I. Procedural History

This disciplinary matter is the subject of a Petition for Negotiated Discipline, filed on March 24, 2016 and amended on June 22, 2016. In the Petition, the parties stipulated to the following facts: In 2003, Respondent worked as an attorney at the Office of Intelligence Policy and Review at the United States Department of Justice. He worked on applications to the Foreign Intelligence Surveillance Court (“the FISA Court”). In the course of his work, he learned that there were a set of applications to the FISA Court that were given special treatment; these applications could only be signed by the Attorney General and went directly to the Chief Judge of the FISA Court. Respondent learned that these applications involved special intelligence obtained from an extra-judicial source called “the program.” He believed this process was illegal.

He inquired about these applications and “the program” to his colleagues and a supervisor. Their responses did not allay his concerns. He did not consult with anyone else at the Department of Justice. Instead, he talked to a former colleague who still maintained a Top Secret security
clearance and worked on Capitol Hill to determine if there had been any Congressional oversight of “the program.”

Unsatisfied with what he learned, he contacted a reporter. While he did not reveal any sources or methods about how intelligence was gathered, and he did not provide any secret documents, he did reveal the confidences and secrets, as those terms are used in Rule 1.6(b), of his client the United States Department of Justice.

Since the disclosure to a reporter, Respondent spent years under criminal investigation by the United States Department of Justice, which was both expensive and stressful. He now works as an Assistant Public Defender in Washington County Maryland which, while a noble pursuit, earns a lower salary than Respondent earned at the Department of Justice.

On June 22, 2016, this Hearing Committee One held a limited hearing on the Petition in which Assistant Disciplinary Counsel Hamilton Fox represented the Office of Disciplinary Counsel and Respondent appeared represented by counsel, Paul Kemp.

The Hearing Committee has carefully considered the Petition for Negotiated Discipline signed by Disciplinary Counsel and Respondent, the supporting affidavit submitted by Respondent (the “Affidavit”), and the representations made by Respondent and Disciplinary Counsel during the limited hearing. The full Hearing Committee also conducted an in camera review of Disciplinary Counsel’s files and records, and held an ex parte meeting with Disciplinary Counsel, as permitted by D.C. Bar R. XI, § 12.1(c). For the reasons set forth below, we approve the Petition, find that the negotiated discipline of a public censure is justified, and recommend that it be imposed by the Court.

II. Findings Pursuant to D.C. Bar R. XI, § 12.1(c) and Board Rule 17.5

The Hearing Committee, after full and careful consideration, finds that:
1. The Amended Petition and Affidavit are full, complete, and in proper order.

2. Respondent is aware that there is currently pending against him a disciplinary matter involving allegations of misconduct. Tr. 22; Affidavit ¶ 5.¹

3. Specifically, Disciplinary Counsel is investigating whether Respondent’s disclosure of client secrets and confidences to a reporter violates Rule 1.6. Tr. 24.

4. Respondent has knowingly and voluntarily acknowledged that the material facts in the Petition are true and support the stipulated misconduct. Tr. 24. Specifically, Respondent admits the following facts set forth in the Petition:

   a) In 2003, Respondent began to work as a lawyer at the Office of Intelligence Policy and Review (“OIPR”), an agency of the United States Department of Justice.

   b) Respondent’s duties involved applying to the Foreign Surveillance Court for warrants to conduct electronic surveillance in national security matters.

   c) The information with which Respondent was entrusted to support his warrant applications was secret, and derived from surveillance conducted pursuant to prior applications to the Foreign Surveillance Court. Respondent was required to obtain and maintain a special security clearance before he could make such applications.

   d) Respondent became aware that there were some surveillance applications that were given special treatment. These applications could be signed only by the Attorney General and were made only to the Chief Judge of the Foreign Intelligence Surveillance Court. The existence of these applications and of this process was secret.

   e) Respondent learned that these applications derived from special intelligence obtained not pursuant to prior applications to the Court, but from an extra-judicial source referred to as “the program.” He inquired about “the program” of other members of OIPR, including a supervising attorney, and based on their answers, he concluded that it was probably illegal as it was not court-supervised.

¹“Tr.” is used to designate the transcript of the June 22, 2016 limited hearing.
f) Even though Respondent believed that an agency of the Department of Justice was involved in illegal conduct, he did not refer the matter to higher authority within the Department, beyond his inquiry of a supervising attorney as set forth in paragraph [4.e] above. He did consult with a trusted former colleague, working for the Congress, who had a Top Secret security clearance, in an unsuccessful effort to determine the extent, if any, of Congressional oversight of “the program.”

g) In 2004, Respondent contacted a newspaper reporter and informed the reporter about what he believed were non-court-ordered intercepts within the Department of Justice. Respondent indicated his belief that this was illegal. The information that Respondent provided to the reporter constituted “confidences” or “secrets,” as those terms are defined by District of Columbia Rule of Professional Responsibility I.6(b), of Respondent’s client, the Department of Justice. Respondent did not reveal any sources or methods regarding the collection of intelligence.

5. Respondent is agreeing to the disposition because Respondent believes that he cannot successfully defend against discipline based on the stipulated misconduct. Tr. 21; Affidavit ¶ 7.

6. Disciplinary Counsel has made no promises to Respondent other than what is contained in the Petition for Negotiated Discipline. Tr. 27; Affidavit ¶ 4. Those promises and inducements are limited to an agreement as to the appropriate discipline. Id. In a joint motion to file a new Petition for Negotiated Discipline, the parties brought a separate possible disciplinary matter to the Hearing Committee’s attention. See Joint Motion at 2. At the limited hearing, Disciplinary Counsel, Respondent, and Respondent’s Counsel all agreed that this Negotiated Discipline does not dispose of that matter; Disciplinary Counsel could proceed in that case later. Tr. at 27.

7. Respondent was represented by counsel both during the negotiation of the negotiated disposition and at the limited hearing. Tr. 17; Affidavit ¶ 1.
8. Respondent has knowingly and voluntarily acknowledged the facts and misconduct reflected in the Petition for Negotiated Discipline and agreed to the sanction set forth therein. Tr. 24-26; Affidavit ¶ 6.

9. Respondent is not being subjected to coercion or duress. Tr. 28; Affidavit ¶ 2.

10. Respondent is competent and not under the influence of any substance or medication. Tr. 17-18.

11. Respondent is fully aware of the implications of the disposition being entered into, including, but not limited to, the following:

   a) he will waive his right to cross-examine adverse witnesses and to compel witnesses to appear on his behalf;

   b) he will waive his right to have Disciplinary Counsel prove each and every charge by clear and convincing evidence;

   c) he will waive his right to file exceptions to reports and recommendations filed with the Board and with the Court;

   d) the negotiated disposition, if approved, may affect his present and future ability to practice law;

   e) the negotiated disposition, if approved, may affect his bar memberships in other jurisdictions; and

   f) any sworn statement by Respondent in his affidavit or any statements made by Respondent during the proceeding may be used to impeach his testimony if there is a subsequent hearing on the merits.

   Tr. 20, 32-34; Affidavit ¶ 3.

12. Respondent and Disciplinary Counsel have agreed that the sanction in this matter should be a public censure. Tr. 26; Affidavit ¶ 4.

13. In mitigation, Respondent and Disciplinary Counsel stipulate that Respondent’s sole intent was to further government compliance with the law, that Respondent raised the issue with a supervisor, and thought that raising the issue with the Attorney General would have been
futile. Tr. 31; Petition ¶ 7. Moreover, the parties stipulated that Respondent received no financial compensation from the disclosure – nor did he intend to – and was motivated solely by his grave concern that the program was unlawful. *Id.* Respondent and Disciplinary Counsel also stipulate that he was careful not to disclose any methods, sources, or specific intercepts about “the program” to the reporter. *Id.*

14. Respondent and Disciplinary Counsel also stipulate that the investigation of this matter – including a criminal investigation of Respondent by the United States Department of Justice – have been stressful and expensive. *Id.* Respondent is currently an Assistant Public Defender in Washington County Maryland and his salary is much lower than it was when he was at the Department of Justice. *Id.*

III. Discussion

The Hearing Committee shall approve an agreed negotiated discipline if it finds:

a) that the attorney has knowingly and voluntarily acknowledged the facts and misconduct reflected in the Petition and agreed to the sanction therein;

b) that the facts set forth in the Petition or as shown during the limited hearing support the attorney’s admission of misconduct and the agreed upon sanction; and

c) that the agreed sanction is justified.

D.C. Bar R. XI, § 12.1(c); Board Rule 17.5(a)(i)-(iii).

A. Respondent Knowingly Agreed to the Negotiated Discipline

Respondent, after being placed under oath, admitted the stipulated facts and charges set forth in the Petition and denied that he was under duress or had been coerced into entering into this disposition. Tr. 24, 28. Respondent testified that he understood the implications and consequences of entering into this negotiated discipline. Tr. 20, 32-34. Respondent acknowledged that any and all promises that have been made to him by Disciplinary Counsel as part of this
negotiated discipline are set forth in writing in the Petition and that there are no other promises or inducements that have been made to him. Tr. 27. Moreover, Respondent is agreeing to this negotiated discipline because he believes that he could not successfully defend against the misconduct described in the Petition. Tr. 21.

Throughout the hearing, Respondent spoke carefully and clearly. His conduct, manner and testimony support the Hearing Committee’s finding that Respondent was competent to testify and entirely credible. The facts set forth in the Petition and records in Disciplinary Counsel’s files corroborate Respondent’s testimony. With regard to the first factor, this Hearing Committee finds that Respondent has knowingly and voluntarily acknowledged the facts and misconduct reflected in the Petition and has agreed to the sanction therein.

B. The Facts Support the Admission of Misconduct and Agreed Sanction

The Petition states that Respondent violated Rule 1.6 when he provided his client’s secrets – as the term is used in Rule 1.6 – to a reporter. Petition ¶ 4. The evidence supports this statement in that the stipulated facts are that Respondent had secrets of his client, the Department of Justice, and that these secrets were disclosed to a reporter. Petition ¶ 3. Therefore, with regard to the second factor, this Hearing Committee finds that the facts set forth in the Petition and established during the hearing support the admissions of misconduct and the agreed upon sanction.

C. The Agreed Sanction is Justified

In determining whether the agreed upon sanction is justified, the Hearing Committee is to “tak[e] into consideration the record as a whole, including the nature of the misconduct, any charges or investigations that Disciplinary Counsel has agreed not to pursue, any circumstances in aggravation and mitigation, and relevant precedent.” Board Rule 17.5(a)(iii).
While Respondent’s violation of Rule 1.6 is a clear violation of the standards that lawyers must maintain in order to maintain the integrity of the profession and the trust of clients, there are a number of mitigating factors stipulated to by Respondent and Disciplinary Counsel. Tr. 31; Petition ¶ 7. Considering all of these factors, and the case law that does exist, we conclude that the sanction is justified.

There is very little law – in the District of Columbia or elsewhere – that is on point. The typical violation of Rule 1.6 that leads to attorney discipline appears to be revealing a client confidence in a motion to withdraw or in a hearing. Petition at 3 (citing In re Gonzalez, 773 A.2d 1026, 1032 (D.C. 2001) (directing Disciplinary Counsel to issue an informal admonition)). The Petition identifies a number of cases involving violations of Rule 1.6 where a more serious sanction than public censure was imposed, but all of them involved additional rule violations. See Petition at 3 (citing In re Rosen, 470 A.2d 292 (D.C. 1983) (six-month suspension); In re Roxborough, 692 A.2d 1379 (D.C. 1997) (60-day suspension with fitness); In re Frison, 89 A.3d 516 (D.C. 2014) (disbarment); In re Baber, 106 A.3d 1072 (D.C. 2015) (disbarment)). But there appear to be no “whistleblower” 1.6 cases in the District of Columbia.

Looking more broadly, the Petition identifies only two cases where someone was a whistleblower – In re Schafer, 66 P.3d 1036 (Wash. 2003) (six-month suspension) and In re Lackey, 37 P.3d 172 (Ore. 2002) (one-year suspension). Petition at 4. The Petition rightly notes that in each of these cases there were substantial personal interests that drove the Rule 1.6 violations. As a result, while the sanction was greater in these two cases, we find them not probative.

Respondent’s violation of Rule 1.6 is very serious. There are, however, substantial mitigating factors here.

First, Respondent acted based solely on a desire to stop something that he thought was illegal. His disclosure was not motivated by financial gain. There are, of course, processes in place
that could have allowed Respondent to ethically bring the existence of “the program” to the attention of others at the Department of Justice, but Respondent believed these avenues would be futile. While, of course, lawyers are prohibited from revealing client secrets, even when it seems that it is the right thing to do, that Respondent’s motivation was to try to end an illegal program through the only method he believed he had available to him is substantially mitigating, notwithstanding the fact that he now realizes there were other options available to him at the time.

Second, Respondent did take steps to limit the disclosure to the extent necessary to make the reporter aware of “the program.” He revealed no information about how intelligence information is collected. Tr. 31; Petition ¶ 7. He provided no documents that contained secret information. Tr. 24-25. He was sensitive to the classified nature of the documents and information he had access to, particularly when disclosing the existence of “the program” to the reporter. Tr. 31; Petition ¶ 7. That he was careful to minimize the extent of the disclosure mitigates the seriousness of Respondent’s rule violation.

Third, Respondent has already paid a severe price for his actions. He was under criminal investigation for years after the disclosure. Id. This criminal investigation was both stressful and expensive. Id. The investigation by Disciplinary Counsel – aside from the criminal investigation – has been pending since 2009. Moreover, Respondent now no longer works for the Department of Justice; he is an assistant public defender in Washington County, Maryland with a much lower salary. Id. No reasonable person looking at what Respondent has gone through would think that revealing a client secret in this way is a cost-free endeavor.
IV. Conclusion and Recommendation

It is the conclusion of the Hearing Committee that the discipline negotiated in this matter is appropriate. For the reasons stated above, it is the recommendation of this Hearing Committee that the negotiated discipline be approved and that the Court publicly censure Respondent.

HEARING COMMITTEE ONE

/MGK/
Matthew G. Kaiser
Chair

/JK/
Joel Kavet
Public Member

/MDH/
Maggie DiPentima Hedges
Attorney Member

Dated: July 11, 2016