opposition. BX 5; BX 9; Tr. 151. By reply email on the

following day, Respondent asked Mr. Stewart to explain the grounds for the extension request. BX 5, 9; Tr. 152.

20. Respondent did not receive a response and did not file an opposition or extension request on behalf of Ms. Norris by the February 14, 2011 deadline. BX 2, Tr. 152-53.

21. On February 26, 2011, after the deadline for filing an opposition, Mr. Stewart replied to Respondent's email with a reference to a prior discussion on the need for an extension and he provided, as grounds for the request, his "overloaded calendar with matters in the U.S. District Court here in NJ." Mr. Stewart also referred to deadlines in administrative matters before the EEOC in Philadelphia and New York. He asked that the motion for an extension be filed *nunc pro tunc*. BX 6, 9, 13; Tr. 153; RX 11.

22. On March 31, 2011, Mr. Stewart provided a draft opposition to Respondent. Tr. 154-55; BX 13, 15. On April 5, 2011, Respondent rejected the opposition as being unacceptable for filing because the document had "numerous omissions" in "cites to the record." Tr. 155; BX 13, 15.

23. On April 11, 2011, Mr. Stewart provided the "corrected" draft opposition to Respondent by email; but the exhibits were not included because they needed to be scanned for electronic filing purposes. BX 9, 15; Tr. 156, 158. Respondent did not file the opposition although he acknowledged that he had a copy that could be filed as of April 11, 2011. Tr. 156. Respondent did not file the opposition on April 11 because he was preparing for trial scheduled that same week or the following week and he had a federal court complaint that needed to be filed in advance of the trial. He stated that he was "unable to drop those matters to address" the opposition from Mr. Stewart. Tr. 157.

24. On April 13, 2011, the district court dismissed Ms. Norris's amended complaint, treating the motion to dismiss filed on December 13, 2010, as conceded because an opposition was not filed. BX 2, 7. Ten days later, on April 23, 2010, Respondent informed Mr. Stewart that the case was dismissed and informed him that a motion for reconsideration needed to be filed within 30 days after entry of the order. BX 15, Tr. 198.

25. After the case was dismissed, Respondent and Mr. Stewart corresponded about filing a motion for reconsideration. BX 15.

a. On May 7, 2011, Respondent wrote to Mr. Stewart stating that he would be unavailable on May 10 and 11 to address the motion for reconsideration because he had a district court brief due and would be in a CLE all day on May 11. He also noted that May 11 is the due date and "that deadline cannot be extended." BX 15.

b. Mr. Stewart replied in a May 9, 2011 email that he learned, by reviewing the district court's order, that the opposition he prepared was not filed and he was "nonplussed" by Respondent's decision to not file it. Mr. Stewart reiterated in a May 10, 2011 email his disbelief that the opposition brief was not filed and he asked Respondent to draft an explanation for not filing the opposition. He also expressed confusion about Respondent being unavailable because of a CLE when Ms. Norris is about to be "booted out of federal court." BX 15.

c. Respondent replied on May 11 stating "I am not writing anything to the judge." He explained that Mr. Stewart was aware of the "February 15" (sic) deadline and blamed Mr. Stewart for missing the deadline and for providing the opposition brief two months late without scanned exhibits. "I am not taking the blame for

the failure to file a deficient document that was months late at the time it arrived." BX 15.

d. Neither Respondent nor Mr. Stewart prepared a motion for reconsideration on behalf of Ms. Norris. BX 2, 15.

26. Nothing was filed on behalf of Ms. Norris between January 14, 2011 (the date that Respondent filed a consent motion to extend the deadline for the opposition) and July 18, 2011 (the date Ms. Norris filed, on her own behalf, a motion for reconsideration). BX 2.

27. Respondent admits that he knew at the relevant time that the court could treat the motion to dismiss as conceded and dismiss the case if an opposition was not filed. Tr. 167.

B. Interactions with Ms. Norris

28. Respondent did not communicate with Ms. Norris prior to the district court dismissing her case on April 13, 2011. Respondent's first contact with Ms. Norris was July 5, 2011, when she contacted him. Tr. 35, 103, 162; BX 8.

29. Respondent informed Ms. Norris that he could not assist her with filing a motion for reconsideration because there may be a conflict of interest. Tr. 41.

30. Ms. Norris obtained the assistance of counsel (not Mr. Stewart or Respondent) to draft a *pro se* motion for reconsideration, which was filed with the district court on July 18, 2011. Tr. 40-42; BX 2; JX ¶ 9; BX 8.

31. On August 16, 2011, Respondent filed a response to Ms. Norris's motion for reconsideration. In that response, Respondent states that he takes no position on Ms. Norris's requested relief, he notes that he remains her attorney of record and he explains that as local counsel he was relying upon Mr. Stewart to complete the filings. BX 9.

32. Ms. Norris's motion for reconsideration was granted on October 18, 2011. BX 2, 10.

33. On November 10, 2011, Respondent filed a motion to withdraw as counsel. BX 2, 11; JX ¶12.

CONCLUSIONS OF LAW

A. Rule 1.3(b)(1) and (2) - Diligence and Zeal

Under Rule 1.3(b),

> A lawyer shall not intentionally:
>
> > (1) Fail to seek the lawful objectives of a client through reasonably available means permitted by law and the disciplinary rules; or
> > (2) Prejudice or damage a client during the course of the professional relationship.

A Rule 1.3(b) violation requires proof that the neglect was intentional. Intent can be established in one of two ways. "[N]eglect ripens into an intentional violation when the lawyer is aware of his neglect of the client matter . . . 'or, put differently, when a lawyer's inaction coexists with an awareness of his obligations to his client.'" *In re Ukwu*, 926 A.2d 1106, 1116 (D.C. 2007) (citations omitted). "[I]ntent may also be inferred where the neglect is 'so pervasive that the lawyer must have been aware of it.'" *Id.* (quoting *In re Lewis*, 689 A.2d 561, 564 (D.C. 1997)); *see In re Robertson*, 612 A.2d 1236, 1250 (D.C. 1992) (attorney must have "knowingly created a grave risk" and understood that prejudice or damage was "substantially certain to follow from his conduct"); *In re Haupt*, 444 A.2d 317, 322 (D.C. 1982) (per curiam) (adopting Hearing Committee findings) (neglect was so "persistent, prolonged, and pervasive" that the attorney must have been aware of it). "Knowing abandonment of a client is a classic case of a Rule 1.3(b)(1) violation." *Lewis*, 689 A.2d at 564.

In this matter, the Committee finds, and Respondent does not really challenge, that he knew of his obligations to Ms. Norris, his client, and knew the consequences of failing to act, *i.e.*, he knew the deadline to file an opposition to the government's motion to dismiss and he knew that the failure to file an opposition or motion for extension could result in a dismissal of his client's case under the court's rules. Respondent acknowledges that Mr. Stewart asked him to seek an extension prior to the deadline and he acknowledges that he did not take any action to protect Ms. Norris's case before the deadline lapsed or immediately thereafter.

Despite this factual background, Respondent argues that his conduct did not violate Rule 1.3(b)(1) because the objectives of the client, as voiced by Mr. Stewart, were unclear, or in the alternative, the action Mr. Stewart requested (a motion for an extension) was not permitted under applicable rules and/or would have violated separate disciplinary rules. We address each argument in turn below.

Respondent asserts that there was conflicting evidence as to whether Mr. Stewart wanted an extension of time to file an opposition to the motion to dismiss. In support, Respondent relies on the findings of fact from a New Jersey disciplinary proceeding against Mr. Stewart.[7] The finding Respondent relies upon states in pertinent part

> [Mr. Stewart] testified that the issues raised by the Defendant's motion to dismiss were difficult and required time and effort to oppose beyond the February 14, 2011 deadline. . . . Therefore, [Mr. Stewart] claimed that he made a strategic decision to file the brief late so that he could develop better arguments.

RX 17 at 12 ¶ ddd. Respondent claims that this finding of fact shows that Mr. Stewart had a strategy and that the "failure to file for an extension was precisely what Mr. Stewart intended in

[7] The disciplinary hearing in New Jersey was held on July 11-12, 2013 and the findings of fact relied upon by Respondent were issued in August 28, 2013.

order to insure [sic] the greatest likelihood of success for the client in opposing the motion to dismiss."[8] Respondent's brief at 6-7.

The Committee is not persuaded that the findings from the New Jersey proceeding are relevant, nor do they create a conflict or confusion as to what Mr. Stewart sought *in February 2011*. At the relevant time period (February 2011), the evidence shows that Mr. Stewart asked Respondent to seek an extension of the deadline. There is nothing in the record of this matter to support that Mr. Stewart wavered in his request for an extension in February 2011 or that Respondent did not understand the request. There is no evidence that Mr. Stewart explained to Respondent a strategy of failing to seek an extension in February 2011. Respondent argues in the alternative that seeking an extension was unjustified under the Federal Rules of Civil Procedure and that seeking an extension would violate other Rules of Professional Conduct. Respondent argues that a motion for an extension, as requested by Mr. Stewart, was unjustified under the Federal Rules of Civil Procedure because Mr. Stewart did not provide (1) a legitimate basis for needing an extension, (2) the length of time he needed an extension, or (3) an affidavit in support for his request because the motion would "rel[y] on facts outside of the record."[9] Respondent's brief at 7-9. Respondent maintains that Mr. Stewart's request was, in essence, that he could not complete the filing by the due date and he needed more time. Respondent states

[8] This misinterprets the New Jersey's findings of fact. The findings also include that "[o]n February 11, 2011, [Mr. Stewart] asked Mr. Francis to obtain an additional extension of time to finish the opposition, which was then due in two days." *Id.* at 10, ¶ ss. Taken together, these findings support the evidence in this matter that Mr. Stewart needed more time to complete the opposition and he asked Respondent to seek that time, *i.e.*, Mr. Stewart made the decision to get more time rather than try to complete the opposition in the two days remaining before the deadline.

[9] Respondent quotes the requirement of Rule 43(c) of the Federal Rules of Civil Procedure.

that such a basis is unjustified, especially in light of the two prior extensions afforded Mr. Stewart.[10]

The Committee is not persuaded by Respondent's arguments, which mischaracterize the record and his role in creating the need for an extension. The motion to dismiss was filed on December 13, 2010. Respondent waited a month, until January 12, 2011, to contact Mr. Stewart by email about the motion to dismiss; the email informed Mr. Stewart that the opposition was due on January 14, 2011 (two days later) and noted that he had a busy schedule and the government would likely consent to an extension. Mr. Stewart replied that he would need at least 30 days and that he had not seen the motion; he requested a copy. On January 14, 2011, Respondent filed a motion for extension with the court stating that the extension was needed because "other counsel" [Mr. Stewart] needed more time to review and generate the response. Respondent also noted the holidays and a new computer system in his office. None of these reasons were supported by affidavit. Moreover, at the time that the motion was filed, Respondent still had not sent the motion to Mr. Stewart, who did not receive the motion until January 21, 2011. On February 10, 2011 (four days before the deadline) Mr. Stewart asked Respondent to seek another extension. While Respondent is correct that Mr. Stewart did not provide a reason for the extension or a proposed deadline, Respondent was not unaware of the facts laid out above. He was aware that Mr. Stewart only had access to the motion to dismiss for approximately three weeks. He knew that Mr. Stewart needed additional time to complete the opposition. These are facially valid reasons for seeking an extension, and are akin to the reasons

[10] Respondent's reference to two prior extensions is misleading. When government counsel sought consent for an extension to file the motion in December 2010, Respondent asked to include an extended deadline for the opposition because of the holidays. This extended deadline was of no benefit to Mr. Stewart because Respondent did not forward the motion to dismiss to Mr. Stewart until after the deadline. FF 13, 18.

asserted in Respondent's prior requests, requests that were granted by the district court.[11] Respondent argues that his failure to file the extension motion is simply "a good faith error of judgment," which does not violate Rules 1.3(b)(1) or 1.3(b)(2), citing *In re Karr*, 772 A.2d 16, 20 (D.C. 1998) and *In re Schoeneman*, 777 A.2d 259, 264 (D.C. 2001). Those cases do not help Respondent because each involved a respondent who made a tactical decision regarding the filing of a motion. Here, Respondent does not offer a tactical reason for not filing the extension motion, there was no advantage to be gained or disadvantage to be avoided by not filing. We cannot find that this is simply a good faith error in judgment because the bases for seeking an extension here are virtually indistinguishable from the reasons offered when Respondent did seek an extension. This is not a "judgment call" where he made the wrong judgment.

Equally unpersuasive are Respondent's arguments that seeking an extension of time would have violated Rules of Professional Conduct 3.1 (prohibiting frivolous filings), 3.2 (prohibiting delay), and 4.4 (using means having no substantial purpose other than delay). As discussed above, the request for an extension would not have violated Rule 3.1 because Mr. Stewart's need for an extension to complete the opposition was not frivolous, as Respondent claims. Mr. Stewart had three weeks to prepare the opposition to the motion to dismiss and he asked Respondent to seek additional time. This was not unlike Respondent's own requests for extensions sought in February 2010 and January 2011. In addition, it is not reasonable to conclude that Mr. Stewart's request for more time was for the purpose of delay in violation of Rules 3.2 and 4.4. There is no evidence of such purpose, and the evidence of record is to the contrary.

[11] Respondent filed two motions for extension in the case, the first was based on his need to get up to speed on the case because he has just entered his appearance, and the second was because of his "busy schedule." FF 10, 15, 17.

The conflict Respondent claims exists between seeking an extension and the Rules of Professional Conduct are "artificial" and "demonstrates a misunderstanding of the nature of the misconduct." *In re Lawrence*, 526 A.2d 931, 932 (D.C. 1986). Lawrence, like Respondent in this matter, was charged with intentionally failing to seek his client's lawful objections. In defense, he asserted that there was a conflict between Federal Rule of Civil Procedure 11 and the obligations under the Rules of Professional Conduct in that he believed his client's claims were meritless and therefore signing a complaint was prohibited under Rule 11. *Id.* However, failing to take any action was not the correct solution. The Court explained that when an attorney believes he cannot proceed under Rule 11, he should withdraw from representation, not simply allow his client's claims to expire. *Id.* at 932-33 (noting that Lawrence did not communicate his concern about a conflict to his client, did not record the concern in his file, did not urge his client to seek another attorney, and did not take any steps to protect his clients claims).

Similarly, there is no evidence that Respondent communicated his concern to Mr. Stewart or the client that seeking an extension would violate the Rules of Professional Conduct, nor that he documented the concern in the file. Rather, the record shows that Mr. Stewart asked Respondent to seek an extension, there was follow up correspondence concerning the grounds for an extension, but a motion was not filed. Respondent did not inform Mr. Stewart that the motion for an extension was not filed; he did not inform him that to do so would violate the Rules of Professional Conduct, and he did not seek to withdraw as local counsel. He allowed the deadline to lapse without taking any action to protect Ms. Norris's claim. These facts establish a violation of Rule 1.3(b)(1).

To establish a violation of Rule 1.3(b)(2), there must be evidence of "actual prejudice or damage to the client." *In re Cohen*, 847 A.2d 1162, 1165 n.1 (D.C. 2004). "[I]t is sufficient to

establish a violation of [the predecessor to Rule 1.3(b)(2) by showing] that the lawyer was 'demonstrably aware' that prejudice or damage to the client would result from his conduct, and that such prejudice or damage did, in fact, result." *Robertson*, 612 A.2d at 1250-51 (by failing to prepare tax returns, respondent "knowingly created a grave risk" that his client would lose claims for refunds and would be financially damaged).

In this matter, Respondent admitted that he knew that the failure to file an opposition or seek an extension by the deadline would result in the district court treating the motion to dismiss as conceded and that his client's claims would be dismissed. Ms. Norris experienced that exact consequence. Her case was dismissed on April 13, 2011, when the district court treated the motion to dismiss as conceded. Thereafter, Respondent did not file a motion for reconsideration to try to revive Ms. Norris's claims. Thus, Ms. Norris was required to obtain the assistance of a third attorney to help her draft a successful motion for reconsideration that she filed *pro se* on July 18, 2011, despite the fact that Respondent remained her attorney of record.

These facts establish a violation of Rule 1.3(b)(2). Ms. Norris suffered prejudice when Respondent's neglect caused her to have to hire a new lawyer to pursue her interests. Respondent argues, without citation, that Ms. Norris was not prejudiced because her case was dismissed on the merits after it was reinstated, and thus would have been dismissed even if Respondent had filed the motion for an extension. Whether the litigation would have been successful on the merits is irrelevant to a charged violation of Rule 1.3(b)(2). *See* Rule 1.3, cmt. [8] (noting that "unreasonable delay" may constitute harm to a client under Rule 1.3, "[e]ven where the client's interests are not affected in substance," because it "can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness"). The question is whether the client suffered prejudice, and here, she did.

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

Rule 1.4 provides, in pertinent part:

> (a) A lawyer shall keep a client reasonably informed about the status of a matter[.]
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

"The guiding principle for evaluating conduct under [Rule 1.4(a)] is whether the lawyer fulfilled the client's 'reasonable . . . expectations for information.'" *In re Schoeneman*, 777 A.2d 259, 264 (D.C. 2001) (quoting Comment [3] to Rule 1.4). "To meet that expectation, 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).

Here, Respondent admits that he did not communicate with Ms. Norris at any time prior to her case being dismissed. He failed to inform Ms. Norris of his role in the lawsuit and made no efforts to ensure that Mr. Stewart kept Ms. Norris informed of the case developments. Respondent did not inform Ms. Norris that a motion to dismiss was filed on December 13, 2010, nor did he inform her of the deadline for filing a responsive pleading. When the case was dismissed without a responsive pleading being filed, he did not inform Ms. Norris of the district court's ruling or the deadline for filing a motion for reconsideration.

Respondent argues that he was not obligated to communicate with Ms. Norris directly because he was only local counsel and Mr. Stewart was the lead counsel and therefore he was responsible for communicating with Ms. Norris. Respondent explained that for practical purposes, there may be a preference to avoid having multiple attorneys communicate with a client and that Ms. Norris and Mr. Stewart had a professional relationship that pre-dates the district court case -- Mr. Stewart represented Ms. Norris before administrative bodies.

The Committee is sympathetic to Respondent's argument but is ultimately not persuaded by it. In essence, Respondent is arguing that the Rules of Professional Conduct may be limited when an attorney is acting in a local counsel role. However, the attorney-client relationship and the Rules of Professional Conduct are not subject to such limitations when an attorney is acting in a representative capacity as Respondent was in this matter. Here, Respondent affirmatively filed a motion in the *Norris v. Salazar* action in which he identified himself as being recently retained by plaintiff [Ms. Norris]. During the relevant period, Respondent was the only attorney of record for Ms. Norris and as such the only person who received district court filings on her behalf and the only person whom opposing counsel contacted for consent to motions filed in the case.

When an attorney acts on behalf of another "in a legal matter, the attorney undertakes the full burdens of the legal relationship." *In re Washington*, 489 A.2d 452, 456 (D.C. 1985). Respondent, by agreeing to serve as local counsel for Ms. Norris, entering his appearance, and filing papers before the Court on her behalf, "invoke[d] upon himself the entire structure of the Code of Professional Responsibility and its consequent enforcement through disciplinary proceedings." *Id.* at 456. Thus, Respondent had an obligation to ensure that Ms. Norris was kept "reasonably informed about the status of the matter" and to ensure that the matter was explained "to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." *See In re Fay*, Board Docket No. 10-BD-022 at 16-18 (BPR Nov. 27, 2013) (rejecting the argument that local counsel owed a lesser duty to the client than did lead counsel), *review pending* D.C. App. No. 14-BG-0007 (scheduled for argument October 28, 2014).

Respondent admitted that he did not communicate with Ms. Norris, and there is no evidence he took steps to ensure that Mr. Stewart was providing adequate communication with Ms. Norris. These facts establish a violation of Rules 1.4(a) and (b).

RECOMMENDED SANCTION

Bar Counsel contends that the range of sanctions available in this matter is an informal admonition to a suspension from the practice. In its brief, Bar Counsel recommends, at minimum, a public censure but argues in its reply brief that a more severe sanction is warranted because of Respondent's lack of remorse and failure to take responsibility for his actions as shown during these proceedings. Bar Counsel suggests a 30-day suspension, stayed upon successful completion of a continuing legal education course on ethics.

Respondent, however, argues that if a sanction must be imposed, then it should be an informal admonition. Respondent refers to *In re Fay* (discussed below) as a comparable case in which the recommended sanction was an informal admonition.

The appropriate sanction is what is necessary to protect the public and the courts, maintain the integrity of the profession, and "deter other attorneys from engaging in similar misconduct." *In re Evans*, 902 A.2d 56, 74 (D.C. 2006) (per curiam) (quoting *In re Uchendu*, 812 A.2d. 933, 941 (D.C. 2002)). The determination of an appropriate disciplinary sanction is based on consideration of the following factors: the nature and seriousness of the misconduct, prior discipline, prejudice to the client, the respondent's attitude, and circumstances in aggravation and mitigation. *See In re Martin*, 67 A.3d 1032, 1053 (D.C. 2013) (citing *In re Elgin*, 918 A.2d 362, 376 (D.C. 2007)); *In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (en banc). Under D.C. Bar R. XI, § 9(h), the sanction imposed also must be consistent with cases involving comparable misconduct.

The Committee recommends a Board reprimand for Respondent's misconduct. The factors listed above weigh in favor of and against Respondent as follows:

In favor of Respondent is that this is the first violation after 21 years as a member of the District of Columbia Bar. In addition, the misconduct is limited to one case where Respondent was acting as local counsel. While the role of local counsel does not excuse or limit Respondent's duties under the Rules of Professional Conduct, it does explain Respondent's misplaced reliance on another attorney to communicate with the client.

The factors against Respondent, however, include that there were multiple rules violated and the conduct at issue was serious and resulted in prejudice to the client. The failure to act to protect a client resulted in dismissal of a case. Respondent is correct that the dismissal was vacated; however, he did not provide any assistance to his client in that regard. *See In re Robertson*, 608 A.2d 756 (D.C. 1992) (appending the Board report and recommendation) (noting that respondent cannot "claim credit" for the lack of prejudice to the client when he missed deadlines and "put his client at risk that their appeals would be dismissed."); *In re Banks*, 461 A.2d 1038, 1041 (D.C. 1983) (adopting Board report and recommendation) ("No lawyer can, or should be allowed to, take such chances with his client's interests and then later plead fortuitous good luck in his defense.").

In addition, Respondent did not show remorse during the proceedings nor has he taken responsibility for his actions and decisions. Throughout the proceeding Respondent blamed Mr. Stewart for the failure to file a timely opposition and the failure to seek an extension. However, Respondent put Mr. Stewart in a difficult position. Respondent sought extensions without consulting with Mr. Stewart and then failed to forward the motion to dismiss for five weeks. When Mr. Stewart, who had the motion for only three weeks, sought more time, Respondent

refused, claiming that Mr. Stewart was already given 60 days. Thereafter, in defense of his actions, Respondent claimed that a motion for an extension based on Mr. Stewart needing more time to complete the opposition would violate court and professional conduct rules. The Committee is perplexed by such a response, as Respondent himself sought and obtained prior extensions for reasons similar to Mr. Stewart's basis. The Committee agrees with Bar Counsel that Respondent's attitude during this proceeding shows a misunderstanding of his obligations under the Rules of Professional Conduct. In particular, the Committee is troubled by the lack of concern for the client throughout the process. Even after the case was dismissed, Mr. Stewart and Respondent appeared more concerned about blaming each other than protecting their client and trying to fix the problem they created for their client.

As stated above, a sanction must be consistent with cases involving comparable misconduct. There are limited cases the Committee can use as comparable to this matter. Recently, the Board adopted the findings and recommended sanction of an informal admonition in *In re Fay*, Bar Docket No. 139-02 (BPR November 27, 2013). Fay was subject to his first disciplinary matter when he filed a complaint as a favor to an attorney-friend whose Bar membership had been suspended for non-payment of dues and the statute of limitations was about to expire. *Id.* at 4-6. Fay understood that the friend would pay his dues and maintain full responsibility for the litigation. However, the friend failed to get reinstated and failed to take action to serve the complaint and the case was dismissed. *Id.* Thereafter, Fay took steps to try to get the case reinstated. *Id.* In recommending the lowest sanction available, the Board noted that Fay "did not have a dishonest motive, and no dishonesty is alleged; in fact, he had good intentions in helping his lawyer-friend avoid missing the statute of limitations." *Id.* at 20. In addition, the Board found that "[Fay] reasonably understood that [his lawyer-friend] would be

promptly reinstated to good standing in the D.C. Bar and would take responsibility for the litigation." *Id.*

In the instant matter, like in *Fay*, there are no allegations that Respondent acted with a dishonest motive. However, unlike *Fay*, it was not reasonable for Respondent to believe that the deadline would be handled by Mr. Stewart. Respondent was the attorney of record in the case. Mr. Stewart could not file a motion for extension or an opposition without it going through Respondent. Therefore, Respondent knew the deadline was missed and he did not take any action to protect his client. After the case was dismissed, he did not take steps to have the case reinstated. Rather, he again delayed matters by providing notice to Mr. Stewart ten days after the case was dismissed and refused to assist Ms. Norris with a motion for reconsideration.

Bar Counsel argues that a public censure is appropriate here, comparing the misconduct to that in *In re Shelnutt*, 719 A.2d 96 (D.C. 1998), *In re Douglass*, 745 A.2d 307 (D.C. 2000), and *In re Bland*, 714 A.2d 787 (D.C. 1998). However, the conduct in those matters differs in important respects to the instant matter and we address each case in turn below.

In *In re Shelnutt*, the respondent was an attorney in a criminal matter; the respondent did not meet with his client and did not return his client's calls. The Committee found that the respondent's neglect resulted in the client remaining in jail four additional days. Thus, the prejudice to the client, remaining imprisoned for four additional days, and the failure to return calls was more significant than in the instant matter. *Shelnutt*, 719 A.2d at 97.

The facts in *Douglass* also differ materially from the instant matter. Douglass represented the personal representative in a probate matter where he failed to defend a claim against the estate forcing a payment at a significantly higher amount. *Douglass*, 745 A.2d at 307. He also entered into settlement discussions without full disclosure to his client. *In re*

Douglass, Bar Docket No. 51-95 at 2, 5 (BPR Oct. 25, 1999). In deciding that a public censure was the appropriate discipline, the Board considered Douglass's two prior instances of discipline and held that there was "evidence that he made misrepresentations to his client in the process of obtaining her authorization to settle the claim." *Id.* at 7, 15. As stated above, Respondent does not have a disciplinary history and there is no charge or evidence of dishonesty or misrepresentation that would warrant a public censure over a reprimand.

Bland, like Respondent, was subject to his first discipline related to his representation of one client in a single matter. *In re Bland*, Bar Docket No. 245-95 at 27 (BPR Jan. 13, 1998). However, Bland's misconduct was more extensive than the Respondent here; Bland was found to have violated ten disciplinary rules in the course of representing a client in a worker's compensation case. *Id.* Bland had missteps and a lack of preparation from the beginning of the litigation; he did not research the defendants prior to filing the complaints; he agreed to dismissals of parties without consulting his client; he missed discovery deadlines resulting in an order to compel; he missed filing deadlines; and he attended a mediation session without full preparation. *Id.* at 4-8. Bland's client confronted him about this lack of effort but his inaction continued when he failed to prepare a required pretrial statement and he failed to attend the pretrial conference which resulted in the case being dismissed; he did not make any attempts to get the case reinstated. *Id.* The Committee referred to his actions as "'a textbook case of incompetent and/or neglectful representation'" and in the latter stages of the representation as "'abandonment of his client's interests.'" *Id.* at 10 (quoting Committee Report). The misconduct discussed in the *Bland* matter extended over multiple years and multiple deadlines whereas the misconduct in this matter spanned a few months and involved one deadline. In addition, Bland, unlike Respondent here, was the sole attorney on the case and thereafter could

not reasonably believe that the communication or other responsibilities were completed by another attorney.

Based on the above discussion, the Committee concludes that a public censure for Respondent's misconduct is not warranted given that it is his first disciplinary matter, the misconduct was for a short duration in a single matter, and his role as local counsel in that matter explains his reliance, albeit misplaced, on another attorney to communicate with his client. However, as stated above, an informal admonition would not be adequate in light of Respondents' misconduct and the Court's precedent. Instead, the Committee concludes that Respondent's conduct warrants a Board reprimand, the sanction that falls between informal admonition and public censure under D.C. Bar R. XI, § 3(a).

CONCLUSION

For the foregoing reasons, the Committee finds that Respondent violated Rule 1.3(b)(1) (intentionally failing to seek the lawful objectives of a client through reasonably available means permitted by law and the ethical rules); Rule 1.3(b)(2) (intentionally prejudicing or damaging a client during the course of a professional relationship); Rule 1.4(a) (failing to keep the client reasonably informed about the status of the matter); and Rule 1.4(b) (failing to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation). As the appropriate sanction for the misconduct, the Committee recommends that the Board issue a reprimand to Respondent.

AD HOC HEARING COMMITTEE

By: /LP/
Lucy Pittman, Chair

/DL/
Darryl Lesesne, Public Member

/EP/
Elissa Preheim, Attorney Member

Dated: September 24, 2014