DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:	:	
	:	
SETH ADAM ROBBINS, ESQUIRE,	:	
	:	Board Docket No. 15-BD-118
Respondent.	:	Bar Docket No. 2013-D431
	:	
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration Number: 471812)	:	

REPORT AND RECOMMENDATION
OF THE BOARD ON PROFESSIONAL RESPONSIBILITY

This conflict of interest matter arises out of a business relationship between Persaud Companies, Inc. (a government contractor, represented by Respondent), Gary Day (who agreed to indemnify Persaud's surety in the event of Persaud's default), and Chesapeake Escrow Services, LLC (a company in which Respondent owned an interest). Prior to the events at issue, Respondent had represented Mr. Day in four or five different matters. The primary issue presented is whether Respondent also acted as Mr. Day's attorney here, or whether, as Respondent contends, he was merely presenting a business opportunity to a friend.

Hearing Committee Number One found that Respondent represented both Persaud and Mr. Day, that his representation of Mr. Day was adversely affected by his representation of Persaud, and that it was likely adversely affected by his ownership interest in Chesapeake. The Hearing Committee concluded that Mr. Day's testimony, "that he believed that Respondent was his lawyer in connection

with the Persaud matter," was credible. FF 26.[1] The Hearing Committee further found that Mr. Day's belief was reasonable given Respondent's interactions with Day on the Persaud matter. H.C. Rpt. at 16-17. After determining that Respondent had an attorney-client relationship with Mr. Day, the Hearing Committee found that Respondent did not obtain Mr. Day's informed consent to the conflicting representations, and thus concluded that Respondent violated D.C. Rules of Professional Conduct 1.7(b)(2) and 1.7(b)(4). *Id.* at 19-22. The Hearing Committee also concluded that Respondent failed to communicate with Mr. Day, in violation of Rule 1.4(a). *Id.* at 18-20. The Hearing Committee recommended that Respondent be suspended for sixty days, with reinstatement conditioned on Respondent taking four hours of ethics CLE. *Id.* at 29. Respondent filed an exception; Disciplinary Counsel did not.

Respondent argues that the evidence does not support the Hearing Committee's conclusion that Respondent was in an attorney-client relationship with Mr. Day. He faults the Hearing Committee for not articulating a clear standard for determining the existence of an attorney-client relationship, for ignoring the standard set forth in the *Restatement of the Law Governing Lawyers*, and other non-D.C. authority, and for ignoring evidence favorable to Respondent. Respondent's primary argument is that Mr. Day never asked Respondent for *legal* advice, much less for representation in the transaction at issue, and thus, there could be no attorney-client relationship. Separately, he argues that, under principles of collateral estoppel, we

[1] "FF" refers to Hearing Committee Number One's Findings of Fact.

should be bound by the decision of a three-judge panel in Virginia that considered the record before Hearing Committee Number One (including the Hearing Committee Report), and concluded that there was no attorney-client relationship between Respondent and Mr. Day.[2]

The Board heard oral argument on May 18, 2017.

The Board, having reviewed the record and the arguments of the parties, concurs with the Hearing Committee's factual findings as supported by substantial evidence in the record, and with its conclusions of law as supported by clear and convincing evidence, including its recommended sanction. As is set forth fully in the Hearing Committee Report, which is attached hereto and incorporated by reference herein, the Hearing Committee correctly examined the "totality of the circumstances" to determine whether the parties manifested "an intention to create the attorney/client relationship." H.C. Rpt. at 15-17 (citations omitted). Contrary to Respondent's argument, the Hearing Committee did recognize the evidence he claims to be inconsistent with the existence of an attorney-client relationship: Mr. Day never explicitly asked Respondent to act as his legal counsel in connection with the Persaud transaction (FF 19), there was no engagement letter covering the Persaud

[2] On February 27, 2017, Respondent filed a notice that a three-judge panel in Virginia had considered the transcript of the evidentiary hearing before Hearing Committee Number One, all exhibits introduced by Disciplinary Counsel and Respondent, the parties' stipulations, and the Hearing Committee Report, and had concluded that there was not clear and convincing evidence of an attorney-client relationship between Respondent and Mr. Day. The Virginia panel did not hear live testimony, but according to Respondent's reply brief, it heard two hours of argument from Respondent and Virginia Bar Counsel. It does not appear that the Virginia panel received the briefs filed with the Hearing Committee here. *See* Respondent's Brief Regarding the Report and Recommendation of Hearing Committee Number One ("R. Br.") 2-4.

transaction, or other document establishing an attorney-client relationship (FF 18), Mr. Day did not pay for Respondent's legal advice (FF 17, 20), no witness testified that Respondent and Mr. Day agreed to enter into an attorney-client relationship, and Mr. Day knew that Respondent was representing Persaud (FF 15).

Despite these facts, the Hearing Committee concluded that there was an attorney-client relationship between Respondent and Mr. Day because Respondent acted like Mr. Day's lawyer: He explained to Mr. Day how his interests would be protected in the deal (FF 20, 23), he negotiated an indemnification agreement to protect Mr. Day (FF 21-22), Mr. Day asked Respondent whether he should sign a certain deal document and about the existence of certain protections in the document, and signed it only after Respondent said it was "OK to sign" (FF 24-25), and, when a dispute arose, Respondent directed opposing counsel not to contact Mr. Day, saying "No, I'm going to communicate with him. I'm keeping him appraised [sic]." (FF 30).

On this record, we agree with the Hearing Committee that Mr. Day requested that Respondent act as his attorney to protect his interests in the transaction. Although Mr. Day never explicitly said that he wanted Respondent to represent him, he understood that Respondent was acting on his behalf in a legal matter (drafting and reviewing transaction documents). Given this pattern of conduct, their past attorney-client relationship, and Respondent's failure to tell Mr. Day that Respondent was *not* acting as Mr. Day's counsel, we agree with the Hearing Committee that Respondent was in an attorney-client relationship with Mr. Day with

respect to the Persaud transaction. We find that the Hearing Committee appropriately weighed the underlying factual evidence presented by Disciplinary Counsel against the contrary factual evidence presented by Respondent in reaching its conclusion that Respondent established an attorney-client relationship with Mr. Day. *See In re Szymkowicz*, 124 A.3d 1078, 1084 (D.C. 2015) (per curiam) (quoting *In re Nace*, 98 A.3d 967, 974 (D.C. 2014)) ("'Where there is substantial evidence to support the agency's findings[,] the mere existence of substantial evidence contrary to that finding does not allow this court to substitute its judgment for that of the agency.'") (brackets and internal quotation marks omitted).

We reject Respondent's argument that we should defer to contrary findings of a three-judge panel in Virginia that considered the hearing transcript, exhibits, and Hearing Committee Report. We recognize that the doctrine of *offensive* collateral estoppel applies in disciplinary proceedings, and "'renders conclusive . . . [the] determination of an issue of fact or law when (1) the issue is actually litigated and (2) determined by a valid, final judgment on the merits; (3) after a full and fair opportunity for litigation by the parties or their privies; (4) under circumstances where the determination was essential to the judgment, and not merely dictum.'" *In re Wilde*, 68 A.3d 749, 759 (D.C. 2013) (alterations in original) (quoting *Modiri v. 1342 Restaurant Group, Inc.*, 904 A.2d 391, 394 (D.C. 2006)). Pursuant to this doctrine, a respondent may be precluded from relitigating an issue that has already been decided against the respondent in a foreign jurisdiction. *Id.* at 761 & n.16 ("This court has further provided for the regular application of offensive collateral estoppel

in a significant category of bar discipline cases by adopting D.C. Bar R. XI, § 11(c), which calls for the imposition of reciprocal discipline on members of the D.C. Bar upon whom discipline has been imposed by another disciplining court . . . ."). "Under principles of collateral estoppel, in reciprocal discipline cases we generally accept the ruling of the original jurisdiction, even though the underlying sanction may have been based on a different rule of procedure or standard of proof." *In re Benjamin*, 698 A.2d 434, 440 (D.C. 1997) (citing *In re Richardson*, 602 A.2d 179, 181 (D.C. 1992) (per curiam) (collecting cases)).

Respondent here seeks to invoke *defensive* collateral estoppel, which allows a defendant to prevent a plaintiff from relitigating an issue the plaintiff already litigated and lost. *See Walker v. FedEx Office Print Servs., Inc.*, 123 A.3d 160, 164-65 (D.C. 2015) (discussing defensive collateral estoppel generally). However, Respondent cites no cases in which Disciplinary Counsel has been precluded from prosecuting a respondent who has been exonerated in a foreign jurisdiction. R. Br. 37. On the other hand, Disciplinary Counsel cites examples of cases in which a respondent was prosecuted here after a foreign exoneration. Disciplinary Counsel's Br. 21 (citing *Wilde*, 68 A.3d at 759 (Disciplinary Counsel not precluded from litigating issue decided in respondent's favor in Maryland disciplinary proceedings), *In re Peterkin*, Bar Docket No. 387-07 at 38 (BPR Nov. 7, 2011) (preclusive effect not given to Maryland disciplinary proceedings when Disciplinary Counsel was not a party) (appended Hearing Committee Report), and *In re Berryman*, 764 A.2d 760, 766-67 (D.C. 2000) (probate court finding not binding on Disciplinary Counsel

when Disciplinary Counsel not a party)). We recognize that in all of these cases the record in the foreign jurisdiction was different from the record developed here and that, in this case, the evidentiary records overlap because the Virginia panel considered the evidentiary record presented to the Hearing Committee, and the Hearing Committee Report itself, before reaching a contrary conclusion as to the existence of the attorney-client relationship.

The two proceedings, however, were not identical. The Virginia panel did not hear live witnesses and did not read Disciplinary Counsel's brief to the Hearing Committee. It did hear argument from Virginia's Bar Counsel and Respondent, which this Hearing Committee did not hear. *See* R. Br. 3. Given these differences, and the fact that the D.C. discipline system had already conducted a live evidentiary hearing, and a Hearing Committee had prepared a report based on that live evidentiary hearing before the case was considered in Virginia, we see no reason to defer to the findings of the Virginia panel.

The Court addressed an analogous issue in *In re Perrin*, where after a hearing was held here, the respondent was disbarred in New York for the same misconduct. 663 A.2d 517, 519 (D.C. 1995). The Court held that where there had already been comprehensive disciplinary proceedings, "it simply makes no sense to disregard the Committee's findings and the Board's recommendation in favor of the other jurisdiction's sanction." *Id.* at 523. Although *Perrin* addressed the sanction imposed in a foreign jurisdiction, and this matter involves a foreign jurisdiction's finding that no rule was violated, that is a distinction without a difference: There is no reason to

disregard the Hearing Committee's consideration of the live evidence in favor of the conclusions reached by the Virginia panel following its review of the cold record.

Thus, for the reasons set forth above, and in the Hearing Committee Report, we agree with the Hearing Committee that Respondent was in an attorney-client relationship with Mr. Day and was required to comply with the Rules. As Respondent does not argue that he did not violate the Rules (if they apply), we see no need to restate the Hearing Committee's analysis of the Rule violations.

With respect to sanction, Respondent argues that he should receive an informal admonition in the event that the Board finds a violation. Disciplinary Counsel agrees with the Hearing Committee's recommendation, as do we.

For the reasons set forth above, and in the attached Hearing Committee Report, we find that Respondent violated Rules 1.4(a), 1.7(b)(2), and 1.7(b)(4), and that he should be suspended from the practice of law for sixty days, with reinstatement conditioned on completing four hours of ethics CLE during or, with Disciplinary Counsel's permission, before the period of suspension.

BOARD ON PROFESSIONAL RESPONSIBILITY

By: /PGB/
Patricia G. Butler
Vice Chair

Dated: July 13, 2017

All members of the Board concur in this Report and Recommendation, except Mr. Kaiser, who is recused.

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

In the Matter of	:	
	:	
SETH ADAM ROBBINS, ESQUIRE,	:	
	:	
Respondent	:	**Board Docket No. 15-BD-118**
	:	**Bar Docket No. 2013-D431**
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration Number: 471812)	:	
	:	

Report and Recommendation

In many ways, this is a straightforward case. The core question here is whether Mr. Robbins, the Respondent, had an attorney-client relationship with a man named Gary Day with respect to a particular transaction. There was no engagement agreement between the two that covered that transaction; no fee paid by Mr. Day for legal work on that transaction; no document that established an attorney-client relationship; and no testimony from any witness to a conversation where Respondent and Mr. Day agreed that they would enter into an attorney-client relationship. We nonetheless find that there was an attorney-client relationship, for the reasons set forth below.

As a result, we find that Respondent violated Rule 1.4(a), Rule 1.7(b)(2), and Rule 1.7(b)(4). We recommend a sanction of 60-day suspension from the practice of law, and a requirement that Respondent take four hours of ethics CLE as a condition of reinstatement.

I. PROCEDURAL HISTORY

Disciplinary Counsel[1] filed a Petition and Specification of Charges on December 29, 2015. The Specification alleges that Respondent violated the following rules:

- Rule 1.7(b)(2), in that his representation of Mr. Day was likely to be adversely affected by his representation of Persaud Companies, Inc.;
- Rule 1.7(b)(4), in that his professional judgment on behalf of Mr. Day might reasonably be adversely affected by his own interest in Chesapeake Escrow Services, LLC; and
- Rule 1.4(a), in that, among other things, by failing to keep Mr. Day reasonably informed about the status of the demand from the surety (Hudson Insurance Company) after July 13, 2012.

Specification ¶ 22 (a)-(c).

Respondent filed his Answer on January 27, 2016. But, on February 8, 2016, Respondent filed a motion to defer the disciplinary proceedings until resolution of Mr. Day's pending legal malpractice suit related to the business transaction at issue.[2] Disciplinary Counsel opposed the motion to defer, arguing that the malpractice suit was unlikely to resolve the material issue of whether an attorney-client relationship existed. On March 8, 2016, pursuant to D.C. Bar. R. XI, § 19(d) and Board Rule 4.2, the Hearing Committee Chair recommended to the Board Chair that the motion be denied. The Board Chair denied Respondent's motion for deferral on April 5, 2016.

---

[1] The Specification of Charges was filed by the Office of Bar Counsel. The District of Columbia Court of Appeals changed the title of Bar Counsel to Disciplinary Counsel, effective December 19, 2015. We use the current title herein.

[2] The suit, captioned as *Gary W. Day v. Seth A. Robbins et al.*, No. 1:15-CV-02023-JKB, filed on July 10, 2015 in the U.S. District Court for the District of Maryland, Greenbelt Division, alleged that Respondent and his prior law firm negligently failed to render proper representation, failed to exercise reasonable care and diligence, and failed to meet the standards of a reasonably competent practitioner by failing to inform Mr. Day of the conflict of interest, and engaged in self-dealing with regard to his escrow company's transactions, among other allegations.

Telephonic prehearing conferences were held on May 4, 2016 and June 20, 2016. On June 21, 2016, Michael C. Zisa filed a third-party motion to quash a subpoena *duces tecum* pursuant to D.C. Bar R.XI, § 18(c) and Board Rule 3.2. Respondent issued the subpoena seeking to compel Mr. Zisa to appear at the hearing and produce emails and documents related to Respondent's work for Mr. Day and the Day Family between 2008 and 2013, when Respondent was employed by Seeger, P.C. Mr. Zisa argued that the subpoena should be quashed because Respondent failed to comply with Board Rule 3.2, and that the requests were overly broad, unduly burdensome, irrelevant, and intended to harass Mr. Zisa. Respondent filed an opposition to the motion to quash. The parties resolved the motion to quash during a telephonic prehearing conference held on June 22, 2016. Prehearing Tr. 159-61, 164.

A hearing was held on June 27 and 28, 2016, before this Hearing Committee Number One (the "Hearing Committee"). Disciplinary Counsel was represented at the hearing by Assistant Disciplinary Counsel Hamilton P. Fox, III, Esquire. Respondent was present and represented at the hearing by Arthur D. Burger, Esquire.

Prior to the hearing, Disciplinary Counsel submitted DX A through D, and DX 1 through DX 26. On June 24, 2016, Disciplinary Counsel filed a motion to submit a new copy of DX 4 (with a Social Security Number redacted) and newly discovered exhibits (DX 27 through DX 31) that it had received from Respondent's former firm on June 22 and 23, 2016. Respondent filed an opposition to the motion. At the hearing, Disciplinary Counsel's motion to submit the supplemental exhibits was granted. Tr. 7-8. All of Disciplinary Counsel's exhibits were received into evidence. Tr. 191-95. During the hearing, Disciplinary Counsel called Richard T. Pledger and Gary Day to testify.

Prior to the hearing, Respondent submitted RX 1 through RX 26, and filed supplemental exhibits (RX 27 through RX 39) on June 27, 2016. All of Respondent's exhibits were received into evidence without objection. Tr. 459-60. Respondent testified on his own behalf. The parties also filed Proposed Stipulations of Fact prior to the hearing.

Upon conclusion of the hearing, the Hearing Committee made a preliminary non-binding determination that Disciplinary Counsel had proven at least one Rule violation. Tr. 459; *see* Board Rule 11.11. In the sanctions phase of the hearing, Respondent submitted in mitigation that he no prior disciplinary misconduct. Tr. 460.

Disciplinary Counsel submitted its Proposed Findings of Fact, Conclusions of Law, and Recommendation as to Sanction on July 28, 2016, and Respondent filed his Proposed Findings of Fact, Conclusions of Law, and Recommendation as to Sanction on August 26, 2016. Disciplinary Counsel filed its Reply on September 2, 2016.

II. FINDINGS OF FACT[3]

1. Respondent, Seth Adam Robbins, Esquire, is a member of the Bar of the District of Columbia Court of Appeals, admitted to practice on May 11, 2001, and assigned Bar number 471812. Stipulation 1.

2. Beginning in law school, Respondent worked for a law firm that came to be known as the Seeger firm, specializing in construction law. Tr. 226-27 (Robbins). In 2011, he was a partner/shareholder in the firm. Stipulation 2.

[3] References to Disciplinary Counsel's Exhibits shall be "DX"; references to Respondent's exhibits shall be "RX." References to the stipulations of fact, executed by the parties and filed with the Hearing Committee on June 16, 2016, shall be "Stipulation." References to the transcript of the June 27-28, 2016 hearing shall be "Tr." References to these Findings of Fact shall be "FF."

3. Persaud Companies, Inc., was a corporation whose primary business was government contracts and construction. Andy Persaud was the owner, CEO, and founder of Persaud. The company was a client of the Seeger firm, and by 2011, Respondent was the Seeger lawyer primarily responsible for its matters. Stipulation 3.

4. Persaud was a licensed contractor and, as of 2011, had been accepted by several agencies of the United States government, including the Department of Defense, as the contractor on multi-million-dollar construction projects. Persaud had never defaulted on a contract obligation as of mid-2011. Stipulation 4.

5. Hudson Insurance Company had served as a surety, issuing payment bonds and performance bonds in Persaud's favor on its construction contracts. Stipulation 5. Contractors on federal construction contracts in excess of $250,000 are required to be bonded. Tr. 242 (Robbins).

6. In February 2011, Respondent and his sister formed Chesapeake Escrow Services, LLC to provide escrow services to contractors. Stipulation 7; Tr. 305, 308-09 (Robbins); DX 18.

7. In the summer of 2011, Andy Persaud, Bob Vacca (Persaud's chief financial officer), Respondent, Mike Schendel (a broker representing Hudson), and an underwriter for Hudson met for dinner in Bethesda, Maryland. Tr. 231-32, 243-44 (Robbins).

8. Persaud wanted Hudson to furnish bonds on its future construction projects, but Persaud did not have certified audited financial statements. Tr. 245, 335-36 (Robbins). Persaud and Andy Persaud had served as indemnitors for Persaud's sureties in the past. Hudson insisted that Persaud bring on an additional indemnitor for future projects. Tr. 245-46, 335-36 (Robbins). Hudson also wanted Persaud to engage an escrow agent to receive and disburse moneys from the agencies with whom Persaud had construction contracts. Stipulation 6. *See, e.g.,* DX 19

(Disbursement and Control Agreement, pursuant to which Chesapeake would receive payments due to Persaud, and make appropriate disbursements (¶¶ A-D, 2.1, 4.1)).

9. Mr. Schendel was familiar with Chesapeake Escrow Services and suggested it might perform the function of escrow agent in future Hudson/Persaud contracts. Tr. 307-09 (Robbins). Chesapeake agreed to provide these services. Tr. 308-09 (Robbins). In general terms, Persaud was to assign to Chesapeake its rights to payment from the government agency with which it was contracting, and Chesapeake would be responsible for distributing the payments. Tr. 306 (Robbins).

10. Respondent had an ownership interest in Chesapeake, and Chesapeake would earn additional revenue for each project on which it served as Persaud's escrow agent. Tr. 305, 310 (Robbins). Assisting Persaud to enter into future construction projects thus would benefit Chesapeake, Respondent's company. Persaud was Respondent's client, so Respondent disclosed this conflict of interest and obtained a written waiver of the conflict from Persaud. DX 19 at 1, 16; Tr. 313-16 (Robbins).

11. John J. Kirlin is a large construction company that was a longtime client of the Seeger firm since before Respondent started working there. It was owned by Wayne Day. Wayne Day's son is Gary Day. Gary Day and Respondent, at least before the events in this case started, were friends and spent time together socially. Tr. 124 (Day); 247, 458 (Robbins); RX 2. The Seeger firm, and Respondent, worked on various matters for the Day family.

12. The Seeger firm, and Respondent in particular, represented the Day family. Tr. 382 (Robbins). Most of the services charged to the Day Family account were provided to Gary Day's parents, but some were provided to other family members, including Gary Day's wife. Tr. 111-12 (Day); 384-94 (Robbins); DX 20.

13. Respondent also opened a separate Seeger billing account for Gary Day matters and sent the bills to Gary Day. DX 21. Respondent admitted that, in at least four or five matters, his client was Gary Day. Tr. 400-06 (Robbins); 118-22 (Day). At the disciplinary hearing Respondent claimed that, in some matters, the firm represented only entities it had formed for Gary Day. Respondent never documented any limitation on the firm's representation of Gary Day personally. Tr. 389-91, 395-97 (Robbins).

14. Gary Day regarded Respondent as his lawyer, and between 2008 and 2011 did not employ any other law firms. Tr. 112 (Day). He employed Respondent and his firm to form small single-purpose entities to invest in other businesses and real estate. In some of these matters, he had a partner. Tr. 108-111, 113-18 (Day). Respondent also represented Gary Day in negotiating his prenuptial agreement (Tr. 112-13 (Day)), in personal real estate transactions (DX 24 at 14, Tr. 117-38, 161-62 (Day)), and in drafting promissory notes (DX 24 at 164, 174). Tr. 118-22 (Day).

15. Respondent thought that Gary Day might serve as an additional indemnitor on the future Hudson/Persaud contracts. Tr. 245-46 (Robbins). Respondent testified that he presented "this business opportunity" to Mr. Day as "a good business deal." Tr. 247 (Robbins). When Respondent approached Gary Day about serving as an indemnitor in the future Hudson/Persaud transactions, Respondent never informed Mr. Day that he would *not* be serving as his lawyer in the matter. Tr. 373-74, 411 (Robbins). Mr. Day was aware that Respondent represented Persaud, but Respondent never discussed with Mr. Day how he could represent him in a matter in which another client had an interest. Tr. 125-26 (Day). Nor did Respondent discuss with him (1) what would occur if a conflict or dispute arose between Mr. Day and Persaud; (2) his obligation to share information with Mr. Day and Persaud; or (3) the possible adverse consequences of a joint representation. Tr. 147 (Day). Respondent admitted that "he failed to make unmistakably clear to

Gary Day the nature and limits of his role in interacting with him in connection with the transaction, as . . . he should have done." Tr. 416-17 (Robbins).

16. Nonetheless, neither Respondent nor his law firm sought legal fees from Mr. Day for Respondent's time spent on the Hudson indemnification. DX 3; Tr. 129, 441-42 (Robbins).

17. Mr. Day paid no legal fees to Respondent or his law firm for this matter. Tr. 129, 441-42 (Robbins).

18. There were no contemporaneous written communications between Respondent and Mr. Day, electronic or otherwise, during the events at issue in which either of them explicitly referred to an attorney-client relationship between them with respect to the Hudson indemnification.

19. Mr. Day did not explicitly ask Respondent, either in writing or orally, to provide him legal services or to otherwise act as his legal counsel in connection with the Hudson indemnification. Tr. 248-49, 343-44, 347 (Robbins).

20. Respondent explained to Mr. Day that Persaud needed a co-indemnitor because Andy Persaud was going through a divorce and was moving assets around to prevent his wife from getting them. He assured Mr. Day that Andy Persaud and the company had more than sufficient assets to protect Mr. Day. Respondent said that Mr. Day need not compensate him, and that he would be paid through the additional legal work he would do for Persaud. Tr. 126-29 (Day).

21. Mr. Day understood that Respondent would protect his interests in drafting the indemnification documents; he expected they would include a provision requiring the surety to seek indemnification first from Persaud and Andy Persaud in the event of a default; a provision requiring that both Mr. Day and Respondent be notified if Mr. Day were asked to indemnify

additional bonds in future; and that Mr. Day explicitly approve indemnifying additional bonds. Tr. 130-31 (Day).

22. Respondent negotiated with Hudson over terms of the indemnification agreement to protect Mr. Day. He informed Hudson's representative that Hudson needed to include language in the indemnification agreement requiring it to send notice to Mr. Day and Respondent, and receive affirmative approval from Mr. Day before it could issue future bonds that Mr. Day indemnified. He also offered to prepare the paperwork to include such a provision. DX 27; Tr. 418-19 (Robbins). Despite Mr. Day's expectations, the final indemnification agreement included no such notification provision, although it was memorialized in an email exchange between Respondent and a Hudson representative. DX 27 at 27-29; Tr. 422-25 (Robbins); DX 2; Tr. 131-33 (Day). Respondent also did not fulfill Mr. Day's expectation that the agreement would include a provision requiring Hudson to look first to Persaud and Andy Persaud before pursuing Mr. Day for indemnification. Tr. 142-43 (Day); DX 1 at 4, ¶ 18.

23. Respondent also assured Mr. Day that his interests would be protected by the escrow arrangement Persaud was entering into with Chesapeake. DX 2; Tr. 317-19 (Robbins). Although Respondent had obtained a written waiver from Persaud, for the conflict arising from his interest in Chesapeake, he obtained no such written consent from Mr. Day. Tr. 320-22 (Robbins). Respondent testified that Mr. Day was aware of his relationship with Chesapeake because he had seen the escrow agreements. Tr. 319-20 (Robbins). Mr. Day's testimony was to the contrary. He testified that he was unaware of Respondent's interest in the escrow agent (Tr. 146 (Day)), even though he knew that Chesapeake was the escrow agent. (Tr. 133 (Day)). Mr. Day appears not to have known of Respondent's relationship with Chesapeake.

24. Based on assurances from Respondent, Mr. Day signed the indemnity agreement without reading or understanding it. Respondent testified that he sent four versions of the agreement to Mr. Day. An email sent October 24, 2011 refers to an earlier email on October 21, 2011 with the initial version of the agreement saying, "attached (again) is the general indemnity agreement." RX 27. October 24 was the first documented receipt of the agreement, as neither the October 21 email nor the attached version of the indemnity agreement was offered into evidence. RX 27. Nor did Respondent explain why he needed to send the agreement a second time if Mr. Day had received it on October 21.

25. On October 24, 2011, Mr. Day did not read the document, but sent it back, signed and notarized, 12 minutes after Respondent forwarded it to him. RX 28; Tr. 134-37 (Day).[4] On October 27, Respondent forwarded a revised version with one change to paragraph 18, which Mr. Day again executed without reading. RX 30; Tr. 137-39 (Day). Then on October 28, 2011, Respondent telephoned Mr. Day and said they needed a single document with all the principals' signatures. Mr. Schendel hand-delivered to Mr. Day a copy of the revised version with signatures of the other parties. Before executing it, Mr. Day spoke with Respondent by telephone and asked if it he should sign. Based on Respondent's assurances, he did. Tr. 137 (Day) (Mr. Day signed the indemnity agreement "based on trust with" Respondent); 139-41 (Day) (Respondent said "it's OK to sign" the indemnity agreement). Mr. Day signed the document without reading it because he trusted Respondent. Tr. 141 (Day).

26. Mr. Day testified to these events. He told the Hearing Committee that he believed that Respondent was his lawyer in connection with the Persaud matter. We found his demeanor

[4] The transcript shows that Mr. Day replied "yes" to the question as to whether he read the agreement. But the follow-up question and answer make it clear that the answer was actually "no." *Compare* Tr. 136, line 22-137 *with* line 8.

credible; he spoke without hesitation and appeared to us to be straightforward in his answers to questions from counsel. Respondent's counsel identified a number of reasons for possible bias in cross-examination. Despite those points, we credit Mr. Day's testimony as to his understanding based on our observation of him both on direct examination and in response to Respondent's counsel.

27. As early as February 2012, Respondent started to see signs that Persaud might have financial and performance problems. On February 27, 2012, Chesapeake loaned Persaud almost $1 million from its escrow account, but did not receive immediate repayment. DX 5; Tr. 353-55 (Robbins). Mr. Day testified that he would have liked to know that Chesapeake had been advancing funds to Persaud at that time because "it would have been showing that Persaud was not performing and there was some underlying risk." Tr. 148 (Day). When Persaud fell behind on its performance of a Tangier Island dredging contract, on which Mr. Day was an indemnitor, Respondent did not inform Mr. Day for months. DX 28; Tr. 368-72 (Robbins). Nor did he inform Mr. Day when he became aware in August 2012 that Persaud was the subject of a federal criminal investigation. Tr. 378-81 (Robbins). Respondent acknowledged that sometime between May 2012 and the summer of 2012, he became aware that Persaud was not escrowing with Chesapeake the funds that its agreement with Hudson required, although he was evasive about the timing of his awareness. Tr. 322-27 (Robbins). He did not tell Mr. Day about Persaud's failure to escrow funds with Chesapeake, even after Hudson made its first claim against Mr. Day on July 13, 2012. Tr. 329-33 (Robbins); Tr. 147-57 (Day). In fact, after receiving the July 13 claim, Chesapeake advanced funds to Persaud to meet payroll, and Respondent never told Mr. Day about Persaud's need for funds to make payroll. DX 5; Tr. 375-78 (Robbins).

28. On July 13, 2012, Richard Pledger, a lawyer for Hudson, sent Mr. Day (and Mr. Persaud) a demand letter because Persaud was failing to pay its bills on some of its projects, resulting in claims against the surety bonds. DX 7; Tr. 55-56 (Pledger). Mr. Day emailed Respondent the last page of this letter, which demanded that the indemnitors "put [Hudson] in funds in the total amount of $1,215,242 or else provide sufficient collateral . . . ." DX 7 at 5; Tr. 149-50 (Day). Mr. Day understood that Respondent, as his lawyer, would represent him with respect to the demand. Tr. 149-50 (Day). On July 16, Respondent emailed back, "I am working out with Hudson. You do not need to be concerned." DX 31. They also spoke by telephone. Respondent still disclosed neither the indications he had received — discussed in FF 27 — that Persaud was in trouble, nor that it was behind in paying its legal fees. Tr. 149-50 (Day). Mr. Day did not respond to Mr. Pledger directly, relying on Respondent to represent him. Tr. 150-53 (Day).

29. Respondent dealt with Hudson and Mr. Pledger on Mr. Day's behalf over the next few months. Initially, he dealt with Hudson directly. Someone at Hudson informed Mr. Pledger that Respondent was representing all the indemnitors. Tr. 57-60, 92 (Pledger). On September 2, 2012, Mr. Pledger sent Respondent a draft complaint that named Mr. Day as one of the potential defendants. DX 8. He directed the letter to Respondent, and not to Mr. Day, because he understood that Respondent was representing Persaud and the indemnitors. Tr. 59-61 (Pledger).

30. Respondent informed Mr. Pledger that he had no objection to Mr. Pledger contacting Mr. Persaud directly. Tr. 61-62 (Pledger). Mr. Pledger then asked if he also could speak directly to Mr. Day. Respondent said, "No, I'm going to communicate with him. I'm keeping him appraised [sic]." Tr. 63 (Pledger).

31. In an email dated September 4, 2012, copied to Mr. Persaud but not Mr. Day, Respondent wrote Mr. Pledger: "Moving forward, to the extent Hudson does in fact file suit against

Persaud and Gary Day, please be aware that I will no longer be engaged in the discussions between Persaud and Hudson—because of a conflict of interest." DX 9. Although Respondent testified this conflict had something to do with his interest in Chesapeake (Tr. 433-34 (Robbins)), a conflict that Persaud had waived (DX 19), the actual conflict was between his two clients, Persaud and Gary Day. This was how Mr. Pledger understood Respondent's statement. Tr. 99-100 (Pledger).

32. On September 10, 2012, Mr. Pledger emailed a letter to Respondent and Mr. Persaud, which, among other things, confirmed Respondent's permission that Mr. Pledger might communicate directly with Mr. Persaud. Mr. Pledger did not send a copy directly to Mr. Day, even though it was addressed to him as well as to Mr. Persaud, because Respondent had withheld permission for communicating directly with Mr. Day. DX 10; Tr. 67-68, 94 (Pledger). Mr. Pledger understood Respondent's instruction not to communicate directly with Mr. Day as an appropriate instruction from a lawyer representing Mr. Day as a client. Tr. 97-98 (Pledger).

33. Respondent did not provide Mr. Day with a copy of the draft complaint sent on September 2 or explain the conflict of interest that might require him to withdraw. Tr. 154-56 (Day). Respondent testified that a reference to "an assignment of the escrow accounts" in a text message that he sent Mr. Day on September 13, 2012, was evidence that he was keeping Mr. Day fully informed. RX 2; Tr. 275-76 (Robbins). The text message does not explicitly refer to the Hudson claim, and no other documentary evidence supports Respondent's assertion that he was informing Mr. Day of the developments. Tr. 431-32 (Robbins).

34. On January 2, 2013, on behalf of Hudson, Mr. Pledger filed suit against Mr. Day, Persaud, and Andy Persaud. DX 15. He did not serve them immediately, but informed the parties of this suit in a letter dated January 13, 2013. DX 13. He sent this letter directly to Mr. Day because Respondent had previously said that he would not continue in the representation once suit was

actually filed. Tr. 70 (Pledger). In his January 13 letter, Mr. Pledger referred to Respondent as "former counsel for PCI [Persaud], Mr. Persaud and Mr. Day." He also referred to previous communications he had made to the parties, and wrote, "We have never received a response directly from Mr. Day, although [Respondent] advises he has kept him appraised [sic], has shared a copy of the Complaint with him and would advise him of my request we meet [sic]. I do understand that, for various reasons, [Respondent] will likely be conflicted out of any legal representation in connection with this matter going forward, but I copy him with this letter as I promised I would do." DX 13 at 4.

35. Shortly after receiving Mr. Pledger's January 13 letter, on January 16, 2013, Respondent texted Mr. Day: "The Persaud crap is not good. . . . I think you are going to need to hire an atty to deal with the surety." DX 14. Mr. Day understood this to mean that he needed to hire a lawyer with specific expertise in the type of litigation that had been filed against him. Tr. 161, 166-70 (Day).

36. Mr. Day hired another lawyer and eventually paid $1.7 million to resolve his dispute with Hudson. DX 16; Tr. 74 (Pledger). He had to borrow some of these funds, and he estimated, including legal fees, that it cost him close to $2 million to resolve this litigation. Tr. 162-64 (Day).

37. Respondent never told Mr. Pledger that he had not been representing Mr. Day in the Hudson matter until July 2013, when Mr. Pledger deposed him. Tr. 75 (Pledger). Even then, Respondent equivocated as to whether he represented Mr. Day in the Hudson/Persaud matter, testifying, "Whether you ask whether I represented him [sic], I've represented them over a period of time. Whether it was related to this particular issue or not, I don't believe that I did, no." DX 25 at 16. This answer surprised Mr. Pledger, and even when responding to his follow-up questions,

Respondent never unequivocally said that he had not been representing Mr. Day. Tr. 75-79 (Pledger).

38. Mr. Pledger testified at the disciplinary hearing that it was his understanding that Respondent represented Mr. Day. This was for two reasons. First, Respondent directed Mr. Pledger not to communicate directly with Mr. Day. Tr. 63, 67-68 (Pledger). Second, Respondent emailed Mr. Pledger and told him that if Hudson were to sue Mr. Day, Respondent would have a conflict. DX 9; Tr. 65 (Pledger). In response to questions by Respondent's Counsel, Mr. Pledger acknowledged that there may be other explanations for each statement. Tr. 97-98, 98-101 (Pledger). Mr. Pledger did not recall ever being told that Mr. Day was represented by Respondent, either by Respondent or by Mr. Day. Tr. 91 (Pledger).

39. Andy Persaud was convicted in 2013 in federal court of bank fraud in connection with these events. Tr. 82, 288-89 (Robbins); RX 1 (Ex. 3-7).

III. CONCLUSIONS OF LAW

The central question in this case is whether Respondent represented Gary Day. Accordingly, we discuss that first.

A. Did Respondent Represent Gary Day?

First, we find the lack of an engagement agreement and other formalities of an attorney client relationship not tremendously helpful. "An attorney's ethical duties to a client arise not from any contract but from the establishment of a fiduciary relationship between attorney and client. . . . 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) (quoting *Nolan v. Foreman*, 665 F.2d 738, 739 n.3 (5th Cir. 1982)). "[I]t is well established that neither a written

agreement nor the payment of fees is necessary to create an attorney-client relationship." *In re Lieber*, 442 A.2d 153, 156 (D.C. 1982).

We are, instead, involved in an intensely fact-bound inquiry. "The existence of an attorney-client relationship is an issue to be resolved by the trier of fact and is predicated on the circumstances of each case." *Id.*; *see also In re Fay*, 111 A.3d 1025, 1030 (D.C. 2015) ("[W]e consider the totality of the circumstances to determine whether an attorney-client relationship exists.").

We take very seriously Mr. Day's testimony that he believed that Respondent was his lawyer. The Court of Appeals has held that "client's perceptions are [an] important consideration in determining whether attorney-client relationship existed." *In re Bernstein*, 707 A.2d 371, 375 (D.C. 1998) (citing *Leiber*, 442 A.2d at 156). As set out above, we find Mr. Day credible and believe his testimony about his understanding that Respondent represented him. In addition, Mr. Day testified that he agreed to sign the indemnification agreement based on his trust in Respondent. *See* FF 25. We find this, too, to be strong evidence of his understanding of Respondent's role.

Moreover, Mr. Day's belief was reasonable. Respondent had represented Mr. Day in the past in connection with a number of business deals. And Respondent's work on the matter was consistent with what lawyers do in such situations; he negotiated a part of the agreement and memorialized it. As a result, we have little trouble concluding that Mr. Day's belief was reasonable. This strongly supports a finding that there was an attorney-client relationship. *See In re Confidential*, BDN 150-85 (BPR Feb. 5, 1987) at 9 ("An important and often controlling consideration is whether the lawyer's overall conduct justified a client's perception of an attorney as his counsel.") (dismissing charges against the respondent); *In re Gil*, 656 A.2d 303 (D.C. 1995)

(adopting BDN 37-92 (BPR Apr. 29, 1994) at 12)) (a "reasonable expectation" by the client may be a basis for finding an attorney-client relationship).

Finally, while Respondent makes much of the lack of documentation clarifying their relationship, we believe that door swings the other way. Respondent could have easily avoided this problem by simply telling Mr. Day that he was not representing him. He did not do so. This strongly supports the conclusion that Respondent represented Mr. Day. *In re Schlemmer*, BDN 444-99 (BPR Dec. 27, 2002) at 14 ("[W]hen a lawyer does not make the conditions of his retention clear, the client's view of the creation of an attorney-client relationship will prevail."), *aff'd in relevant part and remanded for further consideration of sanction*, 840 A.2d 657, 664 (D.C. 2004).

Mr. Pledger's understanding that Respondent represented Mr. Day is wholly consistent with this view. He was a third party witness with no dog in the fight. Perhaps more importantly, what he describes is, again, highly consistent with what a lawyer would do. Lawyers tell opposing counsel to talk to them and not to their client. *See* Rule 4.2. Mr. Pledger explained that Respondent identified a conflict of interest that would prevent him from representing Mr. Day if a suit were to be filed. This is also consistent with Respondent functioning as counsel for Mr. Day.

Ultimately, we have little trouble finding that Respondent represented Mr. Day. Mr. Day reasonably believed Respondent was his lawyer; a disinterested third-party, Mr. Pledger, reasonably believed Respondent was Mr. Day's lawyer; and Respondent acted like Mr. Day's lawyer. There is little in the record to question this conclusion.

B. The Alleged Rule Violations

We turn now to Respondents' alleged rule violations. Disciplinary counsel alleges three rule violations. First, that Respondent violated Rule 1.7(b)(2) because his representation of Mr. Day was likely to be adversely affected by his representation of Persaud. Second, that Respondent

violated Rule 1.7(b)(4) because his representation of Mr. Day would reasonably be affected by his business interest in Chesapeake. And third, that Respondent violated Rule 1.4(a) by not keeping Mr. Day reasonably informed about the demand from Hudson after July 13, 2012.

1. The Alleged Violation of Rule 1.4(a)

Rule 1.4(a) provides that "[a] lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information." Under Rule 1.4(a), an attorney must not only respond to client inquiries, but must also initiate contact to provide information when needed. *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." Comment [1] to Rule 1.4(a). In determining whether Disciplinary Counsel has established a violation of Rule 1.4(a), the question is whether Respondent fulfilled his client's reasonable expectations for information. *See In re Schoeneman*, 777 A.2d 259, 264 (D.C. 2001). In addition to responding to client inquiries, a lawyer must initiate communications when necessary. *See In re Hallmark*, 831 A.2d 366, 374 (D.C. 2003).

Disciplinary Counsel contends that Respondent violated Rule 1.4(a) by failing to inform Mr. Day about developments involving Persaud's financial and performance problems that increased the financial risk to Mr. Day, thus impairing Mr. Day's ability to make informed decisions that might protect his interests. Respondent argues that he did not have an attorney-client relationship with Mr. Day, so Rule 1.4(a) did not require him to keep Mr. Day informed about the case. As is set out above, we reject that argument. Respondent contends that, even if he had an attorney-client relationship with Mr. Day, Respondent kept Mr. Day informed about pertinent

events. Respondent did not identify what information he disclosed to Mr. Day. Based on the findings outlined above, the Hearing Committee agrees with Disciplinary Counsel.

Respondent also failed to inform Mr. Day of several developments in the representation over the course of 2012. First, Respondent failed to inform Mr. Day that Persaud fell behind on a Tangier Island dredging contract on which Mr. Day was an indemnitor. FF 27. Second, Respondent failed to inform Mr. Day after he became aware, sometime between May and the summer of 2012, that Persaud was not escrowing the funds that its agreement required. FF 27. Third, Respondent failed to inform Mr. Day that on July 13, 2012, Hudson made a demand on the indemnitors, including Mr. Day, due to Persaud's defaults on its contracts and associated claims against the surety bonds, despite Persaud's continuing failure to escrow funds with Chesapeake. FF 27-28. Fourth, Respondent failed to inform Mr. Day that Chesapeake advanced funds to Persaud to meet payroll after receiving the July 13 claim. FF 27. Fifth, Respondent failed to inform Mr. Day that on September 2, 2012, he was sent a draft complaint naming Mr. Day as a potential defendant. FF 29. Sixth, Respondent failed to inform Mr. Day that Andy Persaud was under criminal investigation. FF 27. Finally, Respondent failed to inform Mr. Day that if litigation commenced against Mr. Day, he would have to withdraw from the representation due to a conflict of interest. FF 33. Accordingly, the Hearing Committee finds by clear and convincing evidence that Respondent's failure to make these disclosures to Mr. Day violated Rule 1.4(a).

2. The Alleged Violation of Rule 1.7(b)(2)

Rule 1.7(b)(2) provides that "except as permitted by paragraph (c) below, a lawyer shall not represent a client with respect to a matter if . . . 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 "each 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 "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client."

Disciplinary Counsel contends that Respondent violated Rule 1.7(b)(2) because Respondent knew that Persaud's failure to perform on its government contracts would negatively impact Mr. Day, but nevertheless represented both parties without obtaining informed consent from Mr. Day. Respondent's first argument is that he did not represent Mr. Day. We find otherwise, as set out above. As a fallback, Respondent contends that Persaud and Mr. Day's interests were aligned at the *outset* of the representation. Respondent does not contend that he obtained Mr. Day's informed consent. Based on the findings outlined above, the Hearing Committee agrees with Disciplinary Counsel.

Respondent simultaneously represented Persaud and Mr. Day. *See* FF 15. At the outset of the representation, Respondent knew that Persaud's failure to perform on its contracts would cause Hudson to seek payment from Mr. Day. As a result, Mr. Day expected Respondent to protect Mr. Day's interests by requiring the surety to seek indemnification from Persaud and Andy Persaud before Mr. Day. FF 20-21. These protections were not written into the indemnity agreement, but Mr. Day nevertheless signed the agreement based upon assurances from Respondent. FF 22-25. The potential conflict turned into an actual conflict when Respondent realized that Persaud was having financial and performance problems. FF 27. At that point, Respondent was constrained by Rule 1.6 to protect Persaud's confidences and secrets, but also obligated under Rule 1.4 to keep Mr. Day reasonably informed about the status of the matter. Despite this untenable position, instead of withdrawing from the representation, Respondent simply failed to inform Mr. Day of

this development. *Id.* Accordingly, the Hearing Committee finds that Respondent's representation of Mr. Day was likely to be adversely affected by his simultaneous representation of Persaud, and was, in fact, adversely affected. Because Respondent did not obtain Mr. Day's informed consent, the Hearing Committee finds by clear and convincing evidence that he violated Rule 1.7(b)(2).

3. The Alleged Violation of Rule 1.7(b)(4)

Rule 1.7(b)(4) provides that, "[e]xcept as permitted by paragraph (c) below, a lawyer shall not represent a client with respect to a matter if . . . the lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by the lawyer's responsibilities to or interests in a third party or the lawyer's own financial, business, property, or personal interests." Rule 1.7(c) provides that a lawyer may nevertheless represent a client in a situation covered by part (b) if "each 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 "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client."

Disciplinary Counsel contends that Respondent violated Rule 1.7(b)(4) because he had a financial stake in Chesapeake while representing Mr. Day, knowing that the two parties' interests might diverge, without obtaining Mr. Day's informed consent. Aside from arguing that he did not represent Mr. Day, Respondent contends that Chesapeake's role was "ministerial" and that its interests could not have diverged from Mr. Day's interests. Respondent does not contend that he obtained Mr. Day's informed consent. Based on the findings outlined above, the Hearing Committee agrees with Disciplinary Counsel.

Respondent had financial and business interests in Chesapeake. FF 6. Respondent thus benefitted financially every time Chesapeake was paid a fee to escrow funds. FF 10. Because of

this conflict of interest, Respondent had Persaud explicitly waive it in writing, but he did not do the same for Mr. Day. FF 10, 23. Thus, without Mr. Day's knowledge or consent, Respondent had an incentive to keep Mr. Day on as an indemnitor on Persaud's contracts based on his interests in Chesapeake. This conflict of interest contributed to Respondent's failure to inform Mr. Day about events that might have led Mr. Day to take action to protect his interests. *See* Part II.B.1, *supra*. Accordingly, the Hearing Committee finds that it was reasonable to expect that Respondent's representation of Mr. Day would be adversely affected by his financial and business interests in Chesapeake. Because Respondent did not obtain Mr. Day's informed consent, the Hearing Committee finds by clear and convincing evidence that he violated Rule 1.7(b)(4).

C. Sanction

In this case, Disciplinary Counsel has asked the Hearing Committee to recommend the sanction of a 30-day suspension. Respondent has requested that the Hearing Committee recommend an informal admonition, should it find any Rule violation(s). For the reasons described below, we recommend a 60-day suspension, with the condition that Respondent take four hours of CLE prior to reinstatement.

1. 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 (citing *In re Elgin*, 918 A.2d 362, 376 (D.C. 2007)); *In re Berryman*, 764 A.2d 760, 766 (D.C. 2000). In determining the appropriate sanction, the Court 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) (quoting *In re Howes*, 52 A.3d 1, 15 (D.C. 2012)) (internal quotation marks omitted).

2. Application of the Sanction Factors

(i) <u>The Seriousness of the Misconduct</u>

Respondent represented Mr. Day when he had a conflict of interest with his own personal business and with another client he was representing in the same matter. He failed to keep Mr. Day informed about the difficulties Mr. Persaud was having meeting his obligations – which exposed Mr. Day to substantial risk.

Had Mr. Day known that Respondent was in a conflicted position, he would have acted differently. Mr. Day testified that he signed the indemnity agreements without reading them because he was relying on Respondent. FF 25. Based on that, it is reasonable to conclude that Mr.

Day may have done more work to inquire about Mr. Persaud. He may have walked away from a deal where he did not know the principals and was not getting neutral advice.

Regardless, Mr. Day walked into a transaction thinking he had a lawyer who was looking out for his interests. He was wrong. His lawyer stood to profit personally from the transaction and so did his lawyer's other client. While Respondent characterizes this as bringing a good investment to Mr. Day (FF 15), it is clear that without Mr. Day, Respondent would have had to do more work to get this deal funded – assuming the deal could be funded at all. Respondent's motives cannot reasonably be characterized merely as bringing an investment opportunity to a friend. He stood to benefit, as did his other client. He may have wanted this to work out for Mr. Day, but, to be clear, he wanted it to work out for himself and his other client too.

Respondent also failed to inform Mr. Day about Persaud's failure to comply with his obligations as a part of the deal. Indeed, Respondent's actions hurt Mr. Day's ability to learn what was happening with his investment. Because of Respondent's actions, Hudson's lawyer, Mr. Pledger, did not communicate Hudson's demands to Mr. Day. Instead of serving the purposes of Rule 1.4 – to keep a client informed – Respondent did not merely fail to keep his client informed, he affirmatively kept him from getting information about what was happening with his investment. And he appears to have done this for the most base of reasons – to avoid having his misconduct come to light.

We see this as serious misconduct.

(ii) Prejudice to the Client

It is clear that Mr. Day suffered substantial prejudice.

(iii) Dishonesty

We did not see any evidence of dishonesty. Respondent parsed his answers to many

questions, but we do not go so far as to find that any of his answers were dishonest.

(iv) Violations of Other Disciplinary Rules

Respondent did not violate any other disciplinary rules.

(v) Previous Disciplinary History

Respondent has no prior disciplinary history.

(vi) Acknowledgement of Wrongful Conduct

Respondent did not admit that his conduct was wrongful; indeed, he argued that he did not have a conflict or fail to keep Mr. Day informed because he did not represent Mr. Day.

Respondent did acknowledge what he was thinking at the time, while being questioned by the Chair. When asked why he did not affirmatively clarify that he was not serving as a lawyer for Mr. Day, he responded:

> I can only say that I didn't send anything because I genuinely did not believe I was doing legal work for Mr. Day, and if I'm wrong, I'm wrong. . . .
> In hindsight now and everything I've been through I totally get it. No doubt about it. But at that time I just – I generally did not believe I was doing legal work for Mr. Day. I thought I was doing stuff for Persaud.

Tr. at 458. We credit Respondent's description of his thinking. However, as is discussed above, his perception of the relationship is not the one that most matters.

(vii) Other Circumstances in Aggravation and Mitigation

We have not identified any circumstances in aggravation or mitigation.

3. Sanctions Imposed for Comparable Misconduct

Generally, the Court has imposed suspensions of 30 to 180 days for violations of Rule 1.7. We find the Court of Appeals decisions in *In re Shay*, 756 A.2d 465 (D.C. 2000) (per curiam), *In re Cohen*, 847 A.2d 1162 (D.C. 2004), *In re Evans*, 902 A.2d 56 (D.C. 2006) (per curiam), and *In re Elgin*, 918 A.2d 362 (D.C. 2007) informative. In *Shay*, the respondent drafted reciprocal wills

for two purportedly married clients with the knowledge that the husband had failed to finalize a divorce before marrying the wife, making their marriage invalid. 756 A.2d at 468-69 (appended Board Report). The respondent failed to withdraw and withheld the facts surrounding the invalidity of the marriage from the wife for six years, in violation of Rules 1.7(b)(2) and (b)(4), 1.16(d), 8.4(c), and the corresponding former Disciplinary Rules. *Id.* at 469-470, 473-74 (appended Board Report). The respondent also advised the wife not to report that her signature had been forged on the couple's bank note, due to the negative impact it would have on the husband's earning potential as an investment banker. *Id.* at 470-72 (appended Board Report). The Court adopted the Board's recommendation and imposed a 90-day suspension, where the Board stressed potential harm and lack of remorse as aggravating factors. *Id.* at 466, 480-86 (appended Board Report).

In *Cohen*, the respondent undertook representation of a company and its exclusive distributor in a trademark application matter, but when "directly adverse" interests arose, he acted on behalf of one client to withdraw a trademark application without consulting the other, in violation of Rules 1.4(a), 1.7(b), 1.16(d), 5.1(a), and 5.1(c)(2). 847 A.2d at 1163-65. The Court imposed a 30-day suspension, finding that the misconduct was mitigated by the respondent's clean disciplinary record and acknowledgement of wrongdoing. *Id.* at 1167.

In *Evans*, the respondent initiated a probate proceeding on behalf of a borrower in a real estate transaction to secure title to the property she wished to encumber, while also serving as the owner of the title company handling the closing, without obtaining the client's informed consent. 902 A.2d at 61. The Court and the Board found that respondent's representation of the client had the potential to be adversely affected by his business interest in the title company because he had a financial incentive to secure title of the property on behalf of his client so that the loan would close. *Id.* at 58, 65-66 (appended Board Report). As a result of his incentive to complete the

closing, even at the expense of his client's interests in the probate proceeding, the respondent "took shortcuts and made mistakes" in the probate proceeding, resulting in the filing of a deficient probate petition and ultimately his client's removal as personal representative of the estate, in violation of Rules 1.1(a) and (b), 1.7(b)(4), and 8.4(d). *Id.* at 58, 68-69 (appended Board Report). The Court imposed a six-month suspension, partially stayed in favor of probation, because the conduct "arose from self-interest" and was aggravated by prior discipline, prejudice to the client, and lack of remorse. *Id.* at 58, 74-77 (appended Board Report).

In *Elgin*, the respondent failed to execute a formal retainer agreement with a client, and then used the client's credit card to incur significant amounts of debt for personal expenses (which he was unable to repay), concealed the fact that a creditor had filed suit against the client to recover that debt, and settled the lawsuit without the client's knowledge or consent, in violation of Rules 1.2(a), 1.3(b)(2), 1.4(a), 1.5(b), 1.7(b)(4), 1.8(a), 8.4(c), and 8.4(d). 918 A.2d 367-372. The Court imposed a six-month suspension based in part on the fact that, unlike in *Shay*, the case involved exploiting a conflict of interest for personal financial gain as well as more serious rule violations. *Id.* at 380.

Here, the character of the conflict of interest bears closest resemblance to *Shay* and *Cohen*, in which the respondents represented two parties with aligned interests that later diverged, and later withheld information from one client in order to favor the other. The conduct here is more serious than that in both of these cases in the sense that Respondent was motivated by personal financial gain. Respondent here stood to personally profit from the conflict; that suggests a more substantial sanction than where the attorney did not have such a personal motive in the case. At the same time, the misconduct at issue here is less serious than that in *Shay*. The active conflict of interest and withholding of information did not persist for six years and was not accompanied by

dishonesty. Respondent's conduct is also less serious than that in both *Evans* and *Elgin*, in which the Court imposed six-month suspensions, due to the absence of serious companion Rule violations and significant aggravating factors, such as prior discipline.

On balance, we conclude that Respondent's misconduct warrants sanction in between the 30-day suspension imposed in *Cohen* and the 90-day suspension imposed in *Shay*.

IV. CONCLUSION

For the reasons set out above, we find that Respondent violated Rules 1.4, 1.7(b)(2), and 1.7(b)(4). We recommend a sanction of a 60-day suspension from the practice of law, and a requirement that, as a condition of reinstatement, Respondent take four hours of ethics CLE during or, with Disciplinary Counsel's permission, before the period of suspension.

HEARING COMMITTEE NUMBER ONE

/MGK/
Matthew G. Kaiser, Esquire
Chair

/MC/
Marcia Carter

/EYM/
Esther Yong McGraw, Esquire

Dated: January 27, 2017