THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY
AD HOC HEARING COMMITTEE



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| In the Matter of: | : | |
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| LATIF S. DOMAN | : | |
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| Respondent. | : | Board Docket No. 17-BD-059 |
| | : | Disc. Docket Nos. 2010-D050 & 2012-D390 |
| A Member of the Bar of the | : | |
| District of Columbia Court of Appeals | : | |
| (Bar Registration No. 466654) | : | |

## REPORT AND RECOMMENDATION OF THE AD HOC HEARING COMMITTEE

Respondent, Latif S. Doman, is charged with violating Rules 1.1(a), 1.1(b), 1.3(a), 1.3(b)(1) and/or (2), 1.3(c), 1.4(b), 1.15(a), 1.16(d), 8.1(a), 8.4(c), and 8.4(d) of the District of Columbia Rules of Professional Conduct (the "Rules"), arising from his representation of a Complainant in an adverse employment action and in the handling of his IOLTA and operating accounts. Disciplinary Counsel contends that Respondent committed all of the charged violations, and should be disbarred as a sanction for his misconduct. Respondent contends that Disciplinary Counsel failed to meet the standard of proof for any of the charges, thus no sanction is warranted and the charges should be dismissed.

As set forth below, the Hearing Committee finds that Disciplinary Counsel has proven only a violation of Rule 1.15(a) by clear and convincing evidence because Respondent failed to maintain adequate records of his handling of entrusted funds. Accordingly, the Hearing Committee recommends a Board reprimand.

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

## I. PROCEDURAL HISTORY

On October 3, 2017, Disciplinary Counsel served Respondent with a Specification of Charges ("Specification"). (DCX C) The Specification alleges two counts. Count One alleges that Respondent violated the following Rules in connection with his representation of the Complainant in an adverse employment action:

- Rules 1.1(a) and (b), by failing to provide competent representation to his client; failing to represent her interests using the required legal knowledge, skill, care, thoroughness, and preparation reasonably necessary for the representation; and failing to serve his client with the skill and care commensurate with that generally afforded to clients by other lawyers in similar matters;
- Rule 1.3(a), by failing to represent his client with diligence and zeal within the bounds of the law;
- Rule l.3(b), by intentionally (1) failing to seek the lawful objectives of his client through reasonably available means permitted by law and ethics, and/or (2) prejudicing or damaging his client during the course of the professional relationship;
- Rule 1.3(c) by failing to act with reasonable promptness in representing his client;
- Rule l.4(b), by failing to explain the matter to the extent reasonably necessary to permit his client to make informed decisions regarding the representation; and
- Rule 1.16(d), by failing to take timely steps to the extent reasonably practicable to protect his client's interests, such as refunding any advance payment of fee or expense that has not been earned or incurred, in connection with any termination of representation.

(Specification ¶¶ 18 A-F)

Count Two alleges that Respondent violated the following Rules when handling his IOLTA and operating accounts:

- Rule 1.15(a), by (i) failing to hold property of clients or third persons that was in the Respondent's possession in connection with a representation separate from Respondent's own property, and (ii) failing to maintain and preserve complete records of entrusted account funds and other property kept by Respondent for a period of five years after termination of the representation;
- Rule 8.1(a), by knowingly making a false statement of fact in connection with a disciplinary matter;
- Rule 8.4(c), by engaging in conduct involving dishonesty; and
- Rule 8.4(d), by engaging in conduct that seriously interferes with the administration of justice.

(Specification ¶¶ 33 A-D)

Respondent filed his Answer to the Specification of Charges ("Answer") on October 16, 2017. Hearings were held on July 26, August 21, October 2, and November 29, 2018 before this Ad Hoc Hearing Committee.[1] Disciplinary Counsel was represented at the hearings by Traci M. Tait, Esquire. Respondent was present during the hearings and was represented by Daryl Davis, Esquire and Colin Gibson, Esquire.

[1] The initial pre-hearing conference, held on November 9, 2017, set hearing dates for April 5 and 6, 2018. On March 26, 2018, Respondent filed a Motion to Continue, seeking to continue the hearing dates. The motion was granted on March 29, 2018, and at the April 6, 2018 telephonic conference July 26 and 27, 2018 were set as the new hearing dates. A week before the newly rescheduled hearing dates, Respondent's counsel filed a second Motion to Continue, seeking to continue day two of the hearing, July 27, due to a scheduling conflict. The Hearing Committee granted the motion, continuing the second day of the hearing to August 21, 2018. Ultimately, because additional time was needed (partly due to technical difficulties with the testimony of Mr. Gilbert), additional hearing days were held on October 2 and November 29, 2018.

Prior to the hearing, Disciplinary Counsel submitted DCX A through C and DCX 1 through 29.[2] On the final day of the hearing, Disciplinary Counsel offered DCX 18A, 18B, 18C and 30. All of Disciplinary Counsel's exhibits were received into evidence without objection. (Tr. 143:20-144:13, 293:21-294:7, 1235:5-1238:8) During the hearing, Disciplinary Counsel called as witnesses Respondent, the Complainant, Gary Gilbert (a former Equal Employment Opportunity Commission ("EEOC") Administrative Judge), David Chalker (a representative from TD Bank), and Charles Anderson (Disciplinary Counsel's in-house investigator).

Prior to the hearing, Respondent submitted RX 1 through 23. On the third day of the hearing, Respondent offered exhibits RX 24 through RX 58.[3] On the final day of the hearing, Respondent offered exhibits RX 59 and 60. All of Respondent's exhibits were received into evidence without objection or over Disciplinary Counsel's objection. (Tr. 291, 998, 1026-28, 1035-38, 1087-89, 1238-44) Respondent testified on his own behalf. He did not call any additional witnesses.

Upon conclusion of the hearing, the Hearing Committee made a preliminary non-binding determination that Disciplinary Counsel had proven at least one of the Rule violations set forth in the specification of charges. Tr. 1246; *see* Board Rule

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[2]"DCX" Refers to Disciplinary Counsel's exhibits. "RX" refers to Respondent's exhibits. "Tr." refers to the hearing transcript.

[3] RX 24 through RX 58 were numbered, but presented to the panel in a binder with letter tabs A through Z. Some letter tabs included more than one numbered exhibit. In the transcript, these exhibits were referred to by letter when they were moved into evidence, but in the interest of clarity they are referred to here by the exhibit number on each document rather than the mismatched letter tabs they were behind in the binder. In the transcript from the final day of the hearing, there is a colloquy in which the letters were translated into the appropriate numbers.

11.11. In the sanctions phase of the hearing, neither Disciplinary Counsel nor Respondent submitted any additional exhibits or called any additional witnesses.

Disciplinary Counsel submitted its Proposed Findings of Fact, Conclusions of Law, and Recommended Sanction ("DC Brief") on December 19, 2018, and Respondent filed his Proposed Findings of Fact, Conclusions of Law, and Recommended Resolution ("R. Brief") on January 23, 2019. Disciplinary Counsel filed its Reply on January 29, 2019. The Hearing Committee ordered Respondent to file a supplemental brief on January 30, 2019. Respondent filed his Supplemental Post-Hearing Brief Opposing Disciplinary Counsel's Proposed Findings of Fact on February 8, 2019. Disciplinary Counsel filed its Supplemental Reply Brief on February 21, 2019.

## II. FINDINGS OF FACT

The following findings of fact are based on the testimony and documentary evidence admitted at the hearing, and these findings of facts are established by clear and convincing evidence. *See* Board Rule 11.6; *In re Cater*, 887 A.2d 1, 24 (D.C. 2005) ("clear and convincing evidence" is more than a preponderance of the evidence, it is '"evidence that will produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established"' (citation omitted)).

### A. Background

1. Respondent is member of the District of Columbia Bar admitted on December 3, 2001, and assigned Bar number 466654. (DCX 1)

2. Respondent is also member of the Pennsylvania Bar. He was admitted on March 30, 1999 and is currently administratively suspended for failure to pay his dues. (Tr. 348; DCX 2)

3. Respondent attended law school at the University of Pennsylvania and graduated with honors in 1995. While in law school, he was an editor for the Law Review. (Tr. 347)

4. Following law school, Respondent worked briefly at Dewey Ballantine in their international trade practice. (Tr. 348) Respondent then clerked for two years for the Honorable John Penn, Chief Judge of the United States District Court for the District of Columbia. During his clerkship he worked on a number of federal employment cases. (Tr. 234)

5. After clerking, Respondent worked at Morgan, Lewis & Bockius, where he practiced employment law.[4] (Tr. 234)

6. He left Morgan Lewis and went to work at Sprenger & Lang, a plaintiff's class action firm. He continued to work on employment matters. (Tr. 349)

7. Respondent eventually left Sprenger & Lang to form his own firm with Daryl Davis (his counsel in this disciplinary matter). The firm was called Doman

[4] DCX 1 and 2, which show Respondent's membership in the D.C. and Pennsylvania Bars, both list his firm as Howrey Simon Arnold & White. There was, however, no mention of Howrey at any point during the hearing.

Davis. Each of the two lawyers was essentially a solo practitioner. Doman Davis dissolved several years ago. (Tr. 74, 349)

8. Respondent is currently employed as a consultant at Snowbird Consulting Group. (Tr. 350, 375) He advises clients on employment decisions and conducts internal investigations. (Tr. 375)

**B. <u>Count One – Complainant's Employment Matter</u>**

9. Respondent represented the Complainant[5] from January 2007 – when he first filed a response to the Department of Commerce's (the "Department's" or the "Agency's") December 19, 2006 Notice of Proposed Suspension – until late 2009 – when Complainant decided not to file an appeal of the federal district court's grant of summary judgment. (RX 12, RX 43, Tr. 1000-01) Complainant's husband was Respondent's friend, and had recommended that she contact Respondent. (Tr. 183, 186)

10. Complainant executed a written retainer agreement on February 6, 2007, for Respondent "to litigate, represent, defend, and provide counsel to Client in connection with the adverse employment action taken against her in connection with the issuance of her disability-based parking permit." (DCX 3 ¶ 1)

11. The agreement required Complainant to make an initial retainer payment of $2,000, and to pay Respondent's hourly rate of $200 per hour. Beyond

[5] The client will be referred to as "Complainant" throughout this Report and Recommendation in an effort to preserve her confidentiality with respect to the adverse employment action, which could impose "potential taint on future career advancement," and which was ultimately removed from her Agency personnel file. (Tr. 827)

the initial $2,000 payment, the agreement provided that "any additional fees and costs" would be billed on a monthly basis, to be paid by the Complainant or "upon recovery of any monies or things of value in said matter." (DCX 3; Tr. 366-68, 1012-14) Complainant wrote Respondent a check for $2,200 dated February 6, 2007, the same day the agreement was signed. (DCX 17 (Bates 6))

12. Complainant has been employed with the Department of Commerce for over twenty years. (Tr. 187) On December 19, 2006, she received a memorandum of proposed disciplinary action from her supervisor recommending a 7-calendar-day suspension for "unprofessional conduct in improperly using [her] position to obtain a parking permit." (RX 1.2 ¶ 1) The Department alleged that on October 10, 2006, Complainant went to the medical officer on duty and obtained a memorandum requesting that she be granted permanent handicapped parking. (RX 1.2 ¶ 5) The medical officer's memorandum was addressed to Complainant in her capacity as the Department's parking coordinator for the headquarter building. (*Id.*; Tr. 187, 239) Complainant then issued herself a handicapped parking permit on the same day, without obtaining permission or approval from any supervisor. (RX 1.2 ¶¶ 1, 2, 5) These events occurred while Complainant's immediate supervisor was on leave. Complainant did not inform her immediate supervisor that she had issued her own parking permit after he returned from leave. (*Id.*; RX 1.3 ¶ 1) If the same parking space had been assigned under a regular pass rather than a handicapped pass, Complainant would have incurred a monthly cost of $200 - $300. (Tr. 241)

13. Respondent's first course of action was to negotiate a reduction in Complainant's proposed discipline. Respondent's advocacy on Complainant's behalf included a 9-page letter that he drafted, setting out her side of the story and her proposed resolution. (Tr. 264-65; RX 12)

14. Respondent also worked with Complainant to draft an affidavit for her signature. The affidavit was attached to various filings throughout the process. (Tr. 267; RX 15)

15. In January 2007, Respondent convinced the Department to reduce the proposed discipline from a 7-day suspension without pay to a 3-day suspension. (Tr. 235-36) In addition, Respondent convinced the Department to allow Complainant to serve part of her suspension over a weekend with the result that she only gave up one day of pay. (Tr. 235-36)

16. Complainant served her suspension beginning on Saturday, February 10, 2007. She returned to work on Tuesday, February 13, 2007. (RX 5; RX 13)

17. Gary Gilbert, a former EEOC Administrative Judge, Chief Administrative Judge and expert witness for Disciplinary Counsel, testified that in his expert opinion, the reduction of the suspension from several days to one day "on some level . . . seems like a fine result." He went on to say, "[Y]ou got it reduced. I do think that that's everything after that . . . . [M]y advice with Complainant at that point in time would not be to pursue it." (Tr. 811) He also testified about the result obtained by Respondent that, "Anybody should be happy when they're suspended for one day instead of seven." (Tr. 825)

18. After Complainant served her suspension, Respondent continued to advocate for the Department to "overrule[] retroactively" the discipline and to expunge any mention of it from her employment file. (Tr. 266-67; RX 14)

19. Respondent attempted to get the result Complainant desired without filing a formal claim. (Tr. 266)

20. In June 2007, Respondent and Complainant agreed to a mediation session through the Department's EEO office. (Tr. 237-38; RX 2) At the mediation session, which took place on June 4, 2007, the Department offered some accommodations and to remove the discipline from her Department personnel folder, but it would not agree to remove the discipline from Complainant's division employee file. (Tr. 241) The Department also offered to pay Respondent's attorney's fees. (Tr. 242) Complainant rejected this offer because as the HR liaison she knew that if the discipline remained in the division records it could be used against her in future actions and could prevent her promotion to a public trust position. (Tr. 215, 242, 379; RX 4)

21. After the failed mediation, Respondent filed a Formal Complaint of Discrimination on Complainant's behalf on June 18, 2007. (RX 5; *see also* Tr. 351) By filing a Formal Complaint of Discrimination with the EEOC, Respondent preserved Complainant's right of administrative review of the discipline imposed on her.

22. The formal complaint triggered an investigative process. During the investigation, Respondent worked with the EEO investigator to direct the

investigation and to obtain discovery-type materials at no cost to Complainant where possible. (Tr. 242-46, 268-70; RX 5)

23. The investigator's Report of Investigation was "[h]undreds of pages" with 31 exhibits attached, including witness affidavits from the principal witnesses in the case, applicable Department policies, demographic information, a review of the Department's prior discipline for similar situations, and other relevant materials. (RX 5, 17, 28-30; Tr. 242-46, 269-70)

24. When, at the conclusion of the investigation, the Department affirmed the already-imposed discipline, at Complainant's request (and against Respondent's advice) Respondent timely notified the EEOC that she had elected a hearing before an administrative judge. (Tr. 351, 380-83)

25. Complainant's complaint was assigned to EEOC Administrative Judge Richard W. Furcolo ("Judge Furcolo") for hearing. On December 5, 2007, Judge Furcolo issued an Acknowledgement and Order that, *inter alia*, set important deadlines for both parties. (Tr. 145-46; DCX 5A)

26. The Acknowledgement and Order were sent to Respondent via fax. (Tr. 146; DCX 5A)

27. Respondent had recently installed new software on his computer that allowed it to act as a fax machine, converting the fax into an email message. The Order from Judge Furcolo was the first fax that Respondent received after installing this software. The email message was inadvertently directed to Respondent's spam

folder. He did not realize that the order had been sent until the deadline for initiating discovery had passed. (Tr. 351-52)

28. Counsel for the Department propounded discovery requests prior to the December 26, 2007 deadline in Judge Furcolo's scheduling order. Due to competing obligations and the holidays, Respondent did not review the discovery requests until mid-January 2008. (DCX 5B)

29. After reviewing the Department's discovery requests, Respondent called the Department's counsel to ask for a copy of the Acknowledgement and Order. The Department's counsel alerted Respondent to the earlier fax. (DCX 5B)

30. When he discovered the misfiled email in his spam folder, Respondent drafted and filed a "Motion to Extend Discovery Period for 30 Additional Days." (Tr. 352; DCX 5B) It was Respondent's intention, as stated in the memorandum in support of the motion, to extend all deadlines by 30 days – including the deadline for propounding discovery and responding to the Department's discovery requests. (DCX 5B)

31. On January 29, 2008, Judge Furcolo granted Respondent's motion to extend the discovery period by 30 days. Judge Furcolo signed and dated the draft order prepared by Respondent without making changes to it. (*Compare* DCX 5B (draft order), *with* DCX 5C (signed order))

32. The order said that the "discovery period" would be extended by 30 additional days. Unfortunately, Judge Furcolo's order did not specify whether the date to initiate discovery had been extended or whether he had merely extended the

date to complete discovery. Furthermore, the order did not include any specific dates, leaving it unclear whether the 30-day clock began to run from the signing of the order or some other earlier date. (DCX 5C)

33. Respondent interpreted the order granting his motion to mean that all dates had been extended as he had requested in the supporting memorandum. He also assumed that the clock would start to run from the date of the order. He had a good faith belief that his written discovery requests had to be issued by February 28, 2008. (Tr. 352-53)

34. Mr. Gilbert, Disciplinary Counsel's expert in the handling of federal employment law cases, testified that he understood Respondent to be asking for both an extension of the discovery period and an extension of the date to initiate discovery based on his review of Respondent's motion; however, he further testified that it seems "apparent" that Judge Furcolo did not understand the motion the same way. (Tr. 710) He also noted that Judge Furcolo "signed the order as more or less it's written." (Tr. 713)

35. Mr. Gilbert testified that based on his expert review of this case file, the Judge was "not always the . . . most attentive to []his case load." (Tr. 713)

36. Mr. Gilbert categorized Respondent's actions in seeking an extension of time as benefiting Complainant because the Judge's order "relaxe[d]" the discovery schedule and gave both sides "an opportunity to work out . . . the timing of [discovery responses]." (Tr. 714)

37. Mr. Gilbert testified that in his expert opinion the 70-day discovery period in EEOC proceedings is "fairly tight" and that "most defense lawyers would feel the heat for such a short period of discovery." (Tr. 706, 707)

38. On January 29, 2008, the same day that Judge Furcolo issued his order granting Respondent's motion for an extension of time, the Department filed a motion seeking to bar Complainant from propounding discovery requests and contending that Complainant had forfeited her right to propound discovery by failing to initiate a request pursuant to Judge Furcolo's original order. (DCX 5D)

39. Respondent did not file an opposition to the Department's January 29 motion because he believed that it been mooted by Judge Furcolo's ruling that same day, which granted his request for an extension of the deadlines. (Tr. 147-48, 352-53; DCX 5F)

40. The Department received Respondent's discovery requests served by electronic mail on February 12, 2008. (DCX 5E)

41. On February 15, 2008, the Department filed a motion to strike Complainant's discovery requests as untimely, contending that Judge Furcolo did not intend to extend the date for Complainant to initiate discovery, and that only the date to complete discovery had been extended. (DCX 5E)

42. Respondent did not file an opposition to the motion to strike either. (DCX 5I)

43. The "Washington Field Office Hearing Procedures" that were appended to the December 5, 2007 Acknowledgment and Order state, "Parties shall

not file multiple submissions concerning the same matter (e.g., motions for reconsideration, replies to response by opposing party, etc.), and multiple submissions will be stricken by the Administrative Judge." (DCX 5A; Tr. 160-61)

44. As Judge Furcolo had already granted Respondent's motion for an extension of the deadlines, Respondent read the local rule to mean that the Department's second and third motions seeking the same result would be discarded even though they were not entitled as motions for reconsideration. (Tr. 352-54; DCX 5P)

45. Judge Furcolo did not discard the Department's motion to bar Complainant from propounding discovery requests. On February 19, 2008, Judge Furcolo issued an order granting the motion with respect to foreclosing written discovery only. (DCX 5F)

46. Mr. Gilbert testified that "reasonable lawyers would come to different conclusions about whether you want discovery." He explained that he had "seen instances where lawyers have chosen to have limited written discovery or occasionally no discovery and proceed directly to deposition." He categorized such strategic decisions as "rare but not unheard of" although he cautioned that "if [you are] making a decision to forgo a source of evidence or information that's available, I think it's imperative that you educate the client and make sure the client is in agreement with the course of action." (Tr. 715-17)

47. Mr. Gilbert testified that in his opinion Respondent should have "immediately notice[d] the depositions" of Department staff once Judge Furcolo limited his ability to serve written discovery. (Tr. 727-28)

48. When asked whether Respondent met the standard of care for representations in employment law cases like Complainant's case, Mr. Gilbert focused primarily on Respondent's decision not to notice the depositions of agency personnel. (Tr. 776-79)

49. Mr. Gilbert also testified that pursuant to Management Directive 110, a directive issued by the EEOC to give guidance to federal agencies, complainants and plaintiff's counsel, agencies must conduct an "impartial" investigation where "the investigator must maintain an appearance of being unbiased, objective and thorough throughout the investigation" in response to the filing of a formal claim of discrimination. He agreed that "being thorough" should include "identifying and obtaining all relevant evidence from all sources regardless of how it may affect the outcome." He further agreed that the government agency is required to compile the findings of this impartial investigation in the "report of investigation." (Tr. 841-42, 843-45)

50. Judge Furcolo also did not discard the Department's motion to strike the discovery propounded by Complainant. On March 20, 2008, Judge Furcolo issued an Order granting the motion. (DCX 5I)

51. Mr. Gilbert testified that in his opinion Respondent should have responded to the Department's motion to strike and should have asked for a status conference to clear up the confusion around the discovery dates. (Tr. 731-32)

52. At the same time that Respondent and the Department's counsel were arguing about Complainant's discovery requests, there was an outstanding First Set of Interrogatories and Requests for the Production of Documents served on Complainant by the Department via FedEx with a delivery on December 27, 2007. Respondent was obligated to respond on Complainant's behalf by January 28, 2008. (DCX 5G)

53. Respondent was in contact with Complainant and was working with her to collect the requested documents. (Tr. 355-57)

54. Respondent was also in contact with the Department's counsel, who informed him that she planned to file a motion to compel Complainant's responses. Respondent and Department's counsel could not come to an agreement on timing. (Tr. 356-57)

55. On February 29, 2008, the Agency moved to compel responses to its discovery requests. (DCX 5G)

56. Mr. Gilbert testified that the EEOC's 10-day period for filing a motion to compel following a deficient discovery response is "controversial" and "a source of frustration" because it does not give the parties sufficient time to resolve discovery disputes. (Tr. 708)

57. On March 20, 2008, Judge Furcolo granted the Department's motion to compel and directed Complainant to respond by April 3, 2008. The order warned that if Complainant failed to comply, her case could be dismissed. (DCX 5H)

58. On March 31, 2008, the Department noticed Complainant's deposition by fax and mail for April 7, 2008. Complainant was deposed on that date. (DCX 5J)

59. Respondent provided responses to the outstanding discovery by mail on April 1, 2008, ahead of the April 3, 2008 deadline. (DCX 5P at 4 (Bates 209))

60. On April 4, 2008, the Department moved to sanction Complainant for repeatedly failing to comply with Judge Furcolo's orders to provide responses to the Department's discovery requests. The Department sought to have Judge Furcolo sanction Complainant by dismissing her request for a hearing on the merits and remanding the case to the employer for a final decision. The certificate of service states that the motion was served on Complainant and Respondent by FedEx. (DCX 5K)

61. Respondent received the motion on April 7, 2008 by Federal Express. (DCX 5P at 6 (Bates 211), (Bates 229) (FedEx tracking email)) Respondent calculated the deadline for responding to the Department's motion for sanction as 10 days after receipt or April 17, 2008. (Tr. 398; DCX 5P at 6 (Bates 211) (citing the Acknowledgment and Order of Dec. 5, 200[7]), DCX 5A (Bates 6) ("Statements in opposition to discovery motions must be filed within ten (10) calendar days of receipt of the motion.")

62. Mr. Gilbert testified that the due date for Complainant's opposition was "a little bit more complicated" and that he could "understand . . . Respondent's arguments" with regard to the calculation of the deadline. (Tr. 751-52) Respondent had earlier testified that due to the mailbox rule he had until April 17 (Tr. 271, 398), but that the court could not have concluded that he was late prior to 12:01 am on April 16, 2008. (Tr. 257-58)

63. By order dated April 15, 2008, two days prior to the response date calculated by Respondent and before the earliest possible response date under any calculation had passed, Judge Furcolo granted the Department's motion to dismiss Complainant's request for a hearing and remanded the case to the employer for a final decision, noting "again, [Complainant] has not interposed any objection or opposition to an Agency pleading." (DCX 5L)

64. On April 16, 2008, Respondent filed an opposition to the Department's motion for sanctions. (DCX 5M)

65. That same day, Judge Furcolo rejected the opposition filed by Respondent because it was untimely and filed without leave or a showing of good cause. (DCX 5N)

66. On April 24, 2008, the Department issued its final decision without a hearing, denying Complainant any relief on her substantive claims. (DCX 5O)

67. On April 25, 2008, Respondent filed a Motion for Reconsideration of the Order of April 15, 2008. In his motion for reconsideration, Respondent pointed

out the confusion about the deadline for his opposition papers and requested that the Judge reconsider his ruling. (DCX 5P)

68. On May 5, 2008, Judge Furcolo rejected the motion for reconsideration because it was also untimely and filed without leave or a showing of good cause. (DCX 5Q)

69. In April 2008, Respondent consulted with other employment lawyers who represent plaintiffs in order to seek their input and advice on Complainant's case and the actions of the administrative judge. (Tr. 258-61; RX 8)

70. Mr. Gilbert testified that he was "struck" by the lack of communication between Respondent and Judge Furcolo. He stated that when he served as a Judge, he "invite[d]" the parties to call and communicate with him directly. (Tr. 725)

71. Mr. Gilbert testified that the Washington Field Office of the EEOC has made "relatively minor modifications" to the standard Acknowledgment and Order, including the restriction on filing of multiple submissions concerning the same matter. (Tr. 858, 859)

72. The Washington Field Office Procedures specifically state, "Parties are prohibited from engaging in *ex parte* communications with the Administrative Judge (i.e., telephone call without the opposing party present or correspondence without a copy served on the opposing party) concerning the merits of the case." (DCX 5A (Bates 11))

73. The rules of practice before the EEOC are so complicated and convoluted that even a former Chief Administrative Judge who had a hand in

drafting many of the rules can be unfamiliar with particular local variations and requirements. (Tr. 860-62)

74. Mr. Gilbert testified that there are cases in which a complainant might reasonably choose not to take any discovery, choose not to have the case heard before a judge, and may instead ask the agency to make a "decision on the record" as ultimately happened here. (Tr. 741; *see* Finding of Fact ("FF") 47) He testified that his firm had recently made the choice to request a decision on the record and had successfully gotten a "finding of discrimination." (Tr. 740-41)

75. Mr. Gilbert also testified that there are cases in which counsel might reasonably decide to go straight to federal court and forego the administrative process altogether. (Tr. 741) He noted that he had made such strategic decisions for his clients. (Tr. 743)

76. Mr. Gilbert further noted that counsel might make a strategic decision to "ask for [a] final agency decision" on the record in order to "buy additional time" while preparing to file in federal court. (Tr. 742)

77. Mr. Gilbert testified that counsel should include his client in a strategic decision about choice of forum and whether or not to pursue an administrative hearing. (Tr. 743-44)

78. Respondent consulted with Complainant about his recommendation that she proceed directly to federal court rather than remaining before the EEOC in the early morning hours and throughout the day on April 17, 2008. (DCX 6)

79. Disciplinary Counsel's expert conceded that where counsel feels that the Administrative Judge has made multiple rulings contrary to his own rules, it is "not unreasonable" to decide to abandon the agency process and move to federal court. (Tr. 886)

80. Mr. Gilbert further testified, "I don't think the case had merit to begin with. I think it was a long shot . . . ." (Tr. 887)

81. Respondent's representation of Complainant before the EEOC was not without benefits to Complainant. He generated another settlement offer (Tr. 367, 378), preserved her right to sue by keeping her claim active for more than 180 days (Tr. 794-95), developed her damages claim in order to establish a basis for recovery (RX 6; Tr. 249-50, 355-56), and avoided a negative decision on the merits. (Tr. 360-61, 378)

82. To this point Complainant had paid Respondent $2,200 for his representation. Complainant never paid Respondent more than the initial $2,200 even as the case progressed in federal court. (Tr. 224; 271-76)

83. On June 30, 2008, Respondent filed a discrimination complaint against the Department in United States District Court for the District of Columbia, thereby giving Complainant "two bites of the apple." (DCX 7A; RX 38; Tr. 851-52)

84. Respondent advised Complainant that the federal court might be a more favorable forum than the EEOC because Complainant's claims would be considered by a sympathetic jury rather than an administrative judge who might take a narrow view of her arguments. (Tr. 170)

85. Respondent also expected to be able to take discovery in federal court, a reasonable expectation if the case survived a motion to dismiss or for summary judgment according to Mr. Gilbert. (Tr. 853-57)

86. Mr. Gilbert testified that "one of the most important services plaintiff's counsel in employment discrimination cases can serve is identifying whether any individual should pursue the case or not pursue a case." (Tr. 696-97) He further testified that he would not have advised Complainant to take her case to federal court. (Tr. 746)

87. Mr. Gilbert also testified that he could not see anything beyond "garden variety damages" and "marginal harm" in Complainant's case. He opined that the lack of substantial damages should have weighed into her strategic decision about whether to move forward: "years of litigation involving possibly tens of thousands of dollars . . . would not be what I would advise the client to do." He said that he "might, in fact, refuse to take the case, even if somebody wanted to go forward, if I didn't have reasonable confidence that we would prevail in the case or that she would achieve her goals in prevailing." (Tr. 826-28, 829-30)

88. Mr. Gilbert testified that given the facts of Complainant's case – that she "admitted she engaged in the conduct" and "[t]he conduct was subjectively something that someone could conclude was not appropriate" – he would have had "some significant reluctance to encourage an employee to invest a lot of money or time to preserve [a] matter such as this." (Tr. 830-31)

89. Respondent counseled Complainant against continuing to pursue her claim, but she would not take his advice. (Tr. 1012-13)

90. After several unopposed extensions of time to file its substantive response to Complainant's federal civil complaint (DCX 6 (Bates 2-3)), the Department filed a motion to dismiss or in the alternative, for summary judgment on October 17, 2008. (DCX 8)

91. Between October 28 and November 11, 2008, Respondent sought and received three unopposed requests for more time to oppose the motion to dismiss or for summary judgment. As a result, Respondent's opposition on Complainant's behalf was due on November 25, 2008. (Tr. 785-86; DCX 7 (Bates 4))

92. On November 25, Respondent sought an extension of a single additional day to file his opposition on Complainant's behalf. He did not seek opposing counsel's consent, stating: "Plaintiff could not contact Defendant for consent at this hour." (DCX 10)

93. On November 26, 2008, Respondent filed the opposition. (DCX 11)

94. On December 3, 2008, the U.S. Attorney's office filed a consent motion for an extension of time to file a reply by and including December 26 for three reasons: (1) although the opposition was filed on November 26, counsel "did not see" the opposition until December 1, (2) counsel had "conflicting responsibilities" that would interfere with the preparation of a reply, and (3) the opposition filed by Respondent did not include "exhibits and a statement of facts." (DCX 12)

95. On December 24, 2008 and January 15, 2009, the U.S. Attorney's office filed two additional consent motions for extension of time. The reason given for the delay was Respondent's delay in providing the exhibits and statement of facts. (DCX 12)

96. The Department filed its reply to Respondent's opposition on the date it was due – February 6, 2009. (DCX 13)

97. On September 30, 2009, the court issued a memorandum opinion granting the employer's motion to dismiss or for summary judgment. Of the 10 counts Respondent alleged in Complainant's civil complaint, the court entered a final judgment in favor of the employer on four of them, dismissed three with prejudice, and dismissed three without prejudice for lack of subject matter jurisdiction. (Stip. ¶ 4; DCX A ¶ 14.)

98. Disciplinary Counsel's expert witness testified that he was not surprised that the District Court ruled the way it did. He testified that he would not have advised Complainant to pursue her case: "[T]here's no question Complainant engaged in the conduct [for] which she was charged and she admits she did everything that they say she did. The government says that what she did amounts to unprofessional behavior. And she says, 'No, [I did not] engage in unprofessional behavior and you're only trying to discipline me because of the color of my skin and the fact that I have a disability . . . . [B]ut there is, as the Court points out, . . . there's a distinct lack of evidence to support the – the argument, that the reason she was treated that way was because of one of these protected bases." (Tr. 800-01)

99. Disciplinary Counsel's expert witness also testified that using a manager as a comparator for a non-management employee is "not necessarily fatal" to a claim of disparate treatment discrimination. The expert stated, however, that Complainant did not have the same "degree of discretion" when it came to awarding parking permits as her supervisors did. Thus, "not surprisingly" the court concluded that Complainant's managers were not fair comparators in her case. (Tr. 801-02)

100. Respondent emailed the court's order to Complainant on September 30, 2009, the same day it was issued. (DCX 14, 15; Tr. 224-26)

101. Respondent communicated with Complainant primarily by phone calls and text messages although they did email and meet in person from time to time. (Tr. 168-69, 189, 195, 199-200, 262-63, 267, 993-94, 1005) Following the grant of summary judgment and dismissal of her claims, Respondent discussed the next steps with Complainant. They agreed to meet at her house. (Tr. 178-79, 262-63, 1000, 1007-08)

102. During that meeting, Respondent urged Complainant to file an appeal. He contended that the District Court had erred in its decision. He believed that there were legitimate grounds to file an appeal to the U.S. Court of Appeals for the District of Columbia Circuit. (Tr. 178-80)

103. Complainant did not make an immediate decision about whether or not to file an appeal. While she was considering her options, she spoke to at least one other lawyer who told her that she was not likely to get the relief she wanted, which was the removal of the discipline from her record, but that there were other claims

she could pursue in federal court for monetary damages. The other lawyer explained, however, that he would charge substantial fees to represent her on appeal. (Tr. 203-04)

104. Respondent followed up with Complainant a few days before the deadline for filing an appeal and made it clear that she had to file a notice of appeal or would lose that right. (RX 10; Tr. 231, 361-62, 1000-02) Eventually Complainant decided not to file an appeal and the deadline for filing passed. (Tr. 1019; *see also* Tr. 1198-1200)

105. In October 2009, Complainant sent Respondent a letter, which set forth her dissatisfaction with his representation and asked for the return of her file. The letter was mailed twice and both times was returned to Complainant as undeliverable. The first letter was returned because Respondent had moved his office location. The second letter was misdelivered and returned even though it had the correct address. Complainant did not call or email Respondent to follow up on the requests in her returned letters. (DCX 17; Tr. 204, 363, 1014)

106. Complainant filed a disciplinary complaint with the Office of Disciplinary Counsel dated January 26, 2010. In her complaint she asserted that Respondent should be forced to return the $2,200 she had paid him for the nearly-three-year-long representation. (RX 43, 44, 45; DCX 17)

107. The written retainer agreement was governed by District of Columbia law, which required Complainant and Respondent to bring any fee disputes before the District's Attorney/Client Arbitration Board ("ACAB"). Consequently,

Complainant filed a request for arbitration with ACAB for a refund of the $2,200 she had paid in fees, and Respondent filed a counterclaim for $12,000 in fees and expenses. (RX 19; Tr. 271-73, 366-67)

108. At the ACAB hearing, Respondent admitted that he never sent Complainant a monthly bill as provided in the retainer agreement because he did not intend to collect his fees from her. Rather, he expected to collect his fee from an eventual settlement or trial award as they had discussed. Because they did not settle or win at trial, Respondent never sought any additional fees from Complainant. (Tr. 273-75)

109. On January 13, 2011, ACAB issued a decision. The board declined to require Respondent to return any of the $2,200 Complainant had paid him. The board also awarded Respondent an additional $700 for filing costs that he had advanced in connection with the District Court litigation. (RX 19)

110. Complainant testified at the disciplinary hearing that she did not hear from Respondent as often as she would have liked and that she would have liked to have had more updates from him. (Tr. 194-95)

## C. Count Two – Disciplinary Counsel's IOLTA Charges

111. On March 23, 2011, Respondent opened two TD Bank checking accounts on behalf of his firm Doman Davis LLP: a business checking account (#-5156); and a properly designated and identified IOLTA (#-5130). Respondent was the sole signatory on both accounts. (DCX A ¶ 19; Stip. ¶ 5) On September 13, 2012, TD Bank sent a notice to the Office of [Disciplinary] Counsel, reporting that

the Doman Davis LLP IOLTA Trust Account was over-drafted on September 10, 2012. (DCX 22 at 1)

112. The address listed on both the Doman Davis LLP business and IOLTA accounts was 118 Adams Street, Respondent's official business address and the address he had on file with the Bar. (Tr. 376, 544; *see also* DCX 20A & 20B)

113. Respondent chose TD Bank because it was on the Bar's list of approved banks for trust accounts. (Tr. 586-87)

114. Respondent referred to his accounts as "Doman Davis LLP" (the operating account) and "Doman Davis LLP – IOLTA trust account" (the trust account). (Tr. 908-10; *see also* Tr. 546)

115. Respondent asked for a debit card for the operating account when the account was first opened. He did not order checks for the operating account at that time. (DCX 26A; Tr. 587)

116. Respondent intentionally did not ask for checks or a debit card for the IOLTA account. He intended for all transactions involving the IOLTA account to require him to transact business at the teller's window. (Tr. 555-56, 564, 572, 588; *see also* Tr. 17, 629)

117. On several occasions, Respondent presented the teller with a counter slip marked either "Doman Davis" or "Doman Davis – IOLTA" without an account number. He intended for the teller to look up his accounts and add the correct account numbers. On a number of occasions, there was a miscommunication and

the name of the account did not match with the account number that was listed on the slip. (Tr. 532-33, 536-37, 538-39, 549, 551-53)

118. Respondent very rarely held entrusted funds. For example, he tried to avoid taking and disbursing settlement checks. (Tr. 491-93; *see also* Tr. 1208)

119. Respondent read a D.C. Bar magazine article about the *Mance* decision in which a D.C. lawyer was disciplined for putting unearned fees into his operating account rather than his IOLTA account. After reading the article, he determined that it might be a best practice for him to open an IOLTA account out of an abundance of caution. (Tr. 28-29)

120. Respondent also took a CLE course after which he decided that the best course of action would be to put all payments from clients into his trust account until such time that he was confident that the client would not dispute Respondent's entitlement to those funds. He followed that procedure even when the check from the client was for his fees, as discussed below. (Tr. 446, 452, 484-86, 578-79)

121. Respondent took a second CLE regarding the handling of client funds after he was contacted by Disciplinary Counsel. (Tr. 486)

122. Respondent testified that he had been through a number of fee disputes, and he found it easier to assume that every client would eventually dispute his fees. (Tr. 280-83, 287-90)

123. Respondent routinely put client fees in his IOLTA when they were paid. He left them there until he was "certain" that he had earned the money. In some

instances, he left the earned fees in his IOLTA until the end of the representation. In others he did not. (Tr. 446, 484-86, 493, 498, 500-01)

124. Respondent did, however, need funds to run his practice. From time to time he would remove fees that he considered fully earned and not subject to dispute from his IOLTA and transfer those funds to his operating account. (Tr. 446, 502-03)

125. Respondent did not routinely open and review his bank statements or reconcile those statements with his personal records. (Tr. 542-46, 550)

126. Respondent testified that he also used his IOLTA account as a type of savings account where he would segregate money that he was holding in anticipation of advancing upcoming litigation costs. (Tr. 533-35, 547-48) However, the record evidence is not sufficient to establish whether the IOLTA account ever held both entrusted funds and personal funds during the same time.

127. At some point several months after he opened the accounts, Respondent ordered checks for his operating account. (Tr. 587, 628) The bank made a mistake and put the account number of his IOLTA account on the checks that he ordered for his operating account. (DCX 26A; Tr. 572-73, 902)

128. David Chalker, a Vice President and Store Manager from TD Bank, testified at the hearing. He admitted that the bank had made a mistake and testified that he had written a letter to that effect in January 2013, which was provided to Respondent. (DCX 26A; Tr. 601-03, 902)

129. Mr. Chalker further testified that the vendor used by the bank to print checks could not always fit the full name of the account on the check. Thus, checks with the IOLTA account number may not have been properly labeled as IOLTA checks. (Tr. 911-12)

130. Mr. Chalker further testified that banks use only the account number at the base of the check to determine what account is being accessed. Therefore, once the checks had the IOLTA account number on them, it did not matter what was written at the top. All checks in the checkbooks Responded received would pull funds from Respondent's IOLTA account regardless of the name at the top of the check. If the operating account number was on the checks, all funds would have pulled from the operating account. (Tr. 919-21)

131. Mr. Chalker testified that he could understand Respondent's confusion about the checks since he had only ever ordered checks for his operating account and the checks he got had the operating account name on them even if they had the IOLTA account number. (Tr. 927)

132. Mr. Chalker further testified that the limitation on characters in the name field for checks had "been a problem" in other cases of which he was aware. (Tr. 927-28)

133. Disciplinary Counsel first contacted Respondent by certified mail dated November 5, 2012. The letter included 11 interrogatory-style questions and a subpoena seeking documents. (DCX 24)

134. In response to that letter, respondent did not produce business records that would allow Disciplinary Counsel to understand the origin and character of the funds held in his IOLTA account and later moved to his operating account, even though he was asked to do so by Disciplinary Counsel. (Tr. 506-08)

135. Respondent objected to Disciplinary Counsel's subpoena although the grounds for his objections were limited to the breadth of the subpoena, the number of interrogatories, and the time it would take to respond. Respondent's original response did not specifically include the confidentiality theory he raised at the hearing; however, Respondent's letter noted that Disciplinary Counsel's subpoena called for the production of "attorney-client privileged documents." (DCX 25; Tr. 67-75, 470-76; *see also* Tr. 477-82) In a follow-up letter sent on February 12, 2013, Respondent requested that the time period covered by the subpoena be limited to a three-month period, in order to *inter alia*, "limit[] the number of client confidences [Respondent] risk[ed] violating by responding to the broader subpoena." (DCX 25 at 3) Respondent intended these two letters to put Disciplinary Counsel on notice that he was not going to produce any information protected by the attorney-client privilege. (Tr. 470-73) He believed that if Disciplinary Counsel disagreed with this limitation, it would file a motion to compel further production. (Tr. 69, 472)

136. Disciplinary Counsel sent a second letter to Respondent on November 19, 2013. The second letter included a subpoena covering an extended period of time and 9 additional interrogatory-style questions. (DCX 27. *Compare* DCX 24 at 2 (first letter inquiring about time period from Nov. 1, 2011 through Oct. 31, 2012),

*with* DCX 27 at 1 (second letter inquiring about time period from March 23, 2011 through October 29, 2012))

137. Respondent provided a limited response to the second letter on January 15, 2014. (DCX 27A)

138. Disciplinary Counsel sent a third letter to Respondent on January 14, 2016, which included a third subpoena and 6 additional interrogatory-style questions. (DCX 28)

139. Respondent replied by email on February 19, 2016. (DCX 28A)

140. Disciplinary Counsel did not file a motion to compel the records sought in any of these three letters. (Tr. 510-11)

141. Respondent did not produce any redacted or otherwise anonymized financial records.

142. Respondent and Disciplinary Counsel did not discuss the possibility of using redactions or otherwise limiting the scope of Disciplinary Counsel's subpoena. (Tr. 458-59, 618-19, 632)

143. Respondent did not produce any of his personal business records during the hearing although he was invited to do so by the Hearing Committee. (Tr. 134-36)

144. Respondent expressed concern that the records he had available might reveal confidential client information that he did not have permission to disclose because it belonged to clients other than Complainant, clients who had not filed any disciplinary complaints. (Tr. 447, 455-56, 458-60, 467-70, 475-76, 516-18, 606-07)

145. Respondent was able to recall his work for former clients in detail and the circumstances under which they paid him various amounts. He testified that those amounts were earned fees, but also that he put them into his IOLTA until he could be sure that the client would not come back with a dispute over those fees. (Tr. 445-52, 482-84, 487-90)

146. None of Respondent's clients has accused him of mishandling or stealing money that belonged to him or her. (Tr. 968)

147. No third-party has accused Respondent of misappropriating funds that were owed to them. (Tr. 968)

148. Disciplinary Counsel's investigator testified that he could not determine whether any of the funds in Respondent's IOLTA account at any time were entrusted client funds. (Tr. 935-36)

149. Respondent testified that he keeps some records, and he may have kept a notebook or other handwritten notes in his files indicating how much a client had paid him and whether he considered some or all of that amount earned fees. (Tr. 544-46, 581, 585)

150. Respondent did not keep a unified spreadsheet, ledger or other standardized set of financial documents that he could use to reconcile his accounts with the balances on his counter receipts or bank statements.

151. Respondent did overdraw his operating account on more than one occasion. (Tr. 944) Disciplinary Counsel did not submit evidence establishing that the operating account held client or third-party funds at the time of the overdrafts.

Thus, the Hearing Committee does not find that the overdrafts involved the unauthorized use of entrusted funds.

152. Respondent voluntarily attended a meeting with Ms. Tait, Mr. Anderson, and Wallace E. Shipp, Jr. (then-Bar Counsel) in May 2015. (RX 59) The meeting lasted less than an hour. It was not transcribed or recorded. No one in the meeting had Respondent's case file with them for reference. (Tr. 954-60)

153. Although he was asked about the overdraft on his IOLTA account at the May 2015 meeting, Respondent did not or was not able to fully explain what had happened because he had not completed a detailed review of the file. He was under the impression at the time of the meeting that the only problem with his account was due to errors on the counter slips made by one or more TD Bank tellers. (Tr. 952)

154. It later became clear that the bank had provided checks for his operating account with the wrong account number on them. (Tr. 601-04)

155. In response to a subpoena from Disciplinary Counsel, Respondent produced a document listing transactions in his IOLTA account between November 1, 2011 and February 27, 2013. (DCX 26B) He testified that this report was given to him by an employee of TD Bank. (Tr. 453-54; 461-63)

156. Mr. Chalker testified at the hearing that he did not recognize the report as being a document created by TD Bank. He further stated that he did not have personal knowledge of "a process by which [the bank] would create a document that looks like the document that appears at Disciplinary Exhibit 26 B." Mr. Chalker

could not say conclusively whether the report had come from the bank or not. (Tr. 905-06)

157. Mr. Anderson testified that he had "a theory" that Respondent had either created the report himself, or directed someone else to create it, due to three line items in the report that did not appear elsewhere in TD Bank's records. Mr. Anderson did not provide any conclusive evidence to support his "theory" on the origin of the report. (Tr. 945-48)

158. Respondent testified that he did not have Quicken software and that he did not hire anyone who did. He testified, "I went to the bank and this – that's what they printed out for me." (Tr. 1032)

## III. CONCLUSIONS OF LAW

Disciplinary Counsel alleges the Respondent violated numerous Rules of Professional Conduct. Respondent denies any violation of the rules. The Hearing Committee finds that Respondent violated only Rule 1.15(a)'s recordkeeping requirement.

### A. Burden of Proof

Disciplinary Counsel bears the burden of establishing violations of the Rules of Professional Conduct by clear and convincing evidence. *See In re Anderson*, 778 A.2d 330, 335 (D.C. 2001) ("*Anderson I*"); *see also In re Anderson*, 979 A.2d 1206, 1213 (D.C. 2009) (per curiam) (appended Board Report) ("*Anderson II*") (applying clear and convincing evidence standard to charge of misappropriation of funds); Board Rule 11.6. As the Court has explained, "[t]his more stringent standard

expresses a preference for [the attorney's] interests by allocating more of the risk of error to [Disciplinary] Counsel, who bears the burden of proof." *In re Allen*, 27 A.3d 1178, 1184 (D.C. 2011) (second alteration in original) (internal quotations and citation omitted). Clear and convincing evidence is more than a preponderance of the evidence, it is "evidence that will produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established." *In re Cater*, 887 A.2d 1, 24 (D.C. 2005) (internal quotation and citation omitted).

On the basis of the record as a whole, the Hearing Committee reaches the conclusions of law set forth below.

## B. Complainant's Employment Discrimination Claim

### 1. Competence (Rule 1.1(a) and (b))

There are two separate questions tied together within the competence inquiry required by Rule 1.1. The first question is whether the lawyer has sufficient education, training and experience to handle the matter. The second question is whether the lawyer used his or her skills to prepare adequately and represent the client thoroughly in the matter. This second inquiry overlaps to a certain extent with the inquiry required by Rule 1.3, which is addressed later in this report.

The comments to the Rule 1.1 suggest that a fact-finder consider the following when making a determination about a lawyer's competence:

- the lawyer's general experience;
- the relative complexity and specialized nature of the matter;
- the lawyer's training and experience in the field in question;

- whether the lawyer associated with or consulted a lawyer of established competence in the field in question;
- the level of preparation and study the lawyer gave to the matter;
- the quality of the inquiry the lawyer made into the factual and legal elements of the matter;
- the quality of the analysis the lawyer conducted on the facts and applicable law;
- the use of methods and procedures commonly used by others in the field;
- whether the lawyer has kept "abreast of changes in the law and its practice"; and
- whether the lawyer provided "continuing attention to the needs of the representation."

Rule 1.1, cmt. [1], [2], [5] and [6]. The comments to the Rule further indicate that every case does not require the same level of attention and preparation. "The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence." Rule 1.1, cmt. [5].

In addition, to prove a violation of Rule 1.1, Disciplinary Counsel "must not only show that the attorney failed to apply his or her skill and knowledge, but that this failure constituted a serious deficiency in the representation." *In re Evans*, 902 A.2d 56, 69-70 (D.C. 2006) (per curiam) (appended Board Report). Previous deficiencies that the Court of Appeals has categorized as serious include failing to

attend court hearings, failing to comply with court orders, aggressively pursuing a legally unfounded strategy, failing to file a notice of appeal, filing on the wrong forms in the wrong place, naming the wrong defendants, failing to cure deficiencies in filings after having been notified, failing to investigate the facts, failing to take steps to preserve evidence, failing to present the client's arguments, failing to ask for needed extensions of time, and simply abandoning the matter altogether. *See, e.g.*, *In re Speights*, 173 A.3d 96, 99-100 (D.C. 2017) (per curiam); *In re Yelverton*, 105 A.3d 413, 422-23 (D.C. 2014); *In re Vohra*, 68 A.3d 766, 780 (D.C. 2013) (appended Board Report); *In re Drew*, 693 A.2d 1127 (D.C. 1997) (per curiam); *In re Lewis*, 689 A.2d 561, 564 (D.C. 1997) (per curiam) (appended Board Report). In other words, "[m]ere careless errors do not rise to the level of incompetence." *Evans*, 902 A.2d at 70. We are looking for something beyond "run-of-the-mill sloppiness." *Yelverton*, 105 A.3d at 423. Rule 1.1 violations are "worthy of sanction only when they involve conduct that is truly incompetent, fraudulent, or negligent and that prejudices or could have prejudiced the client." *Id.* at 422.

After considering the testimony presented at the hearing, the Hearing Committee concludes that Disciplinary Counsel did not establish by clear and convincing evidence that Respondent was in over his head or that he walked away from Complainant's employment discrimination claim such that there were serious deficiencies in his representation that prejudiced Complainant. While Complainant's case was not without its challenges, we do not find that Disciplinary Counsel has established that the public needs to be protected from Respondent

because he provides chronically inferior representation to his clients or that he provided incompetent, fraudulent or negligent representation to Complainant.

With respect to his background and general experience, Respondent attended a well-respected law school and graduated with honors. He worked at several well-respected law firms in D.C. before starting his own practice. He also clerked for a well-known federal judge. When Respondent agreed to take Complainant on as a client, he was generally experienced in employment discrimination cases and he was aware of the methods and procedures commonly used in the field.

With respect to the quality of the representation provided in this matter, Respondent represented Complainant for two years and nine months before three different tribunals, and he urged her to continue her case before a fourth. During the period of his representation, Respondent negotiated with his client's employer for significantly reduced discipline and fewer lost wages as a result of the shortened suspension. He obtained discovery at a limited cost to his client. He participated in two mediations during which the Department of Commerce made two settlement offers. He preserved her right to sue in federal court by filing a claim with the EEOC. He avoided a negative ruling from the Judge that would have been entitled to deference from the district court. He provided his client with the opportunity for a second bite at the appeal in federal court. And, although it was not the outcome they hoped for, Respondent got a decision on the merits in the district court, which gave Complainant a right to appeal to the circuit court. Although Respondent urged her to continue her case on appeal, Complainant declined.

Here, Disciplinary Counsel's expert witness testified that in his opinion, Respondent should have noticed the depositions of Department staff (FF 48), responded to the Department's motion to strike (FF 51), and requested a status conference to resolve any confusion regarding the calculation of discovery date. (FF 51; *see also* FF 71) He also conceded that it is a legitimate tactical choice not to take discovery. (FF 47, 48, 75) In addition, Respondent's testimony established a logical explanation for his failure to respond to the motion to strike. (FF 44, 45) And the tribunal's rules prevented the type of *ex parte* contact recommended by Disciplinary Counsel's expert witness. (FF 71-74)

However, as explained in one of the most respected treatises on Professional Responsibility, Rule 1.1 "does not authorize second-guessing every decision a lawyer may make." By contrast, "lawyers are accorded a wide range of discretion in both practice technique and decision-making . . . . A thoughtful opinion on a difficult or unsettled question is not incompetent even if it later proves to have been wrong. Neither is a rational choice of tactics in litigation, negotiation, or counseling." Geoffrey C. Hazard, Jr. et al., The Law of Lawyering § 4.06 (4th ed. 2019); *accord In re Stanton*, 532 A.2d 95, 101 n. 3 (D.C. 1987) (Mack, J. concurring) ("There is a delicate balance between enforcing the mandate of the ethical canons and disciplinary rules . . . and at the same time allowing an attorney latitude to make tactical decisions which he or she believes are in the best interests of his client."). Given the substantial evidence that Respondent was adequately trained and experienced in this area of the law combined with the evidence that he provided his

client with consistent representation for nearly three years, we find that Disciplinary Counsel failed to prove a violation of Rule 1.1(a) or 1.1(b) by clear and convincing evidence.

2. Neglect – Rule 1.3(a)

Rule 1.3(a) states that an attorney "shall represent a client zealously and diligently within the bounds of the law." Neglect has been defined as "indifference and a consistent failure to carry out the obligations that the lawyer has assumed to the client or a conscious disregard of the responsibilities owed to the client." *In re Wright*, 702 A.2d 1251, 1255 (D.C. 1997) (per curiam) (appended Board Report) (citing *In re Reback*, 487 A.2d 235, 238 (D.C. 1985), *adopted in relevant part*, 513 A.2d 226 (D.C. 1986) (en banc) ("*Reback II*")). Rule 1.3(a) "does not require proof of intent, but only that the attorney has not taken action necessary to further the client's interests, whether or not legal prejudice arises from such inaction." *In re Bradley*, Board Docket No. 10-BD-073, at 17 (BPR July 31, 2012), *adopted in relevant part*, 70 A.3d 1189, 1191 (D.C. 2013) (per curiam); *see also Lewis*, 689 A.2d at 564 (Rule 1.3(a) violated even where "[t]he failure to take action for a significant time to further a client's cause . . . [does] not [result in] prejudice to the client").

The Court has found neglect in violation of Rule 1.3(a) where an attorney persistently and repeatedly failed to fulfill duties owed to the client over a period of time. *See, e.g.*, *In re Ukwu*, 926 A.2d 1106, 1135 (D.C. 2007) (appended Board Report) (respondent violated Rule 1.3(a) when he repeatedly failed to inform his

clients about the status of their cases, prepare his clients for hearings and interviews with immigration officials, or prepare himself for court appearances); *Wright*, 702 A.2d at 1255 (appended Board Report) (respondent violated Rule 1.3(a) by failing to respond to discovery requests, a motion to compel, and a show cause order); *In re Chapman*, Bar Docket No. 055-02, at 19-20 (BPR July 30, 2007) (respondent violated Rule 1.3(a) where he did virtually no work on the client's case during the eight-month term of the representation, failed to conduct any discovery, and did not respond to discovery requests from the opposing party), *recommendation adopted in relevant part*, 962 A.2d 922, 923-24 (D.C. 2009) (per curiam).

Upon review of the evidence and the testimony presented at the hearing, the Hearing Committee finds that Disciplinary Counsel failed to establish by clear and convincing evidence that Respondent acted indifferently or that he failed to further his client's interests. He obtained benefits for Complainant at every stage of the proceedings and protected her right to continue beyond the point at which she voluntarily decided to stop. (FF 82, 84) There was no evidence that Respondent persistently or repeatedly failed to fulfill his duties to Complainant.

3. Intentional Neglect and Prejudice or Damage to Client – Rule 1.3(b)

Rule 1.3(b) prohibits a lawyer from intentionally:

> (1) [f]ail[ing] to seek the lawful objectives of a client through reasonably available means permitted by law and the disciplinary rules; or
>
> (2) [p]rejudic[ing] or damag[ing] a client during the course of the professional relationship.

Rule 1.3(b)(1)-(2).

A negligent failure to pursue a client's interest is deemed intentional when '"the neglect is so pervasive that the lawyer must be aware of it"' or "when a lawyer's inaction coexists with an awareness of his obligations to his client." *Ukwu*, 926 A.2d at 1116, 1135 (citations omitted). "Neglect of a client's matter, often through procrastination, can 'ripen into . . . intentional' neglect in violation of Rule 1.3(b) 'when the lawyer is aware of his neglect' but nonetheless continues to neglect the client's matter." *Vohra*, 68 A.3d at 781 (quoting *In re Mance*, 869 A.2d 339, 341 n.2 (D.C. 2005) (per curiam)). "[K]nowing abandonment of a client is the classic case of a Rule 1.3(b)(1) violation . . . ." *Lewis*, 689 A.2d at 564.

"Proof of actual intent to harm . . . is not necessary to establish a violation of Rule 1.3(b)(2); but [Disciplinary] Counsel must establish that the attorney 'knowingly created a grave risk' that the client would be financially harmed and understood that financial damage was 'substantially certain to follow from his conduct.'" *In re Wright*, Bar Docket Nos. 377-99 *et al.*, at 24-25 (BPR Apr. 14, 2004) (quoting *In re Robertson*, 612 A.2d 1236, 1250 (D.C. 1992) (appended Board Report)), *findings and recommendation adopted*, 885 A.2d 315, 316 (D.C. 2005) (per curiam). A violation of Rule 1.3(b)(2) cannot be sustained "unless there is actual prejudice or damage to the client." *In re Cohen*, 847 A.2d 1162, 1165 n.1 (D.C. 2004); *see, e.g.*, *Robertson*, 612 A.2d at 1250 (finding intentional damage to a client where the respondent failed to file a client's tax returns before the deadline, thus forfeiting the client's requests for tax refunds).

The evidence presented by Disciplinary Counsel did not establish that Respondent intentionally failed to seek Complainant's lawful objectives or that he intended to cause actual prejudice to Complainant's cause of action or damage her interests. Respondent attempted to achieve the outcome his client asked for at every step of the process, even when doing so was detrimental to his financial interests. When Complainant wanted her record expunged even after Respondent reduced her discipline from a 7-day suspension without pay to a 3-day suspension without pay, Respondent continued to pursue the matter. (FF 16, 83) He advanced the costs for each successive stage of the litigation and recovered only his filing fees at the end of the representation. (FF 107-109) On more than one occasion, Complainant was presented with a settlement offer that would have included payment of her attorney's fees. (FF 20, 81) Respondent never pushed Complainant to accept less than what she wanted solely so that he would be paid. He continued to fight for her until she decided she no longer wanted to move forward. (FF 103-104) The Hearing Committee finds no evidence of intentional neglect of Complainant or actual prejudice or damage to Complainant. Disciplinary Counsel's own expert categorized the "multi-day suspension reduced to one day" outcome as a "fine result" and testified that the case did not "ha[ve] merit to being with . . . . [I]t was a long shot." (Tr. 811, 887; *see* FF 15)

4. Reasonable Promptness – Rule 1.3(c)

Rule 1.3(c) provides that an attorney "shall act with reasonable promptness in representing a client." "Perhaps no professional shortcoming is more widely

resented by clients than procrastination," and "in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed." Rule 1.3, cmt. [8]. The Court has held that failure to take action for a significant time to further a client's cause, whether or not prejudice to the client results, violates Rule 1.3(c). *See, e.g.*, *Speights*, 173 A.3d at 99-101.

Examples of violations upheld by the Court of Appeals include *In re Pye*, where a lawyer acting as personal representative of an estate failed to disburse to the heirs the undisputed portion of their inheritance while he disputed the amount of his fee request. 57 A.3d 960, 972 (D.C. 2012) (per curiam) (appended Board Report). The respondent in *Pye* also used the undistributed money as leverage to attempt to extract an agreement from the heirs that he should be paid more and they should be paid less. *Id.* at 966. In *In re Bernstein*, the respondent failed to file suit for five years after an initial discussion about the need to file and then filed a claim against the client's own insurer without informing the client that he was doing so. 707 A.2d 371, 373 (D.C. 1998). In *In re Geno*, the respondent failed to notify his client of a pending immigration hearing, failed to attend the hearing – which resulted in entry of an *in absentia* deportation order, and failed to take any remedial actions following the missed hearing unless his client would agree to make additional payments to him first. 997 A.2d 692, 692-693 (D.C. 2010) (per curiam).

The Hearing Committee finds Disciplinary Counsel provided no clear and convincing evidence that Respondent failed to act with reasonable promptness in violation of Rule 1.3(c). While Respondent did ask for extensions of time on

multiple occasions, the same could also be said of his opposing counsel. (FF 91-92, 94-95) Requests for extensions of time are not uncommon in the practice of law, a practice former Chief Judge Royce Lamberth of the U.S. District Court for the District of Columbia once referred to as "the usual to and fro of requests for extensions of time and amended scheduling orders." *DL v. District of Columbia*, 274 F.R.D. 320, 326 (D.D.C. 2011). Moreover, there was some confusion at the EEOC over the scheduling order, deadlines and what Judge Furcolo meant when he granted Complainant's motion for an extension of the discovery deadlines. Disciplinary Counsel's own expert admitted that the deadlines at the EEOC are unusually tight and the rules are particularly confusing to any lawyer that does not practice before the EEOC regularly. (FF 37; *see also* FF 34, 56, 62, 67, 73, ) Disciplinary Counsel's expert also testified that the order issued on Respondent's motion to extend was confusing. (FF 32-34) Disciplinary Counsel failed to establish by clear and convincing evidence that Respondent procrastinated or failed to take action when he should have. Thus, Disciplinary Counsel failed to prove a violation of Rule 1.3(c).

5. Failure to Explain – Rule 1.4(b)

Rule 1.4(b) states than an attorney "shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." This rule provides that the attorney "must be particularly careful to ensure that decisions of the client are made only after the client has been informed of all relevant considerations." Rule 1.4, cmt. [2]. The rule places the burden on the

attorney to "initiate and maintain the consultative and decision-making process if the client does not do so and [to] ensure that the ongoing process is thorough and complete." *Id*.

The Court of Appeals has found a violation of Rule 1.4 where the attorney in question failed to inform the client that he had filed a lawsuit on her behalf until 18 months after it was filed and also failed to inform his client that the opposing party made a settlement offer. *Bernstein*, 707 A.2d at 376-77. In *Ukwu*, the Court of Appeals noted that "the lawyer's assistance is vital to his clients' ability to understand fully the options available to them and the consequences of each option," particularly when the client "do[es] not have great experience with the legal culture . . . and [is] not proficient in speaking and reading the English language." 926 A.2d at 1139; *see also In re Gonzalez*, 207 A.3d 170, 171 (D.C. 2019) (per curiam) (attorney failed to provide his Spanish-speaking clients with documents in Spanish or adequate translation of bankruptcy proceedings); *Vohra*, 68 A.3d at 780 (finding violations of Rule 1.4 where attorney failed to help his clients understand how to navigate the immigration process). In *In re Askew* an incarcerated indigent client had to reach out to his court-appointed attorney, who had never been in touch with her client, to tell her that he "wanted to 'have some input into what is going into the [post-conviction] brief because this is my life on the line.'" 96 A.3d 52, 55 (D.C. 2014) (per curiam).

In each of these cases, the attorney in question completely failed to include his client in the decision-making process and/or failed to communicate in a language

that the client could understand. That is not the case here. The Hearing Committee finds that Disciplinary Counsel provided no clear and convincing evidence that Respondent failed to explain matters to his client or give her information sufficient to make an informed decision. At each turning point in the case, Respondent spoke to his client to inform her of what had transpired and to explain what her options were moving forward. (FF 20-21, 24, 53-55, 78, 84, 89, 101-, 104; *see also* FF 105) While Complainant testified that she would have liked to have a lawyer who provided an enhanced level of client service (FF 110), there is nothing in the evidence before the Hearing Committee that establishes by clear and convincing evidence that Respondent fell below the standard expected from ordinary attorneys.

6. Termination of Representation – Rule 1.16(d)

Rule 1.16(d) provides:

> In connection with any termination of representation, a lawyer shall take timely steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by Rule 1.8(i).

Comment [9] to Rule 1.16 further states that even if a lawyer has been unfairly discharged, "a lawyer must take all reasonable steps to mitigate the consequences to the client."

Failure to refund any unearned portion of a fee violates Rule 1.16(d). *See, e.g.*, *In re Samad*, 51 A.3d 486, 497 (D.C. 2012) (per curiam) (finding a violation

where the respondent claimed that he did some work on the case, but did not "suggest that he earned the entire flat fee or that he returned any portion of the fee"); *In re Carter*, 11 A.3d 1219, 1222-23 (D.C. 2011) (per curiam) (finding a violation of Rule 1.16(d) where the attorney failed to pay an ACAB award for unearned fees); *In re Kanu*, 5 A.3d 1, 2-3, 10 (D.C. 2010) (finding a violation of Rule 1.16(d) where the attorney failed to abide by a clause in her retainer agreement promising a refund if she failed to meet her clients' objectives).

Disciplinary Counsel alleges that Respondent violated Rule 1.16 by failing to return the $2,200 Complainant had paid him when she asked for it because he had not performed sufficient work to earn that fee. The evidence shows that Respondent clearly did enough work to earn the $2,200 he charged for nearly three years of representation. (*See* FF 15-17 (negotiate reduction in proposed discipline), 18-19 (negotiate expungement of discipline record), 20 (EEO mediation), 21 (EEO Formal Complaint), 22-23 (EEO Investigation), 24 (EEOC complaint); *see also* 81-82, 108)

Furthermore, because the retainer agreement signed by Complainant was governed by District of Columbia law, it allowed her to arbitrate any fee dispute before ACAB. (FF 10-11, 107) Complainant requested an ACAB arbitration, and Respondent filed a counterclaim. (FF 107) ACAB determined that Respondent was entitled to retain the $2,200 plus $700 in court fees that Complainant had not previously paid. (FF 109) Disciplinary Counsel has failed to establish that any provision of the retainer agreement required Respondent to return the $2,200 given the facts of this case. Disciplinary Counsel has also failed to prove that Respondent's

refusal to return money that he had been paid and had earned constitutes a violation of Rule 1.16(d).

## C. IOLTA and Operating Accounts

### 1. Commingling and Failure to Keep Records – Rule 1.15(a)

Respondent is charged with comingling and the failure to keep adequate records of his handling of client funds in violation of Rule 1.15(a). Rule 1.15(a) provides in part:

> A lawyer shall hold property of clients . . . that is in the lawyer's possession in connection with a representation separate from the lawyer's own property. Funds of clients . . . that are in the lawyer's possession (trust funds) shall be kept in one or more trust accounts maintained in accordance with paragraph (b) . . . . Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

Commingling is established '"when a client's money is intermingled with that of his attorney and its separate identity is lost so that it may be used for the attorney's personal expenses or subjected to claims of its creditors."' *In re Hessler*, 549 A.2d 700, 707 (D.C. 1988) (appended Board Report) (citation omitted); *see also In re Moore*, 704 A.2d 1187, 1192 (D.C. 1997) (per curiam) (appended Board Report) ("Commingling occurs when an attorney fails to hold entrusted funds in a special account, separate from his own funds."). "The rule against commingling has three principal objectives: to preserve the identity of client funds, to eliminate the risk that client funds might be taken by the attorney's creditors, and most importantly, to prevent lawyers from misusing/misappropriating client funds, whether intentionally

or inadvertently." *In re Rivlin*, 856 A.2d 1086, 1095 (D.C. 2004) (per curiam) (appended Board Report).

Disciplinary Counsel failed to prove that Respondent commingled funds. Disciplinary Counsel's investigator testified that he could not establish whether any of the funds held in the IOLTA account were client funds. (FF 148) Disciplinary Counsel did not establish that Respondent's operating account contained client and/or third-party funds at the same time that undisputed earned fees or other funds belonging to Respondent were held in the account. (FF 146, 148, 151) Moreover, no client or third party has complained that Respondent mishandled funds. (FF 147) The Hearing Committee concludes that Disciplinary Counsel failed to establish a commingling violation under Rule 1.15(a) by clear and convincing evidence.

The real focus of the Rule 1.15(a) charge in this matter is the requirement that lawyers keep '"complete records of . . . account funds and other property' and preserve them 'for a period of five years after termination of the representation."' *In re Edwards*, 990 A.2d 501, 522 (D.C. 2010) (appended Board Report) (quoting Rule 1.15(a)). "Financial records are complete only when an attorney's documents are 'sufficient to demonstrate [the attorney's] compliance with his ethical duties.'" *Id.* at 522 (quoting *In re Clower*, 831 A.2d 1030, 1034 (D.C. 2003) (finding Rule 1.15(a) and D.C. Bar R. XI, § 19(f) violations)). The purpose of the requirement of "complete records is so that 'the documentary record itself tells the full story of how the attorney handled client or third-party funds' and whether, for example, the attorney misappropriated or commingled a client's funds." *Id.* (citation omitted);

*see also In re Pels*, 653 A.2d 388, 396 (D.C. 1995) (finding Rule 1.15(a) violation when attorney showed a "pervasive failure" to maintain contemporaneous records accounting for the flow of client funds within various bank accounts). Thus, "[t]he records themselves should allow for a complete audit even if the attorney or client is not available." *Edwards*, 990 A.2d at 522.

Disciplinary Counsel alleges that Respondent failed to keep adequate records and that his failure to do so prevented her from being able to determine whether or not there was any misappropriation of funds. The Hearing Committee would like to note that there has not been any allegation by any client or any third party that Respondent ever misappropriated any funds that belonged to them. (FF 146-48) Respondent testified that he only held entrusted funds (other than fee advances) in the rarest of cases and that when he did so, those funds were then delivered promptly and in full to the ultimate payee. (FF 118, 126, 145) There is nothing in the record to suggest otherwise.

Nevertheless, the exact nature and form of Respondent's books and records is not clear because he never produced them. *See* discussion of Rules 8.4(c) and (d) below. Rule 1.15(a) addresses only the obligation to keep complete and contemporaneous records that allow for an easy audit of the lawyer's accounts. Respondent acknowledged that he did not keep a unified spreadsheet, ledger or other standardized set of financial documents. (FF 150) Respondent also acknowledged that he did not reconcile his bank statements with any personal business records. (FF 125, 150) And, although Respondent does not bear the burden of proof in this

disciplinary proceeding, after he testified that he keeps some personal business records, he did not produce those records despite the Hearing Committee's invitation to do so. (FF 143-44, 149-50) Based on these findings, the Hearing Committee concludes that because Respondent did not maintain complete "[f]inancial records" that were "sufficient to demonstrate [the attorney's] compliance with his ethical duties," Disciplinary Counsel proved by clear and convincing evidence that Respondent violated the recordkeeping requirements under Rule 1.15(a).

2. Knowingly Making False Statement – Rule 8.1(a)

Rule 8.1(a) provides that "a lawyer . . . in connection with a disciplinary matter, shall not . . . [k]nowingly make a false statement of fact[.]" The Rule requires Disciplinary Counsel to prove by clear and convincing evidence that Respondent "knowingly" made a false statement. The Terminology section of the Rules defines "knowingly" as "actual knowledge of the fact in question" which "may be inferred from the circumstances." Rule 1.0(f). Note that Comment [1] to Rule 8.1 provides that "it is a separate professional offense for a lawyer knowingly to make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct." Moreover, the "[l]ack of materiality does not excuse a knowingly false statement of fact." Rule 8.1, cmt. [1].

Disciplinary Counsel alleges that Respondent lied to her during her investigation. The crux of Disciplinary Counsel's argument is that at the May 2015

meeting between Respondent and members of the Office of Disciplinary Counsel,[6] Respondent asserted that the overdraft on his IOLTA account was due to an erroneous counter slip when in truth it was due to an erroneously printed check. (FF 153) The facts established during the hearing demonstrate that the overdraft on Respondent's account was likely due to a combination of multiple bank errors and a failure by Respondent to monitor for and quickly rectify those errors. (FF 128-132, 150-51, 154) Thus, Disciplinary Counsel has established that Respondent's explanation was incorrect, but not that it was "knowingly" so.

The evidence shows that Respondent believed that he had developed a fool-proof system for using his operating account and leaving his IOLTA account untouched unless he went to the bank and specifically took action with respect to his IOLTA account. (FF 114-16; *see also* FF 119-20) Whether his system would have worked in the absence of multiple mistakes by the bank is up for debate, but it is clear that his system could not and did not work in this instance. Although Respondent asked for checks for his operating account, the bank ordered checks with the account number of Respondent's IOLTA account number printed on them. To make matters worse, the bank did not include the full name of the IOLTA account on the checks due to restrictions imposed by the printer. Instead, by unfortunate coincidence, the bank printed the name of Respondent's operating account. (FF 129-

[6] Disciplinary Counsel's Proposed Findings of Fact, Conclusions of Law, and Recommended Sanction suggests that this meeting took place in May 2016, but all evidence presented at the hearing, including RX 59, indicate that the meeting actually took place in May 2015.

130) Thus, Respondent never had any reason to think that there might have been a mistake when he looked at the face of the checks. (*See* FF 131-32)

While it is true that Respondent might have caught the mistake sooner if he had been accustomed to opening his bank statements when they arrived and then reconciling those statements with his books, his mail-opening habits are not at issue here. That Respondent had not fully untangled this mess when he was first invited to meet with Disciplinary Counsel is insufficient evidence to find a knowing violation of Rule 8.1. Disciplinary Counsel has not established by clear and convincing evidence that Respondent had "actual knowledge" that his explanation for the cause of the overdraft given at the May 2015 meeting was untrue, and thus, Disciplinary Counsel has failed to prove that he violated Rule 8.1(a) on this ground.

3. Conduct Involving Dishonesty – Rule 8.4(c)

Rule 8.4(c) provides that it is professional misconduct for a lawyer to "[e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation." Dishonesty is the most general category in Rule 8.4(c), defined as:

> fraudulent, deceitful, or misrepresentative behavior [and] conduct evincing a lack of honesty, probity or integrity in principle; [a] lack of fairness and straightforwardness . . . . Thus, what may not legally be characterized as an act of fraud, deceit or misrepresentation may still evince dishonesty.

*In re Shorter*, 570 A.2d 760, 767-68 (D.C. 1990) (per curiam) (internal quotation marks and citation omitted); *see also In re Scanio*, 919 A.2d 1137, 1142-43 (D.C. 2007). Dishonesty in violation of Rule 8.4(c) does not require proof of deceptive or fraudulent intent. *In re Romansky*, 825 A.2d 311, 315 (D.C. 2003). Thus, when the

dishonest conduct is "obviously wrongful and intentionally done, the performing of the act itself is sufficient to show the requisite intent for a violation." *Id.* at 315. Conversely, "when the act itself is not of a kind that is clearly wrongful, or not intentional, [Disciplinary] Counsel has the additional burden of showing the requisite dishonest intent." *Id.* A violation of Rule 8.4(c) may also be established by sufficient proof of recklessness. *Id*. at 317. To prove recklessness, Disciplinary Counsel must prove by clear and convincing evidence that the respondent "consciously disregarded the risk" created by his actions. *Id.*

Disciplinary Counsel asserts that Respondent acted dishonestly in his interactions and discourse with her throughout the course of her investigation by giving incomplete answers to her questions and omitting relevant information. Respondent counters that he was only defending himself against what he saw as overly broad and overreaching subpoenas. That leaves us with the question of whether Respondent was defending himself "with well-directed zeal within the proper ethical limits of advocacy in the best traditions of the bar" or if he crossed the line. *See U.S. v. Carrell*, 231 F. Supp. 724, 725 (D.D.C. 1964). For guidance we look to the law of contempt. In a dissenting option in *In re Holloway*, Chief Judge Mikva of the U.S. Court of Appeals for the District of Columbia Circuit explained that there is a tension between the need to "safeguard[ ] beneficial advocacy" and the need to protect the "court's authority." 995 F.2d 1080, 1099 (D.C. Cir. 1993) (Mikva, C.J., dissenting). We find the same tension here.

In *Holloway*, Chief Judge Mikva explained that a "contempt certificate must set forth facts which establish a finding of willfulness and contumacious intent beyond a reasonable doubt." *Id*. Chief Judge Mikva then went on to explain that "vigorous advocacy" pursued in good faith fulfills an "attorney's ethical obligation to zealously represent his clients" and is, therefore, '"antithetical to contumacious intent."' *Id.* (quoting *In re Brown*, 454 F.2d 999, 1007 (D.C. Cir. 1971)). We find this analysis instructive. To the extent that Respondent was vigorously defending himself, even if his approach was a "plausible though mistaken alternative," *id.*, we are reluctant to find that he acted dishonestly in the process.

This is not a case where Respondent is accused of committing dishonest acts involving members of the public. Here, the alleged dishonesty arose within the confines of Respondent's interaction with Disciplinary Counsel. That makes it harder to determine whether Respondent was acting dishonestly or whether he was just vigorously defending himself. He did not forge a client's signature, *see Vohra*, 68 A.3d at 783, steal from fraternal organization in which he was a member and the local chapter president, *see In re Slattery*, 767 A.2d 203, 206, 213-14 (D.C. 2001), accept an undisclosed payment in exchange for convincing his clients to settle their claims, *see In re Hager*, 812 A.2d 904, 908-11, 916 (D.C. 2002), suborn perjury, *see In re Corizzi*, 803 A.2d 438, 442 (D.C. 2002), or lie to his client and then "thr[o]w [her] under the bus" to protect himself, s*ee In re Baber*, 106 A.3d 1072, 1077 (D.C. 2015) (per curiam).

The allegations of dishonesty have only to do with Respondent's interactions with and responses to Disciplinary Counsel. In that regard we note that Respondent did not ignore Disciplinary Counsel's requests for information or fail to respond completely. *See In re Anthony*, 197 A.3d 1070, 1072 (D.C. 2018) (per curiam) ("Anthony has failed to respond to any of the disciplinary charges brought against him or to participate at any state of these disciplinary proceedings."). The Hearing Committee does not find that Respondent engaged in "parsimonious dissemination of information" designed to deprive Disciplinary Counsel of the right answers. *See Shorter*, 570 A.2d at 768. Although Disciplinary Counsel raised the specter of falsified bank paperwork during the hearing and in her briefing, we cannot find clear or convincing evidence that Respondent submitted deliberately false paperwork as was the case in the recently-decided *In re Ekekwe-Kauffman*, 210 A.3d 775, 782, 796-97 (D.C. 2019) (per curiam) (finding a violation of Rule 8.4(c) where respondent "submitted a deliberately falsified document . . . to Disciplinary Counsel"); *see also In re Omwenga*, 49 A.3d 1235, 1238 (D.C. 2012) (per curiam) (finding a violation of Rule 8.4(c) and dishonesty testimony where "respondent made false statements to [Disciplinary] Counsel in response to ethical complaints and testified untruthfully before the Hearing Committee"). Instead, Respondent testified that the paperwork he provided was received from TD Bank. (FF 156) The only witness from TD Bank did not recognize that paperwork, but could not say definitively that it had not come from someone at the bank. (FF 157)

Beyond the paperwork, Disciplinary Counsel asserts that Respondent was dishonest in many of his interactions with her over the course of this investigation. We find only that Respondent took an aggressive position and fought as hard for himself as he would have for one of his clients.

It became clear to the Hearing Committee that the relationship between Disciplinary Counsel and Respondent was a highly contentious one. Disciplinary Counsel's direct examination of Respondent was fraught with tension, slow-moving and extremely difficult to get through. On more than one occasion Disciplinary Counsel's unnecessary and repetitive questions were met by unnecessarily vague or intentionally circular answers from Respondent. Nevertheless, Disciplinary Counsel bears the burden of proof, and she has not established by clear and convincing evidence that Respondent acted fraudulently or deceitfully. Nor did she establish the Respondent's "requisite dishonest intent." *Romansky*, 825 A.2d at 315. Respondent took every step he could to protect himself and his clients in responding to Disciplinary Counsel's inquiry following Complainant's complaint. He might have gotten to a satisfactory result in less than nine years if he had been more cooperative and less combative. It appears that relationship between Disciplinary Counsel and Respondent prevented clear communication as to what Respondent was producing, and what he was withholding. Respondent's references to the attorney-client privilege could have more clearly stated that he would not produce information that he believed to the privileged. Disciplinary Counsel should have inquired as to the meaning of the reference to the attorney-client privilege to make certain that it

understood the import of Respondent's response. While the communication between Respondent and Disciplinary Counsel could have been more clear, the Hearing Committee saw no evidence that Respondent intended to deceive Disciplinary Counsel or otherwise act outside the bounds of the law or what is allowed by the Rules of Professional Conduct.

The line between vigorous advocacy and unethical recalcitrance is a thin one, but the Hearing Committee concluded that Respondent did not cross it. For these reasons, Disciplinary Counsel failed to establish by clear and convincing evidence that Respondent made intentionally, or even recklessly, dishonest statements, or made intentional or reckless omissions, in violation of Rule 8.4(c).

4. Serious Interference with the Administration of Justice – Rule 8.4(d)

Rule 8.4(d) provides that it is professional misconduct for a lawyer to "[e]ngage in conduct that seriously interferes with the administration of justice." A respondent's "[c]onduct violates Rule 8.4(d) when it is (1) improper, (2) bears directly on the judicial process with respect to an identifiable case or tribunal, and (3) harms the judicial process in more than a *de minimis* way." *Yelverton*, 105 A.3d at 426; *see also In re Hopkins*, 677 A.2d 55, 60-61 (D.C. 1996). Rule 8.4(d) is violated if the attorney's conduct causes the unnecessary expenditure of time and resources in a judicial proceeding. *In re Cole*, 967 A.2d 1264, 1266-67 (D.C. 2009).

The Court of Appeals has also found that "interfering with [Disciplinary] Counsel's efforts to investigate attorney misconduct" can constitute a violation of Rule 8.4(d). *Yelverton*, 105 A.3d at 426; *see also Edwards*, 990 A.2d at 524 (citing

Rule 8.4, current cmt. [2]); *In re Karr*, 722 A.2d 16, 21-22 (D.C. 1998) (finding a Rule 8.4(d) violation when attorney ignored multiple letters sent to him by [Disciplinary] Counsel in connection with disciplinary matters and when he admitted the violation); *Cater*, 887 A.2d at 17 (finding a Rule 8.4(d) violation when attorney failed to respond to repeated [Disciplinary] Counsel letters and orders of the Board on Professional Responsibility). Disciplinary Counsel argues that Respondent's failure to "respond appropriately" to her investigation and his failure to provide the requested documents in response to her subpoena amounts to a Rule 8.4(d) violation. DC Brief at 50-51.

We conclude that Respondent did not "seriously" interfere with the administration of justice. We find no indication that Respondent ignored Disciplinary Counsel's letters or subpoenas. In each instance, when contacted by Disciplinary Counsel, Respondent provided a response. (*See* FF 135, 137, 139) Where Disciplinary Counsel found those responses inadequate, she had the option to file a motion to compel. *Kanu*, 5 A.3d at 11. While the Court of Appeals' decision in *Kanu* makes it clear that a motion to compel is not a necessary prerequisite to bringing a charge under Rule 8.4(d), *id.*, the Court also noted that there are situations in which a motion to compel would be well advised. *Id.* at 12-13 ("We understand the Board's concern that [Disciplinary] Counsel, by not seeking an order to compel from the Board before charging a violation of Rule 8.4(d), may become both prosecutor and judge in the same matter as, for example, when the subject of an

investigation objects to [Disciplinary] Counsel's inquiry as overbroad or unduly burdensome."). That appears to be the case here.

Disciplinary Counsel never filed a motion to compel. Respondent objected to the requests, characterizing them as overly broad and unduly burdensome, in addition to requiring production of privileged information (although the latter objection was not as clear as the former). Rather than allowing the Board to weigh in on that issue by filing a motion pursuant to Board Rule 2.10(a), Disciplinary Counsel simply reached her own conclusion about the proper scope of her investigation and charged a violation of Rule 8.4(d) when Respondent disagreed.

As outlined above, Respondent's intention was to vigorously advocate for himself. In addition, Respondent was a solo practitioner with limited administrative assistance. After he provided each response to Disciplinary Counsel, he was met by increased demands. Respondent testified that he felt that any additional negotiations with Disciplinary Counsel would only continue to exacerbate the problem rather than moving toward a resolution. (*See* Tr. 70-83) The Court of Appeals has previously held in similar circumstances that an attorney's letter responding to Disciplinary Counsel was adequate to comply with the rule requiring attorneys under investigation to respond to written inquiries. *In re Artis*, 883 A.2d 85, 93 (D.C. 2005) ("[A]n attorney who is notified by [Disciplinary] Counsel about a complaint is entitled to make a 'general denial' of the charges."). The Court in *Artis* also found that the Board on Professional Responsibility's procedures "do not provide for formal discovery and . . . do not permit [Disciplinary] Counsel to propound

interrogatory-like questions to a respondent." *Id.* at 101. The Court adopted the Board's "concern that, without the benefit of counsel at the investigative stage, a respondent might provide incomplete or inaccurate information in an effort to cooperate that could later form the basis for an increased sanction." *Id.* The Court went on to conclude that "interrogatories, as provided for under civil court rules, should not be incorporated into the disciplinary process without promulgation of rules governing their use." *Id.* As in *Artis*, Disciplinary Counsel's interrogatory-like questions to Respondent were overly broad, vague and burdensome. (*See* FF 133, 136, 138) We conclude that the opposition Respondent raised in response to those requests should not form the basis for a violation of Rule 8.4(d). (*See* FF 135, 137, 140)

Finally, it is worth noting, as discussed above, that Respondent's records seem to be somewhat informal and might not have been in a format that was easy for him to turn over. We have addressed the record-keeping violation of Rule 1.15(a), but do not find that failure to turn over non-existent records should constitute a separate violation of Rule 8.4(d).

## IV. RECOMMENDED SANCTION

In this case, Disciplinary Counsel has asked the Hearing Committee to recommend the sanction of disbarment. Respondent has requested that the Hearing

Committee recommend no sanction. For the reasons described below, we recommend the sanction of a Board reprimand.[7]

## A. 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); *Cater*, 887 A.2d at 17. "In all cases, [the] purpose in imposing discipline is to serve the public and professional interests . . . rather than to visit punishment upon an attorney." *Reback II*, 513 A.2d at 231 (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; *In re Berryman*, 764 A.2d 760, 766 (D.C. 2000). Here the Hearing Committee's primary concerns are maintaining the integrity of the legal profession and deterrence. There is no evidence that any sanction is needed to protect the public and the courts from Respondent.

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[7] D.C. Bar Rule XI, § 3 generally permits imposition of three lesser sanctions than disbarment or suspension: censure by the court (public censure), reprimand by the Board, and informal admonition by Disciplinary Counsel. Rule XI, § 3(3), (4), and (5). Although these lesser sanctions are similar in that they all involve some degree of public disclosure, they nevertheless reflect a descending order of severity from public censure to informal admonition. *In re Schlemmer*, 870 A.2d 76, 80 (D.C. 2005).

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 *In re Elgin*, 918 A.2d 362, 376 (D.C. 2007)). 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)).

**B. Application of the Sanction Factors**

1. The Seriousness of the Misconduct

The Hearing Committee concludes that Respondent's violation of the Rule 1.15(a) recordkeeping requirements did not involve serious misconduct. Respondent (when he was in active practice) did not regularly handle entrusted funds other than advanced fees. He took several CLE courses on the proper way to handle client funds and opened an IOLTA account out of an abundance of caution. Respondent tended to leave advanced fees in his IOLTA account longer than necessary in order to be sure that those funds would not be disputed, something he was not required to do, but the record contains no clear and convincing evidence that establishes Respondent commingled funds in violation of Rule 1.15(a). Rather,

Respondent's key mistake was his failure to keep the types of books and records required by the rule. *See supra*, pages 53 to 55.

While we do not reach a firm conclusion about the records that Respondent did keep, we are confident that those records were not kept in a form such that they could be easily turned over to Disciplinary Counsel or easily understood by someone other than Respondent. Nevertheless, there is no indication that Respondent's informal record keeping ever hurt anyone other than himself. In reaching this conclusion the Committee also takes into account that Respondent represented mainly other lawyers with employment claims pending against defendant law firms. Had those lawyers been concerned that Respondent was misappropriating or mishandling funds belonging to either clients or third parties, we are confident that they would have filed a complaint with Disciplinary Counsel. None ever did. (FF 144, 146-48)

2. Prejudice to the Client

Disciplinary Counsel has not asserted that any client was prejudiced by Respondent's failure to maintain financial records.

3. Dishonesty

During the course of the hearing, the Hearing Committee had many opportunities to observe Respondent as he testified. When answering questions posed by members of the Hearing Committee, Respondent was always direct and responsive. When responding to Disciplinary Counsel, he was often short, vague, evasive or non-responsive. As noted above, there is a long history between

Respondent and Disciplinary Counsel that appears to have affected their ability to work together to resolve this matter. However, this is an adversarial proceeding, and we find that Respondent was acting as any attorney would to protect the best interests of his client.

We do not find that Respondent lied or knowingly misrepresented any of the facts in this case. We do not find that Respondent gave less than complete answers to avoid revealing the truth. If anything, Respondent repeated the same answers with the same details on multiple occasions throughout the hearing often weeks or months apart. Thus, the Hearing Committee concludes that Respondent's sometimes vague testimony did not constitute dishonesty that should work as an aggravating factor for the imposition of discipline in this case.

4. Violations of Other Disciplinary Rules

Respondent violated only the recordkeeping requirement of Rule 1.15(a).

5. Previous Disciplinary History

Respondent has not been the subject of previous discipline in this jurisdiction.

6. Acknowledgement of Wrongful Conduct

As discussed *supra*, pages 53 to 55, Respondent has maintained throughout the hearing that he did keep books and records, but that he could not produce those records to Disciplinary Counsel or the Hearing Committee without a court order requiring him to do so. He has repeatedly stated that he believes doing otherwise would violate the confidences of clients who have not brought any claims against him in contravention of Rule 1.6. Respondent's denial of wrongdoing and vigorous

good faith defense on the merits during the hearing did not arise from dishonest attempts to cover up misconduct and should not be considered as an aggravating factor. *See In re Winstead*, Board Docket No. 10-BD-114, at 7 (BPR Mar. 14, 2012), *recommendation adopted*, 69 A.3d 390 (D.C. 2013).

We do not doubt that Respondent has some legitimate privilege and confidentiality concerns about the information that his records contain. We also conclude, based on the evidence presented during the hearing (but without the benefit of seeing any records), that Respondent most likely uses an informal recordkeeping system consisting of handwritten notes, receipts and other pieces of information that may be scattered through his client's files. The exact nature of Respondent's files was never made clear. Accordingly, we have concluded that Respondent violated Rule 1.15(a). Moreover, during the mitigation phase of the hearing Respondent expressed his regret for the situation in which he finds himself and his willingness to accept whatever sanction is imposed on him. (Tr. 1248-50)

7. Other Circumstances in Aggravation and Mitigation

While the facts of the complaint lodged by Complainant were relatively easy to untangle, the facts underlying the claims brought by Disciplinary Counsel are convoluted and not easily put into a logical narrative. This disorder was compounded by two factors: (1) at least one acknowledged bank error and (2) Disciplinary Counsel's approach to the investigation.

First, the evidence before the Hearing Committee clearly establishes that TD Bank made at least one and possibly more errors. Respondent ordered checks for

his operating account. The bank printed those checks with the name of his operating account and the account number for his IOLTA account. Respondent then set about using those checks without realizing the mistake until the account was overdrawn. Respondent has acknowledged that the impact of the bank's mistake might have been discovered sooner if he had been in the regular habit of opening his bank statements and reconciling them with his own records, but he was not. Respondent assumed that a bank recommended to him by the D.C. Bar would be able to understand the difference between an operating account and an IOLTA account. He assumed that the bank and its employees would assist him in putting his funds into the correct account and withdrawing his funds from the correct account. They did not.

Second, Disciplinary Counsel's efforts to seek the truth and protect the public went to an extreme. Rather than engaging Respondent in dialogue aimed at discerning the truth, Disciplinary Counsel sent multiple letters and subpoenas demanding increasing amounts of information each time. Dissatisfied with his low-key and less than detailed responses, Disciplinary Counsel continued to press Respondent with more and more burdensome demands. When Respondent did not provide the answers she sought in the preferred form, Disciplinary Counsel charged him with serious interference with the administration of justice. We recognize and applaud Disciplinary Counsel's desire to protect the public from unscrupulous lawyers and to protect the authority of her office. We question, however, whether she pursued those goals in a reasonable fashion. At the same time, and as noted

earlier, Respondent might have gotten to a satisfactory result in less than nine years if he had been more cooperative and less combative.

**C. Sanctions Imposed for Comparable Misconduct**

Cases where a respondent is found to have violated only the recordkeeping requirements of Rule 1.15(a) and no others are limited. Generally, the sanctions for Rule 1.15(a) recordkeeping violations range from Board reprimand to public censure. *See, e.g.*, *In re Klass*, Board Docket No. 13-BD-041 (Board Order Dec. 22, 2014) (Board reprimanded respondent for violating rules 1.15(a) and (e) for failing to maintain complete records and commingling personal funds to cover an overdraft charge in the trust account, where no client funds were in the account at the time of the overdraft); *In re Mott*, 886 A.2d 535 (D.C. 2005) (per curiam) (public censure for violating Rules 1.15(a) and 1.17(a) and D.C. Bar R. XI § 19(f) "by failing to deposit client funds in a designated escrow or trust account, failing to adequately safeguard the funds, and failing to keep appropriate records"); *Clower*, 831 A.2d at 1031 (public censure for violating 1.15(b) by failing to furnish prompt notice of a settlement and make prompt payment to a third party who had an interest in the funds, and Rule 1.15(a) and D.C. Bar R. XI § 19(f) by failing to maintain complete records regarding the disbursements made from settlement proceeds). Notably, each of these matters involved the failure to maintain records related to a single matter, but all involved violations of other rules or instances where clients and third parties were harmed.

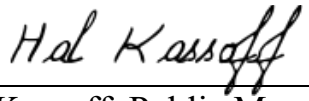
Here, we find that Respondent has violated only the recordkeeping rule. We find that no client or third party was harmed. In fact, we find no aggravating factors and some circumstances in mitigation. Thus, we recommend the sanction of a Board reprimand.

## V. CONCLUSION

For the foregoing reasons, the Hearing Committee concludes that Disciplinary Counsel established by clear and convincing evidence that Respondent violated the recordkeeping requirements of Rule 1.15(a). Disciplinary Counsel failed to establish violations of Rules 1.1(a) and (b), 1.3(a), (b)(1), (b)(2) and (c), 1.4(b), and 1.16(d) in Count I, and failed to establish violations of Rules 1.15(a) (commingling), 8.1(a), and 8.4(c) and (d) in Count II. The Hearing Committee recommends that Respondent receive the sanction of a Board reprimand.

AD HOC HEARING COMMITTEE

Margaret Hedges, Chair



Hal Kassoff, Public Member

Edward Levin, Attorney Member

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY
AD HOC HEARING COMMITTEE

| | | |
|---|---|---|
| In the Matter of: | : | |
| | : | |
| LATIF S. DOMAN | : | |
| | : | |
| Respondent. | : | Board Docket No. 17-BD-059 |
| | : | Disc. Docket Nos. 2010-D050 & 2012-D390 |
| A Member of the Bar of the | : | |
| District of Columbia Court of Appeals | : | |
| (Bar Registration No. 466654) | : | |

CONCURRING OPINION OF MR. LEVIN

I concur with the Chair's well-reasoned decision. I write further to expand upon the comments concerning the troubling conduct of the proceedings as follows:

7. Other Circumstances in Aggravation and Mitigation

> While the facts of the complaint lodged by Complainant were relatively easy to untangle, the facts underlying the claims brought by Disciplinary Counsel are convoluted and not easily put into a logical narrative. This disorder was compounded by two factors: 5 (1) at least one acknowledged bank error and (2) Disciplinary Counsel's approach to the investigation.
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> between an operating account and an IOLTA account. He assumed that the bank and its employees would assist him in putting his funds into the correct account and withdrawing his funds from the correct account. They did not.
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> Second, Disciplinary Counsel's efforts to seek the truth and protect the public went to an extreme. Rather than engaging Respondent in dialogue aimed at discerning the truth, Disciplinary Counsel sent multiple letters and subpoenas demanding increasing amounts of information each time. Dissatisfied with his low-key and less than detailed responses, Disciplinary Counsel continued to press Respondent with more and more burdensome demands. When Respondent did not provide the answers she sought in the preferred form, Disciplinary Counsel charged him with serious interference with the administration of justice. We recognize and applaud Disciplinary Counsel's desire to protect the public from unscrupulous lawyers and to protect the authority of her office. We question, however, whether she pursued those goals in a reasonable fashion. At the same time, and as noted earlier, Respondent might have gotten to a satisfactory result in less than nine years if he had been more cooperative and less combative.

While it may be presumptuous to say this, I know it to be a widely held view of members of our Bar that Disciplinary Counsel is difficult to deal with and over-zealous in pursuit of minor transgressions and mere mistakes. The disciplinary system, in the opinion of this longtime member of the Bar and the Hearing Committee, should be designed to find the truth and to protect the public, but also to be respectful of the members of the Bar who come into its processes. In this regard I would hold Office of Disciplinary Counsel with its fuller understanding and experience with the system, to a higher standard of conduct in disciplinary proceedings, than Respondents who are at a disadvantage in navigating through the

difficulties of defending themselves while conducting a separate workload on behalf of clients.

Disciplinary proceedings should not follow the model of civil litigation which is almost entirely based on winning and losing. In my experience on Hearing Committees and as a Contact Member reviewing Disciplinary Counsel's files, many complaints come from disgruntled clients who expected more than was reasonable and use the disciplinary system to further their own unreasonable, or in some cases, unsavory objectives. The Complainant in this case fits that description, and to this Hearing Committee was neither credible nor a victim of any misconduct. Had Disciplinary Counsel conducted a more open-minded, interactive, and thorough investigation of the substance of the complaint subsumed by Count One, the charges would not have been brought.

The charge that Respondent violated any of the sections of Rule 1 in representing the Complainant was not only not proven – as reflected in the Report and Recommendation of the Committee; it was totally without merit. Evidence of that conclusion is found in the documents submitted by Respondent, and, notably was confirmed by Disciplinary Counsel's expert witness.

The expert witness called by Disciplinary Counsel was quite helpful to the Committee. His testimony is described in some detail in our Report and will not be belabored here. In essence he testified that the Complainant's expectations were not realistically achievable, and that the strategic judgement calls made by Respondent

were entirely within reason. *See* HC Rpt. at 42-44. However, his review of the files was conducted, according to his testimony, immediately before the hearing.

Had Disciplinary Counsel sought his opinion before bringing the charges or well in advance of the hearing, and with the open-minded objective of having his advice guide the prosecution rather than serve merely as ammunition to use against Respondent, Count One could or should have been dropped from the case.

This same observation applies to the pleadings and correspondence prepared by Respondent in the underlying representation. They demonstrate extraordinary effort and zeal, competence, and determination in pursuit of Complainant's objectives. Those objectives were described by Disciplinary Counsel's expert as virtually unachievable.

In that regard, we recognize that Respondent did not cover himself with glory in his interaction with the Office of Disciplinary Counsel. He exhibited much reticence and caution in providing responses to inquiries. Our Public Member understandably expressed his concern repeatedly during the proceedings and our deliberations about the level of candor and cooperation shown by Respondent. We concur that Respondent might have taken a less defensive posture. However, it is not hard to understand how an attorney, who had worked so diligently, virtually without pay, for a client who was ungrateful and unreasonable at best, would be "gun shy" when faced with the apparently contentious and hostile attitude which confronted him by Disciplinary Counsel pursuing a claim that he had not been diligent, responsible, or competent.

The lesson to be learned from this case is that Disciplinary Counsel would do well to view its role in the initial stages of any investigation to be less "prosecutorial" and more open-minded about the realities of representing clients who have difficult cases and unrealistic expectations.

The same can be said about the Count Two charges. Again, Respondent did not make it easy for Disciplinary Counsel to figure out the money trail after receiving notice of an overdrawn IOLTA account. However, the stubborn refusal by Disciplinary Counsel to think differently about responsibility for the overdrawn account after receiving notification from the IOLTA account bank (DCX 26A) showing the bank's error in mislabeling the accounts, is not easily explained away.

Beginning at page 925 of the transcript, Public Member Kassoff, referring to Exhibit 26A, questions the representative of Respondent's bank whose error printing checks resulted in his IOLTA account being overdrawn:

> Q. Mr. Doman has testified that he wanted to be triply sure that he didn't mishandle any money out of his IOLTA account so he never ordered any checks on the IOLTA account. He has testified to that with no evidence to the contrary and there's a lot of evidence that he actually went to the bank and got cashier's checks every time he withdrew from the IOLTA account.
> So in your letter, you say, "Unfortunately, the checks were issued with the wrong checking account number . . . ."
> So you accept responsibility for sending him IOLTA checks that he thought were his business account?

The somewhat convoluted answer was in the affirmative.

All of that information was available to Disciplinary Counsel before charges were brought, and even after the hearing testimony, she pressed on.

As the Report notes, it is possible that Respondent did not have certain financial records that might have put Disciplinary Counsel's concern to rest. If he did not, we do not believe, under *Artis*, that he was required to admit that. We have found merit to a claim of failure to maintain adequate records.

That said, the reason for the overdraw of the account based on the bank error mooted that claim in our view. I recognize that Disciplinary Counsel does not have the option of formally dropping charges that have been approved by a Contact Member. *In re Stanton*, 470 A.2d 281, 285 (D.C. 1983) (per curiam) (appended Board Report) (Once a Contact Member has approved a Petition, "the underlying purposes of the Board require that we proceed directly to a hearing on the merits rather than being detoured into questions of pleading and form"). However, where, as here, evidence not previously obtained makes clear that a claim does not have merit, Disciplinary Counsel should so inform the Hearing Committee. Getting it right rather than plowing forward in the face of the inevitable, and saving the time, expense, and effort of the parties and the Hearing Committee, should be the standard.

The Rule 1.16(d) charge, that Respondent return the meager fee he had received after many hours of work and a good result for the Complainant (in the judgement of Disciplinary Counsel's expert), is the penultimate example of a scorched-earth approach unbecoming of the disciplinary system. How this claim was

pursued after the ruling of the D.C. Bar Attorney/Client Arbitration Board on the fee dispute is really astounding.

As noted, the disciplinary system is intended to find the truth, to protect the public, the judicial system, and the profession from victimization and taint by attorneys who do not live up to their responsibilities. Cognizant of the fact that many cases are dismissed, it is still true that in this proceeding, the system failed.

Of course, the Rules require zealous advocacy on behalf of the client's objectives. In normal civil litigation, the client's objective is to win, to defeat the adversary. A "prosecutor" such as Disciplinary Counsel should, in our opinion, have a different objective. With the "client" being the public interest, the objective should be a just result based on the true facts rather than vanquishing the respondent in the case. The public interest is not served when a respondent attorney is subjected to oppressive prosecution when he has not transgressed or when a transgression was not his fault.

We note that the Maryland Bar seems to have anticipated and made efforts to avoid pitched battles such as the one exhibited in the case before us. As we understand it, the Maryland Bar counterpart to D.C.'s Contact Member screening is a much more exploratory and interactive process in which Disciplinary Counsel, Complainant, and Respondent appear before a Peer Review Panel. Attorney Grievance Commission of Maryland's Administrative and Procedural Guidelines, Sec. 6. (as amended Feb. 20, 2108). At that informal, confidential proceeding (much like a mediation) the following occurs:

> 6.5. If the Panel determines, by a majority vote of its members, that the Statement of Charges has a substantial basis and there is reason to believe that the Respondent has committed professional misconduct or is incapacitated, it shall take such action as is set forth in Maryland Rule 19-720 (c)(2). If the Panel determines that the Respondent should be reprimanded or that the parties should enter into a Conditional Diversion Agreement, it shall so inform the parties at the conclusion of the meeting. If the Respondent and Bar Counsel reject[] the Panel's determination that the Respondent should be reprimanded, the Panel shall not make said recommendation to the Commission. If the Respondent agrees to the Panel's determination that the Respondent should be reprimanded, the Panel shall make said recommendation to the Commission with the contents of the proposed reprimand executed by Respondent. If the Respondent or Bar Counsel rejects the determination that a Conditional Diversion Agreement be adopted, the Panel shall not ma[k]e said recommendation to the Commission. If the Respondent and Bar Counsel agree to a disposition of a reprimand or to a Conditional Diversion Agreement, then the contents of the reprimand or Conditional Diversion Agreement shall be presented to the Panel, and if satisfactory to the Panel, the recommendation of the Panel to the Commission shall include and incorporate the contents of the reprimand or Conditional Diversion Agreement. . . .

These procedural guidelines were created pursuant to the Maryland Code establishing the Attorney Grievance Commission, which grants "[t]he Commission the powers and duties to: . . . recommend to the Court of Appeals the adoption of procedural and administrative guidelines and policies consistent with these Rules[.]" West's Ann. Code of Maryland, Rule 19-702(h)(1) (eff. July 1, 2016).

Additionally, Maryland Code, Rule 19-720 provides for an informal review:

> (c) Meeting.
>
> (1) The Peer Review Panel shall conduct the meeting in an informal manner. It shall allow Bar Counsel, the attorney, and each complainant to explain their positions and offer such supporting information as the Panel finds relevant. Upon request of Bar Counsel or the attorney, the

> Panel may, but need not, hear from any other individual. The Panel is not bound by any rules of evidence, but shall respect lawful privileges. The Panel may exclude a complainant after listening to the complainant's statement and, as a mediative technique, may consult separately with Bar Counsel or the attorney. The Panel may meet in private to deliberate.
>
> (2) If the Panel determines that the Statement of Charges has a substantial basis and that there is reason to believe that the attorney has committed professional misconduct or is incapacitated, the Panel may (A) conclude the meeting and make an appropriate recommendation to the Commission or (B) inform the parties of its determination and allow the attorney an opportunity to consider a reprimand or a Conditional Diversion Agreement.

West's Ann. Code of Maryland, Rule 19-720(c) (eff. July 1, 2016).

Members of Maryland Bar Peer Review Panels have indicated to me that the process is highly successful in resolving, without lengthy and contentious proceedings, many cases where non-malicious errors are made and disbarment or suspension is overly punitive and not warranted.

We respectfully recommend that the spirit, if not the substance, of that process be adopted by the Office of Disciplinary Counsel and the Board.

Finally, we do not know the full reason for his actions, but the Respondent revealed late in the proceeding that he had left the active practice of law. One cannot help but infer that his decision was, in some measure, influenced by the harrowing experience of the over-zealous pursuit of his license in this disciplinary proceeding. *See* Tr. 1121-22. The public and the civil rights bar are deprived, to its loss, of his talents.

This member of the Bar would hope for a better and more principled approach in future cases.

Edward Levin, Attorney Member

Ms. Hedges joins in this Concurring Opinion.