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

In the Matter of:	:	
	:	
HARRY TUN,	:	
	:	
Respondent.	:	Bar Docket No. 273-06
	:	
A Member of the Bar of the District of Columbia Court of Appeals (Bar Membership No. 416262)	:	

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

This matter came before Hearing Committee Number Six for a limited hearing on a Petition for Negotiated Discipline. The members of the Hearing Committee are Mary Lou Soller, Esquire, Dr. Silvia Martinez, and Joan Strand, Esquire. The Office of Bar Counsel ("Bar Counsel") was represented by Assistant Bar Counsel Joseph N. Bowman. Respondent was represented by counsel, Hamilton P. Fox III, Esquire, who was present throughout the limited hearing.[1]

I. PROCEDURAL HISTORY

This is the second time the parties have attempted to negotiate discipline in this matter. Bar Counsel and Respondent first filed a petition for negotiated disposition in 2009. The negotiated discipline was approved by a hearing committee, but was ultimately rejected by the District of Columbia Court of Appeals (the "Court"), based on the recommendation of the Board on Professional Responsibility (the "Board"). Order, *In re Tun*, No. 09-BG-804 (D.C. Jan. 21, 2010). In its Report and Recommendation, the Board proposed an alternative, more severe

[1] Mr. Fox withdrew from the representation on March 31, 2011. *See infra* at 6 n.4.

sanction and suggested that the parties could re-negotiate the discipline, consistent with the Board's recommendation. *See In re Tun*, Bar Docket No. 273-06 (BPR Nov. 24, 2009). The Court agreed that the parties could continue negotiations and resubmit a revised petition for negotiated discipline. Order, *In re Tun*, No. 09-BG-804 (D.C. Jan. 21, 2010). Bar Counsel thereafter filed a Specification of Charges, and the parties submitted a second petition for a negotiated disposition. The matter then came before Hearing Committee Number Six for a limited hearing and recommendation.

A. First Negotiated Discipline Proceeding

On February 17, 2009, Bar Counsel filed a Specification of Charges against Respondent. Thereafter, on March 27, 2009, Bar Counsel and Respondent filed a Petition for Negotiated Discipline (the "2009 Petition"), which was assigned to an Ad Hoc Hearing Committee. Bar Counsel and Respondent stipulated to a proposed sanction of a nine-month suspension, with three months stayed, followed by a one-year period of probation with conditions.[2]

The Ad Hoc Hearing Committee held a limited hearing on June 11, 2009. On July 14, 2009, it issued a Report and Recommendation approving the 2009 Petition (the "2009 HC Report"). The Ad Hoc Hearing Committee concluded that "taking into account all the aggravating and mitigating facts and circumstances – as well as the desirability of an expeditious and final determination herein to both Bar Counsel and Respondent – we agree with the parties that the discipline negotiated in this matter is appropriate." 2009 HC Report at 19, ¶ 23.

[2] In sum, the conditions were that Respondent would: (1) be required to take five hours of continuing legal education related to accounting and record-keeping; (2) meet with Daniel M. Mills (the Manager of the Practice Management Advisory Service ("PMAS") of the District of Columbia Bar), or a practice manager designated by Mr. Mills, to review Respondent's business structure and practice; and (3) follow the requirements established by Mr. Mills or the practice manager.

On August 12, 2009, the Court issued an order, finding that the question of the appropriate sanction was "quite complex," and referring the case to the Board for its "views concerning the appropriateness of the negotiated discipline." Order, *In re Tun*, No. 09-BG-804 (D.C. Aug. 12, 2009). Bar Counsel and Respondent filed a joint motion with the Board requesting an opportunity to brief the matter. The Board granted the motion on September 17, 2009, and specifically directed the parties to address "whether the sanction is justified in light of *In re Cleaver-Bascombe*, 892 A.2d 396 (D.C. 2006)." Order, *In re Tun*, Bar Docket No. 273-06 (BPR Sept. 17, 2009). Bar Counsel filed its brief on September 29, 2009, and Respondent filed his brief the next day.

On November 24, 2009, the Board issued a Report and Recommendation (the "2009 Board Report"), finding that "although the proposed sanction is within the lower range of precedent for the misconduct involved here, we do not believe that the sanction adequately reflects the number of violations nor the extended time period during which they took place." 2009 Board Report at 1. The Board determined that:

> [a] more appropriate sanction would be a suspension of 18 months, with the last six months stayed (a) in favor of a one-year probation subject to the terms of the probation in the negotiated disposition, and (b) conditioned on [Respondent's] compliance with the terms of the probation. If Respondent fails to comply with those terms, we believe that the stay should not only be lifted, but that he should also be required to demonstrate his fitness in order to be reinstated.

Id at 1-2. The Board thus recommended that the Court reject the 2009 Petition. *Id.* at 15.

The 2009 Board Report also recommended that

> [p]ursuant to Board Rule 17.7, the parties should be allowed to submit a modified proposal more in line with our suggested sanction. We do not believe, based on the record developed in this case, that requiring a full evidentiary hearing is likely to produce any significant new evidence that would alter our recommendation.

> Consequently, the better course is for the parties to be given the opportunity to resolve this matter without the burdens and time associated with a full evidentiary hearing.

Id.

On January 21, 2010, the Court issued an Order adopting the Board's recommendation and rejecting the 2009 negotiated discipline, "without prejudice to the parties continuing negotiations and, if agreed, resubmitting a revised petition for approval by the Hearing Committee." Order, *In re Tun*, No. 09-BG-804 (D.C. Jan. 21, 2010).

B. Current Negotiated Discipline Proceeding

Following the Court's rejection of the 2009 negotiated discipline, the Specification of Charges was reactivated and assigned to this Hearing Committee. Thereafter, Bar Counsel filed a new Petition for Negotiated Discipline on November 30, 2010 (the "First Petition"), which was also assigned to this Hearing Committee,[3] and consideration of the Specification of Charges was deferred pending further order of the Hearing Committee. *See* Order, *In re Tun*, Bar Docket No. 273-06 (HC Dec. 8, 2010). The petition incorporated the sanction proposed in the 2009 Board Report, with the exception of the requirement that Respondent demonstrate fitness as a condition of reinstatement if the probation was revoked.

Subsequently, on December 21, 2010, Bar Counsel filed a second Petition for Negotiated Discipline (the "Second Petition") that included a fitness requirement, which made the sanction identical to that proposed by the Board. The Second Petition also clarified the Statement of Promises Made By Bar Counsel (Section III). Finally, in the Second Petition, Bar Counsel offered supplemental authority to support the agreed-upon sanction (Section IV.B), and, in

[3] *See* Order, *In re Rigas*, Bar Docket No. 148-06 at 12 n.6 (BPR Mar. 11, 2009) (providing that, in the interest of judicial efficiency, the hearing committee convened to consider Bar Counsel's specification of charges may consider a petition for negotiated discipline in the same matter, notwithstanding the contrary provision of Board Rule 17.4(c), which the Board intends to amend).

particular, distinguished this case from *In re Cleaver-Bascombe*, 986 A.2d 1191 (D.C. 2010) (per curiam) ("*Cleaver-Bascombe II*"), in which the Court imposed disbarment. The Second Petition also proposed the following probation revocation procedure:

> If Respondent fails to comply with the terms of the probation, Bar Counsel shall notify the Board and recommend that the Board report to the Court and recommend that the stay be lifted and Respondent be suspended for the six-month balance of the 18-month suspension, with a requirement that Respondent furnish proof of rehabilitation as a condition of reinstatement pursuant to D.C. Bar Rule XI, Section 3(a)(2).

At the time Bar Counsel filed the Second Petition, the Board was in the process of considering the adoption of rules to govern probation revocation, based on the Court's recent decisions in *In re Mooers*, No. 06-BG-551 (D.C. June 11, 2010) (per curiam), and *In re Brown*, 10 A.3d 619 (D.C. 2010). The probation revocation procedure set forth in the Second Petition did not consider either of these cases nor the proposed rule change. The Hearing Committee Chair identified the issue for the parties during a pre-hearing conference on January 20, 2011, and on March 10, 2011, immediately prior to the limited hearing, Bar Counsel filed a third Petition, titled "Amended Petition for Negotiated Discipline" (the "Third Petition"). The Third Petition amended the probation revocation provision to provide:

> If Respondent fails to comply with the terms of the probation, Bar Counsel may initiate a probation revocation proceeding which shall be conducted in accordance with the probation revocation procedures in effect at that time.

Third Petition at 10. The Third Petition also included a discussion of additional relevant precedent. *Id*. at 11, 15 n.2.

In each instance in which Bar Counsel filed a Petition, Respondent also submitted a new Affidavit (respectively, the "First Affidavit," the "Second Affidavit," and the "Third Affidavit").

In each of these documents, Respondent attested that he agreed with the statements contained in the corresponding petition.

The limited hearing on the Third Petition was held on March 10, 2011. A second limited hearing was convened on March 28, 2011, to address questions raised both by the Hearing Committee during the first limited hearing and by Mr. Fox's planned withdrawal from his representation of Respondent.[4]

The Third Petition set forth the parties' agreement as to the relevant facts, the disciplinary rules violated, the appropriate sanction, and the procedure to govern any alleged violation of probation. These terms and conditions were confirmed both by Bar Counsel and Respondent at the limited hearing.

The Hearing Committee has carefully considered the Third Petition, the Third Affidavit, and the representations by Respondent, his counsel, and Bar Counsel during the two limited hearings. The Hearing Committee also has fully considered the aggravating and mitigating factors listed in the Third Petition and the Third Affidavit and the sanctions imposed in comparable cases. Finally, the Hearing Committee Chair has reviewed Bar Counsel's investigative files and records *in camera*, met with Bar Counsel *ex parte*, and shared the results of her *in camera* review and *ex parte* meetings with the entire Hearing Committee.[5] *See* D.C. Bar R. XI, § 12.1(c); Board Rule 17.4(h).

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[4] During the March 10, 2011, limited hearing, Mr. Fox informed the Hearing Committee that he was retiring from private practice, effective April 1, 2011, and would not be representing Respondent after that date. Transcript of the Hearing ("Tr.") at 146-47. He did not specify his future plans, however. *Id.* On March 22, 2011, Mr. Bowman submitted a letter, on behalf of both parties, to the Hearing Committee, informing it that Mr. Fox was joining the Office of Bar Counsel as an Assistant Bar Counsel. In that letter, Mr. Bowman relayed Mr. Fox's assertion that he had informed Respondent about his potential change in employment on January 25, 2011, the day after he applied for the position, and that Respondent consented to Mr. Fox's continuing representation. These facts were confirmed by Respondent at the second limited hearing. *Id*. at 184-93.

[5] *See* Confidential Appendix to the Report and Recommendation, appended hereto. *See* Board Rule 17.6.

Based on its review, the Hearing Committee recommends that the Court accept the Third Petition and impose upon Respondent an 18-month suspension, with six months of the suspension stayed, followed by a one-year period of probation, with conditions agreed to by Bar Counsel and Respondent. These conditions require that:

(1) Respondent take five hours of pre-approved continuing legal education ("CLE") related to accounting and record-keeping and that he must certify and provide documentation that he has met this requirement to the Office of Bar Counsel within six months of the Court's order approving this petition; and

(2) During the period of probation:

(a) Respondent will consult with Daniel Mills, the Manager of the PMAS before or within 30 days after probation begins;

(b) Respondent will execute a waiver allowing Mr. Mills, and/or a practice monitor appointed by Mr. Mills, to communicate directly with the Office of Bar Counsel regarding his compliance;

(c) Respondent will allow Mr. Mills or his designated practice monitor to conduct a full assessment of Respondent's business structure and his practice, including but not limited to reviewing financial records, invoices, client files, engagement letters, supervision and training of staff, and responsiveness to clients;

(d) Respondent will allow Mr. Mills and/or his designated practice monitor to ensure that Respondent maintains complete records relating to maintenance of client funds and that Respondent complies with all of Mr. Mills' recommendations;

(e) Respondent will be in full compliance with Mr. Mills' requirements during the period of probation, and Mr. Mills or the designated practice monitor will submit reports about Respondent's compliance every two months during the period of probation; and

(f) Respondent must sign an acknowledgement that he is in compliance with Mr. Mills' requirements and file the signed acknowledgement with the Office of Bar Counsel by the tenth month of his probation.[6]

[6] These conditions are identical to those contained in the 2009 Petition, and identical to those endorsed in the Board's November 24, 2009, recommendation to the Court of Appeals.

Third Petition at 9-10. If Respondent fails to comply with the terms of his probation, Bar Counsel may institute probation revocation proceedings, pursuant to the procedures in effect at that time. If Respondent is found to have violated any of the terms of his probation, the stay of the six-month suspension shall be lifted and a six-month period of suspension shall be imposed. If this occurs, Respondent shall be required to make a showing of fitness to practice, as a condition of reinstatement, pursuant to D.C. Bar Rule XI, § 3(a)(2). *Id*.

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 Third Petition and the Third 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. at 77.

3. In sum, the allegations by Bar Counsel are that Respondent violated the following provisions of the District of Columbia Rules of Professional Conduct:

   a. Rule 1.5(a) and (f), in that Respondent charged a fee that was prohibited by law and therefore *per s*e unreasonable;

   b. Rules 3.3(a)(1), in that Respondent made a false statement of material fact or law to a tribunal;

   c. Rule 8.4(c), in that Respondent engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation; and

   d. Rule 8.4(d), in that Respondent engaged in conduct that seriously interfered with the administration of justice.

Tr. at 65-66, 78-80; Third Petition at 8 (¶ 7).

4. Respondent has knowingly and voluntarily acknowledged that the material facts and misconduct stipulated in the Third Petition are true and correct. Tr. at 77-80; Third Affidavit at ¶ 4. Specifically, Respondent acknowledges that:

a. Between 1999 and 2003, Respondent's practice focused on criminal defense law. As a part of his practice, he accepted appointments from the Superior Court of the District of Columbia ("Superior Court"), pursuant to the District of Columbia Criminal Justice Act ("CJA"), D.C. Code § 11-2601 *et seq*. (2001 ed.), to advise and represent indigent criminal defendants in the Superior Court.

b. When a Superior Court judge appointed Respondent to represent an indigent criminal defendant, the judge issued an order, pursuant to the CJA, to that effect. The order incorporated and included a form entitled "Appointment and Voucher for Legal Services-Initial Claim" ("voucher"), so Respondent could claim payment for legal services he rendered to his clients. The voucher included spaces and sections for Respondent to itemize his time, expenses, and the compensation he claimed in the case. On its face, the voucher also included an oath and affirmation of the correctness of the claimed compensation, with a line for Respondent's signature.

c. After certain intervals in a case, or after completion of a case, Respondent filled out a voucher claiming payment for services rendered in that case, swore to its truthfulness and correctness by signing the voucher, and turned it in to the Superior Court for processing and payment.

d. Between 1999 and 2003, Respondent submitted 162 vouchers to the Superior Court claiming payment for legal services rendered to indigent defendants. In each voucher, Respondent wrote down the time he

purported to have started and stopped working for a particular client for each day he claimed payment.

e. A review of the vouchers that Respondent submitted between 1999 and 2003 reflects that Respondent sought payment for the same time period for two or more clients on 162 occasions.[7]

f. As a result of double billing for multiple clients, Respondent sought and received payment for 1,180.25 hours of services that he did not provide, or that he did not provide at the time that he claimed.[8] Because of his poor record-keeping, Respondent could not submit accurate vouchers. Instead, he simply submitted vouchers that roughly reflected the time – in the aggregate – he had spent on CJA cases. Thus, if Respondent had spent "X" hours during a certain time period on CJA cases, he would submit a voucher reflecting approximately "X" hours. The specific time charges on the vouchers, however, were frequently inaccurate. In some instances Respondent might not have performed the charged-for services at all in the specific case. In other instances, Respondent may have performed the services, but not at the time he certified.

g. The following itemization provides the case name, case number, voucher number, number of hours for each voucher that overlap with another voucher, and the date the Superior Court paid the voucher:

[7] The parties refer to this practice as "double billing." Tr. at 119-20.

[8] For example, in the case of *United States v. Lawrence*, Case No. F-3729-99 (#1 on the itemization in paragraph 4.g, *infra*), Respondent claimed 7.5 hours for time that he also claimed on other vouchers.

	United States v.	Case #	Voucher #	Overlap (double billing)	Date Voucher Paid
1	Lawrence	F-3729-99	868254	7.50	02/01/02
2	Stevenson	F-04223-00	898511	12.50	05/10/02
3	Nicholson	F-04234-00	898531	7.50	11/02/02
4	Davis	M-09940-00	902399	5.00	11/15/02
5	Allen	F-05126-00	901821	7.75	06/02/02
6	Bogan	F-05190-00	902063	0.25	10/26/01
7	Crawford	M-13694-00	908472	8.00	12/21/01
8	Williams	M-13671-00	908474	10.00	01/25/02
9	Miller	M-13778-00	908603	7.25	02/28/03
10	Jordan	M-13780-00	908593	8.25	04/10/02
11	Simmons	M-13770-00	908606	5.50	10/26/01
12	West	F-07132-00	908631	4.75	12/01/01
13	Doe	M-14457-00	910877	1.00	06/20/03
14	Ashmon	F-07487-00	910867	10.50	07/05/02
15	Taylor	M-00311-01	911530	4.00	03/29/02
16	Gray	M-00797-01	912536	3.50	12/21/01
17	McFadden	F-01687-01	915854	5.75	12/21/01
18	Rose	F-01668-01	915858	6.00	05/17/02
19	Grose	M-03589-01	917104	6.75	11/09/01
20	Sandler	F-02116-01	917231	7.50	11/02/01
21	Enworom	M-03622-01	920503	6.75	12/06/01
22	Hinton	F-00459-01	920757	12.75	05/10/02
23	Lea	F-07738-00	948358	0.50	03/01/02
24	Rose	F-03319-01	921317	2.50	05/10/02
25	Short	M-06886-01	922485	9.75	10/26/01
26	Porter	M-06939-01	922519	12.50	12/21/01
27	Epps	F-03743-01	922522	7.25	02/07/02
28	Matthews	SP-1659-01	922541	5.50	10/26/01
29	Anderson	M-06949-01	922569	5.50	12/07/01
30	Jones	M-06950-01	922593	2.50	10/24/03
31	Price	M-06982-01	922597	11.25	12/21/01
32	Boradus	M-00771-01	922719	1.25	10/31/02
33	Enworom	SP-1993-01	925029	2.00	11/02/01
34	Anderson	M-09238-01	926465	5.50	11/28/01
35	Kilgore	M-09256-01	926466	7.00	06/07/02
36	Hodge	M-09236-01	926487	12.75	02/15/02
37	Hodge	M-09262-01	926488	12.25	12/21/01
38	Philson	F-04966-01	926490	13.75	04/19/02
39	Monton	M-09241-01	926496	7.00	05/03/02
40	Puertos	F-04968-01	926498	7.00	01/03/03
41	Hill	M-11206-01	945246	3.50	02/08/02
42	Liverpool	M-11313-01	945351	7.75	08/23/02

	United States v.	Case #	Voucher #	Overlap (double billing)	Date Voucher Paid
43	Masters	F-06220-01	945378	11.75	06/06/03
44	Monarez	M-11264-01	945408	9.75	03/08/02
45	Davis	M-11304-01	945413	5.75	12/21/01
46	Best	F-05062/01	945454	0.50	05/03/02
47	Porter	F-06213-01	946016	9.25	10/24/02
48	Bell	F-06530-01	946028	10.50	04/19/02
49	White	M-11831-01	946071	8.00	09/20/02
50	Harrell	M-11932-01	946072	11.75	03/06/02
51	Johnson	F-06541-01	946100	7.50	12/14/01
52	Johnson	S-02861-01	946128	5.00	05/03/02
53	Bell	F-06536-01	946430	3.00	04/04/02
54	Mims	M-12076-01	946614	5.50	07/12/02
55	Johnson	M-12235-01	946824	7.25	05/10/02
56	Temple	M-12236-01	946825	7.25	04/26/02
57	Puertos	F-0698-001	947180	9.25	01/03/03
58	Porter	M-11061-01	948026	2.50	12/21/01
59	Bossie	M-12793-01	948113	2.50	08/15/03
60	Sillah	M-12818-01	948117	6.50	07/12/02
61	Keye	M-12320-01	948197	1.25	05/30/03
62	Fitzgerald	M-13090-01	948202	3.50	08/26/02
63	Wright	F-07525-01	948342	12.00	07/05/02
64	Williams	M-09357-01	949102	2.00	08/26/02
65	Thomas	M-14323-01	950259	2.50	06/07/02
66	McCallister	F-00649-02	952713	11.75	07/19/02
67	Bailey	SP-00522-02	955554	5.00	04/26/02
68	Richardson	F-01636-02	956257	8.50	03/07/03
69	Drumming	M-02774-02	956459	10.25	07/26/02
70	Smith	F-01741-02	956818	7.00	06/28/02
71	Jackson	M-06913-01	957036	3.00	04/10/02
72	Thomas	M-08791-01	957038	6.00	04/26/02
73	Richardson	F-01806-02	957075	2.00	10/31/02
74	Stoney	M-03026-02	957531	9.50	12/26/02
75	McCoy	F-01965-02	957608	12.50	10/17/02
76	Clark	M-03300-02	957650	10.75	07/19/02
77	Mayreant	M-03333-02	957669	16.00	07/26/02
78	Graham	F-01995-02	957701	5.50	11/28/03
79	Gilbert	F-02057-02	957761	15.00	02/21/03
80	Barnes	M-03400-02	957795	9.50	11/14/02
81	Holloway	M-03409-02	957797	11.50	12/06/02
82	Furbee	M-2071-02	957827	13.25	05/02/03
83	Coffield	M-00030-02	957849	4.25	07/12/02
84	Flythe	M-03016-02	957861	5.75	10/10/02

	United States v.	Case #	Voucher #	Overlap (double billing)	Date Voucher Paid
85	Franklin	M-03399-02	957870	10.75	08/09/02
86	Robinson	M-03418-02	957880	14.50	02/21/02
87	Hemingway	M-03429-02	957886	12.25	02/21/03
88	Lovelace	M-03448-02	957895	8.75	07/10/02
89	Johnson	F-06813-01	957956	4.00	05/10/02
90	Johnson	M-03468-02	957972	8.00	07/12/02
91	Carter	F-02592-02	958078	1.50	07/05/02
92	McCallister	M-12614-01	958147	3.75	07/19/02
93	Carrington	M-9233-01	958403	5.25	07/12/02
94	Seal	F-02250-02	958641	7.25	10/03/02
95	Hornes	F-02253-02	958642	11.75	11/08/02
96	Dupree	M-03759-02	958746	5.50	02/14/03
97	McCleod	M-03786-02	958762	12.25	08/16/02
98	Cooper	SP-00934-02	958867	5.00	07/12/02
99	Robinson	M-0416-02	959220	15.00	02/28/03
100	Ellis	F-02470-02	959272	8.75	11/07/02
101	Jordan	F-02480-02	959277	7.00	11/29/02
102	Johnson	M-04145-02	959302	15.25	09/27/02
103	Carter	SP-01045-02	959314	5.50	07/05/02
104	Ware	M-03428-02	959424	12.50	01/03/03
105	Seal	F-04971-01	961089	11.75	10/03/02
106	Hunter	F-03091-02	961407	6.50	05/23/03
107	Glasgow	F-03273-02	961974	9.50	07/12/02
108	Curry	M-05500-02	962028	13.50	08/02/02
109	Jones	M-05521-02	962035	10.00	09/27/02
110	Wilson	M-05536-02	962939	7.50	09/27/02
111	Rice	M-05546-02	962943	8.50	10/17/02
112	Larker	M-05559-02	962050	12.25	09/20/02
113	Commadore	M-03052-02	962247	0.75	07/12/02
114	Burton	F-03393-02	962354	12.50	12/17/02
115	Tyler	M-04354-02	962399	3.75	09/27/02
116	White	M-05680-02	962413	17.50	10/17/02
117	Burton	M-05706-02	952421	7.50	01/03/03
118	Walker	M-05739-02	962432	8.50	11/02/02
119	Jordan	SP-01422-02	962449	5.00	07/05/02
120	Williams	M-03353-02	962555	14.00	02/21/03
121	Roby	M-05738-02	962568	1.50	11/07/03
122	Williams	M-05742-02	962571	9.00	02/21/03
123	Coffield	F-04003-02	964268	7.25	05/23/03
124	Travis	M-13079-01	965646	14.25	09/27/02
125	Butler	M-04255-02	966120	2.50	03/21/03
126	Best	M-7138-02	966158	4.00	09/27/02

	United States v.	Case #	Voucher #	Overlap (double billing)	Date Voucher Paid
127	Butler	M-07213-02	966168	4.00	03/21/02
128	Grant	M-03343-02	966381	9.25	09/20/02
129	Kenny	F-04716-02	966775	4.50	09/27/02
130	Martin	F-04725-02	966882	4.50	09/05/03
131	Wise	F-04774-02	967050	2.25	01/09/04
132	Mickey	M-07919-02	967092	4.25	04/18/03
133	Stoutamire	M-07942-02	967107	9.00	09/27/02
134	Creek	F-04775-02	967141	4.25	09/19/03
135	Sherman	F-04779-02	967143	6.50	04/11/03
136	Collins	F-04878-02	967382	5.75	11/07/02
137	Bradley	M-08129-02	967447	8.25	12/06/02
138	Martin	M-08126-02	967524	3.50	06/06/03
139	Shuler	M-08336-02	967875	6.50	10/31/02
140	Robinson	M-08341-02	967877	11.00	08/29/03
141	Watkins	F-05039-02	967946	8.50	02/21/03
142	Littlejohn	M-08327-02	968127	11.00	01/17/03
143	Bowler	SP-62136-02	968255	5.00	09/27/02
144	Best	F-05304-02	968910	4.00	09/19/03
145	Robinson	F-05339-02	968925	6.00	02/14/03
146	Ware	M-09009-02	969017	12.00	12/27/02
147	Travis	F-00303-02	970461	6.75	10/17/02
148	Cameron	M-13077-01	970950	7.25	10/31/02
149	Garlington	F-06028-02	971241	7.50	06/06/03
150	Gethers	M-10207-02	971319	5.00	04/18/03
151	Odemns	F-05852-02	971439	7.00	06/13/03
152	Brown	F-060030-02	971561	7.00	08/29/03
153	Douglas	M-10462-02	971888	10.25	09/26/03
154	Lawson	M-10472-02	971895	4.50	01/03/03
155	Davis	M-10488-02	971903	2.75	01/03/03
156	Williams	M-10504-02	971912	9.00	01/24/03
157	Dupree	M-11220-02	973530	1.25	02/21/03
158	Dupree	M-11244-02	973536	1.00	02/14/03
159	Andrews	M-08524-02	973724	9.50	12/06/02
160	Jones	M-08526-02	973958	2.50	01/24/03
161	Key	M-11150-02	974581	1.00	02/21/03
162	Dupree	M-03767-02	978135	8.00	02/14/03
	TOTALS			**1,180.25**	

h. A Superior Court judge became concerned about the accuracy of Respondent's vouchers and notified the Chief Judge, who then referred the

matter to the United States Attorney's Office for the District of Columbia for investigation.

i. During the course of the United States Attorney's Office investigation, Respondent provided evidence that he had rendered legal services in CJA cases for which he had never submitted vouchers.

j. The United States Attorney's Office determined that it would not proceed with a criminal prosecution of Respondent. Nonetheless, Respondent and the United States Attorney's Office agreed that Respondent would remove himself from the Superior Court's list of attorneys who accept court-appointed cases.[9] Respondent also repaid to the Superior Court $16,034, representing the time for which Respondent had double billed, minus a reasonable estimate of the time that he could have billed for other court-appointed matters, but failed to do so.[10]

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[9] Respondent asserts that he withdrew his name from the CJA roster voluntarily, not as part of an agreement with the United States Attorney's Office. He explained that he wanted "to make [himself] clean from everybody, so [he] said [he was] going to withdraw [from] everything." Tr. at 96-97. This is not a significant deviation from the petition for negotiated discipline, because Respondent agrees that this action was ultimately made part of his agreement with the prosecutor.

[10] During the limited hearing and in Respondent's Supplemental Memorandum ("Resp. Supp. Mem."), counsel for Respondent argued that the payment of $16,034 was not an admission that he received monies to which he was not entitled. Rather, it is likely that the United States Attorney's Office

> believed that [Respondent] received no funds that he had not earned, but required him to demonstrate precisely the amounts he was entitled to in the unbilled cases. When, because of a conservation [sic] approach, the amounts fell short of the double-billing, they required [Respondent] to pay the difference. Ironically, [Respondent] could almost certainly have accounted for substantially more fees to which he was entitled but for which he did not bill. Since providing the government with information about cases in which [Respondent] was appointed but filed no vouchers, [he and his counsel] discovered 42 other unbilled cases. [By applying a conservative estimate to these cases], the total is about $37,000, well in excess of $16,034. In short, had this case been litigated, [Respondent] would have produced evidence that even if he had not made restitution of $16,034, he did not receive any CJA compensation that he would not have been entitled to had he billed all his cases.

Third Petition at 1-8 (¶¶ 1-7), 15.[11]

5. During the limited hearing, the parties stipulated to additional facts.

   a. Respondent's record-keeping was abysmal. Tr. at 158-59.

   b. When Respondent signed the vouchers, he knew that he had not checked to make sure that the details for the entries on the voucher "matched up," but he did not have the records to be able to do so. Tr. at 127-28.

   c. Respondent knew that when he signed the vouchers he was making misrepresentations, because he did not check the facts to make sure the entries were accurate when he filed the documents. Tr. at 128. However, Respondent did not have records accurate enough to check these vouchers. *Id*. at 126-129.

   d. Because Respondent did not verify that the vouchers were correct, that is a misrepresentation. Tr. at 128-29, 139.

   e. Respondent recklessly maintained inadequate time records and consciously disregarded the risk that he might be overcharging the CJA fund in a specific case.[12] Tr. at 139-40.

Resp. Supp. Mem. at 3-4. Bar Counsel does not refute this position. Bar Counsel's Supplemental Memorandum (Mar. 23, 2011) ("Bar Counsel does not object to or disagree with Respondent's Supplemental Memorandum."; Tr. at 194.

[11] During the March 10, 2011, limited hearing, the Hearing Committee's references to the page numbers of the petition are to those in the Second Petition, and not in the Third Petition, which was filed at the beginning of the limited hearing. This has resulted in some confusion about the pages cited during the hearing. For example, the parties and the Hearing Committee's discussion of a footnote on pages 13 and 14, is actually located on page 15 of the Third Petition. Tr. at 65.

[12] Bar Counsel made it clear at the limited hearing that it does not have any evidence to the contrary. Tr. at 120-21; 139; *see also* attached Confidential Appendix.

f. In the aggregate, Respondent did not accept any funds from the District of Columbia that he was not entitled to receive if he had correctly filled out the vouchers to reflect the work he had performed. Tr. at 126.

g. Respondent was entitled to the compensation he sought, but he failed to document accurately the services he had provided. Resp. Supp. Mem. at 5; Tr. at 194.

6. Respondent is agreeing to the disposition because he believes he cannot successfully defend against discipline based on the stipulated misconduct. Tr. at 80-81; Third Affidavit at ¶ 5. Respondent believes it is in his best interest to agree to the terms of the negotiated discipline. Tr. at 91.

7. Bar Counsel has not made any promises to Respondent other than what is contained in the Third Petition. Third Petition at 8; Third Affidavit at ¶ 7. Those promises and inducements are that Bar Counsel agrees not to pursue any additional charges arising out of the conduct in the matter described above and not to seek any sanction other than the one negotiated with Respondent.[13] Third Petition at 8. During the limited hearing, Respondent agreed that other than those set forth in the Petition, there have not been any other promises or inducements by anyone. Tr. at 88. Bar Counsel acknowledged that in the First Petition, Bar Counsel had promised to dismiss another matter as part of the negotiated discipline, but Bar Counsel subsequently recommended that the other matter should be dismissed outright. *Id*. at 88-89; *see also* attached Confidential Appendix. Respondent has confirmed that no other promises have been made to him. Tr. at 88-90.

[13] This negotiated discipline encompasses all of the charges contained in the pending Specification of Charges. The Hearing Committee understands that Bar Counsel's agreement not to pursue any additional charges arising out of the conduct in this matter includes the Specification of Charges, and that the matter will be dismissed if the negotiated discipline is approved.

8. Respondent has been informed that he has a right to counsel and has exercised that right by retaining Mr. Fox. Tr. at 72. Respondent has fully conferred with his counsel. *Id.*

9. Respondent's decision to enter into the negotiated discipline is freely and voluntarily made. Third Affidavit at ¶ 6; Tr. at 72, 90-91, 112.

10. Respondent is not being subjected to coercion or duress. Third Affidavit at ¶ 6; Tr. at 72, 90-91, 112.

11. Respondent is competent and not under the influence of any substance or medication. Tr. at 73.

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

(a) he has the right to assistance of counsel if he is unable to afford counsel;

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

(c) he will waive his right to have Bar Counsel prove each and every charge by clear and convincing evidence;

(d) Respondent will waive his right to file exceptions to reports and recommendations filed with the Board and with the Court;

(e) The negotiated disposition, if approved, may affect his present and future ability to practice law;

(f) The negotiated disposition, if approved, may affect his bar membership in other jurisdictions; and

(g) Any sworn statement by him in his affidavit may be used to impeach him if there is a subsequent hearing on the merits.

Third Affidavit at ¶¶ 9-12; Tr. at 100-04.

13. Respondent and Bar Counsel have agreed that the sanction in this matter should be an 18-month suspension, with six months of the suspension stayed, followed by a one-year period of probation, with a fitness requirement if probation is revoked. Third Petition at 8-10; Third Affidavit at ¶ 13; Tr. at 67-69, 81-82, 105-08.

14. 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. at 104-05.

15. Respondent further understands that there are conditions of this negotiated disposition. Specifically, these conditions require that:

(1) Respondent take five hours of pre-approved CLE related to accounting and record-keeping and that he must certify and provide documentation that he has met this requirement to the Office of Bar Counsel within six months of the Court's order approving this petition; and

(2) During the period of probation:

(a) Respondent will consult with Daniel Mills, the Manager of the PMAS before or within 30 days after probation begins;

(b) Respondent will execute a waiver allowing Mr. Mills, and/or a practice monitor appointed by Mr. Mills, to communicate direction with the Office of Bar Counsel regarding his compliance;

(g) Respondent will allow Mr. Mills or his designated practice monitor to conduct a full assessment of Respondent's business structure and his practice, including but not limited to reviewing financial records, invoices, client files, engagement letters, supervision and training of staff, and responsiveness to clients;

(h) Respondent will allow Mr. Mills and/or his designated practice monitor to ensure that Respondent maintains complete records relating to maintenance of client funds and that Respondent complies with all of Mr. Mills' recommendations;

(i) Respondent will be in full compliance with Mr. Mills' requirements during the period of probation, and Mr. Mills or the designated practice monitor will submit reports about Respondent's compliance every two months during the period of probation; and

(j) Respondent must sign an acknowledgement that he is in compliance with Mr. Mills' requirements and file the signed acknowledgement with the Office of Bar Counsel by the tenth month of his probation.

Third Petition at 9-10; Third Affidavit at ¶ 13**;** Tr. at 67-69, 81-83, 105-08.

16. If Respondent fails to comply with the terms of his probation, Bar Counsel may initiate probation revocation proceedings, in accord with the procedures in effect at that time. If Respondent is found to have violated any of the terms of his probation, the stay of the six-month suspension shall be lifted and a six-month period of suspension shall be imposed. Third Petition at 10; Third Affidavit at ¶ 13**;** Tr. at 69, 81-84. Respondent understands that by agreeing to this condition, he is agreeing that if a hearing committee finds that he has violated any term of his probation, the hearing committee will not have any discretion as to what sanction to impose. He is thus relinquishing a right that other respondents have if a hearing committee determines that the respondent has violated probation.[14] Tr. at 84-87.

17. Respondent also understands and agrees that, if probation is revoked, Respondent shall be required to make a showing of fitness to practice, as a condition to reinstatement, pursuant to D.C. Bar Rule XI, § 3(a)(2). Third Petition at 10; Third Affidavit at ¶ 13**;** Tr. at 69, 84, 108-111.

(a) Respondent also understands that the reinstatement process may delay his readmission to the Bar. Tr. at 110.

[14] D.C. Bar R. XI, § 3(a)(7), provides that "[v]iolation of any condition of probation shall make the attorney subject to revocation of probation and the imposition of any other disciplinary sanction listed in this subsection, but only to the extent stated in the order imposing probation."

(b) Respondent also understands that in the reinstatement proceeding, Bar Counsel may use evidence of other unadjudicated misconduct and may question him about any such matters. Tr. at 111.

18. The Third Petition includes one circumstance in aggravation, which the Hearing Committee has taken into consideration. Specifically, Bar Counsel notes that Respondent was issued an informal admonition on February 24, 2004, for failing to retain a copy of his client's file and records reflecting his handling of her settlement funds for the required five-year period, in violation of Rules 1.15(a) and 1.16(d). Third Petition at 16; Tr. at 97; *In re Tun*, Bar Docket No. 385-03 (Feb. 24, 2004).

19. Respondent and Bar Counsel have provided five circumstances in mitigation, which the Hearing Committee has taken into consideration:

(a) Respondent has taken full responsibility for his actions;

(b) Respondent has cooperated fully with Bar Counsel in its investigation of this matter;

(c) Respondent produced evidence to the United States Attorney's Office that he had not billed the District of Columbia for time that he spent representing the indigent criminal defendants in other court-appointed cases;

(d) Respondent has repaid $16,034 to the Superior Court reflecting the difference between the amount that he had double-billed and an estimated amount that he could have, but did not bill the Superior Court in other cases; and

(e) Pursuant to an agreement between Respondent and the United States Attorney's Office, Respondent has withdrawn his name from the list of attorneys who accept court-appointed cases for which they are entitled to be compensated under the CJA.

Third Petition at 16; Third Affidavit at ¶ 15; *see also* Tr. at 91-99.

20. Pursuant to Board Rule 17.4(a), further mitigation was presented during the limited hearing. Tr. at 92-95. Counsel for Respondent represented that he and Respondent had determined that there were approximately 20 more matters on which Respondent had worked but for which he had not submitted any vouchers than those which had been discussed with the United States Attorney. Respondent's counsel estimated that the amount that Respondent did not collect was, conservatively, an additional $29,000. *Id*.[15] Bar Counsel concurred with these representations.

21. Because this case was initiated by a referral from the Superior Court, there was no complainant who could have been notified. Tr. at 70.

22. The Third Petition included a statement of relevant precedent to support the parties' position that the agreed-upon sanction is justified. Third Petition at 10-16. First, the parties focus on Rule 8.4(c) as the lodestar violation. The parties assert that when a court-appointed attorney "deliberately and knowingly makes a false representation in [a] CJA voucher, [he] violates Rule 8.4(c)." *In re Cleaver-Bascombe*, 892 A.2d 396, 404 (D.C. 2006) ("*Cleaver-Bascombe I*") (citing *In re Schneider*, 553 A.2d 206, 209 (D.C. 1989)). Further, even absent a finding of willfulness or intent, an attorney who "recklessly maintains inadequate time records, and consciously disregards the risk that [he] may overcharge a client (or here, the CJA fund), also engages in dishonesty within the meaning of Rule 8.4(c)." *Id*. (citing *In re Romansky*, 825 A.2d 311, 317 (D.C. 2003)); *see* Third Petition at 10.

23. Next, the Third Petition includes cases that define the range of sanctions applicable to Respondent's case. The parties describe the range as follows. As a general matter, sanctions for dishonesty range from public censure, at the low end, to disbarment, on the high

[15] In Respondent's Supplemental Memorandum, Respondent estimated that there were "42 other unbilled cases," totaling about $37,000. Resp. Supp. Mem. at 3-4.

end, depending upon the egregiousness of the conduct at issue. *See, e.g.*, *In re Hadzi-Antich*, 497 A.2d 1062 (D.C. 1985) (public censure for submitting resume containing false information); *In re Hutchinson*, 534 A.2d. 919 (D.C. 1987) (en banc) (one-year suspension for making dishonest, self-exculpatory statement to federal agency investigating insider trading allegation); *In re Sandground*, 542 A.2d 1242 (D.C. 1988) (90-day suspension for assisting client in concealing information about client's funds in discovery responses in divorce proceeding); *In re Schneider*, 553 A.2d 206 (D.C. 1989) (30-day suspension for falsification of travel expenses by a law firm associate); *In re Waller*, 573 A.2d 780 (D.C. 1990) (60-day suspension for misrepresentation to a court to avoid disqualification for conflict of interest); *In re Greenspan*, 578 A.2d 1156 (D.C. 1990) (per curiam) (six-month suspension for making false statements to a bank on behalf of a client and lying under oath regarding the conduct and a fitness requirement also imposed due to "significant record of prior discipline"); *In re Goffe*, 641 A.2d 458 (D.C. 1994) (per curiam) (disbarment for egregious dishonesty, including making false representations, forging signatures on legal documents, falsely notarizing legal documents, and fabricating and creating evidence); *In re Kennedy*, 542 A.2d 1225 (D.C. 1998) (90-day suspension for lying about salary on an application for a bank loan). Where, as here, an attorney's dishonest conduct includes false statements to a court, serious suspensory sanctions are the norm. *See In re Rosen*, 481 A.2d 451 (D.C. 1984) (30-day suspension for making three separate misrepresentations to a court); *In re Reback*, 513 A.2d 226 (D.C. 1986) (en banc) (six-month suspension for neglecting divorce matter, then filing divorce complaint by forging client's signature and having it falsely notarized); *In re Corizzi*, 803 A.2d 438 (D.C. 2002) (disbarment for misconduct in three client matters, including advising two clients to lie during depositions and lying to court regarding representation of third client); *In re Kline*, 11 A.3d 261 (D.C. 2011) (three-year suspension

without a fitness requirement, for negligent misappropriation, criminal forgery, dishonesty, and intentionally prejudicing his client's case). *See* Third Petition at 10-11.

24. The remainder of the Statement of Relevant Precedent focuses on the parties' interpretation of *Cleaver-Bascombe I* and *Cleaver-Bascombe II* (collectively, "*Cleaver-Bascombe*"), a recent case that also addresses CJA voucher fraud. *See* Third Petition at 11-16. As the Statement of Relevant Precedent states, *Cleaver-Bascombe* involved the deliberate falsification of a CJA voucher to the Superior Court claiming payment for work the respondent knew she had never performed. In light of the fact that Cleaver-Bascombe's misconduct in submitting a false voucher was "exacerbated by [her] false testimony during the hearing," the Board recommended a two-year suspension with a fitness requirement. *Id*. at 7-8. The Court, however, rejected the Board's recommendation and disbarred Cleaver-Bascombe. *Cleaver-Bascombe II*, 986 A.2d 1191.

25. Both Bar Counsel and Respondent distinguish this case from *Cleaver-Bascombe* and agree that the sanction here should be substantially less severe. Thus, the Statement of Relevant Precedent includes a lengthy discussion of the similarities and differences between this matter and *Cleaver-Bascombe* and cites *In re Hutchinson*, 534 A.2d 919 (D.C. 1987) (en banc), and *In re Kline*, 11 A.3d 261 (D.C. 2011), in support of the stipulated sanction.

III. DISCUSSION

The Hearing Committee shall approve the petition for 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) 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 Has Agreed to the Sanction Reflected in the Third Petition

With regard to the first factor, the Hearing Committee finds that Respondent has knowingly and voluntarily acknowledged the facts and misconduct set forth in the Third Petition and has agreed to the sanction therein.

After being placed under oath, Respondent 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. at 60, 78-79, 90-91, 111-12. Respondent understands the implications and consequences of entering into this negotiated discipline and believes it is in his best interests to do so. Third Affidavit at ¶¶ 1-15; Tr. at 91. Respondent has acknowledged that any and all promises that have been made to him by Bar Counsel as part of this negotiated discipline are set forth in writing in the Petition and that no other promises or inducements have been made to him. Third Affidavit at ¶ 7; Tr. at 87-90.

The Hearing Committee has carefully reviewed the facts set forth in the Third Petition and established during the hearing, and has concluded that they support the admissions of misconduct and the agreed-upon sanction. Moreover, Respondent is agreeing to this negotiated discipline because he believes he could not successfully defend against the charges described in the Petition. Third Affidavit at ¶ 5; Tr. at 80-81.

B. The Facts Set Forth in the Third Petition Support Respondent's Admission of Misconduct and the Agreed-Upon Sanction

With regard to this second factor, the Third Petition states that Respondent's conduct violated the Rules of Professional Conduct, and Respondent has admitted the violations. Tr. at 78-80. In pertinent part, the stipulated facts show that as the result of sloppy record-keeping, Respondent knowingly filed CJA vouchers claiming payment for 1,180.25 hours of legal services that he did not perform or that he did not provide at the times he claimed, but he did not act with fraudulent intent. It is thus undisputed that:

1. Respondent violated Rules 1.5(a) and (f). The stipulated facts support Respondent's admission that he violated these provisions, in that they show Respondent charged a fee for work he did not perform, which is prohibited by law and *per se* unreasonable. Third Petition at ¶¶ 1-6; Tr. at 78-79.

2. Respondent violated Rule 3.3(a)(1). The stipulated facts, which are consistent with the objective evidence, support Respondent's admission that he violated this Rule, in that they establish that Respondent made false statements of material fact or law to a tribunal when he submitted CJA vouchers to the Superior Court showing that he had performed work in specific cases and at specific times that in fact he had not performed, and for which he was thus not entitled to receive compensation. Third Petition at ¶¶ 1-6; Tr. at 78-79.

3. Respondent violated Rule 8.4(c). The parties stipulated that Respondent engaged in reckless misrepresentation, but not in dishonesty, fraud, or deceit. Tr. at 79-81; 118. The parties further agreed that this misconduct was the result of Respondent's reckless time-keeping, which led to his submission of CJA vouchers containing descriptions of services he knew were inaccurate but which

he sincerely believed would compensate him for the fair value of time he actually worked on CJA cases, in the aggregate. Finally, the parties agreed that Respondent did not submit vouchers, or seek or receive compensation, in many CJA cases for which he was entitled to receive compensation. The stipulations establish that Respondent engaged in reckless misrepresentation within the meaning of Rule 8.4(c). Third Petition at ¶¶ 1-6; Tr. at 79-81, 118, 126-28; *see also In re Romansky*, 825 A.2d 311 (D.C. 2003).

4. Respondent violated Rule 8.4(d). To establish a violation of Rule 8.4(d), Bar Counsel must demonstrate that (i) Respondent's conduct was improper; (ii) that it bore directly on the judicial process with respect to an identifiable case or tribunal; and (iii) that it tainted the judicial process in more than a *de minimis* way. *In re Hopkins*, 677 A.2d 55, 60-61 (D.C. 1996). The CJA program is an integral part of the court's judicial system and therefore, the submission of recklessly false vouchers violates Rule 8.4(d). *See Cleaver-Bascombe I*, 892 A.2d at 404-05; Third Petition at ¶¶ 2-8; Tr. at 79-80.

C. The Sanction Is Justified

In deciding whether to recommend approval of the negotiated discipline, the third and most complicated factor the Hearing Committee must consider is whether the sanction agreed upon is justified. In making this determination, a hearing committee must take into account "the record as a whole, including the nature of the misconduct, any charges or investigations that Bar Counsel has agreed not to pursue, any circumstances in aggravation and mitigation, and relevant precedent." Board Rule 17.5(a)(iii). A hearing committee also has an independent obligation to review the record to assure that the sanction is not unduly lenient. *In re Johnson*, 984 A.2d 176,

181 (D.C. 2009). In *In re Beane*, Bar Docket No. 340-07, *et al*. (HC July 16, 2010), the hearing committee posed the following question to determine whether the sanction was "unduly lenient":

> Based on all the facts and circumstances in this record, does it appear likely that Respondent is getting a result substantially more "lenient" than he would expect if the negotiated discipline were disapproved and Bar Counsel proceeded to adjudicate the case?

The parties have stipulated to the precise sanction suggested in the 2009 Board Report: an 18-month suspension with six months stayed subject to probationary terms, with a fitness requirement if Respondent's probation is revoked. The Hearing Committee finds that the sanction is not unduly lenient and should be approved as justified, for the reasons set forth below.

1. The Board's Recommendation in *Tun I*

When the Court referred the parties' first attempt at negotiated discipline to the Board, the Board recommended that the negotiated disposition be rejected, because the then-proposed sanction (*i.e.*, a nine-month suspension, with 90 days of the suspension stayed, followed by probation for one year) did not "adequately reflect[] the number of violations nor the extended time period during which they took place." 2009 Board Report at 1. The Board instead proposed what it considered to be a "more appropriate sanction," and suggested that the parties could "revise and resubmit a revised petition for negotiated discipline . . . more in line with [that] suggested sanction." *Id*. at 1-2. On review, the Court rejected the petition for negotiated discipline "without prejudice to the parties continuing negotiations and, if agreed, resubmitting a revised petition for approval by the Hearing Committee." Order, *In re Tun*, No. 09-BG-804 (D.C. Jan. 21, 2010). In its order, the Court did not indicate any disfavor with the Board's suspension recommendation.

The parties have now stipulated to the exact sanction the Board proposed. The Hearing Committee recognizes that the Board's recommendation of an 18-month suspension (with six months stayed) in this matter relied on its recommendation for a two-year suspension with fitness in *Cleaver-Bascombe II*, which was then pending before the Court. The Court subsequently rejected that recommendation, instead imposing disbarment for the submission of a single false CJA voucher. Arguably this case is more serious since it involves the falsification of 162 vouchers.[16] But as the parties submit, there are material differences between this case and *Cleaver-Bascombe* that support the imposition of a lesser sanction. Based on our review of the stipulated facts, the applicable precedent, and the factors that distinguish this case from *Cleaver-Bascombe*, the Hearing Committee concludes that the sanction proposed by the parties and earlier recommended by the Board is justified.

2. Range Set by Relevant Precedent

In general, the Court has imposed significant periods of suspension to disbarment for false statements to a court.[17] *See In re Rosen*, 481 A.2d 451 (D.C. 1984) (30-day suspension for making three separate misrepresentations to a court); *In re Reback*, 513 A.2d 226 (D.C. 1986) (en banc) (six-month suspension for neglecting divorce matter, then filing divorce complaint by forging client's signature and having it falsely notarized); *In re Parshall*, 878 A.2d 1253 (D.C. 2005) (per curiam) (18-month suspension for submission of a false status report to a court and fabrication of documents to support it, but respondent expressed regret and cooperated with the

[16] Indeed, it was the number of vouchers and the period of time they encompassed that was the Board's primary basis for rejecting the 2009 negotiated discipline. 2009 Board Report at 1.

[17] The full range of sanctions for violations of Rule 8.4(c) is from a non-suspensory sanction to disbarment. For a more complete discussion of this range, *see* Third Petition, Statement of Relevant Precedent at 10-16. The Hearing Committee recognizes that Respondent's misconduct violated other Rules, including Rule 8.4(d) (serious interference with the administration of justice). Respondent's dishonesty, however, is the core misconduct in this case, and the parties thus focused their sanction analysis on the dishonesty charge. The Hearing Committee finds that the stipulated sanction appropriately encompasses all of the agreed-upon Rules violations.

Office of Bar Counsel); and *In re Corizzi*, 803 A.2d 438 (D.C. 2002) (disbarment for misconduct in three client matters, including advising two clients to lie during depositions and lying to court regarding representation of third client). *See* Third Petition at 10-11.

3. Applicability of *Cleaver-Bascombe*

Cleaver-Bascombe II is the only Court decision that has addressed the appropriate sanction for the filing of a false or inflated CJA voucher.[18] In that matter, the respondent submitted a "patently fraudulent" voucher under oath, and compounded the misconduct by the presentation of false testimony at the disciplinary hearing in support of the fraudulent voucher and by her continuous refusal to admit that the voucher was fraudulent. The Court wrote:

> The allegations in this case are extremely serious. The compensation of attorneys who represent criminal defendants in the District of Columbia courts pursuant to the Criminal Justice Act is based on the assumption that members of our Bar are honorable men and women who will accurately report the work that they have done, and who will not demean their noble calling and bring disgrace to themselves and to their profession by swearing that they performed work that they did not do. Attorneys who accept CJA appointments are therefore expected to be scrupulously honest and to exercise a high degree of care in completing their vouchers, which are paid out of taxpayer funds, and which are submitted to the court under penalty of perjury. Where an attorney has deliberately falsified a voucher and sought compensation for work that he or she has not performed, or for time that he or she has not devoted to the case, that attorney's fitness to practice is called into serious question. This is especially true if the attorney has

[18] *In re Howes*, Bar Docket No. 131-02, is presently pending before the Court. In *Howes*, the Board split on the proper sanction for misconduct involving the improper issuance of witness vouchers by an Assistant United States Attorney with two members recommending a one-year suspension, three members recommending a three-year suspension, and four members recommending disbarment. Although *Howes* bears some similarities to the present case, they are fundamentally very different. Both involved a large number of vouchers, and both Respondent and Mr. Howes signed the forms indicating that they were accurate. This case is distinguishable from *Howes*, however, because Mr. Howes intentionally executed at least some of the vouchers knowing they sought payment for individuals who were not entitled to the compensation, whereas Respondent believed he was entitled to the compensation but acted recklessly. In addition, Mr. Howes took steps to conceal his actions, by miscaptioning vouchers and denying their existence when questioned about them by defense counsel, whereas Respondent fully admitted his misconduct as soon as he was questioned about it. The Hearing Committee thus finds that *Howes* is sufficiently distinguishable from Respondent's submission of recklessly false vouchers that it should not guide the sanction analysis in this matter.

> compounded his or her initial fraud by testifying falsely during the resulting disciplinary proceedings.

Cleaver-Bascombe II, 986 A.2d at 1198-99 (citations to *Cleaver-Bascombe I* omitted).

The Court made clear that its decision in *Cleaver-Bascombe* was not intended to create "a new category of cases" that "warrant[s] presumptive disbarment." *Id.* at 1201 n.13. Instead, it emphasized that its finding was "fact-specific," and that its disbarment recommendation was based on the respondent's manifest lack of "moral fitness." The Court summarized how it viewed Cleaver-Bascombe:

> Cleaver-Bascombe submitted a "patently fraudulent" voucher while under oath. She then lied, also under oath, about submitting the voucher. She maintains now, as she has throughout the proceedings beginning with Judge Graae in the Superior Court, throughout the disciplinary proceeding in *Cleaver-Bascombe I* and here, in *Cleaver-Bascombe II* that her voucher is accurate and her testimony was truthful . . . . We conclude that this record demonstrates that Cleaver-Bascombe lacks the moral fitness to remain a member of the legal profession. We hold no more; no less.

Id. (internal citations omitted). In *Cleaver-Bascombe I*, the Court recognized that a distinction between "deliberate fabrication with intent to steal from the public fisc, and . . . shoddy bookkeeping with reckless disregard for the accuracy of the voucher . . . ." 892 A.2d at 415 n.13. The Court noted that the submission of false vouchers resulting from reckless time-keeping may support the imposition of a relatively short period of suspension, as opposed to disbarment. The Court wrote:

> If the gravamen of Respondent's violation is that she was recklessly sloppy in her timekeeping practices, and if there has been no proof of intent to defraud or of subsequent perjury, a recommendation that a relatively short suspension be imposed . . . may arguably be defensible . . . . If, however, this is a case of a deliberately falsified claim for compensation for work not performed, with intent to defraud the public fisc, then the violations are far more serious . . . .

Id. at 411-12.

The parties stipulated to precisely the sort of reckless violation that the Court recognized in *Cleaver-Bascombe* to be less culpable than the knowing submission of false vouchers, with the intent to defraud.[19] At the same time, this case involved the submission of 162 false vouchers, as compared to a single voucher. Respondent, however, did not act with fraudulent intent. Instead, his misconduct was the inevitable result of his "unacceptably poor record keeping" and his consequent inability to keep track of his time in a high volume CJA practice. Third Petition at 13. Respondent thus "submitted vouchers that roughly reflected the time he had spent on CJA cases in the aggregate, [but] the specific time charges on the vouchers . . .were frequently inaccurate." *Id*. Moreover, the recommendation in this case for an 18-month suspension, with six months stayed in favor of one-year of probation, is longer than the "relatively short period of suspension" contemplated by the Court in *Cleaver-Bascombe I*.

Another key difference that distinguishes this case from *Cleaver-Bascombe* is that Cleaver-Bascombe compounded her initial fraud by testifying falsely before the hearing committee in an attempted cover-up – conduct the Court described as "absolutely intolerable." *Cleaver-Bascombe II*, 986 A.2d at 1200 (quoting *Cleaver-Bascombe I*, 892 A.2d at 412). She also produced a "corroborating" witness, whose testimony suggested her subornation of perjury. *See Cleaver-Bascombe I*, 892 A.2d at 406; *Cleaver-Bascombe II*, 986 A.2d at 1195-97. As the Court noted in *Cleaver-Bascombe II*, the mitigating factors in that case – the absence of prior discipline and lack of harm to the client – were "massively outweighed by the aggravating factor

[19] In *In re Harris-Lindsey*, No. 09-BG-946 (D.C. May 19, 2011), the Hearing Committee did not accept the parties' stipulation to negligent misappropriation, where the objective evidence in the record raised "a serious question . . . whether respondent acted negligently, or instead recklessly . . . ." *Harris-Lindsey*, slip op. at 2. Because the question of intent was critical to deciding the appropriate sanction, the Court concluded that a hearing was necessary in order to present evidence in a contested proceeding. *Id.* The current matter is distinguishable from *Harris-Lindsey*, because the stipulation to recklessness is consistent with the objective evidence in the record and a a fact-finding hearing is not necessary to determine the question of intent.

– testifying falsely under oath in the disciplinary proceeding that the voucher was indeed accurate." *Id*. at 1200.

In contrast, Respondent's conduct was the opposite of that displayed by Cleaver-Bascombe. He has never denied his misconduct, much less lied about it or attempted to cover it up. Before the case ever came to Bar Counsel, Respondent had already fully cooperated with the United States Attorney's Office and had paid restitution of the damages then-calculated by the prosecutor.[20] Respondent continued this cooperation with Bar Counsel. He self-reported his conduct and has provided all information sought by Bar Counsel. Third Petition at 2, 16. Further, he has twice sought to enter into negotiated dispositions – both times fully admitting his conduct and his violations. By contrast, Cleaver-Bascombe denied her misconduct and testified falsely before the Hearing Committee.

In their Statement of Relevant Precedent, the parties cited *In re Hutchinson*, 534 A.2d 919 (D.C. 1987) (en banc), to underscore the value the Court places on a respondent's candor with Bar Counsel and the disciplinary system.[21] Hutchinson lied to a government agency, under oath, in order to shield himself from possible civil and criminal liability. *Id*. at 920-21.

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[20] After a full investigation of Respondent's actions, the U.S. Attorney's Office declined to prosecute him. As the Board noted, while not dispositive, "[this] decision provides some indication that it could not show the *mens rea* required for a fraud case." 2009 Board Report at 14.

[21] In the Third Petition, the parties included the following sentence in the middle of their discussion of *Hutchinson* and *Kline*: ". . . Hutchinson, Cleaver-Bascombe, and Respondent all lied under oath to an official governmental body for personal gain." Third Petition at 15 n.2. The Hearing Committee questioned the parties extensively about whether Respondent intended to stipulate that the false vouchers were knowingly submitted for personal gain. Tr. at 135-43. Both parties stated that they did not intend these words to be read as a statement of fact or as an assertion that Respondent deliberately made a statement he *knew* was false or that he intended to gain any funds to which he was not entitled in the aggregate. *Id*. Respondent conceded in his Supplemental Memorandum that the phrases were "short-hand term[s]" that were "not the most felicitous phrase[s]" and were not intended "to be an amendment of the stipulated facts." Resp. Supp. Mem. at 4-5.

Based on these discussions and representations, the Hearing Committee concludes that the inclusion of this sentence is a red herring and should not be read as inconsistent with the parties' statement of the stipulated facts of this case. It is an example of how important precision in word choice is in the parties' statements preceding and during a limited hearing.

Hutchinson recanted his lie to the federal agency shortly after he made it and before any criminal prosecution commenced. He was truthful and cooperated with Bar Counsel and the Board, raising only meritorious legal arguments in his defense. *Id*. at 924-25. He also sought psychological counseling in an effort to understand why he lied. The Court suspended Hutchinson for one year, without a fitness requirement, stating, "Hutchinson's moral fitness to continue to practice law does not greatly trouble us, for the record reveals not only that he is genuinely contrite but also that he has taken steps toward an understanding of the root causes of his behavior." *Id.* at 924. Like Hutchinson, Respondent has been completely cooperative with the United States Attorney's Office, and with Bar Counsel and the Board. Bar Counsel cannot identify a single incident in which Respondent has been dishonest during the investigation and prosecution of this matter. Obviously, the same cannot be said for Cleaver-Bascombe.

More recently, in *In re Kline,* 11 A.3d 261 (D.C. 2011), Bar Counsel sought disbarment of a respondent who admitted negligent misappropriation, serious dishonesty, criminal forgery, and intentional neglect. The Court expressly rejected this recommendation and instead ordered Kline suspended for three years, without a fitness requirement. The Court ordered the more lenient sanction, in part, because of Kline's genuine remorse and because he fully cooperated with Bar Counsel during the course of the disciplinary investigation. *Id*. at 267. Respondent's conduct is consistent with Kline's; Cleaver-Bascombe's is not.

In sum, in contrast to *Cleaver-Bascombe,* Respondent's conduct was reckless and did not involve an intent to defraud, he acknowledged the misconduct, has paid restitution, has demonstrated that he has not sought compensation for a large amount of work he performed on CJA cases, and has cooperated fully with Bar Counsel. The Hearing Committee thus finds that

the differences that distinguish *Cleaver-Bascombe* from the present case support the stipulated sanction as justified.

D. The Negotiated Sanction Satisfies the Goals Sought to be Achieved by Imposing a Sanction in a Disciplinary Case

The parties have stipulated to the discipline recommended in the 2009 Board Report. The Hearing Committee finds that the negotiated discipline is appropriate and justified, and it comports with the requirements of D.C. Bar R. XI, § 12.1.

The purpose of Bar discipline is the protection of the public and the deterrence of future unethical conduct by attorneys who practice in this jurisdiction. *See, e.g.*, *In re Ryan*, 670 A.2d 375, 380 (D.C. 1996); *In re Appler*, 669 A.2d 731, 738 (D.C. 1995). An 18-month suspension, with six months stayed subject to the terms of the agreed-upon probation is significant and satisfies these criteria. The imposition of a fitness requirement if Respondent fails to adhere to the terms of his probation further supports the imposition of the negotiated sanction. As the Board wrote:

> Since the terms of the probation are well designed to address the reckless habits that led to Respondent's problems here, any meaningful or repetitive failure to adhere to them would, in our view, raise questions as to Respondent's qualifications to practice law after the end of the suspension. Consequently, we believe that a fitness requirement should be imposed as a condition of reinstatement if Respondent fails to comply with the terms of the probation. *See In re Bingham*, 881 A.2d 619, 624 (D.C. 2005) (per curiam).

2009 Board Report at 14-15.

The Hearing Committee agrees with the Board. In fact, the probation revocation conditions agreed to by Respondent arguably go beyond those proposed by the Board. If Respondent fails to abide by any condition of probation, Bar Counsel may seek to revoke his probation. Under current procedures in such instances, generally a hearing committee finding a

violation of probation would have discretion to recommend imposition of the suspended sanction – or something less. Respondent has given up that right here. He has agreed that if a hearing committee finds that he has violated a condition of probation – no matter how small and no matter the reason – the hearing committee *must* recommend imposition of the suspended term of six months suspension, with a fitness requirement. Third Petition at 10; Third Affidavit at ¶ 13**;** Tr. at 69, 81-87.

The parties have been attempting to resolve this case for more than two years. They have negotiated in good faith and in their second petition for negotiated discipline, have stipulated to a sanction endorsed by the Board. The negotiated discipline is also one the Hearing Committee has concluded – after a careful examination of the record and following two limited hearings – is justified. The negotiated discipline in this case would accomplish one of the purposes of negotiated discipline, which is to provide an expeditious resolution of matters for which no useful purpose can be served by conducting a full hearing. As the Board noted in 2009, it did not believe "based on the record developed in this case, that requiring a full evidentiary hearing is likely to produce any significant new evidence that would alter our recommendation." 2009 Board Report at 15. The Hearing Committee agrees. "[T]he better course is for the parties to be given the opportunity to resolve this matter without the burdens and time associated with a full evidentiary hearing." *Id.*

IV. CONCLUSION AND RECOMMENDATION

It is the conclusion of the Hearing Committee that the discipline negotiated in this matter is justified. The Hearing Committee thus recommends that the Court accept the petition for negotiated discipline and impose on Respondent an 18-month suspension, with six months of the suspension stayed, followed by a one-year period of probation, with conditions agreed to by Bar

Counsel and Respondent, and with a requirement that any revocation of probation would require the imposition of the six-month suspension, with a requirement that Respondent prove his fitness to practice law before reinstatement.

For the reasons stated above, it is the recommendation of this Hearing Committee that the negotiated discipline be approved.

HEARING COMMITTEE NUMBER SIX

___/MLS_____
Mary Lou Soller
Chair

___/SLM_____
Silvia Martinez
Public Member

___/JS/_____
Joan Strand
Attorney Member

Dated: June 24, 2011