DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:	:	
	:	
HARRY TUN,	:	D.C. App. No. 09-BG-804
	:	Bar Docket No. 273-06
Respondent.	:	
	:	
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 416262)	:	

REPORT AND RECOMMENDATION OF THE
BOARD ON PROFESSIONAL RESPONSIBILITY

This negotiated discipline case is before the Board on remand from the Court of Appeals to provide the Court with our "views concerning the appropriateness of the negotiated discipline." Order, *In re Tun*, No. 09-BG-804 (D.C. Aug. 12, 2009).[1] As explained below, although the proposed sanction is within the lower range of precedent for the misconduct involved here, we do not believe that the sanction adequately reflects the number of violations nor the extended time period during which they took place. A more appropriate sanction would be a suspension of 18 months, with the last six months stayed (a) in favor of a one-year probation subject to the terms of the probation in the negotiated disposition, and (b) conditioned on his compliance with the terms of the probation. If Respondent fails to comply with those terms, we believe that the stay should not only be lifted, but that he should also be required to demonstrate

[1] On remand, both parties requested the opportunity to brief the appropriateness of the negotiated discipline. *See* Joint Motion of Bar Counsel and Respondent to Permit Briefing by the Parties before the Board responds to the Court's Order of August 12, 2009, filed Aug. 13, 2009. The Board granted that request on September 17th and asked them to address "whether the sanction is justified in light of *In re Cleaver-Bascombe*, 892 A.2d 397 (D.C. 2006)." Order, *In re Tun*, Bar Docket No. 273-06 (BPR Sept. 17, 2009). The parties filed separate pleadings. *See* Bar Counsel's Brief on the Appropriateness of Negotiated Discipline, filed September 29, 2009 ("B.C. Brief"); Respondent's Brief on the Appropriateness of Negotiated Discipline, filed September 30, 2009 ("Resp. Brief").

his fitness in order to be reinstated. Accordingly, we recommend that the Court reject the proposed negotiated disposition as not justified. The parties can, of course, consistent with Board Rule 17.7, revise and resubmit a revised petition for negotiated discipline to the Hearing Committee more in line with our suggested sanction.

I. FACTS

The stipulated facts, as supplemented during the limited hearing on the negotiated disposition, are as follows:

1. Respondent is a criminal defense attorney who, prior to the events involved here, accepted a substantial number of appointments from the District of Columbia Superior Court to represent indigent criminal defendants under the Criminal Justice Act ("CJA"). Petition for Negotiated Discipline ("Petition") at 2-3, ¶¶ 1-2.[2] Between 1999 and 2003, Respondent submitted 162 CJA vouchers to the court for reimbursement for a total of 1,180.25 hours devoted to the defense of CJA clients. *Id*. at 3, ¶ 4. Those vouchers included an itemization of his time, including what he did, when he started, and when he finished. The vouchers also required an oath and affirmation as to the accuracy of the claim for compensation. *Id*. at 2.

2. A Superior Court judge reviewing some of Respondent's vouchers noticed that Respondent had sought compensation for work allegedly done during the same time period for two or more clients ("double billing"). The judge referred the matter to the U.S. Attorney's Office, which declined to prosecute Respondent after he demonstrated that he had rendered legal services for other CJA clients for which he never submitted any vouchers. Petition at 2, 7; Tr. at 21, 23. However, Respondent agreed to remove his name from the Superior Court's list of CJA attorneys and repaid $16,034 to the Superior Court, the difference between the amount of

[2] During the hearing in this case, Respondent testified that from around 1994 or 1995 he was handling approximately 200 CJA cases a year. Transcript of June 11, 2009 Limited Hearing at 21 (Hereafter "Tr.").

double-billed time paid to Respondent and an estimate of the compensation he would have been entitled to with respect to the cases where he did not submit a CJA claim. Petition at 7, ¶ 6.[3] Respondent has not sought any compensation for the double-billed time. Resp. Brief at 2. Respondent was required to self-report to Bar Counsel, which he did. Petition at 2.

3. During Bar Counsel's review of the matter, Respondent demonstrated that he was entitled to compensation for an additional 42 CJA cases for which he did not seek compensation. Tr. at 23.[4] Bar Counsel and Respondent entered into a negotiated disposition in which Respondent stipulated that his conduct violated the following Rules of Professional Conduct:

> (a) Rules 1.5(a) & (f) (charging an unlawful and therefore an unreasonable fee);
>
> (b) Rule 3.3(a)(1) (making a false statement of a material fact to a tribunal);[5]
>
> (c) Rule 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation); and
>
> (d) Rule 8.4(d) (engaging in conduct that seriously interfered with the administration of justice).

Petition at 8, ¶ 7.

4. The agreed sanction is a nine-month suspension, followed by a one-year probation, with 90 days of the suspension suspended if Respondent: (i) takes five hours of a pre-approved CLE course on accounting and record keeping, and (ii) during the probation:

---

[3] The estimate of the time devoted to the cases for which Respondent did not submit any CJA vouchers was based on a review by Respondent's defense attorneys of the court jackets for those cases. Resp. Brief at 2.

[4] Respondent estimates that, had he billed only $400 for each of those cases, he would have been entitled to additional compensation of $16,800. Resp. Brief at 3, n.6.

[5] Rule 3.3(a) provides that "a "lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal . . . . " The stipulation omits the term "knowingly." We do not know whether the omission was part of the agreement between Bar Counsel and Respondent or was an oversight in summarizing the rule. However, we believe the stipulation is sufficient to support Respondent's admission that he violated Rule 3.3(a)(1). Respondent knew that since he drafted the vouchers with inadequate records, some of them were likely inaccurate. He thus violated Rudle 3.3(a)(1), even if he did not intend to claim compensation to which he was not entitled.

- meets with Dan Mills, Esq., the Manager of the Practice Management Advisory Service of the District of Columbia Bar, before or within 30 days of the beginning of probation;
- executes a waiver allowing Mr. Mills or a practice monitor ("practice monitor") to communicate with Bar Counsel concerning his compliance;
- allows the practice monitor to conduct a full assessment of Respondent's business structure, including, but not limited to, financial records, invoices, client files, engagement letters, supervision and training of staff and responsiveness to clients:
- maintains complete records relating to maintenance of client funds and complies with all of the practice monitor's recommendations, including maintenance of records concerning client funds;
- allows the practice monitor to submit quarterly reports to Bar Counsel; and
- signs an acknowledgement that he is in compliance with the practice monitor's requirements and files the signed acknowledgement with Bar Counsel by the tenth month of his probation.

Petition at 8-9.

5. As part of the negotiated disposition, Bar Counsel agreed not to pursue any additional charges arising out of these matters and to dismiss, without prejudice, an unrelated investigation of Respondent now pending in *Tun/O'Donnell,* Bar Docket No. 406-07. Petition at 8. According to Respondent's testimony at the hearing, that matter involved a claim by Ms. O'Donnell that Respondent had not pursued with sufficient diligence her request for relief from a civil protective order. Respondent stated that he had filed all the necessary papers seeking relief, but that the matter remained pending before the Judge. Tr. at 18-19.

6. The negotiated disposition was sent to an Ad Hoc Hearing Committee pursuant to D.C. Bar R. XI, §12.1 and Board Rule 17. The Hearing Committee held a hearing on June 11, 2009 after the Chairman of the Hearing Committee reviewed Bar Counsel's file *ex parte* as contemplated in Board Rule 17. Tr. at 29. The Respondent appeared at the hearing with counsel and testified under oath. *Id*. at 6. In his testimony, Respondent stated that after he completed a case during the period when he submitted the false CJA vouchers, "I moved onto another case

[and] I never got the chance to bill . . . ." Tr. at 21. He went on to explain that for a number of years he recorded his time diligently using a time sheet he had used while working for a law firm, but, starting sometime after 1996-97, he had so many cases that he stopped making detailed notes of his time and "just put down what type of work that I did, but I did not put down the time. . . . [A]fter I finish[ed] the case . . . [I went] back to the file and estimate[d] how much time I put in on each of them, by looking at the type of work I did. Unfortunately for me, at that time the CJA voucher required the date, the time you started, the time you finished." *Id*. at 25. Since he frequently did not prepare the CJA vouchers until the case had been over for several months, he had "case files for almost eight or nine months from beginning to the end, I have a lot of work that I did, but I don't have the times, so I . . . guesstimate[d] the time . . . ." *Id*. at 26.

7. In its Report and Recommendation, the Hearing Committee concluded that, "Respondent credibly testified that he failed to bill at least $23,000 on CJA cases; that his double billing resulted from incompetent record keeping rather than deliberate falsification; that he has taken a number of assigned cases *pro bono*; and that his time accounting for cases he handles on an hourly basis is now scrupulous."[6] Report and Recommendation of Ad Hoc Hearing Committee Approving Petition for Negotiated Discipline, Bar Docket No. 273-06 at 12, ¶ 15 (HC July 14, 2009) ("H.C. Rpt."). The Hearing Committee concluded that "Respondent recklessly maintained inadequate time records . . .", *id.* at 17, and summarized its findings, stating:

> We find on the stipulated facts and the Respondent's testimony presented at the hearing . . . that Respondent engaged in reckless rather than intentional misconduct, and that he testified credibly and truthfully before the hearing committee. He was recklessly

[6] The record does not indicate how much in total Respondent received or claimed as a result of the double billing. It contains only the amount he reimbursed the Court and the amount he claims he would have received had he submitted vouchers for the unbilled cases.

> sloppy but did not intend to defraud the court, nor did he attempt to mislead the Hearing Committee or Bar Counsel.

Id. at 19, ¶ 22.

8. The Hearing Committee also found that the proposed sanction was appropriate. It held that Respondent's conduct was "considerably less culpable than that at issue in *In re Cleaver-Bascombe*,"[7] which it viewed as the lead case in the area. H.C. Rpt. at 19, ¶ 23. It noted that the Court held in *Cleaver-Bascombe,* that:

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

Id. at 18-19 (quoting *Cleaver-Bascombe,* 892 A.2d at 411-12).

The Hearing Committee found that Respondent's conduct was less serious than Cleaver-Bascombe's but, because of the number of false CJA vouchers he submitted, a substantial suspension was warranted. H.C. Rpt. at 19, ¶ 23. It concluded that "taking into account all the aggravating and mitigating facts and circumstances[8] – as well as the desirability of an expeditious and final determination . . ." of the matter, the sanction was appropriate. *Id*.

II. DISCUSSION

Board Rule 17.5(a)(iii) provides that a Hearing Committee reviewing a negotiated discipline case is to determine whether the "agreed upon sanction is justified, taking into

[7] *In re Cleaver-Bascombe*, 892 A.2d 396 (D.C. 2006), on remand, *Supplemental Report and Recommendation of the Board of Professional Responsibility*, Bar Docket No. 183-02 (BPR July 21, 2006) *(*"Supplemental Report"). That supplemental report remains pending before the Court.

[8] Respondent was issued an Informal Admonition in February 2004 for violating Rules 1.15(a) and 1.16(d) by not retaining for the required five-year period a copy of his client's file and records concerning the handling of her settlement funds. Petition at 13.

consideration the record as a whole, including the nature of the misconduct, any charges or investigations that Bar Counsel has agreed not to pursue, any circumstances in aggravation and mitigation, and relevant precedent." The rule does not provide any further guidance for the Hearing Committees in deciding whether a proposed sanction is justified.

However, since one of the reasons the Court adopted the process for negotiated discipline was to expedite the disciplinary process, we interpret that standard as recognizing that Bar Counsel should have reasonable discretion as to the sanction imposed in a negotiated discipline matter and that the Hearing Committee's job – and ours here – is to ensure (a) that Bar Counsel has exercised that discretion responsibly and has agreed to a sanction that might have been imposed had the case proceeded to a hearing and the respondent was found guilty of the misconduct alleged, and (b) that the proposed sanction will further the three purposes of the disciplinary rules: to maintain the integrity of the profession, protect the public and the courts, and deter the respondent and other attorneys from engaging in similar conduct. *See, e.g., In re Pierson*, 690 A.2d 941, 948 (D.C. 1997). This standard of review is analogous to, but more stringent than, that applied by the Court in reviewing sanctions recommended by the Board, where, "[g]enerally speaking, if the Board's recommended sanction falls within a wide range of acceptable outcomes, it will be adopted and imposed." *In re Ukwu*, 926 A.2d 1106, 1120 (D.C. 2007) (quoting *In re Soininen*, 853 A.2d 712, 713 (D.C. 2004)).

As the Hearing Committee found, *Cleaver-Bascombe* is the closest case to this, and is the only other case we are aware of involving the submission to a court of false CJA vouchers.[9] In

[9] Respondent has admitted to violations of Rules 1.5(a) & (f), 3.3(a)(1), 8.4(c) & (d). The violation of Rules 1.5(a) & (b) would, in the normal case, result in a sanction from a public censure to a short suspension, if there were aggravating circumstances. *See, e.g. In re Avery*, 926 A.2d 719 (D.C. 2007) (per curiam); *In re Elgin*, 918 A.2d 362 (D.C. 2007); *In re Boykins*, 748 A.2d 413 (D.C. 2000) (per curiam). The violation of those rules is not the basis for the Court's remand, and the question before us is whether the negotiated disposition is an appropriate sanction for the violation of the latter three rules.

that case, Cleaver-Bascombe submitted a CJA voucher for compensation in connection with her representation of a client in an extradition proceeding. While the Board found that she represented her client adequately and that the record did not support "a finding that Respondent billed for a greater amount of time than she actually spent," *Cleaver-Bascombe*, Supplemental Report at 3-4, the voucher contained requests for compensation for numerous items she did not perform, including a two-hour conference with her client in prison, several one-hour telephone conversations with the client, etc. *Id.* at 4-5. At the hearing, she testified that the voucher accurately reported her efforts and introduced the testimony of a third-party witness, whose testimony the Hearing Committee found not reliable. *Id.*

The Hearing Committee concluded that Cleaver-Bascombe had violated Rules 1.5(a) and 8.4(c) by knowingly filing a false CJA voucher, but also held that, while her testimony was not credible, she had not committed perjury. The Board concluded that she had not only violated Rules 1.5(a) and 8.4(c), but that she had also violated Rules 3.3(a)(1), and 8.4(d). However, it agreed with the Hearing Committee that she had not committed perjury. Both the Hearing Committee and the Board recommended a 90-day suspension with a CLE requirement. *In re Cleaver-Bascombe*, Bar Docket No. 182-02 at 25-32 (BPR Dec. 17, 2004) ("Original Report"). On appeal, the Court held that there was an unreconciled tension between the findings that Cleaver-Bascombe had knowingly filed a false CJA voucher and that her testimony was not credible, and the conclusion that she did not commit perjury when she testified. It remanded the case to the Board for a better explanation. *Cleaver-Bascombe,* 892 A.2d at 410-11.

On remand, the Board concluded that the record supported "the finding that Respondent's description of her specific activities in the voucher was false." Supplemental Report at 4. It found that her voucher appeared to be "a scattershot of whatever occurred to [her] at the time she

prepared it without much deliberation of any kind," *id*. at 5, and that "Respondent's submission of the voucher was more than an exercise of mere recklessness; she knew full well that she had no reliable basis for reconstructing the services she had rendered and so she made it up." *Id*. The Board therefore concluded that she had perjured herself at the hearing. *Id*. at 6. It also noted, however, that had she:

> admitted that she reconstructed her time records well after the fact, had she acknowledged that she did so based on her recollection but may well have made mistakes, and had she shown that she did not seek payment for more time than she actually spent on the matter, we suspect the Court would not have questioned our sanction [of a 90-day suspension with a CLE requirement]. Instead, Respondent defended her voucher as written and insisted it fairly reflected the services she rendered.

Id. The Board recommended a two-year suspension with fitness.[10]

Both Bar Counsel and Respondent contend that *Cleaver-Bascombe* is distinguishable from this matter. Both note that Cleaver-Bascombe testified falsely before the Hearing Committee whereas Respondent has admitted that he filed false CJA vouchers. B.C. Brief at 8; Resp. Brief at 6. Both note that Cleaver-Bascombe never accepted responsibility for her conduct, while Respondent has. *Id*. Both note that Respondent has cooperated fully with Bar Counsel and reimbursed the court for the difference between his overcharges and the amount estimated he would have been due for CJA cases for which he did not file a CJA voucher, while Cleaver-Bascombe did neither. *Id*. Both note as a mitigating factor Respondent's acceptance of CJA cases *pro bono*, while there is no evidence that Cleaver-Bascombe did. *Id*. Finally, both cite to the Court's statement that had Cleaver-Bascombe been negligent or even reckless, it might have accepted a short suspension and argue that this is a case of recklessness, which under

[10] There were two dissents; one which would have imposed a lesser sanction and the other which would have recommended that Cleaver-Bascombe be disbarred.

Cleaver-Bascombe would warrant only a short suspension. B.C. Brief at 8-9; Resp. Brief at 5. In contrast, Cleaver-Bascombe filed one false CJA voucher whereas Respondent filed 162, thus involving more money and potential harm to the public fisc. B.C. Brief at 7.

Nonetheless, we agree that the differences noted by the parties distinguish this case from *Cleaver-Bascombe*, and warrant a lesser sanction than imposed there. *Cleaver-Bascombe* involved not only the submission of a knowingly false CJA voucher to the court, but also false testimony before the hearing committee. Here, Respondent has acknowledged that he submitted false CJA vouchers, has cooperated with Bar Counsel and taken steps to ameliorate his misconduct. These facts bring this case very close to the hypothetical posed by the Court in *Cleaver-Bascombe* that would have warranted only a relatively short suspension had she not compounded her false vouchers with false testimony. However, the number of vouchers and the period of time involved here – 162 vouchers over four years – take this case out of the "short suspension" category and, we believe, require a substantial and meaningful suspension.

Respondent maintains that a nine-month suspension for his conduct is within the range of sanctions imposed for the knowing filing of multiple false documents, *see* Resp. Brief at 11-18, with many of those cases resulting in sanctions of 30 days to 18 months. For example, the Court imposed a suspension of 30 days in *In re Owens*, 806 A.2d 1230 (D.C. 2002) (per curiam), where the respondent had filed false statements under oath with an administrative law judge in order to cover up her attempt to eavesdrop on testimony in violation of the judge's sequestration order; in *In re Uchendu,* 812 A.2d 933 (D.C. 2002), where respondent submitted multiple documents in probate matters where he had signed his clients' names, without initialing the signatures, and had notarized the documents, attesting that the signatures were real; and in *In re Rosen*, 481 A.2d 451

(D.C. 1984), where the respondent had knowingly made three false statements in documents filed with a court.

The Court has imposed suspensions of 60 days in *In re Phillips,* 705 A.2d 690 (D.C. 1998) (per curiam), where the respondent filed a false and misleading petition in federal court and had been held in criminal contempt by the court; in *In re Zeiger,* 692 A.2d 1351 (D.C. 1997) (per curiam), where the respondent falsified a client's medical records before submitting them to an insurance company for reimbursement; and in *In re Jackson,* 650 A.2d 675 (D.C. 1994) (per curiam), where the respondent had prepared and submitted fraudulent tax returns for a client with the intent to deceive both his clients and the IRS. Other cases involving suspensions for shorter periods of time than involved here for submitting false documents with a tribunal include: *In re Waller,* 573 A.2d 780 (D.C. 1990) (per curiam) (60-day suspension for false testimony); *In re Romansky,* 938 A.2d 733 (D.C. 2007) (30-day suspension for falsifying time records to increase fees); *In re Schneider,* 553 A.2d 206 (D.C. 1989) (30-day suspension for altering travel records in violation of predecessor to Rule 8.4(c)); *In re Mendoza,* 885 A.2d 317 (D.C. 2005) (per curiam) (90-day suspension for submitting false CJA vouchers to a factoring agent); and *In re Reback,* 513 A.2d 226 (D.C. 1986) (en banc) (six-month suspension for signing a client's name to a complaint and having the false signature notarized).

Longer suspensions have been imposed in cases that involved the submission of false documents or statements intended to mislead. Thus, the Court imposed a one-year suspension in *In re Powell,* 898 A.2d 365 (D.C. 2006) (per curiam), where the respondent failed to disclose his temporary suspension by the Court in an application for admission to bar of a federal court; in *In re Hutchinson,* 534 A.2d 919 (D.C. 1987) (en banc), where the respondent gave false, sworn testimony in a stock transaction where he had been convicted of a misdemeanor criminal offense;

and in *In re Thompson*, 538 A.2d 247 (D.C. 1987) (per curiam), where the respondent, who had a history of rule violations, knowingly assisted a client in making a false statement on an immigration application. Similarly, it imposed an 18-month suspension in *In re Parshall*, 878 A.2d 1253 (D.C. 2005) (per curiam), where the respondent had "intentionally misled" a district court by filing at least one false status report and fabricated supporting documents; and in *In re Mayers*, 943 A.2d 1170 (D.C. 2008) (per curiam), where the respondent had altered checks filed with the court and falsely inflated the amount of child support payments he had made.

We do not believe that Respondent's misconduct rises to the level of that involved where the Court has imposed the most stringent sanctions for violations of the same rules as involved here. In those cases, the misconduct was more egregious, resulting in harm to clients or situations where the attorney engaged in the misconduct for his or her own benefit. For example, the Court suspended the respondent for two years with a fitness requirement in *Ukwu*, 926 A.2d at 1120, where he lied to a client and the hearing committee, falsely claimed that he had written and sent certain letters to a client, and directed a client to file a statement with the Immigration and Nationalization Service which he knew, or should have known, was false. He also intentionally neglected the interest of a series of other immigration clients.

More severe sanctions were imposed in *In re Pelkey*, 962 A.2d 268 (D.C. 2008) (disbarment), *In re Ayeni*, 822 A.2d 420 (D.C. 2003) (per curiam) (disbarment), and *In re Corizzi*, 803 A.2d 438 (D.C. 2002) (disbarment), but all of those cases involved significant other serious misconduct in addition to the submission of a false statement to the court. In *Pelkey*, the respondent engaged in conduct that amounted to theft from his business partner, lied to the arbitration tribunal and to the Hearing Committee and was found to have engaged in persistent, protracted and extremely serious and flagrant acts of dishonesty. *Ayeni* involved some 11 ethical

complaints, including submitting a voucher for compensation for 19 hours for drafting a brief which was prepared by an intern, and *Corizzi* involved the suborning of perjury.

Respondent's misconduct did not involve any of these kinds of aggravating elements. While Respondent admitted that he violated Rule 3.3(a)(1) in submitting the false vouchers, there is no evidence that Respondent intended to defraud the court or obtain unwarranted compensation; rather, the record confirms that his conduct was not malevolent. Respondent testified during the hearing on his negotiated discipline and was questioned by members of the Hearing Committee. He explained, as discussed above, how he submitted the false CJA vouchers. The Hearing Committee found Respondent's explanation that he did not intend to defraud the court credible. *See* H.C. Rpt. at 19, ¶ 22. That conclusion was reached after the Chairman of the Hearing Committee reviewed Bar Counsel's files *ex parte*, as required under Rule 17.

Further, it is notable that not all of the errors were in Respondent's favor. Bar Counsel concedes that Respondent failed to seek compensation for his work on behalf of at least 42 CJA clients, and the Hearing Committee held that "Respondent credibly testified that he failed to bill at least $23,000 on CJA cases." H.C. Rpt. at 12. In addition, had Respondent intended to defraud or secure unwarranted compensation, he would have been far more careful about the vouchers he did file in order to avoid double billing, something that is relatively easy to spot.[11] Finally, the U.S. Attorney's Office reviewed the matter and decided not to prosecute Respondent. While that office operates under different criteria than the disciplinary system, and

[11] Respondent notes that he could have billed for much of the time he double-billed had he kept adequate records. Resp. Brief at 6. He did not seek to recover that time and reimbursed the Court for the difference between the value of the double-billed time less a reasonable estimate of time associated with other CJA cases for which he had not submitted any vouchers. Based on the record here, it appears that Respondent has not benefitted from his double-billing and has received less compensation than he would have received had he maintained adequate records.

is subject to a higher burden of proof, its decision provides some indication that it could not show the *mens rea* required for a fraud case. Thus, we find that the Hearing Committee's conclusion that Respondent's submission of false CJA vouchers was not fraudulent or designed to gain compensation for work he did not perform is supported by substantial evidence in the record.

We are nonetheless concerned about the volume of false vouchers and the fact that the practice continued over four years. Respondent knew he was preparing the CJA vouchers long after the fact and from records that were not adequate. He undoubtedly knew that there was a risk, indeed a likelihood, that some of the information was not accurate. Yet, he did not correct his acknowledged sloppy recordkeeping habits. Given that fact and the sheer volume of false vouchers, a suspension of effectively six months – nine months with three months stayed – is too short compared with the cases in which comparable sanctions were imposed.[12] That is so even accepting that Respondent has cooperated fully with Bar Counsel, has made a good faith effort to repay to the Court any overpayment, and has undertaken the *pro bono* representation of CJA clients. We believe a more appropriate sanction would be an 18-month suspension, with six months stayed subject to the terms of the agreed-upon probation.

We are also concerned that the only sanction for Respondent's failure to honor the terms of his probation would be that his suspension would resume for the remaining unserved term. Since the terms of the probation are well designed to address the reckless habits that led to Respondent's problems here, any meaningful or repetitive failure to adhere to them would, in our view, raise questions as to Respondent's qualifications to practice law after the end of the

[12] Respondent relies heavily on *Mendoza*, where respondent was suspended for 90 days. However, *Mendoza* did not involve the submission of knowingly false statements to the court. Rather, the false vouchers were submitted to a factoring agent. Further, that case involved 27 false vouchers; not 162.

suspension. Consequently, we believe that a fitness requirement should be imposed as a condition of reinstatement if Respondent fails to comply with the terms of the probation. *See In re Bingham,* 881 A.2d 619, 624 (D.C. 2005) (per curiam) (fitness imposed if respondent failed to accept probation or pay restitution).

III. CONCLUSION

Accordingly, we recommend that the Court find that the proposed sanction does not comport with the requirements of D.C. Bar R. XI, §12.1 and reject the Petition for Negotiated Discipline. Pursuant to Board Rule 17.7, the parties should be allowed to submit a modified proposal more in line with our suggested sanction. We do not believe, based on the record developed in this case, that requiring a full evidentiary hearing is likely to produce any significant new evidence that would alter our recommendation. Consequently, the better course is for the parties to be given the opportunity to resolve this matter without the burdens and time associated with a full evidentiary hearing.

BOARD ON PROFESSIONAL RESPONSIBILITY

By: /TDF/
Theodore D. Frank

Dated: November 24, 2009

All members of the Board concur in this Report and Recommendation.