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

In the Matter of: JOHN L. MACHADO, Respondent. A Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 449961)	Board Docket No. 15-BD-080 Bar Docket No. 2014-D253

REPORT AND RECOMMENDATION OF THE AD HOC HEARING COMMITTEE

Respondent John L. Machado is charged with violating District of Columbia Rules of Professional Conduct 1.1(a), 1.1(b), 1.3(a), 1.3(b)(1), 1.3(c), 3.4(c), and 8.4(d) in connection with his failure to file an appellate brief despite numerous orders to do so. Disciplinary Counsel[1] contends that Mr. Machado committed all of the charged violations and, as a sanction for his misconduct, should receive a ninety-day suspension with a fitness requirement stayed in favor of two years of supervised probation with conditions. Mr. Machado stipulated to all alleged rule violations and agrees with Disciplinary Counsel's proposed sanction recommendation, except for the fitness requirement.

[1] The Specification of Charges was filed by the Office of Bar Counsel. The Court changed the title of "Bar Counsel" to "Disciplinary Counsel," effective December 19, 2015. The Committee uses the current title herein.

As set forth below, the Ad Hoc Hearing Committee finds clear and convincing evidence that Mr. Machado violated Rules 1.1(a), 1.1(b), 1.3(a), 1.3(b)(1), 1.3(c), 3.4(c), and 8.4(d), and it recommends that he receive a sanction of a ninety-day suspension that is stayed in favor of two years of supervised probation with conditions.

PROCEDURAL HISTORY

On August 17, 2015, Disciplinary Counsel served Mr. Machado with a Specification of Charges that was subsequently amended on October 20, 2015. The Amended Specification alleged that Mr. Machado violated the following rules:

- Rules 1.1(a) and (b), by failing to competently represent his client and failing to serve a client with skill and care commensurate with that generally afforded to clients by other lawyers in similar matters;
- Rules 1.3(a), (b)(1), and (c), by failing to diligently and zealously represent his client, intentionally failing to seek the lawful objectives of his client, and failing to act with reasonable promptness;
- Rule 3.4(c), by knowingly disobeying the rules of a tribunal; and
- Rule 8.4(d), by engaging in conduct that seriously interfered with the administration of justice.

(Amended Specification of Charges, ¶ 8.)

Mr. Machado answered on August 21, 2015.[2] The parties filed stipulations on November 20, 2015, and a hearing was held on December 7, 2015, before an Ad Hoc Hearing Committee ("Committee") comprised of Joshua David Rogaczewski,

[2] The Amended Specification added language to define the Rule 1.1(b) violation, and Mr. Machado relied on his original Answer.

Esquire (Chair), David Bernstein (Public Member),[3] and Heidi Murdy-Michael, Esquire (Attorney Member).[4] Disciplinary Counsel was represented at the hearing by Deputy Disciplinary Counsel Elizabeth Herman, Esquire, and Mr. Machado was represented at the hearing by Abraham Blitzer, Esquire.

Prior to the hearing, Disciplinary Counsel submitted Bar Counsel Exhibits A through D and 1 through 4. All of Disciplinary Counsel's exhibits were received into evidence without objection. (Tr.[5] 10, 127.) Disciplinary Counsel called no witnesses. Also prior to the hearing, Mr. Machado submitted Respondent's Exhibit 1, which was received into evidence without objection. (Tr. 54.) Mr. Machado testified on his own behalf in mitigation of sanction and called as witnesses Daniel Mills, William Kovatch, Susan Wisserman, Brigid Benitez, and Betty Ballester.

Disciplinary Counsel submitted its Proposed Findings of Fact, Conclusions of Law, and Recommendation as to Sanction on January 15, 2016, and Mr. Machado filed his Proposed Findings of Fact, Conclusions of Law, and Recommendation as to Sanction on March 23, 2016.

[3] On May 10, 2016, Mr. Bernstein was appointed to the Board on Professional Responsibility, but neither party filed an objection to Mr. Bernstein continuing to preside in this matter. (*See* June 9, 2016 Order at 1.)

[4] The parties corrected their stipulations following the hearing, on December 22, 2015.

[5] "Tr." refers to the transcript of the hearing on December 7, 2015.

I. FINDINGS OF FACT

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

1. Mr. Machado was admitted to the Bar of the District of Columbia Court of Appeals on March 8, 1996 and assigned Bar number 449961. (B.C. Ex. A; Corr. Stip. ¶ 1.)

A. The Misconduct

2. On April 18, 2013, Mr. Machado filed a notice of appeal of a criminal conviction on behalf of his client, Victor Chavez-Diaz. On May 22, 2013, the District of Columbia Court of Appeals appointed Mr. Machado to the appellate case *nunc pro tunc* as of April 19, 2013, and ordered Mr. Machado to file a statement regarding the transcript within thirty days. (B.C. Ex. 3A; B.C. Ex. 3C; Corr. Stip. ¶ 2.)

3. Mr. Machado received the Court's order, but he did not respond to it. (Corr. Stip. ¶ 3.)

4. On July 5, 2013, the Court ordered Mr. Machado again to file a statement regarding the transcript and directed that he do so within fifteen days, and file a motion for leave to file out of time. (B.C. Ex. 3D; Corr. Stip. ¶ 4.)

5. Mr. Machado received this order shortly after July 5, 2013, but he failed to file the statement within fifteen days of the Court order and did not seek an extension of time to do so. (B.C. Ex. 3A; Corr. Stip. ¶ 5.)

6. On September 5, 2013, Mr. Machado filed the statement regarding the transcript. (B.C. Ex. 3G; Corr. Stip. ¶ 6.)

7. In the meantime, on July 29, 2013, Mr. Machado moved to extend the time to file his client's brief and appendix until August 9, 2013. (B.C. Ex. 3E; Corr. Stip. ¶ 7.) Mr. Machado noted in his motion that his father had passed away in July and that he "had to take over two weeks off out of the jurisdiction." (B.C. Ex. 3E.) Mr. Machado did not file the brief on or before August 9, 2013. (B.C. Ex. 3A; Corr. Stip. ¶ 7.)

8. On August 20, 2013, the Court denied Mr. Machado's motion as moot and ordered him to file a brief and the limited appendix within forty days. Mr. Machado received this order shortly after August 20, 2013, but he did not respond to it. (B.C. Ex. 3A; B.C. Ex. 3F; Corr. Stip. ¶ 8.)

9. On December 6, 2013, the Court ordered Mr. Machado again to file a brief, this time within twenty days and file a motion for leave to file out of time. Mr. Machado received this order shortly after December 6, 2013. (B.C. Ex. 3A; B.C. Ex. 3H; Corr. Stip. ¶ 9.)

10. On December 23, 2013, Mr. Machado moved to extend the time to file the brief and appendix. On January 22, 2014, the Court granted the motion and ordered that the brief be filed within twenty days. Mr. Machado received this order shortly after January 22, 2014. (B.C. Ex. 3A; B.C. Ex. 3J; Corr. Stip. ¶ 10.)

11. Mr. Machado filed by the due date neither a brief nor a motion seeking additional time to do so. (B.C. Ex. 3A; Corr. Stip. ¶ 11.)

12. On March 14, May 6, and June 27, 2014, the Court ordered Mr. Machado to file the brief and a motion to file it out of time. Mr. Machado received all of these orders within a short time after they were issued but did not respond to any of them. (B.C. Ex. 3A; B.C. Ex. 3K; B.C. Ex. 3L; B.C. Ex. 3M; Corr. Stip. ¶ 12.)

13. The Court sent all of its orders in Mr. Chavez-Diaz's case to Mr. Machado at his correct office address. (Corr. Stip. ¶ 13.)

14. Mr. Machado received and reviewed all of the Court's orders in Mr. Chavez-Diaz's case soon after they were issued. Mr. Machado was aware that he had not, and was not, responding to the Court's orders. He took no action to ensure that the deadlines would not pass without a response. (Corr. Stip. ¶ 14.)

15. For months at a time, Mr. Machado did no work on his client's appellate brief and made no calendar entries to ensure he would meet the court-imposed deadlines. (Tr. 146–48, 152, 154, 156 (Machado).)

16. On August 15, 2014, the Court vacated Mr. Machado's appointment, removed him from the list of attorneys eligible for court appointments, referred the matter to Disciplinary Counsel, and appointed another attorney to represent Mr. Chavez-Diaz. The Court ordered Mr. Machado to transmit all documents pertaining to the appeal to successor counsel. Mr. Machado complied with this order. (B.C. Ex. 1; Corr. Stip. ¶ 15.)

17. In accordance with the Court's August 15, 2014 order, successor counsel filed Mr. Chavez-Diaz's brief within ninety days. (B.C. Ex. 1; Tr. 41–42, 47 (Kovatch).)

B. Evidence in Mitigation and Aggravation

18. In 2001, Mr. Machado received an informal admonition for similar misconduct that occurred between 1999 and 2001. (B.C. Ex. 4.) The misconduct involved Mr. Machado's neglect of a criminal appeal, failure to respond to multiple court orders, failure to communicate with his client, and failure to promptly turn over to successor counsel the file in the matter. Mr. Machado also failed to respond in a timely manner to Disciplinary Counsel's inquiry into these matters. Mr. Machado's misconduct violated Rules 1.1(a), 1.1(b), 1.3(a), 1.16(d), 1.3(b)(1), 1.3(c) 1.4(a), 1.4(b), and 8.4(d). (B.C. Ex. 4.)

19. Mr. Machado presented testimony from Susan Wisserman (his minister), Betty Ballester (president of the Superior Court Trial Lawyers Association ("SCTLA")), William Kovatch (successor attorney to Mr. Chavez-Diaz), Brigid Benitez (former president of the D.C. Bar and the Hispanic Bar Association ("HBA")), and Daniel Mills (director of the Practice Management Services of the D.C. Bar). Mr. Machado also testified on his own behalf and offered into evidence a letter from Meg Cusack (senior counselor with the Lawyer Assistance Program of the D.C. Bar). (Resp't's Ex. 1.)

20. Ms. Wisserman testified to Mr. Machado's contributions to and participation in the Grace Presbyterian Church, where Ms. Wisserman was the associate pastor. (Tr. 48–50.) She also testified that Mr. Machado appears to have a support network—including her—in the church's community. (Tr. 52–53.)

21. Ms. Ballester testified that for the past twenty years she has known Mr. Machado to be an active volunteer for the SCTLA. (Tr. 12–18.) Mr. Machado tracked attorney compliance with continuing-legal-education (or "CLE") requirements, and in that capacity, he attended many CLE sessions but also taught six or seven over the years. (Tr. 15–16.) She also testified that Mr. Machado played an integral role in setting up the "Spanish panel" to improve access to the Court and the quality of representation for Spanish-speaking defendants. (Tr. 16–17.)

22. Ms. Benitez testified that Mr. Machado volunteered for the HBA and that they had worked together on several HBA committees. (Tr. 29–31.) She testified, based on her position as past president of the D.C. Bar, that she was familiar with the D.C. legal community; knew Mr. Machado to be a "very solid," "well-regarded" attorney with a "very good reputation"; and frequently referred potential clients to him. (Tr. 32–33.)

23. Mr. Kovatch testified that he was shocked to learn of Mr. Machado's failures in this case, but that Mr. Machado promptly turned over all documents and made himself fully available to assist with preparing Mr. Chavez-Diaz's brief. (Tr. 38–40.) Mr. Kovatch testified that Mr. Machado answered all of his questions and was invaluable in formulating the argument for the brief. (Tr. 38–40.)

24. Mr. Mills testified that, since these charges arose, Mr. Machado had made significant progress toward resolving his problems with organization by implementing a case management system called CLEO. (Tr. 56–60.) Mr. Mills was impressed at the extent to which Mr. Machado embraced the new system and transformed his method of tracking important case information. (Tr. 60.)

25. Mr. Machado testified that the misconduct occurred during a particularly difficult time in his life that produced increased stress caused by insomnia, the death of his father, and a busy solo criminal-law practice. (Tr. 105–15.) Mr. Machado also testified that he suffered from attention deficit hyperactivity disorder, (or "ADHD"), which caused him to lack organizational skills. (Tr. 111.) Mr. Machado testified that he changed his medications and was in a better situation mentally and emotionally. (Tr. 110–12, 120, 122–26.)

26. Mr. Machado testified that he was representing a criminal client in the U.S. District Court for the Eastern District of Virginia in a fifteen-defendant "RICO" case under Racketeer Influenced and Corrupt Organizations Act that proved extremely time consuming and intensely time-pressured. Mr. Machado testified that his client made threats against him that caused Mr. Machado to fear for his personal safety and that of his family. (Tr. 101–05.)

27. The Committee finds that each of these witnesses testified credibly as to the matters within their personal knowledge.

II. CONCLUSIONS OF LAW

The record supports the parties' stipulations that Mr. Machado violated each of the Rules charged by Disciplinary Counsel, as explained below.

A. Mr. Machado Violated Rule 1.1(a) and (b) by Failing To Provide Competent Representation and Failing To Serve a Client with Skill and Care.

Rule 1.1(a) requires a lawyer to "provide competent representation to a client." The Court has determined that competent representation requires the "legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." *See In re Drew*, 693 A.2d 1127, 1130, 1132 (D.C. 1997) (per curiam) (appended Board report) (lawyer who has requisite skill and knowledge, but who does not apply it for particular client, violates obligations under Rule 1.1(a)). Rule 1.1(b) mandates that "[a] lawyer shall serve a client with skill and care commensurate with that generally afforded to clients by other lawyers in similar matters." The comments to Rule 1.1 states that competent representation includes "adequate preparation and continuing attention to the needs of the representation to assure that there is no neglect of such needs." D.C. R. Prof'l Conduct 1.1, cmt. 5.

In *In re Evans*, the Court explained—endorsing an appended report from the Board—that:

> To prove a violation [of Rule 1.1(a)], [Disciplinary] Counsel must not only show that the attorney failed to apply his or her skill and knowledge, but that this failure constituted a serious deficiency in the representation . . . . The determination of what constitutes a "serious

> deficiency" is fact specific. It has generally been found in cases where the attorney makes an error that prejudices or could have prejudiced a client and the error was caused by a lack of competence . . . . Mere careless errors do not rise to the level of incompetence.

902 A.2d 56, 69–70 (D.C. 2006) (per curiam) (appended Board report). Although the Board referred to Rule 1.1(a) only, the "serious deficiency" requirement applies equally to Rule 1.1(b). *See In re Yelverton*, 105 A.3d 413, 421–22 (D.C. 2014). To prove a "serious deficiency," Disciplinary Counsel must prove that the conduct "prejudices or could have prejudiced the client." *Id.* at 422.

A hearing committee may find a violation of the standard of care without expert testimony when, as here, an attorney's "conduct is so obviously lacking that expert testimony showing what other lawyers generally would do is unnecessary." *In re Nwadike*, Bar Docket No. 371-00, at 28 (BPR July 30, 2004), *recommendation approved*, 905 A.2d 221 (D.C. 2006) (the failure to file a D.C. Superior Court Rule of Civil Procedure 26(b)(4) expert-witness statement by the deadline for the report or the close of discovery failed to fulfill the attorney's court-ordered discovery obligations regarding an essential expert opinion, and the failure to obtain an opinion at all left the attorney unaware of whether proof existed to sustain the client's claim); *In re Schlemmer*, Bar Docket Nos. 444-99 & 66-00, at 13 (BPR Dec. 27, 2002) (noting, in a case where the attorney failed to file an immigration appeal after the client paid the initial fee for the appeal, that Disciplinary Counsel need not "necessarily produce evidence of practices of other attorneys in order to establish a Rule 1.1(b)

violation"), *recommendation approved in relevant part*, 840 A.2d 657, 664 (D.C. 2004) (remanding to the Board for further consideration of sanction).

The competency, skill, and care of an attorney under Rule 1.1(a) and (b) must be evaluated in terms of the representation required and provided in the particular matter at issue:

> Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation and continuing attention to the needs of the representation to assure that there is no neglect of such needs. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.

D.C. R. Prof'l Conduct 1.1, cmt. [5].

Disciplinary Counsel contends that Mr. Machado's conduct was "obviously lacking" and showed a lack of skill and care because he failed to communicate with the Court after December 2013, despite remaining counsel of record until August 2014, and failed to file the brief or request an extension. Mr. Machado fundamentally agrees, stipulating to violating Rule 1.1(a) and (b) and admitting the rule violations in his post-hearing brief. (*See* Corr. Stip. ¶ 16; Resp't's Br. 6.). Respondent's failure to file the brief, or at least request an extension, was certainly a serious deficiency in the representation that could have prejudiced the client.

Accordingly, the Committee finds that Mr. Machado has violated Rule 1.1(a) and (b).

B. Mr. Machado Violated Rule 1.3(a), (b)(1), and (c) by Failing To Represent a Client Zealously and Diligently Within the Bounds of the Law, Intentionally Failing To Seek the Lawful Objectives of a Client, and Failing To Act With Reasonable Promptness.

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

The Court has found neglect in violation of Rule 1.3(a) where an attorney persistently and repeatedly failed to fulfill duties owed to the client over a period of time. *See In re Chapman*, Bar Docket No. 055-02, at 19-20 (BPR July 30, 2007) (respondent violated Rule 1.3(a) when he did not perform any work on the client's case during the eight-month term of the representation, failed to conduct any discov-

ery, and did not respond to discovery requests from the opposing party), *recommendation adopted in relevant part*, 962 A.2d 922, 923–24 (D.C. 2009) (per curiam); *In re Ukwu*, 926 A.2d 1106, 1135 (D.C. 2007) (appended Board report) (respondent violated Rule 1.3(a) when he repeatedly failed to inform his clients about the status of their cases, prepare his clients for hearings and interviews with immigration officials, or prepare himself for court appearances); *Wright*, 702 A.2d at 1255 (appended Board report) (respondent violated Rule 1.3(a) by failing to respond to discovery requests, a motion to compel, and a show-cause order and failed to respond to the client's numerous requests for information).

Rule 1.3(b)(1) provides that a lawyer shall not intentionally "[f]ail to seek the lawful objectives of a client through reasonably available means permitted by law and the disciplinary rules." A violation of Rule 1.3(b) requires proof of intentional neglect, which is established when the evidence shows that the respondent was (1) "demonstrably aware of [the] neglect," or (2) the "neglect was so pervasive that [the respondent] must have been aware of it." *Reback I*, 487 A.2d at 240; *see Ukwu*, 926 A.2d at 1116. The knowing abandonment of a client constitutes intentional neglect. *See Lewis*, 689 A.2d at 564 (appended Board report).

The Court has explained that ordinary neglect of a client matter "can 'ripen into . . . intentional' neglect in violation of Rule 1.3(b) 'when the lawyer is aware of his neglect' but nonetheless continues to neglect the client's matter." *In re Vohra*, 68 A.3d 766, 781 (D.C. 2013) (appended Board report) (quoting *In re Mance*, 869 A.2d 339, 341 n.2 (D.C. 2005) (per curiam)).

Rule 1.3(c) provides that an attorney "shall act with reasonable promptness in representing a client." "Perhaps no professional shortcoming is more widely resented by clients than procrastination" and, "in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed." D.C. R. Prof'l Conduct 1.3, cmt. [8]. The Court has held that failure to take action for a significant time to further a client's cause, whether or not prejudice to the client results, violates Rule 1.3(c). *In re Speights*, 173 A.3d 96, 101 (D.C. 2017) (per curiam); *In re Dietz*, 633 A.2d 850 (D.C. 1993) (per curiam). Comment [8] to Rule 1.3 provides that "[e]ven when the client's interests are not affected in substance . . . unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness," making such delay a "serious violation."

Disciplinary Counsel contends that Mr. Machado failed to act with skill, care, or reasonable promptness when he failed to communicate with the Court after December 2013, despite remaining counsel of record until August 2014, and failed to file the brief or request an extension. Disciplinary Counsel further contends that Mr. Machado's conduct was intentional because he was aware that he was not responding to the Court's orders to file the brief, yet he continued to ignore his obligations until the Court removed him. Mr. Machado stipulated to violating Rule 1.3 and admits the rule violations in his post-hearing brief. (*See* Corr. Stip. ¶ 16; Resp't's Br. 6.) The record supports Disciplinary Counsel's argument, and Respondent's stipulation and admission.

Accordingly, the Committee finds that Mr. Machado violated Rule 1.3(a), (b)(1), and (c).

C. Mr. Machado Violated Rule 3.4(c) by Knowingly Disobeying an Obligation Under the Rules of a Tribunal.

Rule 3.4(c) provides that a lawyer shall not "[k]nowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists." The "knowledge" element requires proof of "actual knowledge of the fact in question," which "may be inferred from circumstances." D.C. R. Prof'l Conduct 1.0(f).

Disciplinary Counsel contends that Mr. Machado violated Rule 3.4(c) because he knowingly failed to comply with his obligation under the Court's repeated orders to file an appellate brief on behalf of Mr. Chavez-Diaz. Mr. Machado stipulated to violating this rule, and admits the rule violation in his post-hearing brief. (*See* Corr. Stip. ¶ 16; Resp't's Br. 6.) The record supports Disciplinary Counsel's argument, and Respondent's stipulation and admission.

Accordingly, the Committee finds that Mr. Machado violated Rule 3.4(c).

D. Mr. Machado Violated Rule 8.4(d) by Seriously Interfering with the Administration of Justice.

Rule 8.4(d) provides that it is professional misconduct for a lawyer to "[e]ngage in conduct that seriously interferes with the administration of justice." To establish a violation of Rule 8.4(d), Disciplinary Counsel must demonstrate by clear and convincing evidence that: (1) Mr. Machado's conduct was improper, i.e., that he

either acted improperly or failed to act when he should have; (2) Mr. Machado's conduct bore directly upon the judicial process with respect to an identifiable case or tribunal; and (3) Mr. Machado's conduct tainted the judicial process in more than a *de minimis* way, i.e., it must have potentially had an impact upon the process to a serious and adverse degree. *In re Hopkins*, 677 A.2d 55, 60-61 (D.C. 1996). Rule 8.4(d) is violated if the attorney's conduct causes the unnecessary expenditure of time and resources in a judicial proceeding. *See Vohra*, 68 A.3d at 783 (appended Board report); *In re Cole*, 967 A.2d 1264, 1266 (D.C. 2009).

Disciplinary Counsel contends that Mr. Machado seriously interfered with the administration of justice because his neglect caused the Court to issue numerous orders to him, vacate his appointment as counsel, and delay its decision on the appeal. Mr. Machado stipulated to violating this rule, and admits the rule violation in his post-hearing brief. (*See* Corr. Stip. ¶ 16; Resp't's Br. 6.) The record supports Disciplinary Counsel's argument, and Respondent's stipulation and admission.

Accordingly, the Committee finds that Mr. Machado violated Rule 8.4(d).

IV. RECOMMENDED SANCTION

In this case, Disciplinary Counsel has asked the Committee to recommend the sanction of a ninety-day suspension with a fitness requirement, stayed, and two years of supervised probation, with the conditions that (1) Mr. Machado must commit no further disciplinary rule violations; (2) Mr. Machado must meet with a practice monitor at least quarterly and follow the monitor's recommendations; and (3) Mr. Machado must sign a waiver to permit the monitor to file quarterly reports with the

Office of Disciplinary Counsel and the Board on Professional Responsibility. Mr. Machado agrees with the proposed stayed sanction, but does not address the fitness recommendation. For the reasons described below, the Committee recommends the proposed sanction except for the fitness requirement.

A. Standard of Review

The sanction imposed in an attorney-disciplinary matter is one that is necessary to protect the public and the courts, maintain the integrity of the legal profession, and deter the respondent and other attorneys from engaging in similar misconduct. *See, e.g.*, *In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (en banc); *In re Martin*, 67 A.3d 1032, 1053 (D.C. 2013); *In re Cater*, 887 A.2d 1, 17 (D.C. 2005). "In all cases, [the] purpose in imposing discipline is to serve the public and professional interests . . . rather than to visit punishment upon an attorney." *Reback II*, 513 A.2d at 231; *see also In re Goffe*, 641 A.2d 458, 464 (D.C. 1994) (per curiam).

The sanction also must not "foster a tendency toward inconsistent dispositions for comparable conduct or . . . otherwise be unwarranted." D.C. Bar R. XI, § 9(h)(1); *see, e.g.*, *Hutchinson*, 534 A.2d at 923–24; *Martin*, 67 A.3d at 1053 (citing *In re Elgin*, 918 A.2d 362, 376 (D.C. 2007)); *In re Berryman*, 764 A.2d 760, 766 (D.C. 2000). In determining the appropriate sanction, the Court considers a number of factors, including: (1) the seriousness of the conduct at issue; (2) the prejudice, if any, to the client which resulted from the conduct; (3) whether the conduct involved dishonesty; (4) the presence or absence of violations of other provisions of the disciplinary rules; (5) whether the attorney has a previous disciplinary history; (6) whether

the attorney has acknowledged his wrongful conduct; and (7) circumstances in mitigation or aggravation. *See, e.g.*, *Martin*, 67 A.3d at 1053 (citing *Elgin*, 918 A.2d at 376). The Court also considers "the moral fitness of the attorney" and the "need to protect the public, the courts, and the legal profession." *In re Rodriguez-Quesada*, 122 A.3d 913, 921 (D.C. 2015) (per curiam) (internal quotation marks omitted).

B. Application of the Sanction Factors

1. The Seriousness of the Misconduct

Mr. Machado's misconduct was serious in at least two respects. *First*, Mr. Machado's failure to discharge his duties to his client in a criminal appeal, to which the Court appointed him, placed his client in legal peril and placed at risk his client's right to competent counsel. *Second*, Mr. Machado's repeated failure to follow the orders of the Court in the criminal appeal showed significant disrespect for the Court. Indeed, Mr. Machado's misconduct forced the Court to replace him as counsel in the appeal. The potential harm to his client and the inconvenience visited on the Court cannot be overlooked.

2. Prejudice to the Client

In the end, however, Mr. Machado's misconduct did not prejudice his client's legal position. To be sure, replacing Mr. Machado delayed resolution of the criminal appeal, but the Court appropriately did not punish Mr. Machado's client and appointed successor counsel, who perfected the criminal appeal. Mr. Kovatch (successor counsel) testified that Mr. Machado cooperated in the transition of the case to him.

3. Dishonesty

In addition, Mr. Machado's misconduct did not involve dishonesty. Although he ignored the Court's orders to prosecute his client's appeal, Mr. Machado did not act dishonestly in doing so. Moreover, at the hearing Mr. Machado took responsibility for his actions and appeared honest, remorseful, and accountable.

4. Violations of Other Disciplinary Rules

This case does not involve other violations of the D.C. Rules of Professional Conduct.

5. Previous Disciplinary History

Mr. Machado has committed similar misconduct in the past. Specifically, in 2001, he was informally admonished for violating some of the same rules between 1999 and 2001. On the one hand, this history suggests a recurring nature to Mr. Machado's missteps. On the other hand, the long span of time between his interactions with Disciplinary Counsel suggests the misconduct is not constant. Most important, Mr. Machado has recognized the source of the misconduct in this case—a failure to manage his practice effectively—and is taking steps to address that issue.

6. Acknowledgement of Wrongful Conduct

As noted, at the hearing Mr. Machado acknowledged and took responsibility for his conduct in this matter. Indeed, he did not contest the facts and is willing to accept the sanction proposed by Disciplinary Counsel.

7. Other Circumstances in Aggravation and Mitigation

The misconduct in this case—a series of missed deadlines in a criminal appeal—occurred in the midst of a difficult period on Mr. Machado's life. He was involved in a complicated, multidefendant RICO suit in federal court, during which his client threatened him. Also, around this time, Mr. Machado lost his father, and he suffers from ADHD, which impairs his organizational skills. Importantly, Mr. Machado has sought out assistance from Mr. Mills and is willing to make changes in his life and practice to improve his organization and management skills.

In addition, Mr. Machado has made positive contributions to the community and the D.C. Bar. The associate pastor at his church described Mr. Machado's work with the church as well as his use of the church as a support system. The Committee also heard evidence of Mr. Machado's work with the SCTLA, which included tracking CLE requirements, giving CLE trainings to other attorneys, and improving the representation of Spanish-speaking defendants in the D.C. courts. Finally, a past president of the D.C. Bar explained to the Committee Mr. Machado's work with the HBA and that Mr. Machado is a "very solid," "well-regarded" attorney with a "very good reputation."

C. Sanctions Imposed for Comparable Misconduct

Generally, the Court has imposed discipline of a six-month suspension for neglect of a court-appointed criminal appeal. *See In re Murdter*, 131 A.3d 355, 359 (D.C. 2016) (per curiam) (appended Board report) (accepting Board's recommendation of a six-month suspension for neglect of five criminal appeals); *In re Askew*, 96

A.3d 52, 61–62 (D.C. 2014) (per curiam) (suspending attorney for six months when she neglected her client's criminal appeal, offered no mitigating circumstances, and suggested she did not understand the responsibilities of court-appointed criminal work). The recommended sanction for Mr. Machado is consistent with *Murdter* and *Askew*.

Unlike the respondent in *Askew*, Mr. Machado presents several mitigating circumstances, is remorseful, accepted responsibility for his conduct, aided the successor counsel in the neglected appeal, and took steps to address the cause of his misconduct. And the respondent in *Murdter* violated the same rules that Mr. Machado did in this case but did so in *five* cases, demonstrating a wider pattern of misconduct. Indeed, to construct a pattern in this case, one has to go back over a decade to find similar conduct.

In light of the specific facts in this case, the Committee believes it appropriate that Mr. Machado receive a ninety-day suspension that is stayed in favor of two years of supervised probation, with the conditions that: (1) Mr. Machado must commit no further disciplinary rule violations; (2) Mr. Machado must meet with a practice monitor at least quarterly and follow the monitor's recommendations; and (3) Mr. Machado must sign a waiver to permit the monitor to file quarterly reports with the Office of Disciplinary Counsel and the Board on Professional Responsibility. The Committee recommends that Mr. Machado not be required to inform his clients about the probation. D.C. Bar R. XI, § 3(7).

D. Fitness

Although Disciplinary Counsel proposed one, and Mr. Machado did not address the issue the Committee does not recommend the imposition of a fitness requirement in the case. As discussed below, the facts of this case do not warrant one.

A fitness showing is a substantial undertaking. *Cater*, 887 A.2d at 20. Thus, in *Cater*, the Court held that "to justify requiring a suspended attorney to prove fitness as a condition of reinstatement, the record in the disciplinary proceeding must contain clear and convincing evidence that casts a serious doubt upon the attorney's continuing fitness to practice law." *Id.* at 6. Proof of a "serious doubt" involves "more than no confidence that a Respondent will not engage in similar conduct in the future." *In re Guberman*, 978 A.2d 200, 213 (D.C. 2009) (internal quotation marks omitted). It connotes "'real skepticism, not just a lack of certainty.'" *Id.* (quoting *Cater*, 887 A.2d at 24).

In articulating this standard, the Court observed that the reason for conditioning reinstatement on proof of fitness was "conceptually different" from the basis for imposing a suspension. As the Court explained:

> The fixed period of suspension is intended to serve as the commensurate response to the attorney's past ethical misconduct. In contrast, the open-ended fitness requirement is intended to be an appropriate response to serious concerns about whether the attorney will act ethically and competently in the future, after the period of suspension has run . . . . [P]roof of a violation of the Rules that merits even a substantial period of suspension is not necessarily sufficient to justify a fitness requirement . . . .

Cater, 887 A.2d at 22.

In addition, the Court found that the five factors for reinstatement set forth in *In re Roundtree*, 503 A.2d 1215, 1217 (D.C. 1985), should be used in applying the *Cater* fitness standard. They include:

> (a) the nature and circumstances of the misconduct for which the attorney was disciplined;
>
> (b) whether the attorney recognizes the seriousness of the misconduct;
>
> (c) the attorney's conduct since discipline was imposed, including the steps taken to remedy past wrongs and prevent future ones;
>
> (d) the attorney's present character; and
>
> (e) the attorney's present qualifications and competence to practice law.

Cater, 887 A.2d at 21, 25.

These factors do not support a fitness requirement in this case. The record does not contain clear and convincing evidence that casts a serious doubt upon Mr. Machado's continuing fitness to practice law. *See Cater*, 887 A.2d at 24. To be sure, Mr. Machado erred in not heeding the Court's orders in connection with his appointment as counsel to a criminal defendant, but his mistake was not part of an extended pattern of misconduct and did not involve dishonest conduct. In addition, Mr. Machado took seriously at the hearing the need to make changes in his practice to minimize the risk of future mistakes of a similar nature. Based on these facts, the Committee does not believe a fitness requirement is warranted, even if Mr. Machado does not satisfy the conditions of his probation. That is, if Mr. Machado fails to satisfy the conditions of his probation, he should be suspended from practice for ninety days, as the sanction for the underlying misconduct.

V. CONCLUSION

For the foregoing reasons, the Committee finds that John L. Machado violated District of Columbia Rules of Professional Conduct Rules 1.1(a), 1.1(b), 1.3(a), 1.3(b)(1), 1.3(c), 3.4(c), and 8.4(d), and recommends the sanction of a ninety-day suspension stayed in favor of two years of supervised probation, with the conditions that:

> (1) Mr. Machado must commit no further disciplinary rule violations;
>
> (2) Mr. Machado must meet with a practice monitor at least quarterly and follow the monitor's recommendations; and
>
> (3) Mr. Machado must sign a waiver to permit the monitor to file quarterly reports with the Office of Disciplinary Counsel and the Board on Professional Responsibility.

The Committee further recommends that Mr. Machado not be required to notify his clients of his probation. *See* D.C. Bar R. XI, § 3(a)(7).

AD HOC HEARING COMMITTEE

/JDR/
Joshua David Rogaczewski, Chair

/DB/
David Bernstein, Public Member

/HM-M/
Heidi Murdy-Michael, Attorney Member

Ms. Murdy-Michael filed a Separate Statement recommending an additional probation condition.

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

In the Matter of: JOHN L. MACHADO, Respondent. A Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 449961)	Board Docket No. 15-BD-080 Bar Docket No. 2014-D253

SEPARATE STATEMENT OF MS. MURDY-MICHAEL

I concur with the Hearing Committee report, with one exception: I recommend that, as an additional probation requirement, Respondent be barred from seeking or accepting any appointment under the Criminal Justice Act on any appellate matter during the term of his probation. I believe that this additional requirement is necessary because Respondent's violation of the District of Columbia Rules of Professional Conduct (the "Rules") in this matter, Respondent's prior violation of the Rules in 2001, and Respondent's testimony (Transcript at 139-144) indicate that Respondent has particular difficultly ensuring deadlines in appellate matters are tracked and met. Additionally, Respondent stated that he did not have any intention of seeking or accepting appointment in such matters. Id.

/HM-M/
Heidi Murdy-Michael, Attorney Member