DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of CYNTHIA S. MALYSZEK, Respondent. Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 396875)	Board Docket Nos. 13-BD-102 & 14-BD-098 Bar Docket Nos. 2009-D334, 2007-D101, & 2014-D010

REPORT AND RECOMMENDATION OF THE
BOARD ON PROFESSIONAL RESPONSIBILITY

Disciplinary Counsel [1] charged Respondent, Cynthia S. Malyszek, Esquire, with twenty-seven violations of multiple District of Columbia Rules of Professional Conduct ("Rules"), arising out three client matters: Fortune, Silver, and Mills. The Board, having reviewed the record and the briefs of the parties, concurs with the Hearing Committee's factual findings as supported by substantial evidence in the record, with its conclusions of law as supported by clear and convincing evidence, including the conclusion that the Respondent engaged in reckless or intentional misappropriation in the Mills matter, and with its recommendation that Respondent be disbarred. We adopt and incorporate by

[1] The petitions were filed by the Office of the Bar Counsel. The District of Columbia Court of Appeals changed the title of "Bar Counsel" to "Disciplinary Counsel," effective December 19, 2015. We use the current title in this Report and Recommendation.

reference the Hearing Committee Report and Recommendation ("H.C. Rpt.") attached hereto, and summarize the key facts and legal conclusions below.

I. Procedural Background

Disciplinary Counsel first charged Respondent with violations arising out of the Fortune and Silver matters. The Hearing Committee started a hearing in April 2014, but, due to an unfortunate accident suffered by Respondent's counsel, the hearing had to be continued. In July 2014, Respondent terminated her counsel and simply stopped meaningfully participating in the hearing process. Instead, she filed a number of requests to postpone or reschedule hearings. These filings were generally last-minute and untimely. Despite requests for some evidentiary support from the Hearing Committee, Respondent consistently chose not to substantiate her statements that she repeatedly needed to reschedule hearings at the last minute. Nonetheless, the Hearing Committee granted the extensions.

In November 2014, Disciplinary Counsel filed a second specification of charges against Respondent, arising out of the Mills matter. It alleged that she misappropriated client funds, among other charges. The Board consolidated the two cases, and the hearing was scheduled for March 24-25, 2015. Respondent agreed to the hearing dates. On the eve of the hearing, Respondent sought another extension, which was denied. Respondent did not appear at the March 2015 hearing.

When the Hearing Committee recommended disbarment, Respondent filed an exception.[2] Before the Board, Disciplinary Counsel argues that Respondent has

waived her ability to participate in the disciplinary process because she failed to participate in the Mills case and failed to file a brief with the Hearing Committee addressing any of the charges against her.[3] Respondent did not file a post-hearing brief with the Hearing Committee as such, and instead filed Respondent's Objections and Discussion, a Notice and Motion for New Committee, and an unsworn Declaration.

II. Misappropriation

The Hearing Committee concluded that Respondent engaged in at least reckless misappropriation, and, for that reason, recommended disbarment. H.C. Rpt. at 60-62.

Respondent's filings before this Board have been cursory, to say the least, and did not address the Hearing Committee's conclusion that Respondent engaged in reckless or intentional misappropriation other than to assert that "no proper accounting was done of the banking statements or accounting records. It is all based on improper conclusions."[4] There is no merit to this argument.[5]

---

[2] Less than a week before the Board oral argument on her exceptions, Respondent again filed an untimely and unsubstantiated request to postpone the oral argument and participate in the rescheduled argument by video. The Board denied the request for a continuance, but granted permission for Respondent to appear by video on the previously scheduled date. She did not appear at the oral argument, in person or by video.

[3] Disciplinary Counsel's Brief ("ODC Br.") at 13-16.

[4] Respondent Objection and Response to the Report and Recommendation of the Ad Hoc Hearing Committee ("Respodent's Br.") at 6.

[5] Respondent repeats arguments made in her Objections and Discussion and her Notice and Motion for New Committee. The Hearing Committee properly rejected those arguments, and we

The well-reasoned and detailed Hearing Committee report found Respondent had committed misappropriation when (without the client's consent) she withdrew advance fee payments before she had earned them, and thus withdrew funds that should have been held in trust for the client. H.C. Rpt. at 60; *see In re Edwards*, 990 A.2d 501, 518 (D.C. 2010) (appending Board Report) (misappropriation occurs where "the balance in the attorney's . . . account falls below the amount due to the client"); Rule 1.15(e) ("Advances of unearned fees and unincurred costs shall be treated as property of the client pursuant to paragraph (a) until earned or incurred unless the client gives informed consent to a different arrangement.").

Once Respondent is found to have engaged in misappropriation, the sanction depends on whether the misappropriation was reckless or intentional, or merely negligent. If it was reckless or intentional, then the presumptive sanction is disbarment. *In re Addams*, 579 A.2d 190, 191 (D.C. 1990) (en banc). The Hearing Committee determined that Respondent was at least reckless. H.C. Rpt. at 61. She did not put the client funds in an escrow account. *Id.* at 60. She did not have an IOLTA account with an "approved depository" within the meaning of Rule 1.15(b). *Id.* at 57. She appears to have had no controls in place to safeguard client funds; she merely placed the money that her firm received in a general operating account. *Id.* at 60. These facts, and others, were the basis of the Hearing

---

adopt its reasoning. We also agree with the Hearing Committee that Respondent's Motion for New Committee be denied. H.C. Rpt. at 67-75.

Committee's determination. *Id.* at 61-62. We agree with this conclusion. Because the misappropriation was at least reckless, we agree that the sanction should be disbarment.

III. Delay and Waiver

This case has languished in the disciplinary system far longer than is ideal, particularly where the misconduct that warrants disbarment—misappropriation—was largely a matter of straightforward math under *Edwards*.

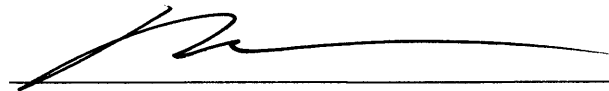
The Hearing Committee granted continuances as Respondent requested them. If a Respondent requests more than one continuance based on a factual representation about a conflicting obligation, a medical necessity, or something similar, it would be appropriate for the Hearing Committee to condition further extensions on an evidentiary showing. Without such a practice, a lawyer could delay the imposition of discipline far longer than would be necessary to comport with due process. This is particularly true when a respondent has a pattern of using such delay tactics. There is a line between appropriately accommodating a respondent's schedule and allowing abuse. Where that line lies turns on questions of fact, hearing committees should not be shy about demanding evidence when they are asked to repeatedly reschedule hearings or other dates.

Disciplinary Counsel argues that one remedy for the delay in this case, at least at the Board level, is for this Board to find that a respondent waives any argument not made to a hearing committee. ODC Br. at 13-16. There is no clear

authority that supports the proposition that a failure to raise an issue before a hearing committee waives a respondent's right to raise that issue before this Board. In *In re Fay,* the Court agreed with the Board that the respondent waived an argument that he did not first make to the hearing committee. 111 A.3d 1025, 1032 (D.C. 2015) (per curiam). However, the Court then addressed the merits of the respondent's argument, suggesting that the waiver discussion was dicta. *Id.* Disciplinary Counsel has raised compelling reasons why such a rule would be appropriate and would streamline the resolution of disciplinary proceedings. However, we do not believe the Court has yet explicitly given the Board the power to adopt the waiver doctrine advanced by Disciplinary Counsel. In light of our obligation to make a determination that the Hearing Committee's Report is supported by substantial evidence, it is not clear how the waiver doctrine suggested by Disciplinary Counsel would function where, as here, Respondent makes arguments to the Board. Thus, while we appreciate the policy concerns behind the arguments of Disciplinary Counsel, absent further guidance from the Court, we decline to conclude that a respondent's arguments to the Board are limited to those made to the hearing committee. Accordingly, we have addressed the merits of Respondent's arguments above.

For the reasons set forth above and in the Hearing Committee report which is attached hereto and incorporated by reference herein, we recommend Respondent be disbarred. Respondent's attention should be drawn 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); *In re Slosberg*, 650 A.2d 1329, 1331-32 (D.C. 1994).

BOARD ON PROFESSIONAL RESPONSIBILITY

By: 

Matthew G. Kaiser

Dated: JUN 16 2017

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

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

In the Matter of CYNTHIA S. MALYSZEK, Respondent. Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 396875)	:	Board Docket No. 13-BD-102 & 14-BD-098 Bar Docket Nos. 2009-D334, 2007-D101, & 2014-D010

REPORT AND RECOMMENDATION
OF AD HOC HEARING COMMITTEE

Respondent, Cynthia S. Malyszek ("Respondent"), is charged with violating multiple rules of the District of Columbia Rules of Professional Conduct (the "Rules") in consolidated disciplinary matters arising from her representation of three separate clients in three unrelated government contract matters. Specifically, Disciplinary Counsel[1] alleges Respondent violated Rules 1.1, 1.3(a), 1.3(b)(1), 1.3(c), 1.4(a), 1.5(b), 1.15(a), 1.15(b) (pre-February 1, 2007 conduct)[2], 1.15(c) (post-February 1, 2007 conduct), 1.16(d), 5.1, 5.3(a), 5.3(b), 5.3(c), 5.5(b), and 7.5. The Hearing Committee finds clear and convincing evidence that Respondent violated several of these rules, including that Respondent committed, at minimum, reckless misappropriation. The Hearing Committee recommends that Respondent be disbarred.

[1] The petition was filed by the Office of Bar Counsel. The District of Columbia Court of Appeals changed the title of Bar Counsel to Disciplinary Counsel, effective December 19, 2015. We use the current title in this Report and Recommendation.

[2] Effective February 1, 2007, Rule 1.15(b) was renumbered as Rule 1.15(c).

I. PROCEDURAL HISTORY

The procedural background is set forth below at length for purposes of assessing Respondent's post-hearing motions.

A. Specification of Charges Relating to Fortune and Silver Matters

The Office of Disciplinary Counsel ("Disciplinary Counsel") served on Respondent a Specification of Charges in Bar Docket Nos. 2009-D334 and 2007-D101.[3] It alleged that Respondent violated Rules 1.1 (failure to act with competence, and skill, and care); 1.3(a) (failure to act with zeal and diligence); 1.3(b)(1) (intentional failure to seek objectives of the client); 1.3(c) (failure to act with reasonable promptness); 1.4(a) (failure to keep client reasonably informed and promptly comply with reasonable requests for information); 1.5(b) (failure to communicate in writing the basis or rate of the fee); 1.15(b) (pre-February 1, 2007) or 1.15(c)[4] (post-February 1, 2007) (failure to promptly render a full accounting)[5]; 1.16(d) (failure to refund unearned fees and surrender papers and property following termination of

[3] On December 5, 2012, a private process server served Robert Malyszek, Respondent's brother, with Disciplinary Counsel's Petition and Specification of Charges at the law office of Malyszek & Malyszek in Westlake Village, California. On December 20, 2013, Respondent's counsel, Robert N. Levin, Esquire, agreed to accept service on behalf of Respondent and requested an additional twenty days to file an Answer, to which Disciplinary Counsel consented. On December 23, 2013, Disciplinary Counsel served Respondent's counsel with its Petition and Specification of Charges via FedEx delivery to Mr. Levin's law office. *See* BX C.

[4] The Amended Specification of Charges included an apparent typographical error, charging that Respondent violated "Rule 1.15(b) (pre-February 1, 2007) or 1.5(c) (post-February 1, 2007) in that following a request by a client through his representatives, she failed to promptly render a full accounting regarding funds she had received from the client." It is clear from the context that Disciplinary Counsel intended to Charge Rules 1.15(b) and 1.15(c), as argued in its brief. Respondent never raised any objection. Accordingly, we construe the "Rule 1.5(c)" charge as a 1.15(c) charge herein.

[5] Disciplinary Counsel originally cited Rule 1.15(a) but corrected it to Rule 1.15(b) (pre-February 1, 2007) or 1.15(c) (post-February 1, 2007) in the Amended Specification of Charges. As noted above, the Amended Specification of Charges mistakenly refers to Rule 1.5(c) instead of Rule 1.15(c). *See supra* note 4.

representation); 5.3(b) (failure to make reasonable efforts to ensure a nonlawyer's conduct complies with the Rules[6]); 5.3(c) (failure to take reasonable steps to avoid or mitigate nonlawyer's misconduct[7]); 5.5(b) (assisting in the unauthorized practice of law); and 7.5 (misleading communication in firm name and letterhead in violation of Rule 7.1). Following two consent motions to extend the time to respond, Respondent timely filed an Answer to the Specification of Charges on March 27, 2014.

At a pre-hearing conference on March 28, 2014, a hearing was set for April 29 and 30, 2014. 3/28/14 Order. Disciplinary Counsel filed an Amended Specification of Charges on April 2, 2014, clarifying which charges were based upon the pre-February 2007 version of the Rules and which were based on the post-February 2007 amended Rules. On April 8, 2014, Respondent filed an Answer to the Amended Specification of Charges, which incorporated by reference her March 27, 2014 Answer.

1. April 29 and 30, 2014 Hearing

The hearing commenced on April 29 and 30, 2014, before an Ad Hoc Hearing Committee ("Hearing Committee") of Elissa J. Preheim, Esquire, Chair ("Chair"); Hal Kassoff; and Wallace A. Christensen, Esquire. Assistant Disciplinary Counsel Hamilton P. Fox, III, Esquire, represented Disciplinary Counsel during the hearing. Robert N. Levin, Esquire, represented Respondent, who was present. Disciplinary Counsel called three witnesses: Judith Silver, Barry Smith, and David Eversz. Respondent called one witness, Respondent's brother and nonlawyer employee, Robert Malyszek.

---

[6] Specifically relating to Rules 1.1, 1.3(a), 1.3(b)(1), 1.3(c), and 1.4(a).

[7] Specifically relating to Rules 1.1, 1.3(a), 1.3(b)(1), 1.3(c), and 1.4(a), 1.15(a), and 1.16(d). The reference to Rule 1.15(a) appears to be a typographical error, which we construe as a reference to Rules 1.15(b) and 1.15(c) as reflected elsewhere in the Amended Specification of Charges. Respondent never raised any objection to this apparent error. *See supra* note 4.

After the lunch break on April 30, 2014, Respondent's counsel advised the Hearing Committee that he was unable to participate further in the hearing because of an injury he sustained from a fall earlier that morning. Tr. 472[8]; *see also* 5/21/14 Letter from R. Levin to E. Branda, Bd. on Prof'l Responsibility at 1. Disciplinary Counsel had rested, and Respondent was the only remaining witness to be called in her case. *See* 4/11/14 Resp't Witness List at 1. The parties estimated that the case could be completed in one day, Tr. 479, and the Hearing Committee postponed the conclusion of the hearing until a later date. Tr. 472, 478-79.

Following a pre-hearing conference on June 19, 2014, the Hearing Committee scheduled the conclusion of the hearing for July 8 and 9, 2014. 6/19/14 Prehr'g Tr. 12-13. The Hearing Committee's Order provided that any continuance motion be made in writing seven days before the hearing date and would be granted only for good cause shown. 6/20/14 Order at 2.

2. July 8, 2014 Resumption of Hearing

The hearing resumed on July 8, 2014, and Respondent did not appear. Counsel for Respondent represented that the parties had attempted a negotiated discipline and that Respondent therefore had not traveled from California to attend the hearing, but because Respondent had not returned executed documents by the stated deadline, there was no negotiated discipline agreement. Tr. 501-08. The hearing proceeded with Disciplinary Counsel's rebuttal case, during which Disciplinary Counsel called rebuttal witnesses Angela Thornton and Julia Porter. Disciplinary Counsel's exhibits[9] BX A-D and BX 1-60 were admitted into evidence, as were Respondent's exhibits RX 1-34. Tr. 539-40.

[8] References to the April 29-30, 2014 and July 8, 2014 hearing transcript are cited as "Tr. __." References to the March 24, 2015 hearing transcript are cited as "3/24/15 Hr'g Tr. __."

[9] References to Disciplinary Counsel's exhibits are cited as "BX __." References to Respondent's exhibits are cited as "RX __."

After Disciplinary Counsel's rebuttal case, the Hearing Committee asked that Respondent's counsel contact Respondent to ascertain if she would appear the next day, July 9, 2014, scheduled as the second day of the hearing. Tr. 540-41. Respondent's counsel reported that she could not afford the trip from California to attend the next day, but that she asked that she be allowed to testify sometime in August. *Id*. at 542. Over Disciplinary Counsel's objection, the Hearing Committee continued the hearing to August 5, 2014. *Id*. at 542-44. The Hearing Committee issued an Order on July 11, 2014, confirming the August 5, 2014 hearing date. 7/11/14 Order.

In a motion dated July 10, 2014, but not received until after the Hearing Committee issued its July 11 Order, Respondent's counsel moved to withdraw. The consent motion, signed by Respondent, stated that "Respondent had been advised . . . of the scheduled hearing in this matter set for August 5, 2014." 7/11/14 Consent Mot. to Withdraw as Counsel at 1. Counsel for Respondent filed a Supplemental Memorandum on July 23, 2014, which Respondent signed, affirming that she had dismissed her counsel and was interviewing successor counsel. Disciplinary Counsel did not object to the motion to withdraw. The Hearing Committee granted the motion to withdraw on July 23, 2014, in an Order that reiterated that the August 5, 2014 hearing would proceed as scheduled.

On July 25, 2014, Respondent filed a *pro se* motion to continue the August 5 hearing for "a minimum of 6 week[s]" so she could retain new counsel. 7/25/14 Resp't Mot. at 1-2 ¶ 7. On August 1, 2014, and over Disciplinary Counsel's objection, the Hearing Committee granted in part Respondent's motion, and converted the August 5 hearing to a status conference. 8/1/14 Order. During that August 5 status conference, Respondent represented that she was "in the midst" of retaining counsel and hoped to finalize retention within two weeks. Accordingly, the

Hearing Committee scheduled a telephonic prehearing conference for two weeks later, on August 19, 2014. 8/5/14 Prehr'g Tr. 26-27; 8/5/14 Order. The Hearing Committee Chair emphasized "that the expectation is that the retention will be finalized in two weeks and that we will go forward with the scheduling." 8/5/14 Prehr'g Tr. 32. Prior to adjourning, the Hearing Committee Chair twice asked if there were any other matters to discuss. *Id*. at 31-32. Respondent did not raise any additional issues.

The Hearing Committee held the telephonic prehearing conference on August 19, 2014, during which Respondent represented that she was "close" to retaining new counsel. 8/19/14[10] Prehr'g Tr. 38-39. The Hearing Committee set the final day of hearing for September 30, 2014. 8/19/14 Prehr'g Tr. 41; 8/22/14 Order. It again required that any motion for continuance be made in writing seven days before the scheduled hearing and would be granted only for good cause shown. 8/22/14 Order. During the conference, Respondent did not raise any concerns other than to note that Robert Levin's "accident . . . and . . . intervening circumstances . . . caused a lot of changes to the schedule." 8/19/14 Prehr'g Tr. 44-46.

On Monday, September 29, 2014, the day before the scheduled hearing, the Hearing Committee received from Respondent an untimely Notice of Inability to Appear and Motion for Continuance of Hearing Date.[11] In her motion, Respondent represented that she could not appear at the hearing because she was the primary caregiver to her mother who required 24-hour care. 9/26/14 Resp't Mot. for Continuance at 1. Respondent also stated that she had been unable to retain counsel and requested "an additional 6 week continuance." *Id*. at 2. That same day, the Hearing Committee denied Respondent's motion for continuance in part, rescheduled the hearing

[10] The Transcript is erroneously dated August 14, 2014.

[11] Respondent's Motion, dated Friday, September 26, 2014, was sent by overnight service.

for October 3, 2014 and directed the Office of the Executive Attorney to identify a facility in California where Respondent might appear by video-conference. 9/29/14 Order. The next day, the Hearing Committee directed Respondent to participate by video-conference at a specified facility in Encino, California, on October 3, 2014, if she could not appear in person in Washington, D.C. 9/30/14 Order.[12]

On October 2, 2014, Respondent filed electronically a Notice of Objections of Hearing Due to Prejudice and Motion for Continuance of Hearing Date and for Leave to File via Electronic Mail, representing that it was impossible for her to appear by videoconference in Encino, California, on October 3, 2014 due to her caregiving constraints. 10/2/14 Letter from Resp't to E. Branda, Bd. on Prof'l Responsibility, attaching Resp't Notice of Obj. and Mot. for Continuance. Respondent also asserted that she "was not represented properly by [her] previous attorney" but did not provide any specifics other than that he was unable to complete the hearing on April 29 due to his injury. 10/2/14 Resp't Notice of Obj. and Mot. for Continuance at 2.

The Hearing Committee converted the October 3 hearing into a telephonic pre-hearing conference, at which time Respondent represented that, three months after her counsel's motion to withdraw, she was still trying to retain new counsel. 10/3/14 Prehr'g Tr. 565. Respondent requested a continuance until December 3, 2014 and represented that if she did not have an attorney by that time, she would testify without one. *Id.* Over Disciplinary Counsel's objection, the Hearing Committee continued the hearing until November 18, 2014. *Id.* at 569; 10/6/14 Order.

[12] The video-conference facility is approximately 20 miles from Respondent's primary address on file with the D.C. Bar, her office in Westlake Village, California.

On November 14, 2014, the Hearing Committee convened a status conference and advised that one of the Hearing Committee members was unable to attend the scheduled November 18 hearing. Pursuant to Board Rule 7.12 (Quorums for Hearings), in response to the Chair's inquiry, both parties consented to proceeding with two members present at the hearing. 11/14/14 Prehr'g Tr. 52-53. By letter dated that same day, but received on November 17, 2014, Respondent stated she was "reneging [her] consent to have one committee member absent at the hearing." 11/14/14 Letter from Resp't to E. Branda, Bd. on Prof'l Responsibility.

The Hearing Committee held a status conference on November 17, 2014 and determined not to proceed with the November 18 hearing with only two members present. 11/17/14 Prehr'g Tr. 68-72.

B. Second Specification of Charges Relating to Mills Matter

On November 17, 2014, Disciplinary Counsel served on Respondent a new, four-page Specification of Charges, Bar Docket No. 2014-D010, which had been filed with the Board on Professional Responsibility ("Board") the previous week. 11/17/14 Prehr'g Tr. 68-71; *see also* 12/24/14 BC Opp'n to Mot. Ext. Time at 2. This new specification alleged that Respondent violated Rules 1.15(a) (commingling entrusted funds in an operating account and intentionally or recklessly misappropriated entrusted funds); 1.15(b) (depositing entrusted funds into a bank that is not an approved depository); 1.16(d) (failing to take timely steps to refund unearned fees at termination of representation); 5.1 (failing to ensure other firm lawyers conform to Rules); and 5.3 (failure to supervise nonlawyers). BX E at ¶ 18.

On November 26, 2014, the Board issued an order to show cause why the latest Specification of Charges should not be consolidated into the Respondent's ongoing disciplinary proceedings before the Hearing Committee. Disciplinary Counsel indicated no objection and

Respondent did not respond. The two disciplinary matters were consolidated on December 22, 2014. 12/22/14 Order.

By motion dated December 5, 2014 but not received until December 22, 2014,[13] Respondent requested a 45-day extension of time, until January 23, 2015, to answer the new Specification of Charges. 12/22/14 Mot. Extension of Time to Answer New Specification of Charges. The Hearing Committee denied Respondent's motion, ordered her to answer the new Specification of Charges by January 9, 2015, and scheduled a telephonic prehearing conference. 12/31/14 Order. Respondent filed her Answer via electronic mail on January 9, 2015.

At the January 16, 2015, telephonic prehearing conference, which Respondent attended, the Hearing Committee set March 24 and 25, 2015, to conclude the hearing on the first Specification of Charges and to conduct a hearing on the new Specification of Charges. 1/16/15 Prehr'g Tr. 85-87. Its subsequent Order confirmed the hearing dates and set deadlines for the parties to serve witness lists, exhibits, objections to exhibits, and motions for remote testimony. 1/22/15 Order. The Order also provided that any motion for continuance must be filed in writing seven days in advance and would be granted only for good cause shown. *Id*. at 2-3.

Respondent did not file any witness list, exhibits, objections to Disciplinary Counsel's exhibits, or motions for remote testimony. 3/24/15 Hr'g Tr. 96-97, 122-23.

On or about 5:00 p.m. on Friday, March 20, 2015, the Hearing Committee received from Respondent a "Notice and Motion" representing that Respondent was "not presently able to leave or travel" due to the development of a "very serious medical condition to the person to whom [she was a] caregiver." That evening, the Hearing Committee treated Respondent's

[13] The motion listed two dates: "[d]ated: December 5, 2014" and "[r]esent December 18, 2014." The Office of the Executive Attorney returned the original motion, as it was improperly filed pursuant to Board Rule 19.2.

"Notice and Motion" as a motion to continue the Tuesday, March 24 hearing date, and denied the motion on grounds that Respondent had not shown good cause. 3/20/15 Order. The Order noted that "Respondent has offered no evidence to support her contention that she was prepared to attend the hearing, or that she is now unable to travel due to another person's illness." *Id.* at 1. The Order directed the Office of the Executive Attorney to serve a copy of the order by email and ordered that the hearing would proceed as scheduled on March 24 and 25, 2015. *Id.* at 2. Respondent did not move for reconsideration or otherwise offer supporting evidence that the March 20 Order expressly noted was lacking.

C. Conclusion of Hearing on March 24, 2015 and Post-Hearing Proceedings

Respondent did not appear at the scheduled March 24, 2015 hearing. 3/24/15 Hr'g Tr. 95. Disciplinary Counsel presented the testimony of one witness, Tez Mills, with respect to the new Specification of Charges, and Disciplinary Counsel's exhibits BX E-G and 61-75 were admitted into evidence. The Hearing Committee closed the record and concluded the hearing. 3/24/15 Hr'g Tr. 128, 131.

The Hearing Committee directed the parties to file proposed findings of fact and conclusions of law, and set a schedule for the post-hearing briefing. 3/27/15 Order. Disciplinary Counsel timely filed its Post-Hearing Brief ("BC Br.") on April 13, 2015, and Respondent's response was due on May 4, 2015. *Id.* By motion dated May 1, 2015, Respondent filed a motion seeking a 30-day extension to file her post-hearing brief, claiming prejudice from not having received the hearing transcript until April 21, 2015. 5/1/15 Resp't Notice and Mot. for Extension of Time. Respondent's filing acknowledged that Disciplinary Counsel had emailed to her his April 13 post-hearing brief, which cited to the hearing transcript. The Hearing Committee granted Respondent's motion in part and afforded her until May 14, 2015, to file a post-hearing

brief, providing that it "will not grant any further extensions of the briefing schedule absent extraordinary circumstances." 5/6/15 Order. Respondent did not file a post-hearing brief.

On May 14, 2015, Respondent emailed a Notice and Motion for New [Hearing] Committee ("Resp't Mot."), objections to the proceedings ("Resp't Obj."), and an unsworn "Declaration" ("Resp't Decl.").[14] In her motion, Respondent alleged, *inter alia*, that she had been prejudiced by (i) her prior counsel's neglect and missteps "due to his health and memory problems" (Resp't Mot. ¶¶ 1-5, 8, 16-17; Resp't Obj. ¶ 1(a)-(c)); (ii) the lack of desired representation (Resp't Mot ¶ 7; Resp't Obj. ¶ 1(d)); (iii) the lack of due process and notice (Resp't Mot. ¶ 6; Resp't Obj. ¶ 3); (iv) the "actions and inactions of the D.C. Bar" and Disciplinary Counsel (Resp't Mot. ¶¶ 9-14; Resp't Obj. ¶ 4(a)-(e)); (v) the improper response from the Hearing Committee (Resp't Mot. ¶ 15; Resp't Obj. ¶ 2); and (vi) "the confines of medical care giving" (Resp't Mot. ¶¶ 15, 17). Disciplinary Counsel filed its opposition on May 20, 2015. 5/20/15 BC Opp'n.

Notwithstanding that Respondent's filings did not comply with the filing requirements under Board Rule 19.2 (Filing), the Hearing Committee determined to take her filings, and Disciplinary Counsel's opposition thereto, under advisement and address them in its Report and Recommendation. 6/1/15 Order.

D. Order Directing Production of Documents Retrieved by a Forensic IT Specialist

Prior to adjourning the hearing on April 30, 2014, and in response to Robert Malyszek's testimony regarding the production of documents (*see infra* FF 48), the Hearing Committee directed Respondent to produce before May 7, 2014 any and all new documents retrieved from

[14] Of the documents Respondent emailed on May 14, 2015, two (Respondent's Motion and unsworn Declaration) were dated May 4, 2015 and a third (Objections) was dated May 11, 2015.

Respondent's reportedly corrupted computer hard drives by the forensic IT specialist that Mr. Malyszek testified had been retained. Tr. 473-76. Respondent provided no documents or update by the May 7, 2014 deadline. On May 21, 2014, counsel for Respondent sent a letter to the Board indicating that due to his fall, he had no recollection of the May 7 due date, but noted his "client . . . retained an IT firm to go over all of the old computers [sic] hard drives that she could assemble from her years of practice" and "[s]ome documents not previously produced to Disciplinary Counsel have been recovered and . . . forwarded" to Disciplinary Counsel. 5/21/14 Letter from R. Levin to E. Branda, Bd. on Prof'l Responsibility at 1.

During the June 19, 2014 prehearing conference, when asked about the status of producing documents retrieved from a computer forensic specialist, Respondent's counsel reported that he had "forwarded everything that was forwarded to [him] and believe[d] that's all they found . . . that had not been previously produced [and that there] wasn't a lot." 6/19/14 Prehr'g Tr. 5. Noting that it was now over six weeks since the hearing had been continued, the Hearing Committee ordered that any additional documents identified by forensic IT specialist be served and filed no later than July 1, 2014, one week before the hearing was scheduled to resume. In addition, given Robert Malyszek's claims that Respondent was unable to recover documents, the Hearing Committee requested an affidavit identifying the steps taken by the IT specialist and other particulars of the specialist's engagement. *Id*. at 6, 8-12, 15; 6/20/14 Order at 1-2.

Respondent did not submit additional documents or an affidavit by July 1, 2014. At the July 8, 2014 hearing, the Hearing Committee stated that the "Order remains in full force and effect" but extended its deadline until July 15, 2014. Tr. 512; 7/11/14 Order at 1 ¶ 4. The subsequent July 11, 2014 consent motion to withdraw as counsel, which Respondent signed,

represented that "Respondent had been advised of the Order requiring her to produce an Affidavit regarding the work of the information technology firm that had been retained to search Respondent's computers for certain records on or before July 15, 2014." 7/11/14 Consent Mot. to Withdraw as Counsel at 1.

Respondent did not submit additional documents or an affidavit by July 15, 2014. On July 16, 2014, Respondent moved for leave to file out of time information as to why the affidavit had not been filed. 7/16/14 Resp't Mot. Respondent's motion did not include an affidavit from the forensic IT specialist as ordered, nor did Respondent provide a date certain of when one would be filed. *Id*. Instead, Respondent asserted that the IT company wanted its attorneys to review and approve an affidavit. *Id*.

During the August 19, 2014 prehearing conference, the Hearing Committee extended to August 29, 2014 the deadline to submit the affidavit, along with any accompanying recovered documents. 8/14/14 Tr. 42-44; 8/22/14 Order. Respondent, who indicated she had taken no active steps to contact the IT specialist since she filed her July 16 Motion for Leave, requested additional time, which was denied. 8/14/14 Prehr'g Tr. 42-44.

Respondent did not produce any additional documents or an affidavit by the August 29, 2014 deadline or at any time thereafter.

II. STANDARD OF REVIEW

Disciplinary Counsel bears the burden of proving by clear and convincing evidence that Respondent violated the Rules of Professional Conduct. *In re Szymkowicz*, 124 A.3d 1078, 1083-84 (D.C. 2015) (per curiam) (quoting *In re Allen*, 27 A.3d 1178, 1184 (D.C. 2011)). As the Court has explained, "[t]his more stringent standard expresses a preference for the attorney's interests by allocating more of the risk of error to Disciplinary Counsel, who bears the burden of proof." *Allen*, 27 A.3d at 1184 (citation and internal quotations omitted). Clear and convincing

evidence is more than a preponderance of the evidence, it is "evidence that will produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established." *In re Cater*, 887 A.2d 1, 24 (D.C. 2005) (citation omitted).

On the basis of the record as a whole, the Hearing Committee makes the following findings of fact and conclusions of law set forth below, which are supported by clear and convincing evidence.

III. FINDINGS OF FACT

A. Respondent's Bar Admission and Legal Practice

1. Respondent is a member of the Bar of the District of Columbia Court of Appeals, having been admitted by motion on February 21, 1986 and assigned Bar Number 396875. *Compare* BX B (4/2/14 Amended Specification of Charges) ¶ 1, *with* BX D (3/28/14 Answer) ¶ 1 (admitting); *compare* BX E (11/10/14 Specification of Charges) ¶ 1, *with* BX G (1/9/15 Answer) ¶ 1 (admitting). *See also* BX A (9/5/85 D.C. Bar Registration Statement).

2. Although not admitted in California, Respondent maintained an office and practice in California, limiting her practice to federal government contracts matters before federal government agencies and courts. *Compare* BX B ¶ 2, *with* BX D ¶ 2 (admitting); *compare* BX E ¶ 2, *with* BX G ¶ 2 (admitting).

3. Respondent practiced law in the law firm of Malyszek & Malyszek. She admits that, at all relevant times, she was the head of the firm and the only lawyer in the firm with an ownership interest. *Compare* BX B ¶ 3, *with* BX D ¶ 3 (admitting); *compare* BX E ¶ 3, *with*

BX G ¶ 3 (admitting). As such, Respondent had managerial authority over nonlawyer employees within the meaning of Rule 5.3.[15]

4. At all relevant times, Respondent's brother, Robert Malyszek (sometimes referred to as "Mr. Malyszek"), was not authorized to practice law. Tr. 269-70 (Malyszek). Malyszek & Malyszek employed Robert Malyszek as a nonlawyer employee. *Compare* BX B ¶ 3, *with* BX D ¶ 3 (admitting); *compare* BX E ¶ 3, *with* BX G ¶ 3 (admitting). Mr. Malyszek's title was "Government Contract Specialist," and he provided consulting services to firm clients. BX 16 at 2; BX 37 at 2; Tr. 199. In addition to his consulting work, he assisted Respondent and worked on "whatever [Respondent] directed [him] to do." Tr. 271 (Malyszek). The other "Malyszek" in the firm's name referred to Respondent's late father, Walter Malyszek, listed on certain versions of the firm's letterhead as "Founding Member." BX 16; Tr. 430 (Malyszek). *Compare* BX B ¶ 3, *with* BX D ¶ 3 (admitting).

B. The Fortune Matter (Bar Docket No. 2009-D334)

5. Fortune's Bulldozing & Grading, L.L.C. ("Fortune"), a small company in Coquille, Oregon, contracted in 2006 with the Natural Resource Conservation Service ("NRCS"), a part of the United States Department of Agriculture, to provide construction services. Due to site conditions that were discovered to be different than understood during the bidding process, Fortune incurred costs on the construction project totaling approximately $900,000 over the contracted costs ("cost overrun"). Therefore, Fortune hired Respondent, who agreed to represent Fortune, to file with NCRS on its behalf a Request for Equitable Adjustment ("REA") of the

[15] Pursuant to the commentary to Rules 5.3 and 5.1, "whether a lawyer has such supervisory authority in particular circumstances is a question of fact." Rule 5.1, cmt. [4]; *see also* Rule 5.3, cmt. [2] (applying same).

contract price ("Fortune Matter"). Tr. 112-18 (Eversz). *Compare* BX B ¶¶ 4, 7, *with* BX D ¶¶ 4, 7 (admitting).

6. Malyszek & Malyszek never provided Fortune with a signed, written retainer agreement. Tr. 121 (Eversz).

7. On January 19, 2007, Fortune sent Malyszek & Malyszek a check in the amount of $12,000, which Malyszek & Malyszek subsequently endorsed. BX 4; Tr. 121-22 (Eversz).

8. Fortune's General Manager, David Eversz, understood that Malyszek & Malyszek would file an REA with NRCS on Fortune's behalf and would defer any payment beyond the $12,000 retainer until after Fortune received a recovery from NRCS. Tr. 121-24 (Eversz). Mr. Malyszek set forth the same understanding in a letter to Fortune's bank on July 20, 2007. BX 16 at 1-2; Tr. 384-86 (stating payment would be deferred until after Fortune received a recovery and not when the initial REA was filed). Mr. Malyszek testified that when he drafted the July 20, 2007 letter, he was aware of the possibility that an REA, which typically took eight to nine weeks to submit, might initially be rejected, thereby extending the process. Tr. 257, 385-86 (Malyszek).

9. Other than explaining that payment would be deferred until recovery from NRCS was received, Mr. Malyszek's July 20, 2007 letter did not mention or otherwise discuss the $12,000 retainer, did not identify the scope of Malyszek & Malyszek's representation, and did not describe the expenses for which Fortune would be responsible. *See* BX 16.

10. Although Fortune's late owner, Richard Fortune,[16] retained Malyszek & Malyszek, it was Mr. Eversz, who primarily dealt with Malyszek & Malyszek on Fortune's behalf. Tr. 114, 117-19, 175-76 (Eversz).

11. Mr. Eversz understood that Mr. Malyszek was a lawyer, but the basis of his understanding was "an assumption." Tr. 119-20. Mr. Malyszek's signature block identified him as "a government contract specialist," and because the correspondence did not state that Mr. Malyszek was *not* a lawyer, Mr. Eversz assumed him to be "a lawyer that specialized in government contracts." *Id.* at 158-59; *see also* BX 16 at 2; BX 35 at 1, 3; BX 37 at 2. No one at Malyszek & Malyszek represented to Mr. Eversz that Mr. Malyszek was a lawyer, but no one told him that Mr. Malyszek was *not* a lawyer. Tr. 159 (Eversz). In contemporaneous written correspondence with third parties, Mr. Eversz referred to Mr. Malyszek not as Fortune's attorney, but as its "consultant." BX 11 at 2.

12. Malyszek & Malyszek letterhead identified Robert Malyszek as a "JD," an "LLM candidate," and a "Government Contract Specialist." BX 16. The firm's letterhead did not expressly refer to Mr. Malyszek with the title of "Esquire" or "Attorney at Law." *See id.*; Tr. 201 (Malyszek). The firm's letterhead did not represent that Mr. Malyszek was a member of any state Bar, but did represent the Bar memberships of both Respondent and the firm's "Of Counsel" attorney, the only other names listed on the letterhead. *See* BX 16 at 1.[17]

[16] Mr. Fortune died in June 2013, and the company became defunct. Tr. 113-14 (Eversz).

[17] In her Answer, while denying that she held out Robert Malyszek as a licensed attorney, Respondent stated that "she has changed her website, stationary and all other materials representing her firm that mention Robert to make it clear that he is not a licensed attorney . . . [and] she will affirmatively state that he is not an attorney and will remove any reference to his legal training." BX D at ¶ 3.

1. Services Performed on the Fortune Matter

13. Throughout the engagement, Mr. Eversz interacted primarily with Robert Malyszek. Tr. 118-19 (Eversz). However, Mr. Eversz interacted with Respondent on at least three occasions. On August 4, 2008, he emailed information to a firm email address, and the following day, Respondent acknowledged receipt of the email, indicated that Mr. Malyszek was out of the office for the week, and confirmed that she would "make sure he looks at it also" and that they would "call if there are any questions." BX 18 at 1. Respondent also answered the telephone on two occasions when Mr. Eversz attempted to call Mr. Malyszek. Tr. 119, 135-36, 184-86 (Eversz). Otherwise, when Mr. Eversz attempted to communicate directly with Respondent by telephone, Respondent did not answer or return his calls. *Id.* at 186. During his two phone conversations with Respondent, and in messages that he left with her answering service, Mr. Eversz conveyed the reason for his call. *Id.* at 185-86.

14. After an initial conversation with Mr. Malyszek in December 2006, Mr. Eversz began forwarding to Mr. Malyszek materials he believed relevant to the Fortune Matter. Tr. 124-25 ("I sent notes from the job . . . profit and loss statements from the accountants . . . copies of the payroll overruns . . . . Basically, I sent them everything I had to prove the case."); BX 2-3, 5-7, 10.

15. On Tuesday, June 19, 2007, an NRCS contracting officer contacted Fortune and expressed a willingness to negotiate a resolution to their dispute, but indicated he would only extend the offer through Friday, June 22, 2007. *See* BX 11 at 1. The following day, June 20, 2007, Mr. Eversz emailed Mr. Malyszek this information and emphasized in large bold letters at the top of the email: "**It is Imperative You Contact the NRCS . . . by Friday.**" *Id.*; Tr. 125-26 (Eversz). Mr. Malyszek responded the same day, advising that "[w]e will contact them by

[T]hursday." BX 12; Tr. 127. However, no one from Malyszek & Malyszek contacted NRCS by the Friday deadline. Tr. 128-29 (Eversz).

16. Upon learning from NRCS that NRCS had not heard from Malyszek & Malyszek by Thursday, Mr. Eversz emailed Mr. Malyszek to request that Fortune "be copied VIA email or fax in all communications, past or present . . . between [Malyszek & Malyszek] and the NRCS," noting that he had "yet to receive any documentation" previously requested. BX 13; Tr. 129-30 (Eversz). Mr. Eversz did not receive copies of the requested correspondence, nor did he receive a response to his email. Tr. 129-30 (Eversz).

17. The Hearing Committee does not credit Mr. Malyszek's testimony that he complied with Fortune's requests to send copies of all correspondence with the NRCS, Tr. 215-16, or that he sent to Mr. Eversz copies of correspondence with the government as "part of the process," *id.* at 239. This testimony is not corroborated by any record documents and is instead contradicted by both contemporaneous written communications from Mr. Eversz and Mr. Eversz's testimony, which the Hearing Committee found to be credible on this point. FF 16.

18. On June 22, 2007 the NRCS made an offer to settle Fortune's significant claim for $10,268.50. BX 14 at 1, 4, 5. After Fortune rejected as inadequate the settlement offer in June 2007, and through mid-2008, Mr. Eversz continued forwarding information to Malyszek & Malyszek and calling the firm in an effort to get the REA submitted. Tr. 133-34, 136 (Eversz). During this time, however, the firm "didn't answer e-mails on a frequent basis, and they didn't answer phone calls or phone messages." *Id*. at 134. Time was of the essence, as Fortune was experiencing severe financial distress. The company was failing, Fortune's bank wanted to collect on a line of credit, and Fortune's owner had to sell all of the company's equipment to stay

afloat. BX 18 at 3; Tr. 135, 142 (Eversz). Mr. Malyszek knew Fortune was financially troubled and anxious to resolve the matter. Tr. 248-49, 255-56, 373-74 (Malyszek).

19. Mr. Malyszek also acknowledged that he was "[a]bsolutely" difficult to reach, and that "it was hard for [him] to just be ready for [Fortune] when they were available to go ahead and jump on their work the same day they would get [him] information." Tr. 206 (Malyszek).

20. In early September 2008, more than twenty months after Fortune retained the firm, Mr. Malyszek informed Mr. Eversz that Malyszek & Malyszek had finalized the REA and filed it with NRCS. Tr. 136-37 (Eversz). Mr. Malyszek testified that he sent the document by Federal Express to both the contracting officer and Fortune "at the same time, same day," *id*. at 236 (Malyszek), but neither the contracting officer nor Fortune received it. *Id*. at 136-39 (Eversz).

21. On September 15, 2008, Mr. Eversz requested from Mr. Malyszek a copy of the receipt showing that the firm filed Fortune's claim with NRCS, BX 21, and he again emailed on October 3, 2008, asking Mr. Malyszek to forward "all confirmation of communications with the NRCS on Fortune's behalf." *Id*.; Tr. 137-38 (Eversz). Despite Mr. Malyszek's assurances that he would do so, BX 21, Fortune did not receive copies of the requested correspondence. Tr. 138.

22. Mr. Eversz ultimately forwarded to the contract officer at NRCS on October 28, 2008 Fortune's copy of the REA prepared by Malyszek & Malyszek, dated September 8, 2008, that Richard Fortune has signed. BX 22; Tr. 139-40 (Eversz). Based on his communications with the government, Mr. Eversz understood that the government had received the REA that Fortune sent in late October, and had not previously received the REA from Malyszek & Malyszek. Tr. 138-39 (Eversz); *see also* BX 22 (Oct. 28, 2008 letter from Eversz to NRCS enclosing copy of the REA, noting that according to Malyszek & Malyszek, the original "was

sent out to you the second week of September, and that "[w]e are trying to figure out where the screw up was").

23. Contrary to Mr. Eversz's testimony (which we find credible), Mr. Malyszek testified that he himself had filed the REA with the government, and had discussed with the government the REA he had filed. Tr. 234-36 (Malyszek). The Hearing Committee does not find Mr. Malyszek's testimony on this point credible. Among other things, Mr. Malyszek testified that the firm usually submitted REAs via FedEx, and that they looked for but could not find any FedEx document showing that the Fortune REA had been sent. *Id*. at 236. Likewise, he testified that he "always" did cover letters, but that no cover letter for the Fortune REA was among either party's hearing exhibits. *Id.* at 371-72.

24. Mr. Malyszek disclaimed having done the legal analysis reflected in the REA, testifying that either Respondent or the other attorney at the firm did so. Tr. 234-35.[18]

25. On January 30, 2009, the NRCS rejected the REA because of "insufficient evidence and proof of economic damage." BX 26 at 1. The letter denying Fortune's claim listed the deficiencies in the REA and stated that the rejection was not final, and that Fortune could resubmit its claim. *Id.*; Tr. 140-41 (Eversz).

26. Given Fortune's grave financial difficulties, there was a significant time pressure to resubmit the REA. Tr. 142 (Eversz). Mr. Eversz sent Robert Malyszek information, most of which had been sent previously, so that the firm could correct the identified deficiencies and resubmit the REA. *Id.* at 142-43; BX 28, 29, 32. Mr. Eversz received no feedback from

[18] According to Mr. Malyszek, at the time of the hearing, the firm was trying to recover electronic copies of the firm's time records showing how much each individual billed in connection with preparing the draft REA. Tr. 235. As discussed *supra* Section I.D., no such records were ever produced.

Malyszek & Malyszek, and he testified that "they were virtually impossible to contact." Tr. 142-43.

27. Not having received a response from anyone at Malyszek & Malyszek, despite the exigency, Mr. Eversz finally revised the REA on his own, and on March 19, 2009 forwarded a draft to Robert Malyszek for review. BX 33, 34; Tr. 142-44 (testifying he "finally decided to do it [him]self").

28. Despite Mr. Eversz's "repeated attempts to contact [Malyszek & Malyszek]," Tr. 145 (Eversz), he had difficulty communicating with anyone at the firm, *id.*; BX 30, 31, 35.

29. On April 1, 2009, Mr. Eversz sent the following email to Mr. Malyszek:

> I need to find out how to expedite our response to the NRCS. Our company is in perilous straits and the response is so close to completion. Our owners are concerned with losing their home and I believe Richard [Fortune] when he says he is determined to go to LA next week and camp out at your office until it gets done.

BX 37 at 1; Tr. 145-46 (Eversz).

30. Mr. Malyszek responded to Mr. Eversz on April 3, 2009, writing that Respondent "is doing a final editing[.] I'll send it as soon as it's done." BX 37 at 2. Fortune never received from Malyszek & Malyszek any edits to the REA. Tr. 146-47 (Eversz). Mr. Malyszek testified that he received the final edits from Respondent, discussed them with her and, while he did not recall when he sent the final edits to Mr. Eversz, that he assumed they were sent shortly thereafter. *Id.* at 376-77, 409-10 (Malyszek). We do not find Robert Malyszek's testimony credible on this point. His testimony is not corroborated by any documentary evidence, and is contradicted by the testimony of Mr. Eversz, whom we do find credible.

31. On April 7, 2009, Mr. Eversz emailed Mr. Malyszek requesting "some kind of timeline for getting that response to the NRCS," but received no response. BX 37 at 5; Tr. 147 (Eversz).

32. On April 13, 2009, Richard Fortune sent three letters to Malyszek & Malyszek separately addressed to Respondent, Mr. Malyszek, and the firm's one other attorney, Mr. Gotovac, with each letter copying the other two recipients. BX 38 at 1, 2; Tr. 149-50 (Eversz). The letters conveyed Fortune's "grave concern regarding the progress of [their] case, [and] most importantly [the] firm's lack of communication" with Fortune:

> On January 30th, 2009 we sent via fax a copy of a REA rejection letter from the NRCS (enclosed). On February 9th, 2009 our manager David Eversz was able to contact Robert Malyszek and review the rejection letter with him. On that occasion Robert requested addition [sic] information, and told us he would act on this matter forthwith because the government contracting officer had indicated he thought we had a legitimate claim but that he needed additional substantiation . . . Since that time David prepared a response and sent it to your office for review and revision by Robert and Cynthia Malyszek on March 19th, 2009. On April 3rd, 2009 Robert Malyszek informed David he had completed the revision and had passed it on to Cynthia for review. Since that time we have called [three different phone numbers] leaving messages daily to no avail.
>
> Leaving messages rarely receives a response. Virtually the only times we have ever spoken with Robert Malyszek have been on those fortuitous occasions when he has answered the phone. We have to call repeatedly [to] obtain any response. On receipt of our letter to your firm dated June 30th, 2008, Robert called us and promised us he would have this matter concluded in 30 days.
>
> In 2006 our company was force[d] to absorb a $450,000.00 los[s] due to actions of the NRCS. In December 2006 we contracted with your firm to represent us with the federal government. We would appreciate it if your firm would send our response to the NRCS directly. There is no reason for further delay. It is imperative for us to move forward with this.
>
> Our financial position remains precarious and without contact or updates from your firm we have no idea what is going on.
>
> We are requesting copies of all correspondence regarding this case.
>
> We have reached the end of our patience and are fed up with being ignored. It takes less than 10 minutes to address and mail the envelope and less than 2 minutes to call us and keep us informed. We would appreciate an immediate reply, specifically in writing upon your receipt of this letter. . . . .

BX 38 at 1 (letter to firm attorney Gotovac).[19] The letters accurately described Mr. Eversz's attempts to communicate with Malyszek & Malyszek at the time. Tr. 150 (Eversz). Fortune received no reply to its letters. *Id.* 149-51.

33. Mr. Eversz ultimately submitted to the NRCS, without legal assistance, the amended REA he had prepared, because Fortune could not afford to hire another lawyer. *Id.* at 151-52.

34. We do not find credible Mr. Malyszek's internally inconsistent and uncorroborated testimony that either he or Respondent responded in any way to the April 13, 2009 letter. At various points, Mr. Malyszek testified that he discussed the letter with Respondent and he thought Respondent had responded to the letter, Tr. 251-52, 429-30, testified that he himself had sent to Fortune, as requested, all correspondence regarding the matter, *id*. at 251, and also testified that he "d[id]n't remember [their] direct response to this letter," *id.* at 252. Nor do we find credible Mr. Malyszek's testimony that he had responded to previous client requests for copies of correspondence related to the matter. *See, e.g.*, *id.* at 360-62. Mr. Eversz, whom the Hearing Committee finds credible, testified that he never received the correspondence he requested, *see id*. at 138, and Mr. Malyszek conceded that no cover letter or email in the record corroborated his own claims to the contrary. *Id.* at 362.

35. Likewise, the Committee does not credit Mr. Malyszek's testimony that the firm did not submit the REA or respond to Fortune's April 13, 2009 letter because it had stopped work for nonpayment. Mr. Malyszek testified that in the March or April 2009 time frame, Respondent "cut [him] off from working with Fortune[] because they were racking up a big bill and we

[19] The letter addressed and faxed to Robert Malyszek, copying Respondent, was substantially similar. BX 38 at 2.

weren't being paid." Tr. 253, 383-84. He claimed that Respondent communicated this to the client and had discussions with Mr. Eversz leading up to the decision to stop working, *id.* at 253-54, but he ultimately testified that he was not aware of any written communication with the client about the need to make payment. *Id*. at 379-80. The suggestion that Malyszek & Malyszek stopped work on the Fortune matter for nonpayment is not corroborated by—and is instead inconsistent with—credible record evidence. First, the explanation is contrary to written representations that Mr. Malyszek, on behalf of Malyszek & Malyszek, made to a bank loan officer on July 20, 2007 that because the firm felt "so strongly that this Claim/Rea will be successful, . . . we have deferred getting paid until Fortune receives a recovery." BX 16; Tr. 384-85 (Malyszek). In addition, contemporaneous emails between Mr. Eversz and Mr. Malyszek in early April 2009 reflect Mr. Eversz's understanding, and Mr. Malyszek's assent, that the firm was continuing to work on the REA, and that Mr. Malyszek would send a revised draft. *See, e.g.*, FF 29-30. Finally, Mr. Eversz (who the Hearing Committee found credible) testified that he never received any written communication from the firm indicating that they were ceasing work for nonpayment of fees. Tr. 153 (Eversz).

36. Malyszek & Malyszek never refunded Fortune any of the $12,000 that Fortune had paid. *Id.* at 152 (Eversz).

37. Fortune never received an accounting, billing statement, or explanation of the work completed by the firm. *Id.* at 152-53 (Eversz). The Change Order Worksheet created by Mr. Malyszek, and included as part of Fortune's original 2008 REA submission, recorded Robert Malyszek's "Consultant Fees" to be "approx. $24,000 to date" but provided no detailed narrative regarding the work performed. BX 22 at 22. Malyszek & Malyszek supplied a copy of the

Change Order Worksheet to Fortune. Tr. 239 (Malyszek). The $24,000 amount for consulting fees was unchanged in subsequent revisions. *See* BX 19, 23, 40.

38. On August 3, 2009, nearly four months after writing to Respondent, Fortune filed a complaint with Disciplinary Counsel. BX 59 at 1; Tr. 151 (Eversz).

39. We find by clear and convincing evidence that Respondent had direct supervisory authority over Mr. Malyszek in the Fortune Matter. Respondent was the head of, and had sole ownership interest in, the small firm of Malyszek & Malyszek, FF 3, and, having agreed to represent Fortune and file an REA on its behalf, she was the partner in charge of the Fortune Matter. FF 5. Indeed, there was only one other active lawyer listed on the firm's letterhead. FF 4, 12. When Mr. Eversz could not reach Mr. Malyszek, he attempted to contact Respondent, who on at least one occasion told Mr. Eversz that she would ensure that Mr. Malyszek would look into Mr. Eversz's question. FF 13.

2. Disciplinary Counsel's Requests for Fortune Matter Documents

40. On August 11, 2009, Disciplinary Counsel notified Respondent of the disciplinary investigation involving the Fortune Matter and requested that Respondent respond in writing "to each allegation of misconduct on or before August 25, 2009." BX 51 at 2. On September 28, Disciplinary Counsel received an unsigned, four-page written response faxed by Mr. Malyszek. BX 52. The response did not indicate any documents were attached, *id*., and Disciplinary Counsel's records indicate that no documents were received on this date. *See* BX 59 at 1 (Chronology Report); Tr. 526 (Thornton).

41. Disciplinary Counsel requested three times from Respondent copies of all communications between Respondent or her staff, and Mr. Fortune or his associates, specifically including an unsigned retainer agreement that Respondent's September 28 fax asserted had been

mailed to Fortune in December 2006. BX 52 at 1 (10/5/10 request); BX 53 at 1 (10/23/09 request); BX 54 at 1 (11/16/09 request); Tr. 520-21, 523 (Thornton).

42. On October 24, 2012, the Assistant Disciplinary Counsel then-assigned to the matter, Ross Dicker, left the Office of Disciplinary Counsel due to illness, and the case and all case files, were reassigned to Assistant Disciplinary Counsel Hamilton P. Fox. BX 59 at 2; Tr. 523 (Thornton); 532-35 (Porter). On April 17, 2013, Disciplinary Counsel again requested from Respondent a copy of the case file, including any signed or unsigned retainer agreements. BX 56 at 1-2. On April 22, 2013, Respondent advised Disciplinary Counsel by fax that she was looking for the Fortune files and claimed that she had "sent Mr. Dicker our entire Fortune file when he asked for it." BX 57 at 1.

43. Ms. Thornton is a Legal Secretary at the Office of Disciplinary Counsel and was Mr. Dicker's legal secretary from 2006 until his departure. Tr. 514-15 (Thornton). Ms. Thornton, who we find was a credible witness, testified that Disciplinary Counsel followed detailed procedures for logging and tracking documents and communications with attorneys facing disciplinary charges. *Id.* at 515-17. Based on her review of Disciplinary Counsel's records, Disciplinary Counsel at no time received from Respondent any of the requested documents pertaining to the Fortune Matter. *Id.* at 526; BX 59. By contrast, Disciplinary Counsel received from Respondent documents related to the Silver Matter (discussed below) in response to its requests. Tr. 528 (Thornton); BX 60.

44. Ms. Porter is a Senior Assistant Disciplinary Counsel in the Office of Disciplinary Counsel who went through Mr. Dicker's office and files after he left the Office of Disciplinary Counsel. Tr. 532-34 (Porter). Ms. Porter, who we find was a credible witness, testified that Mr. Dicker's files were in order, and that he kept files of documents received as evidence in his

cases. *Id.* at 534. Further, Mr. Dicker's approximately forty cases were reassigned, and Mr. Porter had heard of no complaints that any documents that had been produced to Disciplinary Counsel were missing from any of his cases. *Id*. at 535.

45. We reject as not credible Robert Malyszek's hearing testimony suggesting that Respondent produced an unsigned retainer agreement with Fortune in response to Disciplinary Counsel's repeated requests. Tr. 298-310 (Malyszek).

46. We also reject the written, pre-hearing assertions made by Respondent to Disciplinary Counsel in September 28, 2009. Specifically, in response to the Bar Complaint filed by Fortune, Disciplinary Counsel received an unsigned, four-page written response purportedly from Respondent, faxed by Mr. Malyszek. BX 52 at 2-6. The response asserted that (i) a retainer agreement had been forwarded to Fortune, and (ii) that Respondent produced her entire Fortune file to Disciplinary Counsel in 2009. *Id.* We cannot accept these unsigned, uncorroborated, unsworn, and uncross-examined pre-hearing assertions, particularly as these assertions are not supported, and rather are contradicted, by record evidence. *Cater*, 887 A.2d at 6 ("When a respondent attorney has declined to subject herself to examination in the proper manner, at the proper time, before the proper tribunal, the self-serving claims she has made *dehors* the proceeding cannot be accepted if their credibility has not been established by other means.").

47. Based on (i) the evidence presented during the hearing, including Disciplinary Counsel's multiple requests in 2009, 2010, and 2013 for a copy of any retainer agreement, FF 40-42, and (ii) our opportunity to hear testimony from Mr. Eversz, Ms. Thornton, Ms. Porter (all of whom were credible witnesses), and Mr. Malyszek (who we find was not a credible

witness on this subject), we find that that no written retainer agreement was provided to Fortune by Respondent or her firm.

48. Likewise, based on (i) the evidence presented during the hearing, including Disciplinary Counsel's multiple requests for Respondent's Fortune and Silver matter files and Respondent's responses thereto, FF 40-43; (ii) our opportunity to hear testimony from Ms. Thornton, Ms. Porter (both of whom were credible witnesses), and Mr. Malyszek (who we find was not a credible witness on this subject); and (iii) Respondent's failure to comply with the Hearing Committee's Orders regarding this issue, we reject as not credible Mr. Malyszek's testimony that documents reflecting additional communications relating to the Fortune Matter, and billing and time records for either the Fortune or Silver Matters, were previously produced to Disciplinary Counsel (and misplaced or lost by Disciplinary Counsel) or exist in corrupted hard drives. *See, e.g.*, Tr. 235-36, 258-59, 279-80, 284, 359-60 (Malyszek). Respondent's attorney reported to the Hearing Committee that, of the documents forwarded to him by Respondent after Mr. Malyszek's hearing testimony, there was not much that had not previously been produced to Disciplinary Counsel. 6/19/14 Prehr'g Tr. 5. Moreover, the Hearing Committee subsequently afforded Respondent every opportunity to corroborate claims that additional documents existed and were being retrieved by an IT forensic specialist. Respondent did not produce any additional documents, and she failed to comply with the Hearing Committee's Order to produce by August 29, 2014 an affidavit from the IT forensic specialist detailing efforts to retrieve the documents—a deadline which the Hearing Committee extended three times in Orders dated June 20, 2014, July 11, 2014, and August 22, 2014. For all of these reasons, we find that no additional communications or time and billing records relating to the Fortune and Silver Matters were previously produced to Disciplinary Counsel or exist in corrupted hard drives.

49. Finally, based on Mr. Malyszek's demeanor during the Hearing, as well as the nature of his testimony, the Hearing Committee finds that Robert Malyszek was not a credible witness and indeed finds that he repeatedly gave false testimony. Mr. Malyszek's testimony often changed during the course of questioning, and many areas of his testimony were not corroborated—and often were directly contradicted—by contemporaneous evidence or the testimony of credible witnesses.

C. The Silver Matter (Bar Docket No. 2007-D101)

50. On January 20, 2005, Robert Silver[20] and his wife, Judith Silver, met with Respondent and Robert Malyszek. Tr. 17-19 (Silver). That same day, Respondent entered into a Retainer Agreement ("Silver Retainer") with Robert Silver and his three companies—West Coast Products, BJC Sales, Inc., and Silver Sails Travel, Inc. (a/k/a Silver Sales Travel, Inc.)—to obtain relief from a 2003 federal debarment as government contractor ("Silver Matter"). BX 41. *Compare* BX B ¶ 27, *with* BX D ¶ 27 (admitting).

51. In the provision for "Legal and Non-Legal Services Included," the Silver Retainer stated that Malyszek & Malyszek would provide specified "Legal Services . . . to represent the Client before any Federal Government Agencies or Departments, Boards of Contract Appeals, the General Accounting Office, the Inspector General Office or the Court of Federal Claims." BX 41 at 2. Notably, it did not identify any non-legal services to be provided in the matter. *See id*.

52. The Silver Retainer identified Respondent as "Sr. Partner" and "the attorney assigned to Client's Legal Matters." BX 41 at 2 (¶ 5), 5; BX B at ¶ 27. It did not state that Robert Malyszek was a lawyer, and it did not specify his role. It only disclosed that Mr.

[20] Robert Silver died in 2008. BX 45 at 11.

Malyszek's hourly rate was $275.00, which was significantly higher than the $185.00 rate identified for paralegal services. BX 41. It further provided that if the Silver Matter was brought before "any Boards or Courts above stated," "the attorney assigned to Client's Legal Matters . . . will be Cynthia Malyszek, at the rate of $385.00 per hour." *Id*. The Silver Retainer did not state that Mr. Malyszek was not a lawyer. *Id*.

53. The Silver Retainer appeared on Malyszek & Malyszek letterhead that did not list names of any firm attorneys or non-attorney employees. BX 41 at 2. It simply reflected the firm's name, underneath which it stated:

SPECIALISTS IN FEDERAL GOVERNMENT CONTRACTS
"Practice exclusively involving Federal Government Contract matters and proceedings before Federal Courts and Agencies"

Id. Mr. Silver signed the Silver Retainer on the day of his initial meeting with Respondent and Mr. Malyszek. Tr. 19 (Silver). During that initial meeting, Mrs. Silver (who we found credible on this point) testified that neither Respondent nor Mr. Malyszek told her that Robert Malyszek was a lawyer, but that no one had told her that he was not a lawyer. Tr. 83-84 (Silver). She also testified that she never saw anything in writing causing her to believe that Mr. Malyszek would be acting as a lawyer on their behalf. *Id*. at 83.

54. Among other things, the Silver Retainer provided that the firm would provide "statements of invoices and work performed," return the client's legal file and the documents therein "if work is ceased by either Client or Firm," and that "[i]f any amount of Client's retainer remains unused after work is either completed or ceased and costs paid, it shall be returned to the Client after termination of this agreement." BX 41 at 2-3 (¶¶ 7-8, 17).

55. While not identified as an individual client in the Silver Retainer, Mrs. Silver was co-owner and officer of two companies identified in the Silver Retainer subject to the 2003

federal debarment at issue, BJC Sales and Silver Sails Travel. BX 41 at 2; Tr. 18-20, 74-75, 89-90 (Silver); *see also id.* at 47 (Disciplinary Counsel stipulation).

56. The Silver Retainer called for two payments of $15,000 (on January 20, 2005) and $5,000 (on February 17, 2005) to be applied to fees and expenses to be incurred. BX 41 at 3 (¶ 7). On January 20, 2005, Mrs. Silver wrote a check on behalf of BJC Sales Co. in the amount of $15,000 to Malyszek & Malyszek, which the firm subsequently deposited. BX 42; Tr. 21-23 (Silver). *Compare* BX B ¶ 29, *with* BX D ¶ 29 (admitting). On April 14, 2005, Mrs. Silver wrote a check on behalf of Silver Sails, Inc. to Malyszek & Malyszek in the amount of $5,000, which the firm subsequently deposited. BX 43; Tr. 23 (Silver). *Compare* BX B ¶ 30, *with* BX D ¶ 30 (admitting).

57. Mr. Silver was incarcerated in 2006. Tr. 15, 23-24, 27 (Silver); BX 44, item 23. While Mr. Silver was incarcerated, Mrs. Silver communicated with Mr. Malyszek about the Silver Matter. Tr. 27-29 (Silver). *Compare* BX B ¶ 32, *with* BX D ¶ 32 (admitting). Mr. Malyszek testified that during the course of the Silver Matter, he met with Mrs. Silver twice and with Mr. Silver nine or ten times, that his role consisted of collecting data and information, that his work was directed by Respondent, and that he did not provide legal advice regarding the Silver's debarment proceedings. Tr. 271, 403-04 (Malyszek).

58. In 2005, and prior to Mr. Silver's 2006 incarceration, Malyszek & Malyszek attorney Mr. Gotovac corresponded with Mr. Silver, including correspondence that forwarded draft responses to the government regarding Mr. Silver's request for reconsideration of debarment. *See, e.g.*, RX 14 (M000056); RX 18 (M000069-72).

59. On January 31, 2007, while Mr. Silver was incarcerated, Mrs. Silver sent a letter on Silver Sails Inc. letterhead to Respondent and Mr. Malyszek via certified mail terminating the

engagement and requesting "a full accounting" of the $20,000 retainer spent and "a refund of the unused monies." BX 46 at 1; Tr. 29 (Silver). Respondent received the certified letter and signed the certified copy receipt. *Compare* BX B ¶ 33, *with* BX D ¶ 33 (admitting).

60. On or around February 16, 2007, Mrs. Silver received from Respondent a letter stating that Respondent had talked with Mr. Silver's criminal defense team, that Respondent would not "undertake any matter while [Mr. Silver] is being represented by other criminal counsel," and that Respondent had "never initiated a debarment lawsuit," although the firm had "undertaken many administrative remedies prior to [Mr. Silver] being imprisoned and represented by criminal counsel." RX 21 at 1 (M000085); Tr. 79-81 (Silver). In this letter, Respondent also acknowledged recently having received a letter from Mrs. Silver asking her to cease work. Respondent wrote that she had stopped all work when Mr. Silver was arrested, and that she would "cease any further communications with you, your husband and your daughter." RX 21 at 2 (M000086). Respondent did not provide in her letter or otherwise an accounting in response to Mrs. Silver's January 31, 2007 request.

61. Respondent's February 16, 2007 letter to Mrs. Silver was written on Malyszek & Malyszek letterhead identical to that received by Fortune. *Compare* RX 21 (M000085), *with* BX 16. *See generally* FF 12.

62. On February 28, 2007, Mrs. Silver sent an email directly (and only) to Robert Malyszek, addressing him and Respondent, and noting that it had been thirty days from the date of her letter and that she had not received an accounting or copies of the retainer agreement. Mrs. Silver requested that the firm forward the requested accounting and a copy of the retainer agreement immediately. BX 47 at 2; Tr. 29-31, 86 (Silver).

63. Robert Malyszek responded by email on the same day, stating:

> The total estimated hours worked on Mr. Silver's case is 88 hours over a two year period, with a total bill of $30,315. Our records indicate that you have paid $15,000, leaving an unpaid balance of $15,315. Please submit the balance with a certified check or money order. Mr. Robert Silver has a copy of the retainer agreement.

BX 47 at 1.

64. Mr. Malyszek testified that Malyszek & Malyszek did not respond to Mrs. Silver's January 31, 2007 request for an accounting and retainer agreement because Mrs. Silver was not a client. Tr. 273. We do not find Mr. Malyszek's testimony credible, especially in light of the fact that Mr. Malyszek emailed to Mrs. Silver an estimate of total hours and the total bill in response to her February 28, 2007 email request. BX 47 at 1.

65. Mr. Malyszek testified that he did not "have an understanding" regarding a law firm's obligations after a client requests an accounting, Tr. 278, and was unaware of the "statute" requiring attorneys to protect client files for five years. Tr. 289.

66. Mrs. Silver replied to Mr. Malyszek on February 28, 2007, reiterating the request for a copy of the retainer, explaining that she could not find a copy and that Mr. Silver could not retrieve it given his incarceration. She also reiterated her request for "the completed accounting" and corrected Mr. Malyszek's error, noting that $20,000, not $15,000, had been paid to the law firm. BX 47 at 1; Tr. 32-34 (Silver); 281-82 (Malyszek confirming error). Mrs. Silver never received a response to this email. Tr. 34 (Silver).

67. Robert and Judith Silver and their companies subsequently retained attorney Barry Smith to assist them in obtaining from Malyszek & Malyszek an accounting, any refund, and a copy of their file so they could retain a different firm and move their case along. *Id*. at 34-35 (Silver), 99-103 (Smith).

68. On March 6, 2007, on behalf of "Robert and Judy Silver and their companies," Mr. Smith sent a letter to Respondent and Robert Malyszek requesting within fourteen days a

copy of the Silver file, an accounting showing income and expenses to date, a refund of any unused retainer, and a report on the status of their case. BX 48. Mr. Smith received no response. Tr. 102-03 (Smith).

69. On April 2, 2007, Mr. Smith re-sent his March 6 letter via certified mail to an alternative address for Malyszek & Malyszek, requesting in the cover letter that the attached letter be given "high priority." BX 49, 50. Malyszek & Malyszek received Mr. Smith's letter, but no one from the firm responded to it. Tr. 103 (Smith testimony that the certified letter was not returned as undeliverable, yet he received no response from Malyszek & Malyszek).

70. At no time did Mr. Smith (who the Hearing Committee found to be a credible witness) receive from Malyszek & Malyszek a request for an authorization from Mr. Silver to transfer client files, nor did Mr. Smith receive a copy of the Silver file, an accounting, a refund of the retainer, or an explanation as to why none of the requested items were provided. Tr. 104-06 (Smith).

D. The Mills Matter (Bar Docket No. 2014-D010)

71. Mr. Ortez ("Tez") Mills owns and operates a company known as Mills LTD ("Mills"), which provides government consulting services. 3/24/15 Hr'g Tr. 101 (Mills). In 2013 Mr. Mills retained Malyszek & Malyszek to represent Mills in a contract dispute with a government agency ("Mills Matter"). *Id*. at 102.

72. On May 22, 2013, Mr. Mills, on behalf of Mills, received from and executed a Legal Representation Agreement with Malyszek & Malyszek ("Mills Retainer Agreement"), which provided that Respondent would serve as lead counsel, and that "[a]s senior partner, all work produced under this agreement for Mills will be completed, reviewed and approved by

senior counsel." *Compare* BX E ¶ 5, *with* BX G ¶ 5 (admitting). *See also* BX 62 at 1; 3/24/15 Hr'g Tr. 102-03 (Mills).[21]

73. The Mills Retainer Agreement also provided that Mills would pay a retainer of $5,000 against which fees and costs would be applied, and that "[i]f any amount of Client's retainer remains unused after work is either completed or ceased and costs paid, it shall be returned to the Client after termination of this agreement." *Compare* BX E ¶ 6, *with* BX G ¶ 6 (admitting). *See also* BX 62 at 1; 3/24/15 Hr'g Tr. 104 (Mills).

74. On May 18, 2013, Robert Malyszek provided Mr. Mills with wiring instructions for the retainer fee. BX 61 at 1-2; 3/24/15 Hr'g Tr. 105 (Mills).

75. On May 22, 2013, Mills electronically transferred a $5,000 retainer to Malyszek & Malyszek. At the firm's direction, Mills wired these funds into the firm's operating account at California Bank & Trust, a bank that does not have offices in the District of Columbia. *Compare* BX E ¶ 8, *with* BX G ¶ 8 (admitting). *See also* BX 61 at 1-2; BX 63 (wire confirmation); BX 75 at 8 (statement of California Bank & Trust account); 3/24/15 Hr'g Tr. 104-05 (Mills). At the time of this deposit, the Malyszek & Malyszek account contained other funds. BX 75 (statement of California Bank & Trust account).

76. California Bank & Trust was not an "approved depository" under Rule 1.15(b). *See* BX 64 (listing approved institutions for Trust Accounts and IOLTA Trust Accounts (as of March 2014)); *see also* BX 65 (same (updated Apr. 1, 2014)).

[21] The copy of the Mills Retainer admitted into evidence is signed by Mr. Mills, but the signature block for Respondent's signature is blank. *See* BX 62 at 3. However, Respondent admitted in her Answer that she "signed the [Legal Representation] Agreement over the signature line for 'Cynthia Malyszek, Esq.'" *Compare* BX E ¶ 7, *with* BX G ¶ 7 (admitting).

77. Mr. Mills was not aware of the difference between a law firm's operating account and its trust account, he was not asked for permission to place Mills' retainer funds into Malyszek & Malyszek's operating account, and he did not provide informed consent to do so. 3/24/15 Hr'g Tr. 105-06 (Mills).

78. On May 22, 2013—the same day that Mr. Mills wired the $5,000 retainer to Malyszek & Malyszek's operating account—$5,250 was transferred to Robert Malyszek, leaving a balance of only $798.67. BX 75 at 8, 10.

79. The operating account into which the Mills retainer was deposited was "ROBERT MALYSZEK DBA MA[L]YSZEK & MALYSZEK" BX 75 at 2.

80. According to the firm's final invoice for the Mills matter, by May 22, 2013, Malyszek & Malyszek had earned less than $1,150 of the $5,000 retainer. BX 67 at 3. In other words, the invoice indicates that on May 22, 2013 there should have been at least $3,850 of the Mills retainer in the firm's account. *Id.*

81. Malyszek & Malyszek's representation of Mills was concluded as of May 31, 2013, with the filing of a notice of appeal. The only time billed after that date was for $58.50 on June 25, 2013. *Compare* BX E ¶ 9, *with* BX G ¶ 9 (admitting). *See also* BX 67 at 3.

82. Mr. Mills received a final accounting from Malyszek & Malyszek on August 8, 2013. 3/24/15 Hr'g Tr. 107 (Mills); BX 67-68. According to that final accounting, the total amount billed against the $5,000 retainer during the entire course of representation was $4,009.47. *Compare* BX E ¶ 9, *with* BX G ¶ 9 (admitting). *See also* BX 68; 3/24/15 Hr'g Tr. 107-08. The unused portion of the retainer amounted to approximately $990. BX 68; 3/24/15 Hr'g Tr. 107-08.

83. From July through September 2013, Mr. Mills inquired repeatedly by emails to Mr. Malyszek, copying Respondent, seeking the return of the unused amount of the retainer. *Compare* BX E ¶ 11, *with* BX G ¶ 11 (Respondent admitting she was copied). *See, e.g.*, BX 69 at 2 (July 30, 2013), 2-3 (July 31, 2013) (providing wire instructions for return of unused retainer), 3 (Aug. 7, 2013), 8 (Aug. 20, 2013), 12 (Sept. 10, 2013); 3/24/15 Hr'g Tr. 108-11 (Mills).

84. Mr. Malyszek replied to Mr. Mills with assurances that the unused retainer would be returned, but that it may take more time to do so, or that he would check on the status. *See* BX 69. For example, on August 8, 2013, Robert Malyszek, copying Respondent, responded to Mr. Mills' August 7 inquiry and attached the final close-out invoice reflecting that Malyszek & Malyszek billed total fees and expenses of $4,009.47. *Id.* at 3. He informed Mr. Mills that "the return of the retainer may take a few more days." *Id.*; 3/24/15 Hr'g Tr. 110 (Mills). The firm's operating account on that day reflected a negative balance of -$1,435.09. BX 75 at 22. The account balance was -$2,965.59 on August 12, 2013, *id*., and $94.72 on September 10, 2013. *Id.* at 28.

85. On September 18, 2013, Mr. Mills sent an email communication directed to Respondent and Robert Malyszek: "Cynthia & Robert, I'm still waiting on you guys to return the unused amount of my retainer for nearly 2 months now, please advise. At some point, if I do not hear back from you guys, I will have no choice but [to] seek . . . arbitration with the appropriate bar." BX 69 at 12; 3/24/15 Hr'g Tr. 111 (Mills). Respondent did not respond to Mr. Mills' September 18 email. 3/24/15 Hr'g Tr. 116 (Mills).

86. We find that Mr. Mills was a credible witness who offered consistent testimony corroborated by contemporaneous documentary evidence.

87. Malyszek & Malyszek had not refunded the unearned portion of Mills' retainer by the end of 2013, and on December 30, 2013, Mr. Mills filed a complaint with Disciplinary Counsel. BX 70; 3/24/15 Hr'g Tr. 112-13 (Mills). *Compare* BX E ¶ 12, *with* BX G ¶ 12 (admitting).

88. Disciplinary Counsel forwarded the complaint to Respondent on January 17, 2014 via certified mail and requested that she provide a written response by January 31, 2014. BX 71 at 3. Respondent did not provide a written response by the January 31, 2014 deadline. BX 72.

89. On March 26, 2014, Disciplinary Counsel emailed Respondent's counsel stating that if a response was not received by April 4, 2014, Disciplinary Counsel would seek an order compelling one. *Compare* BX E ¶ 14, *with* BX G ¶ 14 (admitting). Respondent wrote to Disciplinary Counsel that same day stating that she "den[ied] each and every allegation of the complaint but nonetheless, [she] sent a letter and check to Tex [sic] Mills . . . on this date." *Compare* BX E ¶ 15, *with* BX G ¶ 15 (admitting).[22] *See also* BX 73 (Mar. 26, 2014 letter from Respondent to Disciplinary Counsel attaching a copy of her letter to Mr. Mills enclosing "a check for the unused portion of the retainer" and indicating that his acceptance of the check would be considered a "full release").

90. Mr. Mills received a refund check in the amount of approximately $990 from Respondent on or about March 26, 2014. BX 73 at 3; 3/24/15 Hr'g Tr. 113 (Mills); *see also* BX G ¶ 16 (admitting Mr. Mills received refund check on or about April 3, 2014).

[22] Notwithstanding the denials in her March 26, 2014 letter, Respondent subsequently filed an Answer to the Specification of Charges in which she admitted the allegations in twelve of the Specification's eighteen paragraphs, and admitted in part allegations in another two paragraphs. *See* BX G.

91. The monthly account statements for California Bank & Trust operating account of Malyszek & Malyszek[23] reflect that on August 8, 2013, when the firm sent Mr. Mills the final accounting indicating that $990 of the retainer had not been used, the bank account was overdrawn in the amount of -$1,435.09. *See* BX 75 at 22; BX 67 at 3. Indeed, between August 8, 2013 and March 26, 2014 (when Respondent returned the unearned funds), the daily recorded balance in the account fell below $990 at least ninety-three times out of the 102 recorded daily balances provided. Of these, forty-seven daily balances reflected a negative balance. BX 75 at 10, 16, 22, 39, 45, 51, 57, 63, 69.

92. During this ten-month period of time, funds in the firm's operating account were withdrawn for business or personal expenses. *See* BX 75. For example, in August and early September 2013 alone, after the final accounting was sent to Mr. Mills, multiple checks made payable to Respondent and to Mr. Malyszek were written against this account, and the memo notations on checks made payable to others reflect, for example, payment of "Office Rent" for September 2013 and "Business Expenses for Aug. 2013." BX 75 at 31.

IV. CONCLUSIONS OF LAW

A. The Fortune Matter

With respect to the Fortune Matter, Disciplinary Counsel alleges that Respondent failed to provide her client with competent representation and/or failed to represent her client with skill and care, in violation of Rule 1.1 of the Rules of Professional Conduct; failed to represent her client with diligence and zeal, in violation of Rule 1.3(a); intentionally failed to seek the lawful objectives of her client, in violation of Rule 1.3(b)(1); failed to act with reasonable promptness in

[23] California Bank & Trust produced these monthly account statements from May 2013 to April 2014 in response to Disciplinary Counsel's subpoena. *See* BX 74, 75.

violation of Rule 1.3(c); failed to communicate with her client, in violation of Rule 1.4(a); failed to provide a written retainer in violation of Rule 1.5(b); and failed to refund unearned fees in violation of Rule 1.16(d). In addition, Disciplinary Counsel alleges that Respondent failed to reasonably ensure that nonlawyer Mr. Malyszek complied with the above-referenced rules, and to avoid or mitigate his known noncompliance, in violation of Rules 5.3(b) and 5.3(c); that she assisted in his unauthorized practice of law, in violation of Rule 5.5(b); and that Respondent's firm name and letterhead were misleading in violation of Rule 7.5. BX B at 5-6 (¶ 26). We address each in turn below.

1. Violation of Rule 5.3

a. Rule 5.3(b)

Rule 5.3(b) requires a lawyer with direct supervisory authority[24] over a nonlawyer "to make 'reasonable efforts' to ensure that the conduct of her nonlawyer employee [i]s compatible with her own professional obligations as a lawyer." *Cater*, 887 A.2d at 5, 13. A lawyer should provide "appropriate instruction and supervision" and "be responsible" for the nonlawyer employee's work product. Rule 5.3, cmt. [1]. As the *Cater* Court explained, "[r]esponsible supervision does not mean that the lawyer must duplicate the employee's work or scrutinize and regulate it so closely that the economic and other advantages of the delegation are lost. Rule 5.3(b) requires 'reasonable efforts,' not overkill. Reasonable controls and review need not be overly intricate or unduly burdensome." 887 A.2d at 16. However, the Court underscored that "reasonable efforts" contemplated by 5.3(b) is a "proactive standard" that requires proper supervision. *Id.* at 15.

[24] A lawyer with direct supervisory authority is one "who has an actual supervisory role with respect to directing the conduct of other lawyers in a particular representation." Rule 5.1, cmt. [4]; *see also* Rule 5.3, cmt. [2] (applying same to supervision of nonlawyer).

For purposes of Rule 5.3(b), we find that Respondent had direct supervisory authority over Mr. Malyszek in connection with the Fortune Matter. FF 39. Given her supervisory authority, under Rule 5.3(b), she was responsible for Mr. Malyszek's work on the Fortune Matter and was required to provide him with appropriate instruction and supervision. We conclude based on clear and convincing evidence that she failed to do so in violation of Rule 5.3(b).

Mr. Malyszek demonstrated limited, if any, understanding of his obligation to conform his conduct to the Rules of Professional Conduct. *See, e.g.*, FF 32, 65. Although Respondent delegated virtually all aspects of the Fortune Matter to Mr. Malyszek, *see, e.g.*, FF 13-14, the record is devoid of any credible evidence that between January 2007 and April 2009 Respondent personally provided any meaningful supervision of him or implemented any procedures—or even a call to the client—to help ensure that Mr. Malyszek's communications were adequate and his work was compliant. *See Cater*, 887 A.2d at 14 (finding Rule 5.3(b) violation where respondent entrusted certain matters to her secretary, but instituted no internal controls and neither supervised the secretary personally nor checked on whether the secretary was doing her job correctly). Indeed, the credible evidence is to the contrary. Respondent's failure to supervise Mr. Malyszek in the Fortune Matter is particularly evident as applied to the adequate representation rules, Rules 1.1, 1.3(a), 1.3(c), and 1.4(a), as discussed further below in Section IV.A.2.

b. Rule 5.3(c)

Under Rule 5.3(c), a nonlawyer assistant's misconduct may be imputed to a lawyer who (1) "requests or, with knowledge of the specific conduct, ratifies the conduct involved" or (2) "has direct supervisory authority" over the nonlawyer in a particular representation "and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to

take reasonable remedial action." Rule 5.3(c); *see also In re Winstead*, 69 A.3d 390, 398 n.12 (D.C. 2013). Pursuant to Rule 5.3(c), if the supervisor knows that the misconduct occurred, the supervisor "is required to intervene to prevent avoidable consequences of misconduct." Rule 5.1, cmt. [6].[25] The lawyer's "knowledge may be inferred from circumstances." Rule 1.0(f).

We find by clear and convincing evidence that Respondent is responsible under Rule 5.3(c) for the conduct of Mr. Malyszek in the Fortune Matter in connection with the Rule 1.1, 1.3, and 1.4(a) violations discussed below. Respondent had direct supervisory authority over Mr. Malyszek in the Fortune Matter. FF 39. Fortune's April 13, 2009 letter to Respondent detailed Mr. Malyszek's failures to communicate with the client and asserted significant deficiencies in the Fortune representation, including the firm's failure up to that time to submit a response to the NRCS. FF 32. Therefore, by at least April 13, Respondent knew or should have known of Robert Malyszek's conduct in the Fortune matter. *See In re Cohen*, 847 A.2d 1162, 1166 (D.C. 2004) ("should have known" standard applied to analogous Rule 5.1(c)(2)). By failing to undertake any action in response—or even to reply in any form—to Fortune's April 13, 2009 letter, Respondent ratified Mr. Malyszek's conduct and failed to intervene to avoid or mitigate the consequences of his conduct. Respondent thereby violated Rule 5.3(c).

2. Violation of "Adequate Representation" Rules 1.1, 1.3, and 1.4(a)

Rules 1.1, 1.3, and 1.4(a) collectively impose affirmative duties upon lawyers to ensure that they adequately represent their clients. Rule 1.1 provides that a lawyer (a) "shall provide competent representation to a client," which "requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation" and (b) "shall serve a client with

[25] *See* Rule 5.3, cmt. [2] ("Comments [4], [5], and [6] of Rule 5.1 apply as well to Rule 5.3.").

skill and care commensurate with that generally afforded to clients by other lawyers in similar matters." The Rule "applies only to failures that constitute a 'serious deficiency' in the attorney's representation of a client." *In re Yelverton*, 105 A.3d 413, 421 (D.C. 2014) (quoting *In re Evans*, 902 A.2d 56, 69 (D.C. 2006)). What constitutes a "serious deficiency" is fact specific and "'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.'" *Id*. at 422 (quoting *Evans*, 902 A.2d at 70). For example, the Court found a Rule 1.1 violation where an attorney failed to attend court hearings, to respond to a show-cause order resulting in summary judgment against client, and to make a submission to a government agency that might have prevented client's suspension from work. *In re Carter*, 11 A.3d 1219, 1223 (D.C. 2011); *see also In re Sumner*, 665 A.2d 986, 989 (D.C. 1995) (attorney, aware that client's appeal could be dismissed, "unquestionably violate[d] Rule 1.1" with his "unexcused failure to make required filings caused by his lack of competence in such matters").

Similarly, Rule 1.3 requires an attorney to represent her client with zeal and diligence, to act with "reasonable promptness," and to not intentionally "fail to seek the lawful objectives of a client" or to "prejudice or damage a client" during the course of the representation. "[N]eglect ripens into an intentional violation when the lawyer is aware of his neglect of the client matter[,]" that is, "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) (citation and quotation marks omitted). Intent, which ordinarily must be established by circumstantial evidence, may be inferred "where the neglect is 'so pervasive that the lawyer must [have been] aware of it.'" *Id*. (citation omitted; alteration in original).

Rule 1.4(a) prohibits a lawyer from failing to "keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information." The touchstone for evaluating conduct under Rule 1.4(a) is "whether the lawyer fulfilled the client's reasonable expectations for information." *In re Hallmark*, 831 A.2d 366, 374 (D.C. 2003) (citation and quotation marks omitted). To meet reasonable expectations, a lawyer not only must respond to client inquiries, but must initiate contact to provide information when needed. *Id.* (citing Rule 1.4, cmt. [1]).

We find clear and convincing evidence that Respondent directly, or pursuant to Rules 5.3(b) and (c), failed to handle the Fortune matter with competence, diligence, reasonable promptness, or adequate communication, in violation of Rules 1.1, 1.3, and 1.4(a). Both Respondent and Mr. Malyszek knew that Fortune was a small business and therefore anxious to resolve the large cost overrun on the government contract. FF 18, 32. Yet it was more than a year and one half before an REA was finalized for submission on behalf of Fortune. FF 20, 22. The government initially rejected that REA, indicating that Fortune could address the enumerated deficiencies and resubmit its claim, but the firm made no effort to address the deficiencies or respond to its client's increasingly desperate communications. FF 25-32. After nearly two months, Respondent's client revised the REA on his own and forwarded the revised draft to Respondent's firm for review, subsequently reiterated the "perilous straits" the client was in and the resulting need to expedite the resubmission to NRCS, and threatened to camp out at Respondent's offices until the draft was finalized, to no avail. FF 27, 29-30. Even after Fortune's strongly worded April 13, 2009 letters addressed to and copying Respondent, which set forth the long-standing lack of communication and the ongoing neglect in finalizing and submitting to NRCS the draft amended REA, Respondent still failed to respond. FF 32.

Consequently, Fortune was left to submit the amended REA that it had prepared itself because it could not afford the time and expense of hiring another lawyer. FF 33.

Even putting aside the failure to engage with the government on settlement, FF 15, and the lengthy delay in submitting the initial REA, FF 20-22, Respondent's wholesale failure to respond to the NCRS rejection notice and to submit an amended REA on behalf of the client is a serious deficiency that unquestionably violated Rule 1.1. *See Carter*, 11 A.3d at 1223; *Sumner*, 665 A.2d at 989. Respondent's failure also fell far short of the diligence, zeal, and reasonable promptness required by Rule 1.3(a) and (c). Further, at minimum, Respondent knew from her client's April 13, 2009 letter that the amended REA had not been submitted, and that Mr. Malyszek had not adequately communicated with Fortune or responded to its reasonable requests for information. FF 32. Respondent's failure thereafter to communicate with Fortune or to finalize and submit an amended REA—leaving her client to submit one himself without the assistance of counsel, FF 33—was an intentional failure to seek the client's lawful objections and prejudiced or damaged the client, in violation of Rules 1.3(b) and 5.3(c). *See Ukwu*, 926 A.2d at 1116 (intent under Rule 1.3(b) arises "when a lawyer's inaction coexists with an awareness of his obligations to the client").

Finally, the record is replete with clear and convincing evidence of Respondent's failures, either directly or pursuant to Rules 5.3(b) and (c), over a span of more than two years to promptly respond to Mr. Eversz's inquiries and reasonable requests and to keep her client reasonably informed about the status of the matter, in violation of Rule 1.4(a). Respondent never personally initiated contact with Fortune during the entire engagement and, other than responding to one email and answering the phone twice, Respondent did not communicate directly with Fortune. FF 13. Mr. Eversz's calls to and messages for Respondent went

unanswered, *id*., as did Fortune's final written plea to her in April 2009, FF 32. *See Hallmark*, 831 A.2d at 373-74 (finding violation of Rule 1.4(a) where respondent's failure to communicate with client about the status of her case over a span of a year and a half did not fulfill the client's reasonable expectations for information). Nor did she properly supervise Mr. Malyszek to ensure that Fortune was kept informed of the status of its case, and that it received prompt responses to its inquiries and repeated requests for copies of correspondence, FF 16, 32, in violation of Rule 5.3(b).

Even if we had credited Mr. Malyszek's testimony that the firm had stopped work on the Fortune matter for nonpayment (which we did not, *see* FF 35), we would nevertheless find clear and convincing evidence that Respondent violated Rule 1.4(a). "Lawyers have an obligation not only to reasonably communicate with their clients about pending matters but also to let them know if they cannot or will no longer continue to pursue their cases." *Hallmark*, 831 A.3d at 373 (citing *In re Santana*, 583 A.2d 1011-13 (D.C. 1990) (per curiam)). Accordingly, even if Respondent had ceased work for nonpayment, her failure to advise Fortune that she could not or would not continue to pursue the REA, FF 35, would violate Rule 1.4(a). *See Hallmark*, 831 A.3d at 373.

3. Violation of Rule 1.5(b)

Rule 1.5(b) requires a lawyer to communicate in writing the basis or rate of the fee before or within a reasonable time after the representation commences. Rule 1.5(b); *In re Ifill*, 878 A.2d 465, 477 n.5 (D.C. 2005). "In a new client-lawyer relationship . . . an understanding as to the fee should be promptly established, together with the scope of the lawyer's representation and the expenses for which the client will be responsible." Rule 1.5, cmt. [1].

We find clear and convincing evidence that Respondent failed to communicate in writing to Fortune the basis or rate of Respondent's fee in violation of Rule 1.5(b). She never provided

Fortune with a written retainer agreement, FF 6, and despite repeated requests from Disciplinary Counsel for the Fortune file, Respondent produced no written communication to Fortune setting forth the basis of rate of her fee in compliance with Rule 1.5(b). FF 47.

The only written representation concerning the fee was Mr. Malyszek's July 22, 2007 letter to Fortune's bank generally describing the deferred payment arrangement between Malyszek & Malyszek and Fortune. *See* FF 8-9. This letter does not comply with Rule 1.5. First and foremost, it was addressed to a third party, not to the client, and it did not set forth the scope of the representation or the expenses for which the client would be responsible. *Id.* Second, the letter was not written before or within a reasonable amount of time after commencing the representation. The Fortune representation commenced in January 2007, and the letter to Fortune's Bank was sent more than six months later. FF 8-9. In short, Respondent violated Rule 1.5(b).

4. Violation of Rule 1.16(d): Refund of Unearned Fees

Upon the termination of representation, Rule 1.16(d) requires a lawyer to "take timely steps" to "refund[] any advance payment of fee or expense that has not been earned or incurred." Rule 1.16(d); *see In re Edwards*, 990 A.2d 501, 521 (D.C. 2010); *Hallmark*, 831 A.2d at 370-72 (finding Rule 1.16(d) violation where attorney did not refund $1,000 that client paid as a flat fee to file a motion to dismiss that the attorney never filed, even though she may have performed services in excess of $100 on an hourly basis).

We conclude that Disciplinary Counsel has not established by clear and convincing evidence that Respondent failed to refund unearned fees pursuant to Rule 1.16(d). While the deficient REA submitted to the government on behalf of Fortune represented that approximately $24,000 had been accrued for consulting fees, FF 37, due to Respondent's failure either to maintain or produce records, the evidentiary record is devoid of detailed billing statements or

invoices. FF 48. Further compounding the situation is Respondents' failure to provide Fortune with a written retainer agreement setting forth the basis of the $12,000 initial payment. FF 6, 45-47. The Hearing Committee has concluded that Respondent provided inadequate representation to Fortune, *see supra* § IV.A.2, and that the firm failed to file any amended REA, FF 33. While we are skeptical that Respondent actually earned the full amount of the $12,000 payment she received from Fortune, as Disciplinary Counsel candidly notes, "[i]t is impossible to determine how much of Fortune's $12,000 was actually earned in the absence of records." Disciplinary Counsel Brief at 40. Consequently, there is not clear and convincing evidence of a Rule 1.16(d) violation.

As discussed below, the amount, if any, of the retainer that was unearned and therefore owing to Fortune should be determined in subsequent proceedings at the time Respondent applies for reinstatement. *See infra* § IV.D.2.

5. Rule 5.5(b): Assisting in the Unauthorized Practice of Law

Rule 5.5(b) prohibits a lawyer from assisting in the unauthorized practice of law. In the District of Columbia, the practice of law is defined under the Court of Appeals Rule 49 as:

> [T]he provision of professional legal advice or services where there is a client relationship of trust or reliance. One is presumed to be practicing law when engaging in any of the following conduct on behalf of another:
>
> > (A) Preparing any legal document, including any deeds, mortgages, assignments, discharges, leases, trust instruments or any other instruments intended to affect interests in real or personal property, will, codicils, instruments intended to affect the disposition of property of decedents' estates, other instruments intended to affect or secure legal rights, and contracts except routine agreements incidental to a regular course of business;
> >
> > (B) Preparing or expressing legal opinions;
> >
> > . . .

> (D) Preparing any claims, demands or pleadings of any kind, or any written documents containing legal argument or interpretation of law, for filing in any court, administrative agency or other tribunal;
>
> (E) Providing advice or counsel as to how any of the activities described in subparagraph (A) through (D) might be done, or whether they were done, in accordance with applicable law . . . .

D.C. App. R. 49(b)(2); *In re Schoeneman*, 891 A.2d 279, 280-81 (D.C. 2006).

We conclude that Disciplinary Counsel has not established by clear and convincing evidence that Respondent assisted Robert Malyszek in the unauthorized practice of law in the Fortune Matter. Even assuming that the REA is considered a legal document within the meaning of Rule 49(b)(2), the only evidence in the record regarding its preparation is Mr. Malyszek's testimony that all of the legal analysis reflected in the REA was done by Respondent and the other firm's attorney (*not* by Mr. Malyszek), FF 24, and Mr. Malyszek's contemporaneous representation to Mr. Eversz in April 2009 that Respondent was "doing a final editing" of the response to the NRCS, FF 30. The Hearing Committee did not find Mr. Malyszek to be a credible witness. FF 49. However, there are no time records, invoices or other evidence from which to determine who performed the legal work. Consequently, there is not clear and convincing evidence of a Rule 5.5(b) violation.

6. Rule 7.5: Misleading Firm Name or Letterhead

Rule 7.1(a) prohibits a lawyer from making false or misleading communications about the lawyer or the lawyer's services,[26] and Rule 7.5(a) specifically prohibits a lawyer from using a firm name or letterhead that violates Rule 7.1.

[26] Rule 7.1(a) provides that a "communication is false or misleading if it: (1) [c]ontains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading; or (2) [c]ontains an assertion about the lawyer or the lawyer's services that cannot be substantiated."

We conclude that Disciplinary Counsel has not proved by clear and convincing evidence that the firm's name and letterhead used in connection with the Fortune matter was objectively misleading regarding Robert Malyszek's non-attorney status. *See In re Winstead*, 69 A.3d 390, 397 n.9 (D.C. 2013) (an attorney's representations concerning his or her services may not be "objectively misleading"). The letterhead expressly identified and listed first Respondent's father, Walter Malyszek, as the "Founding Member," followed immediately by Respondent, "Cynthia Malyszek, Esq." The firm's letterhead did not state that Robert Malyszek was a member of any Bar, whereas the firm's letterhead expressly identified the Bar membership of its two practicing attorneys. It also expressly identified Robert Malyszek as a "Government Contract Specialist" and did not use the term "attorney at law" or the title "Esq." FF 12; *cf. Winstead*, 69 A.3d at 398 (finding Rule 7.5(a) violation where repeated use of "attorney at law" or "Esq.," combined with Maryland office address and the absence of a disclaimer of ability to practice in Maryland was misleading).

We recognize that these distinctions may not be obvious to especially non-attorneys, and we note that an express disclaimer of Robert Malyszek's inability to practice law would eliminate any possibility of misperception, especially given that he shared a last name with the two named partners in the firm. However, based on the evidence, including Mr. Eversz's contemporaneous references to Mr. Malyszek as a "consultant," we conclude that Disciplinary Counsel has not established by clear and convincing evidence that Respondent violated Rule 7.5 regarding non-lawyer employee Mr. Malyszek in the Fortune matter.

B. The Silver Matter

With respect to the Silver Matter, Disciplinary Counsel alleges Respondent violated Rules 1.15(c) (post-February 1, 2007) or 1.15(b) (pre-February 1, 2007) (failure to promptly render a full accounting); 1.16(d) (failure to surrender papers and property following termination

of representation); 5.3(c) (failure to take reasonable steps to avoid or mitigate nonlawyer's violation of Rules 1.15(c), and 1.16(d)); 5.5(b) (assisting in the unauthorized practice of law); and 7.5 (misleading communication in firm name and letterhead in violation of Rule 7.1). BX B at ¶ 39. We address each violation below.

1. Rules 1.15(c), 1.16(d), and 5.3(c): Failure to Render an Accounting and Failure to Surrender Property After Termination

Rule 1.15(c) requires a lawyer to "promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive." It also requires a lawyer to "promptly render a full accounting regarding such property" upon request. Rule 1.15(c).[27] *Edwards*, 990 A.2d at 520.

In connection with the termination of a representation, Rule 1.16(d) requires a lawyer to "take timely steps" to surrender papers and property to which the client is entitled, and to refund "any advance payment of fee or expense that has not been earned or incurred." Rule 1.16(d); *see Hallmark*, 831 A.2d at 372. "[A] client should not have to ask twice" and "is owed an immediate return of his file no matter how meager." *In re Thai*, 987 A.2d 428, 430 (D.C. 2009) (quotation marks and citation omitted).

We find clear and convincing evidence that Respondent failed to render an accounting or turn over the client file in violation of Rules 1.15(c) and 1.16(d). Respondent failed to provide an accounting in response to Mrs. Silver's January 31, 2007 request. FF 59, 60. Respondent's February 2007 letter made no mention of Mrs. Silver's request for an accounting. FF 60. Mr. Malyszek's February 28, 2007 email to Mrs. Silver, in response to an email sent directly to him that same day, did not provide a full accounting; among other deficiencies, on its face it

[27] Rule 1.15(b) imposed the same requirements for requests made before the Rules were amended on February 1, 2007. *See, e.g.*, *Edwards*, 990 A.2d at 520-21.

purported to provide only "estimated" hours. FF 63; *see In re Pels*, 653 A.2d 388, 397-98 (D.C. 1995) (an accounting must identify the amounts received, and the amounts taken as a fee). Even if we were to credit Mr. Malyszek's testimony that no accounting was provided because Mrs. Silver was not defined as a client in the Silver Retainer and therefore not entitled to an accounting, *but see* FF 64, at minimum Respondent's failure to respond to Mr. Smith's April 2007 certified letter violated Rule 1.15(c). It is undisputed that Respondent received Mr. Smith's certified letter, in which Mr. Smith identified himself as Mr. Silver's attorney and requested both an accounting and a copy of the file. FF 68-69. If Respondent had any doubt that Mr. Smith was authorized by Mr. Silver to receive an accounting or client file, she could have requested an authorization. She did not do so. FF 70.[28] Respondent's failure to provide an accounting and client file in response to Mr. Smith's April 2007 request violated both Rules 1.15(c) and 1.16(d).

We decline, however, to hold Respondent accountable for Mr. Malyszek's failings. The January 31, 2007 request, as well as the April 2007 certified letter, were sent to both Respondent and Mr. Malyszek, and because there is no evidence that Respondent delegated the task of responding to these letters, Respondent had an obligation to do so herself. Furthermore, there is no evidence that Respondent was aware of the February 28, 2007 email from Mrs. Silver to Mr. Malyszek, or Mr. Malyszek's response, in which he provided estimated hours rather than an accounting. FF 63. Thus, we find that Disciplinary Counsel has failed to prove that Respondent violated Rule 5.3(c) in the Silver matter.

[28] Furthermore, there is no dispute that by April 2007, Respondent's representation of Silver had ceased, as Respondent had acknowledged in February having received Mrs. Silver's letter terminating the engagement and having ceased working on the Silver matter in 2006. FF 60.

2. Rule 5.5(b): Assisting in the Unauthorized Practice of Law

We conclude that Disciplinary Counsel has not established by clear and convincing evidence that Respondent assisted Mr. Malyszek in the unauthorized practice of law in the Silver Matter. Malyszek & Malyszek initiated no debarment lawsuit. FF 60. There are no invoices or time records indicating the nature of work performed by various firm members. Rather, the only credible record evidence of legal services, if any, performed consist of correspondence from a Malyszek & Malyszek attorney, and not from Mr. Malyszek, regarding administrative debarment proceedings. FF 58. In short, because there is insufficient evidence regarding the nature of the work Mr. Malyszek performed on the Silver Matter, and we find no evidence that Mr. Malyszek engaged in the unauthorized practice of law in connection with the Silver Matter, we have no basis to conclude that Respondent violated Rule 5.5(b).

3. Violation of Rule 7.5: Misleading Firm Name or Letterhead

We find clear and convincing evidence that Respondent used in the Silver Matter firm letterhead that violated Rule 7.5. Unlike the letterhead in the Fortune Matter, the Silver Retainer was on letterhead that identified the firm name, but did not identify the full names of any attorneys or employees. In the context of the Silvers' initial meeting with Respondent and Robert Malyszek, and where no one advised the Silvers that Mr. Malyszek was not a lawyer, we have concerns that the firm's name could mislead someone into believing that Mr. Malyszek was a lawyer and one of the "Malyszeks" in the firm name.

What we find more troubling, however, is the use of the Malyszek & Malyszek letterhead in the context of the Silver Retainer signed on the date of the initial client meeting. The only firm personnel identified by name in the Silver Retainer were Cynthia Malyszek and Robert Malyszek. Whereas Respondent was identified as Senior Partner and the attorney assigned to the Client's legal matters if brought before any of the identified Boards or Courts, the retainer was

conspicuously silent as to Mr. Malyszek's position, role, and the nature of the services he would provide. Furthermore, the hourly rate identified for Mr. Malyszek was significantly higher than that identified for paralegal services, and the Silver Retainer did not identify any non-legal services to be provided in the matter. FF 51-53. Absent any disclaimer, a client would be misled to believe that Mr. Malyszek was a less senior attorney with a lower billing rate that may represent the client before federal government agencies and departments, and that Respondent would be the senior attorney who would appear before the Board of Contract Appeals or any Courts. *Id.*; *see Winstead*, 69 A.3d at 397-98 & n.9. We recognize that Mrs. Silver testified that her belief that Mr. Malyszek was a lawyer was not due to anything she saw in writing, but Rule 7.5 is an objective, not subjective, standard. In context, we find clear and convincing evidence that Respondent's use of the firm name and letterhead on which the Silver Retainer appeared, combined with the communications therein, was objectively misleading, in violation of Rule 7.5.

C. The Mills Matter

With respect to the Mills Matter, Disciplinary Counsel alleges Respondent violated Rules 1.15(a) (commingling and misappropriation); 1.15(b) (depositing entrusted client funds into a bank that is not an "approved depository"); 1.16(d) (failing to take timely steps in refunding unearned fees and expense after termination of the representation); and 5.3(b)-(c) (ensuring nonlawyer employees conform to Rules).[29] BX E at ¶ 18(a)-(g). We address each below.

[29] In connection with the Mills Matter, Disciplinary Counsel also charged Respondent with violating Rules 5.1(a)-(c) and 5.3(a) relating to the supervision of lawyers and nonlawyer employees. BX E at ¶ 18(e)-(g). However, Disciplinary Counsel asserted Rule 5.1 as an alternative charge depending upon Respondent's anticipated testimony, and it did not address either Rule 5.1 or 5.3(a) in its post hearing brief. *See* 3/24/15 Hr'g Tr. 98-99. Accordingly, and in light of our conclusions regarding Rules 5.3(b) and 5.3(c), we need not and do not address Rules 5.1 or 5.3(a).

1. Violation of Rules 1.15(a) (Commingling) and 1.15(b)

Rule 1.15(a) prohibits commingling of client entrusted funds with a lawyer's personal funds, requiring lawyers admitted in the District of Columbia to hold client funds "'in connection with a representation separate from the lawyer's own property and that such funds shall be kept in a separate account maintained in a financial institution.'" *In re Mayers*, 114 A.3d 1274, 1278 (D.C. 2015) (per curiam) (quoting *Edwards*, 990 A.2d at 518); *see also In re Moore*, 704 A.2d 1187, 1192 (D.C. 1997) (per curiam). "While commingling and misappropriation are related and often concur, they are separate violations." *In re Smith*, 817 A.2d 196, 201 (D.C. 2003). The rule against commingling was created "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) (citations omitted). Not only must client funds be held in an account separate from the lawyers' own funds, Rule 1.15(b) requires members of the District of Columbia bar to deposit entrusted client funds with an "approved depository" as defined by Rule XI of the Rules Governing the District of Columbia Bar. *See In re Pierson*, 690 A.2d 941, 942 n.6 (D.C. 1997).

We find clear and convincing evidence that Respondent violated Rule 1.15(b), and that she commingled funds in violation of Rule 1.15(a). Respondent admitted that the $5,000 retainer wired by her client Mills was deposited into Malyszek & Malyszek's operating account at California Bank & Trust. FF 75. Commingling is established where, as here, client entrusted funds are deposited into a law firm's operating account while that account contains the law firm's own funds. FF 75, 78-79; *see, e.g.*, *Mayers*, 114 A.3d at 1278 (commingling established when retainer funds were deposited into attorney's personal bank account); *In re Osborne*, 713 A.2d 312, 312-13 (D.C. 1998) (per curiam) (finding commingling where attorney, through non-

lawyer bookkeeper, deposited fee and expense advances into operating account). In addition, the Mills retainer was deposited at California Bank & Trust, which was not an "approved depository" within the meaning of Rule 1.15(b). FF 76. Respondent was not (and could not have been) exempt from Rule 1.15(b)'s "approved depository" requirement because, although she maintained an office in California, she admitted that she was not licensed in California. FF 2; Rule 1.15(b) (exempting from the "approved depository" requirement that lawyers "participating in, and compliant with, the trust accounting rules and the IOLTA program of the jurisdiction in which the lawyer is licensed and principally practices"). Accordingly, Respondent violated Rule 1.15(b) by failing to maintain the Mills retainer in an "approved depository," and she violated Rule 1.15(a)'s prohibition against commingling by depositing the retainer in the firm's operating account.

2. Violation of Rule 1.16(d)

Respondent also failed timely to refund unearned funds after the Mills representation ended, in violation of Rule 1.16(d). Respondent admits that the Mills representation ended on May 31, 2013. FF 81. Between July and September 2013, Mr. Mills emailed Respondent and Mr. Malyszek at least five written requests for the return of the unused retainer. FF 83-85. Respondent did not respond to any of these requests. FF 83-85. It was only after Mr. Mills referred the matter to Disciplinary Counsel that Respondent finally returned, on April 3, 2014—ten months after the representation ended—the unused portion of the Mills retainer. FF 87-90. The evidence of Respondent's Rule 1.16(d) violation is clear and convincing. *See, e.g.*, *Edwards*, 990 A.2d at 520; *Hallmark*, 831 A.2d at 372.

3. Violation of Rule 1.15(a) (Misappropriation)

Rule 1.15(a) prohibits misappropriation of entrusted funds. Misappropriation is "any unauthorized use of a client's funds entrusted to [a] lawyer, including not only stealing but also unauthorized temporary use for the lawyer's own purpose, whether or not he derives any personal gain or benefit." *Edwards*, 990 A.2d at 518 (citations omitted). Unauthorized use occurs when client funds are deposited into an attorney's account and "the balance in the attorney's . . . account falls below the amount due to the client, regardless of whether the attorney acted with an improper intent." *Id.*; *see Pierson*, 690 A.2d at 947 (explaining that where an account is overdrawn, misappropriation occurs "the moment [the attorney] deposit[s] [the] client's . . . money in the [operating] account"); *In re Ingram*, 584 A.2d 602, 603 n.1 (D.C. 1991) (per curiam) ("'Misappropriation may include merely allowing the account balance to fall below the amount of client's funds in the account.'") (quoting *In re Thompson*, 579 A.2d 218, 220 n.5 (D.C. 1990) (internal citation and quotation marks omitted)). The Court has explained that the "proof requirement" for misappropriation "is not a demanding one, because misappropriation occurs whenever 'the balance in [the attorney's escrow] account falls below the amount due to the client. Misappropriation in such situations is essentially a per se offense; proof of improper intent is not required.'" *In re Carlson*, 802 A.2d 341, 348 (D.C. 2002) (quoting *In re Anderson*, 778 A.2d 330, 335 (D.C. 2001) (quotation marks and citation omitted; alternation in original)).

Here, we find clear and convincing evidence that Respondent misappropriated client funds in violation of Rule 1.15(a). The Mills Retainer Agreement expressly provided, and Mr. Mills understood, that fees and costs incurred during the representation would be applied against the $5,000 retainer fee, and that Malyszek & Malyszek would return any unused amount of that retainer to Mills. FF 73. According to the final accounting that Mills received from Malyszek & Malyszek on August 8, 2013, the unused portion of the $5,000 retainer amounted to

approximately $990, which was owed to Mills, and which Respondent ultimately returned to Mr. Mills in March 2014. FF 82, 90. We conclude that Respondent misappropriated funds owed to Mills as of at least August 8, 2013, when the balance in the firm's operating account into which the Mills retainer was deposited fell below the $990 owed to Mills. FF 82, 84; *see Edwards*, 990 A.2d at 518 (unauthorized use occurs where "the balance in the attorney's . . . account falls below the amount due to the client").

a. Reckless or Intentional Misappropriation

Disciplinary Counsel contends that Respondent committed intentional or at least reckless misappropriation. The level of Respondent's intent can be inferred from surrounding facts and circumstances. *See In re Martin*, 67 A.3d 1032, 1054 (D.C. 2014). Intent "must ordinarily be established by circumstantial evidence." *Ukwu*, 926 A.2d at 1116; *see also In re Starnes*, 829 A.2d 488, 500 (D.C. 2003) (per curiam). It can be established where a respondent elects not to participate in the disciplinary proceedings. *See In re Mabry*, 11 A.3d 1292, 1293-94 (D.C. 2011) (per curiam) (finding intentional misappropriation where Respondent did not participate in disciplinary proceedings and where "much of the evidence [wa]s circumstantial").

Intentional misappropriation occurs when an attorney handles entrusted funds in a way "that reveals . . . an intent to treat the funds as the attorney's own." *Anderson*, 778 A.2d at 339 (citation omitted). Evidence of a respondent's motivation for using a client's funds, or of how she used the funds, is not necessary; intentional misappropriation need only be established through evidence that the respondent removed the funds without client authorization. *See, e.g.*, *In re Omwenga*, 49 A.3d 1235, 1236-38 (D.C. 2012) (per curiam) (finding intentional misappropriation where respondent withdrew funds without client's permission and did not deposit it in another one of respondent's trust accounts).

An attorney's unauthorized use of funds is reckless if her act reveals "'an unacceptable disregard for the safety and welfare of entrusted funds.'" *Mayers*, 114 A.3d at 1278 (quoting *Anderson*, 778 A.2d at 336). The Court has further explained that reckless misappropriation occurs where an attorney handles entrusted funds "in a way that reveals . . . a conscious indifference to the consequences of his [or her] behavior for the security of the funds." *Anderson*, 778 A.2d at 339 (citation and quotation marks omitted). Reckless misappropriation can be shown by:

> a pattern or course of conduct demonstrating an unacceptable disregard for the welfare of entrusted funds, such as [1] the indiscriminate commingling of entrusted and personal funds, [2] the failure to track settlement proceeds, [3] the disregard of the status of accounts into which entrusted funds were placed, or [4] permitting the repeated overdraft condition of an account.

Carlson, 802 A.2d at 348-49 (quotation marks and citations omitted). Notably, "the disregard of inquiries concerning the status of funds" is one of two additional factors that "may also indicate recklessness." *Id*. at 349.

b. Clear and Convincing Evidence of Reckless or Intentional Misappropriation

We find clear and convincing evidence that Respondent committed intentional misappropriation with respect to the Mills retainer. On the very day the $5,000 Mills retainer fee was deposited into the Malyszek & Malyszek operating account, less than $1,150 of the retainer was earned, yet $5,250 was transferred from the account to Mr. Malyszek, leaving an account balance of only $798.67. FF 78-79. During the course of the Mills representation, the firm's operating account was chronically overdrawn and therefore necessarily contained less than the amount owing to Mills. FF 91. According to the firm's own final accounting, it is undisputed that Malyszek & Malyszek owed Mills approximately $990 in unused funds, yet on the very day

it transmitted this accounting to Mr. Mills, the operating account had a negative balance of -$1,435.09. FF 82, 84.

Mr. Mills sent Respondent numerous emails during late July through September 2013 inquiring into the return of the unused retainer in the undisputed amount of $990. FF 83. During that time alone, the operating account was often overdrawn or otherwise dropped well below the $990 owed to Mills, and numerous checks were written against the account for operating expenses. FF 91-92. Despite repeated efforts by Mr. Mills to seek return of the unused retainer funds, Respondent did not return those funds until well after the Bar Complaint was filed—more than seven months after the firm acknowledged owing funds in the amount of $990, during which time the operating account's balance fell below that amount at least ninety-three times. FF 91. This conduct evinces "an intent to treat the funds as the attorney's own," and, as such, is intentional misappropriation. *Anderson*, 778 A.2d at 339; *see In re Cappell*, 866 A.2d 784, 784 (D.C. 2004) (per curiam) (finding intentional misappropriation where funds in trust account were used for personal and business expenses and where the account balance fell below the amount due third party medical providers); *Pierson*, 690 A.2d at 947 (finding intentional misappropriation where respondent deposited entrusted funds into an overdrawn operating account and continued to withdraw from the funds to pay operating expenses).

We further conclude that Respondent's conduct evinces an "unacceptable disregard for the safety and welfare of entrusted funds" and therefore constitutes, at minimum, reckless misappropriation. We find clear and convincing evidence of no less than four of the six factors that *Carlson* identified as factors indicating recklessness: Respondent (1) permitted "indiscriminate commingling of entrusted and personal funds," FF 75, 79, 92; (2) disregarded the status of the operating account into which the Mills retainer was deposited, FF 75, 79, 91

(3) permitted "the repeated overdraft condition" of that account," FF 91; and (4) disregarded Mr. Mills' inquiries concerning the status of the unused retainer funds, FF 83-85. *Carlson*, 802 A.2d at 348-49. Accordingly, clear and convincing evidence establishes that Respondent at least recklessly misappropriated funds owed to Mills.

Furthermore, as discussed in detail below, because holding money in trust for clients is a "nondelegable fiduciary responsibility," any reliance by Respondent on her non-lawyer employee, Mr. Malyszek, would not excuse her failure to ensure the safety of her client's funds. *See In re Gregory*, 790 A.2d 573, 578 (D.C. 2002) (per curiam).

4. Violation of Rules 5.3(b) and Rule 5.3(c)

Rule 5.3(b)'s requirements for a lawyer with direct supervisory authority over a nonlawyer "apply with full force to lawyers charged with the management of client funds." *Cater*, 887 A.2d at 13. *See generally supra* § IV.A.1.a. Because courts view holding money in trust for clients "as a nondelegable fiduciary responsibility," lawyers may employ nonlawyers to assist with this responsibility, but "lawyers must provide adequate training and supervision to ensure that ethical and legal obligations to account for clients' monies are being met." *Cater*, 887 A.2d at 13 (quoting ANN. MODEL RULES OF PROF'L CONDUCT R. 5.3 cmt (5th ed. 2003)); *see also Gregory*, 790 A.2d at 578. As the Court has explained, "reasonable efforts" required by Rule 5.3(b) "is a proactive standard that requires more than careful selection and appropriate training of the employee":

> In important matters such as the . . . handling[] . . . client funds, there must be some system of timely review and internal control to provide reasonable assurance that the supervising lawyer will learn whether the employee is performing the delegated duties honestly and competently or not. If no such system is in place, it will not do for a lawyer to profess ignorance of the employee's dishonesty or incompetence. Internal controls and supervisory review are essential precisely because employee dishonesty and incompetence are not always identifiable in advance.

Id. at 15-16 (internal quotation marks omitted). Accordingly, courts have found Rule 5.3(b) violations where attorneys failed to discover or prevent misappropriation "because they trusted nonlawyer subordinates to manage client funds and did not review bank statements or otherwise verify or check their subordinates' work." *Cater*, 887 A.2d at 13 (collecting cases); *see also In re Brown*, 112 A.3d 913, 916 (D.C. 2015) (per curiam) (finding intentional misappropriation where the respondent left entrusted funds with a nonlawyer employee with no instruction and failed to maintain records or verify payment).

Here, whether or not Robert Malyszek acted at Respondent's direction when he instructed Mr. Mills to wire the $5,000 retainer into Malyszek & Malyszek's operating account at an unapproved depository, and whether or not Respondent knew that the balance of the firm's operating account repeatedly fell well below the amount owed to Mills, does not change our conclusion. Respondent admitted both that she was head of Malyszek & Malyszek and the only lawyer who had an ownership interest in the firm, and the Mills Retainer Agreement confirms that Respondent had direct supervisory responsibility over non-lawyer Robert Malyszek with respect to the Mills matter. FF 3, 72. Even a cursory, periodic review of the monthly bank statements from California Bank & Trust would have revealed to Respondent that the account into which the Mills retainer was deposited was the firm's operating account from which funds were withdrawn to pay business expenses. FF 92. It also would have shown that the operating account was repeatedly overdrawn and otherwise had a balance lower than the amount owing to Mills. FF 91.

Therefore, we find clear and convincing evidence that Respondent violated Rule 5.3(b) by failing to make reasonable efforts to ensure that non-lawyer Robert Malyszek's conduct was compatible with her professional obligations under Rules 1.15(a) and 1.15(b). *See, e.g.*,

Gregory, 790 A.2d at 578-79 (finding respondent violated Rule 5.3(b) by abdicating his responsibility to safeguard his client's entrusted funds).

We further find clear and convincing evidence that Respondent violated Rule 5.3(c) at least with respect to the failure to return the unused Mills retainer. Pursuant to Rule 5.3(c), the conduct of a nonlawyer assistant is imputed to (i) any lawyer who, with knowledge of the specific conduct, ratifies the misconduct; or (2) a lawyer with direct supervisory authority over the nonlawyer assistant who knows of the nonlawyer assistant's conduct "at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action." Rule 5.3(c)(1) & (2). *See generally supra* § IV.A.1.b.

Here, we find that Respondent has imputed responsibility pursuant to Rules 5.3(c)(1) and (2) for Mr. Malyszek's misconduct under Rule 1.16(d). In addition to her direct supervisory authority over him, Respondent was included as a copied or direct recipient of relevant communications between Mr. Malyszek and Mr. Mills between July 30, 2013 and September 10, 2013 regarding the requested return of unused retainer funds. FF 83-84. In short, even if Respondent had relied on her nonlawyer assistant, Robert Malyszek, to return the unused retainer, the evidence is clear and convincing that Respondent was (or should have been) aware of Robert Malyszek's failure to do so at a time when its consequences could have been avoided or mitigated, but she failed to take reasonable remedial action. This misconduct violated Rule 5.3(c).

D. Recommendation as to Sanction

Disciplinary Counsel seeks the sanction of disbarment, or at minimum a two-year suspension with a requirement that Respondent both make restitution to Mrs. Silver and Fortune and that any readmission be conditioned upon proof of fitness to practice. For the reasons described below, we recommend the sanction of disbarment.

When attempting to determine the appropriate discipline under the circumstances, the Hearing Committee must "review the respondent's violations in light of 'the nature of the violation, the mitigating and aggravating circumstances, [and] the need to protect the public, the courts, and the legal profession.'" *In re Austin*, 858 A.2d 969, 975 (D.C. 2004) (quoting *In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (en banc)). As the Court has stated, the discipline imposed "should serve not only to maintain the integrity of the profession and to protect the public and the courts, but also to deter other attorneys from engaging in similar misconduct." *Martin*, 67 A.3d at 1053 (quoting *In re Scanio*, 919 A.2d 1137, 1144 (D.C. 2007)).

Factors considered in imposing an appropriate sanction include "'(1) the seriousness of the conduct, (2) prejudice to the client, (3) whether the conduct involved dishonesty, (4) violation of other disciplinary rules, (5) the attorney's disciplinary history, (6) whether the attorney has acknowledged his or her wrongful conduct, and (7) mitigating circumstances.'" *Martin*, 67 A.3d at 1053 (quoting *In re Elgin*, 918 A.2d 362, 376 (D.C. 2007)); *see Austin*, 858 A.2d at 975.

1. Mandatory Disbarment for Reckless or Intentional Misappropriation

The law regarding misappropriation is clear and consistent: absent "extraordinary circumstances," disbarment is the presumptive sanction for intentional or reckless misappropriation. *In re Addams*, 579 A.2d 190, 191 (D.C. 1990) (en banc); *see also Mayers*, 114 A.3d at 1279 ("'In virtually all cases of misappropriation, disbarment will be the only appropriate sanction unless it appears that the misconduct resulted from nothing more than simple negligence.'") (quoting *Addams*, 579 A.2d at 191); *In re Loomis*, 84 A.3d 515, 518 (D.C. 2014) (per curiam) ("A lesser sanction than disbarment is 'appropriate only in extraordinary circumstances.'") (quoting *Addams* 579 A.2d at 191). This case presents no such extraordinary circumstances. *See, e.g.*, *Mayers*, 114 A.3d at 1279 (disbarring respondent after finding reckless

misappropriation where he commingled clients funds with personal funds and where the account balance fell below the amount of the entrusted funds); *In re Ahaghotu*, 75 A.3d 251, 253 (D.C. 2013) (disbarring attorney for reckless misappropriation upon finding no extenuating circumstances); *Gregory*, 790 A.2d at 579 (disbarment for employee's reckless misappropriation imputed to respondent pursuant to Rule 5.3(b)).

2. Restitution

Disciplinary Counsel asks that Respondent be required to make appropriate restitution as a condition of reinstatement. Under D.C. Bar Rule XI, § 3(b), the Court or the Board may require an attorney "to make restitution either to persons financially injured by the attorney's conduct or to the Clients' Security Trust Fund" or both, as a condition of reinstatement. *Omwenga*, 49 A.3d at 1240, 1245. For these purposes, restitution refers to a payment by Respondent reimbursing a former client "for the money, interest, or thing of value that the client has paid or entrusted to the lawyer in the course of the representation." *Cater*, 887 A.2d at 19 (quoting *In re Robertson*, 612 A.2d 1236, 1240 (D.C. 1992)). For example, in *In re Rodriguez-Quesada*, the Court found restitution warranted where, as we have found here, the respondent "failed to perform the services he had promised to perform . . . or performed those services incompetently and in a manner detrimental to [the client's] interests." 122 A.3d 913, 922 (D.C. 2015) (per curiam).

Here, we find that Fortune paid to Respondent $12,000, but that Respondent failed to submit on its behalf an amended REA. FF 32-33. Respondent also failed to respond to the Silvers' repeated requests for a refund of any unused amount of the $20,000 retainer. FF 59, 62, 66-69. However, the record does not permit a determination of the amount of restitution, if any, owed to either Fortune or Mr. Silver, because Respondent neither provided her clients nor produced to Disciplinary Counsel an accounting of fees and expenses incurred in either matter

and did not proffer any time records or other justification for fees charged. "Where there is a question about the exact amount of restitution, the Court will defer consideration of the restitution issue until the respondent applies for reinstatement." *Omwenga*, 49 A.3d at 1245 (citing cases).

Accordingly, the Hearing Committee recommends deferring until reinstatement the issue of whether Respondent should be required, as a condition of reinstatement, to make restitution to Mr. Silver and to Fortune, its successor, or the Clients' Security Trust Fund in the amount of any unused monies received from either client. *See id.* at 1240 (ordering disbarment for intentional misappropriation and deferring the issue of restitution related to respondent's failure to return other unearned fees or advanced costs until reinstatement); *In re Thomas*, 740 A.2d 538, 546-47 (D.C. 1999); *In re Lewis*, 689 A.2d 561, 567 (D.C. 1997) (per curiam) (adopting recommendations of the Board to defer the issue of restitution until the filing of a petition of reinstatement based on the "unsatisfactory state of the record"); *In re Morrell*, 684 A.2d 361, 372 n.5 (D.C. 1996) ("We agree with the Board's observation that, if respondent seeks reinstatement, evidence that respondent's victims have been made whole would be 'highly relevant.'").

V. RESPONDENT'S MOTION FOR A NEW COMMITTEE

Finally, the Hearing Committee addresses Respondent's Motion for a New Committee. On May 14, 2015, after Respondent elected not to appear at the conclusion of the hearing, and instead of filing a post-hearing brief, Respondent emailed papers titled "Notice and Motion for New [Hearing] Committee," "Respondent's Objections and Discussion," and "Declaration of Respondent," in which she requested "an entirely new hearing, and an entirely new committee." Resp't. Mot. ¶ 16; Resp't Obj. at 6. Board Rule 7.16(a) (Disposition of Motions) requires that the Hearing Committee defer any ruling on Respondent's substantive motion and include a recommended disposition in its report to the Board. *See In re Barber*, 128 A.3d 637, 642

(D.C. 2015) (per curiam); *In re Ontell*, 593 A.2d 1038, 1040 (D.C. 1991). We recommend that Respondent's Motion for New Committee be denied and her objections be rejected.

We set forth below why Respondent's particular contentions and objections are unfounded. But, notably, even if we were to credit any of them (which we do not), it would have no effect on the Hearing Committee's findings and conclusions regarding the Mills representation. Neither Respondent's unsworn declaration nor any of her evidentiary objections address allegations in the Second Specification of Charges arising from the Mills Matter. Likewise, Respondent does not and cannot claim prejudice from allegedly inadequate representation in connection with the misappropriation charges arising from the Mills Matter, as the consent withdrawal of her counsel pre-dated the November 2014 Second Specification of Charges. It is in connection with Respondent's Mills representation that the Hearing Committee has found intentional and, at a minimum, reckless misappropriation, compelling a recommendation of disbarment.

A. Respondent's Contentions and Objections

The gravamen of Respondent's Motion for New Committee and her Objections are assertions that Respondent was prejudiced, primarily by (1) allegedly inadequate representation; (2) lack of representation after her counsel's consent withdrawal; (3) alleged lack of due process and notice; (4) alleged "actions and inactions of the DC Bar" and Disciplinary Counsel; and (5) the Hearing Committee's response to her Motion regarding the March 24, 2015 hearing. We consider and reject Respondent's primary arguments in turn:

1. Respondent's Representation. Respondent alleges that her counsel provided inadequate representation, "most likely due to his health and memory problems." Resp't Mot. ¶ 8; *see also id.* at ¶¶ 1-5, 8, 16, 17; Resp't Obj. ¶ 1(a)-(c). Prior to May 14, 2015, Respondent never raised this issue to the attention of the Hearing Committee. During the ten

months following her counsel's consent motion to withdraw, including the multiple pre-hearing conferences in which the Hearing Committee specifically asked if there were additional issues to be addressed, Respondent did not raise any concerns regarding the quality of her counsel's representation. *See, e.g.*, 8/5/14 Prehr'g Tr. 31-32; 8/19/14 Prehr'g Tr. 44-46 (Respondent noted only that his "accident . . . and . . . intervening circumstances . . . caused a lot of changes to the schedule"); 11/14/14 Prehr'g Tr. 54; 1/16/15 Prehr'g Tr. 86-87. Respondent also raised no such concerns in her July 25, 2014 motion for leave to obtain new representation and continue the hearing. The Hearing Committee notes that it observed Respondent's counsel during the hearings held on April 30, 2014 and July 8, 2014 and perceived nothing of concern or to cause us to question counsel's ability to provide adequate representation.

Further, we find that Respondent's specific arguments either are unsupported or resulted in no prejudice. Respondent claims that her counsel failed to produce numerous documents procured by Respondent on April 9 and 10, 2014, *see* Resp't Mot. ¶ 2, and did not submit as exhibits two boxes of previously produced documents that Respondent claims she saw in Disciplinary Counsel's office during a break in the initial (March 2014) hearing. *Id*. at ¶ 3. However, in May, Respondent's counsel produced additional documents that had been overlooked or recovered. 5/21/14 Letter from R. Levin to E. Branda at 1.[30] In any event, because Respondent's Motion makes clear that any additional documents she now claims her counsel failed to produce were documents within her own possession or knowledge by at least April 2014, we find no prejudice. *See* Resp't Mot. ¶ 2 & Resp't Attach. 2 (asserting that

[30] Respondent attached to her Motion what she characterized as lists of "documents sent to Bob Levin April 10, 2014 prior to discovery deadline" that were "never submitted" to Disciplinary Counsel. However, upon reviewing the document lists, it appears that all but approximately three of the sixty-one documents listed were entered as hearing exhibits. *See, e.g.*, Tr. 467-68, 472; Resp't Attach. 2.

Respondent's attorney failed to submit for discovery and exhibits electronic copies of documents that Robert Malyszek had emailed to the attorney, copying Respondent, on April 9 and 10, 2014). In the ten months following her counsel's withdrawal, Respondent had ample opportunity to produce these documents, but did not do so, and did not otherwise raise this issue with the Hearing Committee.

We likewise find that Respondent's suggestion that her counsel's deficiencies were to blame for her failure to appear at the July 8, 2014 hearing are not supported by the record. The hearing transcript indicates that an attempt at negotiated discipline (the contemplated terms of which the Hearing Committee has never known) failed because Respondent did not sign and return the papers by Disciplinary Counsel's deadline and, as of the morning before the hearing was to resume, Respondent had advised her counsel that she did not want to proceed with negotiated discipline. 7/8/14 Hr'g Tr. 504-05. Respondent had the opportunity to appear at the second day of the scheduled hearing, but declined. Tr. 509, 541-42.

2. Lack of Representation. The Hearing Committee finds that Respondent was not prejudiced by having to retain new representation mid-way through the proceedings. Resp't Mot ¶ 7; Resp't Obj. 1(d). While Board Rule 19.5 (Representation of Respondents by Counsel) states that "[r]espondents may be represented by counsel at all stages of the disciplinary process," retaining counsel in a timely fashion remains the respondent's sole responsibility, and Respondent's failure timely to retain new counsel did create prejudice. *See, e.g.*, *In re Wetzel*, 691 P.2d 1063, 1065-66 (Ariz. 1984) (per curiam) (rejecting due process challenge to hearing committee's denial of request for continuance where the respondent had been unable to timely secure counsel). Here, when Respondent consented to her prior counsel's motion to withdraw, she was the only remaining witness on her Witness List to testify. 4/30/24 Hr'g Tr. 479:1-9.

Respondent was afforded multiple opportunities and accommodations to retain new counsel, to testify, and otherwise to complete the presentation of her defense during the intervening ten months. *See supra* § I.A.-C; *see also* 10/3/14 Prehr'g Tr. 565 (Respondent stated that if she could not obtain new counsel, she would testify without counsel).

3. Due Process. Respondent's claim that she was prejudiced by an alleged lack of due process and notice, Resp't Mot. ¶ 6; Resp't Obj. ¶ 3, is unfounded and misstates the record. Contrary to Respondent's assertion that the Hearing Committee was assigned *before* she was served with the Second Specification of Charges (Resp't Obj. ¶ 3), it was after she was served with the Second Specification of Charges that the Board issued an order to show cause why the Specification should not be consolidated into ongoing proceedings before this Hearing Committee. *See supra* § I.B. Respondent never responded to that order, and the Second Specification subsequently was consolidated before this Hearing Committee. 12/22/14 Order. *See generally supra* § I.C.

In any event, we find clear and convincing evidence that Respondent's due process rights were not violated. "[D]ue process is satisfied when 'the Specification of Charges gave respondent notice of the specific rules she allegedly violated, as well as notice of the conduct underlying the alleged violations.'" *Barber*, 128 A.3d at 641-42 (quoting *Winstead*, 69 A.3d at 397); *see In re Gallagher*, 886 A.2d 64, 68 (D.C. 2005) ("The fundamental requirements of due process are notice and an adequate opportunity to appear and contest charges."). Here, Respondent was afforded ample notice of and opportunity to appear and contest the Second Specification of Charges. She was served the Second Specification, filed an Answer thereto, and was given multiple opportunities to be heard during the proceedings. *See supra* § I.B-C.

4. Conduct of Disciplinary Counsel. Respondent next alleges she was prejudiced by the "actions and inactions of the DC Bar" and Disciplinary Counsel. Among other things, she claims—for the first time—prejudice from a delay in the investigation regarding the Fortune and Silver matters due to Assistant Disciplinary Counsel's illness. Resp't Mot. ¶ 9. She also asserts a right to depose and to rely on Assistant Disciplinary Counsel's alleged past oral statements that those matters were closed, *id*. ¶ 5; Resp't Obj. ¶ 4(a)-(d), and contends that the D.C. Bar and current Disciplinary Counsel intentionally instituted proceedings against her in these matters only after it somehow knew that she had lost hard copy files and that she was in bankruptcy. Resp't Mot. ¶ 13. The Hearing Committee finds no support for any of these allegations. Notably, with respect to Respondent's assertions regarding Disciplinary Counsel's purported past statements of closure, Respondent attached to her Motion written correspondence from Disciplinary Counsel advising that claims brought in two unrelated disciplinary investigations were being dismissed. *See* Attach, 4; Resp't Obj. ¶ 4(d). Respondent proffered no correspondence received from Disciplinary Counsel indicating that it had closed the Fortune and Silver matters. That Respondent retained counsel and defended against the charges in the Silver and Fortune matters without prior objection demonstrates that she understood that these two matters were not closed.

Regarding the alleged investigatory delay, "'an undue delay in prosecution is not in itself a proper ground for dismissal of charges of attorney misconduct,'" *In re Saint-Louis*, No. 15-BG-123, slip op. at 27 (D.C. Oct. 27, 2016) (quoting *In re Williams*, 513 A.2d 793, 796 (D.C. 1986) (per curiam)), and disciplinary proceedings against an attorney are not subject to any period of limitations. *See* D.C. Bar Rule XI, § 1(c). As the Court explained, "[w]hat is required for dismissal of the misconduct charges is delay plus actual prejudice that results in a due process

violation." *Saint-Louis*, slip op. at 28. In *Saint-Louis*, there was no evidence supporting the respondent's assertions that the delay rendered witnesses unavailable or deprived him of an opportunity to examine them or question their credibility. *Id.* at 29. Thus, the multi-year delay at issue did not rise to the level of a due process violation warranting dismissal of the charges. *Id.* at 30.

Here, Respondent does not claim that witnesses in the Fortune and Silver matters were unavailable to testify; in fact, Respondent was able to examine the witnesses and test their credibility. Respondent's witness list did not identify Assistant Disciplinary Counsel Dicker as a potential witness, nor did she previously advise the Hearing Committee that his (or anyone else's) testimony was needed. Respondent also asserts that she lost hard copy files that may have been used in her defense to the charges. But Respondent's counsel submitted exhibits related to the Fortune and Silver matters, and Respondent has not identified what documents were not available to her due to delay.

We conclude that Respondent suffered no prejudice. *See id.*, slip op. at 28.

5. Hearing Committee Response. Finally, Respondent argues she was prejudiced by the Hearing Committee's response to her untitled motion asserting that she was unable to appear at the scheduled March 24-25, 2015 Hearing (Resp't Mot. ¶¶ 15, 17; Resp't Obj. ¶ 2). Respondent's argument is unavailing. "Consistent with due process, a tribunal may deny a request for continuance of a hearing, having considered various factors, including, *inter alia*, any lack of good faith and prejudice to the opposing party." *In re Asher*, 772 A.2d 1161, 1166 (D.C. 2001) (citation omitted). In *Asher*, the Court found that the Hearing Committee did not abuse its discretion by denying a respondent's request to continue where the respondent:

> had notice of the hearing and was given several opportunities to respond and participate; . . . consistently sought to avoid participating in the proceedings; and

> . . . failed to provide the requisite support for his claim of a disabling condition which prevented his participation in the proceedings. . . . Such a voluntary absence does not deny due process, and the administrative tribunal may require the hearing to go forward under such circumstances.

772 A.2d at 1166 (citations omitted).

Here, Respondent's motion, which was untimely, untitled, and submitted in a form that omitted a page, indicated that she would not appear at the long-scheduled hearing due to "the confines of medical care giving." The Hearing Committee, which had previously continued the hearing multiple times, treated this as a Motion for a Hearing Continuance pursuant to Board Rule 7.10 (Hearing Continuances), and denied it. As an initial matter, Respondent's argument that her "Notice and Motion" was not a request for continuance because "those words do not appear anywhere in the motion" is frivolous. While Respondent claims that the request was in fact for a video appearance or to testify by declaration, Resp't Obj. at 2, her request expressly stated that a video appearance "would be tentative," and that she could not submit a declaration by the scheduled hearing date, *see* 3/19/15 Mot. at 1. In any event, Respondent did not contemporaneously contest the Hearing Committee's treatment of her motion as one for continuance.

Furthermore, the Hearing Committee's response did not impede Respondent's opportunity to be heard. Despite having received Respondent's motion around 5:00 pm on the Friday before the Tuesday hearing, the Hearing Committee ruled on the motion, and its Order was served by email, that same Friday evening. The Order expressly noted that Respondent had offered no evidence supporting her claimed inability to attend the hearing. 5/20/15 Order at 1. Although she had been afforded the entire weekend and Monday to do so, Plaintiff did not move for reconsideration, offer evidence that she was unable to attend the March 24 and 25 hearing, seek to participate in the hearing by videoconference, or otherwise challenge the Order. The

Hearing Committee concludes that its response to her Motion visited no prejudice upon Respondent. *Accord Asher*, 772 A.2d at 1166.

B. Declaration in Support of Respondent's Motion for New Hearing Committee

Finally, the Hearing Committee notes that Respondent's unsworn declaration was submitted after the record was closed and after Respondent chose not to participate in the disciplinary proceedings. 5/14/15 Decl. of Resp't. As such, it is "uncorroborated, unsworn and uncross-examined" and cannot support findings of fact or be considered substantial evidence. *See Cater*, 887 A.2d at 6; *see also* D.C. Bar Rule XI, § 9(g)(1). The Court admonished in *Cater* that where, as here, "a respondent attorney has declined to subject herself to examination in the proper manner, at the proper time, before the proper tribunal, the self-serving claims she has made *dehors* the proceeding cannot be accepted if their credibility has not been established by other means. Any other rule would devalue Hearing Committee fact finding and undermine public confidence in the legitimacy of Bar discipline." 887 A.2d at 6. Pursuant to *Cater*, we decline to consider Respondent's unsworn declaration.

CONCLUSION

D.C. Bar Rule XI, § 2(a) states that "[t]he license to practice law in the District of Columbia is a continuing proclamation by this Court that the holder is fit to be entrusted with professional and judicial matters, and to aid in the administration of justice as an attorney and an officer of the Court." Respondent's misconduct has been established by evidence that is clear and convincing. There are no unique and compelling circumstances here that could justify reducing the recommended and presumptive sanction from disbarment to a lesser sanction. In addition to intentionally misappropriating client funds, Respondent also violated numerous other ethics rules in three separate matters for three different clients. Disbarment is appropriate in this case.

For these reasons, we recommend that Respondent be disbarred.

AD HOC HEARING COMMITTEE

By: /EJP/
Elissa J. Preheim, Esquire
Chair

/HK/
Hal Kassoff

/WAC/
Wallace A. Christensen, Esquire

Dated: December 20, 2016