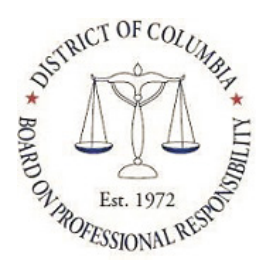


THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*



DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

Issued
August 5, 2022

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

REPORT AND RECOMMENDATION OF THE
BOARD ON PROFESSIONAL RESPONSIBILITY

Respondent, Latif S. Doman, was charged in a two-count Specification of Charges with violating multiple Rules of the District of Columbia Rules of Professional Conduct (the “Rules”).

Count I involves Respondent’s representation of Complainant in an employment dispute and in litigation against the U.S. Department of Commerce (the “Agency” or “Department”). Respondent was charged with violations of Rules 1.1(a) and (b) (failure to provide competent representation); 1.3(a) (failure to represent his client with diligence); Rule 1.3(b) (intentional failure to seek client’s lawful objectives through reasonable and lawful means and/or prejudicing or damaging his client in the professional relationship); 1.3(c) (failure to act with reasonable promptness in the representation); 1.4(b) (failure to explain the matter to the extent reasonably necessary to permit his client to make informed decisions about the representation); and 1.16(d) (failure to take reasonably practicable and

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

timely steps to protect his client's interests, including refunding any unearned advance payment of a fee or expense, in connection with the termination of the representation). The Hearing Committee found no Rule violations in Count I. Disciplinary Counsel argues that the Hearing Committee erred in failing to find violations of Rules 1.1(a) and (b) and 1.3(a), (b) and (c).

Count II involves Respondent's handling of his trust account and his conduct during Disciplinary Counsel's investigation of an IOLTA overdraft notice. Respondent was charged with violations of Rule 1.15(a) (commingling, and failure to maintain and preserve complete records of entrusted account funds and other property for five years after termination of the representation); Rule 8.1(a) (knowingly making a false statement of fact in connection with a disciplinary matter); Rule 8.4(c) (engaging in dishonest conduct); and Rule 8.4(d) (engaging in conduct that seriously interfered with the administration of justice). The Hearing Committee found that Disciplinary Counsel proved only a violation of Rule 1.15(a) based on Respondent's failure to maintain adequate records of his handling of entrusted funds.

Disciplinary Counsel argues that the Hearing Committee erred in not finding violations of Rule 1.15(a) (commingling) in the IOLTA account, and of Rules 8.1(a), 8.4(c), and 8.4(d) based on Respondent's conduct during the disciplinary investigation. Respondent excepts to the Rule 1.15(a) (recordkeeping) violation.

The Hearing Committee recommended a Board reprimand for the Rule 1.15(a) recordkeeping violation. Disciplinary Counsel excepts to the sanction

recommendation. Although Disciplinary Counsel recommended disbarment before the Hearing Committee, it now recommends a one-year suspension before the Board. Respondent excepts to the sanction recommendation, asserting that Disciplinary Counsel failed to prove any Rule violations.

As discussed below, we conclude that Disciplinary Counsel proved by clear and convincing evidence that Respondent violated Rules 1.1(a) and (b) in Count I, and Rules 1.15(a) (recordkeeping) and 8.4(d) in Count II. We also find that Respondent gave intentionally false testimony to the Hearing Committee, and we recommend that he be suspended for a period of thirty (30) days.

I. PROCEDURAL ISSUES

Disciplinary Counsel bears the burden of proving the alleged Rule violations by clear and convincing evidence, which is “evidence that will produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established.” *In re Cater*, 887 A.2d 1, 24 (D.C. 2005) (internal quotations and citation omitted). In deciding whether Disciplinary Counsel has carried this burden, we are required to accept the Hearing Committee’s factual findings that are supported by substantial evidence in the record as a whole, even where the evidence may support a contrary view as well. *See In re Robbins*, 192 A.3d 558, 564 (D.C. 2018) (per curiam); *In re Martin*, 67 A.3d 1032, 1039 (D.C. 2013). “Substantial evidence means enough evidence for a reasonable mind to find sufficient to support the conclusion reached.” *In re Thompson*, 583 A.2d 1006, 1008 (D.C. 1990) (per curiam). We review de novo the Hearing Committee’s legal conclusions and its determination of “ultimate facts,”

that is, those facts “that have a clear legal consequence.” *In re Micheel*, 610 A.2d 231, 234-35 (D.C. 1992) (internal quotations omitted).

Disciplinary Counsel argues that the Board should not apply the standard level of deference to the Hearing Committee’s factual findings, alleging that the Hearing Committee’s report and recommendation, and especially the concurring opinion of two Hearing Committee attorney-members, reflects bias against the prosecution and the Office of Disciplinary Counsel. ODC Br. at 2, 8. Specifically, Disciplinary Counsel asserts that the concurring members improperly considered extrajudicial facts and unfairly disparaged many complainants as disgruntled clients. *Id.* at 3, 5. Disciplinary Counsel asserts that the Board should make its own findings, as appropriate, under Board Rule 13.7. *See In re Schwartz*, 221 A.3d 925, 929 (D.C. 2019) (per curiam) (“Under Board Rule 13.7 of the Board on Professional Responsibility, the Board can make findings of fact in the first instance only if the evidence on the point is clear and convincing.”). Alternatively, Disciplinary Counsel urges the Board to remand this case to a new, “unbiased” hearing committee for a new hearing. ODC Br. at 9, 39, 50. Respondent disagrees.

The Board finds no bias or prejudice. Notably, while Disciplinary Counsel took exception to certain of the Hearing Committee’s conclusions, Disciplinary Counsel did not take issue with the Hearing Committee’s findings of fact. We therefore decline to remand this case to a new hearing committee for a new hearing and fact-finding, and in our review of the Hearing Committee’s report and recommendation we afford the usual deference. Where appropriate, we make

additional factual findings, as the Board often does. *See, e.g., In re Krame*, Board Docket No. 16-BD-014, at 3 n.2 (BPR July 31, 2019), *review pending*, D.C. App. No. 19-BG-0674; *In re Ugwuonye*, Board Docket. No. 10-BD-104, at 3 (BPR July 31, 2018), *recommendation approved where no exceptions were filed*, 207 A.3d 173 (D.C. 2019) (per curiam). We do so consistent with Board Rule 13.7 and based on our review of the evidentiary record, and not because of any perceived bias in the Hearing Committee’s report and recommendation.

While we find no bias reflected in the Hearing Committee’s report and recommendation, the concurring opinion’s discussion of personal views and extrajudicial facts is improper and wholly unhelpful. Discussion of facts outside of the record cannot be allowed to affect decisions in a disciplinary proceeding. Here, we do not find that the concurring opinion’s discussion of personal views and extrajudicial facts affected the Hearing Committee’s findings. But even such gratuitous discussion risks the perception and, as demonstrated here, invites express allegations of bias in favor of one party or another that can undermine confidence in the disciplinary system.

II. FINDINGS OF FACT

Upon review of the record, we find that almost all of the Hearing Committee’s findings are supported by substantial evidence in the record. We include those findings below (cited as “HC FF”) and make additional findings of fact supported by clear and convincing record evidence. *See* Board Rule 13.7; *see also In re Speights*, 173 A.3d 96, 102 (D.C. 2017) (per curiam) (weight and relevance of

evidence is “within the ambit of the Hearing Committee’s discretion”); *In re Outlaw*, 917 A.2d 684, 688 (D.C. 2007) (per curiam) (defining “substantial evidence” as “enough evidence for a reasonable mind to find sufficient support for the conclusion reached” (internal quotations and citation omitted)); *Cater*, 887 A.2d at 24 (“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)). Our additional findings are supported by citations to the record. We also identify below those Hearing Committee factual findings that are not supported by substantial evidence.

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

Count One – Complainant’s Employment Matter

2. Complainant was the parking coordinator for the headquarters building of the Agency. On December 19, 2006, she received a memorandum of proposed disciplinary action from her supervisor recommending a seven-calendar-day suspension for “unprofessional conduct in improperly using [her] position to obtain a parking permit.” The Agency alleged that on October 10, 2006, Complainant issued herself a handicapped parking permit, without obtaining permission or approval from any supervisor. HC FF 12.

3. Complainant’s husband was Respondent’s friend, and had recommended that she contact Respondent. Respondent represented the Complainant from January 2007 – when he first filed a response to 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. HC FF 9.

4. 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.” HC FF 10.

5. 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 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.” Complainant wrote Respondent a check for \$2,200 dated February 6, 2007, the same day the agreement was signed. HC FF 11.

6. Respondent prepared a nine-page letter, supported by Complainant’s affidavit, setting out her side of the story and seeking from the Department a reduced sanction. HC FF 13-14.

7. In January 2007, Respondent convinced the Department to reduce the proposed discipline from a seven-day suspension without pay to a three-day suspension, and to allow Complainant to serve part of her suspension over a weekend with the result that she only gave up one day of pay. Complainant served her

suspension beginning on Saturday, February 10, 2007. She returned to work on Tuesday, February 13, 2007. HC FF 15-16.

8. After Complainant served her suspension, Respondent informally sought to expunge any mention of it from Complainant's employment file. In June 2007, Respondent and Complainant agreed to a mediation session through the Department's EEO office. At the mediation session, which took place on June 4, 2007, the Department offered some accommodations and offered to remove the discipline from her Department personnel folder, but it would not agree to remove the discipline from Complainant's division employee file. The Department also offered to pay Respondent's attorney's fees. 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. HC FF 18-20.

9. After the failed mediation, Respondent timely filed a Formal Complaint of Discrimination on Complainant's behalf with the Equal Employment Opportunity Commission ("EEOC") on June 18, 2007. By doing so, Respondent preserved Complainant's right of administrative review of the discipline imposed on her. HC FF 21.

10. The formal complaint triggered an investigative process, during which Respondent worked with the EEOC investigator to direct the investigation and to obtain discovery-type materials, where possible, at no cost to Complainant. HC FF 22.

11. The investigator's Report of Investigation was "[h]undreds of pages" with thirty-one 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. HC FF 23.

12. 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 Complainant had elected a hearing before an administrative judge. HC FF 24.

13. Complainant's complaint was assigned to EEOC Administrative Judge Richard W. Furcolo ("Judge Furcolo") for a hearing. On December 5, 2007, Judge Furcolo issued an Acknowledgement and Order that, *inter alia*, set important deadlines for both parties, including setting December 26, 2007 as the deadline for propounding discovery. The Acknowledgement and Order was sent to Respondent via fax. HC FF 25-26, 28.

14. 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. HC FF 27.

15. 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. 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. HC FF 28-29.

16. When he discovered the misfiled email in his spam folder, Respondent drafted and filed a "Motion to Extend Discovery Period for 30 Additional Days." It was Respondent's intention, as stated in the memorandum in support of the motion, to extend all deadlines by thirty days – including the deadline for propounding discovery and responding to the Department's discovery requests. HC FF 30; *see* DX 5B at 14 (requesting an additional thirty days to propound and respond to discovery).

17. Respondent argued in the motion that Complainant "would suffer tremendous prejudice if she is not permitted any written discovery. She has not yet had an opportunity to learn the positions of the Agency or see the information" underlying the Agency's decision. DX 5B at 16-17.

18. The proposed order that Respondent submitted with his motion requested that the "discovery period" would be extended by thirty additional days, without specifying whether the date to propound discovery had been extended, as well as the date to complete discovery. HC FF 32.

19. On January 29, 2008, Judge Furcolo granted Respondent's motion to extend the discovery period by thirty days. Judge Furcolo signed and dated the proposed order prepared by Respondent without making changes to it. Thus, the order did not specify whether the date to initiate discovery had been extended or whether it merely extended the date to complete discovery. HC FF 31-32.

20. 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. HC FF 33.

21. 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. HC FF 38.

22. 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. HC FF 39.

23. The Department received Respondent's discovery requests served by electronic mail on February 12, 2008. HC FF 40. On February 15, 2008, the Department filed a motion to strike Complainant's discovery requests as untimely, contending that Judge Furcolo's January 29, 2008, order did not extend the date for Complainant to initiate discovery, and that only the date to complete discovery had been extended. HC FF 41.

24. Respondent did not file an opposition to the motion to strike. HC FF 42.

25. Respondent did not oppose either the January 29 motion to bar Complainant from propounding discovery or the February 15 motion to strike Complainant's discovery because he understood that these were "multiple submissions" on the discovery issue that were barred by the "Washington Field Office Hearing Procedures" that were appended to the December 5, 2007 Acknowledgment and Order: "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." HC FF 43; *see* Tr. 160-61; HC FF 39, 42, 44.

26. Respondent read the local rule to mean that the Department's January 29 and February 15 motions seeking to prevent Complainant from taking discovery would be discarded even though they were not titled as "motions for reconsideration." HC FF 44. However, 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. HC FF 45. The order contained the handwritten notation that there was "NO OPPOSITION" to the Agency's motion. DX 5F at 78.

27. 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. HC FF 50. This order also noted that there was “NO OPPOSITION” to the Agency’s motion. DX 5I at 125.

28. Respondent’s responses to the Department’s discovery requests were due on January 28, 2008. HC FF 52. Respondent was in contact with Complainant and was working with her to collect the requested documents. HC FF 53. 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. When Respondent and Department’s counsel could not come to an agreement on timing, the Department moved to compel. HC FF 54-55.

29. 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. HC FF 57.

30. On March 31, 2008, the Department noticed Complainant’s deposition by fax and mail for April 7, 2008. Complainant was deposed on that date. HC FF 58.

31. Respondent provided responses to the outstanding discovery by mail on April 1, 2008, ahead of the April 3, 2008 deadline. HC FF 59.

32. 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. HC FF 60. The Department

argued that Respondent had not responded to its interrogatories and document requests, and shared concerns that Complainant may not appear for her deposition, which had been noticed for April 7. DX 5K at 138-39.

33. The Department's motion was served on Respondent by Federal Express on April 4, 2008, and was received on April 7, 2008.¹ HC FF 60-61. The Department filed the motion with Judge Furcolo by fax on April 4, as well as by Federal Express. *See* DX 5K at 131.

34. Respondent calculated the deadline for responding to the Department's motion for sanction as 10 days after receipt, or April 17, 2008, relying on the deadline contained in the "Acknowledgment and Order", which provided that responses were due within ten calendar days of receipt. HC FF 61; *see* DX 5A at 6 ("Statements in opposition to discovery motions must be filed within ten (10) calendar days of receipt of the motion." (emphasis added)).² He filed a response on April 16, 2008. HC FF 64. He argued that the Department's motion wrongly assumed that Complainant had not served her discovery responses, which she had timely done on April 1. DX 5M at 154.

¹ We take judicial notice that April 4, 2008, was a Friday, and April 7, 2008, was a Monday. Thus, Respondent received the Department's motion on the first business day after service.

² Disciplinary Counsel's expert witness Gary Gilbert, a former EEOC Chief Administrative Judge testified that any opposition was due on April 14, ten days after it was sent on April 4. Tr. 751-52. He did not explain how he reached that conclusion in light of the longer response time seemingly permitted by the Washington Field Office Hearing Procedures, nor was he asked to do so by either Respondent or Disciplinary Counsel. However, Mr. Gilbert testified that the due date for the opposition was "a little bit more complicated" and that he could "understand . . . Respondent's arguments" with regard to the calculation of the deadline. HC FF 62 (quoting Tr. 751-52).

35. However, unbeknownst to Respondent at the time, Judge Furcolo had granted the Department's motion on April 15, 2008, and remanded the case to the employer for a final decision. The order noted that "again, [Complainant] has not interposed any objection or opposition to an Agency pleading." HC FF 63.

36. On April 16, 2008, Judge Furcolo rejected the opposition filed by Respondent on grounds that it was untimely and filed without leave or a showing of good cause. HC FF 65; *see* HC FF 64. The rejection notice was a preprinted form that did not explain why Respondent's opposition was untimely. DX 5N at 165.

37. On April 24, 2008, the Department issued its final decision without a hearing, denying Complainant any relief on her substantive claims. HC FF 66.

38. On April 25, 2008, Respondent filed a Motion for Reconsideration of the Order of April 15, 2008. HC FF 67. In his motion for reconsideration, Respondent argued that his response was timely because it was due ten days after he received it on April 7, 2008. DX 5P at 211.

39. On May 5, 2008, Judge Furcolo rejected the motion for reconsideration on grounds that it was also untimely and filed without leave or a showing of good cause. HC FF 68. The rejection notice was also a preprinted form that did not explain why Respondent's opposition was untimely. DX 5Q at 230.

The Federal Court Action

40. On April 17, 2008, before he knew that the EEOC case had been dismissed on April 15, Respondent recommended to Complainant that she file a complaint in federal court, rather than go to a hearing before Judge Furcolo.

Complainant agreed. HC FF 78; *see also* DX 6 (email communication between Respondent and Complainant); HC FF 83.

41. On June 30, 2008, Respondent filed a discrimination complaint against the Department in the United States District Court for the District of Columbia. HC FF 83.

42. 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. HC FF 84.

43. Respondent also expected to be able to take discovery in federal court. HC FF 85.

44. Respondent counseled Complainant against continuing to pursue her claim, but she would not take his advice. HC FF 89.

45. After several unopposed extensions of time to file its substantive response to Complainant's federal civil complaint, the Department filed a motion to dismiss or, in the alternative, for summary judgment on October 17, 2008. HC FF 90.

46. 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. HC FF 91.

47. 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." HC FF 92.

48. On November 26, 2008, Respondent filed the opposition. HC FF 93.

49. 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." HC FF 94.

50. 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. HC FF 95.

51. The Department filed its reply to Respondent's opposition on the date it was due – February 6, 2009. HC FF 96.

52. On September 30, 2009, the court issued a memorandum opinion granting the employer's motion to dismiss or for summary judgment. Of the ten 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. HC FF 97.

53. Respondent emailed the court's order to Complainant on September 30, 2009, the same day it was issued. HC FF 100.

54. Respondent communicated with Complainant primarily by phone calls and text messages although they did email and meet in person from time to time. 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. HC FF 101.

55. 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 United States Court of Appeals for the District of Columbia Circuit. HC FF 102.

56. 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. HC FF 103.

57. 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 she would lose that right. Eventually Complainant decided not to file an appeal and the deadline for filing passed. HC FF 104.

58. 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. HC FF 106.

59. The written retainer agreement was governed by District of Columbia law, which required Complainant and Respondent to bring any fee disputes before the District of Columbia Bar's Attorney/Client Arbitration Board ("ACAB"). Consequently, Complainant filed a request for arbitration with the 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. HC FF 107.

60. 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. HC FF 108.

61. On January 13, 2011, the ACAB issued a decision, declining to require Respondent to return any of the \$2,200 Complainant had paid him, and awarding Respondent an additional \$700 for filing costs that he had advanced in connection with the District Court litigation. HC FF 109.

Count II – The Overdraft and Disciplinary Counsel’s Investigation

Respondent’s Bank Accounts

62. 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. HC FF 111. Respondent referred to his accounts as “Doman Davis LLP” (the operating account) and “Doman Davis LLP – IOLTA trust account” (the trust account). HC FF 114.

63. 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. HC FF 115.

64. Respondent very rarely held entrusted funds. He tried to avoid taking and disbursing settlement checks. HC FF 118.

65. 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. HC FF 116. 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 based on his oral instructions. 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. HC FF 117.

66. At some point several months after he opened the accounts, Respondent ordered checks for his operating account. The bank made a mistake and put the account number of his IOLTA account (#-5130) on the checks, rather than the operating account number (#-5156). HC FF 127.

67. Due to the account numbering error, all checks in the checkbooks Responded received would withdraw funds from Respondent's IOLTA account, rather than his operating account, as he intended. HC FF 130.

68. The checks did not identify the account as an IOLTA account. *See* DX 20A at 137. The checks identified the account holder as "DOMAN DAVIS LLP." *Id.* Respondent was unaware of the account numbering error. Tr. 572-75, 594-95.

69. The first withdrawal from the IOLTA account by check was on November 23, 2011. DX 20A at 137.

70. Respondent kept some records of his handling of entrusted funds, 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. HC FF 149. However, 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. HC FF 150.

71. Respondent did not routinely open and review his bank statements or reconcile those statements with his personal records. HC FF 125.

Respondent's Handling of Entrusted Funds

72. After taking a CLE course, Respondent 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. HC FF 120.

73. Respondent had been through a number of fee disputes, and he found it easier to assume that every client would eventually dispute his fees. HC FF 122.

74. 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. 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. HC FF 123-24. Respondent admitted that he "probably erred on the – too far on the side of caution," by leaving earned fees in the trust account after they had been earned, because he did not want to be "caught in a situation where [he] had to pay somebody back[,] and [he] didn't have the money." Tr. 290.

75. Respondent 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. HC FF 126.

76. It appears from the record that Respondent used the misnumbered checks without incident until September 10, 2012. *See* DX 20A & DX 20B at 1-345.

77. On September 10, 2012, check no. 1078, bearing the account number of Respondent's IOLTA account due to the error discussed above, was presented for payment at TD Bank. DX 20 at 352. Check no. 1078, dated September 5, 2012, was payable to "Janelle R. Jones" in the amount of \$525. *Id.* On September 10, 2012, the balance in Respondent's IOLTA account was only \$409.05. DX 20A at 345; DX 24 at 9. On September 11, 2012, the check was returned because the IOLTA account had insufficient funds, and a \$35 "overdraft ret" fee was charged to Respondent's IOLTA account. DX 20A at 345, 352; DX 24 at 8.

78. TD Bank sent an overdraft notice to Respondent and Disciplinary Counsel, showing that check no. 1078 had been presented on September 10, 2012, and returned for insufficient funds on September 11, 2012. DX 24 at 8-9; Tr. 918-19, 923-24 (Bank witness testimony confirming that the overdraft notice reflects that check no. 1078 caused the account to be overdrawn).

Disciplinary Counsel's Investigation – Generally

79. TD Bank's overdraft notice was stamped as received by Disciplinary Counsel on October 19, 2012. *See* DX 24 at 8. On November 5, 2012, Disciplinary Counsel sent Respondent a subpoena seeking documents and an inquiry letter, enclosing the overdraft notice, and requesting that Respondent provide a variety of information regarding the transactions in the overdrawn IOLTA account. HC FF 133; DX 24.

80. On November 8, 2012, 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 letter noted, without elaboration, that Disciplinary Counsel's subpoena called for the production of "attorney-client privileged documents." HC FF 135; DX 25 at 1.

81. 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 and avoid[] the significant time cost associated with gathering the assortment of records requested." DX 25 at 3; HC FF 135.

82. Respondent was concerned 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 – i.e., clients who had not filed any disciplinary complaints. HC FF 144. Respondent intended that the November 8, 2012 and February 12, 2013 letters would put Disciplinary Counsel on notice that he was not going to produce any information protected by the attorney-client privilege. He believed that if Disciplinary Counsel disagreed with this limitation, it would file a motion to compel further production. HC FF 135.

83. On February 27, 2013, Respondent sent Disciplinary Counsel "documents and information responsive" to the November 5, 2012 subpoena. DX 26. This letter did not state that any documents or information were being withheld on privilege or any other ground. *See* DX 26. The letter included "a summary of

the [IOLTA] account transactions for the period identified in the subpoena,” November 1, 2011 – October 31, 2012. DX 26; *see* DX 26B.

84. 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. HC FF 134.

85. 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 nine additional interrogatory-style questions. HC FF 136; DX 27.

86. Respondent provided a limited response to the November 19 letter on January 15, 2014. HC FF 137.

87. Disciplinary Counsel sent a third letter to Respondent on January 14, 2016, which included a third subpoena and six additional interrogatory-style questions. HC FF 138.

88. On February 19, 2016, Respondent emailed a reply to the January 14, 2016 letter. HC FF 139.

89. Disciplinary Counsel did not file a motion to compel the records sought in any of these three letters. HC FF 140.

90. Respondent did not produce any redacted or otherwise anonymized financial records, other than the transaction summary attached to the February 27, 2013 letter. HC FF 141, 155.

91. Respondent and Disciplinary Counsel did not discuss the possibility of using redactions or otherwise limiting the scope of Disciplinary Counsel's subpoena. HC FF 142.

92. Respondent did not produce any of his personal business records during the hearing although he was invited to do so by the Hearing Committee. HC FF 143.

Disciplinary Counsel's Investigation – Respondent's Representations Regarding the Overdraft

93. Respondent did not offer a written explanation for the cause of the overdraft in his submissions to Disciplinary Counsel. The transaction summary that Respondent attached to his February 27, 2013 letter (*see* FF 83) was consistent with the overdraft notice in that it reflected that check no. 1078 in the amount of \$525 payable to "Janelle Ramus Jones" was deposited on September 10, 2012, and returned on September 11, 2012, and that TD Bank charged a \$35 "overdraft fee." DX 26B at 7. Respondent's February 27, 2013, response also included a letter from TD Bank that also specifically identified the check that caused the overdraft as a check to Ms. Jones that was deposited on September 10, 2012. DX 26A.

94. Respondent testified to the Hearing Committee that the transaction summary was given to him by an unnamed TD Bank employee, that all of the information in the summary came from TD Bank, and none came from him. Tr. 627 ("all of this information, the description, the memo, all of that information was provided" by TD Bank). This testimony was not correct. The transaction summary was not prepared by TD Bank, as discussed below.

95. In his brief to the Board, Respondent retreats from his hearing testimony and concedes that the transaction summary contains information that TD Bank did not have:

The information in the Transaction List was consistent with the bank statements produced by the bank and included additional information about the purpose of the checks Respondent had negotiated. Therefore, it is accurate and *provides responsive explanatory information the bank statements did not have*—information Disciplinary Counsel claimed it was seeking.

Resp. Br. at 47 (emphasis added).³

96. Disciplinary Counsel’s investigator, Charles Anderson, testified without contradiction from Respondent that three transactions appear on the transaction summary that do not appear in any of the TD Bank records. Tr. 947-49.

97. Our comparison of the transaction summary with other TD Bank records shows that it includes information that cannot be gleaned from the checks themselves. For instance, the “memo” line on check no. 1002 is blank, but the “memo” column on the transaction summary reflects that this was a “campaign contribution.” *Compare* DX 20A at 156 (check no. 1002), *with* DX 26B at 4. This is not an isolated example. Many of the checks drawn on the IOLTA account have blank memo lines, but the transaction summary contains information in the memo column. The transaction summary contains forty-eight entries showing a payment

³ The Hearing Committee credited Respondent’s testimony that this was a TD Bank document. However, in light of his concession in his brief to the Board that directly contradicts his hearing testimony, and the other objective evidence discussed below, the Hearing Committee’s acceptance of Respondent’s testimony is not supported by substantial evidence in the record on the whole.

to “Janelle Ramus Jones.” Each of these forty-eight entries lists “case assistance” in the “memo” column of DX 26B. However, none of the forty-eight checks written to Ms. Jones contain the phrase “case assistance.” In certain instances, the transaction summary contains a different “memo” entry than is reflected on the corresponding check. *Compare* DX 20A at 158 (check no. 1007 (“ADT 2012”)), *with* DX 26B at 4 (entry for check no. 1007 (“ADT Office”)).

98. The transaction summary is not on TD Bank letterhead, it does not contain any obvious TD Bank markings, and it is not accompanied by any letter or other information from TD Bank attesting to its provenance or accuracy. *See* DX 26B.

99. Respondent did not identify the transaction summary as a TD Bank document when he produced it, even though he sent it to Disciplinary Counsel with a letter on TD Bank letterhead, which he identified as “a letter from TD Bank explaining an error it made.” *See* DX 26 at 1; DX 26A.

100. David Chalker, a Vice President and Store Manager from TD Bank, testified that he did not recognize the transaction summary as a TD Bank document, and he was unaware of any process by which TD Bank would create such a document. Tr. 906.

101. In May, 2015, Respondent voluntarily attended a meeting with Assistant Disciplinary Counsel Tait, Mr. Anderson, and then-Bar Counsel Shipp. 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. HC FF 152.

102. During the meeting, in an effort to explain the cause of the overdraft, Respondent said “that he walked into the bank, picked up a countercheck and the teller filled it out and [he] told the teller to take it out of the operating account. But, in fact, the teller made a mistake and took it out of the IOLTA account.” Tr. 952 (testimony of ODC Investigator Anderson).⁴ This explanation was incorrect. As discussed above, the overdraft was caused by the tender of check no. 1078.

Findings Regarding Charged Commingling

103. After reviewing the TD Bank statements and the documents Respondent provided, Disciplinary Counsel could not determine “whose funds were in the [IOLTA] account, how much of them belonged to Respondent and whether or not they belonged to clients.” Tr. 935-36; HC FF 148. Disciplinary Counsel relies on certain transactions to support its argument that Respondent engaged in commingling. ODC Br. at 45-46. The Hearing Committee did not make explicit findings regarding these transactions, so we do so here.

104. On July 8, 2011, Respondent deposited a \$241,450 check, which reflected his share of the settlement of Client K’s matter. DX 20A at 63, 68; Tr. 569-570. Respondent deposited the entire check into his trust account because Client K disputed Respondent’s fees. Tr. 570. The balance in Respondent’s trust

⁴ We discuss the basis for this finding in our analysis of the charged violations of Rules 8.1(a) and 8.4(c), below.

account was \$550.00 prior to the deposit of the Client K settlement check. DX 20A at 63, 65.

105. There is no evidence in the record whether the \$550 already in the account were entrusted or non-entrusted funds.

106. Respondent's partner resolved the dispute with Client K by agreeing to pay Client K \$40,000, which was sent by wire transfer on July 22, 2011. Tr. 571; DX 20A at 65, 70-71 (showing \$40,000 wire transfer to Client K). For reasons not fully developed in the record, but not germane to our analysis, Respondent's partner was paid \$89,571 from the Client K settlement check, by wire transfer on July 18, 2011. Tr. 578; DX 20A at 63, 70 (showing \$89,571 wire transfer to Darly [sic] Davis). Following these transactions, transfers to Respondent's operating account totaling \$6,050, wire transfer fees, and a \$600 withdrawal, the closing balance in Respondent's account on July 31, 2011 was \$105,729. DX 20A at 63; *see also* Tr. 93-96.

107. Respondent withdrew \$37,522 from his trust account in August 2011. DX 20A at 77. No money was deposited into the account in August. The trust account balance on August 31, 2011, was \$68,207. DX 20A at 77.

108. Respondent withdrew \$10,000 from his trust account in September 2011. DX 20A at 93. No money was deposited into the account in September. The trust account balance on September 30, 2011, was \$58,207. *Id.*

109. Respondent withdrew \$5,000 from his trust account in October 2011. DX 20A at 111. No money was deposited into the account in October. The trust account balance on October 31, 2011, was \$53,207. *Id.*

110. On November 9, 2011, Respondent mistakenly deposited \$11,000 in earned fees into the trust account. DX 20A at 128, 132-34; Tr. 109-112. On November 22, 2011, Respondent deposited a \$5,000 check. DX 26B at 4; DX 20A at 134-134.1 There is no evidence in the record whether this \$5,000 check was entrusted or non-entrusted funds.

111. Respondent withdrew \$18,391.59 from his trust account in November 2011. DX 20A at 128. The trust account balance on November 30, 2011, was \$50,815.41. *Id.*

112. Respondent withdrew \$11,419.00 from his trust account in December 2011. DX 20A at 152. No money was deposited into the account in December. The trust account balance on December 31, 2011, was \$39,396.41. *Id.*

113. On January 27, 2012, Respondent deposited nine checks totaling \$10,265.00 into his trust account. DX 20A at 172, 175-180; DX 26B at 4. He deposited these checks in his trust account because “they were unearned fees [and] that [he] hadn’t reconciled [his] books yet.” Tr. 445. Respondent further elaborated on his practice for handling fee payments:

Because it was my practice to deposit monies in my account that were unearned fees, but primarily when I deposited the monies I just – I hadn’t reconciled my books so I was pretty certain that I had earned the fees but I hadn’t reconciled my books to be able to determine in fact how much I was owed so my practice was to deposit monies in the

account, reconcile my books and then withdraw the money that I needed or was earned.

Tr. 446.⁵

III. CONCLUSIONS OF LAW

A. Count I

The Hearing Committee found that Disciplinary Counsel failed to prove by clear and convincing evidence that Respondent violated any of the Rules charged in the Count I. Disciplinary Counsel takes specific exception only to the Hearing Committee's failure to find the charged violations of Rules 1.1(a) and (b) (failure to provide competent representation); 1.3(a) (failure to represent his client with diligence) and 1.3(c) (failure to act with reasonable promptness in the representation); and 1.3(b)(1) and (2) (failure to seek client's lawful objectives through reasonable and lawful means and/or prejudicing or damaging his client in the professional relationship). Disciplinary Counsel argues that Respondent's conduct before the EEOC and the federal district court violated these Rules.

⁵ We recognize that, despite this general testimony regarding his handling of client fee payments, and his initial testimony that these funds were unearned because he had not reconciled his account, when asked about each individual check, Respondent later testified that he had earned all of the funds that comprised the January 27 deposit (except for a \$15 postal money order, which he could not recall). Tr. 445-453. Thus, after initially testifying that the funds were unearned because he had not reconciled his books, he then testified that they were earned because he was sure that he had earned them by the time that he had deposited them. He did not explain why he deposited them into the trust account if he was certain that he earned them. Despite his hearing testimony that Respondent was confident that he had earned these fees when he deposited them into the trust account, we find that the act of depositing the funds into the trust account is the best evidence that Respondent was not sure that he had earned them when he deposited them.

Respondent supports the Hearing Committee’s conclusion that he did not violate these Rules, arguing that he had sufficient knowledge and experience to handle the Complainant’s matter, and that purported deficiencies in his representation were his well-informed tactical decisions, and thus, not Rule violations.

1. Rule 1.1(a) and 1.1(b) – Competence, skill and care

Rule 1.1(a) requires a lawyer to “provide competent representation to a client,” which requires the “legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.” *See In re Drew*, 693 A.2d 1127, 1132 (D.C. 1997) (per curiam) (lawyer who has requisite skill and knowledge, but who does not apply it for particular client, violates obligations under Rule 1.1(a)). Rule 1.1(b) mandates that “[a] lawyer shall serve a client with skill and care commensurate with that generally afforded to clients by other lawyers in similar matters.” The comments to Rule 1.1 state that competent representation includes “adequate preparation and continuing attention to the needs of the representation to assure that there is no neglect of such needs.” Rule 1.1, cmt. [5].

In re Evans explains that

To prove a violation [of Rule 1.1(a)], [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. . . . The determination of what constitutes a “serious deficiency” is fact specific. It has generally been found in cases where the attorney makes an error that prejudices or could have prejudiced a client and the error was caused by a lack of competence. Mere careless errors do not rise to the level of incompetence.

902 A.2d 56, 69-70 (D.C. 2006) (per curiam) (appended Board Report) (citations omitted). Although the Board referred to Rule 1.1(a) only, the “serious deficiency” requirement applies equally to 1.1(b). *See In re Yelverton*, 105 A.3d 413, 421-22 (D.C. 2014). To prove a “serious deficiency,” Disciplinary Counsel must prove that the conduct “prejudices or could have prejudiced the client.” *Id.* at 422.

Rule 1.1(b) is “better tailored [than Rule 1.1(a)] to address the situation in which a lawyer capable to handle a representation walks away from it for reasons unrelated to his competence in that area of practice.” *In re Lewis*, 689 A.2d 561, 564 (D.C. 1997) (per curiam) (appended Board Report).

2. Rule 1.3 – Diligence, intentional neglect, intentional prejudice, reasonable promptness

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 (appended Board Report) (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).

Rule 1.3(b) provides that:

A lawyer shall not intentionally:

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

A negligent failure to pursue a client’s interest is deemed intentional when “the neglect is so pervasive that the lawyer must have been aware of it” or “when a

lawyer’s inaction coexists with an awareness of his obligations to his client.” *In re Ukwu*, 926 A.2d 1106, 1116 (D.C. 2007) (internal quotations and 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.” *In re Vohra*, 68 A.3d 766, 781 (D.C. 2013) (appended Board Report) (quoting *In re Mance*, 869 A.2d 339, 340 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 (appended Board Report).

To prove a violation of Rule 1.3(b)(2), Disciplinary Counsel must prove, at a minimum that the respondent was “demonstrably aware” that the conduct at issue would damage or prejudice a client. Disciplinary Counsel need not prove that a respondent intended to harm the client. *In re Rachal*, 251 A.3d 1038, 1042 (D.C. 2021) (per curiam) (internal quotations omitted) (citing *In re Dory*, 528 A.2d 1247, 1248 (D.C. 1987) (Belson, J., concurring)); *see also In re Wright*, Bar Docket Nos. 377-99 *et al.*, at 24-25 (BPR Apr. 14, 2004) (Rule 1.3(b)(2) violated where the lawyer “knowingly created a grave risk” that the client would be harmed, and understood that harm was “substantially certain” to follow (internal quotations omitted) (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., Rachal*, 251 A.3d at 1042 (clients were prejudiced by their attorney’s accusation in a public filing that they acted deceitfully); *In re Robertson*, 612 A.2d at 1250-51 (appended Board Report) (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).

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 101. Comment [8] to Rule 1.3 provides that “[e]ven when the client’s interests are not affected in substance . . . unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer’s trustworthiness,” making such delay a “serious violation.”

Discussion

Disciplinary Counsel argues that Respondent violated Rules 1.1 and 1.3 because (1) his draft order did not clearly extend the deadline for propounding and responding to discovery; (2) he failed to oppose both the Agency’s January 29, 2008 motion to bar Complainant from propounding discovery and the Agency’s February 15, 2008 motion to strike Complainant’s discovery requests; (3) he failed to respond

to the Agency's discovery requests; and (4) he failed to avoid dismissal of the federal action. Respondent disagrees.

The Proposed Order Extending Discovery – Disciplinary Counsel is correct that Respondent's proposed order was not clear; however, the motion explicitly requested an extension of both the deadline for propounding discovery and the deadline for responding to discovery. *See* DX 5B at 17; FF 18. There is no evidence that the mismatch between the motion and the order was anything other than a mere careless error, which does not violate Rule 1.1. *See Evans*, 902 A.2d at 69-70 (appended Board Report). Similarly, there is no evidence that this error resulted from neglect or an intentional effort to prejudice Complainant. We agree with the Hearing Committee that Respondent's error in drafting the proposed discovery extension order did not violate any provision of either Rule 1.1 or Rule 1.3.

Respondent's Failure to Oppose – Respondent's failure to oppose the motions to preclude Complainant from propounding discovery and the motion to strike Complainant's discovery requests is another matter. Respondent did not oppose these motions because he concluded that Judge Furcolo would not rule on either motion because each was essentially a motion to reconsider the order extending the discovery period, and such "multiple submissions" were prohibited by the EEOC's local rules. Disciplinary Counsel's expert witness, Mr. Gilbert, testified that Respondent should have sought leave to take written discovery and opposed the motion to strike Complainant's discovery, or at a minimum requested a status

conference with Judge Furcolo. Tr. 724-28; 731-32 (“Given that the motion had been filed, you respond. You respond in some fashion.”).

Although Respondent had an argument that these motions were procedurally improper, he did not make that argument and instead assumed that Judge Furcolo would determine on his own that the Agency’s motions constituted improper “multiple submissions.” Substantively, Respondent could have argued that despite the ambiguous proposed order that Respondent had drafted, Judge Furcolo had extended the deadline for responding to and propounding discovery, which was consistent with the relief Respondent requested in the motion to extend the discovery period. *See* DX 5B at 17.

Respondent argues that his failure to oppose these discovery motions is not misconduct because Complainant did not need discovery, and he made a reasonable professional judgment not to take discovery. But Respondent ignores his own argument to Judge Furcolo when seeking additional time to propound discovery: that Complainant “would suffer tremendous prejudice if she is not permitted any written discovery. She has not yet had an opportunity to learn the positions of the Agency or see the information” underlying the Agency’s decision. DX 5B at 16-17. Respondent cannot claim here that Complainant did not need discovery after arguing to Judge Furcolo that she would be prejudiced without it. Respondent offers no evidence that Complainant’s need for discovery changed between January 22, 2008, when Respondent argued that Complainant would “suffer tremendous prejudice”

without discovery, and January 29 or February 15, 2008, when he declined to oppose the Agency's motions to preclude discovery.

We conclude that Respondent's failure to oppose either of the motions to foreclose discovery violated Rules 1.1(a) and 1.1(b) because Respondent failed to advocate for his client, assuming instead that Judge Furcolo would share his view that the Agency's motions were improper. Such inaction is not reasonable professional judgment. However, we agree with the Hearing Committee that Disciplinary Counsel did not prove violations of Rules 1.3(a), 1.3(b)(1), 1.3(b)(2) or 1.3(c) because Respondent's inaction here was based on poor judgment; it was not due to neglect, a lack of diligence or zeal, or an effort to prejudice Complainant.

Respondent's Failure to Respond to the Agency's Discovery – There is no doubt that Complainant was late in responding to the Agency's discovery requests – so late that the Agency filed a motion to compel, which was granted. Disciplinary Counsel argues that

a direct result of Mr. Doman's failure to comply with discovery deadlines or respond to the Department's motions was that his client's request for a hearing was dismissed with prejudice by the EEOC, and the Department entered a final decision denying his client the relief she was seeking.

ODC Br. at 24. The record does not support this causal connection. Respondent served Complainant's discovery responses by mail on April 1, 2008, before the April 3, 2008, deadline set in the order compelling Complainant to respond. On April 4, 2008, having not received Complainant's discovery responses, the Agency moved for sanctions, asking Judge Furcolo to dismiss Complainant's request for a hearing

and remand the case to the Agency for a final decision. DX 5K at 139 (averring that the agency had not received discovery responses); at 141 (requesting sanctions). The Agency sent the sanctions motion to Judge Furcolo by fax and Federal Express, and it appears that he received the motion on April 4, 2008, the day it was sent. *See* DX 5L at 151 (Judge Furcolo's order, noting that the motion was submitted on April 4, 2008). However, the Agency did not fax the motion to Respondent or Complainant, and served both only by Federal Express. DX 5K at 144 (certificate of service). Respondent did not receive the motion until Monday, April 7, 2008, the next business day. The record is silent as to why the Agency did not serve Respondent by fax.

The Acknowledgement and Order provided that “[s]tatements in opposition to discovery motions must be filed within ten (10) calendar days of receipt of the motion.” DX 5A at 6. Disciplinary Counsel's expert testified without elaboration that under this provision, Complainant's response to the sanctions motion was due on April 14, not April 17 as Respondent calculated. Importantly to our analysis, Disciplinary Counsel's expert conceded that determining the due date was “a little bit more complicated,” and he understood Respondent's argument regarding the due date. Tr. 751-52.

We understand Respondent's argument as well. Unlike Judge Furcolo, Respondent received the motion on April 7. Under the plain language of the Acknowledgement and Order, his response was due on April 17. Respondent filed the Opposition on April 16, arguing that the Agency had “jumped the gun” and filed

the motion assuming that Complainant would not serve her discovery on time.⁶ *See* DX 5M at 154. We recognize that Judge Furcolo ruled that Respondent had not timely filed an opposition, but we cannot find that Respondent’s failure to file the opposition by April 14 violated any Rule of Professional Conduct, because the plain language of the Acknowledgement and Order would lead one to believe that the due date was April 17. Because Judge Furcolo remanded the case back to the Agency, having concluded that Respondent had not opposed the sanctions motion, he never substantively addressed whether Respondent had timely provided discovery requests, and thus, there is no merit to Disciplinary Counsel’s argument that Respondent’s failure to respond to discovery resulted in the dismissal of Complainant’s case by the EEOC.

We agree with the Hearing Committee that Respondent’s delay in responding to the Agency’s discovery requests did not violate any provision of Rule 1.1 or 1.3.

The Federal Case – Disciplinary Counsel argues simultaneously that Complainant’s case lacked merit, yet Respondent was incompetent in failing to avoid dismissal. As Disciplinary Counsel does not argue any specific deficiency in Respondent’s representation in federal district court, we agree with the Hearing

⁶ Given that Respondent’s Opposition was one of Disciplinary Counsel’s exhibits, we are puzzled by Disciplinary Counsel’s argument at page 29 of its Brief that Respondent “failed completely to respond to the Department’s motions to dismiss the administrative proceeding, barring his client from obtaining the hearing she was seeking.” Recognizing that Disciplinary Counsel is making an argument, we must observe that hyperbole inconsistent with the record does not facilitate the efficient resolution of disciplinary matters.

Committee that Disciplinary Counsel failed to prove any Rule violations with respect to that portion of the representation.

B. Count II

The Hearing Committee concluded that Disciplinary Counsel proved by clear and convincing evidence that Respondent failed to keep records of his handling of entrusted funds, as required by Rule 1.15(a), but failed to prove that he engaged in commingling, or that his responses to Disciplinary Counsel’s investigative inquiries violated Rules 8.1(a), 8.4(c) or 8.4(d).

Disciplinary Counsel argues that the Hearing Committee erred in failing to find that Respondent had engaged in commingling, and that his responses to Disciplinary Counsel violated Rules 8.1(a), 8.4(c) or 8.4(d). Disciplinary Counsel also argues that Respondent’s hearing testimony regarding the transaction summary was “flagrantly false.”

Respondent argues that the Hearing Committee erred in finding that Disciplinary Counsel had proven that he did not maintain records of his handling of entrusted funds.

As discussed below, we conclude that Disciplinary Counsel proved by clear and convincing evidence that Respondent failed to keep the records required by Rule 1.15(a), and that his responses to Disciplinary Counsel’s investigative subpoenas violated Rule 8.4(d). We also find that Respondent gave intentionally false testimony to the Hearing Committee.

1. Rule 1.15(a) – Recordkeeping

Rule 1.15(a) requires lawyers to keep “[c]omplete records of . . . [entrusted] funds” and preserve them “for a period of five years after termination of the representation.” *See In re Edwards*, 990 A.2d 501, 522 (D.C. 2010) (appended Board Report). “Financial records are complete only when an attorney’s documents are ‘sufficient to demonstrate [the attorney’s] compliance with his ethical duties.’” *Id.* 522 (alteration in original) (quoting *In re Clower*, 831 A.2d 1030, 1034 (D.C. 2003)). 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.” *Edwards*, 990 A.2d at 522 (appended Board Report); *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 (appended Board Report).

The Hearing Committee found that Disciplinary Counsel proved that Respondent failed to maintain the required records because he did not produce any such records to Disciplinary Counsel during its investigation, and declined to produce such records when the Hearing Committee invited him to do so during the hearing. *See HC Rpt.* at 54-55.

Respondent argues that the evidence shows only that he failed to produce financial records to Disciplinary Counsel, not that he failed to possess them. Resp. Br at 31 (“[T]he failure to produce is not necessarily the failure to possess.”). Respondent argues that Disciplinary Counsel was responsible for the absence of evidence regarding his entrusted funds records because Disciplinary Counsel failed to move to compel their production after Respondent claimed that he needed a court order to produce them because they contain client confidences. Respondent argues that the Hearing Committee should have accepted his testimony that he maintained the required records. We disagree.

First, as discussed below, Respondent never clearly informed Disciplinary Counsel that any documents were being withheld on grounds that they contained client confidences. He did not offer to produce his records with redactions, or otherwise altered, to protect his clients’ identity.

Second, it is well-settled that the “argument that compliance with [Disciplinary Counsel’s] subpoena would breach respondent’s ethical obligation to preserve confidences of former clients is unavailing.” *In re Confidential*, 703 A.2d 1237, 1238 (D.C. 1997).

Respondent chose not to produce records of his handling of entrusted funds at his peril. We reject the notion that Disciplinary Counsel should bear the burden of Respondent’s recalcitrance. We agree with the Hearing Committee that Disciplinary Counsel proved by clear and convincing evidence that Respondent did not maintain the records required by Rule 1.15(a).

2. Rule 1.15(a) – Commingling

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).

The Hearing Committee concluded that Disciplinary Counsel failed to establish a Rule 1.15(a) commingling violation by clear and convincing evidence because (1) Disciplinary Counsel’s forensic accountant testified that he could not establish whether any of the funds held in the IOLTA account were client funds (HC FF 148); (2) 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 (*see* HC FF 145, 148, 151); and, (3) there were no client or third party complaints that Respondent mishandled funds. (HC FF 146-47). The Hearing Committee

concluded that there was a failure of proof because Disciplinary Counsel did not establish when either the IOLTA or operating account held both entrusted and personal funds at the same time.

Disciplinary Counsel excepts to the Hearing Committee's Rule 1.15(a) commingling conclusion, arguing that Respondent did not timely remove fees from his trust account after he had earned them, that he deposited \$30,000 of his own funds into his trust account to cover an overdraft, and he used the trust account to pay personal and business expenses. We disagree.

Delay in Removing Earned Fees – Disciplinary Counsel argues that because Respondent left entrusted funds in the IOLTA account well after they had been earned, entrusted and non-entrusted funds must have been in that account at some point in time. We agree with Disciplinary Counsel only insofar as we expect that given the way Respondent handled his trust account, it is likely that at some point in time, entrusted and non-entrusted funds were in Respondent's trust account at the same time. However, based on Disciplinary Counsel's argument and evidence, we, like Disciplinary Counsel and its accountant, cannot discern if and when entrusted and non-entrusted funds were in the trust account at the same time. (HC FF 148). Thus, we are constrained by the clear and convincing standard of proof to conclude that Disciplinary Counsel failed to prove that Respondent engaged in commingling.

We do not endorse Respondent's failure to produce records, or his "leave it in the trust account until I need it" approach. Rule 1.15(a) very clearly proscribes commingling of entrusted and non-entrusted funds: a lawyer must "hold property

of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property." It is not intended as a "rainy day" fund.

As discussed below, we recognize that Disciplinary Counsel's evidence was limited because Respondent refused to produce the records that he testified would show how he handled all of the funds at issue, and thus we do not have all of the information available to determine whether Respondent correctly handled his entrusted funds. We might be tempted to rely on Respondent's failure to produce his records to draw an adverse inference against him on the commingling charge. However, because his failure to produce records established a violation of the recordkeeping prong of Rule 1.15(a), as well as the Rule 8.4(d) violation discussed below, we find a recordkeeping violation based on the evidence presented during the hearing (in this case the absence of records), rather than assuming that the withheld information necessarily would have been inculpatory and that Disciplinary Counsel thereby has proven the commingling charge.

The evidence indicates that Respondent initially properly handled entrusted funds upon receipt. For instance, when Client K disputed her share of a settlement amount, he correctly deposited the entire amount in trust because his entitlement to any of it was in dispute. When he received advance fees, he placed them in trust. *See In re Mance*, 980 A.2d 1196, 1205 (D.C. 2009) (a lawyer must "safekeep[] the client's funds until it can reasonably be said that they have been earned in light of the scope of the representation"); Tr. 578-79. The evidentiary difficulty in this case

is determining when the funds changed from entrusted to non-entrusted funds and therefore should have been removed from the trust account. *See In re Gray*, 224 A.3d 1222, 1229 (D.C. 2020) (per curiam) (earned fees should be removed from trust when earned); D.C. Bar Ethics Op. 355 (June 2010) (at the latest, earned fees should be removed from the trust account at the end of the representation).

Disciplinary Counsel argues that commingling occurred because Respondent left funds in the trust account for too long, that is, after he was entitled to remove them from the trust account. However, Disciplinary Counsel does not identify when any of the entrusted funds became Respondent's funds. Thus, Disciplinary Counsel did not present evidence establishing that entrusted and non-entrusted funds were in the trust account at the same time.

Respondent testified that he usually waited until the end of a representation to move the earned fees, but if he "absolutely need[ed]" money, he would determine what he had earned to that point in the representation, and withdraw that amount. Tr. at 501-03. When pressed about particular client funds, Respondent consistently declined to say when he decided that he had earned the fees, because he could not remember without access to his records. However, Respondent testified that he never withdrew the funds before they were earned, and that he had the records to prove that. He had not produced those records to Disciplinary Counsel because he "disagree[d] with the scope of the subpoena and the demands that [Disciplinary Counsel] made." *See* Tr. 55-56 ("I have records – the fact that I didn't produce them to [Disciplinary Counsel] does not mean I don't have records. But I have records.").

We recognize that the records that Respondent produced to Disciplinary Counsel were insufficient to show how he handled the entrusted funds, thus violating the recordkeeping prong of Rule 1.15(a), but without records or other evidence sufficient to show that Respondent kept entrusted and non-entrusted funds in the same account at the same time, we cannot find that Disciplinary Counsel proved commingling by clear and convincing evidence.

Disciplinary Counsel cites to Respondent's testimony where he appears to acknowledge using his trust account as something of a "rainy day" fund in case he faced a future client demand for the return of earned fees. He acknowledged that he "probably erred on the – too far on the side of caution," by leaving the funds in his account for too long. Tr. at 290. However, this would establish only that Respondent left his own funds in the trust account; it does not establish that entrusted funds were in the account at the same time. Respondent never admitted to commingling funds, and his testimony that he "probably erred" is not clear and convincing evidence of commingling. See *In re Anderson*, 778 A.2d 330, 337-338 (D.C. 2001) (Disciplinary Counsel bears the burden of proving a Rule 1.15(a) violation by clear and convincing evidence). "This stringent standard 'expresses a preference for the attorney's interests by allocating more of the risk' of an erroneous conclusion to Disciplinary Counsel." *In re Nave*, 197 A.3d 511, 518 (D.C. 2018) (per curiam).

Just as Disciplinary Counsel could not identify when Respondent held entrusted and non-entrusted funds in the same account at the same time, Respondent did not demonstrate through documentary evidence that he kept entrusted and non-

entrusted funds separate. Relying on a Board Report appended to the Court's opinion in *In re Chang*, Disciplinary Counsel argues that it proved commingling because Respondent's inability to identify which funds in an account are his and which are those of a client establishes commingling. ODC Br. at 45 (citing 694 A.2d 877, 880 (D.C. 1997) (per curiam) (appended Board Report)). But in *Chang*, the Board found commingling because the respondent admitted depositing earned fees into his escrow account – at time when the account also contained client funds – “*and* the documentary evidence supported his testimony.” 694 A.2d at 880 (emphasis added) (appended Board Report). Here, Disciplinary Counsel has not directed the Board to any documentary evidence showing that Respondent held earned fees and entrusted funds in the same account at the same time.

The *Chang* Board report cites to Judge Wagner's concurrence in *In re Choroszej*, 624 A.2d 434 (D.C. 1992) (per curiam). We see nothing in Judge Wagner's concurrence that would support the proposition that commingling is proven where the respondent is unable to identify the lawyer's funds from those of a client, without evidence that entrusted and non-entrusted funds were in the same account at the same time. We have located no other Court opinion or Board report that endorses the proposition that commingling is proven when a lawyer cannot identify which funds belong to a client, and which belong to the lawyer. Such a conclusion would seem to shift the burden of proof to the respondent to show that no commingling had taken place.

We recognize that in Rule 1.15(a) misappropriation cases we can consider circumstantial evidence based on the record before us. *See In re Mabry*, 11 A.3d 1292, 1293-94 (D.C. 2011) (per curiam) (finding intentional misappropriation where the respondent did not participate in the disciplinary proceeding and where “much of the evidence was circumstantial”). We see no reason why the same principal should not apply to determine whether commingling, also a violation of Rule 1.15(a), has been proven. But here, at most, Disciplinary Counsel has proven that Respondent left earned fees in the trust account past the point when they should have been removed. This does not establish that entrusted funds were in the trust account at the same time with non-entrusted funds, which evidence is essential to proving commingling.

Deposit into Overdrawn Trust Account – Disciplinary Counsel also argues that Respondent commingled when he deposited \$30,000 of his own funds into his trust account when it was overdrawn. Respondent deposited \$30,000 on September 13, 2012, when the balance in the account was \$374.05 (after the amount of the dishonored check had been added back into the account). DX 20A at 345, 349; *see* Tr. 76-82. There is no evidence as to the nature of the \$374.05, and thus no evidence that Respondent’s deposit of his own \$30,000 resulted in commingling.

Respondent Paid Business Expenses Directly from His Trust Account – Disciplinary Counsel correctly observes that Respondent used funds from the trust account to pay business expenses. But this, by itself, does not establish commingling. Respondent is not required to transfer earned funds from his trust

account to his operating account in order to pay expenses. *See In re Choroszej*, 624 A.2d at 438 (Wagner, J., concurring). Respondent’s payment of business expenses from the trust account is evidence that the account held Respondent’s funds, but is not evidence that it held entrusted and non-entrusted funds at the same time.

3. Rules 8.1(a) and 8.4(c) – Dishonesty to Disciplinary Counsel

Rule 8.1(a) provides that “a lawyer . . . in connection with a disciplinary matter, shall not . . . knowingly 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). 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].

Rule 8.4(c) provides that it is professional misconduct for a lawyer to “[e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation.” Each of these terms encompassed within Rule 8.4(c) “should be understood as separate categories, denoting differences in meaning or degree.” *In re Shorter*, 570 A.2d 760, 767 (D.C. 1990) (per curiam). Each category requires proof of different elements. *See In re Romansky*, 825 A.2d 311, 315 (D.C. 2003). Disciplinary Counsel argues that Respondent engaged in dishonesty, which is the most general of

these categories. It includes “not only fraudulent, deceitful or misrepresentative conduct, but also ‘conduct evincing a lack of honesty, probity or integrity in principle; a lack of fairness and straightforwardness.’” *In re Samad*, 51 A.3d 486, 496 (D.C. 2012) (per curiam) (quoting *Shorter*, 570 A.2d at 767-68). The Court holds lawyers to a “high standard of honesty, no matter what role the lawyer is filling,” *In re Jackson*, 650 A.2d 675, 677 (D.C. 1994) (per curiam) (appended Board Report), because “[l]awyers have a greater duty than ordinary citizens to be scrupulously honest at all times, for honesty is ‘basic’ to the practice of law.” *In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (en banc).

Disciplinary Counsel charges that Respondent violated Rules 8.1(a) and 8.4(c) during a May 2015 meeting with Disciplinary Counsel where he misrepresented the nature of the instrument that caused the overdraft. Disciplinary Counsel’s investigator testified that Respondent said “he walked into the bank, picked up a countercheck and the teller filled it out and [he] told the teller to take it out of the operating account. But, in fact, the teller made a mistake and took it out of the IOLTA account.” Tr. 952. Disciplinary Counsel argues that this explanation was false because, as is discussed above, the dishonored check (no. 1078) was a preprinted IOLTA account check and not a counter check. Disciplinary Counsel further argues that

[t]his is significant because he lied about the transaction – there was no in-person transaction with a bank teller and no counter check – and because it indicated he still had not informed himself that TD Bank had incorrectly put his IOLTA number on checks he thought were withdrawing funds from his operating account.

ODC Br. at 31.⁷

Respondent testified that he did not tell Disciplinary Counsel about a countercheck, and instead told Disciplinary Counsel that he went to the “counter” at the bank to deposit a \$1,400 check, intending for it to be deposited into his trust account, and the teller made an error and deposited the check into his operating account instead. Tr. 1100, 1103.

At a general level, these explanations are the same: a bank employee’s error caused the overdraft. At a more detailed level, the explanations diverge: did Respondent tell Disciplinary Counsel that the teller wrote the wrong account number on a bank countercheck (Disciplinary Counsel’s evidence) or that the teller made a deposit into the wrong account (Respondent’s evidence) leaving insufficient funds in the trust account?

The bank records show that Respondent’s explanation correctly accounts for the error that led to the overdraft. Those records show that Respondent made a \$1,400 deposit on September 10, 2012. DX 20B at 356. The word “IOLTA” is handwritten on the deposit slip (DX 20B at 363), but the \$1,400 was deposited into Respondent’s operating account. DX 20B at 356. Check no. 1078 was presented that same day. DX 20A at 352. Consistent with Respondent’s hearing testimony,

⁷ The TD Bank letter attached to Respondent’s February 27, 2013, response (DX 26A) explained that the checks that TD Bank had provided to Respondent erroneously included the IOLTA account number, rather than the operating account number as Respondent had intended. Thus, Respondent knew about the check numbering error by the time of his May 2015 meeting with Disciplinary Counsel.

had the \$1,400 deposit been credited to the IOLTA account as Respondent said he intended, there would have been no overdraft when check no. 1078 was presented for payment. But the question raised by the Rule 8.1(a) and 8.4(c) charges is what Respondent said at the meeting with Disciplinary Counsel, not what series of transactions caused the overdraft.

The Hearing Committee heard the different recollections of Respondent and Disciplinary Counsel's witness discussed above, but did not make a precise finding as to what Respondent said during the meeting with Disciplinary Counsel. In Finding of Fact 153, the Hearing Committee found that

Although [Respondent] 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).⁸

The Hearing Committee did not otherwise discuss in any detail whether Disciplinary Counsel's witness or Respondent was correct in describing what was said during the meeting. However, in its discussion of the Rule 8.1(a) violation, the Hearing Committee concluded that "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)," and that "Disciplinary Counsel has established

⁸ The Hearing Committee's finding that Respondent "did not or was not able to fully explain what had happened because he had not completed a detailed review of the file" is not supported by substantial evidence in the record. The parties agree that Respondent gave a full explanation of the overdraft at the meeting. Indeed, the gravamen of the Rule 8.1(a) and 8.4(c) charges is that Respondent gave a false explanation, not an incomplete one.

that Respondent's explanation was incorrect, but not that it was 'knowingly' so." HC Rpt. at 56. Although the Hearing Committee's findings on this issue could have been more precise, this discussion supports the conclusion that the Hearing Committee credited Disciplinary Counsel's witness over Respondent in deciding what Respondent said at the May 2015 meeting.

Because the Hearing Committee's conclusion that Respondent's explanation during the May 2015 meeting was incorrect is supported by witness testimony, we find that the Hearing Committee's conclusion is supported by substantial evidence in the record. *In re Szymkowicz*, 124 A.3d 1078, 1084 (D.C. 2015) ("Where there is substantial evidence to support the agency's findings[,] the mere existence of substantial evidence contrary to that finding does not allow this court to substitute its judgment for that of the agency." (alteration in original) (quoting *In re Nace*, 98 A.3d 967, 974 (D.C. 2014) (per curiam))). We recognize that the bank records are consistent with Respondent's recollection of the events giving rise to the overdraft, but as noted above, those bank records are not probative of what Respondent said at the meeting with Disciplinary Counsel.

The Hearing Committee's conclusion that Respondent misdescribed the circumstances leading up to the overdraft in his meeting with Disciplinary Counsel does not establish a violation of either Rule 8.1(a) or 8.4(c). We agree with the Hearing Committee that there was no evidence that Respondent's explanation was knowingly, or even recklessly, false. Disciplinary Counsel seems to argue that simply because Respondent's recitation of the underlying events was incorrect, there

is clear and convincing evidence that he was lying to Disciplinary Counsel. Not so.

Where, as here “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.” *Romansky*, 825 A.2d at 315; *see also In re Uchendu*, 812

A.2d 933, 939 (D.C. 2002) (“[S]ome evidence of a dishonest state of mind is necessary to prove an 8.4(c) violation.”). Disciplinary Counsel offered no evidence that Respondent intended to mislead it regarding the circumstances surrounding the overdraft, or even that his explanation was offered without regard to its truthfulness.

In considering this issue, we observe that other than the difference in recollection as to what was said at the meeting, there is no evidence in the record that there was ever a dispute as to the nature of the instrument that caused the overdraft in Respondent’s trust account. The overdraft notice (sent to both Disciplinary Counsel and Respondent) that began this investigation, indicated that the overdrawn check was check no. 1078. DX 22 at 2. The chart that Respondent provided to Disciplinary Counsel showed the same thing. DX 26B at 7. Disciplinary Counsel had Respondent’s transaction summary and the TD bank records themselves before the May 2015 meeting, but never asked Respondent to correct his statement regarding the “countercheck.” *See* Tr. 960-61.⁹

⁹ Disciplinary Counsel’s failure to confront Respondent about this inconsistency during the meeting could be seen as casting doubt on whether Respondent actually gave the “countercheck” explanation during the May 2015 meeting. However, this issue is not developed in the record, and we decline to draw any inferences from the failure to bring this inconsistency to Respondent’s attention.

Disciplinary Counsel offers no evidence to support its argument that after correctly identifying check no. 1078 as the cause of the overdraft and providing a bank letter recognizing the problem with TD Bank's pre-printed checks, Respondent intentionally or recklessly attempted to mislead Disciplinary Counsel by blaming the overdraft on an error on a "countercheck" and not a "deposit slip." We are left with a Hearing Committee finding that Respondent misspoke at the May 2015 meeting, but nothing more. We agree with the Hearing Committee that Disciplinary Counsel failed to prove by clear and convincing evidence that Respondent made an intentionally or recklessly false statement regarding the nature of the instrument that caused the overdraft. Thus, Disciplinary Counsel failed to prove that Respondent violated Rule 8.1(a) or 8.4(c) during his May 2015 meeting with Disciplinary Counsel.

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

The Hearing Committee concluded that Respondent did not "seriously" interfere with the administration of justice because Respondent did not ignore Disciplinary Counsel's letters or subpoenas. In each instance, when contacted by Disciplinary Counsel, Respondent provided a response. *See* HC FF 135, 137, 139. The Hearing Committee reasoned that if Disciplinary Counsel found those responses inadequate, it had the option of filing a motion to compel. *In re Kanu*, 5 A.3d 1, 11 (D.C. 2010).

Disciplinary Counsel excepts to the Hearing Committee's Rule 8.4(d) conclusion. Disciplinary Counsel argues that Respondent violated 8.4(d) because

he refused to produce either his own accounting records or the documents needed to perform its own accounting analysis, he lied in a meeting with Disciplinary Counsel, and he created a document that he falsely claimed was created by TD bank, DX 26B. Respondent supports the Hearing Committee's conclusion that he did not violate 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,” which includes “interfering with [Disciplinary] Counsel’s efforts to investigate attorney misconduct.” *Yelverton*, 105 A.3d at 426; *see also Edwards*, 990 A.2d at 524 (appended Board Report) (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’s letters and orders of the Board on Professional Responsibility).

We first address Disciplinary Counsel’s last two arguments regarding Rule 8.4(d), as they are related to our prior conclusions. First, we have found that Respondent did not lie in his meeting with Disciplinary Counsel, and thus, that cannot be a basis for a Rule 8.4(d) charge. Second, there is no evidence that Respondent provided Disciplinary Counsel with any evidence regarding the provenance of DX 26B during the investigation. Even though Respondent gave false testimony during the hearing on that subject, as discussed in Section IV.B.7. below,

that false hearing testimony could not have interfered with Disciplinary Counsel's investigation.

Respondent's Responses to Disciplinary Counsel's Investigative Inquiries –

On November 5, 2012, Disciplinary Counsel began its investigation of Respondent's overdraft by sending him a subpoena seeking documents and an inquiry letter, enclosing the overdraft notice, and requesting that Respondent provide a variety of information regarding the transactions in the overdrawn IOLTA account. DX 24. On November 8, 2012, 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 letter noted without elaboration that Disciplinary Counsel's subpoena called for the production of "attorney-client privileged documents." He did not formally object to the production of attorney-client privileged information. Respondent also requested that his deadline for responding be extended until February 15, 2013. DX 25 at 1.

In a follow-up letter sent on February 12, 2013, Respondent requested an additional ninety-day extension of the response time, and 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 and avoid[] the significant time cost associated with gathering the assortment of records requested." DX 25 at 3. Respondent was concerned 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 the Complainant.

Respondent testified that he intended that his November 8, 2012, and February 12, 2013, letters would put Disciplinary Counsel on notice that he was not going to produce any information protected by the attorney-client privilege. He believed that if Disciplinary Counsel disagreed with this limitation, it would file a motion to compel further production. Tr. 69-72.

On February 27, 2013, Respondent sent Disciplinary Counsel “documents and information responsive” to the November 5, 2012 subpoena. DX 26. This letter did not state that any responsive documents or information were being withheld on privilege or any other ground. The letter included “a summary of the [IOLTA] account transactions for the period identified in the subpoena,” November 1, 2011 – October 31, 2012. *Id.*

Disciplinary Counsel sent a second letter to Respondent on November 19, 2013, that included a subpoena covering an extended period of time and nine additional interrogatory-style questions. Respondent provided a limited response to the November 19 letter on January 15, 2014. The response did not assert any sort of objection based on privilege.

Disciplinary Counsel sent a third letter to Respondent on January 14, 2016, which included a third subpoena and six additional interrogatory-style questions. FF 135. On February 19, 2016, Respondent emailed a reply to the January 14, 2016, letter. This email did not assert any sort of privilege objection. *See* DX 28A.

Disciplinary Counsel did not file a motion to compel the records sought in any of these three subpoenas or letters.

Analysis

We agree with the Hearing Committee that Respondent “responded” to Disciplinary Counsel’s inquiries, in that he did not ignore them, and provided information, although not all of the information that Disciplinary Counsel requested. However, we disagree with the Hearing Committee that this is the end of the inquiry; instead, we must determine whether Respondent’s failure to produce the requested documents violated Rule 8.4(d). We conclude that Respondent violated Rule 8.4(d) by failing to adequately apprise Disciplinary Counsel that he was withholding documents on privilege grounds.

Disciplinary Counsel has established, and Respondent concedes, that he did not produce all documents responsive to Disciplinary Counsel’s subpoenas. Respondent argues that he is excused from full compliance with the subpoena because he informed Disciplinary Counsel that he was withholding privileged documents, and Disciplinary Counsel did not compel their production. He understood that by failing to move to compel, Disciplinary Counsel signaled its acquiescence with Respondent’s decision to withhold privileged documents. However, the record shows by clear and convincing evidence that Respondent did not assert a privilege objection or inform Disciplinary Counsel that privileged documents were being withheld from his production.

Disciplinary subpoenas are issued “subject to Superior Court Civil Rule 45.” D.C. Bar R. XI, § 18(a). Super. Ct. Civ. R. 45(d)(2)(A) sets forth the protections applicable to a subpoena recipient, and provides that a party withholding information on the claim that it is privileged “must . . . expressly make the claim.”¹⁰ Respondent did not “expressly make the claim” that he was withholding privileged documents. His first letter to Disciplinary Counsel simply noted that the subpoena called for the production of privileged documents. The second letter was somewhat more specific, referring to the risk that subpoena compliance would violate client confidences. But Respondent never objected on grounds of privilege or stated that he was withholding responsive documents on privilege grounds.

By failing to adequately inform Disciplinary Counsel that documents were being withheld, Respondent deprived Disciplinary Counsel of the opportunity to make an informed decision of whether to move to compel the documents being withheld.¹¹ We conclude that Respondent seriously interfered with the administration of justice by withholding responsive documents on privilege grounds, without informing Disciplinary Counsel that he was doing so or without lodging an objection to the subpoena on grounds of privilege.

¹⁰ Super. Ct. Civ. R. 34(b)(2)(C) is similar, requiring that an objection to a document request “must state whether any responsive materials are being withheld on the basis of that objection.”

¹¹ Such a motion is not a prerequisite to a finding that Respondent’s conduct violated Rule 8.4(d). *Kanu*, 5 A.3d at 11.

IV. RECOMMENDED SANCTION

Disciplinary Counsel requested that the Hearing Committee recommend the sanction of disbarment. Before the Board, Disciplinary Counsel argues that the appropriate sanction is a one-year suspension. Respondent has requested that the Board recommend no sanction.

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., Hutchinson*, 534 A.2d at 924; *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).

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

Respondent’s misconduct is less serious than much of the conduct at issue in disciplinary cases. However, by failing to oppose certain motions in the EEOC case, Respondent failed in his basic duty to advocate for his client in those instances. His justification, that he believed that Judge Furcolo would see the same procedural defects that he saw, reflects a misunderstanding of a lawyer’s obligation to take action to protect his client’s interests.

With respect to the Rule 8.4(d) charge, Respondent responded to Disciplinary Counsel’s investigative inquiry, but the lack of clarity in his written responses did not adequately convey, and thereby impeded Disciplinary Counsel’s ability to fully understand, his position regarding the (non)production of responsive records.

2. Prejudice to the Client

Respondent’s client suffered some degree of prejudice in the EEOC action because she was not permitted to take the discovery that she had requested.

3. Dishonesty

Respondent's underlying misconduct did not involve dishonesty, but as discussed below, he gave intentionally false testimony to the Hearing Committee.

4. Violations of Other Disciplinary Rules

Respondent violated Rules 1.1(a), 1.1(b), 1.15(a) (recordkeeping), and 8.4(d).

5. Previous Disciplinary History

Respondent has not been the subject of previous discipline.

6. Acknowledgement of Wrongful Conduct

In examining this sanction factor, we consider only the violation of Rule 1.15(a) (recordkeeping) found by the Hearing Committee, as that was the only misconduct that Respondent might have acknowledged in briefing or argument before the Board. Respondent has not acknowledged his misconduct in failing to keep records of his handling of entrusted funds. Instead, he argues that he has records of his handling of entrusted funds, but did not produce them because to do so would violate client confidentiality. He argues that he “should not be penalized for being prohibited—ethically and legally—from demonstrating his compliance with Rule 1.15(a).” Resp. Br. at 36.

Respondent's argument is contrary to *In re Confidential*, which, as discussed above, rejected the “argument that compliance with [Disciplinary Counsel's] subpoena would breach respondent's ethical obligation to preserve confidences of former clients.” 703 A.2d at 1238. Disciplinary Counsel's brief cites *Confidential* for exactly this point. But Respondent ignored *Confidential* in his brief, and instead

maintained his argument that Rule 1.6 prohibited him from producing the records Disciplinary Counsel requested.

7. Other Circumstances in Aggravation and Mitigation

Respondent Gave Intentionally False Hearing Testimony. As discussed above, Respondent produced a summary of IOLTA transactions as Attachment B to his February 27, 2013 letter. DX 26B. Disciplinary Counsel argues that Respondent gave intentionally false testimony during the disciplinary hearing when he testified that DX 26B was created by TD Bank. *See* Tr. 453-54, 461-63. The Hearing Committee found that Respondent did not give *any* intentionally false testimony, but it did not directly address Disciplinary Counsel’s contention that Respondent gave false testimony as to the source of DX 26B. *See* HC Rpt. at 69. Whether Respondent gave “sanctionable false testimony before the Hearing Committee is a question of ultimate legal fact” that the Board reviews *de novo*. *In re Bradley*, 70 A.3d 1189, 1194 (D.C. 2013) (per curiam); *see In re Mazingo-Mayronne*, 276 A.3d 19, 22 (D.C. 2022) (per curiam) (agreeing with the Board that respondent’s testimony was intentionally false, where Hearing Committee had not made such a finding, noting that “the Board was free to reach an independent conclusion as to whether [respondent’s] testimony was intentionally false”).

a. The Hearing Committee’s Analysis

The Hearing Committee appears to have misunderstood Disciplinary Counsel’s argument concerning DX 26B. Disciplinary Counsel argued that Respondent testified falsely about the origin of the document; it did not argue that

Respondent violated Rule 8.4(c) by producing a false document during the investigation. *See* ODC Br. to HC at 30, PFF 76 (arguing that Respondent never identified TD Bank as the source of DX 26B during the investigation). However, in considering the DX 26B issue, the Hearing Committee concluded that “[a]lthough 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.” HC Rpt. at 60.

The report suggests that the Hearing Committee considered the conflicting evidence regarding the origin of DX 26B and concluded that Disciplinary Counsel had failed to prove that Respondent testified falsely that the document came from TD Bank. With respect to the origin of DX 26B, the Hearing Committee noted that Respondent testified he had received it from TD Bank, and that the witness from TD Bank (Vice President/Branch Manager David Chalker) “did not recognize that paperwork, but could not say definitively that it had not come from someone at the bank. (FF 157).” HC Rpt. at 60. Thus, it appears that the Hearing Committee concluded that Mr. Chalker did not rebut Respondent’s testimony that he had received DX 26B from TD Bank.

The Hearing Committee’s suggestion of Mr. Chalker’s uncertainty appears to rest on its finding that “Mr. Chalker could not say conclusively whether the report had come from the bank or not. (Tr. 905-06).” HC Rpt. at 36-37 (HC FF 156). We conclude that this finding is not supported by substantial evidence in the record as a whole. The following is the entirety of Mr. Chalker’s testimony regarding DX 26B:

Q Do you recognize this to be a document created by TD -- by TD Bank?

A I do not.

Q Does TD Bank have a process by which they would create a document that looks like the document that appears at Disciplinary Exhibit 26 B?

A Not to my knowledge.

Tr. 906. Contrary to the Hearing Committee's characterization, this testimony does not suggest an uncertainty or equivocation as to whether DX 26B was prepared by TD Bank. Mr. Chalker testified that to his knowledge it was not a TD Bank document, and he knew of no way that TD Bank could have created it. Respondent never challenged this testimony during the hearing. He asked Mr. Chalker no questions about DX 26B.

This is not simply the matter of the weight to be given to an item of evidence. Mr. Chalker's testimony is not sufficient to support the Hearing Committee's finding that Mr. Chalker could not conclusively say that DX 26B was not a bank document. Instead, it supports the opposite finding, as Mr. Chalker testified that DX 26B was not a TD Bank document.

b. DX 26B Was Not Created By TD Bank

Having determined that Mr. Chalker denied that DX 26B was a TD Bank document, we must determine whether there is clear and convincing evidence that Respondent's contrary hearing testimony was false, and if so, intentionally so. As discussed below, we find that the testimony was intentionally false.

Unlike the question discussed above (what was said at the May 2015 meeting), this is not simply a conflict between Respondent's and Mr. Chalker's testimony.¹² The content of the document itself may be the most important evidence as to whether it was created by TD Bank.

Respondent testified that he did not provide any of the information in DX 26B, and that all of it came from TD Bank. Tr. 627 ("all of this information, the description, the memo, all of that information was provided" by TD Bank). If so, one would expect all information reflected in DX 26B to be contained in the other bank records TD Bank produced to Disciplinary Counsel. However, DX 26B contains information regarding Respondent's transactions that is not included in the TD Bank records. Disciplinary Counsel's investigator testified without contradiction from Respondent that three transactions appear on DX 26B that do not appear in any of the TD Bank records. Tr. 947-49.

Our review of DX 26B shows that it includes explanatory information that cannot be gleaned from the checks themselves. For instance, the "memo" line on check no. 1002 is blank, but the "memo" column on DX 26B reflects that check no. 1002 was a "campaign contribution." *Compare* DX 20A at 156 (check no. 1002), *with* DX 26B at 4. This is not an isolated example. Many of the checks drawn on

¹² Disciplinary Counsel's expert testified that he believed that DX 26B had been created using Quicken, because he was able to recreate the exhibit using that software. Tr. 945-47. We need not determine how the document was created in order to determine whether it was a TD Bank document.

the IOLTA account have blank memo lines, yet DX 26B has information in the memo column. DX 26B contains forty-eight entries showing a payment to “Janelle Ramus Jones,” each of which lists “case assistance” in the “memo” column. However, none of the forty-eight checks written to Ms. Jones contain the phrase “case assistance.” In certain instances, DX 26B contains a different “memo” entry than is reflected on the corresponding check. *Compare* DX 20A at 158 (check no. 1007 (“ADT 2012”)), *with* DX 26B at 4 (entry for check no. 1007 (“ADT Office”)).

In his brief to the Board, Respondent concedes that DX 26B contains information that TD Bank did not have, and he argues that this is a good thing:

The information in the Transaction List was consistent with the bank statements produced by the bank and included additional information about the purpose of the checks Respondent had negotiated. Therefore, it is accurate and *provides responsive explanatory information the bank statements did not have*—information Disciplinary Counsel claimed it was seeking.

Resp. Br. at 47 (emphasis added). But this squarely contradicts his hearing testimony that all of the information on DX 26B came from TD Bank. Worse yet, it attempts to distract from the very serious issue before us – the truthfulness of his sworn testimony to the Hearing Committee – and persuade us that the only issue before the Board is whether the information on DX 26B is accurate.

In considering the truth or falsity of Respondent’s testimony regarding the origin of DX 26B, we further note that DX 26B is not on TD Bank letterhead, it does not contain any obvious TD Bank markings, and it is not accompanied by any letter or other information from TD Bank attesting to its provenance or accuracy. He did

not identify it as a TD Bank document when he first produced it to Disciplinary Counsel, even though he sent it to Disciplinary Counsel with a letter from TD Bank explaining the check misnumbering issue. Respondent's submission described its attachments as

a letter from TD Bank explaining an error it made (Attachment A); a summary of the account transactions for the period identified in the subpoena (Attachment B); and the contact information for the sources, payors, payees, and clients related to the transactions (Attachment C).

DX 26 at 1. If TD Bank were the source of both the letter (Attachment A) and the summary (Attachment B), Respondent would have made that clear in the letter. Respondent testified at the hearing that he was the source of the information in Attachment C. Tr. 465.

Upon consideration of the foregoing, we find that there is clear and convincing evidence that Respondent's testimony as to the source of DX 26B was false.

c. Respondent's testimony about DX 26B was intentionally false

We next consider whether Respondent's false testimony was intentional, as intentionally false testimony is a significant aggravating factor in determining a sanction. The record compels the conclusion that the false testimony was intentional. We quote Respondent's hearing testimony at length because the protracted repetition of the false story regarding the origin of DX 26B shows that the false statements were made intentionally.

This issue arose during Disciplinary Counsel's examination of Respondent during its case-in-chief on August 21, 2018. Disciplinary Counsel had asked Respondent to locate the entry on DX 26B corresponding to a deposit reflected on

the TD Bank statements. Tr. 450-53. Respondent could not locate the entry¹³ and then testified that he did not create DX 26B:

A Before you move on though I want to point out that this document I got from the bank. I didn't create this document which is DCX-26B.

Q So this is not yours?

A No I got this from the bank when I went in to get the letter and this is what they -- this is what the bank gave me.

Q So you produced none of your own financial records in response to disciplinary counsel's subpoenas?

A I produced -- well the bank was my bank, and I went in and got my records from the bank and this is the bank's document that they gave me, yeah.

Q But --

A And then in fact when I went in -- I didn't get this. I had to go in, they had to prepare it and then I had to come back and they gave this to me. If you note in the upper right corner on that first page they have this TD Bank number there, I don't know who -- what that number is but this is not a document that I created, this is the bank's document.

Q And did you check it for accuracy?

A No, the bank gave it to me. You asked me to get -- you asked me to get the records, I went to the bank and I got them and this is what I got. In fact if you look at my response, my response to which this was attached, my response was dated February 27th and this printout the last date on it is February 27th so I was responding to your subpoena.

I went to the bank, I got -- they gave me this, I drafted my response to you and I sent it to you.

¹³ The entry at issue, the deposit of a \$325 check, was part of the January 27, 2012, deposit of multiple checks totaling \$10,265. Tr. 441-43; *see* DX 20 at 172, 175 (\$10,265 deposit slip), 178 (\$325 check). It is the \$10,625 deposit that is reflected on DX 26B at 4.

....

Q Would you tell me what about the document that appears at Disciplinary Exhibit 26 B at page 4, you would have alerted someone that this is a document written by TD Bank?

A I mean it looks like a bank document to me. It's not a document that I would have created. I don't have the software or anything like this to create and I wouldn't have any need. I did not create this document, I did not, I got this from the bank.

Q Is there anything on this document that indicates that? Is there anything that identifies it as a TD Bank document?

A I'm looking at this document. I don't see anything on the face of it that would indicate that but again, I did not create this document.

Q And you also did not check it?

A I got it from the bank. You asked me -- I did not check it for accuracy, I got a printout from the bank of the transactions on my account for the year long period that you asked and I produced it, so this is what it is, yep.

Q And so that's not what disciplinary counsel's subpoena asked for. What did you tell the bank you needed?

A I'm sorry?

Q Disciplinary counsel didn't ask for a printout of a year-long printout of the bank[']s transactions. We asked for some very specific kinds of things in order to be able to track the funds.

What did you ask TD Bank for that resulted in this document?

A I asked TD Bank for a statement of my accounts for the period -- for my IOLTA account for the period 11/1/2011 through whatever your subpoena was but I think the only transaction during that period ended at 10/29/2012, so that's what they gave me and that's what I produced to you.

Tr. 453-54, 461-63; *see also* Tr. 467 (referring to DX 26B as "the chart that the bank gave me"); 471-72 ("I wanted to do what I could to comply [with Disciplinary Counsel's subpoena] so I went to the bank, I got the information I could get and

that's what [Disciplinary Counsel] got."); 604 (confirming that DX 26B was produced by TD Bank).

When examined by his counsel later that same day, Respondent repeated that DX 26B had been prepared by TD Bank, noting that TD Bank had included the information from the "remarks" line of each check:

Q Is [DX 26B] the document that you referred to that you received from the bank?

A Yes, I got this bank -- I got this document on the 27th it says it on the upper-left corner, 2/27/13 and that's the same day that I responded to the subpoena.

Q In your mind, why were you requesting this information from the bank?

A Because I was asked to by bar counsel.

Q And did you believe this was responsive to the bar counsel's request?

A Yes I mean it shows all the transactions that were in the account. It shows who the -- who it shows the descriptions that were included in the account, in the transactions, and they even put the remark lines -- they put the information in the remark lines on it, so it was very helpful.

Tr. 604-05.

Later, on October 2, 2018, during direct examination in his defense case, Respondent responded to testimony from Disciplinary Counsel's expert that DX 26B had been prepared using Quicken:

And so what you see is that letter that I got from the bank from January 7th, I had to grab -- I had that already, and then I ran to the bank to get the printout that was dated February 27, the day I turned it over. I know Mr. Anderson is testifying that [DX 26B is] a Quicken document, but I don't have Quicken, I didn't pay anybody to do

Quicken. I went to the bank, and this -- that's what they printed out for me.

Tr. 1032.

During his closing argument almost two months later, Respondent continued to assert that DX 26B was a TD Bank document:

with regard to the document that I provided, in the effort to cooperate with Bar Counsel's investigation, I maintain that I believe, and I had no reason to dispute myself that that was a document that I got from the bank.

Tr. 1249. We recognize that Respondent's statement during closing argument is not testimony, but his continued adherence to this false narrative over several months of testimony and again in his closing argument is evidence that these false statements were made intentionally, and were not the result of a momentary memory lapse or a slip of the tongue. Respondent repeatedly and intentionally sought to mislead the Hearing Committee as to the origin of DX 26B.

C. Sanctions Imposed for Comparable Misconduct

The sanctions for Rule 1.15(a) recordkeeping violations fall on the low end of the range of available sanctions. *See, e.g., In re Harris-Lindsey*, 242 A.3d 613 (D.C. 2020) (informal admonition for failure to maintain records); Order, *In re Klass*, Board Docket No. 13-BD-041, at 1-3, 5 (BPR 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, 536 (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”); *In re Millstein*, 855 A.2d 1137, 1137-38 (D.C. 2004) (per curiam) (public censure for, *inter alia*, failing to maintain complete financial records).

Isolated failures to competently represent a client, like that here, have also resulted in relatively minor sanctions. *See In re Nwadike*, 905 A.2d 221, 232 (D.C. 2006) (informal admonition for a single failure to serve client with skill and care, where there were significant mitigating circumstances); *In re Shelnut*, 719 A.2d 96, 96-97 (D.C. 1998) (per curiam) (public censure for failure to serve client with skill and care, failure to act with reasonable promptness, and failure to explain matters to a client).

The failure to respond to Disciplinary Counsel’s investigative inquiries has resulted in relatively brief suspensions. *See, e.g., In re Pullings*, 724 A.2d 600, 600-01, 602 (D.C. 1999) (per curiam) (including appended Board Report) (sixty-day suspension stayed for one year of probation with conditions for failing to respond to Disciplinary Counsel’s inquiries and Board orders in two disciplinary matters, and other misconduct); *see also In re Godette*, 959 A.2d 61, 63 (D.C. 2008) (thirty-day suspension, plus six hours of CLE courses, and a requirement to file response to disciplinary complaint within ninety days or be subject to fitness requirement upon any reinstatement); *In re Cooper*, 936 A.2d 832, 833-36 (D.C. 2007) (per curiam) (thirty-day suspension with fitness requirement and proof of compliance with

Disciplinary Counsel's subpoena where respondent failed to respond to inquiries and subpoena regarding discrepancies in his IOLTA account); *In re Scanlon*, 865 A.2d 534, 534-35 (D.C. 2005) (per curiam) (thirty-day suspension with reinstatement conditioned on filing response to disciplinary complaint and completion of six hours of CLE courses where respondent violated Rules 8.1(b), 8.4(d) and D.C. Bar R. XI, § 2(b)(3)); *In re Steinberg*, 761 A.2d 279, 280, 284 (D.C. 2000) (per curiam) (including appended Board Report) (thirty-day suspension where respondent had prior disciplinary history and exhibited extreme delay in responding to Disciplinary Counsel's requests in two separate matters). Respondent's misconduct here is not as serious as in the cases cited above, because he did in fact respond to Disciplinary Counsel, and he corresponded repeatedly during the course of the investigation. However, as discussed above, his failure to lodge a privilege objection or otherwise inform Disciplinary Counsel that he was withholding responsive documents seriously interfered with Disciplinary Counsel's investigation.

While the misconduct underlying each of the Rule violations is relatively minor and is misconduct for which the appropriate sanction generally falls on the low end of the range, here Respondent also gave protracted intentionally false testimony to the Hearing Committee, which is a serious aggravating factor. *See In re Cleaver-Bascombe*, 892 A.2d 396, 411-13 (D.C. 2006).

The two cases involving the most comparable conduct to that here counsel in favor of a suspension between thirty and sixty days in length. The respondent in *In re Chapman* neglected to conduct discovery in his client's employment

discrimination case, resulting in its dismissal, and the hearing committee found the respondent to be “non-credible” during the hearing, although there was no finding of intentionally dishonest hearing testimony, nor any support for such a finding. *See* 962 A.2d 922, 924-926 (D.C. 2009). The Court held that the respondent’s deliberate dishonesty to disciplinary counsel during its investigation and his lack of remorse for the harm he caused his client were aggravating factors that justified a suspension greater than the thirty days recommended by the Board. It therefore imposed a sixty-day suspension with thirty days stayed in favor of a one-year probation with conditions. *See id.* at 927.

In re Wilson involved conflict of interest, competency and other violations that prejudiced the client. 241 A.3d 309, 312 (D.C. 2020) (per curiam). While there was no evidence of self-interest or underlying dishonesty, and while the respondent had handled a related matter skillfully, he had not fully acknowledged his wrongful conduct at the time of the hearing committee report, had received an informal admonition twenty years earlier, and testified falsely during the disciplinary hearing. The Court found that respondent’s intentionally false testimony was a significantly aggravating factor and, based on the totality of factors, imposed a thirty-day suspension. *Id.* at 312-14.

Here, Respondent’s misconduct was arguably less serious and prejudicial to his client than the neglect in *Chapman*, but Respondent engaged in multiple Rule violations in two separate counts and, as in *Wilson*, he gave intentionally false testimony during the disciplinary hearing.

After considering the totality of the sanction factors discussed above, including the relatively minor nature of the misconduct underlying the Rule violations, and the protracted intentionally false testimony to the Hearing Committee, and recognizing that general deterrence is one of the purposes for imposing a disciplinary sanction, we recommend that the Court suspend Respondent from the practice of law for thirty days.

CONCLUSION

For the foregoing reasons, the Board recommends that the Court conclude that Disciplinary Counsel has proven by clear and convincing evidence that Respondent violated Rules 1.1(a), 1.1(b), 1.15(a) (recordkeeping) and 8.4(d), that he gave protracted false testimony to the Hearing Committee and should be suspended for a period of thirty days.¹⁴ We further recommend that Respondent's attention be directed to the requirements of D.C. Bar R. XI, § 14, and their effect on eligibility for reinstatement. *See* D.C. Bar R. XI, § 16(c).

BOARD ON PROFESSIONAL RESPONSIBILITY

By: 

Elissa J. Preheim

This matter was decided during the 2021-22 Board term. All Members of the Board concur in this Report and Recommendation.

¹⁴ Disciplinary Counsel argued to the Hearing Committee that Respondent's reinstatement to practice should be conditioned on Respondent providing Disciplinary Counsel with his records of his handling of entrusted funds. *See* ODC Br. to HC at 54-55; ODC Reply Br. to HC at 18-19. Disciplinary Counsel does not ask the Board to impose this reinstatement condition, perhaps because Disciplinary Counsel asserts that Respondent is no longer engaging in the practice of law. *See* ODC Br. at 49. As Disciplinary Counsel seems to have abandoned this proposed reinstatement condition, we do not consider it.