October 23, 2017
Corrected October 24, 2017

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

In the Matter of:	:	
	:	
MICHAEL M. WILSON,	:	
	:	Board Docket No. 15-BD-064
Respondent.	:	Bar Docket No. 2013-D296
	:	
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 941674)	:	

REPORT AND RECOMMENDATION OF
HEARING COMMITTEE NUMBER FOUR

Disciplinary Counsel[1] charged Respondent, Michael M. Wilson ("Respondent"), with five violations of the District of Columbia Rules of Professional Conduct ("Rules"), all pertaining to Respondent's work on a wrongful death/medical malpractice case. Respondent is charged with violating Rule 1.1(a) (failing to provide competent representation); Rule 1.2(a) (failing to consult with all clients about settlement); Rule 1.4(a) (failing to keep a client reasonably informed about the status of a matter and failing to comply with reasonable requests for information); Rule 1.4(b) (failing to explain the status of the matter necessary to allow the client to make informed decisions); and Rule 1.7(b)(2) (representing clients when the representation was adversely affected by representation of another client).

[1] Effective December 19, 2015, the title of "Bar Counsel" was changed to "Disciplinary Counsel." D.C. Court of Appeals Rule XI of the D.C. Rules Governing the Bar. The new title is used in this Report and Recommendation.

Based on the findings set forth below, the Committee concludes that Respondent violated the rules as charged and recommends a 30-day suspension, stayed for one year of probation with the requirement to complete eight hours of continuing legal education courses.

I. PROCEDURAL HISTORY

Disciplinary Counsel filed the Specification of Charges on June 9, 2015, which was served on Respondent's attorney, Stephen A. Friedman, Esquire, by consent, on June 11, 2015. BX B-C.[2] Respondent filed an Answer on July 2, 2015. BX D. Respondent sought discovery through a motion filed on September 4, 2015, requesting a copy of Disciplinary Counsel's file, any record of prior discipline, and permission to take the depositions of Ashley Coleman and Demetrius Davis; Disciplinary Counsel filed an opposition on September 9, 2015.

A prehearing conference was held on September 9, 2015. The parties agreed to a schedule for exchanging witness lists, exhibits, stipulations, and the hearing. In addition, the parties discussed Respondent's request for discovery. An order followed setting forth the agreed upon schedule and resolving Respondent's motion for discovery, noting that the request for Disciplinary Counsel's file and record of prior discipline was moot as Disciplinary Counsel responded to both requests, and denying the request to conduct depositions. H.C. Order, Sept. 28, 2015.

[2] "BX" refers to Disciplinary Counsel's Exhibits, "RX" refers to Respondent's Exhibits, "Tr." refers to the hearing transcript, and "FF" refers to Findings of Fact.

Stipulations were not filed. On October 19, 2015, the parties filed witness lists and exhibits. On October 30, 2015, Disciplinary Counsel filed an objection to Respondent's Exhibit 3.

The hearing was held on November 18-19, 2015, before Lucy Pittman, Esquire, Chair, and Octave Ellis, Public Member. The third member of the committee, Gwen Green, Esquire, Attorney Member, was unable to attend the hearing. There was insufficient time to appoint an alternate member, but Board Rule 7.12 allows the hearing to continue before a quorum of two members. In addition, the parties agreed that Ms. Green could participate in the decision by reviewing the record. Tr. 6; *see also* Board Rule 7.12. Assistant Disciplinary Counsel Hamilton P. Fox, III, Esquire, appeared on behalf of the Office of Disciplinary Counsel[3] and Stephen A. Friedman, Esquire, appeared on behalf of Respondent.[4] Both parties submitted documentary evidence and presented witnesses. Disciplinary Counsel offered BX A-D, 1-28, all of which were admitted. Tr. 205, 572, 601. Disciplinary Counsel called Demetrius Davis and Ashley Coleman as witnesses. Tr. 40, 167. Respondent offered RX 1-2, 4-14, all of which were admitted; in addition, part of RX 3 was admitted (*see* section IV(B) for full discussion). Tr. 234-37, 289, 368. Respondent called Robert Fields as a witness, and Respondent testified on his own behalf. Tr. 237, 369.

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[3] Mr. Fox was appointed Disciplinary Counsel effective June 7, 2017.

[4] On October 21, 2016, Mr. Friedman filed a motion to withdraw his appearance, which Respondent signed. The motion was granted in a separate order issued with this report and recommendation.

After the close of the first phase of the hearing, the Committee made a preliminary non-binding determination that Respondent violated a Rule. Tr. 587. The hearing continued to the sanctions and mitigation phase, and Disciplinary Counsel recalled Respondent. Tr. 587.

Post hearing briefs were ordered. H.C. Order (Dec. 9, 2015). Disciplinary Counsel filed its brief on December 18, 2015; Respondent filed his brief on January 19, 2016; and Disciplinary Counsel filed its reply on January 27, 2016. H.C. Order (Feb. 8, 2016).

II. STANDARD OF REVIEW

Disciplinary Counsel bears the burden of establishing by clear and convincing evidence that Respondent violated the Rules of Professional Conduct. *See In re Anderson*, 778 A.2d 330, 335 (D.C. 2001) ("*Anderson I*"); *see also In re Anderson*, 979 A.2d 1206, 1213 (D.C. 2009) (applying clear and convincing evidence standard to charge of misappropriation of funds) ("*Anderson II*"); Board Rule 11.6. As the Court has explained, "[t]his more stringent standard expresses a preference for the attorney's interests by allocating more of the risk of error to [Disciplinary] Counsel, who bears the burden of proof." *In re Allen*, 27 A.3d 1178, 1184 (D.C. 2011) (citation and internal quotations omitted). Clear and convincing evidence is more than a preponderance of the evidence, it is "evidence that will produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established." *In re Cater*, 887 A.2d 1, 24 (D.C. 2005) (citation omitted). On the basis of the record as a whole, the Hearing Committee makes the following findings of fact and

conclusions of law set forth below, each of which is supported by clear and convincing evidence. *See* Board Rule 11.6.

III. FINDINGS OF FACT

The findings of fact are based on testimony from four witnesses and multiple volumes of exhibits. The Committee finds the testimony of Ashley Coleman, Davis, and Fields credible, although each of the witnesses had difficulty remembering certain details. Respondent's testimony was also largely credible. The Committee finds that Respondent had good intentions in his interactions with his clients and he sought the best result for them. However, there were times in his testimony where he was not credible, particularly, as noted in Finding of Fact no. 15, where the Committee finds Respondent was dishonest.

1. Respondent is a member of the District of Columbia Bar, having been admitted by examination on December 14, 1977, and assigned Bar number 941674. Specification of Charges ¶ 1; Answer, ¶ 1 (admitted); BX A. Respondent is also a medical doctor. Tr. 371-72 (Respondent).

2. On May 10, 2012, Cynthia Coleman-Fields died following back surgery. Tr. 42-45 (Davis), 241, 244-45 (Fields). Thereafter, her husband, Robert Fields, contacted Respondent to retain an attorney in a wrongful death/medical malpractice suit. Tr. 45-46 (Davis); 245-46 (Fields); 375-79 (Respondent). Respondent did preliminary research on the surgical procedure, concluded there may be a claim, and set up a meeting with Fields for May 15, 2012. Tr. 47-48 (Davis), 246 (Fields), 375-79 (Respondent).

3. Ms. Coleman-Fields had three adult children: Demetrius Davis, Ashley Coleman, and April Coleman. Tr. 42-45 (Davis); 241-42, 244 (Fields).

4. Ms. Coleman-Fields died intestate. Tr. 384 (Respondent).

May 15, 2012 Meeting

5. On May 15, 2012, Respondent met with Fields, Davis, and Ashley Coleman at his office, and April Coleman participated by telephone. Tr. 47-48 (Davis); 169-70 (Coleman); 251 (Fields); 380 (Respondent).

6. Respondent explained his experience and background to the family and they discussed filing a medical malpractice/wrongful death lawsuit. Tr. 47 (Davis); 383 (Respondent).

7. Respondent explained that an estate needed to be established and that because Coleman-Fields died intestate, her estate would be divided by percentages set in law and that Fields, as the spouse, was entitled to a larger share of the proceeds of any litigation. Tr. 49 (Davis); 149 (Coleman); 314 (Fields); 384-86 (Respondent).

8. Susan Liberman, an attorney who handles probate matters, joined part of the meeting by telephone. RX 12; Tr. 387 (Respondent). Liberman explained the process of setting up the estate and for identifying the personal representative of the estate, and she further explained that under District of Columbia law she believed that the estate would be divided with 50 percent to Fields as the surviving spouse and 50 percent shared among Coleman-Fields's children, but that she would research that further. RX 12; Tr. 346 (Fields), 387-91, 397 (Respondent). The family agreed to retain Liberman to set up the estate. Tr. 346 (Fields), 389-91 (Respondent).

9. Respondent and/or Liberman also explained the importance of selecting a personal representative because he or she would make the decisions for the estate. Tr. 250-52 (Fields), 384-85; 387-91 (Respondent).

10. The family agreed that Fields would be the personal representative of Coleman-Fields's estate. Tr. 389 (Respondent); RX 5 at 162-68; Tr. 251 (Fields).

11. Fields wanted to have an even split of the proceeds from any lawsuit with his wife's children; the children were in agreement. Tr. 47-49 (Davis), 192, 199 (Coleman), 253-54 (Fields), 398-99 (Respondent). Respondent discouraged Fields from making such a decision at that time. Tr. 49 (Davis), 412-13 (Respondent).

12. During the meeting, Respondent created a handwritten numbered list. The first item stated that Respondent reimbursed Davis $110 for a parking ticket, "which will be a case expense." BX 3 ¶ 1; *see also* BX 4 (copy of check and parking ticket); Tr. 47-48 (Davis); 249-50 (Fields); 401-03 (Respondent). The second item stated that "We have agreed" that Respondent will pay Susan Liberman's fee of $3,000 to set up the estate, which "will be treated as a client expense." BX 3 ¶ 2; BX 5 (copy of check); Tr. 50 (Davis); 260-61 (Fields); 401-02 (Respondent). The third item states "We have agreed that the husband and the 4 children will equally divide the net proceeds, regardless of D.C. Probate law." BX 3 ¶ 3.[5] This document was signed by Fields only. BX 3.

[5] Brittany Spencer was a biological child of Coleman-Fields but was adopted by another family. During the May 15 meeting, the family and Respondent included her but later determined she was not a beneficiary of the estate. Tr. 42, 47, 53 (Davis).

13. No one has disputed that the first two items were binding or enforceable and that Respondent would be reimbursed for the two expenses. Tr. 311-12 (Fields), 412-13, 473 (Respondent).

14. The third item on the list (referred to herein as the "distribution agreement") became the source of dispute later in the representation. The Committee finds that the family wanted a valid agreement providing for an even distribution of the proceeds from the lawsuit. Tr. 47 (Davis), 253-54, 312-13 (Fields). Respondent was aware that the family wanted such an agreement, but contrary to the family's wishes, he unintentionally created a distribution agreement that was invalid.[6] Tr. 398-401, 415, 473, 485 (Respondent). The family believed the distribution agreement was valid at the time it was drafted and signed. Tr. 267, 314-18 (Fields) (Fields learned that the distribution agreement was invalid around July 31, 2012, when Liberman told him); *see also* Tr. 52, 82, 85 (Davis); RX 10 at 242-66 (emails) (Davis learned that it was invalid in 2013), Tr. 193 (Coleman).

15. Respondent's explanation of the distribution agreement shifted over time, and the Committee finds his testimony about the distribution agreement to be dishonest. The Committee finds that Respondent was reluctant to draft the distribution agreement and tried to dissuade the family and Fields from entering into

[6] The parties have consistently agreed that the distribution agreement is invalid or nonbinding. Disciplinary Counsel argues that it should have been obvious that the agreement was invalid because it lacked consideration. *See* Bar Counsel's Proposed Findings of Fact, Conclusions of Law, and Recommendation as to Sanction ("DC Br.") at 15-16. Respondent does not dispute that the agreement was non-binding and testified that it was his intention to have it be non-binding. Tr. 415, 473, 485 (Respondent). As there is no dispute between the parties, the Committee finds that the agreement was not enforceable.

the agreement. Tr. 49 (Davis), 412-13 (Respondent) (testifying that he did not want to draft the agreement because of the conflicting interests of the family members but also because he was not familiar with probate law or drafting contracts). But the Committee does not find support in the record that Respondent told the family the distribution agreement was invalid and, indeed, does not believe that Respondent intended it to be invalid at the time he drafted it. Tr. 414 (Respondent). In this regard, Respondent's statements about the distribution agreement has changed. In response to Disciplinary Counsel, he stated that the *family* signed the distribution agreement. RX 2 at 12. He also stated that after Fields renounced the agreement, Respondent sought input from Liberman on the agreement. RX 2 at 67. An email in August with Liberman confirms that "they" agreed the document was not binding about two months after it was drafted. RX 7 at 177. These earlier statements show an evolution in Respondent's explanation for the distribution agreement.

16. At the end of the meeting on May 15, 2012, Respondent entered into a retainer agreement with the family. Tr. 50 (Davis); 293-94 (Fields), BX 2. The retainer agreement identifies the clients and scope of representation as follows: "We, the undersigned clients, do hereby retain [Respondent] . . . as my attorney[] to provide representation in a claim for medical malpractice claims and wrongful death claims on behalf of each of us and the Estate of Cynthia B. Coleman-Fields who died on May 10th, 2012." BX 2 at 1. The signature page includes lines for signatures from Fields, Davis, Ashley Coleman, Spencer (*see supra*, n.5), April Coleman, and the Estate of Cynthia Coleman. BX 2 at 2. Before each name, the person is identified as

"Client." BX 2 at 2; Tr. 52-53 (Davis), 171-73 (Coleman), 258-59 (Fields). On May 15, 2012, Fields, Davis, Ashley Coleman, and Respondent signed the agreement. BX 2 at 2. No other signatures were added after May 15, 2012. BX 2.

17. The agreement provided a statement on Respondent's right to withdraw as counsel:

> We understand that our lawyers shall not pursue a medical malpractice case without competent medical testimony and that our lawyers reserve the right to withdraw their representation if such testimony is not forthcoming. Our lawyers reserve the right to withdraw from the case for any reason prior to the filing of a lawsuit or claim and thereafter with our permission and/or permission of the court.

BX 2 at 2.

18. When the retainer agreement was signed, all parties agreed that Respondent's clients were Fields, Davis, and the Colemans. Tr. 53 (Davis), 174 (Coleman), 294, 309, 349 (Fields), 413 (Respondent) ("they were clients").

19. Respondent testified that once the Coleman-Fields Estate was established, it would be his only client, and that he orally amended the retainer agreement at the May meeting to reflect that change. Tr. 409-12 (Respondent). He also testified that the written retainer agreement was an "interim" agreement but acknowledged that he did not amend or correct it after the May meeting. Tr. 409-12 (Respondent).[7] Respondent stated that the family understood the Estate would be the

[7] Fields testified that he may have signed a second agreement but he did not have a copy and could not recall specifics. Tr. 294-96, 310 (Fields). Based on Respondent's admission that he did not draft a second agreement and the evidence that Fields had an agreement with James Bailey, a co-counsel added to the case, it is likely that Fields is recalling the agreement with Bailey as the "second" agreement. Tr. 411; BX 27. The resolution of this factual issue is not material to the Committee's determination of the charges against Respondent.

client. Tr. 410-11, 455 (Respondent). The Committee does not find sufficient support for Respondent's statement that the family *understood* that they would no longer be clients once the Estate was established. Instead, the clear and convincing evidence shows, and the Committee finds, that each family member believed that he or she was a client throughout the litigation. Tr. 53 (Davis), 174 (Coleman). The family's belief was supported by Respondent's own conduct, to include the retainer agreement and his references that they were clients. RX 2 at 24-26 (acknowledging that the family members were "clients" and he should have withdrawn from representation when they became "estranged"); RX 2 at 31; Tr. 467 (Respondent); RX 10 (emails between Davis and Respondent); BX 23 (letter withdrawing from representation). The Committee does not find that Respondent's testimony was intentionally false. The record is unclear as to whether Respondent was mistaken as to the family's understanding or whether he did not actually explain that the Estate would be the sole client. Respondent's use of "client" and "beneficiary" interchangeably and his equating "client" with the named party in the medical malpractice lawsuit shows his own lack of precision in how he referred to or viewed the family. Tr. 456-57 (Respondent) (discussing the party that has a cause of action as the estate); RX 2 at 25-26 (equating beneficiary with client); RX 2 at 26 (acknowledging that the family members were "clients"); RX 2 at 67 (claiming he told the family he would be representing the estate and not the individual family members).

20. Respondent did not identify for the family the potential conflicts of interest in a joint representation. Tr. 53-56 (Davis), 172 (Coleman), 266, 296-308 (Fields). During his meeting with the clients, he identified the distribution agreement as a conflict of interest, but his testimony did not elaborate on the nature of the conflict and he drafted it anyway. Tr. 267, 313 (Fields); 414 (Respondent) ("I told them that — that it would be a conflict of interest because they have competing interest. And also . . . if I'm trying to draft a contract . . . who's [*sic*] side am I taking . . . how am I going to write something up that involves all of them."). Similarly, Fields recalls a discussion of conflicts but was unable to recall the specifics. Tr. 296-308 (Fields).

21. Respondent believed that Fields understood the discussion during this meeting, but was not confident that Davis and Ashley Coleman understood the discussion. Tr. 384, 387 (Respondent).

22. A few weeks after the May 15, 2012 meeting, Davis contacted Respondent to ask about the case; Respondent provided an update. Tr. 153 (Davis).

Establishment of the Estate and Wrongful Death Lawsuit

23. On May 31, 2012, Liberman filed the Petition for Probate in the Superior Court, on behalf of Fields, seeking to appoint Fields as Personal Representative of the Estate of Cynthia Coleman-Fields. RX 5 at 154-167. Renunciations signed by Davis and April and Ashley Coleman were included with the petition. Tr. 149-50 (Davis); RX 5 at 165-67. On June 6, 2012, Fields was named as Personal Representative of the Estate of Cynthia Coleman-Fields. RX 6 at 175.

24. On August 1, 2012, Respondent received an email from Liberman concerning the Estate and method of dividing the proceeds as permitted by law and the order appointing Fields as Personal Representative. "As we discussed yesterday, I note that Mr. Fields signed a document indicating his intent equally to divide among himself and the decedent's four children (including one legally adopted by someone else) the proceeds of the lawsuit. *You and I agree* that this merely is a statement of intent and not a binding agreement." RX 7 at 177 (emphasis added). At the time of this email, Respondent did not share with Davis that the distribution agreement was not binding. Tr. 61 (Davis). Liberman informed Fields that the distribution agreement was invalid. Tr. 280, 314-15, 317, 328 (Fields). Thereafter, Fields decided he did not want an even distribution of the proceeds with his wife's children and he informed Respondent of that decision. Tr. 280, 333 (Fields). Respondent did not share this decision with Davis. Tr. 69-72 (Davis).

25. There was a breakdown in the relationship between Fields, on the one hand, and Davis and the Colemans on the other. Tr. 58 (Davis); 267-74, 322 (Fields). In November 2012, Fields directed Respondent to discontinue communicating about the case with Davis. Tr. 108-09 (Davis); 275-76 (Fields); 418-20 (Respondent). Respondent believed that as Personal Representative of the estate, this was a decision that Fields could make and that he had to comply. RX 2 at 15-16 (Answer), Tr. 392-93 (Respondent). Respondent did not discuss withdrawing from representation with Fields. Tr. 322 (Fields).

26. Prior to Fields's directive, Respondent provided updates to Davis about the case, testifying that he "like[s] talking to [his] clients about their case in quite detail." Tr. 421 (Respondent). After the directive, Davis contacted Respondent for an update and Respondent informed Davis that he needed to get the update from Fields. Tr. 63-64, 151-52 (Davis); 420-21; 530-31 (Respondent).

27. Fields initially updated Ashley Coleman on the litigation. After the family dispute, she tried to contact Respondent's office to get an update but did not "get any answers." Tr. 175 (Coleman). She did not provide any specifics on how or when she contacted Respondent's office or the nature of the response, if any. Tr. 175 (Coleman).

28. On November 21, 2012, Respondent filed a wrongful death and survival action on behalf of Fields, individually and as Personal Representative of the Estate, against Dr. Ojedapo Ojeyemi in the U.S. District Court for the District of Columbia, Civil Action No. 12-cv-1896. RX 8.

29. On April 2, 2013, Respondent filed an Amended Complaint in the wrongful death action. BX 6.

30. Respondent moved to have request for admissions admitted after the defendant doctor failed to respond. BX 7 (ECF. No. 18, 21, 25). Respondent believed having the requests deemed admitted would put him in a strong position for settlement purposes. Tr. 423-24 (Respondent).

31. Respondent did not inform Davis that a Complaint and Amended Complaint were filed, and he did not discuss the decision to press for mediation

because of the deficiencies in the opposing party's answers to request for admissions. Tr. 62-63 (Davis).

32. Mediation in the wrongful death action was scheduled for June 24, 2013. BX 7 (May 10, 2013 minute order).

33. Fields initially did not want Davis or the Colemans involved in settlement discussions, but changed his mind when Respondent explained the benefits of having family involved. Tr. 278 (Fields), 395-97, 425 (Respondent). After Fields consented, Respondent contacted Davis about mediation and settlement. Tr. 64-65 (Davis), 175 (Coleman), 276-78 (Fields), 425 (Respondent). A few days before mediation, Respondent discussed the status of the case with Davis by telephone, and Respondent talked to Davis and Ashley Coleman by telephone on June 23, 2013. Tr. 65 (Davis); RX 10 at 200-08.

34. The Colemans relied on Davis as the point of contact with Respondent. Tr. 185-86 (Coleman).

35. Respondent also informed Davis that an additional lawsuit could be filed against Nuvasive, the holder of the patent on the neurosurgical procedure, and he sought Davis's consent to proceed with that suit. RX 2 at 28; Tr. 69 (Davis). Davis and Fields wanted to pursue a lawsuit against Nuvasive. RX 9; BX 21 (agreement to escrow funds for the lawsuit); Tr. 285-86 (Fields); RX 10 at 274.

36. The wrongful death case settled for $550,000.00. RX 9; BX 8; Tr. 434-36 (Respondent). Fields was the only client who was informed of the settlement offer, and he consented to the settlement at mediation. Tr. 67 (Davis); 178-79

(Coleman); 325 (Fields), 541 (Respondent). Respondent informed Davis by email that the case was settled following the mediation. Tr. 68 (Davis); RX 10 at 212; Tr. 433-37 (Respondent).

Dispute over settlement distribution

37. After the lawsuit was settled, Davis learned that the settlement proceeds would be divided with 50 percent to Fields and the remaining 50 percent to be shared between himself and his two sisters. Tr. 71-72 (Davis); RX 10.

38. Davis objected to this division as being contrary to the distribution agreement that was reached on May 15, 2012. Tr. 74-88 (Davis); 492-504 (Respondent); RX 10 at 240-66. Davis also learned that the distribution agreement was not binding. Tr. 71-79 (Davis). He consulted with another attorney and filed a complaint with the then-named Office of Bar Counsel. Tr. 75-77, 88-89 (Davis).

39. After covering attorneys' fees, expenses, and escrowing funds to finance the lawsuit against Nuvasive, the remaining $230,000.00, of the settlement was payable to the Estate. RX 9 at 192; Tr. 90-91 (Davis). Respondent placed the Estate's funds in escrow until the dispute between Fields and Davis was resolved. RX 9 at 192.

40. Respondent mediated between Fields and Davis on the distribution of the settlement. Tr. 77-78 (Davis), 280-82, 335 (Fields), 438-40 (Respondent); RX 9 at 191; RX 10. An agreement was reached: Fields received 37.5 percent, and Davis and the Colemans split of the remaining 62.5 percent. RX 9 at 191; BX 21; Tr. 444-46 (Respondent); Tr. 89-90 (Davis); 282 (Fields), 438-45 (Respondent). The

agreement also stated that this distribution would not be binding on future settlements, including any with Nuvasive. Tr. 287 (Fields); RX 9 at 191.

41. Davis and Fields wanted Respondent to continue to pursue the second lawsuit against Nuvasive, but Respondent did not enter into a new retainer agreement nor did he discuss how to resolve future conflicts or address communication with the clients. Tr. 91-92 (Davis); 451, 541-43 (Respondent).

42. In August 2013, Respondent learned that Davis filed a complaint with the Office of Bar Counsel. On September 20, 2013, Respondent, through counsel and by letter, notified Fields, Davis, and the Colemans that he could no longer represent them in the wrongful death action, and would no longer have any direct communication with them. BX 23. The letter stated that the reason for discontinuing the representation was the complaint filed by Davis with the Office of Bar Counsel. BX 23; Tr. 92-93 (Davis).

43. In October 2013, the family reached an agreement on the funds held in escrow for the planned lawsuit, and the funds were transferred to Liberman, as attorney for the Personal Representative of the Estate. After deducting her fee, the remaining funds were evenly split among Fields, Davis, and the Colemans. BX 25.

Prior Discipline

44. On September 14, 1993, Respondent received an informal admonition based on a complaint that he referenced a confidential disciplinary complaint in a public filing. BX 28 at 1. At the time that the informal admonition was issued, the Section 17(a) of Rule XI of the District of Columbia Court of Appeals Governing

Members of the Bar required that the informal admonition be confidential. BX 28 at 4.

IV. CONCLUSIONS OF LAW

A. Respondent's Motion to Dismiss

Respondent's Answer concludes by requesting that the Board dismiss the Specification of Charges and direct an alternate disposition consistent with the diversion offer that Disciplinary Counsel offered and later withdrew. *See* Answer at 4-5, ¶¶ 14-18 (describing the parties' failed negotiations for diversion under D.C. Bar R. XI, § 8.1). The Hearing Committee is not authorized to rule on motions to dismiss, but should include a recommended disposition of the motion in its report to the Board, after hearing all of the evidence. *See* Board Rule 7.16(a); *In re Ontell*, 593 A.2d 1038, 1040 (D.C. 1991).

Neither Respondent nor Disciplinary Counsel addressed Respondent's request to dismiss this matter in their post hearing briefs, other than a reference in Respondent's conclusion stating that Disciplinary Counsel failed to meet its burden and the matter should be dismissed. Whether Disciplinary Counsel met its burden is addressed in the Conclusions of Law section below.

The Committee recommends that the Board deny Respondent's request, as set forth in his Answer, to dismiss and to enter a resolution consistent with a diversion offer. Respondent did not provide a basis for dismissing the matter, and a hearing committee cannot recommend a diversion because a diversion may be offered "in Disciplinary Counsel's sole discretion." *See* D.C. Bar R. XI, § 8.1(c).

B. Disciplinary Counsel's Evidentiary Objection to Respondent's Exhibit 3

On October 30, 2015, Disciplinary Counsel filed an objection to RX 3, which consists of the handwritten notes of Disciplinary Counsel from his investigative file and a typed transcription of the notes produced by Respondent. Disciplinary Counsel argued that the notes were not admissible for impeachment purposes and that "[a] third party's interpretation of and transcription of someone else's hand-written notes is not admissible" because "[s]uch transcriptions are an opinion by the author of the meaning of notes about statements made by the witness after the fact, *i.e.*, describing the relevant events." Disciplinary Counsel's Objection to Respondent's Exhibit No. 3 at 2.

During the hearing, the parties addressed their arguments as to RX 3 on the record. Tr. 351. Respondent argued that he was not given access to Demetrius Davis nor Ashley Coleman prior to the hearing and that notes contained in RX 3 show that neither considered the distribution agreement to be binding. Tr. 352-55. Respondent's counsel maintained that the parties' understanding as to whether the distribution agreement was binding was relevant to the conflict of interest charge, and Disciplinary Counsel's notes reflecting the parties' understanding should be weighed along with their testimony. Tr. 361-64. Disciplinary Counsel argued that his notes were vague and were not statements adopted by the witnesses. Tr. 357-59.

After taking the matter under advisement, the Chair admitted RX 3 into evidence. Tr. 367. The Chair deferred determination on what weight to accord the handwritten notes contained in RX 3, but determined that the transcribed notes in

RX 3 would not be admitted. Tr. 368. The Chair allowed the parties to address the issue in post-hearing briefs. *Id.* Neither party addressed the weight to be accorded RX 3 in their post-hearing brief.

As explained by the Chair, the Committee admitted the notes and determined their evidentiary weight when it considered all of the evidence. As described in the Findings of Fact, the Committee did not rely on Disciplinary Counsel's notes to support any of the findings. The notes, as Disciplinary Counsel stated, are incomplete thoughts, and were not adopted as statements by either Ashley Coleman or Davis. The parties were permitted to question Ashley Coleman and Davis about their understanding of the distribution agreement and the information shared with Disciplinary Counsel.

C. Rule Violations

A threshold issue is to identify Respondent's clients. Disciplinary Counsel asserts that Respondent's clients were Fields, Davis, the Colemans, and the Estate of Cynthia Coleman-Fields (when established). Respondent asserts that his clients were Fields, Davis, and the Colemans *initially*, but once the Estate was established, the Estate was the only client. The Committee rejects Respondent's assertion and finds that Fields, Davis, and the Colemans were Respondent's clients.

The Court looks to "the totality of the circumstances to determine whether an attorney-client relationship exists." *In re Fay*, 111 A.3d 1025, 1030 (D.C. 2015). In "the majority of cases[,] the attorney-client relationship is created when the client retains the attorney." *Id.*; *see also In re Washington*, 489 A.2d 452, 456 (D.C. 1985)

("[W]here an attorney agrees to act for another person in a legal matter, the attorney undertakes the full burdens of the legal relationship no matter how informal or how unremunerative that relationship may be."). "All that is required is that the parties, explicitly or by their conduct, manifest an intention to create the attorney/client relationship." *In re Ryan*, 670 A.2d 375, 379 (D.C. 1996) (alterations and quotation marks omitted).

Here, there was an "explicit" manifestation of the relationship with the written retainer agreement that stated "the undersigned clients . . . retain [Respondent] . . . to provide representation in a claim for medical malpractice claims and wrongful death claims *on behalf of each of us and the Estate of Cynthia B. Coleman-Fields* who died on May 10th, 2012." BX 2 (emphasis added). Fields, Davis, and Ashley Coleman signed the retainer agreement as the "clients," and April Coleman was identified as a client but did not sign the agreement because she participated in the meeting by telephone. BX 2. The retainer agreement is sufficient to establish that there was an attorney-client relationship with Fields, Davis, and the Colemans as the clients.

In addition to the retainer agreement, the "conduct" and "circumstances" also support finding an attorney-client relationship. *In re Shay*, 756 A.2d 465, 474-475 (D.C. 2000) (appended Board Report) is illustrative of the type of evidence considered in determining if an attorney-client relationship was created by conduct. *Shay* found such a relationship, despite infrequent and indirect communication with the client and lack of retainer agreement, because the client sought professional legal

advice, the respondent held herself out as an attorney and delivered legal services, the client believed the respondent was her attorney, and the respondent did not do or say anything to indicate she was not the client's attorney. *See also In re Lieber*, 442 A.2d 153, 156 (D.C. 1982) ("a client's perception of an attorney as his counsel is a consideration in determining whether a relationship exists").

Here, similar conduct demonstrates that an attorney-client relationship existed, to include:

- Fields, Davis, and the Colemans sought professional legal services from Respondent (FF 5-6);
- Respondent held himself out as attorney, explained the services he would be able to provide, and began to deliver those services immediately (FF 6-7);
- Davis and Ashley Coleman believed that Respondent was their attorney (FF 18);
- Respondent did not modify the written retainer agreement or otherwise terminate the relationship established in that agreement prior to September 23, 2013, when Respondent, through his counsel, terminated the relationship by written letter (FF 19, 42);
- Respondent refers to Davis and the Colemans as his clients during the representation, including in his letter terminating their relationship (FF 15-19, 42);
- Respondent discussed with Davis a second lawsuit and sought his consent to proceed (FF 35); and
- Respondent answered questions about the case against Dr. Ojeyemi when Davis inquired (FF 22, 26).

To be sure, there are factors that weigh in favor of Respondent's position. Similar to *Shay*, Respondent had indirect contact with the Colemans after the initial

meeting, communicating with Fields and Davis, who in turn shared information with the Colemans. Moreover, at some point during the litigation Respondent refused to answer questions from Davis. But, Respondent did not explain to Davis that he was no longer his attorney, just that Fields, as Personal Representative, would not permit sharing information. Later in the litigation, Respondent shared information with Davis again, including seeking his consent for a second lawsuit.

Based on the totality of the circumstances, the Committee concludes Fields, Davis, and the Colemans were Respondent's clients and that relationship did not end until September 23, 2013, when Respondent, through his counsel, terminated the relationship by written letter.[8]

In rejecting Respondent's identification of the Estate as the only client, the Committee does not doubt that Respondent believed that the Estate/Personal Representative would be in charge of the litigation and that the people he identifies as "clients" in his retainer agreement and other contemporaneous documents were the beneficiaries of that Estate. The problem is that his belief was not adequately explained or agreed to by his clients. *See* FF 19.

[8] The facts concerning April Coleman are not as developed as those involving the other clients, but are sufficient to conclude by clear and convincing evidence that she was a client. She was a participant in the first meeting, albeit by telephone, and while she did not sign the retainer agreement, a lack of writing is not dispositive. *See Lieber*, 442 A.2d at 156 ("It is well established that neither a written agreement nor the payment of fees is necessary to create an attorney-client relationship."). Most importantly, Respondent does not dispute that April Coleman was, at least initially, his client, and he included her in the letter terminating his relationship. *See* BX B (Specification of Charges); BX D (Answer) ¶¶ 4, 7, 17(b). Based on this, the Committee concludes that Disciplinary Counsel met its burden of showing that April Coleman was Respondent's client.

Once an attorney-client relationship is established, Respondent "was obliged to exercise all ethical duties arising out of that relationship." *Fay*, 111 A.3d at 1031; *see also Washington*, 489 A.2d at 456 ("[W]hen an attorney undertakes to act on behalf of another person in a legal matter, no matter how pure or beneficent his original intention may have been, he invokes upon himself the entire structure of the Code of Professional Responsibility and its consequent enforcement through disciplinary proceedings."). The Rules addressed in turn below were considered with Davis, Fields, and the Colemans as clients and Respondent owing an ethical duty to each of them.

1. Respondent Violated Rule 1.1(a).

Disciplinary Counsel alleges Respondent violated Rule 1.1(a) by failing to provide competent representation to his clients when he drafted the distribution agreement, a non-binding document purporting to divide equally the proceeds of the medical malpractice/wrongful death lawsuit.

Rule 1.1(a) provides that:

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

The comments to Rule 1.1 state 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." Rule 1.1, cmt. [5]. In *In re Evans,* the Court explained:

> [t]o prove a violation [of Rule 1.1(a)], [Disciplinary] Counsel must not only show that the attorney failed to apply his or his 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) (citations omitted); *accord In re Ford*, 797 A.2d 1231, 1231 (D.C. 2002) (per curiam) (Rule 1.1(a) violation requires proof of "serious deficiency" in attorney's competence); *see also In re Yelverton*, 105 A.3d 413, 421-22 (D.C. 2014) (defining "serious deficiency" in the context of Rule 1.1(a) and (b)). To prove a "serious deficiency," Disciplinary Counsel must prove that the conduct "prejudices or could have prejudiced the client." *Yelverton*, 105 A.3d at 422.

Disciplinary Counsel argues that when Respondent drafted the distribution agreement, it was the intent of all of his clients to agree that the proceeds be divided evenly among them. DC Br. at 15.[9] Disciplinary Counsel asserts that the document was obviously deficient to a litigating attorney who has drafted binding settlement agreements and who would have known that the lack of consideration for Fields to renounce a larger share of the proceeds made the document invalid. DC Br. at 15-16. Disciplinary Counsel states that Respondent's failure to draft a valid agreement prejudiced his clients because Davis and the Colemans received less of the proceeds than was intended. DC Br. at 15. In addition, Fields was prejudiced because after he

[9] "DC Br." refers to Disciplinary Counsel's Proposed Findings of Fact, Conclusions of Law, and Recommendation as to Sanction. "R. Br." refers to Respondent's Proposed Findings of Fact, Conclusions of Law, and Recommendation as to Sanction.

renounced the agreement (after learning it was not valid) he received less than he would have by statute. DC Br. at 15

Respondent argues that creating the distribution agreement was not incompetence. R. Br. at 46. While he agrees that a "better practice" would have been to refuse Fields's request to draft the distribution agreement, he did not refuse because he tried to "accommodate everyone" and is "courteous to a fault." R. Br. at 46. Respondent asserts that it was known by all of his clients at the time the distribution agreement was drafted that it was not a contract, and that he repeatedly advised Fields against making such an agreement. R. Br. at 46.

The Committee finds that Disciplinary Counsel established by clear and convincing evidence that Respondent failed to draft a valid agreement as requested by his clients, and after he and Liberman "agree[d]" that it was invalid, he failed to inform his clients who were prejudiced by the invalid agreement. The Committee rejects Respondent's factual contention that he adequately explained that the agreement was non-binding when it was created. The testimony was consistent that the clients did not know at the initial meeting that the agreement was invalid, which was contrary to their request. All of the clients wanted an even split of the proceeds.

The status of the distribution agreement caused a dispute that affected the distribution of the settlement proceeds, and this dispute was prejudicial to Davis and Fields. Disciplinary Counsel argues that Davis received less of the proceeds than was intended. The Committee agrees that Davis was prejudiced but *not* because he received less of the proceeds, as the record is not entirely clear on that point. The

language of the distribution agreement stated that the proceeds would be split evenly among five people or 20 percent to each of the following: Fields, Davis, Ashley Coleman, April Coleman, and Spencer. Pursuant to the settlement, Davis and each of the Colemans received about 21 percent, Fields received 37.5 percent, and Spencer did not receive any funds.[10] Disciplinary Counsel's argument assumes that the group would have excluded Spencer from the distribution (despite her inclusion in the distribution agreement) because they learned she was not a beneficiary of the Estate. This assumption would support Disciplinary Counsel's conclusion that Davis and the Colemans received less (21 percent compared to 25 percent), but the Committee does not need to make that assumption to find prejudice or the potential for prejudice in this matter. *Evans*, 902 A.2d at 71 (appended Board Report) (showing of a potential for prejudice sufficient).

Davis objected to the proposed distribution of the settlement when it was proposed that he and his sisters would share 50 percent (or 16.7 percent each) of the proceeds. This forced Davis to seek additional legal counsel about whether the distribution agreement was enforceable and put him in the position of negotiating with Fields—with Respondent acting as mediator to obtain a share more consistent with the distribution agreement.

In addition, the Committee agrees with Disciplinary Counsel that Fields was also prejudiced by the distribution agreement. Fields received 37.5 percent which is

[10] The percentages do not account for approximately $40,000 that was put aside for a second lawsuit that was evenly split later. BX 24-25.

a larger share than that set forth in the distribution agreement (either 20 or 25 percent), but he was told in July 2012 that the distribution agreement was invalid and thereafter believed he would receive 50 percent. Like Davis, he had to negotiate a share of the proceeds with Respondent acting as mediator.

In re Evans is somewhat analogous to the present case. 902 A.2d at 71 (appended Board Report). There the respondent filed a deficient renunciation form on behalf of his client that would not have accomplished the objective of renouncing his client's share of the estate. *Id.* The fact that the client did not intend to renounce his share of the estate and was not actually prejudiced by the form "does not remove the potential for prejudice." *Id.* Like the respondent in *Evans*, here, Respondent drafted an invalid document. Unlike in *Evans*, however, there was prejudice, not just the potential, because the document did not accomplish the clients' objectives. At the time that Fields asked to have the document drafted, he wanted an even split of the settlement, an objective shared by all of Respondent's clients, but not achieved with the invalid agreement.

The Committee finds that Disciplinary Counsel has proven by clear and convincing evidence that Respondent violated Rule 1.1(a).

2. Respondent Violated Rule 1.2(a) Because He Did Not Communicate a Settlement Offer to All of His Clients and Did Not Obtain Their Consent Before Settling the Medical Malpractice Lawsuit.

Disciplinary Counsel alleges Respondent violated Rule 1.2(a) when he failed to consult with all of his clients and abide by their decision as to whether, and for how much, to settle the medical malpractice/wrongful death lawsuit. Specifically,

Disciplinary Counsel alleges that Respondent failed to consult with, and abide by, the decisions of Davis and the Colemans. Tr. 14.

Rule 1.2(a) obligates a lawyer to "abide by a client's decisions concerning the objectives of [the] representation . . . and . . . consult with the client as to the means by which they are to be pursued." Comment [1] to Rule 1.2 states that "[t]he client has ultimate authority to determine the purposes to be served by legal representation . . . ." "Rule 1.2(a) . . . is designed to preserve the client's right to accept or reject a settlement offer, and it requires that a client be able to exercise his or her judgment at the time a settlement offer is communicated." D.C. Bar Legal Ethics Op. 289 (1999).

Disciplinary Counsel argues that Respondent has admitted to the violation of this Rule through his testimony because he admitted he did not consult with the Colemans prior to mediation, and did not communicate the settlement offer to Davis or the Colemans, or seek their consent to settle the lawsuit. DC Br. at 17-18. Disciplinary Counsel asserts further that any argument that the Colemans delegated their decision to Davis is insufficient because (1) there is no express delegation by the Colemans and (2) Respondent did not obtain Davis's consent to settle the case anyway. DC Br. at 17-18. Respondent did not formally address Rule 1.2(a) in his brief, incorporating his prior responses. R. Br. at 47. Respondent argued with regard to the other Rule violations that he did not fail to keep his clients informed because once the Estate was established, it was his only client, and he did not have an obligation to inform Davis and the Colemans about the case or mediation. R. Br. at

47. Respondent testified that he included Davis in settlement discussions just prior to mediation because of the importance of having the family present at the mediation to show the strength of the case—not because he was seeking his consent or input.

As noted at the outset of the Conclusions of Law, the Committee rejects Respondent's argument that the Estate was his only client. Fields, Davis, and the Colemans were all his clients. Thus, he had an obligation to communicate the settlement offer to all of his clients and seek their consent prior to settling the lawsuit. *See, e.g.*, *In re Elgin*, 918 A.2d 362, 375 (D.C. 2007) (finding a violation of Rule 1.2(a) where the attorney settled an action without disclosing the terms to his client "in violation of the canon requiring a lawyer to 'abide by a client's decision whether to accept an offer of settlement'") (quoting Rule 1.2(a)); *In re Wright*, 885 A.2d 315, 315 (D.C. 2005) (accepting the Board's findings that respondent violated Rule 1.2(a) when he "settled [his] clients' personal injury claims without their knowledge or consent and otherwise failed to keep [his] clients properly informed or abide by their decisions"); *see also, e.g.*, *Makins v. District of Columbia*, 861 A.2d 590, 594 (D.C. 2004) ("the decision to settle belongs to the client"); *Bronson v. Borst*, 404 A.2d 960, 963 (D.C. 1979) ("absent specific authority, an attorney cannot accept a settlement offer on behalf of a client").

Here, it is undisputed that Respondent updated Davis about the upcoming mediation a few days before, but he did not communicate the settlement offer to Davis or the Colemans nor seek their consent before accepting it. Thus, we find that

Disciplinary Counsel has proven by clear and convincing evidence that Respondent violated Rule 1.2(a).

3. Respondent Violated Rules 1.4(a) and (b).

Disciplinary Counsel alleges that Respondent violated Rule 1.4(a) with respect to Davis and violated Rule 1.4(b) with respect to both Davis and the Colemans.[11] Specification of Charges at 5; BX B ¶ 17(c); Tr. 12.

Rule 1.4 provides, in relevant part:

> (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
>
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Under Rule 1.4(a), an attorney must not only respond to client inquiries, but must also initiate contact to provide information when needed. *See In re Bernstein*, 707 A.2d 371, 376 (D.C. 1998). The purpose of this Rule is to enable clients to "participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued." Rule 1.4, cmt. [1]. "The guiding

[11] We note that the Specification of Charges as to 1.4(b) alleges that Respondent "failed to explain the status of the matter to *some of his clients* to the extent reasonably necessary to permit them to make informed decisions about the representation" (emphasis added). At the beginning of the hearing on November 18, 2015, Disciplinary Counsel clarified that "some of his clients" under the 1.4(b) charge referred to Davis and Ashley Coleman. In its Proposed Findings of Fact, Conclusions of Law, and Recommendation as to Sanction, Disciplinary Counsel alleges Respondent failed "to keep *all of the children* informed to the extent reasonably necessary for them to make informed decisions about the representation" (emphasis added). Respondent does not contest this charge includes *both* Colemans, and we accordingly adopt this interpretation for our analysis. We lastly conclude that our resolution of the matter would be same pertaining to only Davis and Ashley Coleman.

principle for evaluating conduct under Rule 1.4(a) is whether the lawyer fulfilled the client's reasonable expectations for information." *In re Hallmark*, 831 A.2d 366, 374 (D.C. 2003) (appended Board Report) (finding a Rule 1.4(a) violation); *cf. In re Edwards*, 990 A.2d 501, 522-23 (D.C. 2010) (appended Board Report) (no Rule 1.4(a) violation found where the Hearing Committee determined that the respondent's level of communication was not unreasonable, given the nature of the case and the client's behavior); *In re Schoeneman*, 777 A.2d 259, 264 (D.C. 2001) (no violation where "[n]othing in the record point[ed] to any events or circumstances that would have required [respondent] to communicate with [his client] during the time that she was trying to reach him, or that she was not adequately informed of his efforts").

Rule 1.4(b) provides that the attorney "must be particularly careful to ensure that decisions of the client are made only after the client has been informed of all relevant considerations." Rule 1.4, cmt. [2]. The Rule places the burden on the attorney to "initiate and maintain the consultative and decision-making process if the client does not do so and [to] ensure that the ongoing process is thorough and complete." *Id.* In determining whether Disciplinary Counsel has established a violation of Rules 1.4(a) and (b), the question is whether Respondent fulfilled his client's reasonable expectations for information. *See Schoeneman*, 777 A.2d at 264. In addition to responding to client inquiries, a lawyer must initiate communications when necessary. *See Hallmark*, 831 A.2d at 374.

Disciplinary Counsel argues that Respondent admitted he did not

communicate with Davis after November 2012 and until shortly before mediation in June 2013 as instructed by Fields. With regard to the medical malpractice litigation, Respondent did not inform Davis that a complaint was filed, and he did not discuss discovery or strategy, and did not seek Davis's consent to proceed to mediation.

Respondent argues that there is no basis in fact to find a violation of Rule 1.4(a) or (b) because he did not owe a duty to Davis or the Colemans. He argues that once the Estate was established, they were no longer his clients. R. Br. at 47.

As stated, the Committee rejects Respondent's assertion; he was obligated under Rule 1.4(a) to keep his clients "reasonably informed about the status" of the medical malpractice/wrongful death case and to "comply with reasonable requests for information." Rule 1.4(a). The Committee found that Davis sought information periodically from Respondent about the status of the case and initially Respondent complied, but after November 2012, refused to provide Davis information. This refusal was in violation of Rule 1.4(a). *See Hallmark*, 831 A.2d at 373 (failure to return calls from client for six months a violation of Rule 1.4(a)).

In addition, Respondent failed to initiate communication with Davis to explain the lawsuit sufficiently to permit him to make informed decisions about the case.[12] Specifically, Respondent failed to inform Davis that a complaint was filed and that discovery commenced, and he failed to seek Davis's input on whether to proceed to mediation. This lack of communication was in violation of Rule 1.4(b). *See, e.g.*,

[12] The Court has found that a Rule 1.4(b) "violation may overlap with [a] Rule 1.4(a)" violation. *Bernstein*, 707 A.2d at 377 n.9 (citing *In re Drew*, 693 A.2d 1127 (D.C. 1997) (per curiam)).

Bernstein, 707 A.2d at 376-77 (finding a Rule 1.4(b) violation because "[t]he record reflects that respondent did not inform [his clients] that he had filed the [law]suit for eighteen months and that he did not inform them of [a] settlement offer").

There is some suggestion by Ashley Coleman that she sought information from Respondent and was unsuccessful, but her testimony was not fully developed and thus, the Committee does not find that Respondent failed to comply with her requests for information. Similarly, the record is lacking regarding April Coleman. Ashley Coleman's testimony supports Respondent's position that Davis was communicating for himself and his sisters, so the Committee does not find a separate violation for failure to communicate directly with Ashley or April Coleman.

We find that Disciplinary Counsel has proven by clear and convincing evidence that Respondent violated Rules 1.4(a) and 1.4(b) with regard to Davis.

4. Respondent Violated Rule 1.7(b)(2).

Disciplinary Counsel alleges Respondent violated Rule 1.7(b)(2) when he represented Davis and the Colemans in a matter where his representation of them was adversely affected by his representation of Fields. Respondent denies that he violated 1.7(b)(2) during his initial retention and representation and that the Rule did not apply to the individual family members once the Estate was established.

Rule 1.7(b) states, in pertinent part, that:

> Except as permitted by paragraph (c) below, a lawyer shall not represent a client with respect to a matter if: . . .
>
> (2) such representation will be or is likely to be adversely affected by representation of another client[.]

Rule 1.7(c) provides that a lawyer may represent a client in a matter covered by Rule 1.7(b) if "[e]ach potentially affected client provides informed consent to such representation after full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation[,]" and "[t]he lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client."

Comment [27] to Rule 1.7 provides the following definition of "full disclosure":

> Adequate disclosure requires such disclosure of the parties and their interests and positions as to enable each potential client to make a fully informed decision as to whether to proceed with the contemplated representation . . . . Full disclosure also requires that clients be made aware of the possible extra expense, inconvenience, and other disadvantages that may arise if an actual conflict of position should later arise and the lawyer be required to terminate the representation.

The Court of Appeals has held that "'[f]ull disclosure' includes a clear explanation of the differing interests involved in the transaction and the advantages of seeking independent legal advice. It also requires a detailed explanation of the risks and disadvantages to the client entailed in the agreement, including any liabilities that will or may foreseeably accrue to him." *In re James*, 452 A.2d 163, 167 (D.C. 1982). Such a disclosure might include (1) alternative courses of action that would be foreclosed, (2) interests of the lawyer that brought about the conflict, (3) the nature of the resulting representation, and (4) the consequences of a future withdrawal of consent. Charles W. Wolfram, *Modern Legal Ethics* 345-46 (2d ed. 1986).

The adequacy of disclosure under Rule 1.7(c) is evaluated by a subjective standard, "meaning that more explanation may be required to satisfy the Rules' consent and consultation criteria where a less sophisticated client is involved . . . ." D.C. Bar Legal Ethics Op. 309 (2001). Similarly, "[l]awyers should also recognize that the form of disclosure sufficient for more sophisticated business clients may not be sufficient to permit less sophisticated clients to provide fully informed consent." Rule 1.7, cmt. [20]. Less sophisticated clients include "more vulnerable clients such as children, incapacitated persons, persons who are naïve about legal matters, or persons who are under emotional stress." Wolfram, *supra* at 346.

The Court of Appeals has not addressed the issue of burden of proof as it relates to disclosure and consent under Rule 1.7(c). In general, Disciplinary Counsel bears the burden of proving the elements of a Rule violation by clear and convincing evidence. *See Anderson I*, 778 A.2d at 335-37 (holding that intent is an essential element of a misappropriation charge, and thus Disciplinary Counsel must prove both misappropriation and intent by clear and convincing evidence, without shifting the burden to the respondent to prove that the misappropriation was not intentional or reckless) (citing *In re Thompson*, 579 A.2d 218, 221 (D.C. 1990)).

Recently, in *In re Szymkowicz*, Bar Docket Nos. 2005-D179 *et al.* (BPR May 19, 2017), *review pending*, D.C. App. No. 14-BG-0884, a Rule 1.7 case, the Board concluded that although Disciplinary Counsel always carries the burden to prove a Rule violation by clear and convincing evidence, a respondent must produce evidence (or explain why evidence is unavailable) to support a defense or exception

to a charge before Disciplinary Counsel is required to disprove that defense or exception. That is, although Disciplinary Counsel always shoulders the *persuasion* burden of proof, the *production* burden—the obligation to come forward with some evidence—may shift to a respondent:

> [O]nce Disciplinary Counsel presents evidence of a conflict of interest . . . a respondent may offer evidence showing that he or she obtained informed consent . . . . Disciplinary Counsel retains the ultimate burden to prove a violation of a Rule by clear and convincing evidence, and therefore *must rebut any evidence of informed consent*. If a respondent fails to raise informed consent as a defense (or to explain adequately why such evidence is unavailable), Disciplinary Counsel need not prove the absence of informed consent.

Szymkowicz, Bar Docket Nos. 2005-D179 *et al.*, at 6 (emphasis added); *see also In re Shannon*, Bar Docket No. 2004-D316, at 25-26 (BPR Nov. 27, 2012) ("Disciplinary Counsel retains the burden of proof by clear and convincing evidence, but the respondent cannot sit on his hands once the improper transaction has been established, especially where, as here, the lack of fairness is manifest and the client's mental facilities are questionable, and require Disciplinary Counsel to prove the negative."), *recommendation adopted*, 70 A.3d 1212 (D.C. 2013).

An attorney is required to disclose conflicts initially and during the representation to permit the clients to determine if they want to continue with the representation. *Griva v. Davison*, 637 A.2d 830, 845 (D.C. 1994) ("Where dual representation creates a potential conflict of interest, the burden is on the attorney involved in the dual representation to approach both clients with an affirmative

disclosure so that each can evaluate the potential conflict and decide whether or not to consent to continued dual employment.").

Disciplinary Counsel argues that Respondent represented more than one client and that he violated Rule 1.7 when he did not fully discuss the potential conflicts at the outset of the representation with all of his clients, nor did he discuss the conflicts with his clients when a conflict arose during the representation, and that without full disclosure his clients "could not give informed consent to the representation." DC Br. at 11-12. Disciplinary Counsel also argues that Respondent admitted to violating Rule 1.7(b)(2) in his Answer when he admitted that "'events arose during the course of his representation when he should have refused to continue to represent any of the parties, even though Davis, April Coleman[,] and Ashley Coleman declined to retain separate counsel and asked Wilson to continue with his representation and even though Fields never did want him to withdraw.'" DC Br. at 13 (quoting BX D)). Finally, Disciplinary Counsel argues that the Committee should reject Respondent's "changed story" at the hearing where he claimed "for the first time" that he was no longer Davis and Colemans' attorney once the Estate was established. DC Br. at 13-14.

Respondent contends that there were no conflicts at the outset of the representation, that he adequately explained potential conflicts, and that the family members were not clients later in the representation. R. Br. at 41-43. Respondent asserts that the family members "understood" that they would be converted from clients to beneficiaries of the Estate and the Estate would be the only client. R. Br.

at 42. Respondent concedes that he admitted to this violation previously but argues that that was a mistake and unsupported by the record. R. Br. at 44-45.

Based on Respondent's arguments, it is not clear if he is asserting a defense of informed consent, because he contends that there were no conflicts at the outset and that the family members were not clients when a conflict arose later. He nonetheless argues that he disclosed potential conflicts with the clients, so the Committee considers the defense of informed consent.

As to the initial burden, the Committee finds that Disciplinary Counsel proved by clear and convincing evidence that Respondent's representation of Davis and the Colemans were adversely affected by his representation of Fields. As one example, Fields's directive to discontinue communications with Davis, and Respondent's compliance with the directive, was adverse to Davis and the Colemans. This was a conflict and Respondent was required to either obtain informed consent to continue with the representation or withdraw.

The burden shifts to Respondent to produce evidence that there was informed consent or explain the absence of evidence. Starting with the initial representation, Respondent produced evidence that there was discussion of potential conflicts of interest during the May meeting. Fields testified that the distribution agreement was a conflict, and he testified that naming a personal representative solved future conflicts. Fields did not elaborate on the nature of the conflict, and other than the distribution agreement, was not able to recall any specific conflict identified by Respondent. Ashley Coleman and Davis did not recall any discussion of potential

conflicts. Respondent's testimony offered a little more explanation, he testified that drafting the agreement would put him in a position of taking sides among the family members.

Based on this evidence, Respondent did have some limited discussion about conflicts of interest during that initial meeting, but the record demonstrates that the discussion was inadequate to meet the Rule's requirement for full disclosure. Respondent's obligation was to ensure "each" client provided "informed consent to such representation after full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation." Rule 1.7(c). But Disciplinary Counsel proved by clear and convincing evidence that each client did not fully understand the potential conflicts. Respondent was aware that Davis and Ashley Coleman may have been "less sophisticated" or "vulnerable" due to the emotional stress of losing their mother. Tr. 384, 387 (Respondent) (testifying that Davis and Ashley Coleman did not appear to understand the discussion at the initial meeting), 400 (noting that it was only five days after Coleman-Fields' death). As such, more explanation was required to satisfy the Rule. The record does not show that more explanation was provided to ensure that each client consented to the representation despite the potential conflicts.

By way of illustration, the distribution agreement was identified as a conflict at the initial meeting. But as discussed above, the agreement was drafted anyway and the clients understood that the agreement was valid, whereas Respondent asserts that he avoided the conflict by drafting an invalid agreement. To the extent that an

invalid rather than a valid distribution agreement avoided any conflict of interest, Respondent was required to fully explain it to his clients so that they could make an informed decision to proceed with an invalid agreement. Moreover, as explained in FF 15, the Committee does not credit Respondent's testimony that he intended to draft an invalid agreement. Such discussion was clearly lacking as none of the clients understood the agreement to be invalid.

Regarding later in the representation, Respondent was required to disclose conflicts as they arose. Respondent largely concedes that he did not do so and instead argues that he did not have an obligation because the family members were no longer his clients. The Committee has rejected this argument as discussed above. The family remained clients. For example (as noted above), Respondent was required to inform Davis that Fields directed him to stop communications and updates. Respondent did not do so.

Respondent argues that a finding of violation of Rule 1.7 based on this record would result in lawyers "never" being able to "see the family of a deceased since there is always a theoretical possibly of a contest between them and the potential personal representative." R. Br. at 41. But contrary to Respondent's scenario, finding a violation of Rule 1.7 here will not prevent attorneys from entering into joint representation agreements with family members. Indeed, Comment [20] to Rule 1.7 addresses representation of family members with regard to wills and estate planning but identified it as a situation "in which disclosure and informed consent are usually required." It is the disclosure and consent that is lacking here.

We find that Disciplinary Counsel has proven by clear and convincing evidence that Respondent violated Rule 1.7(b)(2).

V. RECOMMENDED SANCTION

Disciplinary Counsel recommends a 30-day suspension for Respondent's Rule violations and dishonest testimony during the hearing. DC Br. at 18-22. Respondent recommends charges be dismissed and, in the alternative, an Informal Admonition issued. R. Br. at 49. For the reasons described below, the Committee recommends a 30-day suspension, stayed for one year of probation with a requirement to take eight hours of continuing legal education courses.

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." *In re Reback*, 513 A.2d 226, 231 (D.C. 1986) (en banc) (citations omitted); *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; *In re Berryman*,

764 A.2d 760, 766 (D.C. 2000). In determining the appropriate sanction, the Court of Appeals 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) (quoting *In re Howes*, 52 A.3d 1, 15 (D.C. 2012)).

B. Application of the Sanction Factors

1. The Seriousness of the Misconduct

Respondent's misconduct was serious. The core violation is the Rule 1.7 violation—the failure to identify and fully discuss potential conflicts of interest with his clients at the outset and thereafter, when a conflict arose, failing to disclose it to his clients and seek direction for moving forward. The consequences of that failure led to the other violations.

2. Prejudice to the Client

As explained above, the distribution agreement prejudiced Respondent's clients. The clients agreed at the initial meeting that they wanted to enter into the

distribution agreement but the agreement that was drafted was invalid. A valid agreement would have prevented the protracted discussions and negotiations after the lawsuit was settled.

The Committee agrees with Disciplinary Counsel that the record otherwise shows that "Respondent handled the wrongful death litigation with skill and care and obtained a reasonable settlement for his clients." DC Br. at 19.

3. Dishonesty

There was no dishonesty or misrepresentation in the conduct charged in this matter.

4. Violations of Other Disciplinary Rules

There are multiple Rule violations in this matter, largely related to the conflict of interest in a joint representation and the consequences of not fully identifying and disclosing conflicts with each client and not obtaining informed consent to proceed or withdraw from the representation.

5. Previous Disciplinary History

Over twenty years ago, Respondent received an informal admonition. BX 28 (September 14, 1993). The charges are not similar to the conduct in this matter.

6. Acknowledgement of Wrongful Conduct

The record is mixed on this factor. Respondent admitted initially that he should have withdrawn as counsel when a conflict arose, but later stated that admission was a mistake. R. Br. at 44-45. He also acknowledged in his Answer that he "does not claim he is faultless in this matter." RX 2 at 15. However, some of

Respondent's statements and arguments reflect that he does not fully appreciate the core issue on conflicts of interest. His testimony included what he learned from a course on joint representation and conflicts of interest, but he emphasized that documenting communications with clients would protect the attorney rather than focus on the benefits of informed clients. Tr. 460-61. Similarly, his Answer focused on the protection to the attorney, rather than ensuring full disclosure and understanding for the client:

> [Respondent] agrees that it would have been the preferable course to have spelled out all of his advice and discussions that he had with the client throughout their relationship; created a 5 page, single spaced, written retainer agreement, that would be updated as events occurred. This would have *fully protected him*, although it is doubtful that the written document would have meant anything to the instant clients, or even sophisticated clients. In reality, verbal discussions with and to clients are what are important to the clients in communicating and understanding information. *Densely written retainer agreements and confirmatory letters are for the benefit of the lawyer so that when recollections differ, the lawyer can point to specific language that protects him from this type of allegation*.

RX 2 at 15.

7. Other Circumstances in Aggravation and Mitigation

Respondent did not introduce any mitigation evidence. Disciplinary Counsel noted, and the Committee accepts, that a factor in mitigation is that Respondent "appears generally to have skillfully handled the wrongful death action[.]" DC Br. at 21. In addition, the Committee finds the lack of disciplinary matters over the last twenty years is a factor in mitigation. *In re Long*, 902 A.2d 1168, 1171 (D.C. 2006) ("We have held repeatedly that an attorney's record, or more accurately a lack

thereof, may be considered a mitigating factor when fashioning an appropriate sanction.").

In aggravation, Disciplinary Counsel argues that Respondent was dishonest in his testimony. DC Br. at 20-21 (citing cases that dishonest testimony is a factor in aggravation). Specifically, Disciplinary Counsel argues that Respondent testified dishonestly that:

> (1) the retainer agreement was an interim agreement and that all the clients agreed that Respondent would just represent the estate after it was formed; (2) the handwritten agreement concerning the division of the litigation proceeds was understood to be non-binding; and (3) that prior to the mediation, Davis had approved a settlement range.

DC Br. at 20. Consistent with the findings of fact, the Committee does not find that Respondent's testimony was intentionally false with regard to the retainer agreement or settlement range. But the Committee does find Respondent's testimony about the distribution agreement was intentionally false. *See* FF 15. None of the clients understood that the agreement was invalid at the time it was drafted and Respondent's own statements about the agreement have shifted over time. The Committee agrees with Disciplinary Counsel that Respondent's testimony was a "*post hoc* rationalization[]." DC Br. at 7.

C. Sanctions Imposed for Comparable Misconduct

A review of cases demonstrates that the discipline imposed for violations of Rule 1.7, conflict of interest, vary and depend on whether there are other rule violations and the seriousness of those violations. The range appears to be from censure to suspension. For example, in *In re Bland*, 714 A.2d 787, 787 (D.C. 1998),

the respondent received a public censure for violation of ten rules but he had an unblemished record and the Board concluded that his "inaction 'was more a product of [his] wishful thinking or bad judgment than a disregard of his client's interest.'" *See also In re McGarvey*, M-129-82 (D.C. Dec. 9, 1982) (public censure); *In re Hughes*, M-80-81 (D.C. Oct. 28, 1981) (public censure).

Conversely when the matters involve other serious rule violations, particularly dishonesty, with the conflict of interest, a suspension appears warranted. *See, e.g.*, *In re Jones-Terrell*, 712 A.2d 496 (D.C. 1998) (60-day suspension for conduct that included dishonesty and a conflict of interest); *In re Shay*, 756 A.2d 465 (D.C. 2000) (per curiam) (appended Board Report) (90-day suspension for conduct that included dishonesty). And where the conflict of interest involves the attorney's self-interest, lengthy suspensions are usually involved. *See, e.g.*, *In re McLain*, 671 A.2d 951 (D.C. 1996) (90-day suspension where attorney borrowed money from his client); *In re Hager*, 812 A.2d 904 (D.C. 2002) (one-year suspension for failure to disclose settlement-fee arrangement and dishonesty); *In re James*, 452 A.2d 163 (D.C. 1982), *cert. denied*, 460 U.S. 1038 (1983) (two-year suspension where attorney, *inter alia*, entered into real estate transaction with a client).

There is no evidence that Respondent acted in his own self-interest nor has the Committee found that Respondent's underlying conduct included dishonesty. But, his actions were serious and he was dishonest with the Committee.

In *In re Boykins*, 748 A.2d 413 (D.C. 2000) (per curiam) the Respondent violated seven rules in relation to his handling a probate matter:

> Respondent failed to provide a written fee agreement; failed to educate himself and comply with his duties as counsel to a conservator, including billing the estate for his services without court approval; failed to advise his client regarding the fee she was entitled to as conservator; failed to withdraw as counsel for the conservator; failed to perceive the conflict of interest between the conservator and the heirs of the estate; and most importantly, failed to comply for nearly one year with the court and its agents in repaying to the estate, improperly received funds for legal services.

748 A.2d at 413-14. The Court imposed a 30-day suspension, stayed for one year of probation and a list of terms of conditions. *Id.* Respondent's actions here do not include such serious violations as improper receipt of funds and ignoring court obligations. More like *Bland*, Respondent's violations are based on a bad decision, not a disregard for his clients' interests. DC Br. at 18 (referring to Respondent's conduct as "misjudgment").

Arguing that there were three instances of dishonesty, Disciplinary Counsel contends that a suspension is warranted. Respondent on the other hand urges the Committee to dismiss all charges or in the alternative to issue an admonition. The Committee agrees with Disciplinary Counsel that the conduct is too serious for an admonition and finds that a suspension is warranted. As explained below, the Committee recommends a 30-day suspension stayed for one year of probation with the requirement that Respondent take eight hours of continuing legal education courses.

In addition to the dishonesty, the factor that gives the Committee pause is the acknowledgement of wrongdoing. The Committee fully respects that Respondent has the right to defend himself as Disciplinary Counsel bears the burden of proof

and this is an adversarial proceeding. The Committee's concern is with some of the statements made in argument and in the written Answer that reflect a misunderstanding of the nature of the violation. Respondent's focus was on self-protective behavior rather than ensuring his clients understand the nature of the representation with a full discussion of potential conflicts. *See, e.g.*, R. Br. at 3 ("Wilson's sin was not being properly self-protective"); Tr. 460-61 (testimony of Respondent explaining that he took a course on conflicts and learned the importance of documenting discussions with his clients and having additional clauses in his retainer agreement to "protect[] the lawyer"); Tr. 584 (closing argument of counsel indicating that a retainer agreement that is "self-protective" "builds a wall with the clients"); Tr. 579-80 (closing argument of counsel arguing that the oral discussion with clients not retainer agreements should control: "The layperson does not get their information from these retainer agreements").

Because of this concern, the Committee recommends that Respondent be placed on unsupervised probation for a period of one year, during which he shall be required to take eight hours of continuing legal education approved by Disciplinary Counsel that cover one or more of the following topics: conflicts of interest, dual/joint representation, communications with clients, retainer agreements, and/or ethics/professional responsibility. The Committee recommends that Respondent shall not be required to notify his clients of the probation. *See* D.C. Bar R. XI, § 3(a)(7). Respondent should be informed that pursuant to Board Rule 18.1, he shall be required to accept the terms of the probation within thirty days of the date of the

Court order imposing probation, either by filing a statement with the Board on a form prepared by the Executive Attorney, or by countersigning the Board order implementing the probation. We recommend that, in the event that Respondent fails to file such a statement within 30 days, or fails to comply with the terms of probation, Respondent shall be suspended from the practice of law for thirty days, and required to prove fitness as a condition of reinstatement. *See In re Bingham*, 881 A.2d 619, 624 (D.C. 2005) (per curiam); *In re Bettis*, 855 A.2d 282, 290 (D.C. 2004).

VI. CONCLUSION

For the foregoing reasons, the Committee finds that Respondent violated Rules 1.1(a) (failing to provide competent representation); Rule 1.2(a) (failing to consult with all clients about settlement); Rule 1.4(a) (failing to keep a client reasonably informed about the status of a matter and failing to comply with reasonable requests for information); Rule 1.4(b) (failing to explain the status of the matter necessary to allow the client to make informed decisions); and Rule 1.7(b)(2) (representing clients when the representation was adversely affected by representation of another client), and should receive a 30-day suspension, stayed for one year of unsupervised probation with the requirement to complete eight hours of continuing legal education courses and the other conditions noted above.

HEARING COMMITTEE NUMBER FOUR

/LP/
Lucy Pittman
Chair

/OE/
Octave Ellis
Public Member

/GSG/
Gwen S. Green
Attorney Member