DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY
HEARING COMMITTEE NUMBER FOUR

In the Matter of:	:	
	:	
CAROLYN MARDIS,	:	
	:	
Respondent.	:	Board Docket No. 14-BD-085
	:	Bar Docket Nos. 2009-D540
	:	& 2009-D557
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 974417)	:	

REPORT AND RECOMMENDATION OF
HEARING COMMITTEE NUMBER FOUR

Executive Summary

This matter arises out of two separate instances of misconduct. In the first matter, Respondent conspired with others in a fraudulent scheme to unlawfully obtain title to a property that was subject to a tax sale. She then took the rightful homeowner's personal property and when the rightful owner contacted her to arrange the return of his property, she provided the owner with a false name, and then demanded that he pay to secure the property's return. She then consigned some of the property to local auction houses (misrepresenting that she had good title). She made misrepresentations to her law firm to cover up her misconduct. In litigation filed by the owner, she testified falsely under oath. She also made false statements to Disciplinary Counsel during the course of its investigation.

In the second matter, Respondent failed to provide her client with a writing explaining the basis of her fee or the scope of the representation, and commingled an advance fee in her operating account, without her client's consent.

Disciplinary Counsel seeks Respondent's disbarment. Respondent argues that she is entitled to mitigation of sanction under *In re Kersey*, 520 A.2d 321 (D.C. 1987) because she suffered from a disability at the time of the misconduct. As discussed below, we find that Respondent did not carry her burden under *Kersey*, and we recommend that she be disbarred.

Introduction

This matter came before Hearing Committee Number Four ("Committee") on Disciplinary Counsel's[1] two-count Specification of Charges filed October 20, 2014, in which Disciplinary Counsel charged Respondent, Carolyn Mardis, with misconduct arising from her involvement in two foreclosure proceedings. Disciplinary Counsel charged Respondent with violating the following District of Columbia Rules of Professional Conduct ("Rules"): 1.4(a) (failure to keep client reasonably informed); 1.4(b) (failure to explain matter to extent reasonably necessary to permit client to make informed decision regarding the representation); 1.5(b) (failure to provide client with writing describing the basis or rate of fee); 1.15(a) (commingling and failure to keep client funds in a trust account); 1.7(b)(4) (conflict of interest – lawyer's professional judgment adversely affected by lawyer's own interests); 3.3(a) (knowingly making false statements of fact to a tribunal); 8.1(a) (knowingly making false statements to Disciplinary Counsel); 8.4(b) (criminal conduct (theft and fraud) reflecting adversely on her fitness to practice); 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation); and 8.4(d) (serious interference with the administration of justice).

Disciplinary Counsel contends that Respondent committed the charged violations, except Rules 1.4(a) and 1.4(b), and should be disbarred as a sanction for her misconduct. Respondent

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[1] The Office of Bar Counsel was renamed The Office of Disciplinary Counsel effective December 19, 2015. The current name will be used in this Report and Recommendation.

contends that no discipline is warranted on the grounds that Disciplinary Counsel failed to establish by clear and convincing evidence that Respondent violated any of the Rules as charged, and thus the Committee should recommend that the Board on Professional Responsibility ("Board") enter an order dismissing the Specification of Charges. Alternatively, if the Committee determines that Disciplinary Counsel proved any of the Rule violations, Respondent contends that she is entitled to mitigation of sanction due to disability pursuant to *In re Kersey*, 520 A.2d 321 (D.C. 1987). Respondent contends that absent a finding of criminal conduct, the misconduct in this matter warrants at most a 90-day suspension, stayed or reduced with conditions based on Respondent's mitigation under *Kersey*.[2]

As set forth below, the Committee finds by clear and convincing evidence that Respondent violated the following Rules with regard to Count I: 1.7(b)(4), 3.3(a), 8.1(a), 8.4(b), 8.4(c), and 8.4(d); and with regard to Count II: 1.5(b) and 1.15(a), and that Disciplinary Counsel failed to establish by clear and convincing evidence that Respondent violated the following Rules with regard to Count II: 1.4(a), 1.4(b), 3.3(a), 8.1(a), 8.4(c), and 8.4(d). The Committee further concludes that Respondent is not entitled to *Kersey* mitigation. Respondent proved by clear and convincing evidence that she has a disability (the first *Kersey* element), but she failed to prove by a preponderance of the evidence that her disability substantially affected her conduct in violating the Rules, and she failed to prove by clear and convincing evidence that she has been substantially rehabilitated from her disability (the second and third *Kersey* elements). The Committee recommends disbarment.

[2] Respondent recognizes that disbarment is mandatory, but still subject to her claim for mitigation, if the Committee finds a violation of Rule 8.4(b) based on fraud and/or theft because such crimes involve moral turpitude. R. Mitigation Br. at 36-37.

I. PROCEDURAL HISTORY

A. Disciplinary Counsel's Charges

On October 20, 2014, Disciplinary Counsel filed the Petition and Specification of Charges and served Respondent (through her counsel). BX 2 and BX 3.[3] The Specification of Charges alleges in Count I ("Kryakov Matter") that, in connection with her representation in a tax sale foreclosure matter, Respondent fraudulently obtained Andre Kryakov's property, while simultaneously depriving her client, Capitol Tax Services ("CTS"), of a business opportunity, violating Rules:

- 1.7(b)(4) by pursuing her own interests rather than that of her client (CTS) and depriving CTS of the opportunity to foreclose Mr. Kryakov's right to redemption;
- 3.3(a) by knowingly making false statements of fact to a tribunal;
- 8.1(a) by knowingly making false statements to Disciplinary Counsel;
- 8.4(b) by engaging in criminal conduct reflecting adversely on her fitness to practice law, specifically, fraud in violation of D.C. Code § 22-3221 and theft in violation of D.C. Code § 22-3211 and/or Md. Code § 7-104;
- 8.4(c) by engaging in conduct involving dishonesty[4]; and
- 8.4(d) by engaging in conduct that seriously interfered with the administration of justice.

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[3] "BX" refers to Disciplinary Counsel's exhibits; "RX" refers to Respondent's exhibits; "Tr." refers to the hearing transcript; "FF" refers to findings of fact; "Stip." refers to the parties' Stipulations of Fact.

[4] At the prehearing conference, Disciplinary Counsel represented that while the Specification of Charges alleged dishonesty in violation of Rule 8.4(c), the charge was intended to apply to all the categories of misconduct prohibited under the Rule—dishonesty, fraud, deceit, and misrepresentation. Disciplinary Counsel maintained that Respondent had sufficient notice of the charges through the Specification of Charges, and counsel for Respondent agreed. Pre-hearing Tr. at 9-11 (Dec. 18, 2014).

Count II of the Specification of Charges ("Dixon Matter") alleges that Respondent engaged in commingling and dishonesty with respect to her representation of Merrick Dixon in his efforts to stop a foreclosure proceeding, violating Rules:

- 1.4(a) by failing to keep Mr. Dixon reasonably informed about the status of the matter;
- 1.4(b) by failing to explain the matter to the extent reasonably necessary to permit Mr. Dixon to make informed decisions regarding the representation;
- 1.5(b) by failing to provide Mr. Dixon a writing describing the basis or rate of her fee before or within a reasonable time after commencing the representation;
- 1.15(a) by failing to hold funds of her client separate from her own (commingling) and failing to keep client funds in a trust account;
- 3.3(a) by knowingly making false statements of fact to a tribunal;
- 8.1(a) by knowingly making false statements to Disciplinary Counsel;
- 8.4(c) by engaging in conduct involving dishonesty[5]; and
- 8.4(d) by engaging in conduct that seriously interfered with the administration of justice.

B. <u>Respondent's Answer</u>

Respondent filed a redacted Answer through counsel on November 12, 2014, admitting some of the factual allegations, but denying she had violated any ethical rules. Respondent also filed a motion for leave to file the unredacted Answer under seal, or in the alternative a motion for a protective order to prevent the disclosure of Respondent's confidential communications with her clients, pursuant to Rule 1.6. Respondent subsequently obtained client consent to disclose the communications at issue and on November 25, 2014, filed a Motion for Leave to File Respondent's

[5] The parties also agreed that the Rule 8.4(c) charge with respect to Count II was intended to include all four categories of misconduct (dishonesty, fraud, deceit, or misrepresentation) and that the Specification of Charges provided sufficient notice of the allegations. *See supra* n.4.

Unredacted Answer *Nunc Pro Tunc* to November 12, 2014. On December 5, 2014, the Committee Chair granted Respondent's motion to file the unredacted answer. Order, *In re Mardis*, Board Docket No. 14-BD-085 (H.C. Dec. 5, 2014). On the same day, the Board Chair denied Respondent's earlier motion as moot. Order, *In re Mardis*, Board Docket No. 14-BD-085 (BPR Dec. 5, 2014).

On May 8, 2015, after the close of the violations phase of the hearing, Respondent filed a motion for leave to amend Paragraph 34 of the Answer to conform it to the evidence presented at the hearing. Disciplinary Counsel filed its opposition brief on May 15, 2015. The Committee heard argument from the parties on May 20, 2015, and denied Respondent's motion on May 21, 2015. Tr. 1430-1431; Order, *In re Mardis*, Board Docket 14-BD-085 (H.C. June 2, 2015); *see also* § VI.A, *infra*, for more discussion on the motion for leave to amend the answer.

C. Notice of Intent to Raise Disability in Mitigation and Practice Conditions

On November 12, 2014, Respondent filed with the Office of the Executive Attorney an Acknowledgment of Disability (or Addiction), in which she asserted that during the period of 2008 to 2012 she suffered from major depression, severe with psychotic features, and alcohol abuse disorder, and a Notice of Intent to Raise Disability in Mitigation as required by Board Rule 7.6.[6] Pursuant to Board Rule 7.6(c), the Board Chair issued an order imposing conditions under which Respondent, who was not practicing law, would practice in the event she resumed the practice of law while this disciplinary matter was pending. Order, *In re Mardis*, Board Docket No. 14-BD-085 (BPR Dec. 22, 2014).

[6] This information was not shared with the Committee until the violations phase of the hearing.

D. Pre-Hearing Proceedings

This case was assigned to Hearing Committee Number Four, comprised of Lucy Pittman, Esquire, Chair; Ms. Nicole A. Evers, Public Member; and Daniel I. Weiner, Esquire, Attorney Member. A pre-hearing conference was held on December 18, 2014, before Ms. Pittman and Mr. Weiner.[7] The evidentiary hearing was scheduled for February 23-26 and March 5, 2015. On February 11, 2015, the parties filed Stipulations of Fact. On the same date, the parties filed their exhibit and witness lists, and Respondent filed an additional list related to mitigating circumstances with the Office of the Executive Attorney and Disciplinary Counsel only.[8] Respondent filed Objections to Disciplinary Counsel's Documentary Exhibits on February 18, 2015, and a Praecipe Withdrawing Certain Objections to Documentary Evidence on February 19, 2015. The objections were addressed during the hearing and are discussed, as needed, in this Report and Recommendation.

E. Hearing – Violation Phase

An evidentiary hearing was held from February 23, 2015 through February 25, 2015, before Hearing Committee Number Four. Disciplinary Counsel was represented at the hearing by Joseph C. Perry, Esquire. Respondent was present throughout the hearing and was represented at the hearing by Justin M. Flint, Esquire, and Diana Hamar, Esquire.[9] The Committee admitted all

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[7] There was an additional pre-hearing conference held on February 13, 2015, before Ms. Pittman and Mr. Weiner.

[8] On April 21, 2015, Respondent's counsel filed a motion for leave to amend the mitigation hearing exhibits pursuant to Board Rule 7.13 and 7.21 to include additional medical records (RX 706) and Dr. Tellefsen's March 23, 2015 report (RX 707). Disciplinary Counsel did not oppose the motion, and RX 706 and RX 707 were admitted into evidence. *See* Tr. 984, 1058.

[9] On June 30, 2015, Borislav Kushnir entered his appearance as counsel for Respondent in place of Ms. Hamar. Praecipe of Substitution of Counsel (filed June 30, 2015). On May 11, 2016, after briefing was complete, Respondent's counsel moved to withdraw. Respondent opposed the

of Disciplinary Counsel's, exhibits, except for BX 246 (Tr. 387-88).[10] Because Disciplinary Counsel did not present a witness to authenticate BX 239 (Mr. Dixon's complaint to Disciplinary Counsel) it was admitted for the limited purpose of demonstrating that Respondent received and responded to it. *Id*. at 383; 388. Disciplinary Counsel called Kenneth Kaufman, Esquire (the complainant), Karen Authement, Esquire, and Andre Kryakov to testify regarding the allegations in Count I. Disciplinary Counsel called Byron Huffman, Esquire, to testify regarding the allegations in Count II.

Respondent's exhibits were admitted without objection as follows: RX 401, 404-405, 417, 437, 439, 446, 476, 480, 493, 497-498, 501-510, 512, 514-516, 519-520, 523-525, 536, 570, and 575 (Tr. 695); and RX 403, 435-436, 440, and 444-445 (Tr. 726). During the hearing, Respondent testified on her own behalf and called Bernard A. Gray, Sr., Esquire, and Virnestean Tubbs to testify.

At the close of Disciplinary Counsel's case, Respondent argued a motion for judgment. Tr. 388-400. Respondent argued that Disciplinary Counsel failed to meet its burden with regard to Count I: Rules 1.7(b)(4), 3.3(a), 8.1(a), and 8.4(b); and with regard to all of the charged

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motion on the grounds that she did not have alternate counsel or viable access to her files. Respondent's counsel's motion to withdraw was denied without prejudice to counsel filing a new motion, supported by evidence that Respondent has received her files. Order, *In re Mardis*, Board Docket No. 14-BD-085 (H.C. July 27, 2016). On August 18, 2016, Respondent's counsel filed another motion to withdraw. Respondent did not oppose that motion, and the motion was granted in an order issued on February 9, 2017.

[10] Disciplinary Counsel's exhibits were admitted as follows: Count I: BX 1-25 (Tr. 104-05); BX 26-40, 41, 42, 42A (Tr. 303); BX 43-49 (Tr. 107); BX 50-90 (Tr. 122); BX 91-95 (Tr. 122-24) (objections were noted for BX 92, 93, and 95 and as discussed herein the Committee considered those objections in weighing the evidence (Tr. 116-18; 123)) BX. Count II: BX 201-211, 214-16, 218, 220-238, 241-45, 247-263 (Tr. 357; 374); BX 217, 219, 240 (Tr. 380); BX 212-213 (Tr. 381-382) (objections were heard and parties were directed to consider addressing the weight to be assigned in post-hearing briefs) (Tr. 281-82, 388); BX 239 (admitted with limitations) (Tr. 383; 388). The Committee did not admit BX 246 (Tr. 387-88).

violations in Count II. The Committee, citing Board Rule 7.16, stated that it would include its recommendation with regard to the motion for judgment in this Report and Recommendation. Tr. 402. Respondent renewed her motion for judgment at the close of the hearing. Tr. 733-34. *See* § IV.B. *infra*, with the Committee's recommendation on the motion for judgment.

On February 25, 2015, the Committee made a preliminary, non-binding determination that Respondent had violated at least one of the charged Rules. Tr. 736; *see* Board Rule 11.11. Disciplinary Counsel timely filed Proposed Findings of Fact and Conclusions of Law on April 1, 2015, and a Reply Brief on April 22, 2015. Respondent timely filed a Post-Hearing Response Brief on April 15, 2015.

F. Hearing – Disability Mitigation Phase

On February 25, 2015, after the Committee announced its preliminary, non-binding determination of a Rule violation, Respondent filed a motion seeking mitigation of sanction pursuant to Board Rule 11.3 and *Kersey*, 520 A.2d at 321. Tr. 736. Respondent's motion included a November 12, 2014 report from Dr. Christiane Tellefsen,[11] that was later supplemented with Dr. Tellefsen's March 23, 2015 report. The second phase of the hearing was continued at Disciplinary Counsel's request to allow Disciplinary Counsel time to investigate and respond to Respondent's motion.[12] On April 7, 2015, Disciplinary Counsel filed an opposition to Respondent's motion. On April 28, 2015, Disciplinary Counsel filed an April 27, 2015 report from Dr. Paul O'Leary.

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[11] On February 26, 2015, Respondent's counsel filed an amendment to the motion to include references to exhibits that were omitted from the February 25 motion.

[12] Respondent did not oppose Disciplinary Counsel's request, and the Chair directed Disciplinary Counsel to file a response to the motion on or before March 27, 2015. Order, *In re Mardis*, Board Docket No. 14-BD-085 (H.C. Feb. 27, 2015). On March 5, 2015, a telephone conference before Ms. Pittman and Ms. Evers was held and the deadline for Disciplinary Counsel's response to Respondent's motion seeking mitigation was moved to April 7, 2015. Order, *In re Mardis*, Board Docket No. 14-BD-085 (H.C. Mar. 9, 2015). In addition, the second phase of the

The hearing resumed on May 1, 2015, and continued on May 20 and 21, 2015. Disciplinary Counsel began the hearing on May 1 with an argument that Respondent was estopped from seeking *Kersey* mitigation because she had not admitted to any wrongdoing. *See* Tr. 863-68. After hearing argument from both parties, the Committee stated that it would include its recommendation on Disciplinary Counsel's motion in this report and recommendation. Tr. 874, 1429-30. The parties further addressed the issue in their post-hearing mitigation briefs.[13] *See* § IV.C, *infra*.

During the disability mitigation phase, Respondent testified on her own behalf and called Dr. Tellefsen as an expert in forensic psychiatry, without objection. Tr. 1008. Respondent's exhibits 701, 703, 704, 706, 707, 708, 709, and 713 were received into evidence. Tr. 984, 1058, 1381. Disciplinary Counsel called Dr. O'Leary as an expert in forensic psychiatry, without objection. Tr. 1224, 1227. Disciplinary Counsel's exhibit 300 was also received into evidence. Tr. 1256.

Respondent's Post-Hearing Opening Brief Regarding Aggravating and Mitigating Circumstances ("R. Mitigation Br.") was timely filed on June 25, 2015. Disciplinary Counsel filed a responsive brief ("BC Mitigation Br.") on July 15, 2015, and Respondent filed a reply brief ("R. Mitigation Reply Br.") on July 27, 2015.

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hearing was set for May 1 and 20-21, 2015. *Id.* On March 3, 2015, Disciplinary Counsel filed a motion to strike Dr. Tellefsen's November 12, 2014 report for failure to suggest a causal connection between Respondent's alleged disability and the misconduct, as required under Board Rule 11.13(a). Respondent's counsel filed a second amended motion regarding disability mitigation on March 24, 2015, that purported to satisfy the standards set forth in Board Rules 11.13(a) and 15.8(c) and included a supplemental report from Dr. Tellefsen dated March 23, 2015. On March 26, 2015, Disciplinary Counsel withdrew its motion to strike Dr. Tellefsen's November 12, 2014 report. Respondent did not object to Disciplinary Counsel's motion to withdraw, and the Chair granted the motion. Order, *In re Mardis*, Board Docket No. 14-BD-085 (H.C. Apr. 8, 2015).

[13] Disciplinary Counsel filed a Statement on Estoppel Argument on June 25, 2015, and also addressed the issue in its Response to Respondent's Post-Hearing Opening Brief Regarding Aggravating and Mitigating Circumstances. Respondent addressed the issue in her Post-Hearing Reply Brief Regarding Aggravating and Mitigating Circumstances.

II. STANDARD OF REVIEW

Disciplinary Counsel bears the burden of establishing by clear and convincing evidence that Respondent violated the Rules of Professional Conduct. *See In re Anderson*, 778 A.2d 330, 335 (D.C. 2001) ("*Anderson I*"); *see also In re Anderson*, 979 A.2d 1206, 1213 (D.C. 2009) ("*Anderson II*") (applying clear and convincing evidence standard to charge of misappropriation of funds); Board Rule 11.6. As the Court has explained, "[t]his more stringent standard expresses a preference for the attorney's interests by allocating more of the risk of error to Disciplinary Counsel, who bears the burden of proof." *In re Allen*, 27 A.3d 1178, 1184 (D.C. 2011) (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 Committee makes the following findings of fact and conclusions of law set forth below, each of which is supported by clear and convincing evidence.

III. FINDINGS OF FACT RELATING TO ALLEGED RULE VIOLATIONS

1. Respondent is a member of the Bar of the D.C. Court of Appeals, having been admitted by motion on May 11, 2007, and assigned Bar number 974417. BX 1; Stip. ¶ 1. She was admitted in Alabama in 2001. BX 1; Tr. 409 (Mardis). On September 24, 2012, Respondent assumed inactive status in the District of Columbia. Stip. ¶ 1.

COUNT I
Kryakov Matter (T Street Property)

2. Andre Kryakov is a dual citizen of the United States and the Russian Federation. Tr. 211 (Kryakov). He first came to the United States as a tourist in 1990. Tr. 226 (Kryakov). In 1993, he began working for NASA. Tr. 227 (Kryakov).

3. In August 1996, Mr. Kryakov purchased a home at 3802 T Street, N.W., Washington, D.C. (hereinafter "T Street Property"). Tr. 226 (Kryakov); BX 5. It was his first home; he paid off the mortgage in approximately four years. Tr. 226, 228 (Kryakov).

4. Starting in 1996, Mr. Kryakov began work as a contractor with the U.S. Department of Energy in connection with a nuclear non-proliferation program designed to secure Russian military sites. Tr. 227 (Kryakov). He traveled frequently, sometimes staying in Russia for more than six months on a particular assignment. Tr. 227-28 (Kryakov); Tr. 35-36 (Kaufman).

5. In the summer of 2005, Mr. Kryakov traveled to Russia with plans to return in September 2005. Tr. 211, 240 (Kryakov); Tr. 34-35 (Kaufman). Before leaving, Mr. Kryakov "simply locked everything up." Tr. 35 (Kaufman). Mr. Kryakov's bank was set up to pay some of his reoccurring bills, such as utilities, but not his real estate taxes. *Id*.

6. Mr. Kryakov prolonged his stay in Russia to care for his mother, who had been diagnosed with brain cancer, and for other personal reasons. Tr. 211, 240 (Kryakov); Tr. 34-35 (Kaufman); BX 81 at 1.

7. While in Russia, Mr. Kryakov failed to pay approximately $2,000 in District of Columbia real estate taxes and penalties on the T Street Property, subjecting the property to a tax auction. BX 6; Tr. 38-39 (Kaufman); Tr. 158-59 (Authement). Mr. Kryakov agrees that it was his responsibility to pay District of Columbia property taxes, but until the events giving rise to these proceedings, he did not know about the tax foreclosure process. Tr. 228-29, 236-37 (Kryakov). He did not know that failing to pay taxes could jeopardize his home-ownership. Tr. 228-29 (Kryakov).

8. On July 14, 2006, Capitol Tax Services ("CTS") bought Mr. Kryakov's home, subject to redemption, for approximately $10,000 at a tax auction. BX 6; Tr. 158-59 (Authement).

Mr. Kryakov remained the legal owner of the property, and the right to redeem the property belonged to him. BX 5; BX 6; Tr. 158-160 (Authement).

9. CTS retained the Law Offices of Heidi S. Kenny, LLC (hereinafter the "Kenny Firm") to gain full title to the T Street Property. Tr. 156-160 (Authement). The Kenny Firm specialized in tax sale foreclosure cases, as well as collections cases in landlord-tenant matters. Tr. 155-56 (Authement).

10. Karen M. Authement, Esquire, an attorney at the Kenny Firm, initially handled the CTS matter. BX 7; Tr. 156-160 (Authement). On February 15, 2007, she filed on behalf of CTS a complaint in D.C. Superior Court to foreclose Mr. Kryakov's right of redemption in a case styled, *Capitol Tax Services v. Kryakov*, Case No. 2007 CA 1292. BX 7; BX 8; Tr. 159-160 (Authement).

11. Members of the Kenny Firm logged their work on the case into a "History Report," via an electronic case management system. BX 49 at 2-14; Tr. 161-63 (Authement); Tr. 668 (Mardis). Each user had unique login information, such that users' initials appeared in the "Oper" (Operator) column, next to their entries. *Id*.; Tr. 668 (Mardis).

12. The addresses of the property involved in tax foreclosure cases were important at the Kenny Firm; attorneys referred to the cases by address and searched in the history report for cases by address. Tr. 554-55, 575, 673 (Mardis). The *CTS v. Kryakov* matter would have been referred to as 3802 T Street. *Id*.

13. In the fall of 2007, the Kenny Firm hired Respondent to assist with, and then take over management of, its D.C. tax foreclosure cases. Tr. 164-65 (Authement). Karen Authement trained Respondent; Respondent would often draft motions for Ms. Authement to review. Tr. 165 (Authement); Tr. 559 (Mardis).

14. Respondent worked on hundreds of cases at the Kenny Firm. BX 89 at 3; BX 47 at 204. When Respondent went to court, she had several matters that would be heard on one day. Tr. 676 (Mardis). As a result, Respondent created a spreadsheet with case information; she would read from the spreadsheet to update the court on the particular matter. Tr. 676-78 (Mardis).

Respondent's Legal Work with Respect to the T Street Property

15. Beginning in early September 2007, Respondent began noting her work in the Kenny Firm's history report in connection with *CTS v. Kryakov* matter. BX 49 at 4. Her entries were identified with her initials, "CTM." Tr. 164-65 (Authement); BX 49. Over the next seven months Respondent had 28 entries in the history report for *CTS v. Kryakov*. BX 49 at 4-8. Respondent's work included, but is not limited to:

a. Respondent reviewed the T Street Property file to ascertain additional information that could be obtained to effect service. The open issue in the case at that time was the lack of service on Mr. Kryakov; a process server had attempted service and reported that the house was vacant and reported that a neighbor did not see anyone going in or out of the property. BX 14; Tr. 165 (Authement).

b. Respondent researched and made efforts to find Mr. Kryakov and recorded information about Mr. Kryakov and potential work history and residences in the history report. BX 49 at 4 (09/07/07 3:23 p.m. entry); Tr. 556-57 (Mardis).

c. Respondent attended four status hearings; BX 7 (status hearings on September 26, 2007, October 24, 2007, January 16, 2008, and May 1, 2008), which Respondent recorded in the history report, BX 49 at 5-7 (09/27/07 10:05 am; 10/25/07 3:20 p.m.; 01/16/08 4:07 p.m.; 05/01/08 1:21 p.m. entries); Tr. 557-58, 561 (Mardis) ("SH" in the log refers to status hearing).

d. Respondent drafted three motions in connection with the T Street Property. The first motion was a supplement to a motion to extend time for service, filed on October 9, 2007, wherein Respondent detailed the efforts to locate and serve Mr. Kryakov. BX 14; BX 7; Tr. 165 (Authement). The second motion prepared by Respondent was a motion to extend service, filed on December 31, 2007; again, the motion detailed the efforts to locate and serve Mr. Kryakov. BX 16; BX 7; Tr. 166-67 (Authement); Tr. 559-560 (Mardis). In January 2008, Respondent began to prepare a third motion by requesting an affidavit of due diligence and performing "an additional" death search using Mr. Kryakov's full name and Social Security number. BX 49 at 6-7 (01/09/08 3:58 p.m. and 01/18/08 9:18 a.m. entries). The third motion was filed on March 17, 2008, seeking service by publication. BX 18; BX 7. The motion detailed the history of the case and the efforts to locate and serve Mr. Kryakov. BX 18. Respondent emailed a related order to the presiding judge. BX 49 at 7 (03/17/08 1:06 p.m. entry).

Respondent's Relationship with Emmette "Tim" Brown

16. Respondent met Emmette "Tim" Brown at the D.C. Superior Court in or about February or March 2008. BX 47 at 177; Tr. 574 (Mardis). Respondent knew Mr. Brown as someone who represented estates in probate matters. Tr. 560 (Mardis). Respondent described her relationship with Mr. Brown as a friendship and business related; they discussed investments but Respondent could not recall the specifics of the discussions and provided vague and inconsistent descriptions of their interactions. BX 47 at 177; Tr. 660 (Mardis); FF 122, *infra*; BX 86 at 4.

17. Respondent and Mr. Brown exchanged phone calls and text messages almost daily beginning March 27, 2008. BX 96B-F. Many days there were numerous calls that began before 9:00 a.m. and continued throughout the day and into the late evening and totaled hours for a given

day. *See, e.g.*, on April 4, 2008, there were twenty-four calls exchanged between Mr. Brown and Respondent that totaled over three hours; the calls began at 7:48 a.m. and ended at 8:17 p.m. BX 96B at 13-14.[14]

18. On March 19, 2008, two days after filing the Motion for Publication, Respondent called Mr. Brown from her cell phone. BX 96B at 3 (Item # 131). Thereafter, phone calls between Respondent and Mr. Brown increased. *See* BX 96B at 4 (one 3/20 call, Item # 266), 7 (three 3/27 calls, Items # 378, 382, 387), 8 (four 3/28 calls, Items # 398, 399, 436, 441), 9 (eleven 3/29 calls, Items # 451, 452, 456, 459, 460, 461, 463, 465, 477, 478, 479).[15]

19. On April 8, 2008, Respondent created an entry in the Kenny Firm's T Street History report stating "Telecom from Mr. Richards, attorney, @215.551.6276." BX 49 at 7. "Mr. Richards" was identified through testimony as Frenchy Risco, Mr. Brown's father. Tr. 37-38, 45 (Kaufman). The entry was logged at 10:45 a.m. *Id*. On that same day, Respondent exchanged at

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[14] The findings of fact will note calls between Respondent and Mr. Brown on certain dates. Respondent argues that noting calls on particular days is misleading because Respondent and Mr. Brown exchanged calls and texts almost daily. Respondent submitted as examples, the following dates: 16 calls exchanged on May 6, 2008 (BX 96C at 18); six calls exchanged on June 1, 2008 (BX 96D at 13), four calls exchanged on July 5, 2008 (BX 96E at 16), and approximately fourteen calls exchanged on September 30, 2008 (BX 96F at 105-07). The Committee finds that there were hours of calls between Respondent and Mr. Brown and that these calls were almost daily beginning March 27, 2008. *See generally* BX 96B-E. However, the Committee disagrees that noting calls on specific days is misleading. The calls demonstrate that Mr. Brown and Respondent were in contact at key moments in this matter. The Committee also finds, as Respondent requests, that there were many other calls that are not detailed in these findings and that the interactions between Respondent and Mr. Brown were frequent and extensive.

[15] In March, 2008, Respondent had a cell phone with the number 443-538-2867. Tr. 655-56, 660-61 (Mardis). She had a home telephone with the number 443-864-4012. Respondent testified that she did not know the 443-864-4012 number (Tr. 654); however, Respondent identified it as her home phone number in connection with the events underlying Count II, and asked the court in those proceedings to contact her there. *See* BX 208 at 51; BX 219 at 2. It also appears on her bank account documents. BX 258. The Committee finds, despite Respondent's denial, that 443-864-4012 was a telephone number that Respondent used during this time period.

least seventeen phone calls with Mr. Brown. Two of those calls were before the "Mr. Richards" entry was logged.[16] There were also approximately twenty-three calls exchanged between Respondent and Mr. Brown the day before, April 7, 2008. BX 96B at 16.

20. On the same day, Mr. Brown exchanged phone calls with a 215 (Pennsylvania) area code phone number (not the "Mr. Richards" number in the history report) at least twelve times; six of those calls occurred before Respondent created the entry about "Mr. Richards."[17] The evidence in the record does not identify the subscriber to that phone number.

21. Respondent did not follow the procedures in place at the Kenny Firm with regard to the call from "Mr. Richards." Respondent did not request, nor did she receive, a written or formal request to redeem the property, nor did she receive a letter of representation from an attorney purporting to represent Mr. Kryakov—these documents were standard requests for the Kenny Firm to proceed with a redemption. Tr. 170-71; 178-79 (Authement); BX 49; Tr. 563-64; 668-672 (Mardis).

Redemption and Sale of the T Street Property

22. On April 9, 2008, the court e-filed an order—signed on April 7—granting CTS's motion for publication. BX 19; BX 49 at 7 (4/9/08 entry). *See* FF 15(d), *supra*.

23. The Kenny Firm's tax sale foreclosure clients reached the point of filing a Motion for Publication "less than ten percent" of the time. Tr. 167-69 (Authement). The Motion for Publication generated excitement in the Firm office, and CTS was told there was a "good chance" they would get the property. *Id*. Based on prior experience, Ms. Authement estimated that CTS would have owned the T Street Property in about twenty to forty-five days after filing a motion

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[16] BX 96B at 16-17 (Items # 905, 911, 921, 927, 939, 940, 942, 944, 946, 947, 948, 952, 953, 955, 956, 957, 964).

[17] BX 96B at 16-17 (Items # 915-920, 922-26, 928) (215-385-2634).

for judgment, which was the next step following service by publication, as permitted by the April 9, 2008 order. Tr. 156-57, 167-69.

24. The next day, April 10, 2008, Respondent drafted a redemption statement for the T Street Property. BX 49 at 7 (4/10/08 entries); Tr. 170-73 (Authement). Generally, redemption statements listed the attorney's fees and expenses that a property owner would have to pay to the Kenny Firm before paying off the D.C. taxes owed and redeeming the property. Tr. 170-71 (Authement). Respondent told Ms. Authement that an attorney had contacted the firm to redeem the T Street Property on behalf of its owner. Tr. 173 (Authement).

25. A status hearing was scheduled for the T Street matter at 10:00 a.m. on April 30, 2008. BX 7; BX 49 at 7 (05/01/08 1:21 p.m. entry). That day, Respondent exchanged phone calls with Mr. Brown, four times before the hearing and at least ten times afterward.[18]

26. On the same day, Mr. Brown made at least two calls to the same Pennsylvania number referred to in FF 20.[19]

27. Respondent appeared at the 10:00 a.m. status hearing and falsely told the court she had spoken with Mr. Kryakov. Respondent stated that she believed Mr. Kryakov would redeem the property and that Mr. Kryakov was "apparently residing, I think, in Pennsylvania." *Id*. She requested the court vacate the publication order issued on April 9, 2008, and hold the matter in abeyance until a status hearing scheduled for sixty days later. BX 21 at 2-3 (rescheduling matter to July 30, 2008); BX 7 at 1 (4/30/08 entry reflecting 10:00 A.M. hearing).

28. After a break in proceedings, Respondent again appeared and falsely represented to the court that she had spoken with Mr. Kryakov. BX 21 at 2-3. Based on Respondent's

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[18] BX 96C at 12-13 (Items # 654, 662, 663, and 671 before 10:00 A.M); *see also id.* (Items # 673, 676, 684, 685, 686, 690, 693, 694, 695, 698).

[19] BX 96C at 13 (Items # 677, 700) (215-385-2634).

representations, the court vacated its April 7 order granting the motion for publication. *Id.*; BX 7 at 1.

29. Also on April 30, 2008, Mr. Brown caused a fraudulent power of attorney (POA) to be filed at the D.C. Recorder of Deeds Office—dated April 19, 2008—purporting to appoint Frenchy Risco as Mr. Kryakov's attorney-in-fact as to the T Street Property. BX 20; Tr. 45-46 (Kaufman). Mr. Risco is Mr. Brown's father. Tr. 37-38, 45 (Kaufman); Tr. 293 (Kryakov); BX 81 at 2. Mr. Brown has admitted that he forged the POA. BX 92 at 3, ¶ 23.

30. On May 20, 2008, Respondent created another false entry in the history report stating, "Telecom to Mr. Richards inquired as to whether or not he intends to redeem the property on behalf of Mr. Kryakov. He stated settlement should occur within the next few weeks." BX 49 at 8 (05/20/08 entry).

31. On May 22, 2008, at around 10:20 a.m., Respondent faxed a new redemption statement to the "Frisco Group." BX 49 at 8. The redemption statement listed the amount ($4,255) that had to be paid to the Kenny Firm. BX 22 at 2. Respondent and Mr. Brown spoke on the phone at least twelve times that day. BX 96D at 7.[20]

32. On the same day, Mr. Brown made a twenty-minute phone call to the same Pennsylvania number referred to in FF 20. BX 96D at 7 (Item # 363).

33. Approximately three and a half hours after Respondent's fax, a copy of the redemption statement she prepared was faxed back to her attention. BX 22; Tr. 51 (Kaufman). The redemption statement fax included a copy of a check made out to the Kenny Firm, laid over the bottom of the document. BX 22 at 2. The fax was addressed: "To: Carolyn Mardis, Re: 3802 T Street. FYI – the check is in the mail." *Id.* at 1.

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[20] BX 96D at 7 (Items # 307, 341, 343, 344, 345, 346, 347, 348, 352, 353, 356, 361).

34. The redemption fees were paid by a cashier's check funded from the account of Michelle Curtis, Mr. Brown's common law wife, that was purchased by Mr. Brown. BX 24 at 2; BX 25 at 2; Tr. 52-53 (Kaufman); Tr. 573 (Mardis); BX 92 at 4, ¶ 25. Respondent knew Ms. Curtis through her friendship with Mr. Brown. BX 72 at 67-69.

35. Mr. Brown sent the redemption check to Respondent at the Kenny Firm, via Express Mail on May 22 or 23, 2008. BX 23; Tr. 49-50 (Kaufman); BX 92 at 4, ¶ 25. It was postmarked Glendale, Maryland, where Mr. Brown and Ms. Curtis then lived, although "A. Kryakov" and the T Street Property address were listed under "FROM" on the envelope. Tr. 49-50 (Kaufman); BX 23. Mr. Kryakov was falsely identified as the remitter on the check. BX 24 at 2; Tr. 52 (Kaufman); Tr. 249 (Kryakov).

36. The funds for the redemption check were from Ms. Curtis's account. BX 24 at 2; Tr. 52-53. The Superior Court (discussed further in FF 94-109) found that Respondent, her husband, Mr. Brown, and Ms. Curtis contributed funds toward the redemption. BX 81 at 3-5, 11-12.

37. On May 30, 2008, Ms. Authement noted in the history report that Mr. Kryakov's taxes remain unpaid and that should they remain unpaid, a "Motion to Extend Nunc Pro Tunc" would need to be filed because the court had vacated the order granting service by publication. BX 49 at 9 (05/30/08 1:50 p.m. entry). Sixteen minutes later, the history report notes that Respondent received a fax of a receipt. *Id*. (05/30/08 2:06 p.m. entry). That same day Respondent called Mr. Brown seven times. BX 96D at 12 (Items # 620-21, 625-28, 635).

38. Mr. Kryakov's delinquent real estate taxes were paid to the D.C. Treasurer by Mr. Brown with a cashier's check funded through Ms. Curtis's account on or about May 22, 2008.[21] BX 25; Tr. 50-54.

39. On June 6, 2008, Respondent and Mr. Brown exchanged at least two phone calls around 7:40 a.m. BX 96D at 17 (Items # 956, 957). Also on June 6, 2008, at 9:17 a.m. Ms. Authement e-filed, or caused to be e-filed, a Praecipe of Partial Dismissal in the CTS matter. BX 26; BX 49 at 9 (06/06/08 entry). The praecipe requested dismissal as to Mr. Kryakov, while the District of Columbia remained a party for reimbursement purposes. *Id*.

40. On June 19, 2008, Mr. Brown caused a second fraudulent POA to be filed at the D.C. Recorder of Deeds Office. BX 27. This document purported to appoint Jihad Rasheed as Mr. Kryakov's attorney-in-fact as to the T Street Property. *Id*.; Tr. 54-55 (Kaufman). Mr. Brown forged Mr. Kryakov's name on the document. Tr. 255-56 (Kryakov); Tr. 56 (Kaufman); BX 92 at 4, ¶ 26.

41. On July 2, 2008, Mr. Rasheed sold the T Street Property to "3802 T Street DC Company, LLC" (3802 Co.), a Delaware Limited Liability Company created and controlled by Mr. Brown. BX 28; Tr. 54-57 (Kaufman). Although the deed reflected a purchase price of $325,000, no money changed hands. BX 28; Tr. 57 (Kaufman); BX 81 at 4. Mr. Brown did not pay Mr. Kryakov anything for the T Street Property. BX 81 at 4; Tr. 57 (Kaufman); Tr. 216-17.

Events Following Sale of the T Street Property

42. Sometime in July 2008, Respondent left the Kenny Firm. Stip. ¶ 9.

[21] The cashier's check was processed on May 29, 2008. BX 25 at 1.

43. From July 8, 2008 to July 18, 2008, Respondent and Mr. Brown had over forty phone calls, totaling over eight hours.[22]

44. By August 2008, Respondent created a company called "Mardis, LLC." Tr. 604-05 (Mardis). Respondent was the sole member of Mardis LLC; she used it "to do real estate transactions" and "sometimes sales of furniture through eBay." *Id*.

45. In August, Respondent was taking action to obtain possession of Mr. Kryakov's furniture from the T Street Property. On or around August 21, 2008, Respondent wrote a check for $500 on a Mardis LLC account (account # 9052) made payable to "Cash" with the notation "Cliff Property: 3802 T Street." BX 30; Tr. 65-66 (Kaufman); Tr. 663 (Mardis). The following day, Respondent wrote a check for $470 on the Mardis LLC account made payable to "Clifton Jones" with the notation "Locksmith & 3802 T St. (270/200)." *Id*. Respondent hired Clifton Jones to haul furniture for her as requested by Mr. Brown. BX 72 at 135-141; Tr. 548-550.

46. In November 2008, Respondent's spouse, Rynele Mardis, was deployed to Iraq. Tr. 421 (Mardis). He returned in December 2009. *Id*.

47. In February 2009, 3802 Co. (Mr. Brown's company), entered into a sales contract with ART3802 T, LLC (ART) to sell the T Street Property. Tr. 58-59 (Kaufman); BX 81 at 4-5. ART's investors sought to buy and renovate the T Street Property, and its members did not know about the fraud perpetrated on Mr. Kryakov. BX 81 at 4-5. The contract specified a purchase price of $465,000, with closing scheduled for March 16, 2009. *Id.*; Tr. 58-59 (Kaufman).

48. On March 12, 2009, Respondent arranged for a portable storage unit (a POD) to be delivered to the 3802 T Street Property on the following day. Stip. ¶ 11. Respondent and/or some

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[22] BX 96F at 1-14 (using both cell and home numbers for Respondent); *see, e.g.*, *id.* (Items # 30 (37 minutes), 35 (27 min.), 174 (64 min.), 182 (33 min.), 189 (38 min.), 203 (33 min.), 228 (87 min.), 231 (38 min.), 335 (41 min.), 348 (32 min.), 368 (26 min.)).

person(s) acting at her behest moved some of Mr. Kryakov's furniture and personal effects from his home to the POD. BX 48 at 9; Tr. 576-77 (Mardis). Respondent paid Mr. Brown $1,500 for Mr. Kryakov's furniture. Tr. 576 (Mardis); RX 480 at exhibit 4.

49. Respondent gave a representative of the POD facility Mr. Brown's phone number, in the event the facility could not reach Respondent regarding the property. BX 47 at 177-78.

50. By March 16, 2009, Respondent had the POD moved to a storage facility in Maryland. Stip. ¶ 12; BX 48 at 9.

51. On March 16, 2009, 3802 Co., acting through Mr. Brown, transferred the fraudulently obtained title to the T Street Property to ART. BX 31; Tr. 57-59 (Kaufman); BX 81 at 4-5. Proceeds from the sale were first applied to extant federal liens on the property, of which Mr. Kryakov was unaware. Tr. 58-60 (Kaufman); BX 81 at 2, 5 n.4. Remaining proceeds from the purported sale (approximately $175,000) were wired to a 3802 Co. bank account (account number ending 1545) controlled by Mr. Brown. BX 32; Tr. 59 (Kaufman); BX 81 at 5.

52. On March 17, 2009, Mr. Brown drew on the same 3802 Co. bank account three checks totaling $11,700 payable to "Rynelle Mardis OR [Respondent]." BX 33 at 1-2; Tr. 60-61 (Kaufman). The notations for these checks read "Loan Repayment," "Expense Reimbursement," and "Investment Return." *Id*.

53. On March 17 and 18, 2009, Mr. Brown drew on the same 3802 Co. bank account three checks totaling over $132,000 payable to "Clearview Acquisitions, LLC," another company Mr. Brown controlled. BX 33 at 4-5; Tr. 61-62 (Kaufman); BX 81 at 5. On March 18, 2009, Mr. Brown drew three checks on his Clearview Acquisitions account payable to Respondent or "Mardis LLC" totaling over $64,000. BX 34; Tr. 61-62 (Kaufman); BX 81 at 5. The memo lines

read "3802 T St. Repay-Payout," "Return Furniture Buyout/Moving" and "Dist: 3802 T St. (Less Buyout)." BX 34 at 1-2.

54. The funds payable to Respondent and Mardis LLC, referred to in FF 52-53, were deposited in Respondent's Mardis, LLC account (account no. 9052) on or around March 19, 2009. BX 35; BX 37 at 2. Respondent gave Mr. Brown her Mardis LLC account number and testified that she believed Mr. Brown deposited the checks on her behalf. Tr. 681-82 (Mardis). Respondent was expecting the funds from Mr. Brown. BX 72 at 61.

55. On March 23, 2009, a check (no. 520) for $47,951.89, payable to "FIA Card Services N.A." and drawn on Respondent's "Mardis LLC" account was created with Respondent's husband as signatory. BX 36. On March 31, 2009, another check (no. 527) for the same amount, this time with Respondent as the signatory was created, payable to "FIA Card Services N.A," Respondent's personal credit card. BX 39. It appears the first check (no. 520) posted to the account as being paid on April 1, 2009. BX 40 at 1. It is not clear from the record why two checks were created.

56. Meanwhile, ART had begun work on remodeling Mr. Kryakov's home. *See, e.g.*, BX 81 at 5.

Mr. Kryakov returns to the United States

57. Mr. Kryakov had no idea that his property had been sold at tax auction or was the subject of subsequent tax redemption proceedings. Tr. 218, 240 (Kryakov); BX 81 at 2. Mr. Kryakov never met nor spoke with Respondent before 2009. Tr. 244-45 (Kryakov). He did not know Mr. Risco or anyone named Mr. Richards. Tr. 45-46 (Kaufman); Tr. 244, 293 (Kryakov); BX 81 at 2. Mr. Kryakov did not know and has never met Mr. Rasheed. Tr. 256 (Kryakov). The

POAs were forged without Mr. Kryakov's knowledge while he remained in Russia. Tr. 45-46 (Kaufman); Tr. 241-42 (Kryakov); BX 81 at 2.

58. On Saturday, March 21, 2009, Mr. Kryakov returned to the United States. Tr. 212 (Kryakov). When he reached his property, Mr. Kryakov was unable to open the front door. Tr. 212 (Kryakov); BX 81 at 5-6. He entered through the back door, and found that all of his furniture and other possessions were gone. *Id*. His house was littered with construction debris. *Id*. Missing items included furniture for the home, paintings Mr. Kryakov had painted, guitars, personal documents, and childhood photos. Tr. 219 (Kryakov); Tr. 74-75 (Kaufman). Mr. Kryakov also had furniture stored in the basement and garage for eventual shipment to Moscow. That furniture was gone. Tr. 224 (Kryakov); Tr. 84-85 (Kaufman).

59. On March 23, 2009, a construction crew arrived at Mr. Kryakov's home to continue work on behalf of ART. Tr. 213-14 (Kryakov), 72-73 (Kaufman). Mr. Kryakov contacted a representative from ART, Andreas Xenophontos, through a crew member. *Id*.; BX 81 at 6. Both Messrs. Kryakov and Xenophontos claimed to be lawful owners of the T Street Property; they contacted the police. Tr. 213-14 (Kryakov). The police were unable to assist in determining the lawful owner.[23] *Id.*

60. Mr. Xenophontos told Mr. Kryakov that the property had been purchased from Tim Brown, and Mr. Xenophontos provided Mr. Brown's cell phone number. Tr. 215 (Kryakov); Tr. 72-73 (Kaufman).

61. Mr. Kryakov called Mr. Brown multiple times on March 23, 2009 and left several messages. Tr. 218 (Kryakov).

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[23] In addition to contacting the police, Mr. Kryakov called the FBI to report what had happened to his property. Tr. 215-16 (Kryakov).

62. That day, Mr. Brown called Respondent's cell phone at least three times, and Respondent called Mr. Brown's cell from her home phone number at least three times.[24]

63. On or around March 25, 2009, Kenneth Kaufman, Esquire, met with Mr. Kryakov; after the meeting, Messrs. Kryakov and Kaufman made arrangements to meet with the police. Tr. 33, 80 (Kaufman). On or around March 28, 2009, Mr. Kryakov retained Mr. Kaufman to help "get his house back and the personal property, if it could be located." Tr. 37 (Kaufman); Tr. 219 (Kryakov).

64. Over the next few months, Mr. Kaufman conducted a thorough investigation into the actions related to the sale of Mr. Kryakov's house and personal property. Mr. Kaufman, *inter alia*, reviewed records at D.C. Recorder of Deeds; ordered transcripts from the D.C. Superior Court in the *CTS v. Kryakov* matter; subpoenaed records from: banks, the Kenny Firm, and the escrow/title company; researched Respondent's identity through a reverse telephone search, property records, and the D.C. Bar website; researched and interviewed staff at the POD company; and interviewed the owner at Laurel Auction, Inc. Tr. 43, 45-47, 64, 68, 78-79, 82-84, 86-88, 107 (Kaufman).

65. On or around March 29, 2009, Messrs. Kryakov and Kaufman met with Mr. Brown in Bethesda, Maryland. Tr. 219-220 (Kryakov); Tr. 74 (Kaufman). Mr. Brown told Mr. Kryakov that Debra Lewis was handling Mr. Kryakov's personal property and that she would be contacting Mr. Kryakov about it. *Id*. Debra Lewis was Respondent; Respondent instructed Mr. Brown to provide a false name to Mr. Kryakov. Tr. 608 (Mardis).

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[24] BX 96F at 300-01 (Items # 10188, 10189, 10195, 10201, 10204, 10206).

66. On March 30, 2009, Mr. Brown called Respondent twice. Respondent called Mr. Brown back and they spoke for approximately six minutes. BX 96F at 311 (Items # 10553, 10554, 10558).

67. Respondent called Mr. Kryakov and introduced herself as Debra Lewis. Tr. 606-09 (Mardis); Tr. 220 (Kryakov). Mr. Kryakov did not record this first conversation. Tr. 220 (Kryakov). Mr. Kryakov continued to communicate with Mr. Brown until the next phone call from Respondent on April 17, 2009. *Id*.

68. On or around April 3, 2009, Mr. Kaufman contacted Ms. Authement at the Kenny Firm to explain he represented Mr. Kryakov and that Mr. Kryakov's property had been fraudulently redeemed and then sold. Tr. 176-77 (Authement); BX 49 at 11 (04/03/09 entry).

69. On or around April 16, 2009, Mr. Kryakov met with Mr. Brown again. Tr. 76 (Kaufman). Mr. Brown asked Mr. Kryakov to sign a waiver releasing all claims to his real property in exchange for the return of his personal property; Mr. Brown provided a draft of such a waiver. Tr. 75-77 (Kaufman); BX 38. That day, Respondent and Mr. Brown talked using both Respondent's cell phone and her home phone number. BX 96F at 328 (Item # 11150, 11151).

70. On April 17, 2009, Respondent called Mr. Kryakov and again identified herself as Debra Lewis. Tr. 220-21 (Kryakov); BX 41. Mr. Kryakov recorded the conversation. *Id*. Respondent stated that she wanted to be reimbursed for moving expenses via a PayPal account and that she would call Mr. Kryakov back to arrange for him to view the condition of his property. *Id*. Respondent did not dispute that the property belonged to Mr. Kryakov and has admitted that it belonged to him. Tr. 612 (Mardis).

71. On April 17, 2009, Respondent also called Mr. Brown from her cell phone and spoke with him for approximately ten minutes. BX 96F at 330 (Item # 11216).

72. On April 19, 2009, Respondent called Mr. Kryakov and told him she was out of town and unable to meet to show his property, but she would call him back to make arrangements to see his furniture. Tr. 222 (Kryakov).

73. Mr. Kryakov tried to contact Respondent after April 19 until their next conversation on April 27, 2009, but was unable to reach her by phone. Tr. 222, 270 (Kryakov).

74. On April 25, 2009, Respondent accessed the POD. BX 47 at 22, 26-28; BX 42.[25]

75. On April 27, 2009, Respondent called Mr. Kryakov again and told him she was still out of town. Tr. 222-23 (Kryakov); BX 42. Respondent sent Mr. Kryakov an email with pictures of his property stored in the POD. Tr. 298-99 (Kryakov); Tr. 81-82 (Kaufman); BX 42 at 4 (pp. 8-9). Respondent used a second false name when she emailed the photos to Mr. Kryakov; the email was sent from an account name Bertha Stansfield. BX 42 at 9; Tr. 81, 100 (Kaufman); Tr. 617-18 (Mardis). During the conversation, Respondent acknowledged that the personal property

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[25] Disciplinary Counsel and Respondent disagree about who accessed the POD on April 25, 2009. Disciplinary Counsel, relying on the testimony of the manager from the POD facility during the Maryland Litigation (FF 87-93), argues that both Respondent and Mr. Brown had the ability to access the POD. Respondent argues she was the only person who had access to the POD. The Committee reviewed the two positions and concludes that it is not clear from the record. The POD manager testified that only persons identified on the account may access the POD and that the company records show that the POD was accessed on April 25 and May 19, 2009. BX 46 at 22, 26-27. The manager did not testify as to who was on the account other than Respondent as the renter/customer. BX 47 at 19-28. The manager testified that Respondent was able to include another person as a point of contact but she was not required to do so. BX 47 at 27-28. During that same hearing, Respondent testified that "originally" Mr. Brown was listed on the POD account in case the company was unable to reach her. BX 47 at 177-78. During her telephone conversation with Mr. Kryakov on April 27, 2009, Respondent denied that Mr. Brown was able to access the POD. BX 42. In addition, Respondent testified before the Committee that Mr. Brown was not able to access to the POD. Tr. 612-13 (Mardis). Because of the manner in which the question was asked during the Maryland Litigation, it is not clear if Mr. Brown remained on the account for the entire period that Respondent was a customer, although Respondent did state he was identified originally on the account. Unfortunately, the POD manager was not asked to confirm who was listed on the account, and therefore the Committee is left with an unclear record. In the end, the Committee is willing to accept Respondent's claim that Mr. Brown was unable to access the POD on April 25, 2009.

belonged to Mr. Kryakov, but stated that "nobody is getting near the POD until the money has been transferred." BX 42 at 4-8.

76. During the April 27, 2009 telephone discussion, Mr. Kryakov asked about specific pieces of his furniture, to include a large mirror. BX 42 at 14. Respondent reported that some of his furniture was damaged and taken to a dump. *Id.* at 12, 15. She did not inform Mr. Kryakov that some of his furniture, including a mirror, was at her home or office. BX 42 at 11-14; Tr. 224-25 (Kryakov).

77. In 2015, on the eve of the disciplinary hearing, Mr. Kaufman learned that two pieces of property belonging to Mr. Kryakov were still located in the office space Respondent previously shared with attorney April Urban, Esquire. One of the items was a large mirror. Tr. 225 (Kryakov); Tr. 102-04 (Kaufman). Respondent left the office in 2010. Tr. 623 (Mardis).

78. The POD in the picture Mr. Kryakov received from Respondent was sixteen feet long. Tr. 223 (Kryakov); BX 42 at 10-11. Mr. Kryakov estimates that it could have held approximately one-quarter of his property. Tr. 224 (Kryakov).

79. In April 2009, Mr. Kryakov gave the phone number for "Debra Lewis," to Mr. Kaufman, who performed a reverse directory search and identified the number as being registered to Rynele Mardis, Respondent's husband. Tr. 225-26, 271-72 (Kryakov); Tr. 77-79 (Kaufman).[26] Mr. Kaufman researched real property in Maryland and found a house owned by Rynele and Carolyn Mardis, and he further found Respondent through the D.C. Bar website. Tr. 78-79 (Kaufman).

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[26] It is not clear from the testimony of Messrs. Kryakov and Kaufman if the reverse directory search was done on April 17 or 27, 2009. Mr. Kryakov testified that it was after the second recorded call, which was on April 27, but Mr. Kaufman believes it was after the first recorded call, which was April 17, 2009. The Committee does not believe that the exact date is needed and concludes that it occurred in April 2009.

80. On April 27, 2009, Messrs. Kaufman and Kryakov traveled to Respondent's residence, and Mr. Kryakov took a photo of the inside of Respondent's open garage. Tr. 271-74; Tr. 257-58 (Kryakov); BX 45 at 3. On or around May 12, 2009, Mr. Kryakov examined the photograph and confirmed that his fireplace screen and set of fireplace implements were inside Respondent's garage. Tr. 271-72 (Kryakov); BX 45.

81. On May 2, 2009, Mr. Kryakov travelled to Russia and did not return until sometime in September of 2009. Tr. 226; 287-88 (Kryakov). Mr. Kryakov was in contact with his attorney, Mr. Kaufman, throughout his time abroad. Tr. 296-97 (Kryakov).

82. In May 9, 2009, Respondent consigned for sale some of Mr. Kryakov's personal property in her possession to AAA Antiques Mall, Inc. in Laurel, Maryland. BX 43. She also entered into a consignment contract with Laurel Auction, Inc. on an unknown date; the auction was scheduled for June 26, 2009, and the POD was delivered to Laurel Auction, Inc. on June 15, 2009. BX 44; Tr. 87-88 (Kaufman); BX 47 at 26-27. On the AAA consignment contract, Respondent certified she was the owner of the property and had "good title" and the "right to sell" it. BX 43. Respondent did not inform Messrs. Kryakov or Kaufman that she consigned the furniture; rather, Mr. Kaufman learned of the consignment from the POD manager on June 17, 2009. Tr. 86, 146 (Kaufman); Tr. 295 (Kryakov); FF 84.

83. Mr. Kaufman researched POD storage facilities and on or about June 17, 2009, he located the POD storage facility that was storing Mr. Kryakov's furniture in a POD rented by Respondent. Tr. 81-84, 86 (Kaufman).

84. Mr. Kaufman talked to the PODs facility manager, Mark DiMuro (who later testified in the Maryland litigation). Tr. 83-84 (Kaufman). Mr. DiMuro informed Mr. Kaufman that the POD was registered to Respondent. Tr. 83-84 (Kaufman); BX 47 at 23. Mr. Kaufman

also learned that just two days earlier, Respondent sent some of Mr. Kryakov's property to Laurel Auction, Inc. Tr. 83-84 (Kaufman); BX 44; BX 47 at 26-27.

85. Mr. Kaufman traveled to Laurel Auction, where he identified some of Mr. Kryakov's property through the window. Tr. 86-88 (Kaufman). Mr. Kaufman spoke with the owner of Laurel Auction, who informed him that: (1) he understood that Respondent owned the subject property; (2) a number of the items had already been sold; and (3) some of the property came directly from Respondent's home, rather than the POD. *Id*.

86. June 17 through 20, 2009, Mr. Kaufman and Respondent spoke about potential settlement over the sale of Mr. Kryakov's personal property. Tr. 88-92.

Maryland Litigation

87. On or around June 22, 2009, Mr. Kaufman filed an action to recover Mr. Kryakov's personal property, on behalf of Mr. Kryakov in the District Court of Maryland (Prince George's County) in a case styled *Kryakov v. Mardis, et al.*, Case No. 502-22437-2009. BX 46; Tr. 90, 93 (Kaufman).

88. On September 3, 2009, the Maryland court held a preliminary hearing to determine who should hold the property pending trial. Tr. 93-94 (Kaufman). The presiding judge determined that Mr. Kryakov could hold the property. Tr. 95-96 (Kaufman). During the hearing, Respondent falsely told the Maryland court that she was unaware there was an issue surrounding the legitimacy of title to the T Street Property at the time she took possession of Mr. Kryakov's furniture. BX 4 at 7.

89. On October 5, 2009, the Maryland Court held a trial. Respondent, Mr. Kryakov, and Mr. DiMuro testified. BX 47.

90. During the trial, Respondent falsely testified that: (1) when she took possession of Mr. Kryakov's furniture, she did not remember that the property she was taking furniture from was the same T Street Property that was the subject of the *Capitol Tax Services* matter she worked on while at the Kenny Firm; (2) she did not know how Mr. Brown came into possession of the T Street Property; (3) she first talked to Mr. Brown about purchasing furniture from the T Street Property in March 2009; and (4) she bought Mr. Kryakov's personal property for $1,500 in an arm's length transaction from Mr. Brown. BX 47 at 171, 176-78, 204.

91. On October 9, 2009, the Maryland Court found that Respondent sent Mr. Kryakov's personal property to Laurel Auction and AAA Antiques Mall when she knew Mr. Kryakov was making a claim of ownership. BX 48 at 5 (p. 10). The Maryland Court further found:

> [Respondent], a licensed attorney in two different states and obviously competent to go into court to handle complicated tax foreclosure matters, bought a basically truckload of furniture for $1,500, sight unseen. That's unusual in the first place. For one, she's not in that business; for second, I don't believe that it was a coincidence in this matter that [Respondent] was the attorney for the tax sale purchaser and then a party that bought that same property is now selling [Respondent] property. [Respondent] had to have known that the property didn't go to foreclosure, and, quite frankly, who sells real estate and the personal property? There's no evidence that any of that ever [sic] or that personal property was ever discussed among the parties. I think it was more than a coincidence on this matter. Not only that, but [Respondent] did have knowledge at some point or another that the furniture was greatly in excess of $1,500. Simply opening the pod would tell you that there was more furniture in there and the quality of the furniture from the photographs that I've seen would – even someone as unsophisticated as the court is to the value of the furniture would tell me that I was sitting on a substantially large amount or dollar amount of furniture on the matter, greatly in excess of anything the $1,500 would be purchased.
>
> [Respondent], even though she had been in contact with Mr. Kryakov, and Mr. Kryakov had made clear his intention that that was his property, decided for unknown reasons, to the court, that she was gonna go ahead and sell that property and put that property to two different auction houses. Her excuse that he was leaving the country and she couldn't – she had to do something with the property is disingenuous at best on the whole matter.

> Another factor in determining this matter is that [Respondent] admitted to the fact and it was substantiated by plaintiff that she used a – false identification, a fake name, when Mr. Kryakov first contacted her for – to get her [sic] property back. Her purported explanation for that that she had dealt with other people who had threatened her before, is also in the court's opinion disingenuous on this matter. I find that [Respondent] knew exactly what she was dealing with on this matter. She knew she was getting a bargain beyond all compare and that she was actively involved in purposely selling this furniture when she knew that Mr. Kryakov was making a claim against that.

BX 48 at 11-14.

92. The Maryland Court awarded Mr. Kryakov $3,960 in damages. BX 48 at 17. This amount reflected the value of the furniture that Mr. Kryakov was unable to recover from Laurel Auction and AAA Antiques Mall because it had already been auctioned off. *Id*.

93. Respondent did not appeal the judgment. Stip. ¶ 20. She also has not paid the judgment to Mr. Kryakov. Tr. 99-100 (Kaufman).

D.C. Litigation

94. Two days after filing the Maryland Litigation, on June 24, 2009, Mr. Kaufman filed in the D.C. Superior Court: "Complaint of Andre M. Kryakov to Try Title, To Set Aside Fraudulent Conveyances, for Ejectment and for Compensatory and Punitive Damages and Other Relief" in *Kryakov v. 3802 T Street DC Company, LLC, et al.*, Case No. 2009 CA 4540. BX 51. Respondent, Mr. Brown, 3802 Co., ART, and ART's lender, Washington First Bank, were among the named defendants. *Id*.

95. On August 19, 2009, the court entered a default against Respondent for her failure to respond to the complaint. BX 53; BX 50 at 8/18/09 entry. The court later allowed Respondent to file an answer. *See* BX 58; BX 50 at 10/30/09 entry.

96. On August 21, 2009, ART and Washington First Bank filed cross-claims against Respondent, Mr. Brown, and the remaining co-defendants for, *inter alia*, conspiracy to defraud (the cross claims were docketed on August 24, 2009). *See* BX 54; BX 55; BX 50 at 8/24/09 entries.

97. On November 12, 2009, Respondent filed verified answers to Mr. Kryakov's complaint and Washington First's and ART's cross-claim. BX 58.

98. Respondent was represented by counsel, first John Mallonee, Esquire, from October 19, 2009 through December 11, 2009. BX 57; BX 60. On December 10, 2009, Bernard Gray, Esquire entered his appearance. BX 59 (docketed on December 11, 2009).

99. Mr. Kaufman, on behalf of his client Mr. Kryakov, was unable to timely obtain discovery from Respondent; motions to compel were filed and orders were issued mandating the production of discovery by specified deadlines. BX 61; BX 63; RX 436 at exhibit 6; BX 65; Tr. 109 (Kaufman); Tr. 704 (Gray); RX 403. Those deadlines were not met by Respondent through her attorney, and the court issued sanctions. RX 403; BX 69 at 2. Mr. Gray paid the sanction on behalf of Respondent because he believed he was "responsible for not getting discovery in, and didn't see any reason that [Respondent] should suffer because of [his] mistake." Tr. 714 (Gray). Mr. Gray also admitted that the failure to respond was "one, because of my carelessness or my not having the information necessary in order for me to do it and two, because I had—tied up in other cases or either ill at the time." Tr. 706 (Gray). The discovery responses remained outstanding despite a warning from the court that a default would be issued if the deadline was missed. RX 444 at 14.

100. On June 25, 2010, the court entered a default judgment against Respondent, because of repeated non-compliance with discovery and the court's orders. BX 69 at 1, 4-6; RX 445. On

July 9, 2010, Respondent filed a *pro se* motion to set aside the order entering default. BX 70. On July 16, 2010, Respondent's counsel filed a motion for reconsideration. BX 71.

101. On July 21, 2010, Respondent gave a sworn deposition in the D.C. Litigation (BX 72).

102. During the July 21, 2010 deposition, Respondent falsely testified that the monies she received from Mr. Brown after the 3802 T Street Property closing were an expected return on an investment related to property, but unrelated to the T Street Property. BX 72 at 54, 61-63, 67, 77-82. Respondent testified that her husband loaned money to Mr. Brown and that the loan covered mortgage payoffs. *Id.* Respondent testified that the investment from her husband was a $6,000 loan that resulted in over $75,000 in return. *Id*.

103. During the July 21, 2010 deposition, Respondent testified she talked to Mr. Brown about purchasing the furniture from the T Street Property in August 2008 and that she wrote the checks to Clifton Jones and for the locksmith as requested by Mr. Brown. BX 72 at 140-42.

104. On July 23, 2010, the court denied Respondent's *pro se* motion to set aside default judgment. BX 73. On July 28, 2010, the court denied Respondent's motion for reconsideration. BX 74.

105. Trial started on October 9, 2012, and lasted nine days; Respondent was not present, but her sworn deposition testimony was read into the record. BX 50 at 6-9; BX 50 at 8 (10/15/12 entry).

106. On October 22, 2012, the jury returned its verdict. Because the court entered a default judgment with respect to Respondent on June 25, 2010, she was presumed to be liable for

all claims asserted by Mr. Kryakov before the trial took place. RX 445.[27] As to Respondent, the jury found her: (1) jointly liable to plaintiff for $150,000 for her participation in a civil conspiracy with respect to obtaining title to the T Street Property and jointly liable for $50,000 in punitive damages because of her participation in that conspiracy; (2) jointly liable to ART and WashingtonFirst for $100,000 for her participation in a civil conspiracy to defraud ART and their lender; (3) liable for conversion of Mr. Kryakov's personal property in the amount of $60,000 and a further $50,000 in punitive damages; and (4) liable for trespass on Mr. Kryakov's property in the amount of $500 and a further $2,000 in punitive damages. *See* BX 77 at 12-14, 22-23, 11, 7 (respectively); Stip. ¶ 43.

107. On November 30, 2012, Mr. Brown filed a Post-Trial Motion for Judgment Not Withstanding the Verdict and for New Trial. BX 50 at 3. On July 15, 2013, the court denied Mr. Brown's motion. The court found:

> Based on the evidence submitted at trial, a reasonable juror could conclude that Carolyn Mardis, Jihad Rasheed, Defendant Brown, and Defendant 3802 T Street Company, LLC, entered an agreement to unlawfully convert the Subject Property. The evidence sufficiently demonstrated that Defendant Brown, Defendant 3802 T Street, Defendant Rasheed, and Defendant Mardis had a common scheme to commit the unlawful conversion. Each step taken by Defendants Brown, Mardis, and Rasheed furthered a common scheme which ultimately left Plaintiff without either his home or any proceeds from the sale of the Subject Property. Therefore, the evidence was sufficient for a finding of civil conspiracy against Defendants.

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[27] The trial court used its broad discretionary power to enter the order of default judgment as a sanction, based on "Mardis's recalcitrance in failing to provide discovery responses pursuant to [the court's] order on four separate occasions." RX 445 at 1. The doctrine of collateral estoppel does not apply to entry of the default. *See In re Fastov*, Board Docket No. 10-BD-096 at 21-23 (BPR July 31, 2013) (setting forth criteria for application of collateral estopped in disciplinary matters). Disciplinary Counsel did not seek to invoke the doctrine of collateral estoppel in this matter as it does not apply here, and the Committee does not use the findings from the D.C. Litigation alone to support its findings.

BX 81 at 13.[28]

108. In August 2013, Respondent filed a notice of appeal. BX 50 at 2 (8/14/13 entry). The Court dismissed the appeal on February 26, 2014, because Respondent failed to comply with the Court's order to provide transcripts. BX 84.

109. Respondent has not paid any of the judgments against her. Tr. 113 (Kaufman).

Disciplinary Counsel Complaint

110. While the D.C. Litigation was pending, on or around December 18, 2009, Mr. Kaufman filed a Disciplinary Counsel complaint about Respondent's conduct. BX 85.

111. On February 5, 2010, Respondent filed a response to the Disciplinary Counsel complaint. BX 86. Through counsel, Respondent falsely stated that the monies she received from Mr. Brown after the 3802 T Street Property closing were for repayment of a personal loan or loans *she* had made to Mr. Brown. *Id*. at 4, 6. Respondent repeated this in her September 9, 2013 response to Disciplinary Counsel, stating that the monies from Mr. Brown were repayments of personal loans she made to Mr. Brown. BX 89 at 3.

112. Also in the February 5, 2010 response, Respondent falsely stated that she first dealt with Mr. Brown regarding Mr. Kryakov's personal property in March 2009. *Id*. at 4-5. On September 9, 2013, Respondent, through counsel, filed a second response to Disciplinary Counsel where she stated "[t]here is no evidence that Mrs. Mardis pursued any personal interests in connection with the Subject Property until August of 2008, when Mr. Brown *allegedly* asked Mrs. Mardis if she would be interested in buying the furniture and personal items from the Subject Property." BX 89 at 4 (emphasis added).

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[28] *See* note 27 concerning the use of the findings from the D.C. Litigation in this disciplinary matter.

Mr. Brown's Criminal Conviction

113. On August 8, 2014, Mr. Brown signed and agreed to a statement of offense where he admitted to his role in the scheme to defraud Mr. Kryakov of his property. BX 92. In addition, on October 31, 2014, Mr. Brown addressed the court during his sentencing. BX 95. Mr. Brown admitted in the statement of offense and during the allocution that he, *inter alia*, learned of the T Street Property from Respondent, he attempted to locate, Mr. Kryakov but when he was unable to do so he assumed he was dead and proceeded with the fraud. BX 92; BX 95 at 76. Mr. Brown forged Mr. Kryakov's name on two powers of attorney that were filed with the D.C. Recorder of Deeds, fraudulently redeemed the T Street Property, and forged a deed to convey the T Street Property to his company. BX 92; Tr. 119 (Kaufman); BX 95 (Respondent is identified as Person C in the statement of offense but the court and prosecutor referred to Respondent by name).[29]

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[29] Disciplinary Counsel relies, in part, on the documents from Mr. Brown's criminal case, *United States v. Brown*, 14-cr-157 (D.D.C.), to include the statement of offense (BX 92), the judgment (BX 93), and the transcript from his sentencing (BX 95) to establish Respondent's role in the fraud. Respondent has objected to the admission and use of BX 92, 93, and 95 throughout the course of the hearing and post-hearing briefs. The exhibits were admitted; but the Committee, as with all evidence, must determine the weight and significance, if any, to assign to the evidence in reaching its findings. *See supra*, note 10.

Respondent argues that the use of the exhibits and findings from Mr. Brown's criminal proceeding is inappropriate here because: Respondent was not a party to the criminal matter and was not able to contest the findings, Mr. Brown was motivated to blame others during his sentencing, and the statements by Mr. Brown in relation to his plea and sentencing contradict prior sworn statements, which should control.

The Committee agrees that there are limitations in relying on Mr. Brown's statements. Mr. Brown has made inconsistent statements regarding the events and actions in obtaining the T Street Property. *Compare, e.g.*, BX 92 and 95, *with* RX 493 at exhibit C. The inconsistent statements are unexplained in this record. Respondent speculates that Mr. Brown had an incentive to blame others during his sentencing and thus his statements are unreliable. Respondent also argues that Mr. Brown's statement in 2013, prior to his sentencing, should be controlling. The Committee rejects that position because Mr. Brown's motivation to provide false statements prior to his prosecution in order to protect himself is just as likely as his motivation to provide false statements during his sentencing. Mr. Brown knew in 2013 that he was being investigated by law

114. On October 31, 2014, the U.S. District Court for the District of Columbia found Mr. Brown guilty of mail fraud. BX 93.

115. During the sentencing proceedings, the District Court asked the U.S. Attorney to address Respondent's apparent role in the fraud as well as her status as a licensed attorney given the misrepresentations that were made to the D.C. Superior Court in the *CTS v. Kryakov* matter. BX 95 at 25-30.

116. No criminal charges have been filed against Respondent. BX 89 at 2.

Credibility findings

117. Respondent's interactions with Mr. Kryakov were dishonest. Respondent used two false names in her interactions with Mr. Kryakov.[30] She consigned Mr. Kryakov's furniture to at least one of the two auction houses on or about May 9, 2009, and sent the POD to the other auction house on June 15, 2009, while also in discussions with Mr. Kryakov about returning the furniture. FF 70, 72, 75-76, 82. Respondent did not inform Mr. Kryakov that she consigned the furniture.

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enforcement. Tr. 597 (Mardis).

Ultimately, the Committee does not need to decide if Mr. Brown's statements about Respondent during sentencing where truthful because there is clear and convincing evidence of Respondent's conduct without relying on those statements. The Committee uses the exhibits solely to establish that Mr. Brown was convicted for his role in these events and to explain his role in the fraud. While his statements during his sentencing are consistent with the findings herein, the Committee does not rely upon those statements in reaching its findings about Respondent's role.

[30] While not charged by Disciplinary Counsel, the Committee notes that Respondent's verified answer in the D.C. Litigation states that she provided her true identity to Mr. Kryakov during one of their telephone conversations. BX 58 at 8 (¶ 42). This is inconsistent with her testimony and Mr. Kryakov's testimony before this Committee. FF 75, 79.

FF 82. She did not inform Mr. Kryakov that some of his furnishings were at her home and office. FF 76-77, 80, 82. This reflects dishonest dealings with Mr. Kryakov.[31]

118. Respondent was dishonest when she claimed that she did not recall the T Street Property from her work at the Kenny Firm. The evidence shows that the address of a property was important at the Kenny Firm. Respondent referred to the *CTS v. Kryakov* matter by address rather than party name and searched for the cases in the history report by address. FF 12. The *CTS v. Kryakov* matter was significant at the Kenny Firm, the client was informed that a rare event was about to occur with the service by publication, and Respondent made diligent efforts for seven months to try to locate Mr. Kryakov. FF 15, 23. The check for a locksmith written one month after leaving the Kenny Firm to obtain personal property from the house is unexplained by Respondent. FF 45. Based on this record, we find that Respondent's claim that she did not recall the T Street Property when she talked with Mr. Brown about purchasing the furniture in August 2008 was deliberately false.

119. Respondent knew Mr. Brown was involved in the fraud since at least April 2008 (when she joined the scheme), and the Committee concludes that her testimony that she did not know about his actions until his plea in August 2014 was deliberately false. Tr. 591 (Mardis); *see* FF 18; Tr. 597 (Mardis) (Respondent knew that detectives were investigating the property in April 2009); *see also* BX 47 and 48 (testimony and findings from the Maryland proceeding where the

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[31] Respondent testified that she talked to Mr. Kaufman before she consigned the furniture. She stated that the first discussion with Mr. Kaufman was in April 2009 while Mr. Kaufman testified it was on June 17, 2009, after he learned that the furniture was consigned. Tr. 678 (Mardis). The Committee does not credit Respondent's testimony but rather credits Mr. Kaufman's version of the events. However, if Respondent's story is correct, then she consigned the furniture while in discussions with both Messrs. Kryakov and Kaufman and did so without informing them. This would reflect dishonest and bad faith actions with regard to Mr. Kaufman as well.

forged powers of attorney were presented); BX 77, 78, 81 (documents from the D.C. Litigation where significant evidence of Mr. Brown's actions were presented).

120. Respondent was inconsistent and appeared to exaggerate her workload at the Kenny Firm. In Respondent's response to Disciplinary Counsel, she reported a workload of hundreds of cases. FF 14. In her testimony in the Maryland Litigation, she stated that she worked on 300 cases. BX 47 at 204. Before this Committee the number grew to thousands of cases. Tr. 417-18. The Committee finds that Respondent had a heavy workload, but the record is devoid of Respondent's *actual* caseload. *See, e.g.*, Tr. 160-61 (Authement) (testified that the tax department at the Kenny Firm had about 2,000 cases but without further clarity as to how many of those were assigned to Respondent). Thus, based on this record, the Committee does not find Respondent's testimony to be intentionally false, but because of the significant increase in Respondent's reported caseload throughout these proceedings, the Committee finds that her exaggeration is another example of her overall lack of credibility.

121. Respondent's testimony about the funds paid to her by Mr. Brown from the proceeds of the sale of the T Street Property was not credible and was deliberately false. Respondent has provided inconsistent explanations for these funds. For example, in Respondent's sworn testimony in the D.C. Litigation, she stated that *her husband* loaned $6,000 to Mr. Brown and that the monies paid by Mr. Brown (over $75,000) were a return on her husband's investment related to unknown property. BX 72 at 54, 61-63, 67-69, 77, 79-80. In her response to Disciplinary Counsel, she claimed *she* provided personal loans to Mr. Brown and that the monies Mr. Brown paid to her were an expected repayment of those loans. FF 111. Respondent's sworn testimony before this Committee was that she did not provide any loans to Mr. Brown, rather, her husband provided three to four loans but she did not know the details of those loans and she referred back

to her deposition transcript. Tr. 583-84; 664 (Mardis). Included in these inconsistent responses, Respondent claims that her conversations with Mr. Brown were about investments only, but not property. Tr. 660 (Mardis). She also claims that the loans or investments made by either her husband or herself related to property, but not the T Street Property. BX 72 at 62; Tr. 660. For example, before this Committee, Respondent provided the following inconsistent testimony:

> Q: What were you [Respondent and Mr. Brown] talking about
> A: I wouldn't remember, but --
> Q: Okay. Were you talking about the T Street property?
> A: No, I know we weren't talking about the T Street property.
> Q: How can you be certain?
> A: Because Tim Brown never talked about properties with me.

Tr. 660 (Mardis). However, on the very next page, Respondent gave the following testimony:

> Q: Okay. So what other dealings were you having with Mr. Brown before April 8, 2008?
> A: Property.
> Q: What do you mean?
> A: I believe we were talking about properties.

Tr. 661 (Mardis).

COUNT II
Dixon Matter

122. Respondent opened a Maryland IOLTA account (#7962) with Revere Bank in August of 2009, although she is not a Maryland lawyer. BX 248; Tr. 446 (Mardis). Respondent closed the Maryland IOLTA account (also in August of 2009), and it did not receive any funds relevant to these proceedings. BX 248.

123. On or around August 17, 2009, Respondent opened a checking account with Revere Bank (account #7970), designated Law Offices of Carolyn T. Mardis, PLLC. BX 258. The monthly statements for this account also bore the designation "Operating." BX 259-261. About

ten days later, Respondent opened another checking account with Revere Bank (account #7236), designated "Mardis LLC." BX 262.

124. On or around September 7, 2009, Merrick Dixon met with Respondent in connection with his efforts to stop the foreclosure of his property at 413 Atlantic Street. Stip. ¶ 45; Tr. 424 (Mardis). Mr. Dixon had defaulted on a refinance loan, and his property was scheduled to be foreclosed on the morning of September 10, 2009. Stip. ¶ 45; BX 201.

125. This was the first time that Respondent represented Mr. Dixon; Mr. Dixon was referred to her through the Legal Club of America. Tr. 423-24 (Mardis).

126. Respondent provided an invoice to Mr. Dixon; both Respondent and Mr. Dixon signed the invoice and dated it September 7, 2009. BX 201; Stip.¶ 46. The invoice states:

Qty	Description	Amount
1	Legal Services	2,500.00
	413 Atlantic St, SE	
	Pre-Foreclosure Litigation	
	Subtotal: 2,500.00	
Currency is in U.S. Dollars (USD) Total:		$2,500.00 USD

BX 201.

127. The invoice does not state whether the legal fee was based on an hourly rate or a fixed/flat fee. BX 201; Stip. ¶ 46. The invoice does not include a reference to hourly rates or additional fees, nor does it state who is responsible for paying costs or expenses. BX 201. In addition, the invoice does not reflect a discount owed to Mr. Dixon.[32] *Id.* The invoice does not define the scope of representation beyond "Pre-Foreclosure Litigation." *Id*.

[32] Email correspondence between Mr. Dixon and Respondent refer to a discount that Mr. Dixon was entitled to because he retained Respondent through a legal club: "remember I also get discounted rates for belonging to the legal club?" BX 234 at 2. Respondent replied "Of course you get a discount. I have worked alot [sic] more than 10 hours." *Id*. at 1.

128. No other written agreement between Mr. Dixon and Respondent exists. Tr. 683-84 (Mardis).

129. Respondent defined "Pre-Foreclosure Litigation" in response to Disciplinary Counsel, explaining it "involves legal services ranging from counseling, contacting and negotiating with lenders, to entering her appearance as counsel of record in litigation in which the secured lender has filed a complaint for foreclosure." BX 243 at 2.

130. One of the first actions Respondent took in her representation of Mr. Dixon was to direct him to file a *pro se* motion for temporary restraining order (TRO) to prevent/postpone the foreclosure. Stip. ¶ 47.

131. On September 8, 2009, the day after Mr. Dixon signed the invoice, he filed the *pro se* motion for a TRO in the case styled, *Dixon v. Trust Capital Investment*, 2009 CA 6476, filed in the D.C. Superior Court. BX 202 at 4 (9/8/2009 entries); BX 204; Stip. ¶ 48. Mr. Dixon also filed a motion for preliminary injunction and a complaint. BX 202 at 4 (9/8/2009 entries); BX 203; BX 205.

132. Respondent informed Mr. Dixon that she would not enter her appearance in the litigation until his fee was deposited into her "client escrow account." BX 243 at 2.

133. Mr. Dixon gave Respondent a check for $2,500 on September 7, 2009, which she deposited in her #7970 operating account (a "Business Advantage Plus Account" with Revere bank that was designated as "Law Offices of Carolyn T. Mardis PLLC-Operating") on September 8, 2009, resulting in a closing balance of $4,261.60. Stip. ¶ 49; BX 260 at 1-3. Respondent used

this operating account for personal or business expenses and deposits, including paying her monthly rent, telephone bills, and for multiple debit transactions.[33] BX 260.[34]

134. There was no evidence that Mr. Dixon consented to have the funds deposited into the operating account instead of a client trust or escrow account. Rather, the evidence shows that Mr. Dixon was told the funds would be deposited into an escrow account. BX 243 at 2.

135. During the course of the Dixon litigation (referred to in FF 132), Respondent sought additional funds from Mr. Dixon, stating that she had worked more than ten hours on the case and her hourly rate was $295. *See* BX 234 at 1 (10/19/09 e-mail to Dixon; "Of course you get a discount, I have worked a lot more than 10 hours . . . ."), 2-3 (10/18/09 e-mail to Dixon; "I need more money. Your $2,500 can only go so far you know."; "I charge $295 per hour and I have exceeded the 10 hours that would have covered the $2,500 . . . ."); BX 235 (email from Respondent to Mr. Dixon referring to her work and payment in hourly installments); BX 236 (e-mails from Respondent requesting more funds). The emails seeking additional funds also refer to the motion to dismiss filed by the defendants in the Superior Court action. BX 234 at 2-3. Respondent informed Mr. Dixon that she needed additional funds to oppose the motion. *Id.* Mr. Dixon affirmed that he wanted the dispositive motion opposed and stated that he was in a "pay as you go scenario." *Id* .

136. Respondent has described the $2,500 paid by Mr. Dixon as both a retainer and as a flat or fixed fee. BX 243 at 2; RX 570 (same as BX 249) at 2; Tr. 433-34 (Mardis). In addition,

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[33] BX 260 at 9 (check from Kaboodle Home Gallery), 15 (payment to attorney John Mallonee), 20 (payment to April Urban for Verizon Bill), 23 (rent), 24 (T-Mobile); BX 261 at 1-2 (multiple debit transactions).

[34] Disciplinary Counsel and Respondent disagree as to whether the expenses paid from the account are personal or business. The Committee finds that whether the expenses are business or personal is not dispositive; rather, the important fact is that the account was an operating account rather than an escrow account.

she explained that the invoice was the written agreement for "pre-foreclosure litigation" only, and that at some point in her representation the Dixon matter became post-foreclosure litigation. Tr. 684 (Mardis).

137. On September 9, 2009, Judge Stephanie Duncan-Peters held a hearing on Mr. Dixon's motion for TRO. BX 202 at 3-4; Tr. 342 (Huffman). Respondent entered her appearance as Mr. Dixon's attorney in the Superior Court action. Stip. ¶ 50; BX 206. Byron Huffman, Esquire, represented Trust Capital Investment, the originator of the refinance loan. BX 207.

138. At the hearing, Respondent represented that Mr. Dixon was attempting to contact a buyer—Wanda Franklin—who had expressed interest in buying Mr. Dixon's property for $275,000. BX 208 at 5-7, 15-17. Respondent further represented that she had been in contact with other interested investors who might be willing to pay a purchase price of $250,000. *Id.* at 17.

139. At the hearing, the parties agreed that if a TRO were granted, Mr. Dixon would obtain a $2,000 cashier's check for deposit in Respondent's attorney escrow account, to reimburse Mr. Huffman and his client for costs associated with delaying the foreclosure. BX 208 at 23-24, 34-35, 45-49.

140. The court withheld its ruling on the motion for TRO and scheduled a conference call for 4:00 P.M. that afternoon. BX 208 at 49. Prior to the 4:00 P.M. hearing, Mr. Dixon obtained the $2,000 cashier's check and Respondent faxed a copy of the check to the court. BX 209. On the fax cover sheet, Respondent represented that the money would be held in an attorney escrow account. *Id.*

141. On September 9, 2009, Respondent did not have a trust account (Maryland trust account or otherwise). Respondent had an operating account and an account known as Mardis

LLC (account #7236), which Respondent mistakenly believed was a trust account. FF 123; Tr. 446-47 (Mardis).

142. The court called Respondent and Mr. Huffman around 4:00 p.m. BX 208 at 49-50. Respondent told the court she had gone to the offices of Maryland Financial Resource Group (MFRG), with which she was already working on an unrelated real estate matter. BX 208 at 51-55. She reported that Steven Allison, the owner of MFRG, was interested in purchasing Mr. Dixon's property for $245,000, had the funds, and could close within seven business days. *Id.* Respondent called Mr. Allison so he could participate in the hearing. *Id.* at 58-59.

143. During the hearing Mr. Allison stated that he was interested in purchasing the property for $237,000 but needed to view the property first. RX 531 at 60, 65. The parties agreed that if Mr. Allison wished to purchase the property he would be required to place a non-refundable $2,500 deposit into Respondent's escrow account the following day before noon, and thereafter Respondent was required to deposit those funds into the court registry. *Id.* at 67-69, 78-79. The parties also agreed, as discussed at the earlier hearing, that Mr. Dixon would pay $2,000 to the lender and the lender's attorney as a result of the postponement of the foreclosure for attorney's fees and advertising costs and the funds would be deposited into the court registry through Respondent's attorney escrow account. *Id.* at 78. Thus, a total of $4,500 would be deposited into the court registry after first passing through Respondent's escrow account.

144. Respondent committed to have a purchase contract written for Mr. Allison by the following morning (September 10, 2009), subject to Mr. Allison seeing the property that evening. BX 208 at 67-68.

145. During the September 9, 2009 afternoon hearing, the court granted Mr. Dixon's motion for TRO. Tr. 343 (Huffman); BX 208 at 79; BX 210. The court ordered that the

foreclosure sale of Mr. Dixon's property would not be held (and could not be rescheduled until after September 22, 2009). BX 210; BX 208 at 79-81. The court also ordered that (1) Respondent deposit a check for $2,000 (for the costs associated with delaying the foreclosure) into the court registry on behalf of Mr. Dixon, and (2) that Respondent report to the court the following day as to whether she had obtained a non-contingent written sales contract on the property accompanied by a $2,500 non-refundable deposit from the purchaser, to be placed in the court registry through her escrow account. BX 210 at 1-2; BX 208 at 76-77, 79.

146. Mr. Dixon deposited the $2,000 cashier's check for Mr. Huffman's costs in Respondent's Mardis LLC #7236 checking account at Revere Bank. BX 263 at 1, 4-6; Tr. 444-46 (Mardis); BX 249 at 2-3; BX 209 at 2.

147. On the morning of September 10, 2009, the court held a telephone status conference. BX 211 at 2. Respondent told the court that following the September 9, 2009 hearing, she was not able to get in further contact with Mr. Allison regarding the property, but that she had communicated with Wanda Franklin, who previously offered $275,000 for the property and remained "very much interested in the property." *Id.* at 3-4.

148. At the end of the September 10, 2009 status conference, the court set another status conference for the following day and informed the parties that if there was no purchase contract for Mr. Dixon's property (from Ms. Franklin or another purchaser), the court would rescind the TRO. BX 211 at 9-10.

149. After the conference, Respondent drew a check for $2,000 for Mr. Huffman's costs on the #7236 checking account and deposited it with the court registry. Tr. 447 (Mardis); BX 263 at 7-8; BX 211 at 4.

150. On September 10, 2009, Mr. Dixon bought five $500 money orders from a Giant supermarket for payment of the $2,500 deposit. BX 212, 213; Stip. ¶ 56. Mr. Dixon showed the unsigned money orders to Respondent as proof that they were purchased. Tr. 452 (Mardis). He also gave her a copy of the Giant receipt. Tr. 451-52; RX 536 (same as BX 213).

151. Respondent did not run the $2,500 deposit through an escrow account into the court registry. Tr. 540-41 (Mardis). Instead, the $2,500 in money orders was directly deposited with the court. *See* Tr. 454-56 (Mardis). When the money orders were deposited into the court registry, they had a notation of "C/O Steven Allison" on the bottom right corner of each of the money orders. Tr. 454; RX 505 (same as BX 214) at 4. Respondent assumed that Mr. Allison had signed each of the money orders. Tr. 453-54 (Mardis).

152. That same day, Messrs. Dixon and Allison executed a contract for the sale of the property. RX 505/BX 214; RX 570. Respondent filed a sales contract for Mr. Dixon's property with the court. BX 214; BX 217 at 6. Along with the contract, Respondent submitted copies of the five Western Union Money Orders, which by then had her Bar number and "C/O Steven Allison" notations. BX 214 at 5-6.

153. The court registry then held $4,500. Stip. ¶ 57.

154. On the morning of September 11, 2009, the court held a telephone status hearing with Respondent and Mr. Huffman. BX 217. At the start of the hearing, the court stated she received a copy of the signed contract and that she and the defendant would have questions about the contract. BX 217 at 2-3. The contract was with the Maryland Financial Resource Group, LLC (signed by Mr. Allison) and Mr. Dixon. BX 214. The court and Respondent then had the following exchange with regard to the $2,500:

> The Court: . . . as I understand it, this is a contract for sale with Steven Allison. Is that right?

> Ms. Mardis: Yes, Your Honor.
>
> The Court: I guess it's really with Maryland Financial Resource Group, LLC, but he's the one who signed the money order, in the amount of 25 hundred dollars. Right?
>
> Ms. Mardis: Yes, Your Honor.

BX 217 at 2-3. The discussion continued with verification that the $2,500 was deposited into the court registry, and the court confirmed through her clerk that the funds were indeed in the registry. BX 217 at 4.

155. During the September 11, 2009 hearing, the parties discussed issues with the September 10, 2009 contract. *See* BX 217 at 4-11. The parties agreed, *inter alia*, that the contract should be altered to reflect that the $2,500 deposit was non-refundable and payable to Mr. Huffman should Mr. Allison choose not to buy the home. BX 217 at 19.

156. During the September 11, 2009 hearing, the court ruled that Mr. Allison could have an opportunity to view the property before purchase. BX 217 at 11-12. Respondent agreed to accompany Mr. Allison to inspect the property by September 15, 2009, and the court set another telephone status hearing for that date. *Id*. at 11-12, 21.

157. On September 15, 2009, Respondent filed with the court an updated sales contract between Messrs. Dixon and Allison reflecting that the $2,500 deposit was non-refundable and was payable to Mr. Huffman. BX 218.

158. That same day, the court held another status hearing. BX 219. Under the terms of the contract, settlement was to take place on September 25, 2009. *Id*. at 5. Respondent specifically requested a further status conference on September 25, 2009. *Id*. at 6. The court set the conference. BX 219 at 6-9.

159. On September 23, 2009, Respondent filed, on behalf of Mr. Dixon, "Plaintiff's Motion to Extend the Temporary Restraining Order." BX 223. Respondent said that the title company had failed to schedule closing for September 25, 2009, and that the parties needed additional time for an addendum to the sales contract to extend the sale date. *Id*. at 1-2. The caption of the motion included a reference to the next scheduled date, a hearing on September 25, 2009 (two days later). *Id.* at 1.

160. On September 24, 2009, Mr. Huffman moved to dismiss the *Dixon* matter stating, *inter alia*, that Mr. Dixon had failed to allege any defense to the foreclosure. BX 225. The next day, he responded to Plaintiff's Motion to Extend the TRO, arguing that the court's TRO had already expired. BX 226.

161. On September 25, 2009, the court held the scheduled hearing. Respondent failed to attend. BX 227; Stip. ¶ 66. The court denied her motion to extend the TRO. BX 227 at 13-14.

162. On September 29, 2009, Respondent filed Plaintiff's Motion for Reconsideration of Plaintiff's Motion to Extend the Temporary Restraining Order. BX 228. Respondent stated that she failed to attend the September 25, 2009 hearing "due to a mistake in interpreting a notification alert from case file express." *Id*. at 1; *see also* BX 243 at 6.

163. On September 30, 2009, the court denied Respondent's motion, stating that it did not credit her explanation for her failure to appear. BX 230. The court order further stated that on the merits of the reconsideration Respondent did not offer any new argument or fact that would justify modifying the court's order to deny extending the TRO. *Id.*

164. On October 16, 2009, Mr. Huffman moved for turnover of the $4,500 held in the court's registry. BX 233.

165. On November 19, 2009, Respondent filed a Motion to Withdraw as counsel for Mr. Dixon, citing "irreconcilable differences over issues arising out of this litigation as well as over the management and direction of the litigation." BX 238. The caption of the motion included a reference to the next scheduled date, a hearing on December 18, 2009.[35] *Id.* at 1.

166. Respondent received a Bar complaint that was filed on December 9, 2009; the complaint alleged, *inter alia*, that Respondent wrongly instructed Mr. Dixon to pay the $2,500 deposit in lieu of payment by Mr. Allison, and that Respondent signed or caused another to sign Mr. Dixon's name to the sales contract. BX 243; BX 239 at 2.[36]

167. The court held a hearing on December 18, 2009, while three motions were pending: (1) Respondent's motion to withdraw, (2) defendant's motion to dismiss, and (3) defendant's motion for turnover of $4,500. BX 202 at 2. Respondent again failed to attend. Stip. ¶ 75.

168. Following the December 18, 2009 hearing, the court issued an order denying Respondent's motion to withdraw because it did not conform to the rules, and the court set an additional hearing on February 26, 2010, to address all pending matters. BX 242.

169. On February 5, 2010, Respondent, through counsel and in response to the allegations referred to in FF 166, represented to Disciplinary Counsel that Mr. Allison deposited the $2,500 in the court registry. BX 243 at 4-5.

170. On February 22, 2010, Respondent moved for reconsideration of her Motion to Withdraw. BX 244.

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[35] The December 18, 2009 hearing was the initial hearing that was scheduled when the case was filed. BX 202 at 4; BX 205 at 17.

[36] The Committee notes the content of the complaint to provide context to Respondent's response to Disciplinary Counsel; the Committee does not consider the statement in the complaint as substantive evidence.

171. On February 26, 2010, the court held a hearing. BX 245. It granted Mr. Huffman's Motion to Dismiss, Motion for Turnover, and Respondent's Reconsideration of Motion to Withdraw as Counsel for Mr. Dixon. *Id*. at 5-8.

172. Ultimately, Mr. Dixon's property was foreclosed. Tr. 351 (Huffman).

173. On October 17, 2013 Respondent provided a second written response to Disciplinary Counsel. BX 249. Respondent clarified her prior statements about the $2,500 deposit into the court registry. *Id.* at 3. She explained that Mr. Allison provided the funds to Mr. Dixon for the down-payment that was required to be held in the court registry. *Id.* Included with Respondent's response to Disciplinary Counsel was an affidavit from Mr. Allison, dated October 4, 2013, where Mr. Allison affirmed that he provided the funds for the $2,500 down payment to Mr. Dixon. *Id.* at exhibit B. The affidavit is silent as to how Mr. Allison's name was placed on the money orders or who deposited the funds into the court registry. *Id.*

IV. FINDINGS OF FACT RELATING TO ASSERTED *KERSEY* DISABILITY MITIGATION[37]

174. Respondent's medical records show she has a history of occasionally being treated for depression. RX 706 at 2; RX 707 at 6. In May 2006, Respondent was prescribed with Wellbutrin for depression. RX 706 at 2. Her depression has waxed and waned over the years. BX 300 at 34.

175. During Respondent's employment with the Kenny Firm, she felt depressed and stressed but did not seek treatment. RX 701 (Dr. Tellefsen's report) at 5.

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[37] A respondent seeking mitigation of sanction pursuant to *In re Kersey* has the burden to prove: (1) by clear and convincing evidence that the respondent had a disability; (2) by a preponderance of the evidence that the disability substantially affected the respondent's misconduct; and (3) by clear and convincing evidence that the respondent has been substantially rehabilitated. *In re Stanback,* 681 A.2d 1109, 1115-16 (D.C. 1996).

176. Respondent testified that, while working at the Kenny Firm, she started to drink alcohol in the evening after she left the Kenny Firm's offices for the day. Tr. 886-87; *see also* RX 701 (Dr. Tellefsen) at 4; RX 707 at 4. This testimony is uncorroborated. Respondent believes the drinking was in response to martial problems and stress of work. Tr. 882-86. Respondent did not drink during the day while she was employed with the Kenny Firm, and there is no evidence that her work product while at the Kenny Firm was deficient, as she maintained her caseload and work. RX 701 (Dr. Tellefsen) at 5. Respondent was "functioning reasonably well at the job." RX 701 (Dr. Tellefsen) at 4-5; RX 707 at 4.

177. In 2008, Respondent's husband received a deployment order to serve in Iraq. RX 701 at 2. He was deployed in November 2008. Tr. 899.

178. Respondent resigned from the Kenny Firm in July 2008. FF 42. Respondent's reasons for resigning from the firm have varied. *See* Tr. 1312-13. She testified that whenever her husband is deployed she will discontinue working outside of the home, and care for the children. Tr. 420. Dr. Tellefsen reports that Respondent informed her the resignation was because Respondent suspected Kenny's husband of misconduct related to a federal investigation. RX 707 at 3. Respondent testified during the second phase of the hearing that she resigned because of the stress of the firm and home. The reason for the resignation is not material to this hearing, but the conflicting statements are another example of Respondent's lack of credibility.

179. After July 2008, Respondent reports that she started to drink all day but hid the drinking from her husband and children. Tr. 887-88. There is no evidence to corroborate Respondent's testimony that she was drinking all day from July 2008 to May 2009. In May 2009, as addressed in FF 182, there is evidence that Respondent was not drinking during the day or affected by alcohol during the work days. In addition, Respondent reported to Dr. Tellefsen that

"significant alcohol abuse be[gan] around 2009," and that prior to that she only drank after work and at a club. RX 701 (Dr. Tellefsen) at 4.

180. In November 2008, Respondent testified that she experienced her first delusional thought. Workmen were in trees in the front of her house, and she believed they were installing satellites to spy on her. Tr. 991. This testimony is uncorroborated.

181. From August 2008 through early 2009, Respondent was self-employed. FF 44.

182. In early 2009, Respondent opened her own firm, and in May/June 2009, she started to share office space in Laurel, Maryland, with another attorney, April Urban. Tr. 1146. Respondent and Ms. Urban worked in close proximity to each other in two separate offices that were situated next to each other, and their offices shared a common wall. Tr. 1146. Ms. Urban observed Respondent and interacted with her on a daily basis. Tr. 1146-47. Ms. Urban found Respondent to be "bright and well spoken, sweet," and they became friends. Tr. 1145.

183. In September 2009, Respondent was arrested twice. Tr. 909-910. Respondent first was arrested for the failure to obey when she refused to provide her car registration during a traffic stop. RX 701 (Dr. Tellefsen) at 2-3; Tr. 909. Soon thereafter, Respondent was arrested for driving under the influence. Tr. 910; RX 701 (Dr. Tellefsen) at 3.

184. Also around September 2009, Ms. Urban noticed alcohol that Respondent kept in the office cabinet; Ms. Urban had not seen Respondent drink in the office nor did she see any behavior that suggested Respondent was drinking in the office. Tr. 1166:12-1167:5.

185. Respondent's husband returned from Iraq in December 2009. Tr. 921. Respondent and her husband experienced marital problems. Tr. 912.

186. Respondent reported to Dr. Tellefsen that her drinking "began when her martial problems began." RX 701 (Dr. Tellefsen) at 4.

187. In December 2009 Respondent started to check the office for electronic bugs because she believed her husband was spying on her. Tr. 1147, 1152, 1162 (Urban). Around December 2009, Respondent brought a ladder to the office and opened the ceiling tiles to check for electronic devices or "bugs." Tr. 1147, 1154.

188. Also in December 2009, Ms. Urban observed Respondent drinking alcohol in the office. Tr. 1147 (stating that Respondent was "drinking a bit before [December 2009]" and that it "got progressively worse through 2010").

189. Respondent told Ms. Urban in or around December of 2009 that she believed Mr. Kryakov was a Russian spy and that he put a bug in the leg of a small table in her office. Tr. 1155. Prior to December 2009, Respondent did not discuss Mr. Kryakov with Ms. Urban, nor did she mention the property dispute. *Id.*

190. By the middle of 2010, Respondent contacted the police multiple times claiming that her husband had broken into her computer and cell phone. Tr. 1152-53. Respondent believed people were in her computer and took the battery out of her computer when she was not using it. RX 707 at 4. Eventually, Respondent purchased a typewriter so she would not have to use a computer or anything electronic. *Id.*

191. In March 2010, Respondent's husband obtained a protective order against Respondent, after Respondent kicked out the front windows of their home, cut the cord to her oven in their kitchen, and dragged the oven to the front of the home. Tr. 914; Tr. 1156-57.

192. Respondent's paranoid thoughts in 2010 focused on her husband and her fear that he was bugging and/or hacking her computer and watching her through the TV. RX 701 (Dr. Tellefsen) at 4-5.

193. Respondent's husband filed for divorce in May 2010. Tr. 922.

194. Ms. Urban observed a motion that Respondent was preparing in her divorce proceedings that was "lacking" and "not appropriate." Tr. 1151. Ms. Urban had limited exposure to Respondent's written work product but described Respondent's work for a client as appearing "normal," it was just the work related to Respondent's divorce that was "off the wall." Tr. 1170.

195. Respondent violated the protective order, and in June 2010 she was required to obtain counseling at Columbia Addiction Center (either from the protective order violation or DUI). RX 703 at MR002; Tr. 914-15. During counseling, Respondent admitted to feeling very stressed and not in control of her actions, but denied any problems with alcohol. Tr. 915-16. The counselor who evaluated her concluded that "she did not exhibit signs or symptoms diagnostic of either a problem drinker or alcoholic." RX 703 at MR 002. Respondent testified that she hid her drinking because of her husband's military career; Respondent's husband needed to renew his security clearance every ten years, and she was concerned that her actions would impact her husband's ability to obtain a renewed security clearance in September 2011. Tr. 989-990; RX 701 (Dr. Tellefsen) at 3.

196. In November 2010, Respondent abruptly moved out of the office space she shared with Ms. Urban. Tr. 1160:3-6. Ms. Urban discovered Respondent had left when Ms. Urban arrived at the office one morning and Respondent's belongings were gone. Tr. 1160:3-6. After Respondent left, she sent Ms. Urban an e-mail telling her that she could keep the furniture that was left in the office. Tr. 1165 (Urban). Some of that furniture belonged to Mr. Kryakov. FF 76-77.

197. Respondent was forced to move out of her family home after she violated a protective order, and she lived at a homeless shelter from August 2011 through February 2012. Tr. 923:4-9.

198. In January 2012, she was evaluated at the shelter by a social worker who concluded:

> Respondent is suffering with constant nightmares about the war and anxiety due to her dealing with her husband during a time of war and viewing some of the horrific events on television . . . She lacks sleep, fear of authority such as police, men in uniform, telephone, computers, Internet, cable, cell phone; feels that people are following her because her husband told her that people were going to take her out . . . She fears that they have changed her identity, feels that there may be some type of intelligence threat.

Tr. 919:17-921:1; RX 703 at MR 005-12. Responded continued to deny alcohol use. RX 703 at MR 007.

199. In June 2011, Respondent was hospitalized and diagnosed with cardiomyopathy and heart failure caused by heavy alcohol consumption and untreated hypertension. RX 701 (Dr. Tellefsen) at 3.

200. Following the hospitalization, Respondent stopped drinking hard liquor and was prescribed medication for high blood pressure. RX 701 (Dr. Tellefsen) at 4; Tr. 935-942.

201. As part of this case, Respondent has been evaluated by two psychiatrists, her own expert, Dr. Tellefsen, and Disciplinary Counsel's expert, Dr. O'Leary. The doctors largely agree on Respondent's mental health diagnoses. Dr. Tellefsen opined that Respondent has major depression with severe psychotic features and alcohol use disorder. RX 701 at 7; RX 707 at 7. Dr. O'Leary includes a diagnosis of anxiety disorder as well. BC Mitigation Br. at 32, 35. Both doctors agree that alcohol use is the primarily problem and that it likely triggered the paranoia and delusions. RX 707 at 7; Tr. 1044:8-10 (Tellefsen); Tr. 1232-33 (O'Leary).

202. Major depression is an illness in which the main symptom is dysfunction in mood that is sustained over time. Tr. 1016:21-1017:4. Cognitive symptoms of major depression include loss of concentration, focus, and motivation or interest in activities that are normally pleasurable.

Tr. 1017:10-15. Symptoms also include the inability to sleep, weight gain, or weight loss. Tr. 1017:16-17.

203. Psychosis is a serious medical condition in which the individual is severely impaired in his or her ability to function in all walks of life and to behave appropriately and effectively. RX 707 at 8. When major depression is accompanied by psychotic features, psychotic symptoms include delusions, which are fixed false idiosyncratic beliefs that may include hallucinations or inaccurate sensory stimuli (such as hearing voices, seeing things that are not there, or having the sensation of something on your skin that is not there). Tr. 1018. Additionally, a person who experiences an "idea of reference" demonstrates a clear sign of psychosis. Tr. 1071. An "idea of reference" "is attaching idiosyncratic significan[ce] to innocuous events." *Id.*

204. Alcohol Use Disorder impairs an attorney's ability to function consistently, normally, or effectively and results in general dysfunction and misguided legal work. Tr. 1053. Severe Alcohol Use Disorder is found when a person drinks so excessively that they experience alcoholic blackouts and display inappropriate and disinhibited behavior. Tr. 1029. An alcoholic blackout seriously interferes with a person's memory and occurs when a person engages in an activity, but due to his or her alcohol level, that person is not able to remember engaging in the activity. Tr. 1029. A blackout occurs when a person has been drinking. Alcohol Use Disorder can result in severe medical complications including heart failure because the toxic effects of alcohol cause the heart to deteriorate. Tr. 1030:2-18. RX 707 at 8; BX 300 at 36.

205. Both doctors agree that attorneys who suffer from Alcohol Use Disorder are at risk of neglecting their clients, *e.g.*, missing court hearings and filing deadlines. Tr. 1247-48 (O'Leary); Tr. 1033 (Tellefsen).

206. Both doctors agree that Respondent was doing better in early 2012. Dr. Tellefsen reports that Respondent's symptoms remitted on their own with a reduction of stress, curtailing alcohol use, and possibly from the treatment for her heart condition. RX 707 at 6. In terms of stress, Respondent returned to her family home, then the family moved to Alabama in August 2012 where Respondent has support from extended family. Respondent worked as an attorney for a period in Alabama, working with the Bar association and a homeless women shelter, and she was appointed to serve as a guardian *ad litem* in one matter, but since 2014 she has not been practicing law. Tr. 896, 942, 946, 993-98. Respondent initially regained stability in her mood and thought in 2013-2014. Tr. 1052-53 (Tellefsen). Respondent did not seek treatment for Alcohol Use Disorder and did not fully acknowledge that she is an alcoholic until after she read Dr. Tellefsen's November 2014 report.[38] Tr. 985-86.

207. After reviewing Dr. Tellefsen's November 2014 report, Respondent stopped drinking beer (she had only stopped hard liquor following her diagnosis of heart failure), began to attend Alcoholics Anonymous ("AA") meetings, and sought treatment from psychiatrist Dr. Jones and psychologist Dr. Mashburn in November of 2014. Tr. 985:1-15. Respondent relapsed into paranoid thoughts in early 2015 and drank alcohol on New Year's Eve, December 31, 2014. She self-reported the alcohol use to her cardiologist, psychiatrist, and psychologist. Tr. 947-48. Currently, Respondent is under the care of a psychologist and a psychiatrist and attends Alcoholics Anonymous meetings twice a month. Tr. 985:3-15; Tr. 987:2-8.

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[38] Somewhat incongruously, Respondent signed an acknowledgment of disability (or addiction) four days before Dr. Tellefsen's report was dated, stating she suffers from a disability or addiction by reason of "major depression severe with psychotic features, and alcohol abuse disorder." RX 701 at 1.

208. Respondent reports that she is feeling better now. She is able to handle stress and finds the AA meetings to be helpful. She thinks the move to Alabama helped and that the environment of Washington metropolitan area was too stressful. Tr. 999. Respondent attends AA twice a month and has a sponsor. Tr. 1050.

209. Respondent's cardiac function is now normal and she has recovered from her cardiac condition. RX 701 at 7.

210. Dr. Tellefsen testified that:

> In terms of depression, [Respondent] had a very stable mood for at least the last year. She did have a recurrence of anxiety and some suspiciousness in January, and she recognized that, discussed it with a psychiatrist. . . . She did that without any difficulty, and feels confident in the care of the psychiatrist, feels confident in the advice about which medicine to take, so forth and has insight into her mood disorder and how it's related to alcohol abuse. . . . So a psychiatrist would say she now has insight into her condition, she has established a support network, she is participating and engaging well in treatment. The treatment is appropriate, and she is currently symptom free.

Tr. 1052-53.

211. Due to the nature of Respondent's diagnosis, Dr. Tellefsen explained that,

> There is no cure. [Respondent will] always have this condition. She's always going to have sensitivity with her mood, or a vulnerability with her mood. She's always going to be vulnerable to reengaging in alcohol abuse, but she is doing all the things that she needs to do to keep all of these things in check, monitored and to nip any recurrence in the bud if they happen.

Tr. 1053:6-15. Thus, Dr. Tellefsen opined that Respondent should remain stable and fully functional as long as she stays in treatment and stays sober. RX 707 at 8.

212. Dr. O'Leary found that Respondent had not yet received an adequate evaluation for her Alcohol Use Disorder, based in part on Respondent's tendency to minimize the nature of her problem. Tr. 1252. In March 2015, Respondent reported to Dr. O'Leary that she had stopped drinking in 2012, when in fact she had been drinking beer until around November 2014. BX 300 at 36. Dr. O'Leary recommends that Respondent should undergo a comprehensive substance

evaluation because his examination of Respondent raised concerns about potential abuse of opioids, amphetamines and benzodiazepines. Tr. 1240-42; *see also* BX 300 at 37 (provisional diagnosis).

V. CONCLUSIONS OF LAW

Disciplinary Counsel argues that in Count I, Respondent violated Rules 1.7(b)(4) (personal interest conflict), 3.3(a) (candor to tribunal), 8.1(a) (knowing false statement to Disciplinary Counsel), 8.4(b) (criminal act that reflects adversely on honesty, trustworthiness or fitness), 8.4(c) (dishonesty, fraud, deceit, or misrepresentation), and 8.4(d) (serious interference with the administration of justice), and in Count II, Respondent violated Rules 1.5(b) (fee agreement), 1.15(a) (commingling), 3.3(a) (candor to tribunal), 8.1(a) (knowing false statement to Disciplinary Counsel), 8.4(c) (dishonesty, fraud, deceit, or misrepresentation), and 8.4(d) (serious interference with the administration of justice). Respondent argues that Disciplinary Counsel failed to establish, by clear and convincing evidence, that Respondent violated any of the Rules charged. For the reasons discussed below, the Committee finds, by clear and convincing evidence, that Respondent violated all of the Rules charged in Count I and Rules 1.5(b) and 1.15(a) in Count II.

A. Count I - *Kryakov Matter*

The key factual issue in Count I is whether Respondent was involved in Mr. Brown's scheme to unlawfully obtain the T Street Property while she was working at the Kenny Firm. If the answer is yes, then almost all of the Rules charged by Disciplinary Counsel in Count I are established. As detailed in the Findings of Fact, the Committee found by clear and convincing evidence that Respondent was involved in Mr. Brown's scheme while she was employed at the Kenny Firm and after she left the firm. The Committee reaches this conclusion based on the following:

- Respondent worked on the *CTS v. Kryakov* matter for about seven months as an attorney at the Kenny Firm, and through her work she learned: that the property was vacant, the identity of the owner was Mr. Kryakov but his whereabouts were unknown, efforts to locate Mr. Kryakov were exhausted, and taxes were outstanding but otherwise the property was without mortgage liens (FF 9, 15);

- The *CTS v. Kryakov* litigation was significant at the Kenny Firm because the firm was about to obtain the property for the client, which was an infrequent outcome (FF 23, 118);

- Property addresses were significant to attorneys at the Kenny Firm, the *CTS v. Kryakov* matter was referred by address, and attorneys searched for cases in the history reports by address (FF 12);

- Respondent knew Mr. Brown through her foreclosure cases at the D.C. Superior Court (FF 16);

- Respondent developed a friendship with Mr. Brown that involved frequent ongoing telephone contact that is inconsistently and vaguely explained by Respondent (*e.g.*, FF 16-17 and n.14);

- Multiple telephone conversations occurred between Mr. Brown and Respondent on key dates when Mr. Brown was working to fraudulently obtain title to the T Street Property, and those conversations are unexplained by Respondent (*e.g.*, FF 16-19, 25, 32, 39);

- Respondent wrote checks to obtain a locksmith for the T Street Property one month after she left the Kenny Firm and has not provided sufficient explanation for doing so (FF 45);

- Respondent provided false information to Disciplinary Counsel about the timeframe when she and Mr. Brown first discussed the furniture from the T Street Property; Respondent did not correct that statement in her second response to Disciplinary Counsel, stating that Mr. Brown "allegedly" asked her to purchase furniture in August 2008 (FF 112); and

- Respondent received about half of the proceeds from the T Street Property when Mr. Brown sold it to ART, and the notations on the payments from Mr. Brown to Respondent explicitly state that the payment was related to the T Street Property and Respondent has not provide a consistent or creditable explanation for the payments (FF 53-54, 122).

After Mr. Kryakov returned to the United States and Respondent was essentially caught, the evidence shows that she attempted to hide her involvement:

- Respondent used two false names when she interacted with Mr. Kryakov (FF 65, 67, 70, 75, 117);
- Respondent misled Mr. Kryakov when she agreed to sell his furniture back to him while at the same time she consigned the furniture to two auction houses (FF 70, 72, 75-77, 82, 117); and
- Respondent did not cooperate in two court proceedings despite being presented with Mr. Brown's unlawful conduct (FF 88, 90-91, 102-103, 106-107).

Finally, the Committee evaluated Respondent's demeanor during her testimony and does not credit her account of events. Respondent's story, which she began telling in 2009, when confronted first by Mr. Kryakov and then his attorney, two court proceedings, Disciplinary Counsel's investigation, and before this Committee, has evolved and changed, and the Committee finds that her inconsistent and implausible accounts to be false. There were times during her testimony when Respondent lacked sincerity and directness in her responses, and she failed to take responsibility for even minor matters.

Each rule charged by Disciplinary Counsel is addressed in turn below.

1. <u>Respondent Violated Rule 1.7(b)(4) (personal interest conflict)</u>

a. Applicable standard

Rule 1.7(b)(4) provides: "[A] lawyer shall not represent a client with respect to a matter if . . . [t]he lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by . . . the lawyer's own financial, business, property, or personal interests." Rule 1.7(b)(4) prohibits an attorney from representing a client when her own interests are in conflict with the client's interests, to include financial, business, property, or personal interests. *See* Comment [11] to Rule 1.7 ("lawyer's own interests should not be permitted to have an adverse effect on representation of a client"). Client consent may permit representation despite a conflict if the consent is "upon full disclosure of the nature and existence of the possible conflict and the

possible adverse consequences of such representation." Rule 1.7(c). Respondent has not claimed that such consent was obtained here.

b. Discussion

The Committee finds that Respondent acted in her own interests in direct conflict with her client's interest in violation of Rule 1.7(b)(4). CTS, Respondent's client, had an interest in lawfully obtaining the T Street Property. FF 8-10, 14, 23. CTS began its process to obtain the T Street Property on July 14, 2006, when it bought the Property subject to redemption through a tax sale, and then on February 15, 2007, filed an action in the Superior Court to foreclose on Mr. Kryakov's right to redeem. FF 8-10. Respondent's duty as CTS's attorney was to represent and advance her client's interests in the Superior Court action.

Respondent, working with Mr. Brown, also had a financial interest in the T Street Property. This interest was in direct conflict with her client's interest and the evidence demonstrates that Respondent took affirmative action in furtherance of her interests. Those actions included: entering false information into the Kenny Firm's history report, completing a redemption statement that was paid by Mr. Brown, and misrepresenting to the court that she had contact with Mr. Kryakov. FF 19, 24, 27-30.

Respondent's actions had an adverse effect on her client. CTS was one step away from lawfully obtaining the T Street Property; after publishing notice of the foreclosure, CTS would possess title to the property if the court granted its motion for final judgment. FF 23. Because the mortgage was paid on the property, CTS would be responsible for back taxes and liens only and would have experienced a considerable profit. FF 3. By way of comparison, Mr. Brown sold the T Street Property to ART for $465,000 and netted $175,000 after covering federal liens, and Respondent received over $75,000 of those proceeds. FF 51-53.

"The conflict of interest rule . . . is designed to assure that the attorney pursues the client's objectives as the client views them, unaffected by any personal interest of the attorney in the outcome." *In re Hager*, 812 A.2d 904, 914 (D.C. 2002), *reinstatement granted*, 878 A.2d 1246 (D.C. 2005). Based on this record, CTS's interests were not advanced by Respondent; rather, her personal interests interfered and prevented CTS from taking all steps necessary to lawfully obtaining the property. The Committee finds that Disciplinary Counsel has proven by clear and convincing evidence that Respondent violated Rule 1.7(b)(4).

2. <u>Respondent Violated Rule 3.3(a) (candor to tribunal)</u>

a. Applicable standard

Rule 3.3(a)(1) provides: "[a] lawyer shall not knowingly [m]ake a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer . . . ." "Knowingly" "denotes actual knowledge of the fact in question." Rule 1.0(f).

The obligation to "speak truthfully to the tribunal" is "one of the lawyer's fundamental obligations." *In re Ukwu*, 926 A.2d 1106, 1140 (D.C. 2007) (appended Board Report). Rule 3.3 requires proof that Respondent's statements were false and that the Respondent knew that they were false. *Id.* at 1140 (appended Board Report). The term "knowingly" "denotes actual knowledge of the fact in question," and this knowledge may be inferred from the circumstances. *See* Rule 1.0(f); *see also In re Spitzer*, 845 A.2d 1137, 1138 n.3 (D.C. 2004) (Respondent could not knowingly violate Rule 8.1(b) without actual knowledge of a Disciplinary Counsel investigation).

b. Discussion

Disciplinary Counsel argues that Respondent knowingly made a false statement when she told the Superior Court, twice, that she talked to Mr. Kryakov and that she believed he was in Pennsylvania, because she knew at the time that she had not talked to Mr. Kryakov. Disciplinary Counsel notes that Respondent had an opportunity to reflect and correct her false statement, but failed to do so and that her justification—that she talked to someone who claimed to be a representative of Mr. Kryakov—is not relevant. Disciplinary Counsel asserts that even if Respondent had stated to the court that she talked to "Mr. Richards," an attorney representing Mr. Kryakov, she would still be in violation of this Rule because Respondent knew that "Mr. Richards" (or Risco) was not Mr. Kryakov's lawful representative.

Respondent admits she made the technically incorrect statement that she had spoken with Mr. Kryakov, but it was based on her conversation with an attorney who identified himself as Mr. Kryakov's attorney, as well as her understanding that she could refer to the property owner in proceedings, because the attorney was working as the property owner's agent.

The Committee agrees with Disciplinary Counsel. On April 30, 2008, Respondent stated to the court that she had spoken to Mr. Kryakov. FF 27. It is undisputed that Respondent did not talk to Mr. Kryakov until 2009; thus, the statement was knowingly false. FF 57. The Committee rejects Respondent's justification that she believed she talked to a representative of Mr. Kryakov. Here, the Committee finds that Respondent knew that "Mr. Richards" (really Mr. Risco, Mr. Brown's father) was not the legal representative of Mr. Kryakov. FF 19. The Committee relies on Respondent's actions and relationship with Mr. Brown to find that she knew about Mr. Brown's actions and was working with him. *See* § V.A (introductory paragraphs). Any statement to the

court by Respondent that she was in contact with Mr. Kryakov or his representative was knowingly false.[39]

The Committee finds that Disciplinary Counsel has proven by clear and convincing evidence that Respondent violated Rule 3.3(a).

3. Respondent Violated Rule 8.1(a) (knowingly false statement to Disciplinary Counsel)

a. Applicable Standard

Rule 8.1 provides in pertinent part: "[A] lawyer in connection with a . . . disciplinary matter, shall not: (a) [k]nowingly make a false statement of fact . . . ." "Knowingly" "denotes actual knowledge of the fact in question." Rule 1.0(f).

b. Discussion

Disciplinary Counsel charged Respondent with making two false statements in connection with the disciplinary matter set forth in Count I. Specifically, Disciplinary Counsel argues that (1) Respondent falsely stated in her February 2010 response to Disciplinary Counsel that the monies she received from Mr. Brown in March 2009, after ART bought the T Street Property, were repayment of personal loans she made to Mr. Brown and that Respondent reaffirmed this false statement in her 2013 response to Disciplinary Counsel; and (2) Respondent falsely stated that she first discussed purchasing the furniture from the T Street Property in March 2009. Respondent argues that the first statement is not false and that Disciplinary Counsel's proof is based on a logical assumption only and the second statement was an error but an error she later corrected.

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[39] Another factor that discredits Respondent's "agency" argument is that she consistently used the term "attorney" to describe the call with "Mr. Richards" to Ms. Authement and the history report. FF 19, 24. She was unable to explain why the spreadsheet she created with notes for the status hearing would describe the call as from Mr. Kryakov rather than to continue to use the term attorney or even to use the name "Mr. Richards." FF 27-28. Instead, she implied the problem was with the spreadsheet—a document she created.

The Committee agrees with Disciplinary Counsel that Respondent made two false statements in connection with Count I. The first false statement concerns the proceeds from the sale of the T Street Property that Mr. Brown paid to Respondent and her husband. Respondent's stories about these funds are riddled with inconsistencies. FF 121. The Committee does not credit Respondent in this regard and finds Respondent's testimony and prior statements about the proceeds from the sale of the T Street Property to be knowingly false.

The Committee relies on other evidence presented; including the checks written by Mr. Brown that explicitly state that the funds are a payment related to the T Street Property. FF 53. Respondent argues that she did not write the checks and does not know what the notations mean, or the reason that Mr. Brown made the notations, and denies that the funds related to the T Street Property. Because the Committee does not credit Respondent's inconsistent statements, it does not accept such an implausible explanation that the funds are unrelated to the T Street Property.

The Committee likewise finds that the second statement concerning the purchase of the furniture from the T Street Property was knowingly false and that Respondent intended to mislead Disciplinary Counsel. *See In re Boykins*, 999 A.2d 166, 174 (D.C. 2010) (finding, *inter alia*, a Rule 8.1(a) violation where the respondent misled Disciplinary Counsel during its investigation). Respondent originally told Disciplinary Counsel that she discussed purchasing the furniture with Mr. Brown in March 2009 and used that response to bolster her claim that she did not remember the T Street Property from her time at the Kenny Firm. FF 112. Later, at her July 21, 2010 deposition, Respondent admitted that the discussion with Mr. Brown occurred in August 2008. FF 103. Despite that admission, Respondent continued to mislead Disciplinary Counsel in her second response stating that Mr. Brown "allegedly asked" her to purchase furniture in August 2008. FF 112.

The Committee finds that Respondent's statements to Disciplinary Counsel were knowingly false and finds that Disciplinary Counsel has proven by clear and convincing evidence that Respondent violated Rule 8.1(a).

4. Respondent Violated Rule 8.4(b) (criminal conduct)

a. Applicable Standard

Rule 8.4(b) provides that "[i]t is professional misconduct for a lawyer to . . . [c]ommit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects." Thus, "an attorney may be disciplined for having engaged in conduct that constitutes a criminal act." *In re Slattery*, 767 A.2d 203, 207 (D.C. 2001). "[A] respondent does not have to be charged criminally or convicted to violate the rule. . . . It is sufficient if his conduct violated a criminal statute and the crime reflects adversely on his honesty, trustworthiness, or fitness." *In re Silva*, 29 A.3d 924, 937 (D.C. 2011) (appended Board Report) (citing *Slattery*, 767 at 207; *In re Pierson*, 690 A.2d 941 (D.C. 1997); *In re Gil*, 656 A.2d 303 (D.C. 1995)). To establish a Rule 8.4(b) violation, Disciplinary Counsel must identify and establish the elements of the alleged criminal offense. *See Slattery*, 767 A.2d at 212-13. Crimes that include the elements of theft and fraud violate Rule 8.4(b). *See, e.g.*, *In re Allen*, 27 A.3d 1178, 1182 (D.C. 2011); *Slattery*, 767 A.2d at 213.

i. Fraud - D.C. Code § 22-3221

Disciplinary Counsel charged Respondent with fraud in violation of D.C. Code § 22-3221(a). The elements of fraud in the first degree are: (1) person engages in a scheme or systematic course of conduct, (2) with intent to defraud or to obtain property of another, (3) by means of a false or fraudulent pretense, representation, or promise, and (4) thereby obtains property of another or causes another to lose property. D.C. Code § 22-3221(a).

The Committee finds that Respondent was engaged in a course of conduct with Mr. Brown with the intent to obtain the T Street Property and the personal property contained within.[40] Respondent's scheme or course of conduct included the following actions:

- Entering false notes into the Kenny Firm's history report that a "Mr. Richards" telephoned seeking to redeem the T Street Property and that he was the representative of Mr. Kryakov (FF 19, 30);
- Falsely informing Ms. Authement that an attorney for Mr. Kryakov contacted her to redeem the T Street Property (FF 24);
- Misrepresenting to the Superior Court that she had been in contact with Mr. Kryakov, that he was living in Pennsylvania, and he wanted to redeem the T Street Property (FF 27-28); and
- Communicating with Mr. Brown about the foreclosure action involving the T Street Property (16-18, 31-32, 37, 39)

In addition, Respondent took specific actions with regard to the personal property within the T Street house, including:

- Obtaining, through a third party, a locksmith for the T Street Property (FF 45);
- Removing, through a third party, the furnishings from the T Street Property and storing them at a POD facility (FF 48, 50);
- Providing a false identity to Mr. Kryakov when he sought the return of his furniture (FF 65, 67, 70, 75, 79, 117);
- Consigning the furniture to two auction houses and claiming good title to the furniture, while simultaneously talking with Mr. Kryakov about returning his furniture (FF 70, 72, 75, 82, 84-85, 117); and
- Falsely representing in the Maryland court proceeding that the furniture was purchased legitimately (FF 88, 90-91).

As noted in the above lists, these actions include multiple instances of false representations. Respondent's actions, in concert with the actions of Mr. Brown, resulted in Mr. Brown obtaining

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[40] The elements of fraud require a showing that Respondent "engaged in 'a scheme or systematic course of conduct' composed of at least two acts calculated to deceive, cheat or falsely obtain property." *Youssef v. United States*, 27 A.3d 1202, 1207-1208 (D.C. 2011) (quoting D.C. Code § 22-3221).

the T Street Property, which he later sold and paid over $75,000 of the proceeds to Respondent and her husband. FF 52-55. In addition, Respondent obtained the personal property contained within the T Street Property. FF 48, 50. The T Street Property and its furnishings, at the time they were obtained, belonged to Mr. Kryakov. Thus, Respondent obtained the property of another and caused him to lose property.

The remaining element of fraud is intent. Disciplinary Counsel argues that Respondent's intent to defraud or obtain property belonging to Mr. Kryakov may be inferred from her conduct. Respondent argues that Disciplinary Counsel failed to show the necessary intent to defraud. Respondent argues that the evidence is circumstantial and there is no proof that Respondent knew about Mr. Brown's actions.

Respondent is correct that much of the evidence is circumstantial, but that evidence is sufficient to establish by clear and convincing evidence that Respondent acted with the intent to obtain Mr. Kryakov's property. "The standard of clear and convincing proof requires 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. Direct proof of a lawyer's state of mind is rarely available." *In re Kline*, 113 A.3d 202, 213 (D.C. 2015) (citations and quotation marks omitted); *In re Starnes*, 829 A.2d 488, 500 (D.C. 2003) ("To be sure, the proof of Respondent's state of mind . . . is circumstantial, but more direct proof of state of mind, such as an outright assertion of an individual's intent, is rarely available."). "The scienter requisite to a disciplinary code violation can be inferred from respondent's conduct." *In re James*, 452 A.2d 163, 166-67 (D.C. 1982) (noting that the Respondent disputed the evidence but the Board is not required to accept Respondent's version of events).

Respondent disputes that she acted with any intent to defraud or obtain Mr. Kryakov's property, but the Committee does not find her denials credible. Rather, the Committee infers the requisite state of mind based on Respondent's conduct and her unexplained and false explanations of her actions.

In addition to the lists of actions above, the Committee finds the following establishes the requisite fraudulent intent:

- Respondent's false description of the "investments" or "loans" made to Mr. Brown (FF 121);
- Respondent's incredible and false explanation of Mr. Brown's payments to her and her husband out of the proceeds from the sale of the T Street Property; payments that included notations of T Street Property (FF 54, 121); and
- The hours of telephone conversations with Mr. Brown and her inability to explain the content of those conversations (*e.g.*, FF 17, n.14, 121).

The Committee finds that Disciplinary Counsel met its burden of establishing the elements of fraud as set forth in D.C. Code § 22-3221(a).

ii. Theft – D.C. Code § 22-3211(b)

With regard to theft, Disciplinary Counsel charged Respondent with theft in violation of either District or Maryland law: D.C. Code § 22-3211 and/or Maryland Criminal Law Code Ann. § 7-104. The Committee may look to the law of any jurisdiction that could have prosecuted Respondent for the misconduct to determine whether the lawyer's conduct is a "criminal act" under Rule 8.4(b). *Gil*, 656 A.2d at 305. Here, the Committee analyzes the District's theft law because the theft occurred in the District of Columbia. Respondent first exercised control of the property in the District, although the Committee notes that Respondent continued to control the property after she moved it to Maryland.

District of Columbia Code § 22-3221(b) (theft) states:

> A person commits the offense of theft if that person wrongfully obtains or uses the property of another with intent . . . [t]o appropriate the property to his or her own use or to the use of a third person.

Disciplinary Counsel asserts that the same evidence that demonstrates Respondent committed fraud also demonstrates that Respondent committed theft with respect to Mr. Kryakov's personal property. Respondent similarly argues that Disciplinary Counsel failed to establish the requisite intent.

The Committee finds that the elements of theft have been established by clear and convincing evidence. First, Respondent wrongfully obtained[41] and used Mr. Kryakov's personal property (furniture). In August 2008, Respondent paid for a locksmith for the T Street Property and paid Clifton Jones to haul furniture from the Property. FF 45. As late as March 2009, Respondent took possession of and controlled Mr. Kryakov's personal property when she had a third party move the furniture from the T Street Property in D.C. and into a POD for storage and later had the POD moved to Maryland. FF 48, 50. Respondent further consigned the property to two auction houses despite knowledge that Mr. Kryakov claimed ownership of the property. *E.g.*, FF 67, 82.

Second, Respondent knew that the property belonged to Mr. Kryakov. Respondent knew that Mr. Kryakov was the owner of the T Street Property. FF 15. In addition, during her testimony

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[41] The term "wrongfully obtains or uses" means: "(1) taking or exercising control over property; (2) making an unauthorized use, disposition, or transfer of an interest in or possession of property; or (3) obtaining property by trick, false pretense, false token, tampering, or deception." D.C. Code § 22-3211(a). Respondent's actions satisfied all three of the statutory definitions of "wrongfully obtains." Respondent "exercis[ed] control" over the property by moving it or causing it to be moved from the T Street Property to a POD unit and then she continued to exercise control over it by controlling access to the POD. FF 48-50, 74. Respondent made an "unauthorized use, disposition or transfer" of the property by consigning it to auction. FF 82, 84. Respondent obtained the property in the first instance by "deception." *E.g.*, FF 18, 27-28, 31, 46.

Respondent admitted that the personal property belonged to Mr. Kryakov. FF 70. She knew that Mr. Kryakov was making a claim for that property when she consigned it and moved it to the auction houses. FF 67, 70, 72, 75-76, 82.

Third, Respondent acted with the intent to deprive Mr. Kryakov the benefit of his property and with the intent to appropriate Mr. Kryakov's personal property for her own use. As stated above with regard to fraud, direct evidence of intent is rare and can be inferred based on the Respondent's conduct and her inconsistent or inadequate explanations. *E.g.*, *Kline*, 113 A.3d at 213; *In re Starnes*, 829 A.2d 488, 500 (D.C. 2003); *James*, 452 A.2d at 166 . Respondent took affirmative action to assist Mr. Brown in unlawfully obtaining the T Street Property as early as April 2008. *E.g.*, FF 16-19, 24-25, 27, 31-32, 37. At that time, Respondent undeniably knew that the property belonged to Mr. Kryakov, as her main task on the *CTS v. Kryakov* case was to locate and serve Mr. Kryakov. FF 15.

In addition, when Mr. Kryakov returned to the United States and confronted Respondent about obtaining his property, Respondent admitted that the property belonged to him and entered into discussions about returning his property. FF 70. However, such discussions were deceptive as Respondent provided Mr. Kryakov with false names and she simultaneously consigned his furniture to two auction houses. FF 117. Thereafter, she continued to represent to the Maryland court that she was a legitimate purchaser of Mr. Kryakov's furniture. FF 88, 90. These actions demonstrate that Respondent had the intent to deprive Mr. Kryakov of his furniture for her own use.

Based on the foregoing, the Committee finds that Disciplinary Counsel met its burden of establishing the elements of theft set forth in D.C. Code § 22-3211; as such, the Committee does not address the alleged theft violation under Maryland law.

The Committee finds that Disciplinary Counsel established the elements of fraud and theft, and therefore finds Disciplinary Counsel has proven by clear and convincing evidence that Respondent violated Rule 8.4(b).

5. Respondent Violated Rule 8.4(c) (dishonesty, fraud, deceit, or misrepresentation)

a. Applicable Standard

Disciplinary Counsel alleges that Respondent violated Rule 8.4(c) by engaging in conduct involving dishonesty. Rule 8.4(c) provides that "[it] is professional misconduct for a lawyer to: . . . [e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation." Dishonesty is the most general category in Rule 8.4(c) and is broader than "what may be legally characterized as an act of fraud, deceit or misrepresentation[.]" *Slattery*, 767 A.2d at 213 (quoting *In re Shorter*, 570 A.2d 760, 767-68 (D.C. 1990)). Thus, dishonesty includes not only fraudulent, deceitful, or misrepresentative conduct, but also "conduct evincing 'a lack of honesty, probity or integrity in principle; [a] lack of fairness and straightforwardness.'" *Shorter*, 570 A.2d at 767-68 (quoting *Tucker v. Lower*, 434 P.2d 320, 324 (Kan. 1967)); *see also In re Scanio*, 919 A.2d 1137, 1142-43 (D.C. 2007); *In re Carlson*, 745 A.2d 257, 258 (D.C. 2000) (per curiam) (dishonesty may consist of failure to provide information where there is a duty to do so). Dishonesty in violation of Rule 8.4(c) does not require proof of deceptive or fraudulent intent. *Romansky*, 825 A.2d at 315; *see also In re Jones-Terrell*, 712 A.2d 257, 258 (D.C. 2000) (per curiam) (violation found despite "lack of evil or corrupt intent"). Thus, when the dishonest conduct is "obviously wrongful and intentionally done, the performing of the act itself is sufficient to show the requisite intent for a violation." *In re Romansky*, 825 A.2d 311, 315 (D.C. 2003). Conversely, "when the act itself is not of a kind that is clearly wrongful, or not intentional, Disciplinary Counsel has the additional burden of showing the requisite dishonest intent." *Id.* A violation of Rule 8.4(c) may also be

established by sufficient proof of recklessness. *See id*. at 317. To prove recklessness, Disciplinary Counsel must prove by clear and convincing evidence that the respondent "consciously disregarded the risk" created by his actions. *Id.*

Disciplinary Counsel also argues that Respondent engaged in fraud and deceit. Fraud "embraces all the multifarious means . . . resorted to by one individual to gain an advantage over another by false suggestions or by suppression of the truth." *Shorter*, 570 A.2d at 767 n.12 (citation omitted). Fraud requires a showing of intent to deceive or to defraud. *See Romansky*, 825 A.2d at 315; *In re Hutchinson*, 534 A.2d 919, 923 (D.C. 1987) (en banc). Deceit is the "suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to mislead . . . ." *Shorter*, 570 A.2d at 767 n.12 (citation omitted). To establish deceit, the respondent must have knowledge of the falsity, but it is not necessary that the respondent have intent to deceive or defraud. *In re Schneider*, 553 A.2d 206, 209 (D.C. 1989) (finding deceit where attorney submitted false travel expense forms but did not intend to deceive the client or law firm and there was no personal gain).

b. Discussion

Disciplinary Counsel argues that Respondent engaged in the following acts of fraud:

- making false entries into a history report at the Kenny Firm that a legitimate representative of Mr. Kryakov sought to redeem the T Street Property (FF 19, 30);
- drafting a redemption statement (FF 24);
- informing Ms. Authement that an attorney called and Mr. Kryakov intended to redeem his property (FF 24);
- informing the court she had spoken with Mr. Kryakov (FF 27-28);
- faxing a redemption statement to the Frisco Group knowing that she was not sending the fax to a legitimate purchaser because Mr. Brown paid the redemption fees (FF 31, 34-37); and
- consigning Mr. Kryakov's furniture to two auction houses wherein she misrepresented in writing to one of the houses that she had clear title to the property when she knew it belonged to Mr. Kryakov (FF 82, 117).

Respondent argues that her actions while she was employed with the Kenny Firm are consistent with an attorney working on a tax foreclosure case where an owner has provided notice that he would like to redeem his property. With regard to the furniture consignment, Respondent argues that such actions were not fraudulent as she worked with Mr. Kryakov's attorney to return the property.

Neither of Respondent's arguments is consistent with the factual record. Rather, Respondent's actions, which included hours of unexplained telephone discussions with Mr. Brown, false entries into the history report, knowing false statements to the court, and failure to follow firm protocol when an "attorney" called to redeem a property, are inconsistent with an attorney handling a foreclosure case. With regard to the furniture, there is no credible evidence that Respondent tried to return the furniture to Mr. Kryakov; rather, the evidence shows that she was dishonest with her dealings with him, and consigned the furniture while in communications with him to return his furniture to him.

The Committee agrees with Disciplinary Counsel that Respondent's actions related to the redemption of the T Street Property where dishonest and constitute fraud because they were taken in furtherance of Respondent's and Mr. Brown's interests in unlawfully obtaining the T Street Property. The false statements, knowing misrepresentations to the court, and consignment the furniture while Mr. Kryakov was making a claim of ownership provides the requisite intent because the actions were "obviously wrongful and intentionally done." *Romansky*, 825 A.2d at 315. In addition, Respondent's actions with regard to Mr. Kryakov's furniture were dishonest and designed to defraud Mr. Kryakov.

Finally, Disciplinary Counsel argues that the following dishonest conduct constitutes deceit:

- giving false statements under oath in the Maryland and District of Columbia proceedings (FF 88, 90-91, 102-103); and
- giving false explanations to Disciplinary Counsel (FF 111-112).

Respondent argues that her statements during the court proceedings and Disciplinary Counsel's investigation were not deceitful because her statements have been consistent and she cannot be expected to remember the details of the T Street Property because she handled "thousands of cases at the Kenny Firm."

The Committee agrees with Disciplinary Counsel that Respondent's statements in the court proceedings and her responses to Disciplinary Counsel, specifically her claim that her purchase of furniture from Mr. Brown was a legitimate purchase and her inconsistent statements about the "loans" to Mr. Brown and the monies he paid to Respondent, were dishonest. Respondent's statements in the Maryland court proceeding that she was a legitimate purchaser of Mr. Kryakov's furniture were knowingly false, as were her statements that the monies paid by Mr. Brown were a return on an investment or repayment of a loan. The Committee has found Respondent knew that the property belonged to Mr. Kryakov and that she was not a legitimate purchaser. Even if the Committee were to accept Respondent's claim that she did not recall the T Street Property from her work with the Kenny Firm, a claim that the Committee rejects, her memory was refreshed through the Maryland Litigation that predates her responses to Disciplinary Counsel and her deposition in the D.C. Litigation. Therefore, her continued denial that the furniture belonged to Mr. Kryakov was dishonest.

The Committee finds that Disciplinary Counsel has proven by clear and convincing evidence that Respondent violated Rule 8.4(c).

6. Respondent Violated Rule 8.4(d) (serious interference with the administration of justice)

a. Applicable Standard

Rule 8.4(d) provides that a lawyer shall not "[e]ngage in conduct that seriously interferes with the administration of justice." In order to violate Rule 8.4(d), the lawyer's conduct must (1) be "improper"; (2) "bear directly upon the judicial process . . . with respect to an identifiable case or tribunal"; and (3) "taint the judicial process in more than a *de minimis* way." *In re White*, 11 A.3d 1226, 1230 (D.C. 2011) (quoting *In re Hopkins*, 677 A.2d 55, 60-61 (D.C. 1996)). Improper conduct includes actions taken by an attorney, as well as when an attorney fails "to take action when, under the circumstances, he or she should act." *Hopkins*, 677 A.2d at 60-61. The first element may include conduct that violates statutory law, court rules and procedures, or other disciplinary rules, or "it may be improper simply because, considering all the circumstances in a given situation, the attorney should know that he or she would reasonably be expected to act in such a way as to avert any serious interference with the administration of justice." *Id.* at 61. The second element—bears directly upon the judicial process with respect to an identifiable case or tribunal—"will very likely be the case where the attorney is acting either as an attorney or in a capacity ordinarily associated with the practice of law." *Id*. An attorney does not need to be acting as an attorney in the identified case or tribunal to violate Rule 8.4(d). *See, e.g.*, *In re Goffe*, 641 A.2d 458, 466 (D.C. 1994) (attorney found in violation because he presented false evidence in discovery in a case where he was a party rather than an attorney, because presentation of evidence is "within the familiar arena of attorneys"). The third element requires a showing that the impact on the judicial process "at least potentially impacts upon the process to a serious and adverse degree." *White*, 11 A.3d at 1230.

b. Discussion

Disciplinary Counsel identifies three court cases where Respondent's conduct seriously interfered with the administration of justice: (1) her misrepresentations to the Superior Court in the *CTS v. Kryakov* matter; (2) her false testimony in the Maryland Litigation; and (3) her false deposition testimony in the D.C. Litigation. Respondent argues that there is insufficient evidence to support finding a violation. We address each of the three cases using the three elements of Rule 8.4(d).

CTS v. Kryakov: First, Respondent's conduct in the *CTS v. Kryakov* matter was improper. Respondent misrepresented to the Superior Court that she was in contact with Mr. Kryakov when she knew in fact she had not had contact with him and did not know his whereabouts. FF 27-28. As set forth above, this action was taken in furtherance of a fraud that violates multiple disciplinary rules already detailed in this Report and Recommendation. *See Hopkins*, 677 A.2d at 61 (explaining that improper conduct may include conduct that violates a disciplinary rule). Second, the false statements had a direct impact on a foreclosure case at the D.C. Superior Court where Respondent was before the court as an attorney. Third, Respondent's conduct tainted the judicial process in more than a *de minimis* way. Based on Respondent's false statements, the court vacated a prior order, and ultimately her client dismissed Mr. Kryakov from the action and lost its right to legally obtain title on the T Street Property. Vacating an order of publication and dismissing a party from an action are significant actions in a foreclosure matter.

Maryland Litigation: First, Respondent's false testimony was improper. Respondent gave testimony under oath that included false statements that she did not remember the T Street Property from her work at the Kenny Firm, that she did not know title over the property was an issue, and that she was a legitimate buyer of the furniture. FF 88, 90. She falsely testified that her dealings

with Mr. Brown were at arm's length, a claim that is impossible to believe in light of the hours of telephone conversations between Respondent and Mr. Brown. FF 90. Second, Respondent's false testimony directly impacted upon a case before the Maryland district court in Prince George's County where she was a party. *See Goffe*, 641 A.2d at 459. Third, Respondent's false testimony bore directly on the Maryland court's findings. The findings detail the court's disbelief in Respondent's testimony and conduct.

D.C. Litigation: First, Respondent's false testimony in her deposition was improper. Respondent falsely testified, *inter alia*, that her husband made loans to Mr. Brown, she did not know the details of the loans, and the monies paid to Respondent and her husband by Mr. Brown did not relate to the T Street Property. FF 102, 121. Like the Maryland matter, Respondent's testimony was given under oath. Second, Respondent's false testimony had an impact on a civil case filed in the Superior Court where Respondent was a party. Third, Respondent's false testimony had a negative impact on the matter in that it related directly to the issue before the jury/court and resulted in significant litigation, including a nine-day jury trial.

The Committee finds that Disciplinary Counsel has proven by clear and convincing evidence that Respondent violated Rule 8.4(d).

B. **Count II – *Dixon Matter***

Disciplinary Counsel's case in Count II had a significant evidentiary issue. Because Mr. Dixon did not testify at the hearing and his complaints to Disciplinary Counsel could not be fully admitted into evidence, Disciplinary Counsel did not meet its burden with regard to six of the eight rules charged in Count II. The Committee addresses each rule in turn below.

1. Disciplinary Counsel Failed to Prove Violations of Rules 1.4(a) and 1.4(b) (communication with client)

a. Applicable Standard

Rule 1.4(a) provides that "[a] lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information." Under Rule 1.4(a), an attorney must not only respond to client inquiries, but must also initiate contact to provide information when needed. *In re Bernstein*, 707 A.2d 371, 376 (D.C. 1998). The purpose of this Rule is to enable clients to "participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued." Comment [1] to Rule 1.4(a). "The guiding principle 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) (finding a Rule 1.4(a) violation); *cf. In re Edwards*, 990 A.2d 501, 522-23 (D.C. 2010) (appended Board Report) (no Rule 1.4(a) violation found where the Committee determined that the respondent's level of communication was not unreasonable, given the nature of the case and the client's behavior).

Similarly, Rule 1.4(b) states than an attorney "shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." This Rule provides that the attorney "must be particularly careful to ensure that decisions of the client are made only after the client has been informed of all relevant considerations." Comment [2] to Rule 1.4(b). The Rule places the burden on the attorney to "initiate and maintain the consultative and decision-making process if the client does not do so and [to] ensure that the ongoing process is thorough and complete." *Id*.

b. Discussion

Disciplinary Counsel states that because it did not present Mr. Dixon's testimony it has not met its burden with respect to the Rule 1.4(a) and 1.4(b) charges. Respondent's brief does not address the Rule 1.4 charges although she did address it in her oral motion for judgment during the hearing and argued that Disciplinary Counsel did not meet its burden.

Pursuant to D.C. Bar R. XI, § 6(a)(3),[42] Disciplinary Counsel may dismiss charges only with the prior approval of a Contact Member. Similarly, under D.C. Bar R. XI, § 5(c)[43] the Committee does not have the power to dismiss charges, but must make findings and recommendations to the Board. Because Disciplinary Counsel does not have the authority to unilaterally elect not to pursue charges that have been approved by a Contact Member, the Committee is required to address the charges and make a recommendation to the Board. *See* Order, *In re Reilly*, Bar Docket No. 102-94 at 4-5 (BPR July 17, 2003) (concluding that Disciplinary Counsel did not have the authority to dismiss charges approved by a Contact Member; thus "Hearing Committees must make findings on all charges brought by Disciplinary Counsel").

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[42] D.C. Bar R. XI, § 6(a)(3) provides, in pertinent part, that "Disciplinary Counsel shall have the power . . . [u]pon prior approval of a Contact Member, to dispose of all matters involving alleged misconduct by an attorney subject to the disciplinary jurisdiction of the Court, by dismissal or informal admonition or by referral of charges . . . ."

[43] D.C. Bar R. XI, § 5(c) provides: "Hearing Committees shall have the power and duty: (1) Upon assignment by the Executive Attorney, to conduct hearings on formal charges of misconduct, a proposed negotiated disposition, or a contested petition for reinstatement and on such other matters as the Court or Board may direct; (2) To submit their findings and recommendations on formal charges of misconduct to the Board, together with the record of the hearing; (3) To submit their findings and recommendations to approve a negotiated disposition and their findings and recommendations in a contested reinstatement to the Court, together with the record of the hearing."

Based on an independent review of the record, the Committee agrees that Disciplinary Counsel failed to establish violations of Rules 1.4(a) and 1.4(b) by clear and convincing evidence and recommends that the Board dismiss the Rule 1.4(a) and 1.4(b) charges.

2. Respondent Violated Rule 1.5(b) (fee agreement)

a. Applicable Standard

Rule 1.5(b) provides:

> When the lawyer has not regularly represented the client, the basis or rate of the fee, the scope of the lawyer's representation, and the expenses for which the client will be responsible shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation.

Written communication related to the basis of fees and the scope of representation is required to prevent misunderstanding and unnecessary disputes. *See, e.g.*, *In re Elgin*, 918 A.2d 362, 374 (D.C. 2007) (Respondent failed to enter into a formal fee agreement and instead had an informal oral agreement that caused confusion about the scope of the fee); Comment [2] to Rule 1.5 ("A written statement concerning the fee . . . reduces the possibility of misunderstanding."). The Rule does not require a lengthy agreement, but it does require providing the basis of the fee. Comment [1] to Rule 1.5 ("It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee.").

b. Discussion

It is undisputed that Respondent did not regularly represent Mr. Dixon. FF 125-126. This was the first and only such relationship between them. Therefore, Respondent was required under the rule to: communicate in writing the basis or rate of the fee, define the scope of the representation, identify the expenses the client was responsible for paying, and provide a writing before or within a reasonable time of commencing the representation. Rule 1.5(b).

Disciplinary Counsel contends that Respondent failed to set forth a writing with her hourly rate and scope of representation.[44] Respondent disagrees and points to an invoice signed by Mr. Dixon and Respondent on September 7, 2009. Respondent argues that the invoice is adequate under the Rule because it provides a flat fee of $2,500 for the scope of representation: "Pre-foreclosure Litigation."

The Committee agrees with Disciplinary Counsel that Respondent failed to comply with the requirements of Rule 1.5(b). In reaching this conclusion, the Committee considered the invoice, the writing that Respondent points to as her agreement with Mr. Dixon. The Committee finds that the invoice did not explain the basis of the fee. The invoice simply stated that the fee was $2,500.00 without any reference to whether the fee was a flat or fixed fee earned at the outset of the representation or was an advance to be earned based on an hourly rate or some other manner. FF 127-128. The failure to provide necessary information in writing caused confusion as Respondent sought additional funds from Mr. Dixon based on an hourly rate that does not appear in the invoice, and Mr. Dixon questioned whether he received a discount he was entitled to because he used the Legal Club of America to engage Respondent. FF 135.

The Committee also finds that the scope of the representation was unclear. "Pre-foreclosure Litigation" is not an adequate description of the representation in this matter. During her testimony, Respondent explained that the reason she sought additional funds from Mr. Dixon was because the scope of the representation changed from pre-foreclosure litigation to post-foreclosure litigation. FF 136. The Committee does not find Respondent credible on this issue.

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[44] The last two elements of Rule 1.5(b) are not at issue. The writing did not address expenses to be paid by Mr. Dixon however, there is no evidence that Respondent sought to charge Mr. Dixon any of the expenses or costs in the litigation (e.g., court filing fees, copying fees, etc.). In addition, the writing was dated within days of Mr. Dixon seeking representation from Respondent and thus was likely completed within a reasonable time after the representation commenced.

Within two days of Mr. Dixon signing the invoice, Respondent entered her appearance in a Superior Court case on his behalf. FF 137. That litigation was part of the "Pre-foreclosure Litigation" referred to in the invoice. While that litigation was pending, only a month into the representation, Respondent sought additional funds because she had spent more than ten hours on the case and she charged $295 hourly. FF 135. She did not seek additional funds because the scope of the representation changed.[45]

The Committee finds that Disciplinary Counsel has proven by clear and convincing evidence that Respondent violated Rule 1.5(b) because Respondent failed to provide Mr. Dixon with a writing setting forth the basis of her fee or the scope of the representation.

3. Respondent Violated Rule 1.15(a) (commingling)

a. Applicable Standard

Rule 1.15(a) prohibits commingling of client property with the attorney's property: "[a] lawyer shall hold property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property. Funds of clients or

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[45] It should have been anticipated that the litigation initiated pursuant to Respondent's advice and where she entered herself as an attorney of record representing Mr. Dixon may include some motions practice. However, when a dispositive motion was filed by the opposing party, Respondent informed Mr. Dixon that she needed additional funds to oppose the motion. Mr. Dixon affirmed that he wanted the dispositive motion opposed and stated that he was in a "pay as you go scenario." The Rule is designed to prevent clients from having to negotiate in this manner.

> An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required . . . . Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction.

Comment [5] to Rule 1.5.

third persons that are in the lawyer's possession (trust funds) shall be kept in one or more trust accounts . . . ."

Commingling occurs when an attorney fails to hold entrusted funds in an account separate from her own funds. *In re Moore,* 704 A.2d 1187, 1192 (D.C. 1997). "'The rule against commingling was adopted to provide against the probably in some cases, the possibility in many cases, and the danger in all cases that such commingling will result in the loss of the clients' money.'" *In re Hessler*, 549 A.2d 700, 702 (D.C. 1988) (quoting *Clark v. State Bar,* 246 P.2d 1, 5 (Cal. 1952)).

To establish commingling, the entrusted and non-entrusted funds must be in the same account at the same time. "The rule against commingling has three principal objectives: to preserve the identity of the 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).

The rule permits advances against unearned fees, but those fees belong to the client unless the client consents to a different arrangement. *See* Rule 1.15(d). "[A]bsent consent by the client to a different arrangement, the Rule's default position is that such advances be treated as the property of the client, subject to the restrictions provided in paragraph (a)." Comment [2] to Rule 1.15.

In *In re Mance*, 980 A.2d 1196 (D.C. 2009), the Court determined that a "flat fee" paid in advance for legal services constitutes an "[a]dvance[] of unearned fees" under Rule 1.15(e),[46] thus prospectively establishing a "default rule [whereby] an attorney must hold flat fees in a client trust or escrow account until earned." *Id.* at 1199, 1206. The Court held that, for purposes of Rule 1.15(e), "money paid by a client as a flat fee for legal services remains the client's property, and counsel may not treat any portion of the money otherwise until it is earned, unless the client has agreed otherwise." *Id.* Consequently, if an attorney withdraws any part of a flat fee before the attorney has earned it and without the client's informed consent, the attorney has committed misappropriation. *Id.* at 1200-01, 1208. However, "an attorney may obtain informed consent from the client to deposit all of the money in the lawyer's operating account or to deposit some of the money in the lawyer's operating account as it is earned, per their agreement." *Id.* at 1206 (citations omitted).[47]

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[46] Rule 1.15 provides, in pertinent part:

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

[47] The Rules define informed consent as "denot[ing] the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Rule 1.0(e). In *Mance*, the Court held that, in order to obtain a client's informed consent in the context of a flat fee, "the attorney must expressly communicate to the client verbally and in writing that the attorney will treat the advance fee as the attorney's property upon receipt." *Mance*, 980 A.2d at 1206 (quoting *In re Sather*, 3 P.3d 403, 413 (Colo. 2000) (en banc)). Moreover, "the client must understand [that] the attorney can keep the fee only by providing a benefit or providing a service for which the client has contracted." *Id.* In addition, the fee agreement entered into by the parties

The Court found that its holding "should be prospective only" because it was the first time that it had announced that flat fees are an advance of unearned fees that belong to the client until earned by the lawyer, absent an agreement to the contrary. *Mance*, 980 A.2d at 1205-06.

b. Discussion

The determinative fact in this matter under Rule 1.15(a) is whether the $2,500 payment from Mr. Dixon was a flat fee payment or an advance on future work. If the former, Respondent could treat the payment as her own property and the actions of depositing the funds into her operating account would not be considered a violation under Rule 1.15(a), as the rule was understood on September 8, 2009, the date of the deposit.[48] However, if the fee was an advance on future work, then all or some of the $2,500 belonged to the client and should have been deposited into a trust account until Respondent earned the fee, unless the client consented to another arrangement.

Disciplinary Counsel argues that the payment from Mr. Dixon was not a flat fee. In support it cites to the contemporaneous correspondence between Respondent and Mr. Dixon wherein Respondent referred to her hourly rate and in October 2009, she stated that she had worked more than the ten hours covered by the $2,500 payment and an additional $2,500 was required for additional work. Respondent counters that the $2,500 was a flat fee but can point to no evidence to support that conclusion, other than the invoice, which is silent on the type of fee.

"must spell out the terms of the benefit to be conferred upon the client," and "the client must be aware of the attorney's obligation to refund any amount of advance funds to the extent that they are unreasonable or unearned if the representation is terminated by the client." *Id.* at 1206-07 (quoting *Sather*, 3 P.3d at 413). Finally, "the client should [also] be informed that, unless there is an agreement otherwise, the attorney must . . . hold the flat fee in escrow until it is earned by the lawyer's provision of legal services." *Mance*, 980 A.2d at 1207.

[48] On September 24, 2009 (about two weeks after Mr. Dixon and Respondent signed the invoice), the Court of Appeals issued the *In re Mance* decision discussed in subsection A above. 980 A.2d at 1196.

As discussed in § V.B.2, *supra*, the writing that Respondent offered as the agreement between her and Mr. Dixon is inadequate. It does not describe the fee as flat or fixed nor does it refer to hourly rate or other manner of earning the fee. FF 127-128. In testimony Respondent described the fee was a flat fee. FF 136. However, Respondent's characterization that the invoice reflects a flat fee is not supported by the record, which includes Respondent's emails written at the relevant time period. FF 135. Those emails demonstrate that Respondent was seeking more funds from Mr. Dixon because she had worked more than the ten hours that the $2,500 covered. *Id.* This implies that Respondent believed the fee was based on an hourly rate to be earned and additional funds would be needed as additional work was performed and expected. Moreover, the record is not clear that Respondent always considered the fee to be a flat fee. In response to the complaint Mr. Dixon filed with the Office of Disciplinary Counsel, Respondent stated that she refused to enter her appearance in Mr. Dixon's case until the additional $2,500 appeared in the "client escrow account." FF 132.

Based on this record, the Committee agrees with Disciplinary Counsel that the $2,500 was not a flat fee; instead it was an advance payment for ten hours of legal services. Therefore, absent consent from the client, placing all of the $2,500 into the operating account resulted in commingling because Respondent had not earned the fee at the time it was deposited. *See Hessler*, 549 A.2d at 702 (commingling occurred when the "attorney deposited his client's funds in his operating account, that is, the account in which he also deposited his own funds and wrote checks to pay his own bills").

The Committee finds that that Disciplinary Counsel has proven by clear and convincing evidence that Respondent violated Rule 1.15(a) with a single act[49] of commingling client funds when she deposited Mr. Dixon's $2,500 advance fee into her operating account without Mr. Dixon's consent.

4. Disciplinary Counsel Failed to Prove a Violation of Rule 3.3(a) (candor to tribunal)

a. Applicable Standard

As discussed *supra* in § V.A.2.a, Rule 3.3 prohibits a lawyer from knowingly making a false statement of fact to a tribunal or failing to correct a false statement of material fact.

b. Discussion

Disciplinary Counsel's charge is based on Respondent's affirmative response to the Superior Court on September 11, 2009, that Mr. Allison signed the money orders that were deposited into the court's registry. FF 154. Disciplinary Counsel argues that the statement was a knowing false statement and the misrepresentation was material, resulting in the Court stopping the foreclosure proceedings based on the premise that there was legitimate buyer. Respondent argues that she assumed that Mr. Allison signed the money orders because the money orders contained the notation "C/O Steven Allison" with a signature that she believed was Mr. Allison's signature; Respondent later learned that Mr. Dixon deposited the money orders into the court registry on behalf of Mr. Allison who supplied the funds and thus she did not make a knowingly false statement.

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[49] Disciplinary Counsel contends that there were other instances of commingling, but the record does not clearly establish other instances. The bank records that Disciplinary Counsel points to show an additional deposit into the operating account of legal fees, but without more information about that matter, such as the agreement with that client, the Committee cannot conclude that the deposit alone shows other instances of commingling.

The question before the Committee is whether there is sufficient evidence that Respondent knew on September 11, 2009, that Mr. Allison did not sign the money orders. The evidence in this regard is not clear, and thus the Committee concludes that Disciplinary Counsel did not establish by clear and convincing evidence that Respondent made a knowing false statement.

It is undisputed that neither Respondent nor Mr. Allison purchased the money orders; rather, Mr. Dixon showed Respondent the money orders unsigned as proof that they were purchased. FF 150. Thus, Respondent knew that Mr. Dixon purchased the money orders for Mr. Allison. However, it is not clear from the record that Respondent knew, on September 11, 2009, that Mr. Dixon added "C/O Steven Allison" to the money orders and then deposited the money orders into the court registry. Respondent testified before this Committee, consistent with her responses to Disciplinary Counsel, that she believed that Mr. Allison signed the money orders because his name appeared on them, but later she learned otherwise. FF 169, 173. Based on this record, the Committee concludes that Respondent's affirmative statement to the court was not a knowing false statement.

In addition, the Committee disagrees with Disciplinary Counsel that the statement was material. The court had before it a contract for sale that was signed by Steven Allison, and which was the focus of the September 11 hearing. FF 152, 154. The money orders were referred to quickly; the court asked a question about the identity of the buyer in the contract and stated that Mr. Allison signed the money orders; Respondent affirmed. FF 154. The court verified, through her clerk, that the $2,500 was deposited into the court registry. FF 155. The discussion continued with the details on the contract that was between the Maryland Financial Resources Group, LLC, but signed by Steven Allison and Mr. Dixon. FF 154-155. At the September 10 hearing, the court indicated that the signed contract was dispositive for keeping the TRO in place; stating that if there

was no purchase contract for Mr. Dixon's property by September 11, the court would rescind the TRO. FF 148. It is not clear that the signature on the money orders was material to any court decision. The TRO that was granted during the September 9 afternoon hearing remained unchanged because the court had a signed contract and confirmed that the $2,500 was deposited into the registry. The parties agreed to make certain modifications to that contract with an additional status hearing set for September 15. FF 156. Based on this record, the Committee cannot find that the affirmation that Mr. Allison signed the money orders was material.

The Committee finds that Disciplinary Counsel has not proven by clear and convincing evidence that Respondent violated Rule 3.3(a).

5. Disciplinary Counsel Failed to Prove a Violation of Rule 8.1(a) (knowingly false statement to Disciplinary Counsel)

a. Applicable Standard

As discussed *supra* in § V.A.3.a, Rule 8.1(a) prohibits a lawyer from knowingly making a false statement of fact in connection with a disciplinary matter.

b. Discussion

Disciplinary Counsel argues that Respondent made a knowing false statement in her February 5, 2010 response to its investigation when she stated that Mr. Allison deposited the $2,500 into the court registry and that he signed the cashier's checks. FF 169. Respondent corrected those statements in her October 17, 2010 response to Disciplinary Counsel, which included a copy of an affidavit by Mr. Allison. FF 173.

Respondent argues that her statements to Disciplinary Counsel were not knowingly false and she corrected the statements in her second response to Disciplinary Counsel after learning that Mr. Allison supplied the funds but was not involved in the deposit.

As explained with regard to Rule 3.3(a), to demonstrate a knowing false statement, Disciplinary Counsel must establish that Respondent knew that Mr. Allison did not sign the money orders and did not deposit the funds when she submitted her written response in February 2010. On this record, the Committee cannot reach such a conclusion. The record shows that Respondent knew that Mr. Allison provided the funds for the money orders and that Mr. Dixon purchased the money orders on his behalf; Respondent saw unsigned orders from Mr. Dixon. FF 150. Respondent later saw Mr. Allison's name added to the money orders. FF 151-152. She made an assumption that Mr. Allison added his name to the orders before they were deposited into the court registry. FF 151. Respondent later corrected her statements to Disciplinary Counsel and included an affidavit from Mr. Allison, both dated in October 2013. The affidavit does not add much clarity to the issue. It confirms that Respondent knew that Mr. Allison provided funds to Mr. Dixon to purchase the money orders but is otherwise silent on who signed the orders and deposited them into the court registry. FF 173. Based on this record, the Committee cannot conclude that Respondent's assumption, which was the basis for her statement to Disciplinary Counsel, was false. Perhaps a more reasonable assumption would have been that Mr. Allison gave the funds to Mr. Dixon and Mr. Dixon did all of the remaining tasks to purchase the money orders and deposit them into the court registry. However, the Committee does not believe that the evidence is sufficient to find that Respondent knew her statement was false in February 2010.

The remaining charge under Rule 8.1(a) alleges that Respondent instructed Mr. Dixon to deposit his own funds into the court registry and that Respondent signed or caused another to sign Mr. Dixon's name to the sales contract. FF 166. Disciplinary Counsel states that without testimony from Mr. Dixon it did not meet its burden here. As discussed *supra*, in § V.B.1.b, Disciplinary Counsel may not unilaterally dismiss charges that have been approved by a Contact

Member, and the Committee is required to consider each charge and make a recommendation to the Board. After review of the record, the Committee agrees with Disciplinary Counsel that this charge should be dismissed.

The Committee finds that Disciplinary Counsel has not proven by clear and convincing evidence that Respondent violated Rule 8.1(a).

6. Disciplinary Counsel Failed to Prove a Violation of Rule 8.4(c) (dishonesty, fraud, deceit, or misrepresentation)

a. Applicable Standard

As discussed *supra* in § V.A.5.a., Rule 8.4(c) prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.

b. Discussion

Disciplinary Counsel argues that Respondent engaged in deceit in connection with her responses to Disciplinary Counsel and in a misrepresentation to the court when she affirmed that Mr. Allison had signed the money orders. Respondent argues that her responses to the court and Disciplinary Counsel were not knowingly false.

As stated above with regard to Rules 3.3(a) and Rule 8.1(a), there is insufficient evidence to establish that Respondent knew her statements to the court or Disciplinary Counsel were false when she made them. To establish deceit, Respondent must have knowledge of the falsity of the statements. *Schneider*, 553 A.2d at 209.

With regard to the misrepresentation argument, Disciplinary Counsel is not required to prove that Respondent acted with "deliberateness" when she affirmed to the court that Mr. Allison had signed the money orders. Rather, in establishing a violation of Rule 8.4(c) based on a misrepresentation, Disciplinary Counsel is only required to prove that Respondent "acted in reckless disregard of the truth." *In re Rosen*, 570 A.2d 728, 728-30 (D.C. 1989) (per curiam)

(finding material misrepresentation in bar application where the respondent acted in reckless disregard of the truth). Disciplinary Counsel does not explain its theory of this alleged violation or cite to the record to support its argument that Respondent engaged in misrepresentation to the court.

Based on this record, the Committee cannot find that Respondent's representation to the court that Mr. Allison signed the money orders was made in reckless disregard of the truth. Respondent made an assumption that Mr. Allison signed the money orders and confirmed that he signed the money orders when the court was inquiring about the contract for sale. These facts differ materially from the situation in *Rosen*, where the attorney completed a Bar application questionnaire accurately stating that he was not the subject of discipline matters. 570 A.2d at 728-29. Later, after learning that he was the subject of two disciplinary matters, the attorney signed an oath affirming that the statements in the questionnaire were still true and accurate. *Id.* The attorney admitted "that in signing the oath, he had failed to review the affidavit and questionnaire, and did not recall its contents." *Id.* at 729. The failure to review the questionnaire before signing an oath was "in reckless disregard of the truth, in that his casual treatment of the oath evinced an obvious and culpable contempt for an attorney's duty to be candid." *Id.* Not so here. Respondent did not know at the time that Mr. Allison did not sign the money orders. She was not causal or reckless in her responses to the court. She made an erroneous assumption based on information before her. FF 151.

The Committee cannot find that Respondent's statements about the money orders was conduct involving dishonesty, fraud, deceit, or misrepresentation; the Committee finds that Disciplinary Counsel has not proven by clear and convincing evidence that Respondent violated

Rule 8.4(c) in connection with her responses to Disciplinary Counsel or representations to the court discussed above.

7. Disciplinary Counsel Failed to Prove a Violation of Rule 8.4(d) (serious interference with the administration of justice)

a. Applicable Standard

As discussed *supra* in § V.A.6, Rule 8.4(d) prohibits conduct that seriously interferes with the administration of justice and is established when the lawyer's conduct (1) is improper, (2) taints the judicial process of an identifiable case or a tribunal in (3) more than a *de minimis* way. A Rule 8.4(d) violation "is generally meant 'to encompass derelictions of attorney conduct considered reprehensible to the practice of law,' . . . and is 'not so broad as to encompass any and all misconduct by an attorney.'" *In re Owusu*, 886 A.2d 536, 541 (D.C. 2005) (quoting *Hopkins*, 677 A.2d at 59). A violation of the rule is established in circumstances where the "attorney should know that he or she would reasonably be expected to act in such a way as to avert any serious interference with the administration of justice." *Hopkins*, 677 A.2d at 60.

b. Discussion

Disciplinary Counsel submits that the affirmation to the court that Mr. Allison signed the money orders and her failure to attend two court hearings in the Dixon matter are sufficient to show a violation of Rule 8.4(d) because the statements to the court tainted the judicial process by stopping a lawful foreclosure based on the court's understanding that there was a legitimate purchaser for Mr. Dixon's property, and because Respondent failed to show at court hearings when there were motions pending. Respondent argues that the evidence was insufficient because Disciplinary Counsel did not establish that her conduct was improper or had an impact on the Dixon matter.

As explained in § V.B.6, there is insufficient evidence to show that Respondent's affirmation to the court that Mr. Allison signed the money orders was knowingly false or with reckless disregard for the truth and thus the Committee does not conclude that it was improper. Moreover, there is insufficient evidence that the affirmation had an impact on the court's actions; the fact that the money was confirmed to be in the court registry, and the court had a signed contract, was sufficient for the court to delay the foreclosure..

The Committee also finds insufficient evidence that Respondent's failure to attend two court hearings violated Rule 8.4(d). The first element of Rule 8.4(d)—improper conduct—is established. Respondent had full knowledge of the hearings and offered unsatisfactory excuses for her absences. FF 158-159, 161-163, 165, 167. The second element is also established because Respondent's failure to appear was in an identifiable case before the Superior Court where Respondent was an attorney. But Disciplinary Counsel did not establish that the failure to attend two hearings had a serious and adverse impact on the proceedings as required by the third element. *Hopkins*, 677 A.2d at 61. Rule 8.4(d) is intended to address, *inter alia*, the failure of counsel to appear for court hearings and the failure to obey court orders. *See* Comment [2] to Rule 8.4. Prior cases demonstrate that repeated failures to respond to court deadlines and orders have been found to violate Rule 8.4(d) and that the evidence of impact on the judicial process may include the subsequent actions taken, such as the appointment of new counsel or significant further proceedings. *See, e.g.*, *In re Askew*, 96 A.3d 52, 54-58 (D.C. 2014) (failing to file a brief after receiving nine extensions, ignoring two court orders, and further delaying an appeal by failing to provide the client file to successor counsel after she was removed); *In re Murdter*, 131 A.3d 355, 356 (D.C. 2016) (failing to file briefs in five criminal appeals and failing to "respond to numerous orders" and requiring the appointment of new counsel).

This case does not have numerous failures or significant subsequent proceedings that were shown in prior Rule 8.4(d) violations. Respondent failed to appear at two court hearings, and the subsequent court actions taken because of those failures included denying a motion for reconsideration and setting an additional hearing. The Committee does not make light of Respondent's failure or the additional burden placed on the Superior Court, but the Committee cannot conclude based on this evidence that Respondent's conduct "seriously and adversely affect[ed] the administration of justice, or her client." *Hallmark*, 831 A.2d at 375. While the conduct was unprofessional, the Committee does not find that it was "reprehensible to the practice of law." *Owusu*, 886 A.2d at 541.

The Committee finds that Disciplinary Counsel has not proven by clear and convincing evidence that Respondent violated Rule 8.4(d).

VI. RECOMMENDED DISPOSITIONS OF MOTIONS

A. Respondent's Motion for Leave to Amend Respondent's Answer to the Specification of Charges

After the close of the first phase of the hearing, Respondent moved for leave to amend Paragraph 34 of her Answer to conform to the evidence presented at the hearing. Respondent's Answer denies that the personal property she consigned to two auction houses belonged to Mr. Kryakov:

> Respondent admits that she consigned personal property to Laurel Auction Inc., and AAA Antiques Mall, Inc., in Laurel, Maryland in May of 2009 but denies that the personal property belonged to Mr. Kryakov.

Unredacted Answer (¶ 34), filed *nunc pro tunc* to November 12, 2014 (unverified answer). In the proposed amendment to paragraph 34, Respondent admits that the personal property she consigned to the two auction houses belonged to Mr. Kryakov:

> Respondent admits that she consigned Mr. Kryakov's personal property to Laurel Auction Inc., and AAA Antiques Mall, Inc., in Laurel, Maryland in May of 2009.

R's Motion for Leave at 1 (¶ 2) & Exh. D at 7 (¶ 34). This proposed change is consistent with Respondent's testimony at the hearing where she testified under oath that the personal property belonged to Mr. Kryakov. FF 70.

Respondent sought to amend her Answer to conform to her testimony during the hearing and argued that such an amendment is permitted under Superior Court Rule of Civil Procedure 15(b) and *Moore v. Moore*, 391 A.2d 762 (D.C. 1978) (interpreting Rule 15(b) to allow amendments to pleadings to conform to the evidence). Respondent argued that without the amendment, the matter may be decided on form rather than substance. In addition, Respondent argued that Disciplinary Counsel waived any objection to the amendment because it did not object to Respondent's testimony or cross-examine Respondent about the inconsistency in her Answer and her testimony. In addition, Respondent argued that there is no prejudice to Disciplinary Counsel and the amendment is limited in nature.

Disciplinary Counsel opposed the amendment. Disciplinary Counsel argued that the amendment impacts its estoppel argument with regard to the mitigation phase of this proceeding. In addition, Disciplinary Counsel argued that the reliance on Rule 15(b) is misplaced because the proposed amendment is not consistent with amendments made to clarify or add claims, defenses or counterclaims. Finally, Disciplinary Counsel argued prejudice, claiming that its case was built on the Answer and this change alters the manner in which the case would have been tried.

The Committee heard additional argument on the motion on May 20, 2015 and queried the parties about the impact of the proposed amendment on the findings in this case and whether Rule 15(b) applies to a proposed amendment that alters facts rather than claims or defenses. Tr. 1173-

1199. Neither party adequately explained how the proposed amendment was dispositive of any fact or conclusion that the Committee needs to determine in this case.

The Committee Chair denied Respondent's motion orally and in an order but without a written opinion. Tr. at 1430-31; Order, *In re Mardis*, Board Docket 14-BD-085 (H.C. June 2, 2015). The analysis of the denial is set forth here.

To begin, the Committee notes that Superior Court Civil Rule 15(b) does not apply to disciplinary proceedings. Rather, the amendment of pleadings is governed by Board Rule 7.21, which leaves the decision to approve an amendment to an answer to the discretion of the Committee Chair. The information that the Committee must weigh includes sworn testimony of the Respondent and other witnesses and multiple volumes of exhibits as well as the pleadings and briefs. The sworn testimony of Respondent, counsel acknowledged during oral argument, is more significant than a denial in an unverified answer. Tr. 1175. Amending the Answer does not alter the other evidence before the Committee or the arguments submitted by the parties. The Committee does not find a basis to permit the proposed amendment based on Board Rule 7.21.

Moreover, even if Superior Court Civil Rule 15(b) applied, the rule permits amendments to pleadings to conform to the evidence and is relied upon to amend claims and defenses. *Moore v. Moore*, 391 A.2d 762 (D.C. 1978), which was cited by both parties, does not address where the proposed amendment is to a fact that was always available to the party who submitted the pleading. As the party seeking the relief, it is Respondent's burden to establish that relief is warranted, *i.e.*, why an amendment to a fact she always possessed is warranted. The Committee was not persuaded that Respondent met that burden here and the motion to amend was denied.

B. Respondent's Motion for Judgment

At the close of Disciplinary Counsel's case, Respondent argued a motion for judgment on certain charges.[50] Tr. 388-400. Respondent, citing Rule 50 of the Superior Court Rules of Civil Procedure, argued that because Disciplinary Counsel did not meet its burden to prove a violation of the disciplinary rules, Respondent was entitled to judgment and should not have been required to proceed with a responsive case. Tr. 401. Respondent asserted that a motion for judgment differs from a motion to dismiss, which the Committee is not authorized to decide under the Board Rules; instead a recommended disposition is included in the report and recommendation.

The Committee, relying upon Board Rule 7.16(a) concluded that it was not authorized to rule upon a motion for judgment and stated that it would include its recommendation in this Report and Recommendation. Tr. 402. Board Rule 7.16(a) provides in pertinent part:

> All motions directed to the manner in which the hearing is to be conducted shall be ruled upon by the Hearing Committee Chair or the Chair's designee either at a prehearing conference as provided in Rule 7.20 or at the time of the hearing. . . . As to all other motions, except motions to dismiss described in subparagraph (b) of this Rule, the Hearing Committee shall include in its report to the Board a proposed disposition and the reasons therefor. The Board will rule on all such motions in its disposition in the case.

Pursuant to Board Rule 7.16(a), we turn to Respondent's motion for judgment, which the Committee treats as a motion to dismiss.[51]

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[50] Respondent renewed her motion for judgment at the close of the hearing. Tr. 733-34.

[51] Respondent argued that a motion for judgment under Superior Court Rule 50 applies and that the procedures under that rule differ from a motion to dismiss. The Committee disagrees. The Board Rules do not permit a hearing committee to decide a dispositive motion during the middle of a hearing. *See In re Ontell*, 593 A.2d 1038, 1040 (D.C. 1991) (emphasis added) (noting that the predecessor to Board Rule 7.16 "*requires* Hearing Committees to defer rulings on substantive motions"); *In re Stanton*, 470 A.2d 281, 285 (D.C. 1983) (per curiam) (appended Board Report). Moreover, under the Superior Court Rules of Civil Procedure, motions for judgment in nonjury trials are treated as motions to dismiss under Rule 41(b), rather than under Rule 50 (traditionally known as a directed verdict); *see also Marshall v. District of Columbia*, 391 A.2d 1374

Respondent argued that Disciplinary Counsel failed to meet its burden with regard to Count I: Rules 1.7(b)(4), 3.3(a), 8.1(a), and 8.4(b); and with regard to all of the charged rules in Count II: Rules 1.4(a), 1.4(b), 1.5(b), 1.15(a), 3.3(a), 8.1(a), 8.4(c), and 8.4(d). Many of the arguments set forth in Respondent's motion were included in her post-hearing brief and were considered by the Committee in its conclusions of law in this Report and Recommendation and will not be repeated here.

Count I

The crux of the argument with regard to Count I is the lack of direct evidence of intent and the over reliance by Disciplinary Counsel on circumstantial evidence. Respondent argued that with regard to Rule 1.7(b)(4), there was no direct evidence that Respondent acted to advance her own interests while CTS was her client, only "circumstantial suggestions that [Respondent] was involved." Tr. 390. With regard to Rule 3.3(a), Respondent argued that there was no direct evidence that Respondent's false statements to the Court were *knowingly* false at the time she made them. Tr. 391-92. Similarly, with regard to Rule 8.1(a), Respondent argued that the statements made to Disciplinary Counsel may have been false but Respondent was not called as a witness in Disciplinary Counsel's case and there was no direct evidence that the statements were *knowingly* false. Tr. 392. With regard to Rule 8.4(b), Respondent argued that Disciplinary Counsel did not

(D.C. 1978) ("In a nonjury trial, a defendant's motion for judgment at the close of the plaintiff's case is properly treated as a Rule 41(b) motion for involuntary dismissal, not as a subdivision (a) motion for a directed verdict."); *Bay Gen. Indus., Inc. v. Johnson*, 418 A.2d 1050 (D.C. 1980) (motion for judgment at close of plaintiff's case in a nonjury trial is governed by Rule 41(b)). In deciding such a motion "the Court, as the trier of fact, need not view the evidence in the light most favorable to the plaintiff. The Court, rather, weighs the evidence and considers credibility the same as it would at the end of the trial." *Marshall v. District of Columbia*, 391 A.2d 1374 (D.C. 1978).

provide any direct evidence of the specific intent needed to establish that Respondent committed fraud or theft.

As stated in § V.A, *supra*, the Committee concluded that Disciplinary Counsel met its burden; the evidence demonstrates that Respondent was involved with Mr. Brown in a scheme to obtain Mr. Kryakov's property while she was working at the Kenny Law Firm, *i.e.*, when CTS was her client. Respondent is correct that much of the evidence is circumstantial, but that evidence is sufficient to establish by clear and convincing evidence that Respondent was involved in the scheme. "The standard of clear and convincing proof requires 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. Direct proof of a lawyer's state of mind is rarely available." *In re Kline*, 113 A.3d 202, 213 (D.C. 2015) (citations and quotation marks omitted); *In re Starnes*, 829 A.2d 488, 500 (D.C. 2003) ("To be sure, the proof of Respondent's state of mind . . . is circumstantial, but more direct proof of state of mind, such as an outright assertion of an individual's intent, is rarely available."). "The scienter requisite to a disciplinary code violation can be inferred from respondent's conduct." *In re James*, 452 A.2d 163, 166 (D.C. 1982).

Accordingly, the Committee recommends that the motion be denied as to Count I.

Count II

Respondent argued that each of the rules charged under Count II should be dismissed. Each rule has been addressed in this Report and Recommendation and will not be repeated here. *See* § V.B. Consistent with the recommendations in this Report, the Committee does not find violations of Rules 1.4(a), 1.4(b), 3.3(a), 8.1(a), and 8.4(d) and recommends dismissal of those charges in Count II. With regard to Rules 1.5(b) and 1.15(a), the Committee found Respondent's conduct violated the rules and recommends that Respondent's motion be denied.

C. Estoppel of *Kersey* Mitigation Defense

During the mitigation hearing, Disciplinary Counsel argued that Respondent should be estopped from raising a *Kersey* defense in these proceedings, and addressed the issue in its aggravation and mitigation post-hearing brief. *See* Tr. 863-871. Disciplinary Counsel argues that Respondent denied engaging in any misconduct during the violations phase of the hearing, then "[a]fter a considerable amount of time for reflection, Respondent took the stand in the mitigation phase and again denied the core misconduct in this matter under oath." BC Mitigation Br. at 41 (emphasis omitted). Disciplinary Counsel argues that based on her denial of misconduct, Respondent was less than forthcoming during the medical examinations preceding her testimony as reflected in the experts' testimony. Dr. O'Leary discussed "the practical problems of mitigation proceedings without any admission of misconduct, including the Respondent's motive to 'cloud' her responses." *Id.* At the same time, "Dr. Tellefsen testified in the broadest generalities, without having reviewed obviously relevant materials or asking Respondent questions about the specific, charged misconduct." *Id.* Thus, Disciplinary Counsel argues that neither expert was able "to obtain a clear (and uninhibited) assessment of [ ] Respondent's disabilities in order to ensure appropriate protection of the public will not be compromised by imposition of *Kersey* mitigation." *Id.*

Respondent argues that Disciplinary Counsel's argument is without merit, offers no authority or citation to applicable rules, and relies entirely on hypothetical policy arguments that have never been raised by the Court. R. Mitigation Br. at 16. Respondent argues that Board Rule 11.13, governing mitigation of sanction for disability or addiction, "does not require charged attorneys to admit liability before presenting a mitigation case" and that the Court "has always permitted charged attorneys to present a mitigation case—even when those attorneys denied

committing any ethical violations." *Id.* (citing *In re Ayeni*, 822 A.2d 420 (D.C. 2003)); *see also* Tr. 868:6-19 (Disciplinary Counsel acknowledges that the Court permitted Mr. Ayeni to present a mitigation case despite denials of misconduct). Finally, Respondent's counsel argues that policy of the disciplinary system requires that Disciplinary Counsel prove allegations of misconduct, while allowing respondents an "undeniable right to defend against allegations of misconduct." *Id.* at 17 (citing D.C. Bar R. XI, § 6(a)(4), Board Rule 19.5(a)). Thus, Respondent's counsel argues that the Committee should disregard Disciplinary Counsel's estoppel argument.

The Committee agrees with Respondent. Disciplinary Counsel's position is inconsistent with *Kersey*, its application, and the explicit terms of the Board Rules, which recognize the respondent's right to contest disciplinary charges, and to assert *Kersey* mitigation if the defense is unsuccessful. *See* Board Rules 11.6 (Standard of Proof), 11.13 (Mitigation of Sanction for Disability or Addiction), 7.6 (Notice of Intent to Raise Disability in Mitigation). The Board Rules specifically provide that the notice of a respondent's intent to raise *Kersey* mitigation is confidential and not to be disclosed to the Committee until it makes its preliminary, non-binding determination of a rule violation. *See* Board Rule 7.6(b) (providing that "[t]he Hearing Committee before which the disciplinary matter is pending shall not be informed of the notice by the Office of the Executive Attorney or Disciplinary Counsel until the conclusion of the first phase of the hearing, and the Hearing Committee has determined preliminarily pursuant to Rule 11.11 that Disciplinary Counsel proved some or all of the charges alleged in the petition"). The rules, much like the procedures for invoking the insanity defense in a criminal case, thus protect against taint by the fact-finder, and preserve the respondent's right to a vigorous defense and, if preliminarily found to have violated the rules, to explain that the misconduct was substantially caused by a

disability or addiction. In addition, Respondent is correct that this is a novel argument advanced by Disciplinary Counsel without legal authority.

The Committee recommends that Disciplinary Counsel's motion for estoppel be denied. As discussed in the mitigation section of this Report, Respondent's failure to accept responsibility for her actions and to acknowledge her role in the Kryakov and Dixon matters is relevant to determining whether Respondent is fully rehabilitated. It does not, however, prevent her from making a *Kersey* mitigation argument.

VII. RECOMMENDATION AS TO SANCTION

Standard of Review

The appropriate sanction is what is necessary to protect the public and the courts, maintain the integrity of the profession, and "deter other attorneys from engaging in similar misconduct." *In re Kline*, 113 A.3d 202, 215, n.9 (D.C. 2015) (citing *In re Reback*, 513 A.2d 226, 231 (D.C. 1986) (en banc)). The determination of an appropriate disciplinary sanction is based on consideration of the following factors: the nature and seriousness of the misconduct, the presence of misrepresentation or dishonesty, the respondent's attitude toward the underlying misconduct, prior misconduct, prejudice to the client, and circumstances in aggravation and mitigation. *Id*. (citing *In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (en banc)). Under D.C. Bar R. XI, § 9(h), the sanction imposed also must be consistent with cases involving comparable misconduct.

Disciplinary Counsel recommends disbarment. Respondent asks that the Specification of Charges be dismissed, or in the alternative, that the sanction be mitigated under *In re Kersey*, 520 A.2d 321 (D.C. 1987), based on her alleged disability. Respondent acknowledged that if mitigation is not applicable and the Committee finds violation of Rule 8.4(b), then disbarment is

required. R. Mitigation Br. at 36-37. For the reasons set forth below, we recommend that Respondent be disbarred.

A. The Nature and Seriousness of the Misconduct

Respondent's misconduct was extremely serious. In the Kryakov matter, she and Mr. Brown engaged in a fraudulent scheme to unlawfully obtain title to the T Street Property and sell it. Respondent used the bulk of her share of the proceeds to pay off a personal credit card bill. FF 55. She appropriated Mr. Kryakov's furniture and personal effects, used a false name when he contacted her to get the property back, admitted that the property belonged to him but demanded that he pay to have it removed from storage and she simultaneously consigned it to auction, misrepresenting to an auction house that she held clear title to the property. She made false representations to the Kenny Firm to cover up her misconduct, testified falsely under oath in the Maryland and District of Columbia civil proceedings, and provided false explanations to Disciplinary Counsel.

In the Dixon matter, Respondent's misconduct, while not as serious, involved the mishandling of client funds. She failed to provide her client with a writing explaining the basis of her fee or the scope of the representation, and commingled an advance fee in her operating account, without her client's consent.

B. Whether the Conduct Involved Dishonesty and/or Misrepresentation

Respondent committed the criminal acts of theft and fraud in the Kryakov matter and engaged in a pattern of misrepresentation and dishonesty, including the use of two false names in her interactions with Mr. Kryakov. She also testified falsely under oath in the Maryland and District of Columbia civil proceedings, and made misrepresentations to Disciplinary Counsel, when asked to explain her conduct.

C. Respondent's Attitude Toward the Underlying Misconduct

Respondent maintained during the first phase of the proceedings that she did not violate any rules, and she denied most of the underlying conduct. Her attitude toward the misconduct, specifically her denials that she engaged in any misconduct, was the subject of significant argument by counsel in this case. Respondent largely denied the misconduct. In so doing, she provided inconsistent and incredible statements which the Committee, detailed in its findings, found to be false. Respondent's apologies to Messrs. Kryakov and Dixon during the hearing were insincere, in that she failed to accept responsibility for her wrongdoing. Tr. 958-59 ("I apologize to Mr. Kryakov. I apologize to [Mr.] Dixon; *that anything they thought I did or if I did do anything wrong, I apologize for it*.") (emphasis added).

D. Prior Misconduct

Respondent does not have a record of prior discipline.

E. Prejudice to Client

In Count I, Respondent pursued her self-interest at the expense of her client, CTS, and deprived CTS of the opportunity to foreclose on Mr. Kryakov's right to redeem the T Street Property. In Count II, there was no proof that Mr. Dixon was harmed as a result of Respondent's failure to put the basis of her fee and the scope of the representation in writing or by the commingling of the advance fee in her operating account.

F. Other Circumstances in Aggravation and Mitigation

A "respondent's false testimony before the Hearing Committee 'is a significant aggravating factor[.]'" *In re Bradley*, 70 A.3d 1189, 1195 (D.C. 2013) (quoting *In re Cleaver-Bascombe*, 892 A.2d 396, 412-13 (D.C. 2006)). Respondent testified falsely to the Committee regarding her participation the scheme to obtain the T Street Property from Mr. Kryakov in Count I. The Committee details in FF 117-119, 121 the false statements made to the Committee. She also

testified falsely regarding her attempts to obtain additional funds from Mr. Dixon for the foreclosure litigation in Count II.

G. Sanctions Imposed for Comparable Misconduct

Respondent engaged in the criminal acts of theft and fraud. Had she been prosecuted and convicted of the crimes underlying her Rule 8.4(b) violations, her disbarment would have been mandated under D.C. Code § 11-2503(a) for felonies that inherently involve moral turpitude. *See In re Tillerson*, 878 A.2d 1186 (D.C. 2005) (disbarment for crime of first degree theft); *In re Coles*, 912 A.2d 1168 (D.C. 2006) (per curiam) (disbarment for crime of fraud). The fact that Respondent escaped prosecution does not change the character of her acts, which because of their gravity, call for the ultimate sanction of disbarment. *See In re Appler*, 669 A.2d 731, 741 (D.C. 1995); *see also In re Pelkey*, 962 A.2d 268, 281-82 (D.C. 2008) (disbarment for the criminal act of theft); *In re Slattery*, 767 A.2d 203, 218-19 (D.C. 2001) (same); *In re Gil*, 656 A.2d 303 (D.C. 1995) (same).

H. Disability in Mitigation of Sanction

The Court has permitted mitigation of sanction where the respondent's misconduct is shown to be caused by a disabling addiction or mental illness, from which the respondent has been substantially rehabilitated. *See Kersey*, 520 A.2d at 326-27 (alcoholism); *In re Verra*, 932 A.2d 503, 505 (D.C. 2007) (depression and dysthymia).

Kersey mitigation is available where the respondent demonstrates:

(1) by clear and convincing evidence that the respondent had a disability;

(2) by a preponderance of the evidence that the disability substantially affected the respondent's misconduct; and

(3) by clear and convincing evidence that the respondent has been substantially rehabilitated.

Verra, 932 A.2d at 505 (quoting *In re Lopes*, 770 A.2d 561, 567 (D.C. 2001)); *see In re Stanback*, 681 A.2d 1109, 1115-16 (D.C. 1996) (discussing the differing burdens of proof); Board Rule 11.13.

A respondent who establishes all three *Kersey* factors may be entitled to have the sanction stayed in favor of probation. *See, e.g.*, *Kersey*, 520 A.2d at 528 (disbarment stayed in favor of probation); *In re Temple*, 629 A.2d 1203, 1210 (D.C. 1993) ("*Temple II*") (disbarment stayed in favor of probation); *Verra*, 932 A.2d at 505 (disbarment for reckless misappropriation stayed in favor of three years' probation). D.C. Bar R. XI, § 3(a)(7) provides that any period of probation shall be no more than three years.

Respondent argues that she has established grounds for *Kersey* mitigation based on a diagnosis of "Major Depression, Severe, with psychotic features and Alcohol Use Disorder during the relevant time period of 2008 through 2012," which substantially affected her misconduct, and from which she "is substantially rehabilitated based upon the success of her continuing medical treatment and dedication to sobriety." R. Mitigation Brief at 3-4. Disciplinary Counsel argues that although the experts "agreed that Respondent was significantly disabled by alcoholism and psychotic thinking[,]" they disagreed on when the impairment began[52] and whether her disabilities caused her ethical violations. BC Mitigation Br. at 1-2.

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[52] Disciplinary Counsel argues that Dr. O'Leary determined that Respondent's alcohol problem became severe in September 2009, and her psychotic behavior set in around December 2009. BC Mitigation Br. at 1. Respondent argues that Dr. Tellefsen determined she "was on a continuous "downward trending course from 2007 to 2012,' during which her depression, drinking, and psychosis slowly built-up and combined into an impairment." R. Mitigation Reply Br. at 17.

The Committee finds that Respondent is not entitled to *Kersey* mitigation because she failed to prove that her disability was a substantial cause of the misconduct in Count I, and she failed to prove that she is substantially rehabilitated from her disability.

1. Respondent Established that She Suffered from a Disability

Respondent argues that clear and convincing evidence supports Dr. Tellefsen's evaluation and diagnosis that Respondent suffered from "Major Depression, Severe, with psychotic features and Alcohol Use Disorder[,]" with the depressive symptoms including "stress, anxiety, fatigue, difficulty tolerating stress, defaulting focusing and sleep deprivation." R. Mitigation Br. at 26. She asserts that the depressive symptoms became "evident while she worked at the Kenny Firm from September 2007 through July of 2008[,]" that she attempted to treat her anxiety with alcohol by drinking and driving on her commute home from work[,]" and as a result, her "Alcohol Use Disorder became severe in July of 2008 when [Respondent] quit her job at the Kenny Firm and started to consume alcohol all day." *Id.* Finally, Respondent's "excessive consumption of alcohol led to the development of psychotic symptoms, which became severe in November or December of 2008," and "by the middle of 2009 [Respondent] became overtly psychotic and developed psychotic delusions about being monitored and followed." *Id.* Disciplinary Counsel does not dispute that "[t]he experts who testified during the mitigation phase of these proceedings agreed that Respondent was significantly disabled by alcoholism and psychotic thinking[,]" but disagrees that Respondent was disabled during the entire period. BC Mitigation Br. at 1.

The Committee agrees that Respondent established through clear and convincing evidence that she had a disability, namely Alcohol Use Disorder with severe psychotic features. For these reasons, the Committee finds that Respondent met her burden of proving, by clear and convincing evidence, that she suffered from a disability.

2. Respondent Did Not Establish that Her Disability Substantially Affected All of the Underlying Misconduct.

To show that her disability "substantially affected" her conduct, Respondent must establish that "but for [her disabling condition, her] misconduct would not have occurred." *Kersey*, 520 A.2d at 327. The "but for" test "does not require proof that the attorney's disability was the 'sole cause' of the attorney's misconduct." *In re Zakroff*, 943 A.2d 409, 423 (D.C. 2007). Rather, Respondent must show that there is "a sufficient nexus between [the respondent's disability] and [her] misconduct" and that "removal of the substantial contributing factor . . . would eliminate the offensive conduct, even if there are other reasons for some of the misconduct." *Id.* (citing *Kersey*, 520 A.2d at 327 n.16 and *In re Temple*, 596 A.2d 585, 590 (D.C. 1991) (explaining that "there must be a close nexus between the misconduct and the mitigating factor proffered, whether alcoholism, drug addiction or mental illness," and holding that this test was met even though the respondent "was able to manage an appearance of normalcy in his law practice")).

On the causation issue, Respondent argues that Respondent's "Major Depression, Severe, with psychotic features" and Alcohol Use Disorder substantially affected Respondent's professional conduct, thoughts, and judgment from 2008 through 2012. R. Mitigation Br. at 28. Dr. Tellefsen concluded that but for Respondent's psychiatric conditions, the misconduct would not have occurred, and only after the all-day drinking, depression, and psychosis did the incidents related to the misconduct occur. *Id.*

Disciplinary Counsel argues that "Respondent made no apparent attempt to specifically connect the dots as to how her disabilities, to the extent she suffered from disabilities at the time, caused any one of those individual steps in 2008" leading to her involvement in the criminal theft and fraud in the taking of Mr. Kryakov's real and personal property. BC Mitigation Br. at 38. Disciplinary Counsel argues that Respondent and Dr. Tellefsen offered only generalizations as to

causal connection. Disciplinary Counsel also asserts that the experts' testimony aligns and "there was no evidence that Respondent's disabilities were affecting her work at the Kenny Firm." *Id.* Finally, Disciplinary Counsel argues that Dr. O'Leary's "specific reasoning as to why this protracted misconduct was *not* caused by the alleged disabilities" is "further corroborated by the testimony of Respondent's only witness, Ms. April Urban." *Id.* at 39.

The Committee agrees with Respondent in part and Disciplinary Counsel in part. The key issue here is timing.

Both doctors agree that Respondent's mental health illnesses do not have an on/off switch and pinpointing the exact date or timeframe when a condition started to affect her conduct is not exact, but the Committee must nonetheless determine whether Respondent has established by a preponderance of the evidence whether her illness substantially affected the specific misconduct that covered many years.

Dr. Tellefsen concludes that Respondent's mental health illnesses were disabling from 2008 through early 2012. RX 707. Whereas, Dr. O'Leary concludes that Respondent's illnesses were disabling from August/September 2009 through February 2012. BX 300. It is not clear from Dr. Tellefsen's report or testimony how she reached the conclusion that Respondent was disabled in 2008. In 2008, Respondent was working at the Kenny Firm. FF 15, 42. Based on Respondent's testimony, she experienced some depression symptoms while she was employed with the Kenny Firm, her stress level was increased, and she had some difficulty sleeping. FF 175. She began to drink after work hours as a way of dealing with the stress. FF 176. However, as Dr. Tellefsen reported, Respondent was functioning well at the Kenny Firm. FF 176. Her work was not affected, and she did not drink during the day.

In mid-2008, Respondent resigned from the Kenny Firm, and in August 2008, she established Mardis, LLC, which she used to do real estate transactions and to buy and sell furniture on eBay. FF 44. Respondent gave uncorroborated testimony that she was drinking all day long after she resigned from the Kenny Firm. FF 179. The Committee is reluctant to accept Respondent's uncorroborated testimony as the sole evidence on this issue because of her inconsistent and false testimony during this matter. But even if the Committee accepts Respondent's testimony, that does not establish that Respondent's illness was affecting her conduct in 2008. As Dr. Tellesfsen described, Respondent's conditions had a downward trend. Tr. 1028. The Committee accepts that the alcohol use in late 2008 was part of that downward trend, but without evidence that it affected Respondent's work or life functions, the Committee cannot conclude by a preponderance of the evidence that Respondent's conduct in 2008 was caused by her illness.

Instead, the evidence supports Dr. O'Leary's opinion that Respondent's alcohol use disorder was mild before September 2009 and she was not psychotic until about December 2009. Tr. 1314-15. This is consistent with Dr. Tellefsen's opinion that Respondent was overtly psychotic in mid-2009, but 100% impaired by December 2009. Tr. 1035. And it is consistent with the other evidence in the record, namely that Respondent was functioning well in early to mid-2009, she was not drinking during the day, and she was polished at work. FF 182. In September 2009, there were signs that the alcohol use had a negative impact on Respondent. She was arrested twice. FF 183. Later, in December, Ms. Urban observed that Respondent was drinking in the office during the day (prior to December she noticed wine in the cabinets only). FF 184, 188. Respondent's drinking, per her report, increased when her husband returned from Iraq in December 2009. FF 185. There were marital troubles, and Respondent increased her drinking to

deal with the marital stress. FF 186. Respondent began to experience delusional and paranoid thoughts. FF 187, 189-192. Respondent acted upon those delusional and paranoid thoughts in 2010 by searching for electronic bugs, calling the police, and refusing to use her computer. FF 188-189, 194, 196. Ms. Urban observed this downward spiral and describes it as beginning in December 2009 and through 2010. FF 189-190, 195, 197. The Committee credits Dr. Tellefsen's testimony that the mental health conditions were likely present and having an impact on Respondent before she had outward signs of her paranoia that were observed. Tr. 1025-28. For that reason, the Committee concludes that the alcohol use disorder was disabling prior to December 2009 when Ms. Urban started to observe the problems and agrees with Dr. O'Leary that the evidence supports a finding that it began in August to September 2009. BX 300. Without more evidence on impact prior to the arrests in September 2009, however, and because Ms. Urban testified that Respondent was functioning at a high level before September 2009, the Committee concludes that Respondent did not establish by a preponderance of the evidence that her conduct prior to September 2009 was caused by her illness.

Based on the above timeline, most of the misconduct alleged in Count I, the Kryakov matter, was based on Respondent's conduct in 2008 and early 2009, before Respondent's illness affected her conduct. Thus, the Committee concludes that Respondent did not carry her burden of establishing by a preponderance of the evidence that her illness was a substantial cause of her misconduct during that time period.

Respondent's misconduct in Count I related to her statements and testimony in 2010, Rules 8.1(a) (false statements to Disciplinary Counsel), 8.4(c) (dishonesty related to false statements in the D.C. Litigation and to Disciplinary Counsel), and 8.4(d) (interference with the administration of justice in the D.C. Litigation), is more complicated. The record establishes that Respondent

was suffering from Alcohol Use Disorder and psychosis in 2010 when she responded to Disciplinary Counsel and gave her deposition testimony in the D.C. Litigation. Dr. Tellefsen's testimony generally explained that Respondent's disability may have resulted in her lack of candor in both contexts. However, as noted below, Respondent's failure to correct the false statements to Disciplinary Counsel in her 2013 response and her reliance on her 2010 deposition testimony as part of her testimony in this matter, both of which occurred after both doctors agree that the illness was not causing misconduct, creates a real question of whether the false statements were caused by her illness.

In addition, Dr. Tellefsen's general statement that Respondent's illness may have caused her to have poor judgment does not create the necessary causal link between Respondent's illness and her dishonesty. Tr. 1047, 1089-1092. The Board explained in *Lopes*:

> Dishonesty cuts away at the heart of the legal profession. We are not inclined to diminish the seriousness of that misconduct by relying on too tenuous a link between dishonesty and physical and psychological impairments. . . . There is no evidence . . . that the physical and psychological impairments, separately or in combination, either rendered Respondent unable to understand that he was being dishonest or unable to behave otherwise. Absent such evidence, we cannot conclude that the ailments were "sufficiently determinative of his conduct" to support a *Kersey* defense.

770 A.2d at 568-69 (quoting the Board decision). Thus, the Committee concludes that Respondent did not carry her burden of establishing by a preponderance of the evidence that her illness was a substantial cause of her misconduct in Count I related to her false statements and testimony. As such, Respondent is not entitled to *Kersey* mitigation with respect to the misconduct in Count I (Kyakov).

Respondent did establish by a preponderance of the evidence that her conduct alleged in the Count II, the Dixon matter, was caused by her illness. The experts opined that an attorney who is suffering from Alcohol Use Disorder is at risk of neglecting client matters, such as missing court

hearings and filing deadlines. Respondent's conduct in the Dixon matter is consistent with the doctors' opinion: Respondent missed deadlines and was otherwise neglectful of her case responsibilities. The misconduct was limited to an inadequate fee agreement and errors in setting up a client trust account and using it separate from an operating account. While the latter can have serious consequences, both reflect sloppy and inattentive work. The Committee found that Respondent missed court deadlines in the Dixon matter as well, while not in violation of the Rule charged, it supports Respondent's position that she was struggling at that time with her work and professional duties. Moreover, the Committee, credits the testimony of Ms. Urban, who saw firsthand the effect of Respondent's illness on her conduct in late 2009 and 2010.

For these reasons, the Committee finds that Respondent met her burden of proving, by a preponderance of the evidence, the second element of the *Kersey* test for Count II, but not for Count I.

3. Respondent Did Not Establish that She has been Substantially Rehabilitated

To satisfy the third *Kersey* factor, Respondent must show by clear and convincing evidence that she has been "substantially rehabilitated." The Court considers evidence of rehabilitation because "an attorney should not be punished simply for punishment's sake. If the attorney no longer poses a threat to the public welfare, or if that threat is manageable and may be controlled by a period of probation, then disbarment or a period of actual suspension may be unnecessary." *Appler*, 669 A.2d at 740. The Court has observed that *Kersey* mitigation has been allowed only when it "belie[ved] that the attorney no longer posed a significant risk to the public." *Id.* at 739. The Court also noted that "[t]he 'substantial rehabilitation' prong of *Kersey* in essence imposes a sort of fitness requirement on an attorney who seeks mitigation of sanctions under this doctrine." *In re Robinson*, 736 A.2d 983, 989 (D.C. 1999).

On the rehabilitation issue, Respondent maintains that her "Alcohol Use Disorder is in remission and she is participating and engaging well in treatment." R. Mitigation Br. at 32. Respondent cites Dr. Tellefsen's conclusion that Respondent "has implemented robust safeguards to reduce the risk of reoccurrence," and that she "receives appropriate treatment once a month from a psychiatrist who is adept in recognizing symptoms of both substance abuse and depression[,] . . . receives treatment from a psychologist twice a month and attends Alcoholics Anonymous meetings twice a month." *Id.* Finally, Respondent argues that the Committee should disregard Dr. O'Leary's opinion that Respondent is at high risk of relapse and not substantially rehabilitated, because she has not had a substance abuse evaluation and intensive treatment at a drug treatment center. She argues that Dr. O'Leary's "proposed treatment is not clinically appropriate based upon [Respondent's] current condition." *Id.* at 33.

Disciplinary Counsel contends that "Respondent's failure to prove causation renders consideration of the rehabilitation moot" and that "Respondent has failed to carry her burden in establishing rehabilitation by clear and convincing evidence." BC Mitigation Br. at 39-40. Specifically, Disciplinary Counsel maintains that Respondent "does not appear to understand the full scope of her issues with alcohol" based on her "relapse with alcohol and delusional thinking as recently as January 2015." *Id.* at 40. "In addition, Dr. O'Leary testified to further concerns about abuse of other substances based on analysis of medications Respondent has been prescribed and/or obtained from others." *Id.*

The Committee finds that Respondent did not establish by clear and convincing evidence that she is rehabilitated.

First, as stated in *Robinson*, the rehabilitation standard is similar to a fitness standard. 736 A.2d at 989. Respondent's argument that she is no longer drinking alcohol or experiencing

paranoid delusions is only part of the calculus. As the Court explained in *Robinson*, such an "argument rests on an unacceptably narrow definition of substantial rehabilitation; that is, if the evidence shows that a specific condition that was originally determined to have been a cause of the misconduct in question has abated, that individual is 'substantially rehabilitated,' regardless of evidence indicating that because of other related factors there is serious doubt about that individual's ability to practice law in accordance with the rules of ethics." *Id.*

Throughout these proceedings, Respondent has failed to take responsibly for her actions and misconduct. Disciplinary Counsel strongly argued that Respondent should be precluded from putting forth *Kersey* evidence in light of her failure to admit wrongdoing. As discussed in Section VI.C, *infra*, the Committee recommends denying that request. However, Respondent testified falsely throughout her hearing testimony and adopted some of her prior false statements into her current testimony—extending her wrongdoing beyond the period of when her illness was affecting her conduct. The Committee fully appreciates that a respondent is entitled to defend herself, but doing so through repeated false testimony raises "serious doubt about [Respondent's] ability to practice law in accordance with the rules of ethics." *Robinson*, 736 A.2d at 989.

Second, the Committee cannot credit Dr. Tellefsen's testimony about Respondent's rehabilitation. Dr. Tellefsen wrote two reports in this matter. The first is dated November 12, 2014, in which she concludes that Respondent is fully rehabilitated. Dr. Tellefsen reached this conclusion even though Respondent was not in treatment at the time of the report, and she had not fully accepted that she was an alcoholic until after the report was written. Moreover, at that time, Respondent was still drinking alcohol—albeit beer rather than hard liquor—and she was not attending AA meetings. Dr. Tellefsen's second report in March 2015 also states that Respondent is fully rehabilitated and justifies that conclusion with the fact that Respondent has accepted that

she has a drinking problem and is in treatment to include AA meetings. Dr. Tellefsen did not provide a satisfactory justification for her implausible conclusion in the first report. Tr. 1082-84; RX 701; RX 707.

Finally, when considering the *bona fides* of Respondent's *Kersey* claim, the Committee is troubled by the fact that Respondent signed a statement on November 8, 2014 setting forth her intent to assert *Kersey* mitigation based on alcohol use disorder. By her own testimony, Respondent did not accept that she had such a condition until after she reviewed Dr. Tellefsen's report, dated four days later on November 12, 2014. RX 701. This casts doubt on the sincerity of the *Kersey* claim.

For these reasons, the Committee finds that Respondent did not meet her burden of proving, by clear and convincing evidence, this element of the *Kersey* test.

Recommended Sanction

The Committee recommends that Respondent be disbarred.

VIII. CONCLUSION

For the foregoing reasons, the Committee finds that Respondent violated the following Rules with regard to Count I: 1.7(b)(4), 3.3(a), 8.1(a), 8.4(b), 8.4(c), and 8.4(d); and with regard to Count II: 1.5(b) and 1.15(a), and should receive the sanction of disbarment. We further recommend that the Board and Court direct Respondent's attention 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).

HEARING COMMITTEE NUMBER FOUR

/LP/
Lucy Pittman, Chair

/NAE/
Nicole A. Evers, Public Member

/DIW/
Daniel I. Weiner, Attorney Member

Dated: February 15, 2017