THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

Issued
January 17, 2019

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| In the Matter of: | : | |
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| MICHAEL M. WILSON, | : | |
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| Respondent. | : | Board Docket No. 15-BD-064 |
| | : | Disciplinary 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 THE BOARD ON PROFESSIONAL RESPONSIBILITY

Hearing Committee Number Four ("Hearing Committee") found that Respondent, Michael M. Wilson ("Respondent"), violated District of Columbia Rules of Professional Conduct 1.1(a) (failing to provide competent representation), 1.2(a) (failing to consult with all clients about settlement), 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), 1.4(b) (failing to explain the status of the matter necessary to allow the client to make informed decisions), and 1.7(b)(2) (representing clients when the representation was adversely affected by representation of another client), arising from his joint representation of family members in a wrongful death/medical malpractice case.

As set forth in its thorough and well-reasoned report, the Hearing Committee viewed "[t]he core violation [as] the Rule 1.7 violation[,]" based on Respondent's

* Consult the 'Disciplinary Decisions' tab on the Board on Professional Responsibility's website (www.dcattorneydiscipline.org) to view any prior or subsequent decisions in this case.

Respondent's "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." HC Rpt. at 43. Although the Hearing Committee found no evidence that Respondent acted in his own self-interest and that "[t]here was no dishonesty or misrepresentation in the conduct charged in this matter[,]" it concluded that Respondent gave intentionally false testimony regarding the circumstances of his drafting of a distribution agreement. *Id.* at 44, 47; *see* Finding of Fact ("FF") 15. The Hearing Committee recommended a thirty-day suspension, stayed for one year of probation with the requirement that Respondent take eight hours of continuing legal education courses.

Neither party disputes the Hearing Committee's conclusions on the Rule violations. Disciplinary Counsel argues that the Hearing Committee erred in its sanction analysis by (1) staying the suspension after finding that Respondent gave intentionally false testimony; (2) failing to find that Respondent gave dishonest testimony in two additional instances; and (3) relying on "comparable" sanctions cases which did not involve dishonest hearing testimony. Disciplinary Counsel also argues that a probationary sanction is insufficient in light of Respondent's failure to understand his wrongful misconduct or accept responsibility for it. ODC Br. at 11; *see also* Reply Br. at 8-9. Respondent argues that the recommended thirty-day stayed suspension is within the range of sanctions for comparable misconduct and asserts that the Board should consider the fact that he is a sole

practitioner in recommending a stayed suspension, arguing that "[a]n outright suspension can cause irrevocable damage to a sole law practice, and the Court of Appeals is very hesitant to bring about that result." Resp. Br. at 18 (citing *In re Robinson*, 635 A.2d 352, 355 (D.C. 1993) (per curiam) (appended Board Report)).

Having reviewed the record and the parties' briefs, the Board adopts the Hearing Committee's factual findings, as supported by substantial evidence in the record, and concurs with the legal conclusions as to the Rule violations. With respect to sanction, we agree with Disciplinary Counsel that the single instance of intentionally false testimony found by the Hearing Committee, and Respondent's failure to acknowledge timely the wrongfulness of his conduct, are sufficiently aggravating to require that Respondent serve the thirty-day suspension. We thus recommend that the Court suspend Respondent for thirty days, but allow the suspension to begin on a date selected by Respondent within ninety days of the Court's suspension order.

## I. Factual Summary

The Board adopts the Hearing Committee's findings of fact (FF 1-44), *see* HC Rpt. at 1-18[1], pursuant to Board Rule 13.7. The following is a summary of the facts.

On May 10, 2012, Cynthia Coleman-Fields died intestate following surgery. During a May 15, 2012 meeting, Respondent agreed to represent Ms.

[1] References to the Hearing Committee's Report and Recommendation are designated "HC Rpt. at _."

Coleman-Fields' husband, Robert Fields, and three of her adult children, Demetrius Davis, Ashley Coleman and April Coleman (collectively "Ms. Coleman-Fields' children"), and the to-be-formed Estate of Cynthia Coleman-Fields. Susan Liberman, another lawyer who handled the probate case, participated in part of the meeting by telephone. Respondent did not identify or explain to the family members any potential conflicts of interest arising from this joint representation, other than a vague statement about the distribution agreement he drafted.

Mr. Fields said at the May 15 meeting that he wanted to divide the proceeds of any lawsuit evenly with the children and asked Respondent to prepare an agreement. Although Respondent did not want to draft such a distribution agreement because of the conflicting interests of the family members (*i.e.,* one of his clients (Mr. Fields) would receive less than the fifty-percent share he would receive otherwise, while the others would receive more than they otherwise would) and because he was not familiar with probate law or drafting contracts, Respondent nonetheless prepared a handwritten "distribution agreement" that provided, in part: "We have agreed that the husband and the 4 children will equally divide the net proceeds, regardless of D.C. Probate law." Only Mr. Fields signed this document.

After Ms. Liberman opened the Estate, with Mr. Fields designated as the Personal Representative, she told Respondent and Mr. Fields that she believed the distribution agreement Respondent had drafted was not binding. Mr. Fields subsequently decided that he did not want to evenly share the proceeds with the

children. Respondent did not share with Ms. Coleman-Fields' children, his other clients, either that the agreement was invalid or Mr. Fields' decision not to share the proceeds evenly.

At the hearing, Respondent contended that he had *intentionally* drafted an *invalid* distribution agreement and that he told his clients that the agreement was invalid. The Hearing Committee found that Respondent's testimony was dishonest and a "*post hoc* rationalization" to explain his error in drafting the distribution agreement. Respondent does not contest this finding before the Board, and we agree that Respondent's testimony was dishonest.

Later in 2012, the relationship between Mr. Fields and his late wife's children broke down, and Mr. Fields directed Respondent not to communicate with Mr. Davis about the case. Believing that Mr. Fields, as Personal Representative, had the authority to give him this direction, Respondent complied, but made no effort to withdraw from his representation of Mr. Davis and Ms. Coleman-Fields' other children.

Respondent filed a wrongful death action on behalf of the Estate in November 2012 and an amended complaint in April 2013, without telling Ms. Coleman-Fields' children. They were informed that the case would be mediated and a likely settlement range, but Mr. Fields alone decided to settle the case at the mediation. As even Disciplinary Counsel agrees, the record shows that '"Respondent handled the wrongful death litigation with skill and care and obtained a reasonable settlement for his clients."' HC Rpt. at 44 (quoting ODC

HC Brief at 19).

Following the settlement, Mr. Davis learned that despite the May 2012 distribution agreement to divide the proceeds evenly, Respondent intended to pay half of the settlement proceeds to Mr. Fields and divide the other half among Ms. Coleman-Fields' children. Mr. Davis objected to this proposed distribution as contrary to the distribution agreement. Respondent then told him for the first time that the distribution agreement was not binding. Because there was a dispute among his clients as to how the settlement proceeds were to be divided, Respondent escrowed the funds and attempted to mediate the dispute. He ultimately negotiated an agreement whereby Mr. Fields would receive 37.5 percent and Ms. Coleman-Fields' children would split the remaining 62.5 percent.

## II. Conclusions of Law

Neither party disputes the Hearing Committee's conclusion that Respondent did not provide competent representation, in violation of Rule 1.1(a), by drafting an invalid distribution agreement (HC Rpt. at 26-28); failed to consult with Ms. Coleman-Fields' children about settlement or obtain their consent before settling the wrongful death case in violation of Rule 1.2(a) (*id.* 30-31); failed to communicate with Mr. Davis in violation of Rule 1.4(a) and 1.4(b) (*id.* 33-34); and engaged in a conflicting representation (of Mr. Fields and Ms. Coleman-Fields' children) without obtaining informed consent from all clients in violation of Rule 1.7(b)(2) (*id.* 39-42).

We agree with the Hearing Committee's conclusions regarding the Rule violations for the reasons set forth in the Hearing Committee report.[2]

## III. Sanction Recommendation

Disciplinary Counsel excepts to the sanction recommendation, arguing that the Hearing Committee erred in its sanction analysis by (1) staying the suspension after finding that Respondent gave intentionally false testimony, (2) failing to find that Respondent was dishonest in his testimony on two additional grounds, and (3) relying on "comparable" sanctions cases which did not involve the respondent's dishonest testimony.

Respondent argues that the Board should accept the Hearing Committee's credibility determinations and adopt the sanction recommendation of a thirty-day stayed suspension, based on comparable misconduct cases and his contention that the Court gives significant weight to the imposition of a suspensory sanction on sole practitioners.

Thus, the only dispute between the parties is whether the thirty-day suspension should be stayed, as recommended by the Hearing Committee (and

[2] In his Answer to the Petition, Respondent requested that the Board dismiss the charges and direct an alternative disposition consistent with the diversion agreement Disciplinary Counsel offered to Respondent 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 recommended that the Board deny Respondent's request on the grounds that (i) Respondent did not argue a valid basis for dismissal and (ii) only Disciplinary Counsel may offer diversion under D.C. Bar R. XI, § 8.1(c). HC Rpt. at 18. Because neither party addressed this issue in their briefs to the Board, we deny Respondent's dismissal request for the reasons set forth in the Hearing Committee report. *Id.*

argued by Respondent), or served (as argued by Disciplinary Counsel). For the reasons set forth below, we recommend that Respondent be required to serve the thirty-day suspension.

A. Aggravating Factor of Dishonesty

We begin our sanction analysis with Disciplinary Counsel's argument that the Hearing Committee erred in failing to find that Respondent lied to the Hearing Committee when he testified that (1) the May 15, 2012 retainer agreement was an "interim" agreement, and all involved understood that the Estate would be Respondent's only client once it was formed; and (2) he had received Mr. Davis' approval to settle the wrongful death claim for between $400,000 and $600,000. Whether the Respondent gave sanctionable false testimony before the Hearing Committee is a question of ultimate legal fact that the Board reviews *de novo*. *See In re Bradley,* 70 A.3d 1189, 1194 (D.C. 2013) (per curiam). Disciplinary Counsel bears the burden of proving facts in aggravation of sanction by clear and convincing evidence, which 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 and quotation marks omitted); *In re Downey,* 162 A.3d 162, 167-69 (D.C. 2017) (Disciplinary Counsel must prove alleged dishonest testimony by clear and convincing evidence).

With respect to the "interim" nature of the May 2012 retainer agreement, Disciplinary Counsel argues that Respondent's testimony was false because he offered this explanation for the first time at the hearing, despite myriad earlier

opportunities to present this exculpatory information. ODC Brief at 6-7; *see also* Reply Br. at 3. In response, Respondent cites to the Hearing Committee's finding that Respondent's initial response to the disciplinary complaint asserted that he told the family that he would be representing the Estate and not any individual family members. Resp. Br. at 14 (citing FF 19 (citing RX 2)). Disciplinary Counsel argues that the Hearing Committee's paraphrase of Respondent's response letter "does not say what the Hearing Committee and Respondent say it says." Reply Br. at 4. For the reasons set forth below, we agree with the Hearing Committee and Respondent.

We agree with Disciplinary Counsel that nothing in the retainer agreement suggests that it is "interim" in any way, and in fact, it provides that Respondent will "provide representation in a claim for medical malpractice claims and wrongful death claims *on behalf of each of us* [(Mr. Fields and Ms. Coleman-Fields' children)] and the Estate of Cynthia B. Coleman-Fields." BX 2 at 1 (emphasis added). This is plainly contrary to the notion that the Estate would be the only client after it was formed.

However, as the Hearing Committee recognized, Mr. Fields testified that Respondent explained that initially the individual family members were the clients, "but once the estate was established, the estate would be the clients [sic]." Tr. 294.

In addition, in his initial response to the disciplinary complaint, while Respondent did not assert that it was an "interim" agreement, he asserted that he

had explained to the parties that (1) the nature of his representation would change once the Estate was established; (2) once the Estate was opened "he would then actually be working for the Estate and not [for] each of them individually"; (3) if the wrongful death case settled without the parties' agreement on a division of the proceeds, "they could then each retain their own counsel who would represent them in the settlement distribution negotiations with each other," but Respondent "could not take sides, advocate for or represent any of the beneficiaries"; and (4)

> [t]he Retainer Agreement that the Parties executed was consistent with the understanding that once the Estate was opened, the Estate would be the client, and not any of the individual beneficiaries. However, in some ways, [Respondent] viewed this as an academic point because under D.C. law, the Estate's attorney is responsible to represent the interests of the beneficiaries at trial.

RX 2 at 66-67.

There is no doubt that all of Respondent's clients did not understand that the Estate would be the sole client after its creation. However, the issue here is whether Respondent lied to the Hearing Committee when he described the May 15 retainer agreement as an "interim" agreement. We do not have a "firm belief" that Respondent's hearing testimony on this point was intentionally false, because Mr. Fields testified that Respondent explained that the Estate would be the client after it was formed, and the explanation given in Respondent's initial response to Disciplinary Counsel is sufficiently similar to Respondent's disputed testimony about the nature of the agreement.

Disciplinary Counsel next argues that Respondent testified falsely "that after Mr. Fields gave him permission to inform the other family members about mediation, [Respondent] discussed with Mr. Davis [sic] and received his approval to accept a settlement between $400,000 and $600,000." *See* ODC Brief at 8 (citing Tr. 433). Respondent argues that Disciplinary Counsel is wrong and that he "did not falsely testify that he sought settlement approval from Mr. Davis; rather he testified that he specifically told Mr. Davis that he was not seeking his consent." Resp. Br. at 15 (citing Tr. 433). Because the parties are arguing about the meaning of Respondent's testimony on page 433, we set out the relevant testimony here:

> So I explained to [Mr. Davis] that the top end[] was maybe 7, 750, and the bottom end was maybe 3 or $400 thousand, if they want to not credit her future earnings, not credit or properly evaluate the lost wages and instructions; so I said it was somewhere around that range. And I said that as far as I'm concerned, you know, it would be nice to have 4 or $500,000. We'd love to have $600,000; but that's about what we're talking about, I said what would you think about something in that range. And I had told him, you know, very clearly that he doesn't have a say. It's only the PR who has a say, but I wanted his input to the PR and—and that was valuable. So I said the range is—that's the range, I said what do you think about that. He said hmm, he said I don't know, it sounds pretty good to me. He said—and I said, you know, is that the range that you think we should settle for, and he said yes, and if you could get us somewhere in that range, that would work for me.

We agree with Respondent that he did not testify that he received Mr. Davis's *approval* to settle the case for between $400,000 and $600,000. As Respondent correctly notes, he testified that he told Mr. Davis that Mr. Davis

"doesn't have a say" as to the settlement amount, "[i]t's only the PR who has a say," but that Respondent wanted Mr. Davis' "input to the PR." Tr. 433. To be sure, Respondent's testimony could be seen as inconsistent with Mr. Davis' somewhat narrower testimony that he and Respondent never discussed "the amount for which [Mr. Davis] might be willing to settle the case." Tr. 65. However, Mr. Davis's testimony is not sufficiently clear to find by clear and convincing evidence that Respondent's testimony was wrong, much less an intentional falsehood. First, it is literally true that Respondent never discussed the amount for which *Mr. Davis* would be willing to settle the case because Mr. Davis had no authority to settle the case. Second, even if Mr. Davis' testimony were understood to be inconsistent with Respondent's testimony on page 433, that inconsistency alone is not sufficient to establish clear and convincing evidence that Respondent's testimony was an intentional falsehood, given the ambiguity in Mr. Davis' testimony.

B. Recommended Sanction

The Board concurs with and adopts the Hearing Committee's conclusions regarding the seven sanction factors. *See* HC Rpt. at 43-46. Having found no additional aggravating factors, we next address Disciplinary Counsel's argument that the Hearing Committee erred in recommending a fully-stayed suspension despite finding that Respondent testified falsely during the disciplinary hearing. As noted above, the parties seem to agree that Respondent should be suspended for thirty days; the sole point of disagreement is whether the suspension should be

stayed or served.

In arguing in favor of the stayed suspension, Respondent asserts that the Court gives "significant weight" to practitioners' status as sole practitioners and is "very hesitant" to cause "irrevocable damage to a sole law practice" by suspending a sole practitioner who has engaged in misconduct. In support, Respondent cites only to *In re Robinson,* 635 A.2d 352, where the Court appended the Board's report, which noted that a suspension would have "a drastic adverse financial impact on" Respondent. *Id.* at 355 (appended Board Report). This is an observation, not guidance that this impact should be avoided. Respondent cites no other cases to support the notion that the imposition of a suspension should be stayed if the suspension would have a "drastic impact" on the respondent's solo practice.

The Court has observed that a disciplinary suspension "has a greater impact on a solo practitioner, or lawyer in a very small firm, than on a lawyer who is part of a larger practice where other attorneys can more easily step in during the period of suspension." *In re Mance,* 980 A.2d 1196, 1208 (D.C. 2009). However, sole practitioners are not categorically entitled to more lenient treatment simply by virtue of the size of their law practice, and any number of sole practitioners have been suspended since *Robinson*. *See, e.g.*, *In re Avery,* 189 A.3d 715 (D.C. 2018) (per curiam); *In re Chapman,* 962 A.2d 922 (D.C. 2009) (per curiam); *In re Outlaw,* 917 A.2d 684 (D.C. 2007) (per curiam); *In re Hallmark,* 831 A.2d 366 (D.C. 2003).

Pursuant to D.C. Bar R. XI, § 9(h), we must recommend a sanction that is consistent with the sanctions imposed in cases involving comparable misconduct, and not otherwise unwarranted. We agree with Disciplinary Counsel that the cases relied on by the Hearing Committee in its sanction analysis did not involve "comparable" misconduct because none involved intentional false testimony to the Hearing Committee, as is the case here. As Disciplinary Counsel correctly argues, false testimony to a Hearing Committee is a significant aggravating factor. *In re Cleaver-Bascombe,* 892 A.2d 396, 412 (D.C. 2006); *In re Tun,* 195 A.3d 65, 74-75 (D.C. 2018) (false testimony is a significant aggravating factor where the respondent lied to cover-up the misconduct). Here, Respondent lied to the Hearing Committee about his incompetent drafting of the distribution agreement. Specifically, rather than accepting responsibility for the drafting error, Respondent testified that he drafted an unenforceable agreement on purpose, and that he had so informed the clients. Tr. 415-18, 473. "While respondents are entitled to deny [Disciplinary] Counsel's charges, they are not immune from sanctions for making affirmative false statements in connection with disciplinary proceedings." *In re Corizzi*, Bar Docket No. 219-98 *et al.*, at 27 (BPR Mar. 14, 2001), *aff'd*, 803 A.2d 438 (D.C. 2002). Notably, in his brief to the Board, Respondent does not challenge the Hearing Committee's finding of false testimony.

Neither the Hearing Committee, nor Respondent in his brief to the Board, have cited a case in which a respondent who testified falsely has received a fully-stayed suspension. We have similarly been unable to locate such a case. Instead,

cases involving false testimony have resulted in a suspension, and for good reason. As the Court observed in *Cleaver-Bascombe,* "an attorney who presents false testimony during disciplinary proceedings clearly does not appreciate the impropriety of his or her conduct." 892 A.2d at 412 (internal citation, quotations and alterations omitted). Thus, "[d]eliberately dishonest testimony receives great weight in sanctioning determinations because a respondent's 'truthfulness or mendacity while testifying on his own behalf, almost without exception, [is] probative of his attitudes toward society and prospects of rehabilitation[.]'" *In re Chapman,* 962 A.2d at 925 (alterations in original) (citation omitted) (Court imposed sixty-day suspension with thirty days stayed in favor of a one-year probation, rather than the stayed suspension recommendation, where the respondent's testimony to the hearing committee was either not credible or deliberately dishonest); *see also In re Avery,* 189 A.3d at 721 (Court imposed sixty-day suspension with thirty days stayed in favor of a one-year probation rather than the "stay-in-favor-of probation recommendation" in case involving not credible or false testimony).[3]

Respondent's intentionally dishonest testimony distinguishes the facts here from those in *In re Boykins,* 748 A.2d 413 (D.C. 2000) (per curiam), on which the Hearing Committee relies in recommending a stayed 30-day suspension. Because the significant aggravating factor of dishonesty is present here, and not in *Boykins,*

[3] The Court's decision in *In re Avery* was released on August 2, 2018, several months after the Report and Recommendation in this matter was issued. Thus, the Hearing Committee did not consider *Avery* in its sanction analysis or recommendation.

we recommend that the Court require Respondent to serve the thirty-day suspension.

Although we reject Respondent's argument that we should consider Respondent's status as a sole practitioner when recommending a consistent sanction for comparable misconduct, we recognize that in *In re Avery* the Court considered potential harm to clients as a factor in allowing a respondent to begin his thirty-day suspension within ninety days of the Court's suspension order. 189 A.2d at 722. The Court allowed such flexibility after recognizing that "clients, as well as respondent, may be prejudiced by respondent's having to give up his practice," and that allowing additional time before the suspension begins may be a help to clients in allowing for the expeditious resolution of pending matters, or the enlistment of successor counsel. *Id.* at 721 (citation and quotation marks omitted); *see also In re Ontell,* 593 A.2d 1038, 1043 (D.C. 1991) (allowing similar flexibility regarding the timing of the served suspension). We note that in *Avery,* the Court relied on the D.C. Bar's Practice Management Advisory Service assessment that the respondent had substantially improved his practice since the time of the misconduct, and that such assessment is not present here. However, not only do Disciplinary Counsel's charges not relate to the Respondent's handling of the underlying wrongful death litigation, but the Hearing Committee concurred with *Disciplinary Counsel's* assessment that '"Respondent handled the wrongful death litigation with skill and care and obtained a reasonable settlement for his clients."' HC Rpt. at 44 (quoting ODC HC Brief at 19). Thus, here, the record

supports the conclusion that Respondent's clients may be adversely impacted by his suspension from practice, which favors allowing Respondent's suspension to begin somewhat later than thirty days after the Court's order, as provided in D.C. Bar R. XI, § 14(f).

## IV. Conclusion

For the foregoing reasons, the Board adopts the findings of fact of the Hearing Committee and its conclusions of law that Disciplinary Counsel has proven by clear and convincing evidence that Respondent violated Rules 1.1(a), 1.2(a), 1.4(a), 1.4(b), and 1.7(b)(2). The Board recommends that Respondent be suspended for thirty days, and that, like *Avery*, the thirty-day period of actual suspension shall begin on a date Respondent selects—and reports in advance to Disciplinary Counsel—within ninety days after the Court's suspension order, provided that he has by that date filed the affidavit required by D.C. Bar Rule XI, § 14(g).

BOARD ON PROFESSIONAL RESPONSIBILITY

By: Elissa J. Preheim
Elissa J. Preheim

All members of the Board concur in this Report and Recommendation except Ms. Pittman, who is recused, and Mr. Hora and Ms. Sargeant, who did not participate.