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

In the Matter of:	:	
	:	
GREGORY L. LATTIMER,	:	Board Docket No. 15-BD-070
	:	Bar Docket No. 2014-D145
	:	
Respondent.	:	
	:	
A Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 371926)	:	

REPORT AND RECOMMENDATION OF
AD HOC HEARING COMMITTEE

On June 23, 2015, the Office of Bar Counsel, now the Office of Disciplinary Counsel, filed a Specification of Charges alleging that Respondent violated seven of the District of Columbia Rules of Professional Conduct and six comparable rules of the Virginia Rules of Professional Conduct. The violations arose out of Respondent's representation of Ms. Denise Wilkins in her suit for the wrongful death of her son, Justin Davis. Mr. Davis was killed while in the custody of Virginia's Central State Hospital, where he had been sent by court order for treatment for his drug addiction and an evaluation as to his competency to stand trial.

Disciplinary Counsel charged Respondent with violating the following rules of the District of Columbia Rules of Professional Conduct:

Rule 1.1 (failure to provide competent representation, skill and care);

Rule 1.3(a) (failure to represent his client zealously and diligently);

Rule 1.3(c) (failure to act with reasonable promptness in representing his client);

Rule 1.4(a) (failure to keep his client reasonably informed);

Rule 1.4(b) (failure to explain a matter to his client to the extent reasonably necessary to permit his client to make informed decisions);

Rule 3.3(a) (knowingly making a false statement of fact to a tribunal); and

Rule 8.4(c) (engaging in dishonesty).

Respondent was charged with violations of the same Virginia Rules of Professional Conduct, except for Rule 1.3(c). Under the Virginia Rules, the obligations imposed under D.C. Rule 1.3(c) are included in Virginia's Rule 1.3(a). Virginia's Rule 1.3(c) addresses other issues.

The Committee finds that Disciplinary Counsel has established a violation of Virginia Rules 1.1, 1.3(a), 3.3(a) and 8.4(c), as well as D.C. Rules 1.1, 1.3(a), 1.3(c), 3.3(a) and 8.4(c).[1] The Committee recommends that Respondent be suspended from the practice of law for a period of forty-five days, rather than the ninety days proposed by Disciplinary Counsel. The Committee finds that Disciplinary Counsel has not established by clear and convincing evidence that a fitness requirement is appropriate.

Procedural History

A pre-hearing conference was held on November 2, 2015 in Courtroom II of the Historic Courthouse, at which the Chair of the Committee heard argument on Respondent's Motion to Defer the hearing pending the outcome of Ms. Wilkins' malpractice case against him and his co-counsel. Pending the ruling on Respondent's Motion to Defer, the Chair set the dates for the hearing and directed the parties to agree on appropriate dates for the exchange of exhibits and related matters. On December 12, 2015, the Motion to Defer was denied by the Chair of Board on Professional Responsibility on the recommendation of the Chair of the Ad Hoc Committee.

[1] As explained below, the Committee finds that the Virginia Rules are controlling. *See* pp. 28-29, *infra.*

A hearing was held before the Ad Hoc Committee in Courtroom II on February 18 and 19, 2016. Disciplinary Counsel was represented by Hamilton P. Fox, Assistant Disciplinary Counsel; Respondent appeared *pro se.* At the start of the hearing, the Chair denied Respondent's objections to some of Disciplinary Counsel's exhibits and to the qualifications of Disciplinary Counsel's expert witness. Respondent was given leave to raise his concerns with respect to the expert's qualifications in his brief. (Tr. 19-22). Disciplinary Counsel introduced two witnesses, Ms. Wilkins and Jeffrey Fogel, Esq., who was offered as an expert. Respondent testified on his own behalf as did his assistant, Ms. Susan Imani Berk. Exhibits offered by both sides were admitted in evidence on the final day of the hearing. (Tr. 346-47, 597-98 (admitting Respondent's Exhibits 1-30, 36, 41, 42, 48-51 and Disciplinary Counsel's Exhibits A-D and 1-42)). At the conclusion of the liability phase of the proceeding, the Committee tentatively concluded that Disciplinary Counsel had established at least one disciplinary violation.

In an Order released on March 4, 2016, the Committee Chair set the dates for the filing of briefs and requested that the parties address whether the District of Columbia and Virginia Rules of Professional Conduct impose a different standard under the rules allegedly violated by Respondent, and, if so, which rules apply. The Chair requested that, if "either party proposes use of the Virginia Rules, the party shall also address whether the Hearing Committee should look to Virginia or District of Columbia precedent in determining the sanction, if any, to be recommended." (Order dated March 4, 2016 at 2).

Disciplinary Counsel filed its Proposed Findings of Fact and Conclusions of Law on March 21, 2016. Respondent filed his Post-Hearing Brief on April 21, 2016, and Disciplinary Counsel filed its Reply Brief on April 29, 2016. On May 18, 2016, Respondent filed a Surreply to Disciplinary Counsel's Reply Brief in which he disputed many of the factual assertions in the

Reply Brief and submitted additional emails relating to the case. Disciplinary Counsel opposed the Surreply on the grounds that the Board rules do not authorize a Surreply, Respondent did not seek leave to file the Surreply, and the Surreply was repetitive. On May 11, 2016, Respondent filed "Respondent's Response to Disciplinary Counsel's Opposition to Respondent's Surreply Brief," again without requesting leave to file. On June 6, 2016, the Chair of the Committee rejected Respondent's May 11 filing and ordered the Office of Executive Attorney to reject any additional pleadings that might be filed without a request for leave. While the Committee does not condone Respondent's failure to seek leave to file his Surreply, it finds that some of the material submitted with the Surreply is relevant to the issues in this case and is of assistance in addressing the issues. It will accept the pleading to the extent reflected in this Report. It is rejected in all other respects.

FINDINGS OF FACT[2]

A. Background

1. Respondent Gregory L. Lattimer is a member of the Bar of the District of Columbia Court of Appeals. He was admitted to the Bar on July 5, 1983; his Bar number is 371926. (D.C. Exh. A).[3]

2. Respondent is a graduate of the University of Miami and Washington College of Law of American University. After working at various government agencies, he entered private practice in 1992. (Tr. 411).

[2] Attached to this Report is a timeline of events.

[3] Disciplinary Counsel's exhibits will be cited as D.C. Exh. ---; Respondent's exhibits will be cited as R. Exh. ---.

3. Respondent is a solo practitioner who is assisted by his wife, Susan Imani Berk.[4] Respondent's practice is primarily civil litigation and, since 2000, he has tried some 180 cases in Maryland, the District of Columbia and Virginia. (R. Exh. 25-27). Much of his practice involves civil rights cases for wrongful death. (Tr. 412-13).

4. Ms. Berk is a graduate of Cornell University and American University's law school. She is a member of the New York and Pennsylvania Bars and has extensive experience in the area of labor relations. (Tr. 349-53; 419). She is not admitted in the District of Columbia.[5]

5. Among her functions, Ms. Berk screens potential client matters for Respondent. (Tr. 352). She also acts as a liaison between Respondent and his clients. Since he is not in the office most days, "it's [her] role to keep them informed of cases, to ensure them what is going on. And a lot of time in wrongful [sic] cases like this is to hold their hand, walk them through it, talk to them repeatedly, [and to let them know] … what is going on, what is the process." (Tr. 353). She acted in this capacity in Ms. Wilkins' case. (Tr. 352-54).

B. The Death of Mr. Davis

6. Mr. Davis was initially arrested by the Alexandria police after his mother called them. She was concerned for his well-being and wanted to get him off the street. He was addicted to drugs and had been engaged in erratic behavior that she believed questioned his mental health. (Tr. 38-41). She attributes his mental health problems to a head injury when he

[4] The transcript erroneously refers to Ms. Berk as Ms. Birk.

[5] The Committee takes official notice that Ms. Berk is not on the list of members maintained by the District of Columbia Bar. *See* http://www.dcbar.org/membership/find-a-member-results.cfm (visited on February 1, 2017).

was five years old. (Tr. 39). On his arrest, he was charged with assault and battery, resisting arrest, and being drunk in public. (D.C. Exh. 4C at 1).

7. While in custody, he was transferred from the Alexandria jail to Western State Hospital on order of a Virginia court. He was at Western State Hospital for approximately six weeks. (Tr. 41-42).

8. On January 5, 2010, he was transferred to Central State Hospital in Petersburg, Virginia. (R. Exh. 7 at 1; Tr. 42-43). He was classified as "a court-ordered Treatment of Incompetent Defendant." (D.C. Exh. 4C at 1). While at Central State Hospital, he was killed on the evening of February 27, 2010, by another patient, George Phillips. (D.C. Exh. 4C at 3).

9. Mr. Phillips was transferred to Central State Hospital on February 15, 2010 from the Northwestern Regional Jail. At that time, he was charged with capital murder. (D.C. Exh. 4C at 1). Mr. Phillips was subsequently charged with capital murder in connection with Mr. Davis' death. (*Id.*).

10. Both men were housed in the same forensic ward in the hospital. Each had his own room, but doors were not locked. (Tr. 162; D.C. Exh. 4C). The ward to which they were assigned housed the most violent patients at the hospital. (Tr. 167; D.C. Exh. 23 at 8).

11. Mr. Davis' record at Central State indicates that he had assaulted or attempted to assault seven other patients and staff members. (D.C. Exh. 4C at 1; R. Exh. 8 at Latimer 269). He was on violent observer status, which, under hospital rules, required that he be checked on every fifteen minutes. (D.C. Exh. 39 at 5). His relationship with Mr. Phillips was also confrontational, with several altercations between them before Mr. Phillips murdered Mr. Davis. (D.C. Exh. 4C at 37).

12. Mr. Phillips' violent nature was known to the officials of Central State. He was on violent observation status for at least a week prior to killing Mr. Davis as well as suicide and escape observation status. (D.C. Exh. 39 at 5). Mr. Phillips had advised Dr. Tracy Duarte, one of physicians on the hospital's medical staff, that he had thoughts of harming himself and others, specifically Mr. Davis. He felt threatened by Mr. Davis. (D.C. Exh. 4C at 8-9).

13. The senior medical staff discussed the "progression, frequency, and intensity of Mr. Phillips' threats to Mr. Davis." (*Id.* at 9). They were aware of the animosity between Mr. Davis and Mr. Phillips, but decided not to relocate either Mr. Davis or Mr. Phillips to a different ward. Instead they decided to assign a staff person whose responsibility was to monitor Mr. Phillips. (*Id.* at 8, 34, 37). The Investigative Report prepared for the hospital ("Report") is unclear whether the staff person was to be dedicated to Mr. Phillips or could perform other functions. (D.C. Exh. 4C at 8). However, the Report is clear that the senior staff was principally concerned about Mr. Phillips' violent tendencies; the extent to which they were concerned about his attacking Mr. Davis is not clear. (D.C. Exh. 4C at 7-9).

14. According to the Report, Dr. Duarte informed Lawrence Harris, the charge nurse, of Mr. Phillips' threats, and Mr. Harris said he "would keep an eye" on Mr. Phillips. Mr. Harris disputed that claim. (*Id.* at 8). The Report noted that a staff person was to be assigned to monitor Mr. Phillips, although it is unclear.

15. There is some question whether the order to assign a staff person to monitor Mr. Phillips was communicated to the ward staff. (*Id.*). Neither Ms. Bernadette Spruill, the nursing supervisor, nor the day nurse were aware of Mr. Phillips threats to Mr. Davis. (*Id.* at 8; *see also* R. Exh. 15 at 7 (transcript p. 24)). The medical records did not include any mention of those threats. Dr. Yaratha, one of the doctors responsible for Mr. Davis, did not recall any specific

mention of Mr. Davis being threatened. (D.C. Exh. 4C at 8). Finally, it appears that he was allowed in the gym and was permitted to eat in the cafeteria when he should not have been. (D.C. Exh. 38 at 65).

16. There is no disagreement about the requirement that a member of the hospital staff sit in a chair -- the "yellow chair" -- which had a view of the hall on which their rooms were located and to watch the hallway. The "yellow chair" assignment appears to be an additional safeguard beyond the normal hospital rules which required the staff to check on patients every fifteen minutes during the evening to assure that they were in their beds and breathing normally. (D.C. Exh. 4C at 4-5).

17. Closed circuit video of the hallway showed that between 9:39 and 9:56 on the evening of February 27, 2010, Mr. Phillips visited Mr. Davis' room twice. (D.C. Exh. 4C at 4-6).

18. The Forensic Mental Health Technician ("FMHT"), who was assigned the task of sitting in the yellow chair from 9:30 to 10:30 pm on February 27, was not in the chair during that period. She was in the dayroom watching television with the charge nurse. They were aware that Mr. Phillips was not in his room as he came to the day room to request lotion. (D.C. Exh. 4C at 5).

19. Mr. Davis was found dead at approximately 5:15 am the following morning, February 28, 2010. (D.C. Exh. 4C at 4).

20. The Report concluded that the FMHT's failure to monitor the hall and the charge nurse's failure to assure that she did "provided the opportunity for Mr. Phillips to attack Mr. Davis." It noted that the FMHT admitted "'I have no reason for not doing my 9:45 pm and 10:00 pm checks. I have no reason for not being at my post which is up against the wall looking down

the hall. …'" The FMHT understood that "the purpose for the patient checks is to ensure the safety of the patients by counting to make sure they are where they are suppose[sic] to be." (D.C. Exh. 4C at 6, Lattimer 456-57).[6] The report stated that the charge nurse admitted that the normal procedures for monitoring patient safety had been largely ignored. (*Id.* at 5, 9, Lattimer 458).

21. Other members of the staff on duty that evening did not conduct all the monitoring checks of patient rooms as required by the hospital's procedures. Of the twenty-seven rounds required, only six were performed. (D.C. Exh. 4C at 6, 26).

C. Ms. Wilkins Seeks Help for Her Son's Wrongful Death

22. Sometime after her son's death, Ms. Wilkins retained Brooks Hundley, a lawyer with offices in Chesapeake, VA, to represent her. (Tr. 42-45; R. Exh. 5). She subsequently discharged him and retained another lawyer, whose name she could not remember. (Tr. 44-45).

23. She discharged her second attorney two weeks after retaining him (Tr. 45) and retained Donald W. Marcari, a lawyer with offices in Chesapeake, VA. (D.C. Exh. 3A). She subsequently discharged Mr. Marcari on September 9, 2011. (R. Exh. 1 at Lattimer 89).

24. She was upset that Mr. Marcari urged her to go to a mediation (Tr. 85, 87) scheduled on October 3, 2011. (D.C. Exh. 3A at 2-3). She thought that Mr. Marcari "was working with the governor of the State of Virginia …[which] made her very leery as to why I would want to continue with somebody who is working to work against anything that I am trying to do." (Tr. 85).

[6] Several exhibits consist of a series of e-mails which are not in chronological order and not consecutively paginated. *See* R. Exh. 1; D.C. Exh. 4C, and the Attachment to the Surreply. At the bottom of each page in these exhibits is a reference to what appears to be an exhibit in another case. Those are references are: "Lattimer --" with a page number. For ease in finding the relevant material, the Committee will reference the "Lattimer" page numbers where there are no other page numbers.

25. She wanted damages of $7 million, $1 million for each of the seven individuals associated with Central State that she thought were responsible for her son's death. (R. Exh. 1 at Lattimer 87-88; Tr. 63). Mr. Marcari was discussing a settlement in the range of $150,000 to $250,000, with a potential settlement of $500,000. (D.C. Exh. 3A at 2-3). She was opposed to "a settlement out of court. …. I wanted to go to court because I also wanted to see the people who did this … get justice." (Tr. 42, 87-88).

26. On August 22, 2011, Ms. Wilkins wrote to Howard Woodson, a Virginia lawyer and former President of the NAACP, Alexandria Chapter. She asked him to help her find a lawyer who could help her make:

> a difference for all the young black men, like my son, who may slip through the cracks. I feel that if I have someone from your organization standing with me that the State will think twice before they try to pull the wool over my ignorant eyes. I believe I am doing this for the sake of Black Young Men Everywhere.

(R. Exh. 1 at Lattimer 93 (capitals in original); *see* Tr. 49-50, 417).

27. Mr. Woodson contacted Respondent to find out whether he would be interested in taking the case, forwarding Ms. Wilkins' email. (*Id.*). He sent Respondent Ms. Wilkins' telephone number and her e-mail address. (R. Exh. 1 at Lattimer 92-93). He sent Ms. Wilkins Respondent's telephone number. (Tr. 50-51). Ms. Wilkins spoke to Respondent and sent him an email on August 30, 2011 explaining the case. (R. Exh. 1 at Lattimer 87; Tr. 351). She sent a redacted copy of the Report. (Tr. 51, 418). That copy masked the names of the charge nurse and the FMHT and others. (R. Exh. 8).

28. On September 9, 2011, she notified Mr. Marcari that she had retained Respondent.[7] (R. Exh. 1 at Lattimer 89; Tr. 53). On September 11, 2011, Mr. Marcari

[7] Respondent and Disciplinary Counsel disagree when Respondent was retained. Respondent argues it was when Ms. Wilkins signed his retainer agreement. Disciplinary Counsel asserts he

acknowledged Ms. Wilkins' decision, expressed surprise that she was changing lawyers, and asked her to have Respondent contact him to arrange for the transfer of the file. (R. Exh. 1 at Lattimer 90; Tr. 54). Respondent sent Mr. Marcari an email on September 14, 2011 asking for a time when they might discuss Ms. Wilkins's case. (R. Exh. 36). Mr. Marcari did not respond. (Tr. 470).

29. On September 22, 2012, Ms. Wilkins sent an e-mail to Ms. Berk asking if Mr. Marcari had contacted Respondent. (R. Exh. 1 at Lattimer 86). Ms. Berk responded "not yet." When Ms. Wilkins asked "What should I do?", Ms. Berk told her that Respondent will handle it. (*Id.* at Lattimer 85-86).

30. On October 18, 2011, Ms. Wilkins received a telephone call from Steve Bricker, a lawyer who worked with Mr. Marcari, expressing concern that Respondent had not contacted

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was retained in early September. The Committee concludes that Respondent was retained in early September.

When an attorney-client relationship commences turns on the facts and circumstances in each case. *See In re Fay*, 111 A.3d 1025, 1030 (D.C. 2015) and cases cited therein. There is no bright line. However, "[i]t is well established that neither a written agreement nor the payment of fees is necessary to create an attorney-client relationship. [Nor is it] necessary for an attorney to take substantive action and give legal advice in order to establish such a relationship." *In re Lieber*, 442 A.2d 153, 156 (D.C. 1982) (citing *In re Russell,* 424 A.2d 1087 (D.C. 1980); *In re Fogel*, 422 A.2d 966 (D.C. 1980)). And, although a client's view of the matter is not controlling, *Fay*, *supra*, 111 A.3d at 1030, "a client's perception of an attorney as his counsel is a consideration in determining whether a relationship exists," *Lieber*, *supra*, 422 A.2d at 156. The Restatement of the Law Governing Lawyers provides that a "relationship of a client and lawyer arises when … a person manifests to a lawyer the person's intent that the lawyer provide legal services to the person and either … the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide services.…"

The facts here track the Restatement formula rather closely. Ms. Wilkins thought she had retained Respondent in early September. She notified Mr. Marcari that she had retained Respondent and terminated Mr. Marcari's representation. She had sent Respondent the redacted Report, and he had spoken to her before she discharged Mr. Marcari. Respondent contacted Mr. Marcari in an effort to discuss the case before Ms. Wilkins signed the retainer letter. (R. Exh. 36). He also advised Ms. Wilkins that he had a number of other cases that he was working on at the time, but would send her a retainer agreement (Tr. 54-56), thereby implying that he would represent her. Ms. Wilkins thought Respondent had agreed to represent her when she spoke to him, and he took no steps to disabuse her of that notion. The Committee concludes these facts establish an attorney-client relationship was established in early September 2011.

them to obtain the file. He noted that a lot of work to that still needed to be done. (D.C. Exh. 42 at 1-2). Ms. Wilkins e-mailed Respondent concerning the call on the same day. (*Id.*). The following day, October 19, 2011, Respondent wrote to Mr. Marcari to request the file. (R. Exh. 3). Respondent never discussed the case with Mr. Marcari. (Tr. 488).

31. In a letter dated October 17, 2011, Respondent sent Ms. Wilkins his retainer agreement. She signed it on October 24, 2011 and returned to Respondent. (R. Exh. 2 at Lattimer 128-29, 130).

32. Respondent's retainer agreement provided, in relevant part, that Ms. Wilkins was retaining "the Law Office of Gregory L. Lattimer, PLLC, and Law Office of S.H. Woodson, III, P.C. as my attorneys at law, with power of attorney to prosecute the claim or claims for damages against any and all persons, entities or government, which may be liable and responsible as the result of the wrongful death of my son, Justin L. Davis." The remainder of the retainer letter described the contingency fee payment terms. (R. Exh. 2 at Lattimer 128).

33. Respondent included the quoted language in all his contingency cases because he wanted his clients to understand that they were "relying on his judgment" and that they were giving him authority to exercise that judgment on their behalf. (Tr. 472). He testified "the whole arrangement is based upon me giving my time and me paying all of the expenses, then I have to have some latitude in determining who is going to be sued." (Tr. 441). If Respondent "and Ms. Wilkins had any disagreement about who to sue, then our relationship matter would have ended at that point." (*Id.*).

34. On October 24, 2011, Mr. Marcari sent Respondent his file. The file included a copy of his notice of claim on Ms. Wilkins' behalf, information about potential expert witnesses contacted by Mr. Marcari, and what appears to be notes of an interview with a former employee

at Central State who was there at the time of Mr. Davis' death. Those notes indicate that the employee stated that there was insufficient staff to assure security and that three staff members should have been assigned to Mr. Phillips. (D.C. Exh. 3G).

35. In his transmittal letter, Mr. Marcari explained that, in his opinion, the Commonwealth "has liability under the [Virginia] Tort Claims Act for $100,000" for Mr. Davis' death. He stated that he had intended to file claims under 42 U.S.C. § 1983 against the FMHT, the charge nurse, and other members of the treatment team who decided to leave Mr. Phillips and Mr. Davis in the same ward. He advised that he thought he could prove gross negligence and could recover punitive damages. (D.C. Exh. 3A at 2).

36. He wrote that his conversations with the Attorney General's office indicated that they valued the case in the range of $150,000 to $250,000 and that they "thought with some effort they could convince the Governor to go to Half Million Dollars." (D.C. Exh. 3A at 2-3). He advised that he had told Ms. Wilkins that he "thought mediation would be productive, if nothing else to determine the Commonwealth's strategy and what they were thinking." The decision whether to settle was hers. (*Id.*).[8]

37. Although Respondent spoke to her in September, he met with Ms. Wilkins for the first time on December 3, 2011. (R. Exh. 1 at Lattimer 98). Ms. Berk had spoken to her and communicated by e-mail a number of times before then. (Tr. 352-54). Throughout Respondent's representation of Ms. Wilkins, much of the communication was effected through Ms. Berk. (Tr. 61-63, 351-61). She spoke to or e-mailed Ms. Wilkins several times a month.

[8] The record is silent as to who cancelled the October scheduled mediation. Respondent did not participate in any mediation or engage in settlement negotiations with the Virginia Attorney General's office. (Tr. 377-78, 424, 436, 526). He did not believe the case would settle. (Tr. 521-22).

(*Id.*). Ms. Berk testified that she was sensitive to the trauma suffered by Ms. Wilkins in losing a child. (Tr. 359-66; *see also* Attachment 1 to the Surreply ("Attachment") at Lattimer 43).

38. Respondent emailed Ms. Wilkins several times during the course of the litigation, explaining the difficulties with the case. (Tr. 88-89, 98-99, 100-01, 106-08; *see also, e.g.*, R. Exh. 1; Attachment *passim*). Either he or Ms. Berk provided her copies of documents when she asked for them (Tr. 119), although Ms. Wilkins complained in February 2013 that she had to request an update to learn what was going on. (Attachment at Lattimer 1743).

39. Ms. Wilkins told Respondent that money was not her objective; she "wanted justice." (Tr. 95-96). She thought that the employees and the doctors at Central State Hospital in charge of Mr. Davis' care were "accessories to the murder." (Tr. 45-47). She wanted to expose publicly what had happened to her son. (Tr. 96). She told him that "for every person who went home, had dinner with the family, went out to a club, hung out with everyone and enjoyed their life, who was in that room who knew that [my] son was being murdered, I want a million dollars for every one of those people. … I felt like the state needed a smack on the back of their hand and needed to feel it because that was just terrible." (Tr. 63). She made it clear that she would not be satisfied with an award within the Virginia Tort Claims Act's limit of $100,000. (Tr. 101-02). She testified that how Respondent achieved the goal was not her concern. (Tr. 115).

C. Respondent Files a Complaint

40. On February 27, 2012, the last day or next to last day before the statute of limitations expired,[9] Mr. Woodson filed a Complaint prepared by Respondent in the United States District Court for the Eastern District of Virginia (Richmond). (Tr. 404-05). Respondent

[9] It is not clear on this record whether the two-year statute of limitations began to run on Mr. Davis' death or the date on which his death was discovered. For the purposes of this Report, the Committee will assume that the Complaint was filed on the last day of the statutory period.

sent the draft Complaint to Mr. Woodson a few days before the statute of limitations expired. He did not remember precisely when, however. (Tr. 445-46).

41. The suit was against Central State Hospital; Vicki Montgomery, Director, Central State Hospital; and unidentified employees at Central State Hospital. Ms. Montgomery and the unidentified employees were sued in their individual and official capacities. (D.C. Exh. 5 at 1-2). Respondent appeared *pro hac vice* and served as lead counsel. (Tr. 405; R. Brief at 2).[10]

42. He understood that Ms. Wilkins did not want to settle. (R. Exh. 13 at Lattimer 61). She wanted to go to court and make "the State of Virginia … feel the sting of their wrongs and not have them tapped on the back of the hand. I want them to know that they can never let anything this gross happen again." (R. Exh. 1 at Lattimer 88).[11] He advised Ms. Wilkins that the Commonwealth would not settle for $7 million dollars and that they would have to go to court to achieve such a recovery. (R. Exh. 13 at Lattimer 61-62).

43. The Complaint included claims under the Virginia Wrongful Death Act for wrongful death as a result of gross negligence and deliberate indifference, a claim under 42 U.S.C. § 1983 for unspecified acts that violated Mr. Davis's constitutional rights against cruel and unusual punishment, and a claim grossly negligent supervision result in Mr. Davis' death. (D.C. Exh. 6 at 4-6).

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[10] The Respondent's brief will be cited as (R. Brief at --); Disciplinary Counsel's briefs will be cited as (D.C. Brief at --) or (D.C. Reply Brief at --), as applicable.

[11] She testified: "I wanted to go to Court because I wanted to see the people who do this. I wanted to get justice for the two people that I thought -- there was more involved in my decision than just a million dollars. …" (Tr. 87-88). When asked by Respondent whether she had told him people don't understand the plight of young black men, she testified that "this was not something you were going to allow to be swept under the rug." (Tr. 88).

Ms. Wilkins appears to have planned using the funds generated by the lawsuit to fund other activities. She created at least one foundation, "Justice for Justin" (Tr. 362-63, 377), and was trying to obtain a loan secured by the proceeds of the lawsuit to fund a television program to help young men suffering from drugs and alcohol addiction obtain television coverage of the case. (R. Exh. 14; Tr. 363-64, 402-03; Attachment to the Surreply (Attachment) at Lattimer 1739).

44. Prior to filing the Complaint, Respondent undertook Internet research concerning Central State Hospital and its management. (Tr. 456-57, 490-91). He reviewed the material Mr. Marcari and Ms. Wilkins had sent him, which included the redacted version of the Report. (Tr. 426-28). He testified that he did research on LexisNexis, but no longer prints out the cases because they are storable on line. (Tr. 491-92). Ms. Berk's testified that he researched his cases thoroughly. (Tr. 389, 405-06, 409-10).

45. Based on his experience and review of the materials, Respondent concluded that Mr. Marcari's plan to sue the charge nurse and the FMHT did "not have a shot" because they were not aware of the threat to Mr. Davis. (Tr. 426, 512). He also thought that neither of them would be able to satisfy any judgment that might satisfy Ms. Wilkins. (Tr. 431). Respondent did not attempt to learn the identity of either the charge nurse or the FMHT (Tr. 511) because he thought that they were scapegoats. (Tr. 513). He also thought that Virginia would not indemnify them if they were sued because they were not governmental officials, were relatively low-level employees, and had been fired. (Tr. 517-19).

46. Respondent decided that suing the doctors would be fruitless because as long as they did something, it would be difficult to prove deliberate indifference. (Tr. 427). He concluded that, to establish a case of deliberate indifference, he had to sue supervisory personnel. (Tr. 427-33).

47. Respondent did not attempt to learn the identity of the others charged with Mr. Davis' care by hiring a private investigator, asking the Virginia state attorney for that information, or otherwise. He did not attempt to use the limited options under the Federal rules to take any discovery prior to the filing of the Complaint, *see* Fed R. Civ. P. 27(a)(3) (Tr. 180-81, 591-92, 594), nor did he seek leave to expedite the process after filing so that he could take

discovery prior to the relation-back deadline of Rule 15(c), F.R.C.P.[12] Rather, he relied on his Internet search to determine the individual responsible for supervising the staff. (Tr. 475-76, 490-91). He sued Ms. Montgomery because, after researching the hospital on the Internet, he believed she was the person running the place at the time of the murder. She was Assistant Director of Clinical Administration at the time of Mr. Davis' death, (R. Exh. 10 at Lattimer 338),[13] and had held several acting director positions. He thought Dr. Davis, the Director of the hospital, was a figurehead. (Tr. 427-28).

48. Respondent did not discuss the Complaint with Ms. Wilkins prior to filing it. (Tr. 64-65; 471-72). He testified that he explained to her "exactly where we were in that process and discussed with her the Complaint that we filed and when I expected that … it would be filed.

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[12] Rule 15(c), prior to its amendment in 2015, provided that an amendment to a pleading relates back to the original pleading if, *inter alia*, the party receives notice of the action within 120 days from the filing of the original pleading.

[13] The description of Ms. Montgomery's job in her Employee Work Profile is as follows:

> This position provides direction to and oversight of the operations of the Hospital …[a]ssesses, develops, monitors, and evaluates the clinical and forensic operations of the hospital. Provides administrative and operational supervision to medical/clinical department and forensic services directors, and their administrative personnel. Directs the interface among all clinical and forensic administrative and operational processes in furtherance of the hospital mission. Guides the development and implementation of fully integrated, efficient, and efficacious operational systems within the hospital. Provides analysis and recommendations relative to the necessary resources to permit hospital management the opportunity to meet standards of operation.

The position required the

> [a]bility to communicate effectively, verbally and[sic] In writing. Supervisory and management skills to work with individuals and groups to achieve identified goals of the program. Knowledge of mental health principles and practices. Extensive experience in high level management of hospital clinical and administrative operations.

(R. Exh. 10 at Lattimer 363).

It is questionable whether this Profile was obtained from an Internet search as it contains a stamp indicating it came from Central Hospital personnel files. Indeed, Respondent himself titled the exhibit as hospital personnel records. (*See* Respondent's Exhibit List at 1; R. Exh. 10).

Went over [the] particulars with her." (Tr. 471-72). He explained the problems with the case (Tr. 420-24) and why he sued Ms. Montgomery and not the charge nurse and FMHT. (Tr. 134-38, 426-28). At Ms. Wilkins' request, Ms. Berk sent Ms. Wilkins the Complaint and other documents. (Tr. 360). As a general rule, however, Respondent did not provide clients with copies of filings unless they requested them. (Tr. 557).

49. Ms. Wilkins frequently expressed her appreciation of Respondent's efforts and did not question his decisions. (R. Exh. 1 at Lattimer 80-82; R. Exh 13, Surreply at 1739). On March 2, 2012, Ms. Wilkins e-mailed Respondent's office that he had "captured my heart completely. My heart is at peace now. … I feel for the first time that I can rest. …" She asked about next steps and whether she could get a lump sum settlement payment. (R. Exh. 1 at Lattimer 80-81). In an earlier e-mail, she asked how much they are seeking, to which Respondent said $12,500,000. (R. Exh. 1 at Lattimer 81-82). On February 7, 2013, Ms. Wilkins emailed Ms. Berk and complimented Respondent's Opposition to Ms. Montgomery's Summary Judgment motion, noting "Wow, he is a great communicator and I am happy to have him as my lawyer." (Attachment at Lattimer 1739).

50. On March 21, 2012, the Commonwealth moved to dismiss the Complaint on the grounds that (a) Central State Hospital was immune from suit in federal court under the doctrine of sovereign immunity as was Ms. Montgomery in her official capacity, and (b) the allegation that Ms. Montgomery was grossly negligent was not supported by any facts. (D.C. Exh. 8).

51. On April 4, 2012, Respondent filed an amended Complaint in which he dropped the hospital as a defendant and included additional factual allegations concerning the alleged gross negligence of Ms. Montgomery and others. (D.C. Exh. 9). On April 5, 2012, the District

Court denied the Commonwealth's motion to dismiss as moot in light of the amended Complaint. (D.C. Exh. 10).

52. On April 11, 2012, Ms. Montgomery moved to dismiss the amended Complaint on the grounds that she was immune from the claim against her in her official capacity, that there were insufficient factual allegations supporting the claim that she was responsible for supervising the charge nurse or FMHT, and that Virginia did not recognize a claim for negligent supervision. (D.C. Exh. 11).

53. On April 25, 2012, Respondent filed a Memorandum in Opposition to the Motion to Dismiss. (D.C. Exh. 12). On May 4, 2012, Ms. Montgomery moved for summary judgment on essentially the same grounds as in her motion to dismiss. (D.C. Exh. 13). On the same date, Ms. Montgomery moved to dismiss the April 11 motion to dismiss. (D.C. Exh. 5 at 3 #15).[14]

54. On May 18, 2012, Respondent opposed the summary judgment motion on the grounds that (a) Ms. Wilkins had not had the opportunity to take discovery, and (b) there were disputed facts as to the extent of Ms. Montgomery's responsibilities at the hospital and her knowledge of the facts concerning Mr. Davis and Mr. Phillips. (D.C. Exh. 14). Ms. Berk sent Ms. Wilkins copies of these documents. (Tr. 360-61; Attachment at 1737).

55. On June 12, 2012, the Court held the summary judgment motion in abeyance and ordered the defendants to produce documents concerning Ms. Montgomery's position and responsibilities at the hospital. (D.C. Exh. 5 at 4 #20). Respondent forwarded the Court's email notification to Ms. Wilkins. (Attachment at Lattimer 1728).

56. On July 24, 2012, the Court entered a pretrial scheduling order, (D.C. Exh. 5 at 4 #24; Tr. 200), which, *inter alia*, required Respondent to identify his expert witness by October

[14] D.C. Exh. 5 is the docket sheet for the case. The # indicates the docket entry referenced.

22, 2012. (D.C. Exh. 18). Summary judgment motions were due December 31, 2012. (D.C. Exh. 19).

57. On August 14, 2012, the Court, over Ms. Montgomery's objection, granted Respondent's request to take discovery. (D.C. Exh. 5 at 4 #25).

58. On August 22, 2012, Ms. Montgomery filed her Answer. (D.C. Exh. 17). On September 7, 2012, the Attorney General's office provided Respondent with an un-redacted copy of the Central State report. (D.C. Exh. 4A & 4C). Attached to the report were the statements of the witnesses interviewed by the investigator, some of which included addresses and potential contact information. (D.C. Exh. 4C at, *e.g.*, 16, 17, 21, 24, 35, 37). The report included a list of the employees interviewed. (*Id.* at 2).

59. Respondent did not interview or seek to depose any of these individuals (Tr. 180-82, 489-93, 591-94), nor did he amend the Complaint to name the unnamed employees he purportedly sued.[15] However, depositions of eight individuals were ultimately scheduled. (D.C. Exh. 18 at 1; R. Exh. 17). Ms. Bernadette Spruill, the nursing supervisor, was deposed on November 15, 2012 (R. Exh. 15), and Dr. Charles Davis, the former head of the hospital, was deposed on March 5, 2013. (R. Exh. 17). Ms. Montgomery, Dr. Yaratha, and Messrs. or Ms. Bailey, Parham and Barker were also deposed. (R. Exh. 19).

60. On or about October 23, 2012, Dr. Cohn wrote to Respondent and advised that he could not provide the opinion Respondent wanted. (Tr. 538). Dr. Cohn reimbursed Respondent for his expert fee on October 25, 2012. (R. Exh. 11 at Lattimer 988).

[15] The docket sheet does not contain any amended complaint adding these individuals as defendants.

61. On October 24, 2012, Respondent filed a motion, consented to by Ms. Montgomery, to extend the time to identify his expert witness to November 21, 2012 and to extend to January 10, 2013, the date on which summary judgment motions were due. On October 25, 2012, the Court granted his request to extend the time to identify his expert witness, but denied his request to change the date for summary judgment motions. Those motions remained due on December 21, 2012. (D.C. Exh. 19; D.C. Exh. 5 at 5 #30).

62. On November 21, 2012, Respondent filed a Certificate Regarding Discovery in which he certified that, pursuant to Rule 26, expert disclosures were served on Ms. Montgomery on that date. (D.C. Exh. 20 at 1). Respondent designated Pogos H. Voskanian, MD, as his expert witness. He included Dr. Voskanian's professional resume with the Certificate. He stated that Dr. Voskanian would testify with his report, which was "being provided under separate cover." (*Id.* at 3).[16] Respondent sent Dr. Voskanian's resume to Ms. Wilkins on January 10, 2013. (Attachment at Lattimer 1729).

63. On November 26, 2012, five days after Respondent's Certificate, Dr. Voskanian provided Respondent with a conclusory one-page preliminary report that listed the documents Dr. Voskanian reviewed. The total substance of the report was a single sentence: "it is my opinion to a reasonable degree of medical certainty that the care and treatment provided to Mr. Justin Lamar Davis fell substantially below an acceptable standard of care." He faulted the level of care and supervision provided by the hospital. (D.C. Exh. 21).

[16] Respondent also identified Ms. Mila Ruiz Tecala, LICSW, DCSW, who he stated was not "an expert in the typical sense, however, since she was not retained for purposes of litigation." He identified her because she might provide expert opinions based on her examinations of Ms. Wilkins, Mr. Davis's father and his sister. (D.C. Exh. 20 at 1-2).

64. Respondent provided this preliminary report to Ms. Montgomery's attorneys on December 4, apologizing for the delay and saying that he thought he had sent it earlier. (R. Exh. 12 at Lattimer 69).

65. On December 13, 2012, Ms. Montgomery renewed her Motion for Summary Judgment. (D.C. Exh. 22).

66. On December 21, 2012, Respondent served Dr. Voskanian's full report on Ms. Montgomery. (D.C. Exh. 23). He did not seek an extension of time to file the report. (Tr. 541-42). Ms. Montgomery moved to exclude Dr. Voskanian as an expert on the grounds that his report was late. (D.C. Exh. 24). Respondent opposed that motion on December 27, 2012. (D.C. Exh. 25).

67. On December 27, 2012, Respondent sought leave to file a Second Amended Complaint adding as defendants Dr. Sridhar Yaratha, Mr. Davis' treating physician, and Dr. Charles Davis, the director of Central Hospital at the time of Mr. Davis' death. He sued both Dr. Yaratha and Dr. Davis in their official and individual capacities. The Second Amended Complaint did not include claims against the "unidentified employees" named in his original and First Amended Complaints. (D.C. Exh. 26 & 27).

68. On January 2, 2013, Respondent filed an Opposition to Ms. Montgomery's motion to renew her summary judgment motion. (D.C. Exh. 5 at #44). Two days later, the Court, on its own motion, continued without date the trial scheduled for February 19, 2013 and suspended the filing dates for other pleadings. (*Id.* at #48). It set a motions conference for February 7, 2013 (*id.* at 7) to consider Ms. Montgomery's motion to exclude the expert and her summary judgment motion. (D.C. Exh. 28). Respondent or Ms. Berk forwarded to Ms. Wilkins

the Court's electronic notice of the action (Attachment at Lattimer 1727-28) and a copy of this opposition.

69. At the motion conference, the Court excluded Respondent's expert witness -- Dr. Voskanian -- because his report was late and accepting it would "turn everything that is in the pretrial order on its head." (D.C. Exh. 28 at 17). In doing so, the Court noted that Respondent could argue whether Ms. Montgomery had shown deliberate indifference -- if that was the standard necessary to support a claim under 42 U.S.C. § 1983 -- without an expert. (*Id.*).

70. The Court deferred ruling on Ms. Montgomery's motion for summary judgment. It ordered Ms. Montgomery to produce certain documents and to allow Respondent to take depositions of Dr. Yaratha and Dr. Davis for the limited purpose of determining whether the relation-back provisions of Rule 15(c), Fed. R. Civ. P, were applicable to the Second Amended Complaint. (D.C. Exh. 29).

71. On February 15, 2013, Respondent moved to alter or amend the Court's ruling excluding the expert. In his motion, he stated that excluding "plaintiff's expert would be catastrophic. There is no more significant evidence for the plaintiff, from a legal point of view, than her expert's opinion." (D.C. Exh. at 7). Respondent repeated this claim in a brief to the United States Court of Appeals for the Fourth Circuit. (D.C. Exh. 34 at 29).

72. After a hearing on April 10, 2013, the Court granted Ms. Montgomery's motion for summary judgment, finding that she did not have any supervisory responsibilities at the time of Mr. Davis' death, and denied Respondent's motion to alter or amend the Court's order excluding his expert witness. The Court also denied Respondent's motion for leave to file a Second Amended Complaint on the grounds that, *inter alia*, neither Dr. Yaratha or Dr. Davis had

notice of the suit within 120 days of its filing, as required under Rule 15(c) for the Complaint to relate back. (D.C. Exh. 31 & 32).

73. During that hearing, the Court noted that "I think you should have sued the lady who was supposed to sit in the yellow chair. That is the person whose error or whose inattentiveness led to the death in this case. And if you had sued her, you would have had a slam dunk. And I think the state probably has insurance to cover that. At least they did when I was in the Attorney General's office." (D.C. Exh. 31 at 29). However, in its Rule 26(a) disclosures, the Commonwealth had answered "N/A" to the question whether there was any insurance agreement available for inspection and copying. (D.C. Exh. 4B at 3).

74. Respondent notified Ms. Wilkins of the Court's action and promised to appeal. (Attachment at 1715). On June 10, 2013, Ms. Berk emailed Ms. Wilkins to discuss what happened in the mediation scheduled by the Court of Appeals. (R. Exh. 48).

75. Respondent unsuccessfully appealed that order to the United States Court of Appeals for the Fourth Circuit. (D.C. Exh. 39). In his opening brief, Respondent maintained that at the time of Mr. Davis' death, Dr. Davis "still has an office and practices medicine at the hospital…." (D.C. Exh. 34 at 35).

76. Dr. Davis testified at his March 5, 2013 deposition that he had no affiliation or office at Central State after May 2010. (D.C. Exh. 37 at 3, 8-9). However, a web site for Dr. Davis states that he was affiliated with Central State. (R. Exh. 16 at 2, 6 (the latter gives Central State as one of the "locations" for Dr. Davis)).[17]

[17] The print-out of the web site does not have a date, and although we do not know when it was downloaded, it is clear that it was created after Dr. Davis ceased service as Director of the hospital. As such, it lends some support to Respondent's claim that Dr. Davis had a relationship with the hospital, notwithstanding his deposition testimony. The brief, however, went beyond saying that Dr. Davis was affiliated with the hospital.

77. During the oral argument in the Court of Appeals, Respondent was asked by Judge Thacker[18] when he had filed his Complaint. He answered that he filed it twenty-three months after Mr. Davis' death. (D.C. Exh. 38 at 20-21). A short time later, Judge Thacker noted that the lawsuit was filed on February 27, 2012, the last day of the statutory period. Respondent acknowledge his misstatement, saying he was sorry and that he "miscounted." (D.C. Exh. 38 at 22-24).

78. In her opinion for the Court, Judge Thacker noted Respondent's statements concerning Dr. Davis and his misstatement as to when the Complaint was filed. (D.C. Exh. 39 at 6 n.2). On May 2, 2014, Judge Thacker referred the matter to Disciplinary Counsel, saying "I forward it for your consideration inasmuch as I question Mr. Lattimer's handling of the case as well as his candor to the court." (D.C. Exh. 40). Respondent never sent Ms. Wilkins a copy of the Court of Appeals decision. (Tr. 79).

D. Two Theories of the Case

79. At the hearing, Disciplinary Counsel's expert witness, Jeffrey Fogel, Esq., faulted Respondent's preparation and theory of the case. He testified he had reviewed Respondent's file and that it lacked any evidence of any pre-filing investigation, research or time records. (Tr. 185-86). Since Respondent could have recovered attorney's fees had he been successful in the Section 1983 claim, Mr. Fogel believed the lack of documentation indicated that no such efforts had been undertaken. (Tr. 185).

80. In Mr. Fogel's view, Mr. Marcari's analysis of the potential causes of action was correct. (Tr. 175-77). Respondent should have sued the hospital in state court under the Virginia

[18] The transcript of the oral argument was prepared under the supervision of Disciplinary Counsel and does not identify which judge was speaking, other than to indicate "the Court" or "female voice." Judge Thacker was the only female on the panel.

Tort Claims Act action against the Commonwealth, with damages capped at $100,000. (Tr. 168-69, 170-71). He thought that was a straightforward case. (D.C. Exh. 41 at 4). In addition, Respondent should have sued the state employees for gross negligence in either state or federal court and brought an action in federal court under 42 U.S.C. § 1983 for willful indifference to Mr. Davis's safety. (Tr. 169-70, 172-73, 253-58; D.C. Exh. 41 at 3-5).

81. Mr. Fogel opined that Respondent erred in suing Ms. Montgomery for deliberate indifference. (Tr. 194; D.C. Exh. 41). He testified that, in order to sue a "supervisor who had no direct involvement in the precise circumstances [of those, the nurse and FMHT], … you would have [to] show that the supervisor was aware of a pervasive risk of harm" and that he or she "did not respond to it in any manner at all; that is, deliberately indifferent to the information provided …." (Tr. 169-70). He stated that he thought the Commonwealth would indemnify the employees if a jury assessed damages. (Tr. 174-75). Mr. Fogel did not cite any case or specific matter in which he was involved to support that assertion.

82. Mr. Fogel further faulted Respondent's decision to wait until the statutory deadline to file the Complaint and for not exploiting the available provisions of the Federal Rules that would have permitted him to take discovery expeditiously. (Tr. 180-83). *See* Fed. R. Civ. P. 26(d). He also thought Respondent could have sued under the Virginia Tort Claims Act in state court to take advantage of Virginia's rules allowing the service of discovery documents with the Complaint. (Tr. 181).

83. Respondent has a more complex view of the case, particularly given Ms. Wilkins' objectives for the litigation. She was not interested in a damage award of $100,000, but wanted obtain justice -- public exposure of what she thought was the inexcusable failure of the

Commonwealth to protect to her son -- and an award of several million dollars. (R. Brief at 1, 2).

84. He maintains that it would have been futile to sue the hospital because Section 8.01-195.3(4) of the Virginia Tort Claims Act precludes recovery for "any claim based on an act or omission of an … employee in the execution of a lawful order of any court." (Tr. 496-501). He notes that Ms. Wilkins would not have settled for the $100,000 maximum under the Tort Claims Act.

85. He argues that any action under the Virginia Tort Claims Act would have been tactically unwise since he would have had to file the claim in Dinwiddie County, VA, where Central State is located. (Tr. 419-20). Central State is the largest employer in the County, and Respondent thought a local jury would be unlikely to fault the hospital for Mr. Davis' death. He was also concerned that a jury in Dinwiddie County would not be receptive to the appearance of two African American lawyers -- Mr. Woodson and Respondent -- from the Washington Metropolitan area. (Tr. 434-35).

86. With respect to a Section 1983 claim, Respondent believed that suing Ms. Thompson and Mr. Harris would not have been productive. He thought that they were scapegoats. In all events, neither had the resources to pay the kind of damages Ms. Wilkins sought (Tr. 70-71), and there was no assurance that Virginia would indemnify the individuals. (Tr. 445, 519). He believed that suing the doctors would be unproductive because it would be virtually impossible to prove deliberate indifference. (Tr. 427). *See also* ¶ 45, *supra*.

87. In order to achieve Ms. Wilkins' objective, Respondent concluded that the only viable course was to seek recovery under Section 1983 for the failure of the hospital director to supervise the employees charged with monitoring Mr. Phillips and Mr. Davis and for gross

negligence. He argues that he researched Central Hospital at length and concluded that Ms. Montgomery was the individual who had supervisory responsibilities during the period when Mr. Davis was admitted and when he was killed. (Tr. 419, 427-28, 454-57; R. Exh. 9 & 10).

88. Mr. Fogel's familiarity with the decisions cited by Respondent was limited. (Tr. 224, 228, 230). When asked for a case that would support his position that Section 8.01-195.3(4) was inapplicable, he was unable to cite one. (Tr. 303-04). Disciplinary Counsel has also been unable to find a case that would support his argument.

Conclusions of Law

A. Applicable Rules of Professional Conduct

1. In his March 14, 2016 Order, the Committee Chair directed the parties to address which disciplinary rules applied, Virginia's or the District of Columbia's. Disciplinary Counsel argues that, under Rule 8.5 of the District of Columbia Rules of Professional Conduct, the Virginia Rules apply. Respondent did not specifically address the issue, but appears to accept the applicability of the Virginia Rules. (*See* R. Brief at 32). The Committee agrees that the Virginia Rules apply.

2. Rule 8.5 of the District of Columbia Rules of Professional Conduct provides that:

> a. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs….
>
> b. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:
>
> 1) For conduct in connection with a matter pending before a tribunal, the rules to be applied shall be the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise ….

Local Civil Rule 83.1(I) of the United States District Court for the Eastern District of Virginia provides that lawyers appearing before that Court shall adhere to the Virginia Rules of

Professional Conduct. Since this disciplinary matter arose in connection with a case litigated in the Eastern District of Virginia, where Respondent was admitted *pro hac vice*, Rule 8.5 of the District Rules requires that his professional conduct comport with the Virginia Rules. *Cf. In re Gonzalez*, 773 A.2d 1026, 1029 (D.C. 2001). While the differences between the Virginia and the District of Columbia Rules appear to be minor, the Committee will rely on the Virginia Rules and precedent in reaching its recommendations, except where we were unable to find relevant precedent. In those situations, the Committee will look to the decisions of the District of Columbia Court of Appeals.

B. Respondent's Objections to the Expert Witness

3. Respondent challenges Mr. Fogel's qualifications as an expert witness. He maintains that Mr. Fogel lacked the criteria to serve as an expert witness established in *In re Melton*, 597 A.2d 892 (D.C. 1991) (en banc), because he never handled a death case, never handled a death case involving a mental facility, never qualified as an expert in Virginia, had less experience than Respondent in the federal courts in Virginia, Maryland and the District of Columbia, and did not know what Respondent had done to prepare for Ms. Wilkins' case. (R. Brief at 40). Mr. Fogel is, Respondent maintains, "an experienced prisoner's rights lawyer," (*id.* at 41), but that is insufficient to qualify him as an expert in cases such as Ms. Wilkins'. (*Id.* at 41-43).

4. As his testimony showed, Mr. Fogel has extensive academic and practical experience in handling cases arising under Section 1983. He is an experienced litigator who has handled a variety of cases in Virginia and elsewhere involving claims of tortious conduct by governmental officials. Contrary to Respondent's claim, he has experience in litigating negligence cases, albeit in New Jersey rather than Virginia. (Tr. 152). Mr. Fogel reviewed the

files Respondent produced pursuant to Disciplinary Counsel's subpoena and the relevant documents concerning Ms. Wilkins' case. He spoke with Mr. Marcari and the Virginia State Attorney who represented the Commonwealth in her case. (D.C. Exh. 41 at 1). If Mr. Fogel was unaware of Respondent's effort to prepare, it was because Respondent did not keep sufficient records of his actions.

5. At the hearing, the Committee concluded that Mr. Fogel qualified as an expert and, after careful consideration of the arguments in Respondent's brief, we affirm that finding, although testimony during the hearing raised some questions concerning the extent of Mr. Fogel's experience with and knowledge about the Virginia Tort Claims Act. (Tr. 223-40). *See* ¶¶ 17, 20, *infra*.

6. Rules 1.1 and 1.3 require lawyers to provide competent, timely and diligent representation. That is not an abstract standard but one which requires a comparison of the manner in which Respondent handled Ms. Wilkins' case and manner in which competent lawyers would handle similar cases. *In re Douglass*, 859 A.2d 1069 (D.C. 2004). That inquiry includes looking at a respondent's "inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners." *Livingston v. Virginia State Bar*, 744 S.E.2d 220, 225 (Va. 2013). It also includes "adequate preparation and continuing attention to the needs of the representation to assure that there is no neglect of such needs." Rule 1.1, cmt. [5].

7. What those requirements entail is usually established through testimony of an attorney who is knowledgeable and has experience in the area. Practitioners have routinely testified in disciplinary cases concerning the manner in which experienced lawyers handle matters. *See, e.g.*, *In re Samad*, 51 A.3d 486, 496 (D.C. 2012); *In re Ukwu*, 926 A.2d 1106, 1113

(D.C. 2007). And, the District of Columbia courts do not require an expert in a professional field to demonstrate that he or she is a specialist in a particular branch within a profession. *Melton*, *supra*, 597 A.2d at 897-98.

8. Mr. Fogel's record established that he was familiar with and experienced in handling Section 1983 and related cases and was in a position to testify concerning the handling of such cases. Respondent's challenge to Mr. Fogel's qualifications is an argument that Mr. Fogel never handled a case on all fours with Ms. Wilkins'. That argument does not establish that Mr. Fogel is unqualified to testify as an expert. Respondent has not shown how Ms. Wilkins' case differs from the sexual assault or the excessive force cases which Mr. Fogel handled, both of which arose under Section 1983. Nor has he shown how Ms. Wilkins' case differed from other Section 1983 cases, which Respondent admits Mr. Fogel has handled. In the absence of such a showing, the Committee finds that Mr. Fogel's record and experience qualifies him as an expert who may testify in support of Disciplinary Counsel's case.

C. Charges Relating to the Representation of Ms. Wilkins

9. Disciplinary Counsel has charged Respondent with failing to provide competent representation and failing to serve his client with the skill and care commensurate with that generally afforded to clients, in violation of Virginia Rule 1.1, and failing to represent Ms. Wilkins with reasonable diligence and promptness, in violation of Virginia Rule 1.3(a).[19] While stated as separate rule violations, the conduct underlying these claims is the same or interrelated. To avoid unnecessary repetition, we will address the rule violations collectively.

[19] Since the Committee has concluded that the Virginia Rules apply, our discussion will focus on those rules. At the same time, the Committee finds that the conduct found that violated the Virginia Rules also violated the comparable rules of the District of Columbia.

10. As noted above, Respondent disputes Disciplinary Counsel's approach to the case, arguing that it would not have achieved Ms. Wilkins' goals of a huge damage award and a trial which exposed the Commonwealth's neglect. The only way to achieve those results, he contends, was to sue senior officials of the hospital for gross negligence and deliberate indifference in their supervision of the care provided Mr. Davis.

11. These opposing views pose the question whether Respondent's decisions as to how to prosecute Ms. Wilkins' case were within the acceptable bounds of professional discretion lawyers enjoy under the Rules. A reasoned decision concerning how to proceed does not rise to the level of a Rule violation, even where the results are adverse. As the Court of Appeals has held, "a judgmental or tactical error of this kind, revealed by later events or hindsight, does not in and of itself establish a disciplinary rule violation." *In re Thorup*, 432 A.2d 1221, 1226 (D.C. 1981). "It is not our function to assess the relative merits or demerits of reasoned tactical choices made by diligent counsel." *In re Stanton*, 470 A.2d 272, 276 (D.C. 1983) (appended Board Report); *cf. Strickland v. Washington*, 466 U.S. 668, 689 (1984) ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."). *See also, e.g.*, Rule 1.3, cmt. [1]; *In re Yelverton*, 105 A.3d 413, 423 (D.C. 2014); *In re Ford*, 797 A.2d 1231 (D.C. 2002) (per curiam).

12. The Court has taken a similar approach in legal malpractice cases. In *Biomet Inc. v. Finnegan Henderson LLP*, 967 A.2d 662 (D.C. 2009), the D.C. Court of Appeals held that the law firm was not guilty of malpractice in making a tactical decision not to raise a constitutional challenge to the amount of punitive damages where the law was unclear as to when that challenge had to be first raised. Chief Judge Washington, writing for the Court, held that "an

attorney is not liable for mistakes made in the honest exercise of professional judgment." *Id.* at 665. The Court found that "the process of structuring an appellate brief and deciding which arguments are best raised is a strategic, litigation decision and an exercise of professional judgement." It is immune from a malpractice claim. *Id.* at 666.

13. In *Mills v. Cooter*, 647 A.2d 1118 (D.C. 1994), the Court held: "An attorney is under no obligation … to maintain a position which the attorney does not believe that he can arguably defend, even if that position is urged upon him by the client. … It is the duty of an attorney to 'counsel or maintain such actions … only as appear to him legal and just.' … The determination of whether a proposed suit is 'legal and just' must be made by the attorney who signs the pleadings…." *Id.* at 1121.

14. Virginia decisions accord the same degree of deference. Reasoned decisions, even based on errors of law, do not rise to a violation of Rule 1.1. "Disciplining an attorney on the basis of incompetent representation under Rule 1.1 … involves attorney performance that extends significantly beyond mere attorney error." *Barrett v. Virginia State Bar*, 634 S.E.2d 341, 347 (Va. 2006). Both the Virginia and D.C. Rules give lawyers discretion in determining the means by which a matter may be pursued. *See* Rule 1.3, cmt. [1] ("a lawyer is not bound to press for every advantage that might be realized for a client");[20] *Stanton*, *supra*, 470 A.2d at 272. Indeed, filing a single non-meritorious claim does not violate Rule 1.1, *see, e.g.*, *In re Thorup*,

[20] There is a slight difference between the language in the Comments to the Virginia and D.C. Rules on a lawyer's obligations in these circumstances. Comment 1 to D.C. Rule 1.3 provides that lawyers are "to take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor." Comment 1 of Virginia Rule 1.3 that a lawyer "may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor." At first blush, the Virginia Rule would appear to give lawyers more discretion in deciding how to handle a matter. However, both include the provision that "a lawyer is not bound to press for every advantage that might be realized for a client," and the District of Columbia Court of Appeals has held that lawyers have reasonable discretion to make "tactical choices." *See Stanton*, *supra*, 470 A.2d at 272. Accordingly, the Committee believes there is no meaningful difference in the rules.

supra, 432 A.2d at 1221; nor does suing the wrong defendant. *Weatherbee v. Virginia State Bar*, 689 S.E.2d 753, 757 (Va. 2010) (suing the wrong doctor was not a violation of Rule 1.1).

15. Disciplinary Counsel's prosecution of this case makes no room for this discretion. Respondent was representing a client who was seeking an unusual result in a personal injury matter, including damages that were substantially more than those generally awarded in such cases. In Respondent's view, the fact pattern was problematic, and the theory advanced by Mr. Fogel and urged by Disciplinary Counsel was unlikely to achieve those objectives. (Tr. 422-43). He elected to pursue a theory of the case that parted from the norm.

16. As explained below, the Committee concludes that Disciplinary Counsel has not established by clear and convincing evidence that Respondent's decision not to sue (a) the hospital under the Virginia Tort Claims Act or (b) the charge nurse or the FMHT under Section 1983 violated either Virginia Rules 1.1 or 1.3(a).[21] However, the Committee finds that his investigation of the claims and the manner in which he prosecuted Ms. Wilkins' case did not meet the requirements imposed by those Rules.

i. Respondent's Decision Not to Sue Under the Virginia Tort Claims Act

17. Disciplinary Counsel's first claim is that Respondent should have sued Central State under the Virginia Tort Claims Act. As Mr. Fogel's testimony makes clear, that strategy is the one typically used in wrongful death cases arising from negligence or malfeasance by entities of the Commonwealth. Respondent challenges its applicability here on the grounds that Section 8.01-195.3(4) of the Virginia Tort Claims Act precludes suits based upon the act or omission of a Commonwealth "employee in the execution of a lawful order of a court." He asserts that, since Mr. Davis was at Central State pursuant to an order of a court, Section 8.01-195.3(4) prevents

[21] The Committee reaches the same conclusion with respect to the D.C. Rules.

any recovery. He cites *Baumgardner v. Southwestern Mental Health Inst.*, 442 S.E.2d 400 (Va. 1994) and *Patten v. Commonwealth*, 553 S.E.2d 517 (Va. 2001), in support of his argument. In both of those cases, the Commonwealth was found to be immune for claims arising from injuries caused by the negligence of its employees in providing medical care while the plaintiffs were in a state hospital pursuant to court orders.

18. Disciplinary Counsel argues that the cases are distinguishable because Mr. Davis' death did not result from Central State's negligence in providing medical care, but from inadequate security: "the Central State employees were not carrying out a specific court order in determining how to protect Mr. Davis and others from Mr. Phillips." (D.C. Brief at 20). Disciplinary Counsel contends that the controlling precedent is *Whitley v. Commonwealth*, 538 S.E.2d 296 (Va. 2000). In that case, the Court found that Section 8.01-195.3(4) was inapplicable to a suit for the wrongful death of an inmate at a state penal institution resulting from the prison's failure to properly treat his epileptic seizure. The Court held the employees responsible for the death were not implementing a court order requiring them to provide medical care and thus their actions were not covered by the Section 8.01-195.3(4) exception. *Id.* at 495-96. Mr. Fogel supported Disciplinary Counsel's argument that Section 8.01-195.3(4) was inapplicable to Mr. Davis' case. (Tr. 229-34). However, his familiarity with *Baumgardner* and *Patten* appeared to be limited. And when asked for a case that would support his position that Section 8.01-195.3(4) was inapplicable, he could not cite one.[22]

19. It is possible that Disciplinary Counsel is correct and that the decision in *Whitley* is controlling. However, Disciplinary Counsel has not shown that to be the case by clear and

[22] During the hearing, Disciplinary Counsel stated he would provide a citation to a decision, but apparently could not find one as none was included in either the opening or reply brief. The Committee has also been unable to find a decision on point.

convincing evidence.[23] Mr. Davis was at Central Hospital pursuant to a court order and he died while under the care of the hospital. We do not know the precise terms of that order, but, from the record here, it appears that the court order remitting Mr. Davis to the care of Central State was similar to the orders in *Baumgardner* and *Patten*. In *Baumgardner*, the order provided Ms. Baumgardner was "to obtain emergency medical evaluation or treatment." She died when placed in a restraint after she became agitated. 442 S.E.2d at 401. In *Patten,* the Court found Ms. Patten was mentally ill and remanded her to the care of Western State hospital "to make provision for her suitable and proper care …." 553 S.E.2d at 518. She died as a result of a reaction to the medications she was given to treat her mental illness. In all three cases, the deceased was placed by a court in the care of a hospital for medical treatment and died during the course of that treatment.

20. Mr. Whitley, on the other hand, was in a penal institution and died as a result of its negligence in providing medical care. The harm in *Whitley* resulted not from the implementation of the terms of the court order committing Mr. Whitley to the prison, but from the prison's negligence in providing medical care. Here, Mr. Davis was committed to Central State for medical care, and the Committee presumes that adequate medical care includes taking reasonable necessary steps to assure the physical safety of the patient. (*See, e.g.*, D.C. Exh. 23 (Dr. Voskanian's expert testimony report)). Any such obligation could distinguish Mr. Davis' case from *Whitley* and bring it within the ambit of *Baumgardner* and *Patten.* In the absence of a

[23] In this proceeding, the question of what Virginia law provides is a factual question. It is not a matter relating to the disciplinary law applicable to Respondent's conduct, which is the legal standard the disciplinary system applies, but is a question of what Virginia law is. As a fact question, Disciplinary Counsel must establish the law by clear and convincing evidence.

Virginia decision clarifying the scope of *Whitley* vs. *Baumgardner* and *Patten*, the Committee lacks a sufficient basis to conclude that *Whitley* is controlling.[24]

21. Disciplinary Counsel's other arguments -- that Mr. Marcari and Mr. Fogel both believed a Virginia Tort Claim action would not have been frivolous, and the Virginia Commonwealth attorney would not have been negotiating with Mr. Marcari if he thought the state was immune[25] -- do not cure the problems with his reliance on *Whitley*. As noted, Mr. Fogel's familiarity with *Baumgardner* and *Patten* appeared limited, (Tr. 224, 228-30), and he could not provide any support for his view that Section 8.01-195.3(4) of the Virginia Tort Claims Act was inapplicable.

22. Although it is unlikely the Attorney General's office would have been discussing settlement if the Commonwealth was immune, we do not believe that is sufficient to resolve the issue. It is hearsay[26] and Mr. Marcari, who told Respondent about the Assistant Attorney General's views, never testified, nor did the Assistant Virginia State Attorney.[27] Thus, Respondent did not have the opportunity to cross examine them concerning the issue. In all

[24] One could argue that, given the uncertainty as to the scope of Section 8.01-195.3(4), Respondent should have filed under the Virginia Tort Claims Act in order to cover all bases. The Committee is reluctant to reach that conclusion for several reasons. First, Disciplinary Counsel has not urged it; his argument is that liability under the Act is clear. Second, Mr. Fogel did not suggest it, but took the same position as Disciplinary Counsel. Third, and controlling, the decision not to pursue that claim was a tactical decision within the discretion of counsel. *See Barrett*, *supra*, 634 S.E.2d at 341.

[25] D.C. Brief at 21; D.C. Reply Brief at 10.

[26] Under the Board Rules, hearsay is admissible in disciplinary proceedings. The weight to be given it, however, is to be determined by the hearing committee. *In re Shillaire*, 549 A.2d 336, 343 (D.C. 1988) (hearsay is admissible in disciplinary proceedings, the hearing committee determines the weight it should be afforded). The Committee has given it little weight for the reasons stated in the text. No firm offer of settlement was ever made.

[27] The Committee also notes that Mr. Marcari, whose theory of the case Disciplinary Counsel espouses, argued that Mr. Davis' homicide was the result of "non-compliance with established standards of care for institutions like Central State," (D.C. Exh. 3C at 2), and not a failure to provide adequate security, as Disciplinary Counsel now argues.

events, no settlement offer was made, so there is no assurance that the Commonwealth would actually have settled.

23. In sum, the Committee is not in a position to resolve the legal issue concerning the scope of the exception to the Virginia Tort Claims Act on which Respondent relied. In order to prove a violation of Virginia Rules 1.1 and 1.3(a), it was Disciplinary Counsel's burden to establish by clear and convincing evidence that Respondent's decision not to proceed based on his reading of *Baumgardner* and *Patten* was inconsistent with the reasonable exercise of professional judgment. Disciplinary Counsel failed to do so.

ii. Respondent's Decision Not to Pursue Section 1983 and Gross Negligence Claims Against the Charge Nurse and the FMHT

24. Disciplinary Counsel maintains that Respondent violated Virginia Rules 1.1 and 1.3(a) by not suing the charge nurse and the FMHT for deliberate indifference under Section 1983 and for gross negligence claim under Virginia law. Respondent disagrees. He argues that he did not sue the two ex-hospital employees because he could not satisfy the extremely high burdens needed to sustain a deliberate indifference or gross negligence case against them. He also argues that they did not have the resources to pay a judgment, and that the Commonwealth would not indemnify them, particularly since they had been fired. (Tr. 431-32).

a. The Deliberate Indifference & Gross Negligence Claims

25. Respondent maintains that under *Parrish v. Cleveland*, 372 F.3d 294 (4th Cir. 2004), he would have been required to establish that the employees "'actually knew of and disregarded a substantial risk of serious injury" to Mr. Davis and that they "subjectively recognized a substantial risk of harm. It is not enough that they should have recognized it but that they actually did." (R. Brief at 17). He also argues that he would have been required to

show that they subjectively recognized that their actions were "inappropriate in light of that risk." (R. Brief at 17 (quoting *Parrish*, *supra*, 372 F.3d at 302)).[28]

26. He asserts that neither the charge nurse nor the FMHT had "any evidence of any specific threat to Justin Davis…. The evidence in the [case]… was that [the charge nurse and the FMHT] … knew nothing other than that someone was supposed to sit in the yellow chair and watch the hall." (R. Brief at 18).[29] In support, he notes that Bernadette Spruill, the nursing supervisor who was responsible for supervising the nursing staff, was not aware of any threats against Mr. Davis or that any special procedures were to be used to assure Mr. Davis' safety. (R. Brief at 19-20). Thus, he asserts that he could not have demonstrated the requisite knowledge to sustain a deliberate indifference under Section 1983 or a gross negligence claim. (R. Brief at 15-22).

27. Disciplinary Counsel challenges Respondent's view of the evidentiary burden under Section 1983, arguing that it would have been sufficient for Respondent to show that the charge nurse and FMHT knew there was a serious risk of injury to any of the patients under their care. "They did not have to know that Mr. Davis in particular was threatened." It was enough

[28] The Committee does not find persuasive Disciplinary Counsel's argument that, because there was no record of legal research by Respondent in his files, these arguments are post-hoc rationalizations. (D.C. Reply Brief at 9-10). Respondent testified that he no longer prints copies of his legal research and relies on the capabilities of current research programs. Disciplinary Counsel introduced no evidence to rebut that testimony. The Committee is aware that legal research services, including Westlaw, offer storage services for research conducted on their websites. Thus, Respondent's testimony that he no longer copies decisions is credible. Further, Respondent has had extensive experience in handling wrongful death and related cases, and the familiarity he demonstrated during the hearing with the relevant legal standards in gross negligence and Section 1983 cases leads us to conclude that Disciplinary Counsel's argument is speculative.

[29] As noted above, the Report indicates the principal concern was Mr. Phillips' violence and there was a substantial question whether his animosity toward Mr. Davis was communicated to the staff. *See* FF 13-15.

that they knew that Central State housed dangerous individuals and that they were required to monitor the hallway to assure patient safety. (D.C. Reply Brief at 10-11).

28. The record in this proceeding does not permit the Committee to determine whether Disciplinary Counsel or the Respondent is correct as to the evidentiary burden of establishing deliberate indifference. Under *Farmer v. Brennan*, 511 U.S. 825, 843 (1994), Respondent was not required to show that "the complainant was especially likely to be assaulted by the specific prisoner who eventually committed the assault," nor was he required to show that the employee "acted or failed to act believing that harm actually would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm." *Id.* at 842. Under Fourth Circuit precedent, "a factfinder may conclude that the official's response to a perceived risk was so patently inadequate as to justify an inference that the official actually recognized that his response to the risk was inappropriate." *Parrish*, *supra*, 372 F.3d at 303. These holdings would appear to indicate that Disciplinary Counsel has the better case, but they are not determinative, particularly since Disciplinary Counsel is relying on abstract concepts rather than a case with comparable facts.

29. However, even assuming *arguendo* that Disciplinary Counsel is correct, he has not shown by clear and convincing evidence that Respondent's conclusion that he could not make a showing of deliberate indifference or gross negligence against the charge nurse and FMHT was unreasoned. The Report provided some support for the claim that the nurse and FMHT were aware of the dangers posed by Mr. Phillips. There is no dispute the patients on the ward housing both Mr. Davis and Mr. Phillips were the most dangerous in the hospital and that the nurse and FMHT knew that. The Report indicated that there was evidence that the nurse may have been told of Mr. Phillips' aggressive activities and had some information concerning the

danger Mr. Phillips posed to Mr. Davis. Further, both the FMHT and the charge nurse admitted that they failed to fulfill the most basic obligations in not assuring that Mr. Phillips' conduct was actively monitored. Mr. Fogel testified that he was of the opinion that there was a sufficient basis to support a gross negligence and a deliberate indifference claim.

30. On the other hand, the Report also noted that the charge nurse denied he was advised about Mr. Phillips' aggressive tendencies. There are other statements in the Report questioning whether the individuals on the scene were informed of Mr. Phillips' threats to Mr. Davis. Mr. Fogel's testimony on the point was limited, resting essentially on the fact that Mr. Davis was in a high-risk ward and thus the failure of the nurse and FMHT to monitor developments by sitting in the yellow chair was essentially *per se* deliberate indifference and gross negligence. It is difficult to distinguish that lapse from ordinary negligence, which is not sufficient to support either a Section 1983 claim or a gross negligence claim, particularly if Respondent could not show that they were alerted to the risk Mr. Phillips posed to Mr. Davis.

31. Moreover, when viewed against the available evidence concerning the inadequate supervision by senior staff, the Committee cannot say that Respondent's decision to seek relief by suing senior staff rather than the nurse and FMHT was unreasoned. There is a fair amount of material in the Report that the senior staff of the hospital had acted with deliberate indifference and gross negligence in dealing with Mr. Davis and Mr. Phillips. The doctors responsible for his care were clearly aware that Mr. Phillips was very violent. They had held meetings prior to his arrival about how to deal with him. They were also aware that he was a threat to Mr. Davis -- he told them he might kill Mr. Davis. Yet they did not assure that the plans to protect Mr. Davis from Mr. Phillips were implemented. Ms. Spruill was not aware of them, and the charge nurse denied that he had been advised about the need to watch Mr. Phillips. The Report also indicated,

although not without some contradiction, that Mr. Phillips was to be watched one-on-one. But that requirement was not conveyed to the ward staff. Other restrictions on Mr. Phillips' conduct were not enforced. He was allowed in the gym and was permitted to eat in the cafeteria when he should not have been. In addition, there was evidence that the staffing on the ward was chronically insufficient.

32. The record evidence concerning the gross negligence claim was comparable to that concerning deliberate indifference. To establish gross negligence, Respondent was required to establish "a degree of negligence showing indifference to another and an utter disregard of prudence that amounts to a complete neglect of the safety of such other person. This requires a degree of negligence that would shock fair-minded persons, although demonstrating something less than willful recklessness." *Cowan v. Hospice Support Care, Inc.*, 603 S.E.2d 916, 918 (Va. 2004). Respondent claims that he could not make that showing, while Mr. Fogel indicated that he thought Respondent could, although his testimony on the point is abbreviated and his written submission is cursory. (*See* Tr. at 253-58; D.C. Exh. 41).

33. Thus, the evidence available to Respondent at the time he filed the Complaint was inconsistent, and Disciplinary Counsel has not shown that Respondent's belief that he could not show the subjective awareness required to support a deliberate indifference claim was unreasoned. Accordingly, the Committee finds that Respondent's decision not to pursue claims for deliberate indifference against the charge nurse and the FMHT, but to sue the hospital Director and other supervisory personnel for deliberate indifference under Section 1983, was reasoned and within the discretion granted lawyers under the Rules. *Cf. Mitchell v. Rappahannock Regional Jail Authority*, 703 F. Supp. 2d 549 (E.D. Va. 2010).

34. Finally, Respondent argues that suing the nurse and FMHT made no sense as they were judgment proof. Respondent was dealing with a client who wanted huge sums of money. It is clear that neither the charge nurse nor the FMHT had the resources to pay any meaningful judgment, nevermind one that might satisfy Ms. Wilkins' demands.

35. Disciplinary Counsel doesn't contend that the charge nurse or the FMHT could satisfy a judgment of the size Ms. Wilkins desired. Instead, he asserts that the Commonwealth would have indemnified them for any judgment. The record support for that position is thin. The only evidence addressing the issue was (a) Mr. Fogel's statement that he thought the Commonwealth would indemnify and (b) Judge Gibney's comment at the April 2013 motion conference that, when he worked for the Commonwealth, he thought there was an insurance policy. However, the Commonwealth's Rule 26(a) disclosures indicating that there was no insurance policy to cover Ms. Montgomery would appear to question that statement. *See also Couplin v. Payne*, 613 S.E.2d 592, 596 (Va. 2005) (agency of the state has no liability to an employee found liable for a tort).

36. Although Section 1983 would be a hollow remedy if States or their institutions did not indemnity employees for Section 1983 claims, the burden was on Disciplinary Counsel to establish that the Commonwealth would have indemnified the nurse and FMHT. The evidence of the Commonwealth's willingness to indemnify is not clear and convincing. Without indemnification, a successful lawsuit would have been largely a pyrrhic victory. In light of the discretion given lawyers in deciding how to pursue cases, the Committee concludes that

Disciplinary Counsel has not established by clear and convincing evidence that Respondent's decision not to sue the nurse and FMHT violated Virginia Rule 1.1 or 1.3.[30]

b. Respondent Did Not Pursue Adequately His Theory of the Case

37. Electing not to pursue the route outlined by Mr. Marcari and advocated by Mr. Fogel, Respondent filed his suit against Ms. Montgomery, who was Director of the hospital at the time he filed his Complaint.[31] He sought relief under Virginia law for grossly negligent supervision and under Section 1983 for deliberate indifference in failing to supervise the staff adequately. (D.C. Exh. 9 at 4-5).[32] Although Virginia Rules 1.1 and 1.3(a) give attorneys reasonable discretion to select the manner in which a case is pursued, Rule 1.1 also requires lawyers to make an informed decision concerning the appropriate tactics.

> Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation and continuing attention to the needs of the representation to assure that there is no neglect of such needs.

Rule 1.1, cmt. [5]. Rule 1.3(a) requires that a lawyer act diligently: "A lawyer shall act with reasonable diligence and promptness in representing a client." Comment [1] to D.C. Rule 1.3 provides:

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[30] Respondent's argument as to the willingness of the Commonwealth to indemnify the nurse and FMHT would appear to apply to Ms. Montgomery. As a civil servant, it is unlikely that she had the funds to pay the kind of judgment Ms. Wilkins sought. However, Respondent testified that, in his experience, states will indemnify management-level officials in these circumstances, but not lower-level employees. (Tr. 515-17). Disciplinary Counsel did introduce any evidence to dispute this statement.

[31] She was the Assistant Director at the time of Mr. Davis' death.

[32] Disciplinary Counsel argues that Respondent sought relief for negligent supervision by Ms. Montgomery, not grossly negligent supervision. However, the Complaint and both Amended Complaints alleged grossly negligent supervision, (*see* D.C. Exh. 6, 9, 27), and the Court of Appeals decided the case on the grounds that there were insufficient allegations of grossly negligent supervision. *Wilkins v. Montgomery*, 751 F.3d 214, 228-29 (4th Cir. 2014).

> The duty of a lawyer, both to the client and to the legal system, is to represent the client zealously within the bounds of the law …. This duty requires the lawyer to pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer, and to take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor.

Rule 1.3, cmt. [1].[33]

38. Respondent's efforts in these areas were inadequate. He proceeded based on his perceptions of the case, with inadequate evidence as to whom to sue, without investigating the underlying facts as to the actions of the charge nurse and FMHT before filing his Complaint, without assuring that he had an expert witness who would support his theory of the case, and, after waiting until the last minute to file suit, failing to aggressively take discovery. He testified that before he agreed to take the case, he reviewed the Report prepared by the hospital's investigator and the material provided by Mr. Marcari and conducted Internet research on Central Hospital and its management. There is little other evidence concerning his research efforts, except for Ms. Berk's non-specific testimony that he generally researched his cases thoroughly.

39. Respondent did not discuss the case with Mr. Marcari. He did not request an unredacted version of the report from the Commonwealth attorney,[34] did not seek the names of the individuals interviewed for the report, and did not interview any of them before suing. He did not request Mr. Davis' medical records to identify the individuals at the hospital who were responsible for Mr. Davis' care; he did not retain an investigator to find them or otherwise attempt to contact them to determine what they knew. He did not attempt to obtain discovery

[33] The Comment also provides: "However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued. *See* Rule 1.2."

[34] Respondent did not obtain a copy of the unredacted report until September 2012, eight months after he filed the Complaint.

prior to filing his Complaint, as permitted in some circumstances by the Federal Rules of Civil Procedure.

40. It is not clear exactly what information Respondent obtained from the Internet concerning Ms. Montgomery. Although the job description in her Employee Work Profile, Role Description, dated Nov. 1, 2009 (R. Exh. 10 at Lattimer 363) provides some support for his conclusion that she was responsible for supervising the hospital staff, it is not clear that Respondent had access to that when he filed. The document bears the stamp "Personnel Central Hospital" (R. Exh. 10 at Lattimer 320), and it is questionable whether Respondent obtained that on the Internet. The other documents he submitted here as evidence to support his decision to sue Ms. Montgomery suffer from similar problems.

41. Respondent's failure to ascertain these essential facts before filing suit was aggravated by waiting until the last minute to file his Complaint.[35] In so doing, he limited his ability to take discovery to determine (a) who were the responsible individuals in the hospital and their roles, if any, in Mr. Davis' death, (b) who was the Director of Central State at the time of Mr. Davis' death, (c) what information concerning Mr. Davis and his relationship with Mr. Phillips was given to the staff on the ward, and (d) any other information which might have supported his theory of inadequate supervision. The delay also limited Respondent's ability to conduct discovery in a sufficiently timely manner to invoke the relation back provisions of the Rule 15(c) of the Federal Rules. Filing the Complaint earlier would have given him more time to

[35] The Committee does not believe that, standing alone, Respondent violated any rule by filing the Complaint on the last or next to last day of the statutory period. The violations stem from the constraints that followed from his failure to develop the facts necessary to determine his theory of the case before filing and then failing to deal with the difficulties that the last minute filing created.

find an expert who could support his theory or to modify his Complaint to fit the theory Dr. Cohn might have been able to support.[36]

42. The Committee finds Respondent's claim that he discussed the case with Dr. Cohn before filing the Complaint to be dubious. While Respondent had an existing relationship with Dr. Cohn and presumably spoke to him during the period before filing the Complaint, the Committee concludes he did not provide Dr. Cohn with sufficient information for Dr. Cohn to evaluate Respondent's theory of the case until October 2012, some fifteen months after he was contacted by Ms. Wilkins, a year after he received Mr. Marcari's file showing Dr. Cohn as his expert, ten months after filing the Complaint and three weeks before the expert witness report was due. By not consulting with his expert before filing his Complaint, he set off on a theory of the case without the support of an expert. And, by delaying meaningful consultation with his expert, he limited the amount of time he had to revise his Complaint or to obtain another expert witness when he lost Dr. Cohn as an expert. As a result of his delay, he was unable to obtain an expert opinion in time to file a report, as required under the scheduling order. He lost the ability to present expert testimony, which might have improved his opposition to Ms. Montgomery's summary judgment motion.

43. The Committee recognizes that Respondent was retained late, with only five months until the statute of limitations ran, and was dealing with a difficult client who sought more than compensation for the loss of her son. It also recognizes that, as a solo practitioner operating under a contingent fee and bearing the costs, he wanted to control costs and avoid

[36] Disciplinary Counsel also argues that, having waited until the eleventh hour to file, Respondent should have filed in state court, where the procedures permitted him to simultaneously serve a subpoena with the Complaint. (D.C. Brief at 16-17). The Committee has concluded that Respondent's decision not to sue in state court was a tactical decision Disciplinary Counsel has not shown was unreasonable.

pursuing theories he thought would not succeed. (*See* Tr. 415-16, 441). But these considerations do not excuse or mitigate his failure to investigate the case more thoroughly, to make fuller use of the hospital's investigatory report, to pursue the leads Mr. Marcari provided, to consult with his expert witness sooner to develop support for his theory of the case, and otherwise to pursue the potential arguments which might have resulted in a successful action.

44. Respondent developed his theory of the case based on his experience in other cases but without adequately ascertaining the facts. By limiting his investigation to the Internet, not pursuing other avenues to obtain information to support his case, and waiting to the statutory deadline to file his Complaint, Respondent failed to fulfill his obligation to pursue Ms. Wilkins' case with vigor and diligence. Virginia Rules 1.1 and 1.3(a) required Respondent to take more aggressive action when he was retained to obtain the information he needed to ascertain the parties to be sued under his theory of the case. Had he done so, he would have had more time to take discovery and amend the Complaint without having to rely on Rule 15(c) and its short relation-back time period. *See Rice v. Virginia State Bar*, 592 S.E.2d 643 (Va. 2004) (failing to obtain necessary documentation to support motion and failing to file on time); *In re Roof*, No. 0021-0334 (VSB Disc. Bd. 2003) (Rule 1.3 violated by lawyer submitting client's hand-written, uncorrected writ to Supreme Court); *see also In re Karr*, 722 A.2d 16, 17 (D.C. 1998); *In re Wright*, 702 A.2d 1251, 1254-55 (D.C. 1997) (per curiam). In short, Respondent's efforts on behalf of Ms. Wilkins lacked the zeal and vigor required of lawyers.

c. Respondent Adequately Communicated With Ms. Wilkins

45. Disciplinary Counsel charged Respondent with violating both Virginia Rule 1.4(a), failure to keep Ms. Wilkins informed about the status of the case and to comply with her reasonable requests for information, and Virginia Rule 1.4(b), failure to explain a matter to the

extent reasonably necessary to permit his client to make informed decisions during the representation.[37]

46. Disciplinary Counsel argues that Respondent failed to keep Ms. Wilkins informed about the status of the case except when requested, did not discuss whom to sue, did not send her a copy of the amended complaints, and did not explain in advance why he had chosen to sue Ms. Montgomery, about whom Ms. Wilkins knew very little. Disciplinary Counsel also faults Respondent for not advising her about the serious problems with the case, including: his inability (a) to add defendants because of the statute of limitations; (b) to obtain a timely expert report; and (c) to convince the Court to allow him to use Dr. Voskanian as an expert. Disciplinary Counsel maintains that Ms. Wilkins only learned about these issues when she attended the oral argument before the Fourth Circuit. (D.C. Brief at 26-27).

47. Respondent contends that he or Ms. Berk spoke with or communicated frequently with Ms. Wilkins and that he explained the reasons why he sued Ms. Montgomery and did not sue the charge nurse and FMHT. He spoke with her before he took the case and explained the problems with the case. (R. Brief at 26).[38] Ms. Berk testified she communicated with Ms. Wilkins on a regular basis and was sensitive to the trauma associated with losing a child. Ms. Berk also sent Ms. Wilkins copies of the material she requested as well as other material and kept her advised as things occurred in the case, including the mediation efforts at the Court of

[37] Other than to include Rule 1.4(b) in the conclusion, Disciplinary Counsel addresses only Rule 1.4(a) in its brief. Arguably, Disciplinary Counsel has abandoned the Rule 1.4(b) charge. However, to avoid the potential need for a remand, the Committee will address Rule 1.4(b).

[38] Respondent's views as to the problems with the case are different than those noted by Disciplinary Counsel. He was concerned, *inter alia*, that Ms. Wilkins' actions in calling the police to arrest her son prejudiced her case. (Tr. 422).

Appeals. Respondent notes that Ms. Wilkins did not question his decision to sue Ms. Montgomery and frequently expressed appreciation for his efforts. (*See, e.g.*, R. Brief at 27).

48. The testimony with respect to the communication between Respondent and Ms. Wilkins is troubling. The parties are poles apart. Ms. Wilkins consistently stated that Respondent had told her the case was a "slam dunk." Respondent maintains that he always thought the case was difficult. Depending on which theory of the case one subscribes to, both are correct. However, it is clear that Ms. Wilkins sought extraordinary damages and Respondent chose a course of action which he hoped might get her that result. His course of action was risky, as events established, and her hopes for the case vanished. She is understandably upset and blames Respondent.

49. On the other hand, Respondent and his wife were attempting to defend his actions, both here and, presumably, in the malpractice case Ms. Wilkins has filed. Thus, their testimony too tended to heighten their responsiveness and their efforts to achieve Ms. Wilkins' objectives, including acquiring sufficient funds to establish a foundation in her son's name to assist other young black men in similar situations. (Tr. 377; R. Exh. 14). On balance, however, the Committee finds Respondent's and Ms. Berk's testimony more credible than Ms. Wilkins. It accords more closely with the written record, particularly the emails between Respondent and Ms. Berk, on the one hand, and Ms. Wilkins, on the other. There were at least twenty-two e-mails from Respondent or Ms. Berk to Ms. Wilkins, several of which reference telephone conversations or other communications. The Committee finds Ms. Wilkins' memory was selective and her testimony was inconsistent with her written communications praising Respondent's actions.

50. The Committee also finds troubling Ms. Wilkins' lack of understanding of the litigation she instituted. (Tr. 118-28). That lack of understanding is reflected in her reasons for discharging Mr. Marcari and in the circumstances leading up to Respondent's e-mail explaining that "no one settles" for $7 million and admonishing her for borrowing money at exorbitant rates against any potential recovery in the lawsuit. (R. Exh. 13). Her apparent lack of knowledge of how the case would proceed is difficult to understand. In addition to Respondent's testimony that he explained the process to her, she had gone through three other lawyers before employing Respondent. It is difficult to believe that the process was not explained to her before she retained Respondent, or that she was not told that it would be difficult to obtain the amount of damages she was seeking given the limitations on recovering a judgment of that size from the Commonwealth. While her direct testimony gave the impression that Respondent withheld important information from her, she admitted that she spoke with or emailed Ms. Berk on a frequent basis. (Tr. 62).

51. There is little question that Respondent might have communicated more fully with Ms. Wilkins and provided her with documents when filed without her asking. Under his understanding of his retainer agreement, however, he had full control of the litigation and thus thought there was a limited necessity to consult with Ms. Wilkins. He believed it was sufficient that he responded to her questions and generally kept her informed of major developments.

52. The emails show that Ms. Berk provided Ms. Wilkins with the initial complaint and with the summary judgment papers. She advised Ms. Wilkins concerning the depositions. Respondent sent her the resume of his expert witness, Dr. Voskanian, and she was told that the District Court denied the motion to allow him to testify and dismissed the Complaint. Contrary to Disciplinary Counsel's claim, the Committee finds that Respondent did not prevent Ms.

Wilkins from attending the depositions; rather, he told her that most clients don't attend depositions, but that she could; she decided not to. (Tr. 75, 120-22, 354-56; R. Exh. 48, 49, 50). She attended the oral argument on appeal and was advised when the Court of Appeals ruled. (Tr. 399-400). And, as Disciplinary Counsel admits, he explained to Ms. Wilkins why he did not think it prudent to sue the charge nurse or FMHT. (D.C. Brief at 26).

53. The Committee concludes that that level of communication satisfies Virginia Rules 1.4(a) & (b), particularly since Ms. Wilkins delegated strategic decisions to Respondent. Virginia Rules 1.4(a) & (b) provide:

> (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
>
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comment [5] to those Rules provides:

> The client shall have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. … *Even when a client delegates authority to the lawyer, the client should be kept advised of the status of the matter. … The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests.* (emphasis added).

The case law interpreting this comment is sparse to non-existent. Neither party cited a decision, and the Committee could not find one.

54. Based on the language of the Comment, however, Respondent had a limited obligation to keep Ms. Wilkins informed under the Virginia Rules. His retainer agreement gave Respondent a "power of attorney to prosecute the claim or claims for damages against any and all persons, entities or governments … ," delegating to him control of the litigation. (R. Exh. 2 at 1). Indeed, he made it clear during his testimony that, unless he had that control, he would not proceed.

55. As the Committee understands the Virginia Rule, Respondent was, under those rules, required only to keep Ms. Wilkins advised of the status of the matter sufficient to fulfill her reasonable expectations. The Committee does not believe that required him to tell her of every development in the case. *See* Comment [5] to Rule 1.4 ("In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that might injure or coerce others. On the other hand, a lawyer ordinarily cannot be expected to describe trial or negotiation strategy in detail."). There is no evidence in the record here that Ms. Wilkins sought detailed information concerning each stage of the litigation until February 2013, at which point Respondent or Ms. Berk advised Ms. Wilkins, as requested, of developments.

56. The cases cited by Disciplinary Counsel do not require a different result. The facts in *Green v. Virginia State Bar*, 677 S.E.2d 227 (Va. 2009) are opaque; there is no discussion of the factual predicate for the Rule 1.4 violation. The case thus provides no meaningful guidance as to Virginia's views on the nature of a lawyer's Rule 1.4 obligations or how delegation affects them. In *Motley v. Virginia State Bar*, 536 S.E.2d 97 (Va. 2000), the respondent failed to inform his client that his appeal to an intermediate appellate court had been denied, as a result of which the client lost the opportunity to appeal to a higher court. No such lack of communications occurred here nor did Ms. Wilkins lose any opportunities to challenge adverse rulings. In *In re Hallmark*, 831 A.2d 366 (D.C. 2003), the respondent failed to communicate with her clients about three cases. In one, the respondent did not talk to her client for seven months and failed to advise him that she would not proceed because the case had no merit. In the second, the respondent did not communicate with her client for eighteen months,

and in the third, she failed to let her client know she had withdrawn. Respondent provided substantially more information to Ms. Wilkins.

57. Similarly, in *Ukwu*, *supra*, 926 A.2d at 1106, the respondent failed, among other rule violations, to return his client's calls, failed to send correspondence to his client that affected her case, and failed to notify her when he case was dismissed for his failure to file a brief. In *In re Fling*, 44 A.3d 957 (D.C. 2012) (per curiam), the respondent's failure to communicate jeopardized her clients' interests and required them to retain new counsel. No comparable issues are involved here. Indeed, most of the cases the Committee has found involving Rule 1.4 violations have been situations where the client was harmed as a result of the lack communication. *See, e.g.*, *In re Schlemmer*, 840 A.2d 657 (D.C. 2004); *In re Asher*, 772 A.2d 1161 (D.C. 2001); *In re Steele*, 868 A.2d 146 (D.C. 2005). Disciplinary Counsel has not shown how Ms. Wilkins was harmed by the level of communication in this case. She knew that the case had been dismissed at the trial court level and she knew or should have known from the information provided by Ms. Berk and Respondent that the case was not proceeding smoothly.

58. Rule 1.4 does not require "an attorney … [to] communicate with a client as often as the client would like, as long as the attorney's conduct was reasonable under the circumstances" and as long as "'he [keeps] the client adequately informed of the progress'" of the case. *In re Schoeneman*, 777 A.2d 259, 262 (D.C. 2001) (quoting *In re Walker*, 647 P.2d 468, 470 (Or. 1982) (en banc)). While he Committee finds Respondent's practice of not providing clients with filings unless they ask to be problematic, it concludes that, under the terms of his retainer agreement and Virginia Rule 1.4, Disciplinary Counsel has not shown by clear and convincing evidence that Respondent failed to keep Ms. Wilkins reasonably informed as to the status of her case.

C. Alleged Violations of Rule 3.3(a) and Rule 8.4(c)

59. Disciplinary Counsel charges Respondent with violations of Virginia Rule 3.3(a) and Virginia Rule 8.4(b) in connection with two matters: (1) his statement to the Court of Appeals in response to a question that he filed the Complaint twenty-three months after Mr. Davis' death rather than the last day of the limitations period, and (2) by arguing in his brief to the Court of Appeals that Dr. Davis was associated with Central State when Respondent sought to add Dr. Davis as a defendant in his Second Amended Complaint. We treat them in turn.

i. Respondent's Misstatement as to When the Complaint Was Filed

60. There is no question that Respondent told the Court that he filed the Complaint twenty-three months after Mr. Davis' death, although he qualified it with an "I believe." When Judge Thacker pointed out a few minutes later that he had filed on the last day, he admitted his mistake and apologized, saying he miscounted.[39] The Committee questions whether in context the statement is actually a misstatement. The difference between twenty-three and twenty-four months is slight and, in the absence of materiality, the Committee does not think Respondent violated either rule. Under the District Rules, Disciplinary Counsel would be required to demonstrate that the misstatement was material.[40] The Virginia Rule is slightly different[41] and

[39] The record is unclear as to when Respondent delivered the Complaint to Mr. Woodson, who filed the Complaint. For the purposes of his matter, the Committee assumes that Respondent knew the Complaint was filed on the last day of the statute of limitations period.

[40] D.C. Rule 3.3 provides:

> (a) A lawyer shall not knowingly:
>
> (1) Make 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, unless correction would require disclosure of information that is prohibited by Rule 1.6…. (emphasis added).

[41] It provides that a lawyer shall not "knowingly make a false statement of fact or law to a tribunal." "Knowingly" is defined as actual knowledge of the fact at issue. Knowledge can be inferred from the surrounding circumstances. *See Moseley v. Virginia State Bar*, 694 S.E.2d 586, 588 (Va. 2010).

does not include materiality language. However, the commentary on the Rule states that Virginia did not include the word "material" because it thought it redundant. *See* Virginia Rules of Professional Conduct at 64. Thus, we find that the Virginia and the D.C. Rules are the same.

61. The Committee fails to see how the statement related to a "material fact." The proximity of the filing of the Complaint to the deadline to file was not an issue on appeal. The case turned on whether (a) there were contested issues of fact that would preclude summary judgment, (b) the District Court properly excluded Respondent's expert witness, and (c) Dr. Davis was on sufficient notice of the case to permit Respondent to amend the Complaint to add him under Rule 15(c). *See Wilkins v. Montgomery*, 751 F.3d 214 (4th Cir. 2014). Whether the Complaint was filed one month before the end of the limitations period or on the day it expired was not relevant to any of these issues.

62. Disciplinary Counsel's effort to show materiality falls short. He argues that the filing date was material because Respondent was attempting to rely on the 120-day relation-back provision of Rule 15(c) to sue Dr. Davis. (D.C. Brief at 28-29). The Committee has trouble understanding this argument. The relation-back provision turns on when the statute of limitations expires, so whether Respondent filed in January 2012 or on February 27, 2012, Respondent would have had to show that Dr. Davis knew of the lawsuit no later than August 10, 2012 -- 120 days after February 27.[42] When he filed the Complaint was not relevant to whether his Amended Complaint would relate back.

63. Disciplinary Counsel's claim under Virginia Rule 8.4 is a closer question. That Rule makes it professional misconduct to: "Engage in conduct involving dishonesty, fraud,

[42] Dr. Yaratha learned of the suit on November 8, 2012, four months after the time period established under Rule 15(c), when his deposition was noticed. Dr. Davis learned of the suit on December 28, 2012, when his deposition was noticed. *Wilkins*, *supra*, 751 F.3d at 225. The Amended Complaint was filed on December 27, 2012.

deceit, or misrepresentation." It does not contain an express materiality requirement. Dishonesty, fraud and deceit, however, are typically thought to include an element of intent or *mens rea*. For example, Webster's New Collegiate Dictionary defines dishonesty as "a lack of integrity" and dishonest as "tending to lie, cheat, or deceive." Black's Law Dictionary defines dishonesty as: "Deceitfulness as a character trait; behavior that deceives or cheats people; untruthfulness; untrustworthiness." The District of Columbia Court of Appeals has taken a similar view. In an extensive discussion of Rule 8.4(c), the Court noted:

> dishonesty, fraud, deceit, and misrepresentation are four different violations, that may require different quantums of proof. Hence, while an intent to defraud or deceive may be required for a finding of fraud, dishonesty may result from conduct evincing "a lack of honesty, probity or integrity in principle; [a] lack of fairness and straightforwardness…." Thus, "what may not legally be characterized as an act of fraud, deceit or misrepresentation may still evince dishonesty."
>
> Our case law has consistently found that when Bar Counsel presents clear and convincing evidence that an action is *obviously wrongful and intentionally* done, the performing of the act itself is sufficient to show the requisite intent for a violation. However, when the act itself is not of a kind that is clearly wrongful, or not intentional, Bar Counsel has the additional burden of showing the requisite dishonest intent. …

In re Romansky, 825 A.2d 311, 315-16 (D.C. 2003) (internal citations deleted; emphasis added); *see also In re Evans*, 902 A.2d 56, 74 (D.C. 2006) ("Submitting a document that another person has falsely signed is not obviously wrongful or dishonest.") (per curiam) (appended Board Report).

64. The limited number of Virginia cases we have found addressing this issue also appear to require some degree of *mens rea.* In *Gunter v. Virginia State Bar*, 385 S.E.2d 597, 600 (Va. 1989), the Court held that recording of a conversation with a third person without that person's knowledge or consent was conduct involving fraud, dishonesty or deceit. Focusing on the term deceit, the Court found that it entailed intentional conduct designed to mislead another.

In *Morrissey v. Virginia State Bar*, 448 S.E.2d 615 (Va. 1994), the Court found a violation of the predecessor to Rule 8.4(c) where a prosecutor withheld information from a complainant in a criminal case to affect a plea agreement -- conduct clearly involving intentional dishonest actions. We have not found any case, and Disciplinary Counsel has not cited any, where a violation of Rule 8.4(c) was grounded on a non-material statement of fact made without an intent to deceive.

65. The Committee finds that Disciplinary Counsel has not shown the required *mens rea* by clear and convincing evidence. As was the case with the materiality requirement under Rule 3.3(a), Respondent had nothing to gain by saying that he filed the Complaint one month earlier than he did. In reaching this conclusion, we are aware, as Disciplinary Counsel notes, that Judge Thacker found the point significant. The Committee is sensitive to concerns raised by a court about an attorney's ethical conduct and has treated her comments seriously. But, Disciplinary Counsel has not introduced any evidence or otherwise explained why the misstatement was material or significant, and the Committee cannot think of one. Accordingly, we conclude that Respondent's misstatement was just that; no rule violation has been established.

ii. Respondent's Statement that Dr. Davis Was Affiliated With Central State

66. Disciplinary Counsel's claim that Respondent violated Virginia Rules 3.3(a) and 8.4(c) in arguing that Dr. Davis had an office and practiced medicine at Central State when the Complaint was filed is well taken. Respondent knew, or should have known, that based on Dr. Davis' deposition, he no longer maintained an office at Central State after May 2010. Respondent argues that, notwithstanding Dr. Davis' deposition testimony, he had a reasonable basis to believe that Dr. Davis was still associated with Central State based on Internet material

he developed. (R. Brief at 31).[43] He also contended that Dr. Davis, as head of the hospital at the time of Mr. Davis' death, had to have known of the lawsuit. (*Id.* at 30).

67. Respondent's argument misses the point. Disciplinary Counsel is not charging him with a violation of Rules 3.3 and 8.4(c) based on the allegation in the Second Amended Complaint that Dr. Davis was, or should have been, on notice that the hospital had been sued and that he might be sued as well. (D.C. Exh. 27). Respondent is charged with dishonesty based on the unqualified statement in his appeal brief that "Dr. Davis … still has an office and practices medicine at the hospital." (D.C. Exh. 34 at 43). By the time that statement was made, the record had been set. Respondent was no longer free to rely on his beliefs; he was limited to the record. *See Brubaker v. City of Richmond*, 943 F.2d 1363, 1373 (4th Cir. 1991).

68. The question under Virginia Rule 3.3(a) is whether the false statement was about a "material" fact, and under Rule 8.4(c), whether it "adversely affects his qualification to practice law." The Committee finds that the statement related to a material fact. The question before the Court was whether the Second Amended Complaint would relate back under Rule 15(c), and that turned on whether Dr. Davis had notice of the suit. If Dr. Davis had an office in or was practicing at the hospital when the Complaint was filed, the case for establishing notice was unquestionably stronger than if he didn't.

69. Respondent asserts that he was not relying on Dr. Davis' continuing relationship with the hospital to support his relation-back claim. Rather, he relied on the fact that the hospital and the staff were all represented by the Commonwealth's Attorney General's office and thus they either had to have known of the lawsuit or it was attributable to them. (R. Brief at 33-36).

[43] *See* FF 76. Respondent's Exhibit 16 contains what appears to be Internet material concerning Dr. Davis that states that he is affiliated with Central State Hospital. Given the doctor's deposition testimony, however, that material does not support Respondent's unqualified statements to the Court.

While he made that argument, his claim that Dr. Davis had an office and practiced at the hospital was part of that argument. Thus, Respondent wrote in his brief that: "Dr. Davis is the outgoing Director of the Central State Hospital, and *still has an office and practices medicine at the hospital*. … It is both implausible and astounding that the lawyer for all of these people would not have consulted with them prior to filing the subject motions. Dr. Yaratha and Dr. Davis are still associated with Central State Hospital …." (D.C. Exh. 34 at 35 (emphasis added)). Accordingly, we find Disciplinary Counsel has established a violation of Virginia Rule 3.3(a).

70. We also conclude that Disciplinary Counsel established that his dishonesty questions his qualifications to practice law within the meaning of Virginia Rule 8.4(c). The Comments to the Disciplinary Rule provide little guidance as to what dishonest conduct questions a lawyer's qualification to practice law. Comment [2] provides that conduct "involving violence, dishonesty, breach of trust, or serious interference with the administration of justice" is conduct that violates the Rule. (Virginia Rule 8.4, cmt. [2]). A rather circular definition. Decisions under the rule, however, indicate that any intentional misstatement of a material nature to a court or tribunal violates the rule. *See, e.g.*, *Morrissey*, *supra*, 448 S.E.2d at 615 (withholding information concerning the terms of a plea agreement); *Gay v. Virginia State Bar*, 389 S.E.2d 470 (Va. 1990); *Gunter*, *supra*, 385 S.E.2d at 597 (clandestine recording of telephone conversations); *Gibbs v. Virginia State Bar*, 348 S.E.2d 209 (Va. 1986) (submission of a forged letter). Respondent's dishonesty may not rise to the level of dishonesty in these cases, but his continued assertion that Dr. Davis had an office at the hospital and was seeing patients there was belied by the record, and he knew or should have known that fact. Thus, the statement was either intentional or reckless and in either case lacked the requisite obligation of a lawyer to a court. That is particularly true since Respondent did not correct the statement -- or explain the

basis for his belief notwithstanding Dr. Davis' deposition -- when the Commonwealth pointed it out in its Brief. For these reasons, the Committee concludes that Disciplinary Counsel has established by clear and convincing evidence that Respondent violated Virginia Rules 3.3(a) and 8.4(c) in claiming in his appellate brief that Dr. Davis had an office and saw patients at the hospital after his retirement in 2010.

E. Conclusion

71. In sum, the Committee finds that Disciplinary Counsel has established the following rule violations:[44]

- Virginia Rules 1.1 & 1.3(a) by (a) failing to undertake sufficient factual research prior to filing his Complaint, (b) failing to consult with his expert witness sufficiently in advance of filing suit to assure that his theory of the case had expert support, and (c) not pursuing discovery aggressively once he filed his Complaint.

- Virginia Rules 3.3(a) & 8.4(c) by asserting in his appeal papers that Dr. Davis continued to have an office at the hospital and to see patients after April 2010.

Sanction Recommendation[45]

72. Disciplinary Counsel recommends that Respondent be suspended from the practice of law for a period of ninety days and that he demonstrate his fitness to resume the practice of law. The determination of the appropriate sanction is among the more difficult tasks in a disciplinary case, as the Court and the Board have noted. *See, e.g.*, *Ukwu*, *supra*, 926 A.2d at 1120. Under Rule XI, § 9(h), we are required to recommend a sanction consistent with sanctions for comparable misconduct. *In re White*, 11 A.3d 1226, 1249 (D.C. 2011) (per curiam). The sanction should attempt to serve three purposes: (1) maintain the integrity of the

[44] As noted above, the Committee also finds his conduct violated comparable D.C. Rules.

[45] Disciplinary Counsel argues that the sanctions imposed under the D.C. Rules should apply here. (D.C. Brief at 31-32). Respondent does not contest that assertion. The Committee agrees with Disciplinary Counsel. *See In re Ponds*, 888 A.2d 234, 245 (D.C. 2005) (applying D.C. sanctions for violations of Maryland rules).

profession, (2) protect the public and the courts, and (3) deter other attorneys from engaging in similar misconduct. *See In re Scanio*, 919 A.2d 1137, 1144 (D.C. 2007).

73. We are required to consider seven factors in deciding the sanction (1) the seriousness of the conduct, (2) prejudice to the client, (3) whether the conduct involved dishonesty, (4) violation of other disciplinary rules, (5) the attorney's disciplinary history, (6) whether the attorney has acknowledged his or her wrongful conduct, and (7) mitigating circumstances. *In re Elgin*, 918 A.2d 362, 376 (D.C. 2007).

74. Seriousness of the Misconduct: Disciplinary Counsel argues that Respondent's misconduct was serious. While recognizing that proving gross negligence can be difficult (and presumably so too is deliberate indifference), Disciplinary Counsel argues that the Virginia Tort Claims Act "seemed impossible to lose, had it been brought." (D.C. Brief at 32). Disciplinary Counsel also maintains that Ms. Wilkins was prejudiced -- "not just because she lost her case," but also because she "wanted justice for her son." *Id.*

75. The Committee has some problems with Disciplinary Counsel's argument. First, the Committee concluded that Disciplinary Counsel has not established that the Virginia Tort Claims Act case was a "slam dunk." On this record, the viability of the claim is open to question. Second, even if the Virginia Tort Claims Act claim was a "slam dunk," Ms. Wilkins had made it clear that the $100,000 potential recovery was insufficient. Thus, it would not have served her demands. Third, Respondent would have had to sue in what he viewed as an unfavorable forum to pursue the claim. Disciplinary Counsel has adduced no evidence that Respondent's decision not to pursue that claim fell outside the discretion given counsel to determine strategy.

76. Thus, what might have been a relatively easy case had Ms. Wilkins been content with an award of $100,000 (or even $500,000) became a far more difficult case given her desire to recover $7 million and make it a test case against the Commonwealth. The Committee believes that Respondent sincerely tried to achieve those results. Where he fell short, however, was in failing to pursue his theory of the case with sufficient vigor and diligence. Although the Committee believes that Respondent was sincerely trying to assist Ms. Wilkins achieve her objective, these lapses resulted in his inability to survive a summary judgment motion, thereby depriving Ms. Wilkins of a trial exposing the Commonwealth's treatment of her son.

77. The Committee finds his misstatement to the Court concerning Dr. Davis' status to be bothersome. By the time he filed his appeal brief, Respondent knew that Dr. Davis had not maintained an office in the hospital for a substantial period of time before Respondent filed his Second Amended Complaint. The seriousness of that misstatement was aggravated by his failure to correct the mistake in his reply brief or even during argument. Respondent's argument that he did not intend to deceive and was acting on his reasonable belief that Dr. Davis had a continuing relationship with the hospital (R. Brief at 28, 30-31) does not excuse the misrepresentation. He did not claim that there was some question about the accuracy of Dr. Davis' deposition testimony, which was supported by the record; instead, he made an unqualified statement. Once the case was in the Court of Appeals, he was limited to the record and could not make the unqualified assertion he made. The Committee finds his erroneous statement, if not reckless, was at least negligent.

78. Prejudice: The Committee also agrees with Disciplinary Counsel that Ms. Wilkins was prejudiced by Respondent's action, losing her chances to recover for the wrongful death of her son and to achieve her other objectives, discussed below. However, as the

Committee has noted and Disciplinary Counsel recognizes (D.C. Brief at 32-33), she wanted more from the lawsuit than is typically recoverable in a tort or a Section 1983 case: she wanted to make the suit a show case of the Commonwealth's failure to address adequately the mental health needs of black youth and to embarrass the hospital and those whose decisions she thought led to his son's death. She refused to settle, which was part of the reason she fired Mr. Marcari; she wanted a trial for the publicity. Those demands made the case far more difficult and complex than the normal wrongful death case. In the Committee's view, her demands mitigate the significance of the prejudice she suffered. In shooting for the moon, Ms. Wilkins contributed to the results.

79. Dishonesty: The Committee finds Respondent's arguments before the Court of Appeal concerning Dr. Davis' relationship with the hospital was at least reckless. His insistence that he had a reasonable belief in making the argument does not excuse the statement, particularly given his failure to correct or qualify the misstatement. The Committee finds that his claim as to Dr. Davis was not within the acceptable bounds of advocacy.

80. Previous Misconduct: Respondent received an informal admonition in 2005 for violations of Rule 1.1(a) & (b), Rule 1.5(e), and Rule 1.15 in connection with his delay in delivering a settlement check received for minor children. The delay was occasioned by difficulties associated with the appointment of a guardian. In issuing the admonition, Disciplinary Counsel noted, *inter alia*, Respondent's lack of prior discipline and his motivation to protect the settlement award for the benefit of the children. (D.C. Exh. 42 at 5). That is Respondent's only disciplinary action in thirty-three years of practice, during twenty-four of which he was a solo practitioner. The Committee does not believe this to be a serious adverse mark.

81. Respondent's Acknowledging His Wrongful Conduct: Disciplinary Counsel faults Respondent for what Disciplinary Counsel calls his "full-throat denial of any misconduct whatsoever, in the face of the district court's statement that he lost a 'slam dunk' case because he sued the wrong party and despite his obvious failure to produce expert disclosures on time." (D.C. Brief at 33). What Disciplinary Counsel has ignored, however, is that Respondent is a defendant in a malpractice case brought by Ms. Wilkins. Any acknowledgement by him that he erred will unquestionably become a major piece of evidence in that case.[46] In light of these facts, the Committee finds Disciplinary Counsel's argument on this factor unreasonable. The Committee cannot give Respondent credit for recognizing that he may have made a mistake, but it will not count his unwillingness to admit error as a negative factor either.

82. Mitigating Circumstances: Disciplinary Counsel charges a laundry list of aggravating and finds no mitigating circumstances. (D.C. Brief 34). Except for the dishonesty charges, however, many of these alleged aggravating factors are disagreements between Disciplinary Counsel and Respondent about the law and how best to litigate the case. There is no question that some of Respondent's comments during the hearing were problematic, such as arguing it is acceptable to sue the Commonwealth in federal court since immunity is waivable and his reliance in his brief (R. Brief at 2-3; 28) on the fact that Mr. Woodson filed the Complaint when Respondent was lead counsel. But, in general, the Committee finds Disciplinary Counsel's argument on aggravation is a stretch. Respondent should have been more diligent, but the Committee finds he earnestly sought to reach the results Ms. Wilkins wanted.

[46] Disciplinary Counsel insisted on pursuing this matter over Respondent's objections; it could have held the prosecution until the malpractice case was resolved. The Committee recognizes that the Chair contributed to this conundrum when he recommended that the Chair of the Board deny Respondent's request.

83. On the other hand, the Committee finds that Respondent's conduct in connection with the hearing is an aggravating factor. Disciplinary Counsel subpoenaed his records in Ms. Wilkins' case, yet Respondent did not produce the full file, as the additional emails which he introduced during the hearing (Tr. 6-8, 470-71) and in his Surreply establish. In addition, he ignored Board rules in filing the Surreply and in filing his "Response to Disciplinary Counsel's Opposition to Respondent's Surreply Brief" without seeking leave to file. His failure to follow the Board rules is a concern and reflects adversely on Respondent.

84. The Sanction: The sanction imposed for violations of the rules charged here varies from disbarment to informal admonitions. Discipline Counsel cites *In re Hitselberger*, 761 A.2d 27 (D.C. 2000) (per curiam), *In re Pennington*, 921 A.2d 135 (D.C. 2007) and *In re Carr-Kennedy*, 698 A.2d 1021 (D.C. 1997) (per curiam) in support of its proposed sanction. The respondent in *Hitselberger* was suspended for sixty days for violations of Rules 1.1, 1.3, 1.4, 8.1 and 8.4 for failure to file a motion before the statute of limitations expired, failure to advise his client of the ruling, and lying to the client that he would file an appeal. In *Pennington*, the respondent was suspended for two years with fitness for not advising her client that the statute of limitations had run before filing the Complaint and attempting to make the client whole by paying the client out of her own funds. The Court found her actions involved affirmative deceit since her clients might have filed a malpractice case if she advised them of the true facts. In *Carr-Kennedy*, the respondent was suspended for 240 days with fitness for neglecting her client's appeal and failing to stay in communication with the client. Both *Pennington* and *Carr-Kennedy* were reciprocal discipline cases and are of limited precedent as there is a presumption in those cases that the sanction imposed by the original jurisdiction will be imposed here. *See* Rule XI, § 11(c).

85. Other decisions have imposed lesser sanctions. In *In re Fox*, 35 A.3d 441 (D.C. 2012) (per curiam), the Court suspended respondent for forty-five days for violations of Rules 1.1(a) & (b), 1.3(a) & (c) and 1.4(a) & (c). The respondent did not file a complaint within the statute of limitations, failed to contact key witness, and erroneously told the client that the statute had run when he did contact her. The Court found that the respondent's twenty-four years with only one informal admonition on an unrelated matter was a mitigating factor. *In re Bah*, 999 A.2d 21 (D.C. 2010) (per curiam) involved the failure to file a competent application to the Board of Immigration Appeals and failure to advise the client of the problem in a timely manner. The respondent was suspended for thirty days, stayed for a year on probation. He was required to take CLE courses acceptable to Disciplinary Counsel. Other cases involving lesser sanctions for violations of Rules 1.1 and 1.3 than in the cases cited by Disciplinary Counsel include: *In re Thai*, 987 A.2d 428 (D.C. 2009) (per curiam) (sixty-day suspension with thirty days suspended in favor of a one year probation with CLE requirements); *In re Cole*, 967 A.2d 1264 (D.C. 2009) (thirty-day suspension for not filing an corrected application for renewal of a temporary protected status application and then falsely telling client he had); and *In re Chapman*, 962 A.2d 922 (D.C. 2009) (per curiam) (thirty-day suspension for failing to conduct discovery, resulting in dismissal of the case).

86. The sanctions imposed for violations of Rules 3.3(a) and 8.4(c) are often more severe, some involving disbarment. The rule violation in the cases resulting in disbarment, however, were typically more significant, including false statements in affidavits, *In re Mayers*, 114 A.3d 1274 (D.C. 2015) (per curiam) (disbarment); multiple violations including knowingly submitting forged client signatures, *In re Vohra*, 68 A.3d 766 (D.C. 2013) (three-year suspension plus fitness); falsely telling the Superior Court the respondent had made child support payments,

In re Mayers, 943 A.2d 1170 (D.C. 2008) (per curiam) (eighteen-month suspension); and intentionally filing false statements with the court that attached fabricated documents to support fraudulent reports, *In re Parshall*, 878 A.2d 1253 (D.C. 2005) (per curiam) (same). Other cases have shorter suspensions. In *In re Uchendu*, 812 A.2d 933 (D.C. 2002), the respondent was suspended for thirty days for submitting verified documents with the probate court in which he had forged his client's signatures and falsely notarized the documents. Similarly, in *In re Owens*, 806 A.2d 1230 (D.C. 2002) (per curiam), the respondent was suspended for thirty days for filing false statements with an administrative law judge, as was the respondent in *In re Rosen*, 481 A.2d 451 (D.C. 1984) for filing a false document with a court. *See also Scanio*, *supra*, 919 A.2d at 1137 (thirty days for misrepresentations concerning insurance claims); *Pennington*, *supra*, 921 A.2d at 135 (sixty days, with thirty suspended, for advising co-counsel she could conceal failure to file timely complaint).

87. As is typically the case, this case does not fit nicely within the four corners of these decisions. Respondent's violations of Rules 1.1 and 1.3 are less serious than those in *Hitselberger*, *Pennington* or *Carr-Kennedy* in that Respondent did not abandon his client or lie to her. We believe his Rule 1.1 and 1.3 violations are closer to those in *Fox*, *Bah* and *Cole*, which resulted in thirty-day suspensions. His violations of Rules 3.3(a) and 8.4(c) are somewhat more serious, although they do not rise to the level of falsifying an affidavit or submitting forged documents as in the cases imposing more serve sanction. His claims concerning Dr. Davis' relationship with the hospital warrant a sanction in addition to any that would be imposed for the Rule 1.1 and 1.3 violations. The increase, however, need not be extensive -- the Court was not misled by his claim as the Commonwealth corrected the record; the misconduct occurred in a single case; and Respondent had a basis to question the accuracy of Dr. Davis' deposition

testimony. The Committee does not believe that Respondent's previous violation requires or even justifies any additional sanction. Based on these considerations, the Committee believes a suspension of forty-five days would be appropriate.

88. Finally, Disciplinary Counsel has not made a case for a fitness requirement. The Court of Appeals has made it clear that "the record in the disciplinary proceeding must contain clear and convincing evidence that casts a serious doubt upon the attorney's continuing fitness to practice law." *In re Cater*, 887 A.2d 1, 6 (D.C. 2005). In deciding whether fitness is appropriate, the Court explained that:

> The open-ended fitness requirement is intended to be an appropriate response to serious concerns about whether the attorney will act ethically and competently in the future, after the period of suspension has run. Primarily, our concern is that [the attorney's] resumption of the practice of law will not be detrimental to the integrity and standing of the Bar, or to the administration of justice, or subversive to the public interest. …
>
> [T]he decision to impose a fitness requirement turns on a partly subjective, predictive evaluation of the attorney's character and ability. … proof of a violation of the Rules that merits even a substantial period of suspension is not necessarily sufficient to justify a fitness requirement, while evidence of circumstances surrounding and contributing to the misconduct may be what tips the balance in favor of the condition.

Id. at 22 (citations and internal quotations omitted).

89. In reaching its conclusion, the Committee is to be guided by the four *Roundtree* factors. They are: (1) the nature and circumstances of the misconduct for which the attorney was disciplined; (2) whether the attorney recognizes the seriousness of the misconduct; (3) the attorney's conduct since discipline was imposed, including the steps taken to remedy past wrongs and prevent future ones; (4) the attorney's present character; and (5) the attorney's present qualifications and competence to practice law. *In re Roundtree*, 503 A.2d 1215, 1217 (D.C. 1985). Given the facts of this case, it is difficult to apply second and fourth factors. In light of the pendency of a malpractice case, the Committee believes it unfair to weigh his

acceptance of responsibility in deciding whether fitness is required. With respect to the fourth factor, no evidence was adduced as to Respondent's character, other than that he was subject to an informal admonition ten years ago. However, he has not had any other disciplinary matter since then, and there were extenuating circumstances in that matter.

90. Relying on the other factors, the Committee does not believe Disciplinary Counsel has shown that Respondent's misconduct in this case raises serious questions as to his fitness to practice law. Respondent's misconduct occurred in a single case; it was a difficult case and he was dealing with a difficult client. While his decisions have proven to have been ill-advised, Disciplinary Counsel has not shown that they were unreasoned or beyond the discretion accorded lawyers in making strategy decisions. He should have done more homework before launching on his perilous flight, but that does not mean that his theory of the case establishes that he lacks the capacity to practice law. Indeed, the record here indicates that there was substantial preliminary evidence to support his theory. His problem is that he did not conduct a sufficient fact inquiry before filing the Complaint and waited too long to file it.

91. Respondent has been practicing for twenty-four years as a private practitioner and has litigated hundreds of cases. This is only the second disciplinary action taken and it arose ten years after his prior disciplinary matter. Respondent made a mistake in pursuing Ms. Wilkins' case as he did; the Committee is recommending that he be suspended for forty-five days as a sanction. Disciplinary Counsel has not shown that he should be effectively further sanctioned and deprived of the opportunity to practice law for an additional period of time in order to meet the fitness requirement. *In re Kline*, 11 A.3d 261, 267 (D.C. 2011).

Conclusion

92. For the reasons set forth above, the Committee concludes that Disciplinary Counsel has established a violation of Virginia Rules 1.1 and 1.3(a) in that Respondent did not adequately prepare before filing the Complaint, prejudiced his client's case by filing on the statutory deadlines, and did not pursue discovery with sufficient diligence once he filed. We also find that he violated Rules 3.3(a) and 8.4(c) in asserting in the Fourth Circuit Court of Appeals that Dr. Davis had an office at Central State when the record in this case showed that the doctor did not. We recommend that he be suspended for a period of forty-five days.

AD HOC HEARING COMMITTEE

/TDF/
Theodore D. Frank, Chair

/SKB/
Sara K. Blumenthal

/PBM/
Patricia B. Millerioux, Esq.

Dated: February 16, 2017

Lattimer TimeLine

Feb. 27, 2010	Davis died
Feb. 15, 2011	Notice of Claim filed with Va. Atty Gen. office
Aug. 22, 2011	Wilkins contacts Woodson re finding a new lawyer; Woodson contacts Lattimer about potentially representing Wilkins
Sept. 9, 2011	Wilkins e-mails Marcari discharging him and advising she was changing lawyers
Sept. 11, 2011	Marcari acknowledges receipt of Wilkins' e-mail
Sept. 14, 2011	Lattimer e-mails Marcari
Sept. 22, 2011	Wilkins e-mails Berk re Lattimer & Marcari getting together
Oct. 17, 2011	Lattimer mails Wilkins a retainer letter
Oct. 18, 2011	Bricker calls Wilkins re status of case; Wilkins e-mails Lattimer
Oct. 24, 2011	Lattimer retainer letter signed
Oct. 24, 2011	Marcari mails Lattimer the file
Dec. 3, 2011	Lattimer and Wilkins meet
Feb. 21, 2012	E-mail from Wilkins re status of case
Feb. 27, 2012	Complaint filed
Mar. 2, 2012	Wilkins e-mails Lattimer expressing satisfaction with the Complaint
Mar. 21, 2012	Montgomery's Motion to Dismiss filed
April 4, 2012	Amended Complaint filed dismissing hospital
April 11, 2012	Montgomery files Motion to Dismiss Amended Complaint
May 4, 2012	Montgomery files Motion for Summary Judgment
May 18, 2012	Lattimer files Opposition to Motion for Summary Judgment
June 12, 2012	Court holds Summary Judgment Motion in Abeyance; orders Commonwealth to produce documents and allows for discovery

July 24, 2012	Scheduling order entered; required identifying expert witnesses by Oct 22; summary judgment motions due on Dec. 31, 2012
Aug. 22, 2012	Answer filed
Sept. 7, 2012	Defendant produced documents
Oct. 22, 2012	Lattimer's motion to extension of time to produce expert witness granted
Nov. 8, 2012	Notice of Deposition served on Dr. Yaratha
Nov. 14, 2012	Ms. Spruill deposed
Nov. 21, 2012	Plaintiff's Expert Witness to be identified
Nov. 21, 2012	Lattimer files expert witness notice
Nov. 26, 2012	Lattimer files an inadequate report from expert
Dec. 21, 2012	Lattimer serves full expert report served on Defendant
Dec. 27, 2012	Motion for leave to file a Second Amended Complaint adding Yaratha and Charles Davis, actual head of the Hospital
Dec. 28, 2012	Notice of Deposition served on Dr. Davis
Feb. 8, 2013	Court excluded expert testimony
Mar. 5, 2013	Dr. Davis deposed
April 10, 2013	District Court dismisses the case
July 15, 2013	Lattimer's appeal brief filed
March 18, 2014	Case argued in the Court of Appeals
May 5, 2014	Case decided by the Court of Appeals.