DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:	)	
	)	
BILLY L. PONDS,	)	**Bar Docket No. 150-98**
	)	
Respondent.	)	

REPORT AND RECOMMENDATION OF THE BOARD ON PROFESSIONAL RESPONSIBILITY WITH RESPECT TO SANCTION

In a previous Memorandum Opinion and Order dated July 31, 2003 (the "July 2003 Opinion"), the Board found violations of Rules 1.7(b)(4) and 1.16(a)(1) of the Maryland Rules of Professional Conduct (the "Rules") and declined to find a violation of Rule 1.16(a)(3).[1] Because Hearing Committee Number Eight had found no violations of the Rules in its Report and Recommendation dated August 9, 2002, and had not addressed the issue of sanction, the Board directed the parties to present briefs recommending an appropriate sanction and any documentary evidence in aggravation or mitigation. The Board also stated that it would consider remanding the matter to the Hearing Committee for fact finding relating to the appropriate sanction if either party showed good cause for doing so. Neither party requested a remand. Hence, after a brief review of the factual background, we turn to the issue of sanction, which is before us now in the first instance.

[1] The Maryland Rules were deemed applicable pursuant to the D.C. R. Prof. Resp. 8.5(b)(1) (choice of law), since the conduct occurred in proceedings before the U.S. District Court for the District of Maryland.

I. BACKGROUND

We will not repeat the detailed factual findings set forth in the July 2003 Opinion, but a synopsis may be helpful for purposes of convenient presentation. The Respondent's client Gifford Thompson was indicted for conspiracy to import and distribute 15-20 kilograms of cocaine. He entered a guilty plea, and later decided to try to withdraw it, alleging that the Respondent had coerced him to plead guilty on the day of the hearing. Thompson first sent a letter to the Respondent demanding that he file motions seeking vacatur of the plea and refund his $14,000 retainer so that Thompson could obtain other counsel. Thompson then filed a letter with the court proclaiming his innocence and stating that the Respondent, "using scare tactics[,] coerced and frightened me completely out of my wits" in pressuring him to plead.

The District Court treated Thompson's letter as a motion to vacate the plea, set a hearing on the motion, and requested the parties' positions. The court specifically requested the position of the Respondent, who stated that "[i]n light of the fact that I still represent Mr. Thompson, I believe that it would be inappropriate to respond at this time [to the allegations]." The government opposed the motion to vacate and served that opposition only on the Respondent. The Respondent did not, however, share a copy of the government's opposition with Thompson until the day of the hearing, nor did he meet or communicate with Thompson until that date. The Respondent did continue all other aspects of the representation. For example, he filed exceptions to the presentence report and sent a copy to Thompson in prison.

At the hearing, the court asked the Respondent if he would present the motion to vacate. He responded that it would be inappropriate for him to do so. Thompson then

presented the motion pro se. The court denied the motion to vacate based on its extensive voir dire of Thompson prior to his guilty plea, and proceeded to the sentencing hearing, whereupon the Respondent resumed his representation of Thompson, at least to the extent of making a brief statement requesting a three-point reduction (to level 35) under the Federal Sentencing Guidelines for acceptance of responsibility and, in the alternative, sentencing at the low end of level 38. Thompson then allocuted at length to the court, further averring his innocence and thus undermining the possibility of a sentencing reduction for acceptance of responsibility. The court found Thompson's offense level to be 38 and sentenced him at the low end, i.e., to 292 months. The low end for level 35 would have been 210 months.

The Respondent did not file a notice of appeal within the 10-day period. Thompson, however, wrote to the Fourth Circuit stating that he would like to pursue an appeal but did not have counsel. The court treated the letter as a notice of appeal and appointed the Respondent as counsel even though Thompson had repeated the allegations regarding the Respondent in his letter. After being advised by the Fourth Circuit of his failure to file the docketing statement, the Respondent moved for additional time and filed it. Thompson subsequently wrote to the court asking for new counsel. The Respondent did not oppose, and the court appointed another attorney.

Bar Counsel charged the Respondent with violations of Rules 1.7(b)(4) (conflict of interest), 1.16(a)(1) (failure to withdraw when necessary to avoid violation of the Rules), and 1.16(a)(3) (failure to withdraw when discharged). The Board agreed with the Hearing Committee that Thompson’s letter demanding that the Respondent refund his retainer but also directing that he pursue vacatur on his behalf did not indicate an intent to terminate

with sufficient clarity to support the Rule 1.16(a)(3) charge. The Board disagreed with the Hearing Committee with respect to the other two charges, however, emphasizing that the critical inquiry in respect of conflict of interest is not whether Thompson's desire to vacate the plea had merit, but whether the Respondent could diligently discharge his duty to pursue his client's objectives without damaging his own interests. "Respondent had an obligation here to be an advocate for his client in the motion to vacate his guilty plea. He could not do so because advocating his client's position would subject him to malpractice and discipline." July 2003 Opinion 20. Hence, we found a conflict of interest and an impermissible failure to withdraw from the representation in light of that conflict.

II. SANCTION

The parties are not far apart in their respective recommendations as to the appropriate sanction for the Rule 1.7(b)(4) and 1.16(a)(1) violations. Bar Counsel recommends a "short suspension with restitution." Bar Co. Br. 2. The Respondent argues for "[r]eprimand, censure, or in the alternative a thirty (30) day suspension with supervision, held in abeyance for a six month probationary period." Bar Counsel seeks inclusion of a restitution requirement on the theory that "[e]ven where an attorney has done some work for the client, restitution is appropriate if the client did not benefit from the legal services because of the attorney's unethical conduct." Bar Co. Br. 7 (citing cases). The Respondent counters that he earned his fee by performing services including "discovery . . . police reports, handwriting exemplar report(s), reviewing motions, consultations with the investigator and the client and numerous other issues." Res. Br. 7.

In considering the appropriate sanction in this matter, we must take into account (i) the nature of the violations, (ii) any mitigating and aggravating factors, (iii) the need to

protect the public, the courts, and the legal profession, and (iv) the moral fitness of the attorney. See In re Hager, 812 A.2d 904, 921 (D.C. 2002). We consider the nature of the violations in subsection A and the other factors in subsection B below. In subsection C, we consider Bar Counsel's request that the Respondent be required to make restitution for his legal fees.

A. The Nature of the Violations

"With respect to conflicts of interest, '[s]anctions . . . have ranged from informal admonitions to lengthy suspensions.'" Hager, 812 A.2d at 922 (quoting In re Shay, 756 A.2d 465, 483 (D.C. 2000)) (one-year suspension for conflict of interest and multiple related violations); cf. In re Shay, 756 A.2d 465 (D.C. 2000) (90-day suspension); In re McLain, 671 A.2d 951 (D.C. 1996) (90-day suspension); In re Butterfield, BDN 264-99 (BPR June 10, 2003) (30-day suspension). In Hager, class action counsel entered into a "Settlement Agreement," without the consent of their clients, agreeing not to bring further claims against the defendant on behalf of the existing clients or others. The lawyers received attorneys' fees of $225,000 and agreed not to disclose the arrangement to their clients. Finding multiple serious violations, the Court imposed a suspension of one year. The respondent in Shay discovered that her client had been lying to his present "wife" about his having divorced his first wife and then undertook to represent both the client and his present, putative "wife" in the drafting of reciprocal wills and related issues. Shay continued to conceal the deception, even while advising the putative wife in matters where she had a compelling need to know the truth.

We do not believe that the Respondent's actions in this case rise to the level of the misconduct apparent in Hager and Shay. There is no allegation here of willful collusion in

the deception of a client as in Shay. Nor is there anything in this record akin to the misconduct in Hager, where the lawyer accepted monetary compensation from an adverse party and agreed not to pursue the litigation and not to disclose the payment to his clients.

We also find the level of culpability here generally lower than in the cases cited by Bar Counsel. For example, the two-year suspension in In re James, 452 A.2d 163 (D.C. 1982), was not only for a conflict of interest, but also for the respondent's conversion of client funds that he had agreed to pay to a third party in satisfaction of obligations under a settlement agreement. See James, 452 A.2d at 164. There is no such allegation here. In re Boykins, 748 A.2d 413 (D.C. 2000), involved multiple violations in a probate matter, with charges sustained under Rules 1.1(a), 1.1(b), 1.3(a), 1.3(c), 1.7(b), and 8.4(d). The multiple violations were offset by the Court's finding that all but one of the violations stemmed from the respondent's inexperience. We do not find Boykins particularly instructive in the present circumstances. In re Jones-Terrell, 712 A.2d 496 (D.C. 1998), involved egregious overreaching by a lawyer with respect to her elderly and incapacitated client. We do not view the misconduct here as comparable to that established in Jones-Terrell.[2]

Closer in terms of seriousness are McLain and Butterfield. The Court in McLain ordered a ninety-day suspension for a violation of the predecessor to Rule 1.8(a), where the respondent borrowed money from his clients (which he did not repay) without advising

[2] Bar Counsel also cites In re Hunter, 734 A.2d 654 (D.C. 1999). The Court in that case imposed a 90-day suspension as reciprocal discipline for multiple Rules violations where the Respondent represented a criminal defendant in a case in which an officer with whom she was romantically involved had participated in the arrest of the co-defendant and was to be a government witness at trial. We agree with Bar Counsel that Hunter, though decided under the lenient standard of review applicable in reciprocal cases, is at least somewhat comparable to the present case in terms of seriousness.

them that he had a conflict, that his interests differed from theirs, or that they should seek advice from another attorney regarding the transaction. In Butterfield, BDN 264-99, the Board recommended a 30-day suspension where a lawyer undertook representation of a new corporate client that was bidding for the same government contract as an existing firm client, without disclosure of the conflict or consent. Like McLain, the Respondent here failed to bring a conflict of interest and the need for disinterested legal advice promptly and adequately to the attention of his client. Like Butterfield, the Respondent persisted in a representation that was simply too fraught with conflict to continue.

There are some conflicting considerations as regards the seriousness of the misconduct in this case. On the one hand, we have difficulty finding that the Respondent's violation resulted from more than an error of judgment regarding the permissibility of "carving out" the conflicted aspect of the representation while preserving the broader attorney-client relationship, as opposed to a willful and knowing violation of the Rules. After all, a Hearing Committee of this Board, the District Court, and the Fourth Circuit, to varying degrees, all failed to perceive an incurable conflict.[3]

On the other hand, the Respondent's approach may well have had serious adverse consequences for his client. Thompson, perhaps above all, needed someone – a disinterested lawyer – to advise him candidly and forcefully regarding the likelihood of success on his motion to vacate and the prospect of losing the reduction in his sentence for

[3] Nevertheless, as we stated in the July 2003 Opinion, "Respondent cannot shift the responsibility for his withdrawal from the case to the Court. The Court certainly cannot know the facts involving the attorney-client relationship and whether withdrawal is necessary. The Rules of Professional Responsibility impose the conflict of interest and withdrawal determination on the attorney alone, who is in the best posture make informed judgments on the issue." July 2003 Op. 22.

acceptance of responsibility.[4] The Respondent was unable to provide the needed advice, and he took insufficient steps to see that his client received it.[5] Thompson's sentence is now almost eight years longer than it likely might have been had he taken responsibility for his crime rather than proclaiming his innocence. Thompson might, of course, have taken the same actions and received the same sentence even if properly advised by a disinterested lawyer. We will never know. What is clear to us, however, is that it is not enough in the face of a conflict of this character simply to declare a portion of the representation "off limits," stand idly by until the day of the hearing before raising the subject of separate counsel, and thus effectively leave the client to fend for himself in the conflicted area of the representation.

B. The Other Factors

We have considered several additional factors in reaching our recommendation as to sanction. In aggravation, Bar Counsel calls our attention to previous discipline and to what she characterizes as the Respondent's "evasive and argumentative" testimony before the Hearing Committee. The Respondent contends that he represented Thompson zealously in the areas that he considered to be outside the conflict and that he cooperated

[4] Thompson also needed competent counsel if he was to have any chance of successfully withdrawing his plea by attacking his lawyer's actions.

[5] Although neither the Committee nor the Board made any findings in this regard, the Respondent claims he told Thompson just before the sentencing hearing that Thompson should ask the District Judge to appoint separate counsel for purposes of the motion to vacate. See Tr. 141. Thompson's account of the conversation with the Respondent prior to the hearing does not make reference to any such advice. See id. at 27. In any event, even if fully credited, the Respondent's testimony reflects an untimely and inadequate effort to make his client aware of the existence of the conflict, of the Respondent's inability to present the motion, and of the need to consider obtaining separate counsel.

with Bar Counsel.[6] The previous discipline was an informal admonition issued in 1994 for failure to communicate adequately with a client.[7] As to evasiveness, we have reviewed the record and are not inclined to place great weight on this consideration. In the final analysis, we find nothing unusually persuasive or compelling in the aggravating and mitigating factors adduced by the parties.

Beyond what we have discussed above, we are not aware of additional information bearing on the remaining sanction criteria, i.e., the protection of the public, the courts, and the legal profession and the moral fitness of the attorney. As discussed above, we discern no perfidy in the violations in this case yet view them as sufficiently serious to warrant more than a nominal sanction.

As noted above, we believe that the present case is comparable in terms of seriousness to McLain and Butterfield, and hence amenable to a suspension of 60 days in ordinary circumstances. However, in view of the very lengthy delay in the disposition of this case, and the fact that the Respondent has practiced law ethically during the pendency of this matter, see In re Williams, 513 A.2d 793, 798 (D.C. 1986), we recommend that

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[6] The Respondent also contends that the conflict issue that confronted him was "difficult and complicated" and that he took no "affirmative action" to the detriment of his client. Res. Br. 1. The substance of these points is addressed in subsection A ("Seriousness of the Violation") above.

[7] In characterizing the prior discipline, Bar Counsel states as fact certain allegations that were contested and explicitly not resolved by the informal admonition. Specifically, Bar Counsel states that the 1994 complainant, Mr. McIntyre, "retained Respondent to represent him on appeal because Mr. McIntyre had reviewed his previous attorney's brief and was dissatisfied. Instead of withdrawing the previously filed brief or filing a supplemental brief, Respondent adopted the previous counsel's brief to argue the case." Bar Co. Br. 2. The informal admonition, however, states that "[w]e make no finding whether Mr. McIntyre consented to the filing of the [previous attorney's] brief. Mr. McIntyre denies that consent was given, and [Respondent] assert[s] the contrary. Because of the discipline issued as a result of the Rule 1.4(a) violation, we do not resolve this issue." Informal Admonition Letter from Leonard H. Becker, Esq., to Billy L. Ponds, Esq. (June 13, 1994).

execution of the 60-day suspension be stayed for a six-month period of unsupervised probation and that the Respondent be required to complete a continuing legal education course on ethics or criminal practice covering conflicts of interest during the six-month period as a condition of vacating the suspension. Cf. In re Peek, 565 A.2d 627, 634 (D.C. 1989) (approving "an extended, supervised period of probation in lieu of all or part of a shorter period of suspension").[8] We are, of course, mindful of the Court's rule that circumstances must be "unique and compelling" for delay to become a mitigating factor. In re Fowler, 642 A.2d 1327, 1331 (D.C. 1994). We conclude that the five-year delay in this case rises to that level. A delay of this length places this case in an exceptional category, at the outermost bounds of known delays within the disciplinary system, and we believe that the Fowler rule allows for mitigation in these circumstances. See In re Starnes, 829 A.2d 488, 490 (D.C. 2003) (adopting Board recommendation that suspension be reduced by 3 months in part because of similarly unusual and lengthy delay).

C. Restitution

Bar Counsel urges us to recommend that the Court require restitution of the $14,000 retainer given by Thompson to the Respondent on the theory that "Respondent's unethical conduct means that Mr. Thompson derived little or no benefit from Respondent's representation." Bar Co. Br. 8. We decline to include such a recommendation. A restitution determination in this case, where the record establishes that the Respondent provided substantial services to his client, would not be possible, because the record includes no billing records, affidavits, or other materials necessary to such a determination. We note in this regard that our July 2003 Opinion invited the parties to request a remand to

[8] The Respondent should be required to file proof of completion of the course within the 6-month period as a condition of vacating the suspension.

the Hearing Committee, upon a showing of good cause, for any further fact finding they considered necessary. No remand was requested. Cf. In re Solomon, 599 A.2d 799, 808 (D.C. 1991) ("In our view, the sanction of restitution should be imposed only after a full and fair hearing with adequate notice that the nature and extent of the services performed by the respondent are in issue.").

As the Court has stated, "[i]t is the general rule . . . that where an attorney violates his or her ethical duties to the client, the attorney is not entitled to a fee for his or her services." Hager, 812 A.2d at 923. In the same decision, however, the Court made it clear that the lawyer "may be entitled to a reasonable fee for the work he did prior to his unethical conduct." Id. The Respondent rendered most of his services in this case prior to the entry of his client's guilty plea and is presumably entitled to his fees for those services. The conflict of interest did not arise until after that point, when Thompson accused him of coercion and sought to recant his plea. Further, we have no information in the record that would allow us to determine the value of the services rendered by the Respondent up to that point, or, for that matter, after that point.

Finally, restitution is normally imposed in neglect and similar cases where the attorney does not perform the agreed work at all or does so in such a wholly deficient manner that retaining the funds would amount to unjust enrichment.[9] See, e.g., In re

[9] The cases cited by Bar Counsel all fit this description, Bar Co. Br. 7-8, and we are not aware of a disciplinary case in which the Court has attempted to assess restitution based on the theory that an attorney's ethical misconduct caused a diminution in the value of otherwise substantially completed legal services. See In re Solomon, 599 A.2d 799, 808 (D.C. 1991) ("[T]he Board has recommended restitution in other cases where a lawyer has done some de minimis work that did not rise to the meaningful level."); cf. In re Hallmark, 831 A.2d 366, 375 (D.C. 2003) (partial restitution ordered where lawyer performed services relating to one task but no services with respect to other discrete task); In re

Pullings, 724 A.2d 600 (D.C. 1999) (restitution ordered where lawyer was hired to handle appeal but took no action on appeal); In re Wright, 702 A.2d 1251, 1257 (D.C. 1997) (restitution ordered where lawyer provided only minimal services and then abandoned case); In re Foster, 699 A.2d 1110 (1997) (restitution ordered where attorney took no action in custody matter and client lost cusody of his son). We do not understand Bar Counsel to assert that the Respondent provided no legal services to Thompson. Rather, the theory seems to be that, although the Respondent provided legal services to his client pursuant to the retainer, the "benefit" of those services was diminished or negated by his misconduct. Bar Counsel thus appears to mean "benefit" not in the ordinary sense of services rendered requiring a certain amount of time at the attorney's hourly rate, but rather in the sense of ultimate success or improvement of the client's legal position.

We are aware of no precedent for this results-oriented concept of "benefit" for purposes of restitution in a disciplinary proceeding. The Court has cautioned that "[t]he disciplinary process is not designed to handle questions of causation, foreseeability, burdens of proof, mitigation, contributory negligence, and other issues which have to be resolved in a civil suit for damages." Matter of Robertson, 612 A.2d 1236, 1241 (D.C. 1992).[10] Yet, these are precisely the types of causation-related questions that would be raised by an inquiry into the ultimate "benefit" to Thompson of the Respondent's legal services. Was the ultimate denial of "benefit" to Thompson – in the form of a 292-month sentence – the result of the Respondent's mishandling of the conflict of interest, or would

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Roundtree, 467 A.2d 143, 148 (D.C. 1983) (some initial work done, but total neglect after a certain point resulted in dismissal of case, making restitution appropriate).

[10] Although the Court was focused on a different issue in Robertson, i.e., whether "restitution" should go beyond amounts actually received by the attorney from the client and into the realm of damages, the Court's concerns are similarly present here.

Thompson have suffered the same fate even if properly advised by a disinterested lawyer? Was the value of the Respondent's services in evaluating the government's case and counseling a guilty plea negated by the guilty plea, or by missteps at the sentencing phase? We think these issues are more properly the province of an action for civil damages, but even if we were prepared to undertake such inquiries, we are unable to do so on the present record.

IV. CONCLUSION

For the foregoing reasons, the Board recommends that the Court impose a sixty-day suspension on Respondent, stay execution of the suspension during an unsupervised probationary period of six months, and require Respondent to file, within the six-month probationary period and as a condition of vacating the suspension, proof of completion of a continuing legal education course on legal ethics or criminal practice covering conflicts of interest.

BOARD ON PROFESSIONAL RESPONSIBILITY

By: ________________________________
Martin R. Baach
Board Member

Dated: January 22, 2004

All members of the Board concur in this Report and Recommendation except Ms. Williams and Mr. Wu, who did not participate.

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:	)	
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	)	
BILLY L. PONDS,	)	**Bar Docket No. 150-98**
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Respondent.	)	

MEMORANDUM OPINION AND ORDER OF THE BOARD ON PROFESSIONAL RESPONSIBILITY

I. INTRODUCTION

This matter considers the ethical duties of a criminal defense attorney where his client, after having pled guilty pursuant to a plea bargain, subsequently wants to vacate his guilty plea and go to trial. In this particular matter, which occurred in the United States District Court for the District of Maryland, the defendant accused Respondent, his retained attorney, of coercing his guilty plea and demanded the return of all legal fees paid in order to retain new counsel. After conveying his accusations and demands via a letter to Respondent, the defendant mailed a similar letter directly to the Court. Respondent thereafter chose not to represent his client in the plea withdrawal proceeding, but chose to represent the client in the sentencing that followed. Respondent thereafter chose not to assist his client with noting a timely appeal.

Bar Counsel charged Respondent with (1) failing to move for withdrawal from this representation when continuing representation would result in a violation of one or more of the Maryland Rules of Professional Conduct (the "Maryland Rules") under Maryland Rule

1.16(a)(1)[1] (2) with failing to move to withdraw from this representation upon discharge by the client, under Maryland Rule 1.16(a)(3); and (3) with a conflict of interest violation under Maryland Rule 1.7(b)(4) under the theory that Respondent's continuing representation of the defendant might be adversely affected by Respondent's professional and personal interests, including defending his reputation and avoiding malpractice.

Hearing Committee Number Eight (the "Hearing Committee") conducted a hearing on these allegations on April 15, 1999. Both Respondent and his former client, Gifford Thompson, testified. Bar Counsel's exhibits ("BX") A-D and 1-12 and Respondent's exhibits ("RX") 1-10 were admitted. Hearing Committee Transcript ("Tr.") at 3-4; 140.

On August 9, 2002, the Hearing Committee issued its Report and Recommendation recommending that Respondent be found not to have violated the charged disciplinary rules. The Hearing Committee further recommended that the case be dismissed. Bar Counsel timely noted her exception to the Hearing Committee Report, requesting that the Board conclude that the three charged violations were proven by clear and convincing evidence and further, that the matter be remanded to the Hearing Committee to consider aggravating and mitigating evidence prior to the Hearing Committee recommending a sanction.

We note at the outset that an attorney's obligations after his client herself files a motion to withdraw a guilty plea can be very difficult to know, particularly during the time when no decision has been made by the court whether it will conduct a hearing on such a request. If the court rules promptly that it will not hold an evidentiary hearing because the request is meritless

[1] As all of the events in question occurred in Maryland, the charges were lodged under the Maryland Rules pursuant to Rule 8.5(b)(1) of the District of Columbia Rules of Professional Conduct (the "Rules"). Rule 8.5(b)(1) states: in relevant part: "[f]or conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for the purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits. . . ."

on its face and because the underlying guilty plea record shows a knowing and voluntary decision by the defendant, then there is little likelihood of a conflict of interest and likely no need for defense counsel to move for withdrawal. On the other hand, matters become more complicated for counsel where the court has not decided whether to grant a hearing or has decided to grant a hearing on the motion. In such situations and depending on the allegations underlying the motion, a conflict of interest may well arise necessitating a motion to withdraw.

The presentation by Bar Counsel to the Hearing Committee never explained these complexities. Rather, Bar Counsel's presentation started with the conclusion that Respondent had to have a conflict of interest under Maryland Rule 1.7(b)(4) and that, as a result, it was incumbent on Respondent to move for withdrawal under Maryland Rule 1.16. In our analysis, we believe that Bar Counsel's presentation should have begun well before Maryland Rule 1.7, namely with Maryland Rules 1.2, 1.3 and 1.4. A fuller presentation of these foundational issues would have greatly assisted the Hearing Committee's resolution of the matter -- with which it obviously struggled for a significant period of time before it issued its Report.

This Board certainly does not want to set an ethical standard that a defense counsel must rush to withdraw every time a criminal client has a post-guilty plea change of heart and later wants to try her luck with a jury. On the other hand, every defendant has the right to have her attorney vigorously and competently abide by her decision as to whether to plead guilty or go to trial, even if that decision later changes. If her attorney fails in this regard because the client's interests conflict with his own, this failure may be in violation of his professional obligations.

II. FINDINGS OF FACT

The Board accepts the Hearing Committee's findings of fact, to the extent they are factual and not conclusory, as they are fully supported by the record. See In re Micheel, 610 A.2d 231, 234 (D.C. 1992). The Board does not dispute the Hearing Committee's credibility

determinations, but finds they are largely irrelevant. The Hearing Committee's credibility findings primarily address the merits of the motion, particularly whether it was baseless or frivolous. For example, the Hearing Committee found . . . "Mr. Thompson's testimony regarding his attempt to withdraw the plea incredible; the evidence is clear and convincing that Mr. Thompson freely entered his plea and was not coerced by Respondent." See HC Report at 5 ¶ 10. The issue here is not whether Mr. Thompson's desire to withdraw his guilty pleas was meritorious or just a change of heart; the issue is whether Respondent's ethical duty required his withdrawal after his client attacked his competence and honesty.

The Hearing Committee's findings of fact are set forth below, but they have been expanded by the inclusion of additional facts from admitted exhibits, particularly from the transcripts of defendant Thompson's guilty plea and from the hearing on the request to vacate his guilty plea. See Board Rule 13.7. The Hearing Committee's findings have also been rearranged in chronological order.

1. Respondent has been a member of the District of Columbia Bar since June 25, 1984.

2. Defendant Gifford Thompson was indicted on November 20, 1996 in the United States District Court for the District of Maryland, arraigned on November 26, 1996, and ordered held without bond on December 5, 1996. He was initially represented by the Office of the Federal Public Defender. BX 10 at 93-96.

3. On February 8, 1997, Respondent was retained to represent Mr. Thompson. On February 14, an order granting the substitution of counsel was granted and Respondent's appearance entered. BX 10 at 96. A non-refundable retainer of $20,000 plus expenses was agreed to, with full payment due regardless of whether the case went to trial or was resolved with

a guilty plea.[2] BX at 1 at 5-8. Defendant Thompson was charged with conspiracies to import cocaine and to distribute and possess with the intent to distribute between 15 and 50 kilograms of cocaine.[3] Respondent had previously represented defendant Thompson in a criminal case in the District of Columbia.

4. On July 10, 1997, Mr. Thompson entered a guilty plea before United States District Judge Alexander Williams, Jr., pursuant to a plea agreement dated June 23, 1997, but signed by Respondent and Mr. Thompson that day (July 10). The district court made a thorough Rule 11(b), Fed. R. Crim. P. inquiry. In the course of the plea colloquy, which was taken under oath, Mr. Thompson stipulated that the government's evidence would include that during April 1996, he and others conspired to import cocaine into the United States from Jamaica; that during this time he utilized the service of eight female couriers who traveled to Jamaica and returned to the U.S. with cocaine concealed inside their bodies; and that on some trips the couriers had additional cocaine concealed in tennis shoes they were wearing and in pairs of shoes carried in their suitcases. See Plea/Rearraignment Transcript, RX 3 at 20-22.

Mr. Thompson affirmatively answered the District Court's inquiry that he had read the written plea agreement and gone over its content with Respondent. The Court reviewed with Mr. Thompson the maximum possible sentence (not less than 10 years nor more than life) for the offense to which he was pleading guilty and the potential sentence under the United States Sentencing Guidelines. It was explained that Respondent would argue at sentencing that Mr. Thompson's ultimate offense level should be a 31 but that the government would argue that the

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[2] Respondent received at least $14,000 of the agreed $20,000. BX 4 at 16.

[3] The charges were pursuant to 21 U.S.C. §§ 846 and 963. Under the United States Sentencing Guidelines, the offense levels (with their corresponding sentence ranges) increase with the increased weight of the drugs involved. See U.S.S.G. § 2D1.1 and § 1B1.3.

offense level was 36, assuming a two-point acceptance of responsibility deduction under U.S.S.G. § 3E1.1(a). Id. at 8-14.

The Court explained to Mr. Thompson that after receiving the Presentence Report, he could sentence him to the maximum sentence (life), and that if the Court did that, Mr. Thompson would not be free to withdraw his plea. The Court asked, "Is that clear to you?" Mr. Thompson responded, "Yes, Your Honor." Mr. Thompson also stated he understood that his plea agreement limited his appeal rights. Id. at 13-16.

The Court asked Mr. Thompson: "Are you pleading guilty because you are guilty?" Mr. Thompson replied, "Yes, Your Honor." Id. at 16. The Court advised Mr. Thompson of his rights under the United States Constitution, including "an absolute right to plead not guilty and you can go to trial if you like." Id. at 17.

Just prior to accepting Mr. Thompson's guilty plea, the Court made the following inquiry:

THE COURT: All right. Now, Mr. Thompson, are you satisfied with the services rendered to you at this point by Mr. Ponds?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right. Has he gone over the plea agreement with you?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right. Has he discussed the charges, the elements of the charges, and any potential defenses that you have?

THE DEFENDANT: Yes, Your Honor.

THE COURT; All right. He's done everything you've asked him to do?

THE DEFENDANT: Yes, Your Honor.

THE COURT:	All right. Do you have any other questions you want to ask of me before I make a decision on your guilty plea?
THE DEFENDANT:	No, Your Honor.

Id. at 22. The Court then accepted Mr. Thompson's guilty plea. Id. at 24.

5. On or about July 21, 1997, Mr. Thompson sent Respondent a three-page, typed letter stating, in part:

> When I accepted your counsel in the beginning of this incubus, I declared my innocence to you, as I do maintain my innocence now. You were told expressly that anything short of *nolle proseque* [sic] or an acquittal at the conclusion of my trial was not acceptable in light of my actual innocence. With the exception of the day you dropped that bombshell plea agreement on me in the courtroom, which I had no prior consultation on, did I ever waiver upon my innocence.

BX 7 at 48.

Mr. Thompson's letter goes on to accuse Respondent of deliberately betraying him. It alleged that Respondent did not consult with him on the plea agreement because Respondent knew that Mr. Thompson would not agree with it and that his plea was not voluntary because Respondent had coerced and frightened him. The letter states: "The way I have been duped by you into pleading guilty is tantamount to a high-pressure and torturous confession induced by police." BX 7 at 48.

The letter concludes with the following:

> I expect that upon your perusal of what I have exposed in this correspondence, you will attempt setting matters straight. You will do this by filing appropriate motions to the court admitting the irreparable harm you have done me. You will petition the court to vacate my guilty plea, as it was not voluntary. You will, finally, pay restitution in the amount paid you in fees, so that I may secure new, competent counsel.
>
> Should you fail to be reasonable at this juncture, be duly apprised that I will begin every legal recourse at my disposal, such as a campaign to notify all bar associations, licensing agencies, media and the public of your impropriety.

Id. at 50. Respondent did not reply to this letter. Tr. at 94-95.

6. On or about August 13, 1997, the District Court received a letter from Mr. Thompson dated July 28, 1997. Among other things, this letter states:

> Respectfully, I submit to the Court that my Guilty Pleading of July 10, 1997, was not voluntary; that I am not guilty as charged; that I am completely innocent of the Criminal Indictment against me; and that my counselor using scare tactics coerced me and frightened me completely out of my wits and sensibilities. As such, my rejoinders to the Court's battery of queries before accepting my Plea were neither voluntary nor true.

Id. at 4. The letter to Judge Williams goes on to request that the court "grant a hearing where I might be better prepared to defend and to show the merits of my petition praying the Court will reverse itself in its finding my Guilty Plea was voluntary, thereby vacating my Guilty Plea which will permit me to defend my innocence at trial with new, competent counsel." Id. Attached to this July 28, 1997 letter was a copy of Mr. Thompson's July 21, 1997 letter to his counsel.

7. The Court subsequently sent Respondent and the government a copy of Thompson's July 21 and 28, 1997 letters. The district judge asked Respondent for a response.

8. In a letter dated September 10, 1997, Respondent wrote to the court, "In light of the fact that I still represent Mr. Thompson, I believe that it would be inappropriate to respond at this time [to Thompson's allegations]." Id. at 14.

9. On September 9, 1997, Respondent filed exceptions to the Presentence report. BX 4 at 28-30. A copy of the Presentence report and the filed exceptions were mailed to Mr. Thompson on September 12, 1997 and received at the Charles County Detention Center on September 15, 1997. Id. at 25-30.

10. On or about September 19, 1997, the government filed a 13-page opposition to Mr. Thompson's request to vacate his guilty plea captioned "Government's Response to Defendant's Pro Se Motion To Withdraw Plea of Guilty." BX 11. The government only served

Respondent with that opposition. Respondent did not share a copy of the government's opposition with Mr. Thompson until the September 26, 1997 hearing. Tr. 120.

11. On or about September 19, 1997, Respondent forwarded to Mr. Thompson a copy of a letter from the prosecutor identifying United States Customs Service Special Agent Lavery as a government witness at Mr. Thompson's sentencing hearing. BX 7 at 32-33.

12. Respondent did not meet or speak with Mr. Thompson between the day he received Mr. Thompson's July 21, 1997 letter requesting to withdraw his guilty plea and the September 26, 1997 hearing date/sentencing date.

13. The hearing on the request to withdraw plea of guilty took place before Judge Williams on September 26, 1997, as scheduled. At that time, the Court acknowledged receipt of the letters from Mr. Thompson indicating that he wanted to withdraw his guilty plea and that there was a dispute between him and his attorney. At the outset of this hearing, the court addressed Respondent and the following exchange took place:

COURT: Mr. Ponds, are you arguing that motion yourself on his behalf or how are you going to proceed with that?

MR. PONDS: No, Your Honor. I think it would be inappropriate for me to argue the motion since there's things in his motion that ---

COURT: All right. Well, Mr. Thompson, I'll let you further address me.

BX 10 at 21.

14. The Court began the hearing by asking Mr. Thompson why the Court should allow him to withdraw a plea that had previously been provided under oath. Mr. Thompson said that Respondent had shown him the plea offer letter only 15 or 20 minutes before he pled guilty and that Respondent had advised him that if he didn't take that offer, he was going "to get life"

imprisonment.[4] Mr. Thompson then reasserted his claims that his attorney had intimidated him and lied to him. He said he did not trust his lawyer. Id. at 22-25. After listening to these statements by Mr. Thompson, the Court delivered its findings of fact, one of which was that Mr. Thompson had been represented by competent counsel. The Court finished with the following comments:

> COURT: But I don't think, Mr. Thompson, that you have established your burden to withdraw your guilty plea. I can't withdraw a guilty plea when I went through a half hour questioning with you and you satisfied me on the record that you made a knowing and voluntary plea, and there is absolutely no way under the law that I can withdraw your guilty plea. I can't do it and won't do it. And I am going to deny your pro se motion that you have filed.

Id. at 28 (emphasis added). Upon denying the request to withdraw his guilty plea, the Court commenced the sentencing hearing, which began with the testimony of the United States Customs Service Special Agent.

15. Respondent resumed his role as Mr. Thompson's attorney during the sentencing hearing. His allocution, however, consisted of just a brief statement asking the Court to give Mr. Thompson a three point reduction for "acceptance of responsibility,"[5] to level 35, and if the Court elected not to do that, to sentence Mr. Thompson to the low end of the sentencing range for level 38.[6]

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[4] Mr. Thompson further explained, "When I came to him he told me that if I go to trial Tuesday, I would definitely get life. BX 10 at 114. He later added that he had only met with Respondent on "three times" and that Respondent did not discuss the case with him. Id. at 114-15.

While the record does not resolve the issue whether Respondent indeed told Mr. Thompson that he would get a life sentence, the facts do establish that under a worst case sentencing scenario if he went to trial, Mr. Thompson would have an offense level of 38, Criminal History Category III, and fall in a guideline range of 292 months to 365 months. As the record shows, he was ultimately sentenced on his guilty plea to 292 months.

[5] See U.S.S.G. §3E1.1(a) and (b).

[6] The low end of the sentencing range for level 38 was 292 months.

Mr. Thompson then allocuted at some length to the Court; his entire statement was contrary to his sentencing guideline interests in that he repudiated any acceptance of responsibility, and ensured that he would be sentenced at a level 38.[7] Respondent stood by silently without intervening while Mr. Thompson denied his involvement in the cocaine conspiracy. The Court found Thompson's offense level to be 38 and sentenced him at the low end of the guideline range to 292 months.

16. At the conclusion of the sentencing proceeding, the Court advised Respondent and Mr. Thompson that Thompson had 10 days to note his appeal. Id. at 145. Respondent, however, did not communicate with his client after sentencing except one letter relative to possible cooperation with the Drug Enforcement Administration. Tr. 33, 128. No notice of appeal was filed in the ensuring 10 days.

17. On November 4, 1997, Mr. Thompson wrote a letter to the United States Court of Appeals for the Fourth Circuit ("Court of Appeals"). BX 12 at 165. The letter sought to inform the Court of Appeals that Mr. Thompson did not have counsel to process his appeal but that he was interested in appealing his case.[8] This letter was treated as a Notice of Appeal.[9] This letter also contained accusations that Respondent had misrepresented facts and coerced Mr. Thompson's plea. Notwithstanding, on December 4, 1997, the Court of Appeals appointed Respondent to represent Mr. Thompson in his appeal. Id. at 167.

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[7] There is no indication that Respondent provided advice to Mr. Thompson concerning his allocution as Respondent did not speak to his client between the date of Mr. Thompson's guilty plea and his sentencing. It can safely be said that Mr. Thompson's allocution increased his sentence by 82 months from 210 months (offense level 35) to 292 months.

[8] There is no explanation in the record as to why Respondent did not note an appeal within ten days of sentencing.

[9] BX 12 at 163; see also BX 10 at 98 reflecting that a copy of this pro se notice of appeal was mailed to Respondent by the Clerk's Office on November 7, 1997.

18. On December 24, 1997, the Court of Appeals sent a letter to Respondent advising him of a violation of the appellate rules in connection with his failure to file a docketing statement, transcript purchase order and counsel of record form. Id. at 169. On December 31, 1997, Respondent filed a motion for an enlargement of time to file the appellant's docketing statement;[10] and subsequently filed it with the Court. Id. at 173-74.

19. On January 5, 1998, Mr. Thompson sent a letter to the Clerk of the Court of Appeals requesting the appointment of new counsel in light of Mr. Thompson's allegations against Respondent. Respondent filed a response on January 20, 1998, stating that he had no objections to Mr. Thompson's request. Mr. Thompson's request for the appointment of new counsel was granted on February 19, 1998. Id. at 180, 181, 184, 191.

Credibility

The Hearing Committee credited Respondent's view that Mr. Thompson was having second thoughts about his guilty plea and was desperate. It credited Respondent's belief that he thought Mr. Thompson's motion was baseless. It further credited Respondent's concern that his pursuit of such a motion could subject his client to additional charges of perjury and/or interference with the administration of justice and result in an even longer sentence. It credited Respondent's assertion that he decided not to take a position with regard to Mr. Thompson's motion to withdraw the plea in order to avoid being called as a witness against his client and to avoid facilitating his client's perjury. Lastly, it credited Respondent's testimony that he did not interpret Mr. Thompson's July 21, 1997 letter as a discharge. See HC Report 4.

[10] At the hearing, Respondent explained that he was out of the jurisdiction for three to four weeks during the month of December 1997 (Tr. at 85-86 and 129-131), so he had his assistant prepare a motion for enlargement of time, sign it on his behalf and file it.

III. DISCUSSION

We believe the relevant starting point in analyzing Respondent's conduct, which was not part of Bar Counsel's presentation, is Maryland Rule 1.2, "Scope of Representation" and in particular subparts (a), (d) and (e). Maryland Rule 1.2(a) states in relevant part:[11]

> (a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d), and (e), and, when appropriate, shall consult with the client as to the means by which they are to be pursued . . . . In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, . . .

Maryland Rules 1.2(d) and (e) state:

> (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.
>
> (e) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

With regard to Maryland Rule 1.2(a), it mandates that a lawyer abide by his client's decision as to a plea to be entered: in a criminal case, "the lawyer shall abide by the client's decision" about how to plead. This Maryland Rule does not preclude a client from changing his mind about his entered plea; most often the change in plea is from not guilty to guilty, but nothing precludes a change going in the opposite direction. One of the most fundamental rights of any criminal defendant is the right to go to trial -- even if the evidence overwhelmingly shows guilt. Here, the defendant fairly promptly had a change of heart (or mind) and wanted to exercise that constitutional right to proceed to trial. There is nothing improper or illegal in a defendant changing his mind, particularly prior to sentencing and courts are authorized to permit

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[11] Maryland Rule 1.2(a), quoted above, is almost identical to the District of Columbia's Maryland Rule 1.2(a).

such a change if the defendant "shows any fair or just reasons." See Rule 32(e), Fed. R. Crim. P.[12] A lawyer is bound to zealously defend such a client within the bounds of the ethical rules.

As Mr. Thompson's counsel, Respondent had to either fully support his client's changed decision, or if he could not do so, to withdraw.[13] At that juncture, Mr. Thompson was in great, indeed dire, need of competent legal advice from his attorney as he was proceeding down a perilous path. Under Maryland Rule 1.2, Respondent had an obligation to consult with his client about the law, to explain to the client the consequences of his conduct, and to explain the limitations on what Respondent could do. Here Respondent did nothing; in fact he consciously decided not to communicate with his client.

Comment [7] to D.C. Rule 1.2 recognizes that in these circumstances, "the lawyer's responsibility is especially delicate." It notes that the lawyer cannot further fraudulent acts by the client and that where the client is engaging in dishonest conduct, "[w]ithdrawal from the representation . . . may be required."

Another Rule not discussed by Bar Counsel but plainly relevant is Maryland Rule 1.3, which states:

> A lawyer shall act with reasonable diligence and promptness in representing a client.[14]

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[12] As of December 1, 2002, the standards for withdrawing guilty pleas are now contained in Rule 11(d)(2)(B), Fed. R. Crim. P.

[13] In Treece v. State, 547 A.2d 1054 (Md. 1988), the Maryland court found that a defendant who is competent is entitled to decide what his defense will be, and absent unusual circumstances, this decision binds his counsel (and the trial judge).

[14] Maryland Rule 1.3 is a briefer version than D.C.'s rule requiring "diligence."

Withdrawal of the guilty plea by a defendant is a lawful objective and there is a great deal of caselaw on this subject explaining the factors that a court might consider in deciding whether to grant a motion to vacate the guilty plea made prior to sentencing.[15] Not only did Respondent fail to provide the court with legal authority that might support Mr. Thompson's withdrawal of his plea, Respondent further did not deliver to his client the government's opposition so that Mr. Thompson could prepare to rebut it.

On the other hand, had Respondent met with his client and determined that their differences were irreconcilable and the only viable course of action to withdraw the guilty plea would be to attack his own representation and credibility, the necessity to withdraw would be obvious.

In addition, Maryland Rule 1.4(b) imposed a duty on Respondent to meet and confer with his client. Maryland Rule 1.4(b) provides:

> A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Respondent made no effort to explain the law regarding plea withdrawals to Mr. Thompson. In fact, Respondent purposely avoided his client when he should have been speaking to his client and giving advice as required by Maryland Rules 1.2 and 1.4.

IV. CONCLUSIONS OF LAW

A. Respondent Had a Conflict of Interest

The Hearing Committee found no violation of Maryland Rule 1.7(b), which states in relevant part: "A lawyer shall not represent a client if the representation of that client may be

[15] There were many factual and legal grounds that could have been mustered on behalf of Mr. Thompson's motion by a zealous advocate, including the promptness of the motion; ineffective assistance, lack of prejudice to the government; innocence of the charges; coercion; that the plea entered in haste and confusion; and that the plea was involuntary. See, e.g., United States v. McCoy, 215 F.3d 102, 107 (D.C. Cir. 2000); United States v. Wilson, 81 F.3d 1300, 1306 (4th Cir. 1996); Gooding v. United States, 529 A.2d 301, 307 (D.C. 1987). It is not known whether any of these would have convinced the district court, had they been made, to grant the motion.

materially limited by the lawyer's . . . own interests." The Hearing Committee agreed that there would be a violation of this conflict of interest rule if Respondent was Mr. Thompson's lawyer on the motion to withdraw the guilty plea, but concluded "[t]he simple truth . . . is that Respondent did not represent his client in the Motion to Withdraw the Plea." HC Report at 9. We disagree with this conclusion; Respondent was, in fact, Mr. Thompson's counsel and continued in that capacity at the plea withdrawal motion and sentencing. Respondent would cease being defendant Thompson's attorney only if he (Respondent) moved for withdrawal and the Court granted his motion. See Local Maryland Rule 201(3) "Withdrawal of Appearance," United States District Court for District of Maryland. As Respondent continued to be Mr. Thompson's counsel, he had a duty either to zealously represent Mr. Thompson or, if he could not ethically provide such representation, he needed to move to withdraw.

The Hearing Committee's reasoning for concluding Respondent did not represent Mr. Thompson during the plea withdrawal proceeding was essentially that Mr. Thompson's motion was pro se,[16] and Mr. Thompson represented himself on that motion pro se, and that the district court judge could have assigned new counsel for Mr. Thompson if he wanted, but chose not to. HC Report at 9. The Hearing Committee concluded that:

> It is clear that Respondent could not and did not represent Mr. Thompson in the argument on the Motion to Withdraw the Plea. It is possible, though by no means clear, that he [Respondent] had a duty to point out to the Court that Mr. Thompson should have had separate counsel appointed for the argument on the Motion to Withdraw the Plea. Bar Counsel did not,

[16] The government described Thompson's requests to withdraw his guilty plea as being "pro se," but this descriptive reference by the government does not mean that Respondent made a valid waiver of counsel. Before a defendant is deemed to be representing herself pro se, a judge must make a "searching or formal" inquiry into both the defendant's understanding of the Sixth Amendment waiver and her awareness of the disadvantages of self-representation. See Patterson v. Illinois, 487 U.S. 285, 299 (1988); Brewer v. Williams, 430 U.S. 387, 404 (1977) (presumption against implied waiver of counsel because representation by counsel indispensable to fair administration of criminal justice system).

> however, charge Respondent with a violation of the competency requirements of the rules.

HC Report at 11. This conclusion is contrary to Maryland Rule 1.16(b) and (d) and Local Maryland Rule 201.[17]

As we noted above, when Respondent received the July 21, 1997 letter from his client, he had a duty under Maryland Rules 1.2 and 1.4 to consult with his client about this very important matter, to explain the effects of such a motion on his case and possible sentence, and then to abide by his client's decision if Respondent could still fully and zealously represent the client. If Respondent could not zealously represent Mr. Thompson because of ethical constraints or because of a personal conflict of interest, then he would have had no choice but to move to withdraw. A criminal defendant's representation is continuous – as a defense attorney is not free to jump in and out of a representation as it suits that attorney's needs or purposes. The facts here show that Respondent was operating under an actual conflict of interest during the hearing on the plea withdrawals as his client as had accused him, in so many words, of coercion and ineffective assistance which made his guilty plea involuntary. In a case with very similar facts, United States v. Davis, 239 F.3d 283 (2d Cir. 2001), the Court of Appeals wrote:

> Davis argues persuasively that his counsel was operating under an actual conflict of interest at the plea withdrawal hearing. The question is a familiar one. Recently in Lopez v. Scully, 58 F.3d 38, 41 (2d Cir. 1995), we reviewed the denial of a defendant's motion to withdraw his plea on the grounds that his attorney had coerced him into pleading guilty. Following defendant's pro se allegation of coercion, we held that "[a]t that point, the attorney had an actual conflict of interest: to argue in favor of his client's motion would require admitting serious ethical violations and possibly subject him to liability for malpractice; on the other hand, any contention by counsel that defendant's allegations were not true would

[17] If Respondent had ceased being Mr. Thompson's lawyer, he would have been required to take steps to protect his client's interest. See Maryland Rule 1.16(d).

> contradict his client." Id. (internal quotation marks and alterations omitted). The actual conflict in such a case is plain.

Davis, 239 F.3d at 286; see also United States v. Morris, 259 F.3d 894, 899 (7th Cir. 2001) (actual conflict of interest where attorney accused of giving false advice to induce a guilty plea; attorney would have a self-interest in protecting himself from a malpractice claim).[18] Respondent had other conflicts as well, not the least of which was his non-refundable retainer agreement he had with Mr. Thompson, which allowed Respondent to keep the entire legal fee paid regardless if the case went to trial or was concluded with a guilty plea. Without passing judgment as to whether such a retainer agreement is ethically permissible,[19] it certainly created a conflict in that Respondent stood to collect the $14,000 without having to spend days in trial on a difficult drug case. Respondent certainly had a strong financial interest in Mr. Thompson not being able to withdraw his plea.

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[18] The Davis court further clarified, however, that there are limits as to when conflicts of interest occur:

> ...[N]ot every disagreement with defense counsel amounts to a conflict of interest. "It is to be expected that counsel will often be placed in the difficult position of having to comment on an asserted disagreement with her client, if only to inform the court as to whether she believes that she can continue the representation." Id. Consistent with the limitation recognized in White, Lopez should not be read as holding that the mere accusation of coercion, without more, is sufficient to create a conflict of interest. In Lopez, a conflict arose when defense counsel was placed in the position of having to contradict his client in order to protect himself from allegations of malpractice and potential liability. On the other hand, and as is frequently the case, if a defendant's allegations describe only competent counsel's candid advice about the risks of going to trial, counsel will not be placed in an actual conflict between advocating for his client's interests and his own.

Davis, 239 F.2d at 286-87. (citations omitted).

We do not, however, subscribe to Bar Counsel's position that "[i]t is axiomatic that an attorney must withdraw from a representation as soon as an attorney is accused by his client of ineffective assistance of counsel." Brief of Bar Counsel at 9. Whether an attorney must withdraw is a decision driven by the specific facts confronting the attorney.

[19] See Maryland Rule 1.16(d) requiring an attorney, upon termination of the representation, to "refund[ ] any advance payment of a fee that has not been earned."

While not developed by Bar Counsel, there is also a significant issue whether Respondent failed to assist his client in filing the necessary notice of appeal.[20] The record suggests that Respondent failed to consult with his client on whether to appeal as it is extremely difficult to conclude that Mr. Thompson specifically instructed Respondent not to file the notice of appeal on his behalf.

Subsequent to Mr. Thompson's sentencing in this matter, the United States Supreme Court reviewed the proper framework for evaluating ineffective assistance of counsel claims where counsel failed to file a notice of appeal without the client's consent. Roe v. Flores-Ortega, 528 U.S. 470 (2000). The Court held:

> [T]hat counsel has a constitutionally-imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are non-frivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. In making this determination, courts must take into consideration all the information that counsel knew or should have known.

Id. at 481 (citing Strickland v. Washington, 466 U.S. 668, 690 (1984)).

This holding in Roe v. Flores-Ortega was based on well-established precedent. In Strickland, the Court emphasized that a lawyer has a duty "to consult with the defendant on important decisions . . . in the course of the prosecution." Strickland, 466 U.S. at 688. The decision to appeal is such an important decision, and this decision to seek or forego an appeal is for the convicted defendant and not his lawyer. Jones v. Barnes, 463 U.S. 745, 751 (1983). This right to effective assistance of counsel applies to retained, as well as appointed counsel. Cuyler

[20] No notice of appeal was filed within 10 days of sentencing.

v. Sullivan, 446 U.S. 336, 344-45 (1980). This duty of effective assistance includes the appellate stage of the representation. Evitts v. Lucey, 469 U.S. 387, 396-99 (1985).

B. Respondent's Failure to Withdraw Violated Maryland Rule 1.16(a)(1)

Having concluded that Respondent's representation of Mr. Thompson was materially limited by his personal interests, we further find that his failure to withdraw violated Maryland Rule 1.16(a)(1) which provides: "except as stated in paragraph (c), a lawyer shall not represent a client or, where the representation has commenced, shall withdraw from representation of a client if the representation will result in a violation of the Rules of Professional Conduct. . . ."

It is clear that lawyers must withdraw where their clients' interests are in conflict with their own professional or personal interests. Respondent had an obligation here to be an advocate for his client in the motion to vacate his guilty plea. He could not do so because advocating his client's position would subject him to malpractice and discipline. Respondent's failure to withdraw also may well have caused him to neglect Mr. Thompson in connection with his sentencing. Respondent elected not to communicate with Mr. Thompson between the time of his guilty plea and his sentencing. It is unclear how Respondent complied with his duty to meet and converse with his client about the contents of the presentence report during that time; the implication is that he did not. Moreover, Respondent's considered decision not to communicate with his client between the guilty plea and sentencing raises further ineffective assistance issues stemming from this failure to withdraw and allow for new counsel to advise Mr. Thompson. Respondent's allocution for a client facing between 210 and 365[21] months lasted approximately one minute. See BX 10 at 135, lines 20-25 to 136, lines 1-11. Mr. Thompson's allocution at his sentencing, by contrast, was lengthy and could not have been more harmful to himself in that he

[21] 365 months is the upper limit under the United States Sentencing Guidelines for offense level 38, Criminal History III.

single-handedly convinced the district court that a sentence of 292 months rather than 210 months was warranted. Id. at 143. While Mr. Thompson may have addressed the court in the fashion he did notwithstanding any legal advice to the contrary, the record seems to suggest that Mr. Thompson's statements were the result of an uncounseled and misguided attempt to get a lower sentence.

Respondent's purported explanations for not moving for withdrawal do not excuse his ethical violations. His concern that he might alert the government of his availability as a witness in the hearing on the motion to withdraw plea of guilty is unavailing. First, by standing mute rather than being an advocate as to why Respondent's motion to withdraw his guilty plea should be allowed, he virtually assured the motion's denial. The government did not need him as a witness. Further, his failure to forward to Mr. Thompson the government's written opposition to his guilty plea withdrawal request until the hearing itself further assured that Mr. Thompson would not address the salient legal issues. The government had no need whatsoever to rebut Mr. Thompson's claims through Respondent as the government's opposition came in unopposed. Respondent received no assistance from his counsel, much less effective assistance.

Respondent claims a greater ethical responsibility not to alert the government as to his availability as a witness, but points to no ethical rule to support his argument. It may well have been the case that if new counsel had been appointed to represent Mr. Thompson, new counsel might have decided to call Respondent as a witness.[22]

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[22] Mr. Thompson repeatedly claimed that the plea agreement was thrust upon him immediately before his case was called for the change of plea hearing and that he was rushed into the plea without careful consideration and on the purported statement by Respondent that he would serve a sentence of life in prison. The government dated the plea agreement June 23, 1997. Respondent and Mr. Thompson dated it on the day of the guilty plea – "7-10-97." See RX 2. There is a question as to whether Respondent failed to show this agreement during the 2-1/2 week period, and exactly how long before the actual guilty plea the plea agreement was shown.

Lastly, Respondent cannot shift the responsibility for his withdrawal from the case to the Court. The Court certainly cannot know the facts involving the attorney-client relationship and whether withdrawal is necessary. The Rules of Professional Responsibility impose the conflict of interest and withdrawal determination on the attorney alone, who is in the best posture to make informed judgments on the issue.

C. Bar Counsel Failed to Present Clear and Convincing Evidence That Respondent Was Discharged by Mr. Thompson

The Hearing Committee found no violation of Maryland Rule 1.16(a)(3) requiring that an attorney "shall withdraw from the representation of a client if . . . the lawyer is discharged." We agree with the Hearing Committee that the evidence is not clear that Respondent was actually discharged by Mr. Thompson. On the one hand, Mr. Thompson was demanding that Respondent file pleadings for him; on the other, Mr. Thompson was demanding the return of his money to get new counsel. This evidence is insufficient to find an ethical violation.

V. FURTHER ACTION

In light of the Board's finding of two violations in this matter, Bar Counsel and Respondent are directed to present to the Board in documentary form any evidence, in mitigation or aggravation, within 30 days of this Memorandum Opinion and Order, along with briefs recommending an appropriate sanction. However, if Bar Counsel or Respondent within 30 days of the date of this Memorandum Opinion and Order establishes good cause to present such

evidence at a hearing, the Board will consider remanding this matter to a Hearing Committee.

IT IS SO ORDERED.

BOARD ON PROFESSIONAL RESPONSIBILITY

By: ____

Joanne Doddy Fort
Chair

Dated: July 31, 2003

This Memorandum Opinion and Order was prepared by Board member Paul L. Knight. All members of the Board on Professional Responsibility concur in this Memorandum Opinion and Order.