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

In the Matter of:	:	
	:	
GREGORY L. LATTIMER,	:	
	:	
Respondent.	:	Board Docket No. 11-BD-085
	:	Bar Docket Nos. 2009-D170, *et al.*
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 371926)	:	

REPORT AND RECOMMENDATION
OF THE AD HOC HEARING COMMITTEE

I. INTRODUCTION

1. Respondent, Gregory L. Lattimer, Esquire, is charged with violating Rule 1.4(a) of the District of Columbia Rules of Professional Conduct (the "Rules"), in each of three separate client matters. The Hearing Committee finds clear and convincing evidence that Respondent violated Rule 1.4(a) in the course of his representation of two clients, and recommends that Respondent receive a public censure for his misconduct. The Hearing Committee finds that Disciplinary Counsel did not establish a violation of Rule 1.4(a) in the third client matter.[1]

II. PROCEDURAL HISTORY

2. On December 14, 2011, Disciplinary Counsel filed a Specification of Charges ("Specification") and Petition Instituting Formal Disciplinary Proceedings ("Petition"). The Specification and Petition were served upon Respondent on December 27, 2011. The Specification alleges that Respondent violated Rule 1.4(a) (failure to keep clients reasonably informed or to comply with reasonable requests for information) with respect to three clients: Roderick Strange,

[1] Following the hearing, the District of Columbia Court of Appeals changed the title of Bar Counsel to Disciplinary Counsel, effective December 19, 2015. We use the current title herein.

Debra Rowe and Toby Cooper. On January 24, 2012, Respondent filed a *pro se* Answer to the Specification.

3. A pre-hearing conference was held on February 27, 2012, before Erik T. Koons, Esquire, Chair of the Ad Hoc Hearing Committee. Disciplinary Counsel was represented by Assistant Disciplinary Counsel Hamilton P. Fox, III, Esquire. Respondent appeared *pro se*. The hearing was scheduled for May 9 and 10, 2012.

4. On March 5, 2012, Respondent filed a request for a more definite statement or alternatively, for a Bill of Particulars. Disciplinary Counsel filed an opposition to Respondent's request on March 9, 2012. On March 26, 2012, the Ad Hoc Hearing Committee denied Respondent's request for a more definite statement, finding that the Specification of Charges provided adequate notice of the charges.

5. On April 9, 2012, Disciplinary Counsel filed a motion for leave to present the testimony of Roderick Strange by video-teleconference, pursuant to Board Rule 11.4. Respondent did not consent to Disciplinary Counsel's motion but did not file a brief in opposition to the motion. By order dated April 20, 2012, the Ad Hoc Hearing Committee granted the motion.

6. On April 26, 2012, the parties filed and exchanged witness and exhibit lists. On May 2, 2012, the parties filed pre-hearing briefs. Also on May 2, 2012, Respondent filed objections to the admissibility of three of Disciplinary Counsel's proposed exhibits on relevance and hearsay grounds: BX 32 and 45, relating to arbitration awards in the Rowe and Cooper matters,

and BX 59, a letter from Mr. Strange's successor counsel.[2] At the start of the hearing, this Hearing Committee deferred ruling on the admissibility of the exhibits. Tr. 22:10-23:10.[3] [4]

7. On May 3, 2012 and June 7, 2012, Disciplinary Counsel requested that the Hearing Committee schedule an additional hearing date, because Ms. Cooper, one of the complainants, was unavailable to testify on the date scheduled due to a family medical emergency. By order dated June 13, 2012, the Ad Hoc Hearing Committee scheduled an additional hearing day for August 10, 2012.

8. An evidentiary hearing was held on May 9 and 10, 2012, and August 10, 2012.[5] The Ad Hoc Hearing Committee included Chairman Koons, Allen Feldman, Esquire, and Billie LaVerne Smith, Public Member. Disciplinary Counsel was represented by Mr. Fox. Respondent appeared *pro se*.

9. Disciplinary Counsel called six witnesses in its case-in-chief: Debra Rowe, Jacqueline Byrd, Antonio Strange, Mamie Strange, Roderick Strange, and Toby Cooper. Respondent testified on his own behalf, and called his wife, Susan Berk, who was his office assistant. Disciplinary Counsel called one rebuttal witness, Tanya Simmons Keys. Disciplinary

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[2] "BX" refers to Disciplinary Counsel's exhibits.

[3] "Tr." refers to the transcript of the hearing.

[4] Board Rule 11.3 provides that the Hearing Committee is required to receive all "[e]vidence that is relevant, not privileged, and not merely cumulative" and "shall determine the weight and significance to be accorded all items of evidence upon which it relies." Additionally, it is well established that hearsay evidence is generally admissible and is a basis to establish a violation of the disciplinary rules. *See In re Shillaire*, 549 A.2d 336, 343 (D.C. 1988) (FBI agent's affidavit was admissible hearsay evidence and the "only legitimate issue ... [was the] weight that should be accorded to it."). In accordance with Board Rule 11.3, the Hearing Committee admits BX 32, 45, and 59 into evidence. The Hearing Committee has not relied on BX 45 in this Report.

[5] The transcript of the August 10, 2012 hearing is erroneously marked "August 16, 2012."

Counsel introduced BX "A-D" and "1-62" into evidence. Respondent introduced exhibits marked "1-11." Each of these exhibits is now admitted into evidence.

10. At the conclusion of the violations phase of the hearing, the Hearing Committee deferred its preliminary, non-binding determination as to whether Respondent committed a violation of the disciplinary rules until after the filing of post-hearing briefs. *See* Board Rule 11.11.[6] Tr. 129-30. On September 25, 2012, Disciplinary Counsel filed its brief with Proposed Findings of Fact and Conclusions of Law. Respondent filed his brief on November 26, and filed an amended brief on November 29, 2012.[7] Respondent filed a supplemental brief on November 30. Disciplinary Counsel filed its Reply Brief on December 10, 2012.

11. Following the filing of post-hearing briefs, the Hearing Committee issued an order making a preliminary, non-binding determination that Disciplinary Counsel proved a violation of Rule 1.4(a), and directing the submission of evidence in aggravation and mitigation of sanction in documentary form. Order, Bar Docket Nos. 2009-D170, *et al.* (H.C. Dec 5, 2013); *see* Board Rule

[6] Board Rule 11.11 provides, in relevant part, that

> [a]t the conclusion of the evidentiary portion of the hearing and after hearing such final argument as the Hearing Committee Chair shall permit, the Hearing Committee shall go into executive session and decide preliminarily whether it finds a violation of any disciplinary rule has been proven by Disciplinary Counsel. . . . In those extraordinary cases where the Hearing Committee is unable to reach such a preliminary determination, the Hearing Committee Chair may defer the presentation of matters in aggravation (including prior discipline) and in mitigation until such later time as the Hearing Committee Chair shall designate for the presentation of such evidence in documentary form or at a subsequent hearing which the Hearing Committee Chair may authorize on a showing of good cause.

[7] Disciplinary Counsel's Proposed Findings of Fact and Conclusions of Law will be cited as "D.C. Br. at __" and Respondent's Amended Proposed Findings of Fact and Conclusions of Law as "R. Br. at __."

11.11. On December 20, 2013, Disciplinary Counsel filed a brief with respect to sanction,[8] recommending that Respondent be suspended for six months with reinstatement conditioned on proof of fitness to practice, and restitution to Mamie Strange and Toby Cooper. Respondent filed his brief with respect to sanction on January 17, 2013, in which he requested the issuance of an informal admonition for his misconduct. On January 30, 2014, Disciplinary Counsel filed a motion for leave to file a supplemental exhibit relating to sanction, with the attached exhibit.[9] Respondent did not oppose the motion. By order dated February 20, 2014, the Hearing Committee accepted the exhibit for filing and it is accepted into evidence.

III. LEGAL STANDARD

12. Rule 1.4(a) provides:

> A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

13. "The guiding principle for evaluating conduct under this rule is whether a lawyer fulfilled the client's reasonable . . . expectations for information." *In re Hallmark*, 831 A.2d 366, 374 (D.C. 2003) (citation omitted). In order to comply with the rule, "a lawyer not only must respond to client inquiries but also must initiate communications to provide information when

[8] Disciplinary Counsel filed three exhibits with its sanction brief, marked BX 64-66. BX 64 is a copy of an order of the D.C. Superior Court entering judgment in the amount of $5,500 against Respondent and in favor of Toby Cooper in their attorney's fee dispute. BX 65 is an informal admonition issued in 2006 concerning Respondent's mishandling of settlement funds. BX 66 is a copy of a summons and complaint Respondent filed against Toby Cooper, seeking $2,000,000 in damages resulting from her alleged defamation during their attorney's fee dispute. Each of these exhibits is now admitted into evidence.

[9] The exhibit attached to Disciplinary Counsel's January 30, 2014 motion is an Order of the Superior Court of the District of Columbia, dated January 29, 2014, in the case captioned *Cooper v. Lattimer*, Civ. Case No. 2011 CA 007481 D, and is marked BX 66. Because Disciplinary Counsel previously submitted an exhibit also marked as BX 66, the Hearing Committee has re-numbered the exhibit as BX 67.

needed." *In re Hallmark*, 831 A.2d at 374 (D.C. 2003) (citing Rule 1.4(a) cmt. [1]). "An attorney need not communicate with a client as often as the client would like, as long as the attorney's conduct was reasonable under the circumstances." *In re Schoeneman*, 777 A.2d 259, 264 (D.C. 2001) (citing *In re Walker*, 647 P.2d 468, 470 (Or. 1982) ("Although the [attorney] did not communicate with the client as often as the client believed he should have, the record establishes that he kept the client adequately informed of the progress he made with each case.")). However, "[l]awyers have an obligation not only to reasonably communicate with their clients about pending matters but also to let them know if they cannot or will no longer continue to pursue their cases." *Hallmark*, 831 A.2d at 373.

IV. FINDINGS OF FACT & CONCLUSIONS OF LAW

14. This case follows Respondent's rejection of an Informal Admonition for his alleged violation of Rule 1.4(a) in his representation of Debra Rowe, Roderick Strange, Toby Cooper, and a fourth client.[10] As was his right, Respondent rejected the Informal Admonition and requested a hearing on the charges. *See* Letter of Informal Admonition (attached to Respondent's Supplemental Post-Hearing Brief). The matter was thus governed by Board Rule 6.4, which provides, in pertinent part, that Disciplinary Counsel "may not add any charge to the petition arising out of the same circumstances that [Disciplinary] Counsel was aware of at the time of the investigation, which charge was not included in the original informal admonition."[11]

15. During the violations phase of the hearing, Disciplinary Counsel introduced evidence of additional, uncharged misconduct, as relevant to the determination of the appropriate

[10] Respondent disclosed the Informal Admonition in his post-hearing brief filed with the Hearing Committee. He asserts that the unnamed fourth client "refused to cooperate with what [Disciplinary Counsel] was seeking to do." Resp. Sanctions Br. at 1.

[11] Board Rule 6.4 reads, in its entirety:

sanction. *See* Tr. 14-16. Respondent objected on the grounds that consideration of the uncharged misconduct violated his right to due process, because he did not have notice of the charges and an opportunity to respond. *Id.*; *see also* Resp. Sanctions Br. at 4.

16. Disciplinary Counsel was aware of the uncharged misconduct at the time it issued the letter of Informal Admonition, which made direct reference to it. *See infra* at 53-55. As a result, and as explained below, we have concluded that it is inappropriate to consider the uncharged misconduct as part of our sanction analysis. We nonetheless have made findings of fact regarding those allegations, in the event the Board or the Court disagrees with our determination.

A. Respondent's Bar Admission and Practice

17. Respondent is a member of the Bar of the District of Columbia Court of Appeals, having been admitted on July 5, 1983, and assigned Bar Number 371926.

18. Since 1994 or 1995, Susan "Imani" Berk has served as Respondent's assistant. Tr. 323 (Berk).[12] Ms. Berk is an attorney. Tr. 322 (Berk). At all times relevant to this case, her role was to field incoming calls and "to stand in [Respondent's] shoes" when he was not available. Tr. 323-24 (Berk). Ms. Berk also maintained a log tracking deadlines for Respondent's ongoing litigations and prepared documents for Respondent's review. Tr. 325-329 (Berk).

> In the event that respondent rejects an informal admonition, respondent shall request in writing a formal hearing. This hearing shall be conducted in accordance with Section 8(c) of Rule XI except that Disciplinary Counsel and the Hearing Committee may not add any charge to the petition arising out of the same circumstances that Disciplinary Counsel was aware of at the time of the investigation, which charge was not included in the original informal admonition.

[12] "Tr. ___" refers to the hearing transcript. "FF __" refers to the findings of fact contained herein.

19. Ms. Berk and Respondent are married. Tr. 323 (Berk).

B. Findings of Fact With Respect to Respondent's Representation of Debra Rowe (Count One: Bar Docket No. 2009-D319)

20. From November 1998 until April 2008, Debra Rowe was employed by the District of Columbia Department of Health HIV/AIDS Administration, ultimately serving as the Chief of Housing Programs for that agency. Tr. 33-34 (Rowe).

21. In April 2008, Ms. Rowe was demoted, placed under investigation by the FBI, and ultimately fired. Tr. 35-36 (Rowe). Ms. Rowe believed she had been wrongfully terminated after objecting to a D.C. Councilman's proposed use of program funds. Tr. 35 (Rowe). Upon the recommendation of another attorney, Donald Temple, Ms. Rowe contacted Respondent to discuss the prospect of filing a civil suit against the District of Columbia government. Tr. 38 (Rowe).[13]

22. Ms. Rowe's first contact with Respondent was a 15 to 20-minute telephone call, sometime during the first week of May 2008. Tr. 39 (Rowe).

i. Ms. Rowe's Initial Meeting with Respondent

23. Later that week, Ms. Rowe met with Respondent at his office for at least 30-40 minutes. Tr. 40, 97 (Rowe), 332 (Berk). At the initial meeting, Ms. Rowe told Respondent that she wanted to bring a "whistleblower" lawsuit against the District of Columbia government, because she believed she had been terminated in retaliation for her complaints about the alleged misconduct of a D.C. Councilman. Tr. 34-35, 39, 40 (Rowe). Ms. Rowe also told Respondent that she believed her whistleblower claim was subject to a one-year Statute of Limitations. Tr. 42 (Rowe).

[13] Ms. Rowe was represented by another attorney, Robert Mance, with respect to the FBI investigation. Tr. 36 (Rowe).

24. Respondent agreed to take Ms. Rowe's case and to send her a retainer agreement. Tr. 40-41 (Rowe). Respondent testified that he advised Ms. Rowe at the initial meeting that she "did not have much of a chance" on a whistleblower claim, because Respondent had just litigated and lost a whistleblower case with similar facts. Tr. 493 (Respondent); *see also* Tr. 378-79 (Berk).

25. Respondent also testified that during the initial meeting he informed Ms. Rowe that he would not file any civil lawsuit on her behalf until after the FBI investigation concluded. Respondent testified that he "would never file a lawsuit, a civil lawsuit for someone facing criminal charges," because it could result in a waiver of the client's Fifth Amendment rights. Tr. 494-495 (Respondent).

26. Ms. Rowe disputes Respondent's account of their initial meeting. First, Ms. Rowe testified that Respondent did not express any "reservations" about her proposed whistleblower claim. Tr. 113 (Rowe); *see also* Tr. 67-68 (Rowe) (stating that the first time she and Respondent discussed the merits of the whistleblower claim was April 2009). However, Ms. Rowe testified on cross examination that Respondent may have mentioned that he did not favor filing a whistleblower claim, based on recent rulings of the D.C. Court of Appeals and the D.C. Circuit. *See* Tr. 112-13 (Rowe). Ms. Rowe denied that Respondent ever advised her that she should delay filing a civil case until after the criminal investigation concluded. Tr. 87 (Rowe).

27. We credit Respondent's testimony that he advised Ms. Rowe at the initial meeting that he disfavored filing a whistleblower claim, and advised against filing any civil claim while Ms. Rowe was under investigation. Respondent's recollection of the meeting was clear and detailed. By contrast, Ms. Rowe's testimony was inconsistent, and she ultimately could not recall what Respondent told her during the meeting.

ii. The Retainer Agreement and Ms. Rowe's Initial Payments

28. On or about May 5, 2008, Respondent sent Ms. Rowe a retainer agreement that called for a $6,000 flat fee, in addition to a contingency fee of 33% of any recovery in excess of $6,000 obtained through settlement prior to litigation, or 40% of any recovery in excess of $6,000 obtained as a result of litigation. Tr. 44 (Rowe); BX 2.

29. At some point between May 5 and May 20, 2008, Ms. Rowe called Respondent and explained that she could not pay the $6,000 flat fee at once. Tr. 45 (Rowe). She proposed a payment plan that was incorporated into a revised retainer agreement. *Id.*

30. During this telephone call, Respondent explained that "because [he] had other pressing matters [he] could not begin work on [Ms. Rowe's] case until the retainer agreement had been paid in full." Tr. 91-93 (Rowe), 338 (Berk), 496 (Respondent).

31. On May 20, 2008, Ms. Rowe signed the revised retainer agreement. BX 4. The retainer agreement required Ms. Rowe to make an initial payment of $2,500 on May 20, 2008, followed by installment payments of $500 every two weeks until the $6,000 retainer was paid in full. BX 4.

32. The revised retainer agreement expressly stated: "Attorney shall commence services when the full retainer has been paid." BX 4. All other terms remained unchanged from the draft retainer agreement Respondent had sent Ms. Rowe on May 5, 2008.

33. Pursuant to the terms of the revised retainer agreement, Ms. Rowe paid Respondent $2,500 on May 20, 2008. BX 10.

34. Ms. Rowe paid Respondent $500 on June 10, 2008; $500 on June 20, 2008; and $500 on July 10, 2008. BX 33. Thus, as of July 10, 2008, Ms. Rowe had paid Respondent $4,000 of the $6,000 retainer. She made no further payments until March 2009. Tr. 45-46 (Rowe).

iii. Ms. Rowe's Attempts to Contact Respondent by Telephone from May to August 2008

35. Immediately following the execution of the retainer agreement, and before Ms. Rowe made payment in full, Ms. Rowe began calling Respondent's office frequently to advise him of "ongoing developments" she believed relevant to her case. Tr. 47 (Rowe), *see also* Tr. 339 (Berk). Ms. Rowe estimated that she called Respondent's office two or three times per week during the spring and summer of 2008. Ms. Rowe's calls typically were answered by Ms. Berk, who informed Ms. Rowe that Respondent was unavailable. Tr. 46-47 (Rowe), 342-44 (Berk). Ms. Rowe testified that she left messages with Ms. Berk, but that Respondent never returned her calls. Tr. 46-47 (Rowe).

36. On the other hand, Respondent and Ms. Berk testified that Respondent did speak to Ms. Rowe by telephone between May and August 2008. Tr. 497 (Respondent), 339 (Berk). Respondent testified that after several calls, he told Ms. Rowe that he could not talk to her every day, and asked that she email him instead of calling. Tr. 497 (Respondent).

37. We credit Respondent's testimony concerning his communications with Ms. Rowe during the summer of 2008. Respondent's testimony was more clear and detailed than Ms. Rowe's. Furthermore, and as discussed in additional detail below (*see* FF 44, 56, 64), Ms. Rowe's testimony concerning the timing and extent of her communications with Respondent was inconsistent and, in several instances, contradicted by the record.

iv. Ms. Rowe's August 2008 Meeting with Respondent

38. Ms. Rowe testified that she eventually became frustrated with her inability to speak with Respondent as much as she wanted and sought to meet with him in person. Tr. 48 (Rowe), 497 (Respondent).

39. In early August 2008, Ms. Rowe met with Respondent at his office.[14] Their meeting lasted between 20 minutes and one hour. *See* Tr. 49-51 (Rowe) (20 or 30 minutes), 431 (Berk) (one hour). According to Ms. Rowe, they "didn't discuss [her] case," only her financial "hardship," and her "concerns about Ms. Berk when [she] was trying to reach [Respondent]." Tr. 98 (Rowe). Ms. Rowe told Respondent that Ms. Berk was "rude," and that she "wasn't confident that [Ms.] Berk was giving [Respondent her] messages." Tr. 51-52 (Rowe). She testified that she told him that although she could not make the installment payments due under the retainer amount, she was in jeopardy of losing the residence she was renting, and that she "really needed to get it done." Tr. 50 (Rowe). Ms. Rowe also testified that she told Respondent that the FBI investigation had closed. Tr. 49-50 (Rowe).

40. Respondent then asked Ms. Rowe how much she had paid on her retainer. Tr. 50 (Rowe), 497-98 (Respondent). Ms. Rowe told Respondent she had paid $4,000 of the $6,000 retainer. Tr. 50 (Rowe).

41. According to Ms. Rowe, notwithstanding her failure to make the installment payments due under the retainer agreement, Respondent agreed to file her case, because it was "a slow time in the court. . . ." Tr. 50 (Rowe).

42. Respondent denied that he agreed to commence work on Ms. Rowe's case before the retainer was paid in full. Tr. 497-98 (Respondent); *see also* Tr. 338 (Berk). Respondent testified that he asked Ms. Rowe: "[A]re you living up to your agreement with me? And she said,

[14] The parties dispute whether the August 2008 meeting occurred after Ms. Rowe showed up at Respondent's office without an appointment (Tr. 48 (Rowe)), or whether Respondent had Ms. Berk schedule an appointment at Ms. Rowe's insistence (Tr. 497 (Respondent)). It is not necessary for us to resolve this factual dispute. The parties agree that Respondent and Ms. Rowe met in August because Ms. Rowe was dissatisfied with Respondent's lack of responsiveness to her telephone calls.

I haven't. And I said, if that's the case why do you want me to do something that you did not agree upon? And [at] that point, she calmed down." Tr. 498 (Respondent). Respondent also testified that he told Ms. Rowe that she should not worry about the civil lawsuit so long as she was still being investigated by the FBI. *Id*.

43. Respondent testified that he believed the matter was resolved, because the volume of Ms. Rowe's calls decreased, and she did not send him any emails for the rest of the year. Tr. 498 (Respondent).

44. We credit Respondent's testimony concerning the August 2008 meeting. Such an agreement would have been inconsistent with the express terms of the retainer agreement, and with Respondent's prior statements that he would not prioritize Ms. Rowe's case until he received the full retainer. *See* Tr. 91-93 (Rowe), 496-498 (Respondent). Respondent's testimony also is supported by the fact that Ms. Rowe did not attempt to contact Respondent for the remainder of the year. If Respondent had agreed to file Ms. Rowe's complaint in August 2008, it would be unlikely that Ms. Rowe would abandon her efforts to follow up with him for several months thereafter.

v. Ms. Rowe's Communications with Respondent in Late 2008 and Early 2009

45. In December 2008 and January 2009, Ms. Rowe became concerned about the approaching Statute of Limitations for filing a whistleblower claim, which she believed was set to expire in February 2009, and called Respondent's office "several times." Tr. 51-53 (Rowe), 501 (Respondent).

46. In response, Respondent scheduled a meeting with Ms. Rowe for the first or second week of January 2009. Cornell Jones, a former colleague who had knowledge of Ms. Rowe's termination, attended the meeting. Tr. 53-54 (Rowe). Ms. Rowe testified that during the meeting,

Respondent took notes and acted "like he was going to move forward." Tr. 56 (Rowe). At the end of the meeting, Respondent told Ms. Rowe that he would "begin looking at her case more closely." Tr. 503 (Respondent), 56 (Rowe). However, Respondent also told Ms. Rowe that he was not "going to prioritize" her case. Tr. 107 (Rowe).

47. Respondent testified that because Mr. Jones attended the January 2009 meeting, Respondent believed that attorney-client privilege would be waived if he discussed the substance of Ms. Rowe's case. Tr. 501 (Respondent). However, Respondent testified that he again told Ms. Rowe that it was not appropriate to file her civil case while the criminal investigation was still open, and that he reminded Ms. Rowe that the retainer agreement had not yet been satisfied. Tr. 502-03 (Respondent).

48. After meeting with Respondent, Ms. Rowe contemplated filing for bankruptcy, and engaged a bankruptcy attorney, Christopher Hamlin, Esquire. Tr. 62, 98 (Rowe). Ms. Rowe called Respondent several times to discuss the potential bankruptcy filing, but was unable to get through to him. Tr. 99-100 (Rowe).

49. Sometime around February 9, 2009, Ms. Rowe told Ms. Berk that she was discharging Respondent. Tr. 57-58, 100 (Rowe). Ms. Berk advised her that she could pick up her file. Tr. 101 (Rowe). At the same time, Respondent signed a check refunding the $4,000 that Ms. Rowe had paid him. BX 6 at 101-03, 347-48.

50. Ms. Rowe never picked up her file, or the $4,000 check. Tr. 503 (Respondent). On February 18, 2009, Ms. Rowe met with Donald Temple, the attorney who had referred her to Respondent. Tr. 59, 109 (Rowe). Mr. Temple advised Ms. Rowe to apologize, send Respondent and Ms. Berk a card and flowers, and to tell them that she did not want her file back. Tr. 59 (Rowe).

51. That same day, Mr. Temple sent an email to Respondent summarizing his conversation with Ms. Rowe. BX 7. In the email, Mr. Temple specifically mentioned that Ms. Rowe was "in trouble," and that she was struggling to keep her house. *Id*.

52. Thereafter, Ms. Rowe delivered a conciliatory card to Respondent and flowers for Ms. Berk, and told at least Ms. Berk that she wanted Respondent to "take the case back." Tr. 58-61, 105 (Rowe). Respondent and Ms. Berk contend that Ms. Rowe delivered the flowers and card when she visited their office on February 24 or 25.

53. Ms. Rowe testified that she gave Ms. Berk the flowers and card when she visited Respondent's office during the first week of March, and that she also paid Respondent an additional $1,000 toward the $6000 retainer payment at that time. Tr. 61 (Rowe); BX 33; BX 8.[15] Sometime shortly after this payment, Respondent agreed to "modify" the retainer agreement and "began performing services," even though Ms. Rowe had not paid the entire amount due. RX 2.

54. Also in early March 2009, Ms. Rowe told Respondent, for the first time, that she had filed for bankruptcy, and engaged Mr. Hamlin as her bankruptcy attorney. Tr. 108 (Rowe), 506 (Respondent).

55. On March 11, March 13, and March 20, 2009, Ms. Rowe provided Respondent with materials that she believed were relevant to her case. BX 12, 13, 15. Respondent did not believe

[15] Respondent's file contains a receipt issued by Ms. Berk, stating that on March 3, 2009, Ms. Rowe paid $500 in cash toward her retainer fees. BX 33. However, Ms. Rowe testified that she paid Respondent $1,000 on that date. Tr. 61 (Rowe). The record contains no evidence of any other payments made by Ms. Rowe, but the accounting Respondent provided Ms. Rowe in July 2009, after the representation ended, states that Ms. Rowe paid Respondent a total of $5,000. BX 33. In his November 4, 2009 letter to Disciplinary Counsel, Respondent also stated that he believed that Ms. Rowe had paid him $5,000 as of March 2009. RX 2 – D2009-319. Thus, we find that Ms. Rowe paid Respondent $1,000, not $500, on March 3, 2009.

the materials were helpful, and he did not reply to these communications. Tr. 68-69, 72 (Rowe) Tr. 508 (Respondent).

56. On or about March 20, 2009, Ms. Rowe obtained documents related to the FBI investigation, which was being closed, and brought the documents to Respondent's office. Tr. 70, 120-21 (Rowe); BX 14. Respondent and Ms. Rowe spoke about the status of the FBI investigation either when Ms. Rowe visited Respondent's office to deliver the documents, or on the telephone shortly thereafter. Tr. 121-122 (Rowe) (not recalling whether she met with Respondent or whether they spoke on the telephone).

57. Disciplinary Counsel argues that the return of the FBI-seized documents removed any impediment to Respondent moving forward with Ms. Rowe's case. However, the documents did not include her diary and journal, which Respondent thought were important to her case. Tr. 121-122 (Rowe).

vi. April 20, 2009 Telephone Call

58. On or about April 20, 2009, shortly before the Statute of Limitations was set to expire on the whistleblower claim, Respondent and Ms. Rowe spoke again by telephone. Tr. 114-15 (Rowe), 509-510 (Respondent). Respondent initiated the conversation from out of the country, while on vacation. Tr. 114 (Rowe), 509-510 (Respondent). He said he did not like the whistleblower theory but that if Ms. Rowe wanted, he would electronically file a complaint asserting a claim under the whistleblower statute while he was on vacation. Tr. 66-67 (Rowe), 510 (Respondent).

59. Ms. Rowe declined to have Respondent file the case at that time. Tr. 67 (Rowe), 511 (Respondent). Ms. Rowe testified that she agreed with Respondent's recommendation to refrain from filing a whistleblower claim because she "[didn't] have a choice," and because she "didn't really have confidence in him filing from out of the country. If he didn't file from right

here in the City in a year . . . I was disappointed, you know, and I just – it was like, whatever." Tr. 67 (Rowe).

vii. Communications about Ms. Rowe's Job Opportunity with the D.C. Mayor's Office

60. In early May 2009, Ms. Rowe came under consideration for a job with the D.C. Mayor's office. The parties agree that Ms. Rowe and Respondent communicated twice about the job opportunity and its effect on Ms. Rowe's case: once by email, and once by telephone. The parties disagree as to the timing and sequence of these communications. Respondent understood that Ms. Rowe did not want to proceed with her case while she was under consideration for the job, and thus believed it was not necessary to communicate with her between the beginning of May and late June, 2009. Disciplinary Counsel contends that Ms. Rowe instructed Respondent to continue work on her case even though she was under consideration for the job, and thus that Respondent violated Rule 1.4(a) when he failed to communicate with Ms. Rowe in May and June of 2009.

61. Respondent testified that he first learned of Ms. Rowe's job opportunity on May 12, 2009, when Ms. Rowe emailed Respondent to inform him that she had interviewed for a job with the Fenty administration. BX 17. At the conclusion of the email, Ms. Rowe stated that she still wanted to file her lawsuit against the city, but asked for Respondent's advice. *Id*.

62. Respondent testified that after he received Ms. Rowe's May 12 email, they had a "long discussion" by telephone about whether to proceed with Ms. Rowe's lawsuit. Tr. 123-25 (Rowe), 880 (Respondent). At the conclusion of this conversation, they agreed that it would be best to refrain from filing suit so long as Ms. Rowe was under consideration for a job with the D.C. Mayor's office. Respondent testified that he understood Ms. Rowe's instruction was to refrain from filing a complaint on her behalf as long as she was in contention for the position.

63. Disciplinary Counsel asserts, and Ms. Rowe testified, that the sequence of the phone call and email were reversed. Ms. Rowe testified that prior to May 12, she participated in a telephone call in which she informed Respondent of the job opportunity, and after some discussion, agreed with Respondent's suggestion that they refrain from filing a lawsuit so long as Ms. Rowe was under consideration for the job. On May 12, after the telephone call, Ms. Rowe changed her mind, and emailed Respondent (BX 17), instructing him to proceed with filing the lawsuit even though she was still under consideration for the position. Tr. 128-130 (Rowe). Thus, Ms. Rowe asserts that the telephone call came first, and the email (BX 17) came second. Ms. Rowe testified that she expected that Respondent would continue work on her case during May and June of 2009.

64. We credit Respondent's testimony concerning the timing of his May communications with Ms. Rowe. Ms. Rowe's May 12, 2009 email provided Respondent with background information that would have been unnecessary if she had already spoken to him about the job opportunity. Furthermore, at the conclusion of her email, Ms. Rowe stated, "I still want to file suit against the city for the major problems and embarrassment that they have caused me. Please advise." *Id*. Had Ms. Rowe and Respondent had their "long discussion" about the job before Ms. Rowe interviewed and sent her May 12, 2009 email, it would have been unnecessary for her to tell Respondent that she had been asked to interview for the job, or describe the job opportunity to him. It also would have been unnecessary for Ms. Rowe to ask Respondent to advise her on the matter for a second time.

viii. Communications between Ms. Rowe and Respondent in late May, June and July 2009

65. The parties also dispute the nature and frequency of communications between Ms. Rowe and Respondent between late May and July 2009. Ms. Rowe testified that she found out

within one week of her May telephone call with Respondent that she would not get the mayor's office job, and that she communicated that to Respondent through Ms. Berk. Tr. 76 (Rowe).

66. Thus, Ms. Rowe testified that in late May, she believed Respondent was proceeding with her case. To that end, Ms. Rowe testified that she called Respondent's office several times in late May seeking to speak with him about the case, but that Ms. Berk would not put her through to Respondent, and Respondent did not return her messages. Tr. 130-31, 137 (Rowe). Ms. Rowe also testified that she could "not . . . recall" speaking to Respondent after May 12, 2009. Tr. 130-31, 137 (Rowe).

67. Ms. Rowe emailed Respondent information about her case on May 16, May 18, May 19, June 3, June 9 and June 12, with no response from Respondent.

68. Respondent asserts that he believed it was not necessary to respond to Ms. Rowe's emails because he understood that Ms. Rowe was still under consideration for the job in the Mayor's office, and that Ms. Rowe wanted him to refrain from preparing or filing a complaint while her application remained pending. Tr. 884-85 (Respondent). Respondent testified that Ms. Rowe did not tell him that she did not get the position until sometime after June 20, 2009. Tr. 514 (Respondent). At that time, Ms. Rowe asked Respondent to "move forward" with her case. *Id*.

69. We again credit Respondent's testimony concerning his communications with Ms. Rowe in late May and June of 2009. When pressed, Ms. Rowe ultimately could not recall whether or not she spoke to Respondent during this time period. In this regard, we also note that in several instances, Ms. Rowe's testimony as to the timing of events was inaccurate, sometimes by a matter of months. For example, Ms. Rowe testified that she had no telephone calls with Respondent between March and June 2009. However, as detailed above, Ms. Rowe also testified that she spoke to Respondent in late March (to discuss the return of her documents from the FBI); on April 20 (to

discuss the decision not to file a whistleblower claim); and in early May (to discuss her potential job with the Mayor's office). Additionally, Ms. Rowe testified that she applied for the Mayor's office job in July 2009, when in fact she had interviewed in early May. *See* BX 17.

ix. Ms. Rowe's Termination of Respondent and Attempts to Recover Fees

70. On July 13, 2009, Ms. Rowe sent Respondent an email stating that she had "decided to seek other counsel to handle my case." BX 25; Tr. 78, 136-37 (Rowe), 886 (Respondent). Ms. Rowe decided to discharge Respondent because "he had not done anything," and "because [she] couldn't get in touch with him." Tr. 77-78 (Rowe). She asked for the return of her file and her $5,000 payment. Tr. 78-79 (Rowe).

71. Respondent returned the file, but only refunded $2,500 of the $5,000 Ms. Rowe had paid. Tr. 79 (Rowe); BX 28, BX 29. On July 16, 2009, Respondent also sent Ms. Rowe an accounting, which stated that he performed 17.5 hours of work on her case, largely consisting of research on potential causes of action. BX 30.

72. Respondent's file consisted of materials given to him by Ms. Rowe, his communications with Ms. Rowe, records of Ms. Rowe's payments to Respondent, and a sample complaint from a whistleblower case Respondent had previously worked on. BX 33. The file did not contain any notes or other materials evidencing work on Ms. Rowe's case. *Id*.

73. Ms. Rowe subsequently filed a complaint with the District of Columbia Bar Attorney/Client Arbitration Board (ACAB), seeking return of the remaining $2,500 she had paid in legal fees. BX 32. On June 24, 2010, the arbitrator awarded Ms. Rowe $1,200, which Respondent paid. *Id*.; Tr. 83-4 (Rowe).

C. Conclusions of Law With Respect to Respondent's Representation of Debra Rowe (Count One: Bar Docket No. 2009-D319)

74. Disciplinary Counsel alleges that Respondent "failed to keep his client reasonably informed about the status of her matter," and that he "failed to comply with reasonable requests for information" in violation of Rule 1.4(a). Specifically, Disciplinary Counsel alleges that Respondent violated Rule 1.4(a) by failing to timely or adequately communicate his reservations about filing a whistleblower claim for Ms. Rowe, by falsely informing Ms. Rowe that he would proceed with her case in August 2008, and by failing to respond to Ms. Rowe's attempts to confer with Respondent about her case and financial struggles. As set forth below, we find that Disciplinary Counsel failed to prove a violation of Rule 1.4(a) in the Rowe matter.

i. Disciplinary Counsel Failed to Prove a Violation of Rule 1.4(a) with Respect to Respondent's Communications with Ms. Rowe about the Whistleblower Claim.

75. Disciplinary Counsel alleges that Respondent failed to adequately communicate with Ms. Rowe concerning her whistleblower cause of action in two ways. First, Disciplinary Counsel asserts that during Respondent's initial meeting with Ms. Rowe in May 2008, he failed to tell her that he did not support the filing of a whistleblower claim. In Disciplinary Counsel's view, Respondent was required to inform Ms. Rowe about his concerns about a whistleblower claim so that she could make an informed judgment as to whether to proceed before she paid Respondent's substantial advance fee. *See* D.C. Br. at 31. Second, Disciplinary Counsel alleges that Respondent violated Rule 1.4(a) when he called Ms. Rowe in April 2009 to advise her not to file a whistleblower claim, because the call took place only days before expiration of the Statute of

Limitations, and "there was no realistic possibility for the consultation and decision-making described in Comment [2] to Rule 1.4." D.C. Brief at 32.[16]

76. Respondent maintains that he advised Ms. Rowe during their initial meeting that he did not believe she would prevail on a whistleblower claim, and that if retained, he "would look at other options." R. Br. at 2-3. Respondent further asserts that when he spoke to Ms. Rowe in April 2009, he repeated this advice but agreed to file a whistleblower claim prior to the expiration of the Statute of Limitations, if she wished. R. Br. at 8.

77. Disciplinary Counsel failed to establish that Respondent violated Rule 1.4(a) with respect to his communications about the potential whistleblower claim. During his initial meeting with Ms. Rowe, Respondent shared his concerns about the whistleblower claim, advising her that he had just litigated and lost a similar case. *See* FF 24**,** *supra*. Thus, by the time that Respondent offered to file a whistleblower claim during his April 20, 2009 phone call with Ms. Rowe, just prior to the expiration of the Statute of Limitations, Ms. Rowe was well-aware of Respondent's reservations. We thus reject Disciplinary Counsel's suggestion that Ms. Rowe was surprised by the advice and thus did not have adequate time to consult or consider whether to authorize the filing of the suit, and we find that Disciplinary Counsel failed to establish that Respondent violated Rule 1.4(a).

[16] Comment [2] to Rule 1.4 provides, in relevant part: "The lawyer must be particularly careful to ensure that decisions of the client are made only after the client has been informed of all relevant considerations. The lawyer must initiate and maintain the consultative and decision-making process if the client does not do so and must ensure that the ongoing process is thorough and complete."

ii. Disciplinary Counsel Failed to Prove that Respondent Failed to Keep Ms. Rowe Reasonably Informed about the Status of Her Case.

78. Disciplinary Counsel also failed to prove that Respondent violated Rule 1.4(a) by failing to adequately respond to Ms. Rowe's efforts to learn about the status of her case. Specifically, Disciplinary Counsel argues that Respondent did not respond to Ms. Rowe's emails and phone calls about developments in the case or to Ms. Rowe's attempts to inform him of her financial struggles. To the contrary, the evidence shows that Respondent kept Ms. Rowe reasonably informed.

79. Respondent had consistent contact with Ms. Rowe throughout the course of the representation. Their initial meeting took place in May 2008, shortly after Ms. Rowe telephoned Respondent about retaining him. FF 22-23. Later that week, Ms. Rowe spoke to Respondent on the telephone about a payment plan. FF 29. We credit Respondent's testimony that he spoke with Ms. Rowe by telephone during the summer of 2008, at which time Ms. Rowe passed along information she believed was relevant to her case. FF 36. In August 2008, after Ms. Rowe came to Respondent's office without an appointment, Ms. Rowe and Respondent met to discuss her financial troubles and complaints about Ms. Berk. FF 39. At that time, Respondent reiterated that he would not begin work on Ms. Rowe's case until she paid all of the monies owed under the retainer agreement. FF 42.

80. Thereafter, Respondent's communications with Ms. Rowe were sufficient to keep her reasonably informed about the status of her case, which was that the complaint had not yet been drafted or filed, and that the Statute of Limitations was not set to expire for several months. There is no piece of information, but for Respondent's reluctance to file a whistleblower case, discussed above, which Disciplinary Counsel asserts Respondent failed to adequately communicate to Ms. Rowe. As such, Respondent's conduct is easily distinguishable from those

cases in which the Court has found violations of Rule 1.4(a). *See In re Wright*, 702 A.2d 1251, 1255 (D.C. 1997) (violation of Rule 1.4(a) where the respondent ignored all communications with the client after filing suit); *In re Ifill*, 878 A.2d 465, 469 (D.C. 2005) (violation of Rule 1.4(a) based on the failure to communicate with a client over several months, including not picking up the phone, or ending a call quickly, and failing to convey important information to the client received from a third party); *In re Starnes*, 829 A.2d 488, 505 (D.C. 2003) (violation of Rule 1.4(a) based on an abandonment of the representation); *In re Baron*, 808 A.2d 497, 498 (D.C. 2002) (violation of Rule 1.4(a) for the failure to communicate during the entire pendency of a criminal appeal).

81. Moreover, Respondent's lack of communication with Ms. Rowe in May and June of 2009 was reasonable, given that there were no new developments or impending deadlines, and Respondent understood that Ms. Rowe did not want him to pursue her case while she was seeking a job with the D.C. government. Ms. Rowe may have wished Respondent to be more responsive to her inquiries at certain points of the representation, but we do not believe that the evidence is clear and convincing that Respondent failed to keep his client reasonably informed, as required by Rule 1.4(a).

82. Accordingly, based on all the facts and circumstances, we find that the record does not contain clear and convincing evidence that Respondent violated his obligations under Rule 1.4(a) with respect to Ms. Rowe.

D. Findings of Fact With Respect to Respondent's Representation of Roderick Strange (Count Two: Bar Docket No. 2009-D170)

83. In December 2007, Roderick Strange was convicted of aggravated assault, assault with a deadly weapon, felony threat, and other charges. Tr. 275 (R. Strange). In March 2008, he was sentenced to 132 months in prison. *Id*. Mr. Strange was represented during his criminal trial

by Donna Beasly, Esquire, a court-appointed lawyer. Ms. Beasly filed a notice of appeal. Tr. 275-76 (R. Strange).

i. Mamie Strange's Retention of Respondent to Represent Roderick Strange

84. Mr. Strange's family sought to hire an attorney to handle the appeal. Mr. Strange's sister, Jacqueline Byrd, contacted Respondent on the recommendation of her friend. Tr. 142 (Byrd).

85. On March 25, 2008, Ms. Byrd, Mamie Strange (Roderick Strange's mother), and several other family members met with Respondent in his office. Tr. 142-43 (Byrd), 516 (Respondent). During that meeting, Respondent told the family that he would charge a flat fee of $7,500 to handle Mr. Strange's appeal. However, Respondent stated that he wanted to meet with Mr. Strange before accepting the representation. Tr. 144-46 (Byrd), 517 (Respondent).

86. The next day, March 26, 2008, Respondent met with Mr. Strange at the D.C. Jail. Tr. 285 (R. Strange), 518 (Respondent). During the meeting, Respondent and Mr. Strange discussed the facts underlying Mr. Strange's conviction. Tr. 301-02 (R. Strange). Respondent did not take notes of the meeting. Tr. 533, 579-80 (Respondent).

87. After meeting with Respondent, Mr. Strange spoke with his mother, and they agreed to retain Respondent. Tr. 285-6 (R. Strange), 217-18 (M. Strange). Mrs. Strange then telephoned Respondent to tell him that she wanted to hire him to represent Mr. Strange. Tr. 218-19 (M. Strange).

88. On March 27, 2008, Respondent sent Mrs. Strange a retainer agreement. Tr. 521-522 (Respondent); BX 48. The retainer agreement provided that Respondent's fee for representing Roderick Strange on appeal would be $7,500, with $4,000 due at the time the retainer was signed, and the remainder due in installments. In the cover letter that accompanied the retainer agreement,

Respondent stated: "Once retained, I will proceed with the appeal of your son's criminal conviction." BX 48.

89. On March 31, 2008, Mrs. Strange signed the retainer agreement, and returned it to Respondent with a check for $4,000. BX 52.

90. The parties dispute whether Mrs. Strange and Antonio Strange, Roderick Strange's nephew, returned the signed retainer agreement to Respondent in person, or whether Mrs. Strange mailed the signed agreement and check to Respondent. Mrs. Strange and Antonio Strange, Roderick Strange's nephew, testified that they visited Respondent's office on March 31, 2008, met with Ms. Berk, and gave her the signed retainer agreement and a $4,000 check. Tr. 197-99 (A. Strange), 218-19 (M. Strange).

91. Antonio Strange testified that during his March 31 visit to Respondent's office, he and Mrs. Strange met with Ms. Berk in a conference room. Tr. 199-200 (A. Strange). Antonio Strange further testified that the conference room had a glass window, through which he could see Respondent sitting in his office, on the telephone. Tr. 206 (A. Strange). Mr. Strange testified that he asked to meet with Respondent to question him about Roderick Strange's appeal, but that Ms. Berk "kept putting it off," and they eventually left. Tr. 200-01 (A. Strange).

92. Respondent and Ms. Berk denied that the Stranges visited his office on March 31, 2008, and asserted that the retainer agreement was submitted by mail. Tr. 522 (Respondent), 384-85 (Berk). The evidence shows that Antonio Strange's testimony about the layout of Respondent's office was mistaken; there were no glass walls or windows, and there was no conference room from which Antonio Strange could have been able to see into Respondent's office. Tr. 390-401 (Berk); RX 8, 9, 10, 11.

93. Nonetheless, we credit the testimony of Antonio and Mamie Strange that they visited Respondent's office on March 31, 2008, because it is corroborated by Respondent's check log, which shows that Mrs. Strange's $4,000 check, dated March 31, 2008, was received that same day, and cashed on April 1, 2008.[17] BX 51, 52.

ii. Roderick Strange's Transfer and Efforts to Contact Respondent

94. In April 2008, Mr. Strange was transferred from the D.C. Jail to a prison in South Carolina. Tr. 286-87 (R. Strange). Mr. Strange testified that his journey from D.C. to South Carolina took two to three weeks, and that he called Respondent's office collect while in transit and after arriving in South Carolina to inform Respondent of his new contact information. Mr. Strange further testified that he did not speak to Respondent during this time because Respondent's office did not accept Mr. Strange's collect calls. Tr. 288 (R. Strange).

95. Respondent testified to the contrary, stating that he spoke to Mr. Strange by telephone both while Mr. Strange was in transit, and after he arrived in South Carolina. Tr. 527 (Respondent).

96. We credit Mr. Strange's testimony on this point. First, Respondent's testimony concerning his purported telephone conversations with Mr. Strange was vague, whereas Mr. Strange provided detailed testimony about his efforts to reach Respondent, without success. Second, Mr. Strange's testimony was corroborated by Mamie Strange, who testified that during April and May 2008, she also called Respondent's office to provide Mr. Strange's new address, but was unable to reach anyone. Tr. 221-22 (M. Strange). Because Mrs. Strange was unable to

[17] We note here Disciplinary Counsel's objection to Respondent's submission of evidence to rebut testimony that the Stranges observed Respondent on the phone through a window and failed to speak to them. Given the Hearing Committee's acceptance of Disciplinary Counsel's witnesses statements on this topic, Disciplinary Counsel's objection is thus moot.

give Respondent the new address by telephone, she wrote a letter to Respondent on May 22, 2008, to provide him with Mr. Strange's South Carolina address. Tr. 233-34 (M. Strange); BX 55. Had Roderick or Mamie Strange succeeded in their attempts to reach Respondent by telephone, Mrs. Strange would not have had to write such a letter to Respondent.

iii. CJA Attorney Ian Williams Appears on Behalf of Mr. Strange.

97. Respondent never entered an appearance on behalf of Mr. Strange. On April 21, 2008, Ian A. Williams, Esquire, a CJA attorney, was appointed as counsel for Mr. Strange. BX 60.

98. On May 8, 2008, Mrs. Strange paid Respondent $500, the first installment payment due under the retainer agreement. BX 53.

99. At some point during May or June 2008, Respondent visited the Appeals Coordinator's Office of the Court of Appeals to check on the status of Mr. Strange's appeal. Tr. 524-525 (Respondent). Thereafter, although Respondent was not listed as Mr. Strange's counsel of record, an employee of the Appeals Coordinator's Office contacted Respondent concerning the status of the appeal. Tr. 549-550 (Respondent).

100. On July 30, 2008, the Court noted that the record on appeal was complete, and ordered that Mr. Strange's brief was due within 40 days. BX 60. Mr. Williams subsequently filed two motions to extend the time to file Mr. Strange's appellate brief. *Id*. By orders dated September 17, 2008 and November 10, 2008, the Court extended Mr. Strange's time to file an appellate brief until December 10, 2008. *Id*.

iv. Respondent's Purported July 2008 Call with Roderick Strange

101. The parties dispute whether Respondent and Mr. Strange spoke by telephone during the summer of 2008. Respondent and Ms. Berk testified that in July, Respondent placed a

telephone call to Mr. Strange and spoke with him. Respondent testified that the call was arranged through administrators at the South Carolina prison where Mr. Strange was incarcerated. Tr. 407 (Berk), 527 (Respondent). Mr. Strange denied that the call took place. Tr. 288-89 (R. Strange).

102. During the time Mr. Strange was incarcerated in South Carolina, any call from an attorney to an inmate had to be arranged through Tanya Simmons Keys, a correctional counselor at the prison. Tr. 663-64 (Keys). Specifically, an attorney was required to fax Ms. Keys a letter, on letterhead, requesting a phone call with a named inmate. Tr. 665 (Keys). Ms. Keys was then required to prepare a memo to the associate warden of the prison, and if the request was approved, to notify the attorney and set up the date and time of the call. Tr. 665-66 (Keys). Both the attorney's letter requesting the call, and Ms. Keys' memo obtaining approval of the call were to be placed in the inmate's central file. Tr. 666 (Keys).

103. Respondent's files contain handwritten notes indicating that Ms. Berk called Ms. Keys three times, on July 16, July 22, and July 23, 2008. RX 5. The notes state that Ms. Keys was on vacation, and that on at least one occasion, Ms. Berk left Ms. Keys a message about scheduling a telephone conference. *Id*.

104. Ms. Keys maintained a log book of every call placed by an attorney to an inmate. Tr. 666 (Keys). Ms. Keys' logbook did not contain a record of any call from Ms. Berk, and Mr. Strange testified that no such call occurred. Tr. 667 (Keys), 287 (R. Strange).[18] Further, Respondent's testimony concerning the purported July conference call with Mr. Strange is inconsistent with his May 7, 2007 letter to Disciplinary Counsel. *See* RX 1. In that letter,

[18] Ms. Keys testified that she took a vacation during July 2008, and that another counselor would have assumed her duties during that time. Tr. 671, 673 (Keys). However, Ms. Berk testified that the July call with Mr. Strange was arranged by Ms. Keys, not by another counselor at the prison. *See* Tr. 406-07 (Berk).

Respondent detailed the work he performed in the Strange matter, and his communications with Mr. Strange and Mamie Strange, but did not mention a prison conference call in July 2008. We thus credit the testimony of Ms. Keys and Mr. Strange, and find that there was no call between Mr. Strange and Respondent in July 2008.

v. The Strange Family's Attempts to Contact Respondent

105. Throughout the summer and fall of 2008, Mr. Strange and his family attempted to contact Respondent by telephone. First, after being transferred to South Carolina, Mr. Strange placed collect calls to Respondent's office, but the calls were not accepted. Tr. 288 (R. Strange), 478 (Berk) (testifying that she typically did not accept collect calls from prisoners if Respondent was not available).

106. Mr. Strange then began paying for calls to Respondent, although the record does not show how many times he called. Tr. 288 (R. Strange). On one occasion, Mr. Strange spoke with Ms. Berk, who told him that Respondent was not available. Tr. 291 (R. Strange). One time, in October 2008, Mr. Strange spoke with Respondent. *Id*.

107. Because he typically was unable to speak with Respondent, Mr. Strange asked his family members – Ms. Byrd and Antonio Strange -- to call Respondent and find out the status of the case. Tr. 289 (R. Strange), 201-02 (A. Strange), 221 (M. Strange), 159 (Byrd). However, Mr. Strange never authorized Respondent to speak to anyone else about his case, including his family. Tr. 607 (Respondent).

108. Ms. Byrd testified that she called Respondent's office "all day long", and "at least 30 times a week," on average. Tr. 149 (Byrd). Ms. Byrd further testified that sometimes Ms. Berk would answer, and sometimes there would be no answer at all – not even by an automated answering system. *Id*. Similarly, Antonio Strange testified that he called Respondent's office at

least four times a day, and that when he called, no one answered, and that the call connected to voicemail only one time. Tr. 203 (A. Strange).

109. We credit the testimony of Ms. Byrd and Antonio Strange that they attempted to contact Respondent by telephone, but find that the evidence fails to support the large volume of calls they recalled placing. Ms. Berk testified credibly and in detail about the phone system used in Respondent's office, and explained that at all times, an incoming call would either have been answered by her, or sent to an automated voicemail system, contrary to the testimony of Ms. Byrd and Antonio Strange that they were unable even to leave a message for Respondent. Tr. 401-02 (Berk).

110. During this time, Ms. Byrd also visited the Court of Appeals to find out the status of Mr. Strange's case. Tr. 150-52 (Byrd). Ms. Byrd discovered that Mr. Williams had been appointed as Mr. Strange's attorney, and that Respondent had never entered an appearance in the case. *Id*.

111. Ms. Byrd then spoke to Respondent by telephone. Tr. 154 (Byrd). Respondent told Ms. Byrd that the Stranges were responsible for obtaining the transcripts of Mr. Strange's trial for him. Tr. 154-55 (Byrd). Ms. Byrd did not recall her response. Tr. 155 (Byrd).

112. Ms. Byrd contacted Donna Beasly, Mr. Strange's trial attorney. Ms. Beasly told Ms. Byrd that she had compiled materials for Respondent, but that he had never contacted her to get the file. Tr. 153, 164-65 (Byrd).

113. Ms. Byrd also spoke to Mr. Williams, who told her that he was in possession of the trial transcripts, and that if Respondent entered an appearance in the case, Mr. Williams would send all of the information and materials to him. Tr. 156 (Byrd). Ms. Byrd did not testify as to when her conversation with Mr. Williams took place.

114. Ms. Byrd then spoke with Respondent by telephone again, with her sister (Vivian Strange) on the line, to discuss her concern that Respondent was not working on Mr. Strange's appeal. Tr. 158 (Byrd). During the call, Ms. Byrd came to believe that Respondent was not familiar with Mr. Strange's case. Tr. 159-61 (Byrd). After Ms. Byrd confronted Respondent, he refused to communicate further with her or any family members other than Mamie Strange, who had retained him. Tr. 161 (Byrd). Ms. Byrd called Mamie Strange to recommend that Mrs. Strange stop paying the installments due under the retainer agreement because she believed that Respondent was not working on Mr. Strange's appeal. Tr. 161-62 (Byrd).

115. After speaking with Ms. Byrd, Respondent called Mamie Strange. Respondent told Mrs. Strange that Ms. Byrd had asked him to stop working on Mr. Strange's case, and asked whether Mrs. Strange wanted him to continue with the representation. Tr. 224 (M. Strange); BX 58. Mrs. Strange told Respondent that she would call him back with further instructions, but never did. Tr. 227-28 (M. Strange).

116. Because they believed that Respondent was not working on Mr. Strange's appeal, Mr. Strange's family stopped making the installment payments due Respondent under the retainer agreement. Tr. 162 (Byrd), 223-22 (M. Strange), 293 (R. Strange).

vi. Roderick Strange's October 2008 Communications with Respondent

117. By September 2008, Mr. Strange considered Mr. Williams, not Respondent, to be his attorney. Tr. 314 (R. Strange). Mr. Strange began communicating by telephone and letter with Mr. Williams concerning the appeal. Tr. 280, 314 (R. Strange).

118. In October 2008, Mr. Strange telephoned Respondent's office, and spoke to him. Mr. Strange testified that Respondent was unfamiliar with Mr. Strange's name and case. Tr. 291-

92 (R. Strange). Respondent told Mr. Strange that he was still owed $3,000 for his work on the appeal. Tr. 292 (R. Strange).

119. On November 20, 2008, Respondent sent Mr. Strange a letter, with a copy to Mamie Strange. RX 3. In the letter, Respondent explained that the deadline to file an appellate brief was approaching, and that under the retainer agreement, Mrs. Strange still owed Respondent $3,000 for his services. Respondent also stated that he would file a brief for Mr. Strange, if Mr. Strange wanted him to. Neither Mr. Strange nor Mamie Strange responded to Respondent's letter. Tr. 228 (M. Strange), 312 (R. Strange).

120. On November 21, 2008, Mr. Williams sent Mr. Strange a draft brief for his review. BX 59. Mr. Williams filed a brief for Mr. Strange on December 10, 2008. BX 60.

121. Respondent did not refund any of the $4,500 Mrs. Strange paid him to handle Mr. Strange's appeal. Tr. 226-27 (M. Strange), 600-601 (Respondent). Mrs. Strange did not request a refund from Respondent. Tr. 227 (M. Strange).

E. Conclusions of Law With Respect to Respondent's Representation of Roderick Strange (Count Two: Bar Docket No. 2009-D170)

122. Disciplinary Counsel alleges that Respondent violated Rule 1.4(a) in the Roderick Strange matter by failing to adequately explain the appeals process to Mr. Strange at the outset of the representation, by failing to communicate to Mrs. Strange or Mr. Strange that he would not commence work on the case until the entire fee was paid, and by failing to communicate with Mr. Strange or his family members throughout the course of the representation. Disciplinary Counsel also alleges that Respondent failed to timely respond to Mr. Strange's family, who frequently called his office requesting status updates. D.C. Br. at 33-35. As explained below, we find that Disciplinary Counsel proved that Respondent violated Rule 1.4(a) by failing to adequately

communicate with Mrs. Strange concerning the retainer agreement, and by failing to communicate with Mr. Strange for several months after being retained to prosecute his appeal.

i. Respondent Reasonably Communicated with Roderick Strange during their Initial Meeting.

123. Disciplinary Counsel contends that Respondent violated Rule 1.4(a) in the Strange representation when he failed to discuss the substance of the case with Mr. Strange and to explain the process for filing an appeal at their first and only meeting at the D.C. Jail on March 26, 2008. In support, Disciplinary Counsel relies on Mr. Strange's testimony, in which he stated that Respondent did "not really" explain the appeals process, and that Mr. Strange and Respondent only discussed "what happened during [Mr. Strange's] case, and what [he] was charged with," as well as the facts underlying Mr. Strange's conviction. Tr. 301-02 (R. Strange).

124. We find that this evidence is insufficient to show, by clear and convincing evidence, that Respondent failed to discuss the substance of the case with Mr. Strange during their initial meeting, particularly in light of the fact that Mr. Strange asked his mother to retain Respondent after this initial meeting.

ii. Respondent Failed to Reasonably Communicate with the Stranges Concerning the Meaning of the Retainer Agreement.

125. Mr. Strange's mother, Mamie Strange, and Respondent met with Respondent on March 31, 2008 to execute the retainer agreement. The agreement provided that Respondent's fee on appeal would be $7,500, with $4,000 due at the time the agreement was signed. BX 48. The remainder was due in installments payable on May 1, 2008 ($500), July 1, 2008 ($500), and September 1, 2008 ($2,500). The retainer agreement states: "[t]o engage the attorney under this Retainer agreement, the client shall execute this agreement and submit payment of ($4,000) along with the executed retainer agreement." BX 49. In the cover letter that accompanied the retainer agreement, Respondent stated "Once retained, I will proceed with the appeal of your son's criminal

conviction." *Id*. Nothing in the retainer agreement provided that Respondent would not enter his appearance unless the $7,500 fee was paid in full. *Id*. In fact, Respondent's March 27, 2008 cover letter to Mamie Strange enclosing the retainer agreement stated, "once retained I will proceed with the appeal of your son's criminal conviction." BX 48. Respondent checked on the status of the appeal with the Appeals Coordinator office, and thus, did some work on the appeal.

126. Respondent testified that he told the Stranges that he never intended to enter an appearance in the Strange case until he was paid in full. Tr. 546 (Respondent). This was not made clear in the retainer. Moreover, the final installment payment under the retainer agreement was not due until September 1, 2008 – several months after the retainer agreement was signed, and only eight days before Mr. Strange's appellate brief was due. Nothing in the record suggests that the Stranges understood that Respondent would not enter his appearance until shortly before the brief was due. The Stranges' repeated requests for information between March 2008 and October 2008 show that Roderick and Mamie Strange expected Respondent to enter an appearance and commence work on the case upon being retained. Respondent's failure to communicate either orally or in the retainer agreement that he would not enter his appearance until the entire flat fee was paid violated Rule 1.4(a).

iii. Respondent Violated Rule 1.4(a) by Failing to Communicate with Roderick Strange after the Retainer Agreement Was Signed.

127. Disciplinary Counsel established by clear and convincing evidence that Respondent violated Rule 1.4(a) with respect to his failure to reasonably communicate with Roderick Strange between March 31, 2008 and November 20, 2008.

128. Specifically, Disciplinary Counsel notes that, apart from his initial meeting with Mr. Strange at the D.C. Jail, Respondent spoke to his client only once, in October 2008, seven months after he was retained. Respondent does not dispute that over the course of several months,

Mr. Strange and his family attempted to contact him concerning the status and progress of the appeal. Once, Respondent answered Mr. Strange's call, but did not discuss anything of substance, because he had not yet received the trial transcript. Tr. 554 (Respondent). Respondent's assistant made some efforts to schedule a conference call with Mr. Strange in July 2008, but the call never took place.

129. Thus, during the representation, Respondent spoke to Mr. Strange once but never explained to him the appeals process, or the issues to be addressed on appeal. Specifically, Respondent testified that he had intended to assert on appeal that Mr. Strange had been deprived of the effective assistance of counsel at trial, but then failed to communicate to Mr. Strange the steps for pursuing an ineffective assistance of counsel claim, including the need to obtain a copy of the trial transcripts, and the requirement that a motion first be filed with the trial court. *See* Tr. 573-578 (Respondent). This failure of communication violated Rule 1.4(a).

iv. Disciplinary Counsel Failed to Prove the Failure to Communicate with Mamie Strange, Roderick Strange's Designate, or that He Had an Obligation to Communicate with Other Members of the Strange Family.

130. Disciplinary Counsel further asserts that Respondent violated Rule 1.4(a) by failing to adequately communicate with members of Roderick Strange's family, "despite Respondent's promise to keep Mr. Strange's family informed about the status of the appeal." *See* D.C. Br. at 35 (arguing that Respondent's communications with Ms. Byrd violated Rule 1.4(a)).

131. Mamie Strange retained Respondent to represent Mr. Strange on appeal. *See* BX 48. Disciplinary Counsel contends that thereafter, Respondent failed to adequately communicate with Mrs. Strange about the substance of Mr. Strange's case. However, Disciplinary Counsel failed to show that Respondent's client, Mr. Strange, ever authorized Respondent to speak about the case with Mrs. Strange. Accordingly, we cannot find that Respondent had a duty to update

Mrs. Strange as to the status of Mr. Strange's appeal, or that he violated Rule 1.4(a) by failing to communicate with her.

132. Rule 1.8(e) permits an attorney to accept compensation for representing a client from someone other than the client if:

> (1) The client gives informed consent after consultation;
>
> (2) There is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
>
> (3) Information relating to representation of a client is protected as required by Rule 1.6.

133. Rule 1.6, in turn, requires that an attorney "shall not knowingly reveal a confidence or secret of the lawyer's client, with "confidence" defined as "information protected by the attorney-client privilege under applicable law," and "secret" defined as "other information gained in the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing, or would be likely to be detrimental, to the client." Rule 1.6(a), (b). Absent authorization from Mr. Strange, Respondent was not permitted to discuss information about the representation with any other person, including Mrs. Strange and Mr. Strange's other relatives. *See* Rule 1.6, Comment [12] (Rule 1.6 permits disclosure of client confidences where the attorney has obtained the informed consent of the client); Rule 1.0(d) (defining "informed consent" as "the agreement by a person to a proposed course of action after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct").

134. Absent any proof that Mr. Strange provided Respondent with informed consent to communicate about his case with Mrs. Strange or other family members, it was not unreasonable

for Respondent to refrain from communicating with them about the status of the case, despite their frequent efforts to speak with him, and Respondent did not violate Rule 1.4(a) on this basis.

F. Findings of Fact With Respect to Respondent's Representation of Toby Cooper (Count Three: Bar Docket No. 2010-D401)

135. In February 2009, Toby Cooper was the victim of what she considered to be racial discrimination. Ms. Cooper asserted that while walking in her neighborhood in Leesburg, Virginia with her mother, local police wrongly accused the pair of trespassing. Tr. 677-79 (Cooper). Ms. Cooper also asserted that the police tried to force her and her mother to leave a country club where Ms. Cooper was a member. *Id*. Ms. Cooper, acting *pro se*, filed a lawsuit arising out of these events in the Loudoun County Circuit Court. Tr. 679-80 (Cooper).

136. On December 4, 2009, Ms. Cooper took a nonsuit (a voluntary dismissal without prejudice), because she was unable to pursue the case while taking care of her ailing mother. Tr. 680 (Cooper); BX 34. A Loudoun County Circuit Judge told Ms. Cooper that she had to refile her case within six months of taking the nonsuit. Thus, Ms. Cooper understood that the deadline for refiling her case was June 4, 2010. Tr. 681 (Cooper).[19]

137. Ms. Cooper recalled that she spoke with Respondent by telephone in late April or May 2010 to discuss whether he would represent her in refiling her lawsuit. Tr. 682 (Cooper). Respondent testified that Ms. Cooper left him messages on May 22, 2010 and May 28, 2010, and that they first spoke when he returned her calls on June 1, 2010. R. Br. at 18.

138. Ms. Cooper's cell phone records corroborate that she and Respondent spoke on June 1, 2010 for 67 minutes; on June 2, 2010 for 12 minutes; and on June 7, 2010 for 38 minutes.

[19] In fact, the Statute of Limitations did not expire until February 2011.

BX 44. These were the only telephone conversations Respondent and Ms. Cooper had during the course of the representation. Tr. 698 (Cooper).

139. During their initial June 1 phone call, Ms. Cooper and Respondent discussed the facts of the case, and Ms. Cooper's potential lawsuit against the Loudoun County Sheriff's Department. Tr. 682-83 (Cooper), 817 (Respondent). Although she had not yet retained Respondent, Ms. Cooper believed that Respondent would refile her case in Loudoun County Circuit Court prior to June 4, 2010. Tr. 682-83 (Cooper).

140. During their June 7, 2010 call, Ms. Cooper learned that Respondent had not refiled her case in Loudoun County Circuit Court. Ms. Cooper was "livid," and demanded an explanation. Tr. 688-89 (Cooper). Ms. Cooper testified that during the June 7 call, Respondent informed Ms. Cooper for the first time that he intended to file her case in the U.S. District Court for the Eastern District of Virginia. Tr. 684-85, 689 (Cooper). He explained to Ms. Cooper that his failure to file the complaint in Loudoun County was of no consequence. Tr. 685 (Cooper). Respondent told Ms. Cooper that her case should have been filed in federal court, and that her Loudoun County complaint had "no chance" because she had not identified the proper defendants, and Loudoun County was "not a very hospitable" jurisdiction for a racial discrimination case. Tr. 817-18 (Respondent).

141. At some point during their June conversations, Ms. Cooper and Respondent discussed Respondent's fee. Tr. 689-690 (Cooper), 819-821 (Respondent). They agreed that Respondent would represent Ms. Cooper, that she would pay Respondent a $5,500 retainer, and that Respondent would collect a percentage of any recovery in excess of $5,500. Tr. 689-690 (Cooper), 820-21 (Respondent).

142. On June 11, 2010, Respondent signed and sent to Ms. Cooper a retainer agreement. BX 35; Tr. 690-91 (Cooper). The retainer agreement provided:

> I agree to pay said attorneys as a fee for professional services an engagement fee of five thousand five hundred dollars ($5,500.00), which is paid to attorneys in exchange for attorneys agreeing to take my case on a contingency fee basis. It is understood that this fee becomes the exclusive property of the attorneys upon execution of this agreement and delivery of the fee to attorneys.

143. The retainer agreement provided that Respondent would be entitled to 33% of any recovery in excess of $5,500 obtained after settlement, or 40% of any recovery in excess of $5,500 obtained after litigation. BX 35. The agreement stated that Ms. Cooper would be responsible for payment of all expenses and court costs associated with prosecuting her claim. *Id*.

144. Over the next few days, Ms. Cooper and Respondent exchanged emails concerning the retainer agreement. Tr. 691-95 (Cooper); RX 4. In one email, Ms. Cooper stated that she believed the description of the contingent fee arrangement in the draft agreement was incorrect. RX 4. In a reply email, Respondent explained that the fee provision in the draft agreement was accurate, and explained that the contingent fee provisions would only apply in the event more than $5,500 was recovered on Ms. Cooper's behalf.

145. In response, Ms. Cooper thanked Respondent for "clearing up [her] concerns," and requested an appointment to meet and sign the retainer agreement so that Respondent could "get started on [her] case." RX 4.

146. On June 18, 2010, Ms. Cooper met with Respondent at his office in Washington, D.C., and executed the retainer agreement. Tr. 695-98 (Cooper). At that time, Ms. Cooper also paid Respondent $5,500. Tr. 697 (Cooper).

147. Ms. Cooper testified that she understood that the $5,500 was a "retainer" that Respondent would use "to get started on [her] case." Tr. 696-97 (Cooper). Ms. Cooper understood

that Respondent would use the money for "up front" costs, such as hiring a private investigator, obtaining a copy of the tape of the 911 call placed to complain about Ms. Cooper and her mother, and hiring an expert witness. Ms. Cooper testified that Respondent never told her that the retainer was non-refundable. Tr. 696-97 (Cooper). However, Ms. Cooper testified that during the June 18 meeting, Respondent told her that he would provide her with an accounting of how the funds were spent. Tr. 697 (Cooper).

148. Respondent testified that during the June 18 meeting, he fully explained to Ms. Cooper that the $5,500 was "an engagement fee" which Respondent charged in exchange for taking her case on a contingent fee basis. Tr. 837 (Respondent). Respondent further testified that he explained to Ms. Cooper that "costs have nothing to do with" the $5,500, which "becomes my funds at the moment you pay them, the exclusive property of my law office." *Id*.

149. Respondent further explained to Ms. Cooper that he would be visiting the incident site himself. Respondent requested that Ms. Cooper gather information concerning her claims, including a map of the community where the incident occurred, and a list of witnesses and their contact information. Tr. 699 (Cooper), 826-28 (Respondent).

150. At the June 18 meeting, Respondent impressed upon Ms. Cooper that the Eastern District of Virginia was considered a "rocket docket" and that she would need to gather all the necessary background information before filing her complaint. Tr. 699-70 (Cooper). Accordingly, on June 24, Ms. Cooper emailed Respondent the witness names he had requested during their June 18 meeting. Tr. 700 (Cooper).

151. On July 1, 2010, Ms. Cooper mailed Respondent a package of documents relevant to her case. Tr. 702-03 (Cooper); BX 37. On July 6, 2010, Ms. Cooper emailed Respondent to check whether he had received the package, but received no response. BX 36; Tr. 705-06

(Cooper). That same day, Ms. Cooper also telephoned Respondent's office, and was told the package had not been received. Tr. 705-06 (Cooper).

152. On July 6, 2010, Respondent emailed Ms. Cooper to explain that he had been in trial when she tried to reach him, that he was "preparing the complaint in [her] case presently," and that he would "let [her] know when we file." BX 36. Respondent did not state whether he had received Ms. Cooper's package. *Id*.

153. Two days later, on July 8, 2010, Ms. Cooper again emailed Respondent to see whether he had received the package. BX 36. Nearly two weeks later, on July 19, 2010, Respondent's assistant, Ms. Berk, finally emailed Ms. Cooper to confirm receipt of the package, and explained that Respondent was in trial and would contact Ms. Cooper "at his first opportunity." BX 36. Respondent never followed up. Tr. 711-12 (Cooper).

154. Ms. Cooper did not see Ms. Berk's July 19 email until July 22. Tr. 710-711 (Cooper). Thus, on July 21, 2010, Ms. Cooper re-sent the package to Respondent's office. BX 38.

155. In a cover letter for the second package, Ms. Cooper requested that Respondent "[p]lease update me on what action you've taken on my case. I understand that we are on the fast track as you call it, the 'rocket docket' and want to be sure you have everything needed to move forward with my case in a timely and complete manner." BX 38.

156. Ms. Cooper called Respondent's office on July 26, 2010 and on July 27, 2010. Both times, Ms. Cooper was told that Respondent was unavailable. Tr. 711-14 (Cooper); BX 44.

157. Ms. Cooper called Respondent's office three times between 1:56 p.m. and 2:02 p.m. on July 28, 2010, and was again told that Respondent was unavailable. Tr. 714-15 (Cooper); BX 44. Eventually, Ted Williams, another attorney in the office and a friend of Respondent's, returned

Ms. Cooper's call. Tr. 714-15 (Cooper), 832 (Respondent). This was the first and only time that Ms. Cooper spoke to Mr. Williams. Tr. 715 (Cooper). Ms. Cooper complained to Mr. Williams that Respondent had not returned her calls. Mr. Williams agreed to contact Respondent and have him contact Ms. Cooper. Tr. 716 (Cooper).

158. On July 28, 2010, at 3:21 p.m., Respondent emailed Ms. Cooper, stating that he was on vacation but had been alerted by Mr. Williams of Ms. Cooper's concerns and that he had not realized that she was unhappy with his representation. BX 39. Respondent's email stated that "I have repeatedly told you that I am preparing to advance your claim, I do that in the manner that I determine is best." He also stated that "[i]f you are truly dissatisfied with me, I urge you to seek other counsel and you should also understand that I will not accept you disparaging me to other lawyers while I am supposedly working on your behalf." *Id.*

159. At 4:36 p.m. on July 28, 2010, after receiving Respondent's email, Ms. Cooper called him. Tr. 720 (Cooper); BX 44. She was not able to reach Respondent at that time. Tr. 720 (Cooper). At 9:22 p.m., Ms. Cooper sent an email to Respondent, rebuking him for his lack of communication and failure to update her on the status of her case, the rudeness of his staff, and urging him to file her complaint. BX 39.

160. At 11:55 p.m. on July 28, Respondent sent a reply email, in which he disagreed with Ms. Cooper's characterization of their communications. BX 39. In that email, Respondent stated that he had provided Ms. Cooper a status update in his July 6 email and that the status of the case had not changed since then. He also noted that Ms. Berk had emailed her on July 19. *Id.*

161. Ms. Cooper responded by email on July 30, reiterating her concerns about Respondent's representation and to confirm whether Respondent had the materials necessary to move forward. *Id.* Respondent did not respond. Tr. 728-29 (Cooper).

162. Approximately three weeks later, on August 19, Ms. Cooper again emailed Respondent requesting an update on the status of her case. BX 40. Respondent did not respond. Tr. 729-30 (Cooper).

163. On September 3, 2010, Ms. Cooper called Respondent's office but did not reach him. BX 44; Tr. 730 (Cooper). Respondent testified that he did not know that Ms. Cooper had called his office on September 3. Tr. 903 (Respondent).

164. In an email dated September 22, 2010, Ms. Cooper discharged Respondent and requested the return of her full $5,500.00 fee. BX 41; Tr. 730-31 (Cooper).

165. Respondent immediately replied by email, stating that he had done substantial work on Ms. Cooper's case and that per the retainer agreement, she was not entitled to a full refund. BX 41. Thereafter, Ms. Cooper's files were returned to her by mail, but her retainer was not. BX 42.

166. Ms. Cooper was unable to retain another attorney to take her case. She testified that most attorneys required a fee for an initial consultation and that she had no money after having paid Respondent $5,500, and her mother's medical bills. Tr. 740-41 (Cooper). Other attorneys with whom Ms. Cooper spoke were unwilling to take the case based on the short window before the Statute of Limitations was due to expire in February 2011. Tr. 741-42 (Cooper).

167. On November 3, 2010, Ms. Cooper filed a request for arbitration with the District of Columbia Bar Attorney/Client Arbitration Board. BX 64 at 2. On March 27, 2011, Respondent filed an untimely opposition to Ms. Cooper's request. *Id*. On July 21, 2011, the arbitrator awarded Ms. Cooper the full amount of the fees she paid Respondent, $5,500. BX 46; BX 64 at 2; Tr. 742 (Cooper).

168. Respondent did not comply with the arbitrator's award. Thus, on September 20, 2011, Ms. Cooper filed an action in D.C. Superior Court to confirm the award. Tr. 744-45 (Cooper); BX 64 at 2.

169. On November 3, 2012, Respondent commenced a civil action against Ms. Cooper, alleging that she had made defamatory statements in her complaints to the ACAB and Disciplinary Counsel, and seeking damages of $2,000,000. BX 66. Respondent voluntarily dismissed the case on November 30, 2012.[20]

170. On April 9, 2013, the Superior Court of the District of Columbia issued an order confirming Ms. Cooper's arbitration award. BX 64.

171. On April 23, 2013, Respondent filed a motion to alter or amend the Court's April 9, 2013 judgment confirming the arbitration award. RX 6.

172. On January 29, 2014, the court issued a second order confirming the arbitration award of the Attorney/Client Arbitration Board, and denying Respondent's motion to alter and/or amend the court's judgment of April 9, 2013. BX 67.

G. Conclusions of Law With Respect to Respondent's Representation of Toby Cooper (Count Three: Bar Docket No. 2010-D401)

173. Disciplinary Counsel contends that Respondent violated Rule 1.4(a) by failing to keep Toby Cooper reasonably informed about the status of her case at the outset of the representation, failing to adequately communicate the terms of the retainer, and failing to respond

[20] In its sanctions brief, Disciplinary Counsel asserts that Respondent voluntarily dismissed his complaint against Ms. Cooper after Disciplinary Counsel sent Respondent a letter. D.C. Sanctions Br. at 8. Respondent asserts that he dismissed the case because he performed some legal research and determined that Ms. Cooper's statements to the ACAB were privileged and thus not actionable. R. Sanctions Br. at 7. Neither Disciplinary Counsel nor Respondent cite any record evidence that shows the reason for the voluntary dismissal.

to Ms. Cooper's reasonable requests for information during the course of the representation. We agree.

i. Disciplinary Counsel Failed to Prove the Failure to Keep Ms. Cooper Reasonably Informed at the Outset of the Representation.

174. Disciplinary Counsel alleges that Respondent did not intend to begin work on the Cooper case until the retainer agreement was executed, but that he failed to communicate that fact to Ms. Cooper. As a result, Disciplinary Counsel argues, Ms. Cooper believed that Respondent would refile her case in Loudoun County prior to June 4, 2010. Disciplinary Counsel asserts that Ms. Cooper thus was deprived of an opportunity to make a meaningful decision whether to allow the June 4, 2010 deadline for her state court claim to lapse, presenting her with a "*fait accompli*" to file in federal court.

175. Disciplinary Counsel's position that Respondent failed to keep Ms. Cooper "reasonably informed" so that she might make a meaningful decision about her state court claim rests on the mistaken premise that the deadline to refile in Loudoun County Circuit Court was June 4, 2010. In fact, the deadline was February 2011, the date when the Statute of Limitations for her claim under 42 U.S.C. § 1983 was set to expire.[21] Thus, there is no basis to find that Respondent failed to keep Ms. Cooper reasonably informed of an imminent deadline, which did not in fact exist.

[21] Va. Code § 8.01-229(E)(3) provides that where a plaintiff takes a voluntary nonsuit, the statute of limitations shall be tolled until six months after entry of the nonsuit, or until expiration of the original statute of limitations, whichever is later. Ms. Cooper's claim under 42 U.S.C. § 1983 arose out of her encounter with police in February 2009. The statute of limitations for a Section 1983 claim was two years. *See Owens v. Okure*, 488 U.S. 235 (1989) (statute of limitations for § 1983 action is equivalent to the statute of limitations for a personal injury claim under applicable state law); Va. Code §8.01-243(A) (statute of limitations for personal injury claim is two years). Thus, under Va. Code § 8.01-229(E)(3) the statute of limitations for Ms. Cooper's claim was to expire in February 2011.

176. Moreover, the evidence does not support Disciplinary Counsel's position that Respondent failed to communicate to Ms. Cooper that he would not begin working on her case until the retainer was executed. To the contrary, Ms. Cooper testified that during their conversations on June 1, 2010 and June 2, 2010, Respondent was "very cavalier" about the June 4 date, because he intended to file her case in federal court. Tr. 683-85 (Cooper). Respondent's testimony was consistent; he testified that he informed Ms. Cooper during their initial calls that it would be a "complete waste" to refile the racial discrimination case in Loudoun County Circuit Court, and that he believed from the start that her case should have been filed in federal court. Tr. 817-18 (Respondent). Under these circumstances, we cannot find that Respondent failed to adequately communicate with Ms. Cooper before June 4, that he failed to keep Ms. Cooper reasonably informed about a potential state court action, or that he allowed the June 4 "deadline" to pass, without explanation.

ii. Disciplinary Counsel Proved that Respondent Failed to Reasonably Inform Ms. Cooper of the Terms of the Retainer Agreement.

177. Disciplinary Counsel further alleges that Respondent violated Rule 1.4(a) when he failed to communicate to Ms. Cooper the terms of the retainer, the logistics for associating with Virginia counsel or whether Ms. Cooper would have to pay legal fees for Virginia counsel. Specifically, Disciplinary Counsel contends that Respondent failed to clarify that the "engagement fee" of $5,500 was non-refundable, thereby denying Ms. Cooper a meaningful opportunity to make an informed decision about whether to retain him. D.C. Br. at 36. In response, Respondent argues that the retainer agreement clearly states that the entire $5,500 fee "becomes the exclusive property of [Respondent] upon execution of this agreement and delivery of the fee to [Respondent]." BX 35. We agree that Respondent failed to reasonably inform Ms. Cooper about the fixed fee arrangement.

178. In *In re Mance*, 980 A.2d 1196 (D.C. 2009),[22] the Court held that an attorney may charge a fixed fee, but that he must first "obtain informed consent from the client" before depositing the funds in his operating account. Thus, the Court stated that:

> The attorney must expressly communicate to the client verbally and in writing that the attorney will treat the advance fee as the attorney's property upon receipt; that the client must understand the attorney can keep the fee only by providing a benefit or providing a service for which the client has contracted; that the fee agreement must spell out the terms of the benefit to be conferred upon the client; and that the client must be aware of the attorney's obligation to refund any amount of advance funds to the extent that they are unreasonable or unearned if the representation is terminated by the client.

Mance, 980 A.2d at 1206-7 (quoting *In re Sather*, 3 P.3d at 403, 413 (Colo. 2000)).

179. Respondent's retainer agreement with Ms. Cooper stated that the $5,500 "non-refundable engagement fee" would become Respondent's "exclusive property" upon payment. Respondent failed to explain to Ms. Cooper, either verbally or in writing, that he was obligated to refund any unearned portion of the $5,500 in the event she terminated the representation. Indeed, Ms. Cooper understood that Respondent would use the $5,500 as an advance against services rendered to her by Respondent and any third parties he hired, such as investigators. Tr. 805-6 (Cooper). Ms. Cooper also understood that Respondent would provide her with an invoice documenting his time and expenditures to account for his use of the funds, although he never did so. Tr. 696-97 (Cooper).

[22] Although Respondent engaged in similar fixed fee arrangements with Ms. Rowe and Mr. Strange, he was retained in those matters prior to the Court's decision in *Mance*. Thus, he was not required to make the *Mance* disclosures in those cases.

180. Because Respondent did not make the disclosures required under *Mance*, we find he failed to adequately communicate with Ms. Cooper concerning the terms of the retainer agreement, in violation of Rule 1.4(a).

iii. Respondent's Failure to Communicate with Ms. Cooper after the Execution of the Retainer Agreement

181. Ms. Cooper signed the retainer agreement on June 18, 2010, and discharged Respondent on September 22, 2010. FF 146, 164. Disciplinary Counsel contends that Respondent's failure to communicate with her during that period, despite her constant efforts to reach him, violated Rule 1.4(a). During that time, Ms. Cooper received only three communications from Respondent's office, despite her persistent efforts to reach him. First, on July 6, 2010, Respondent emailed Ms. Cooper telling her that he was in trial and that he was "preparing the complaint in her case presently." FF 152; BX 36. On July 6 and July 8, Ms. Cooper emailed Respondent to see whether he had received a package of documents she sent him. FF 152-153. On July 19, Ms. Cooper received her second communication from Respondent's office: an email from Ms. Berk explaining that the package had been received. FF 153.

182. On July 26-28, Ms. Cooper called Respondent's office several times. Ultimately, Ted Williams, another attorney who was a friend of Respondent's, returned Ms. Cooper's call, and spoke to Respondent on her behalf. Finally, on July 28, Respondent emailed Ms. Cooper twice in response to her complaints to Mr. Williams, stating that the status of her case had not changed and expressing dissatisfaction with Ms. Cooper's disparaging remarks about his representation. FF 158. Thereafter, Respondent did not communicate with Ms. Cooper for nearly two months, until after she terminated his services on September 22, 2010. FF 161-164.

183. Respondent maintains that his communications with Ms. Cooper were reasonable, citing *Schoeneman*, 777 A.2d at 264-65. Respondent emphasizes that in *Schoeneman*, the Court

held that "[a]n attorney need not communicate with a client as often as the client would like, as long as the attorney's conduct was reasonable under the circumstances." Respondent argues that his conduct was reasonable, because "[n]othing had changed with respect to the status of the case," and Respondent planned to update Ms. Cooper after he filed the complaint.

184. Respondent's reliance on *Schoeneman* is misplaced. In *Schoeneman*, the Court held that despite the client's dissatisfaction with the infrequency of the attorney's communications, the respondent's monthly updates were not "*prima facie* unreasonable" under the circumstances and therefore did not violate Rule 1.4(a). *Id.* Importantly, however, *Schoeneman* involved a long-term, complex fraud investigation coupled with extended negotiations. *Id.* Due to the drawn-out nature of that case, the Court found that monthly conversations were not *prima facie* unreasonable. Furthermore, when Schoeneman did communicate with his client, he provided updates on the status of her case. *Id.*

185. Here, the entirety of Respondent's representation of Ms. Cooper spanned approximately five months, during which time the only status updates Respondent provided Ms. Cooper were limited to his July 6 and July 28, 2010 emails, where he stated that he had not yet filed the complaint. FF 152, 160. These communications came only after extended efforts by Ms. Cooper to reach Respondent. After July 28, Ms. Cooper heard nothing from Respondent for nearly two months, until she terminated him on September 22, 2010. FF 164.

186. Respondent personally instilled a sense of urgency upon Ms. Cooper when he told her that the Eastern District of Virginia was considered a "rocket docket" and that she would need to have all her information prepared in order to move forward quickly. FF 150. Ms. Cooper rushed to get Respondent the materials he required and expected that Respondent would move the case quickly based on his own assertions. Under these circumstances, Ms. Cooper's expectations

for information were reasonable and we find that Disciplinary Counsel has shown by clear and convincing evidence that Respondent violated Rule 1.4(a) when he kept her in the dark by failing to provide her with any substantive information concerning the status of her case, including when he expected to file the complaint. *See Hallmark*, 831 A.2d at 374 ("The guiding principle for evaluating conduct under Rule 1.4(a) is whether the lawyer fulfilled the client's reasonable . . . expectations for information.") (citations and internal quotations omitted).

V. SANCTION

187. Disciplinary Counsel recommends a sanction of a six-month suspension with a fitness requirement with restitution for Respondent's alleged violations of Rule 1.4(a), misconduct which, in the ordinary course, would result in a sanction of an informal admonition. Respondent contends that the appropriate sanction, if any, is an informal admonition. For the reasons set forth below, and based on our finding that Respondent violated Rule 1.4(a) in two separate matters, we recommend that Respondent receive a public censure.

A. Standard of Review

188. The appropriate sanction is one that is necessary to protect the public and the courts, to maintain the integrity of the profession, and to deter Respondent and other attorneys from engaging in similar misconduct. *See In re Martin*, 67 A.3d 1032, 1053 (D.C. 2013) (citing *In re Scanio*, 919 A.2d 1137, 1144 (D.C. 2007)). The sanction imposed must also be consistent with cases involving comparable misconduct. *See* D.C. Bar R. XI, § 9(h)(1); *In re Elgin*, 918 A.2d 362, 373 (D.C. 2007); *In re Berryman*, 764 A.2d 760, 766 (D.C. 2000). The determination of a disciplinary sanction takes into account: (1) the seriousness of the conduct at issue; (2) the prejudice, if any, to the client which resulted from the conduct; (3) whether the conduct involved dishonesty and/or misrepresentation; (4) the presence or absence of violations of other provisions

of the disciplinary rules; (5) whether the attorney had a previous disciplinary history; (6) whether or not the attorney acknowledged his or her wrongful conduct; and (7) circumstances in mitigation of the misconduct. *See In re Vohra*, 68 A.3d 766, 784 (D.C. 2013) (citing *In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (en banc)).

B. Disciplinary Counsel's Position

189. Disciplinary Counsel argues that a severe sanction is warranted, because Respondent repeatedly took advantage of vulnerable clients by requiring that they pay him substantial advance fees, and then refused to communicate with the clients, or perform any work on their cases. *See* D.C. Sanctions Br. at 2. Specifically, Disciplinary Counsel asserts that in each of the three matters at issue, Respondent initially made himself available in order to induce Ms. Rowe, Mr. Strange, and Ms. Cooper to retain him. D.C. Br. at 1-2. Then, after the retainer agreements were signed, and Respondent was paid a substantial portion of his fee, he did no work, and avoided further contact with his clients. *Id*. According to Disciplinary Counsel, Respondent's lack of communication caused each of his clients to discharge him, at which time Respondent either refused or failed to refund the client's fee, despite performing little to no work. *Id*.

190. Based on the foregoing, Disciplinary Counsel concludes that Respondent not only violated Rule 1.4(a) in each of the three matters at issue, but also violated Rules 1.1(a) and (b) (competence), Rule 1.3(a) (diligence and zeal), Rule 1.3 (c) (reasonable promptness), and Rule 1.5(a) (unreasonable fee). Disciplinary Counsel also argues that Respondent's conduct in the Cooper matter "approached misappropriation" because Respondent charged her a non-refundable flat fee in violation of the Court's ruling in *Mance*. Disciplinary Counsel further asserts that Respondent retaliated against Ms. Cooper and violated Rule 8.4(d) by refusing to satisfy the ACAB fee award in her favor, and by filing a $2 million lawsuit against her for allegedly making

defamatory statements during the ACAB arbitration. Finally, Disciplinary Counsel argues that Respondent testified falsely at the hearing that he arranged a conference call with Mr. Strange while he was in prison. D.C. Sanctions Br. at 8. Taking into account all of Respondent's alleged misconduct and the aggravating factors, Disciplinary Counsel concludes that Respondent should be suspended for six months, with his reinstatement conditioned on a showing of fitness, and proof of restitution of the amount of $5,500 to Ms. Cooper. *See* D.C. Sanctions Br. at 9-10.

C. Respondent's Position

191. Respondent argues that if any sanction is to be imposed, it should be an informal admonition. Respondent disputes Disciplinary Counsel's characterization of his conduct, and asserts that he did not deliberately withhold information from his clients, or seek to have his clients discharge him, because he had no incentive to do so, and such a practice ultimately would have harmed his business. *See* R. Sanctions Br. at 2-3, 9-10. Respondent also challenges Disciplinary Counsel's allegations that he violated any rule other than Rule 1.4(a), arguing that he should not be sanctioned for uncharged misconduct without notice and an opportunity to be heard. *Id*. at 4. Respondent disputes that the flat fee he charged Ms. Cooper violated *Mance*, and asserts that he did not retaliate against her. To that end, Respondent notes that he voluntarily dismissed his lawsuit against Ms. Cooper after researching the issue, and discovering that statements made in an ACAB proceeding are privileged, and thus that they cannot form the basis for a defamation suit. R. Sanctions Br. at 7. Respondent also denies Disciplinary Counsel's allegation that he lied at the hearing with respect to the Strange case. *Id*. at 8.

D. Recommended Sanction

192. Disciplinary Counsel's recommendation of a six-month suspension with a fitness requirement rests entirely on uncharged misconduct in the Rowe, Strange, and Cooper matters,

including alleged violations of Rules 1.1(a) and (b) (competence), 1.3(a) (diligence and zeal), 1.3(c) (reasonable promptness), 1.5(a) (unreasonable fee), and 8.4(d) (serious interference with the administration of justice), which Disciplinary Counsel asserts should be considered in aggravation of sanction. *See* D.C. Sanctions Br. at 3. Ordinarily, uncharged misconduct may be considered as an aggravating factor in determining the appropriate sanction, if it is supported by clear and convincing evidence. But it should not be considered here, because the allegations arise from the same set of facts underlying the Informal Admonition, which were previously rejected by Respondent and led to the instant disciplinary proceeding.[23]

193. Thus, Board Rule 6.4 precluded Disciplinary Counsel from adding any charges to the Specification of Charges in the instant matter, apart from the Rule 1.4(a) violations on which the letter of Informal Admonition was based. Board Rule 6.4 provides:

> In the event that respondent rejects an informal admonition, respondent shall request in writing a formal hearing. This hearing shall be conducted in accordance with Section 8(c) of Rule XI, except that [Disciplinary] Counsel and the Hearing Committee may not add any charge to the petition arising out of the same circumstances that [Disciplinary] Counsel was aware of at the time of the investigation, which charge was not included in the original informal admonition.

194. The prohibition against adding charges to a petition under Board Rule 6.4 is intended to avoid penalizing a respondent who chooses to reject an informal admonition. That purpose would be equally undermined if Disciplinary Counsel were permitted to introduce those

[23] On July 13, 2011, Disciplinary Counsel offered Respondent an informal admonition with respect to his alleged misconduct in the Rowe, Strange and Cooper matters, which he rejected. Ordinarily, a rejected informal admonition is confidential. *See* D.C. Bar R. XI, § 17(a). In this case, however, Respondent affixed a copy of the rejected informal admonition to his Supplemental Post-Hearing Brief, and has argued that Disciplinary Counsel is precluded from relying on additional uncharged misconduct to seek a sanction greater than an informal admonition.

same charges to support a material enhancement of the otherwise appropriate sanction, including a fitness requirement.

195. Moreover, Disciplinary Counsel's position, that it was unaware of the full extent of Respondent's misconduct at the time of the Informal Admonition, lacks any support in the record. To the contrary, the letter of Informal Admonition itself recounts the same basic facts that underlie most of the additional rule violations in the Rowe, Strange and Cooper matters, and generally asserts that Respondent did not timely communicate or perform work in the cases. RX S-1.

196. In addition, Respondent's letters to Disciplinary Counsel prior to the issuance of the Letter of Informal Admonition establish that Disciplinary Counsel was not only aware, but had already considered these other rule violations. The clearest example is Respondent's November 16, 2010 letter to Disciplinary Counsel, in which Respondent expressly disputes Disciplinary Counsel's assertion that he violated Rules 1.1, 1.3, 1.4, 1.5 and 1.16 in the Cooper matter. *See* RX 1 – 2010-D401. Similarly, in his May 7, 2007 letter to Disciplinary Counsel concerning the Strange case, Respondent defended his retention of the fee paid by Mamie Strange, and detailed the work he performed on the case, as well as his alleged communications with Mr. Strange and his family members. *See* RX 1 – 2009-D170. Respondent sent Disciplinary Counsel two letters concerning the Rowe case, dated August 18, 2009 and November 4, 2009. *See* RX 1 – D2009-319; RX 2 – D2009-319. Respondent's August 18, 2009 letter purports to attach Respondent's entire "file" from the Rowe case, which Disciplinary Counsel asserts is evidence of Respondent's neglect of the case. Respondent's November 4, 2009 letter contains a detailed recitation of the facts in the Rowe case, from Respondent's perspective, and corresponds in all relevant respects to his hearing testimony.

197. Accordingly, we have not considered the additional alleged violations of which Disciplinary Counsel was aware – the violations of Rules 1.1(a) and (b), 1.3(a), 1.3(c) and 1.5(a) -- and apparently chose not to prosecute, in aggravation of sanction.[24]

i. Seriousness of the Misconduct

198. Respondent violated Rule 1.4(a) with respect to two clients, Roderick Strange and Toby Cooper. Respondent's misconduct, while serious, does not warrant a period of suspension.

199. Disciplinary Counsel has cited no comparable case in which a suspension of any length was imposed as the sanction for a single violation of Rule 1.4(a), and we have identified no such cases. In fact, Respondents have received non-suspensory sanctions even where they violated other rules in addition to Rule 1.4(a). *See, e.g.*, *In re Schlemmer*, 870 A.2d 76 (D.C. 2005) (Board reprimand for violations of Rules 1.3(a) (diligence and zeal) and 1.4(a)); *In re Geno*, 997 A.2d 692 (D.C. 2010) (per curiam) (public censure for violations of Rules 1.3(c) (reasonable promptness)); *In re Mudd*, Bar Docket No. 458-02 (BPR Nov. 10, 2004) (informal admonition for violations of Rules 1.4(a) and 1.16(a) and (d) (termination of representation)). Thus, Disciplinary Counsel's requested sanction of a six-month suspension far exceeds the range of sanctions in comparable cases.

ii. Prejudice to the Clients

200. Respondent's failure to communicate with Mr. Strange and Ms. Cooper did not prejudice them. Disciplinary Counsel asserts that Mr. Strange was prejudiced because his mother did not receive a refund of the money she paid Respondent, but acknowledges that Mr. Strange's

[24] As discussed below, Disciplinary Counsel also argues that Respondent violated Rule 8.4(d) when he retaliated against Ms. Cooper by filing a defamation lawsuit, and contesting the ACAB award and judgment Ms. Cooper obtained. Such alleged misconduct occurred after the informal admonition was issued, and thus Board Rule 6.4 does not preclude us from considering it in aggravation of sanction.

court-appointed attorney timely prosecuted his appeal. Disciplinary Counsel further contends that Ms. Cooper was prejudiced because Respondent refused to refund her fees, and thus Ms. Cooper had no money to hire successor counsel. However, the record shows that after she discharged Respondent, Ms. Cooper was unable to hire another attorney because she was busy caring for her mother, not just because she had not received a refund from Respondent. Thus, Disciplinary Counsel has not established that Ms. Cooper suffered prejudice as a direct result of his misconduct.

iii. Whether the Conduct Involved Dishonesty and/or Misrepresentation

201. There is insufficient evidence to conclude that the Respondent's conduct involved dishonesty or misrepresentation.

iv. Violation of Other Disciplinary Rules

202. Disciplinary Counsel asserts that Respondent's conduct in failing to satisfy the ACAB award and judgment Ms. Cooper obtained "approaches misappropriation."

203. Ms. Cooper prevailed in the ACAB proceeding in August 2011. The arbitration award was entered in April 2013. Respondent refused to satisfy the award, and Ms. Cooper was compelled to file a *pro se* action in D.C. Superior Court to enforce it. In response, Respondent raised a number of meritless procedural arguments that were ultimately rejected by the court in its order of January 29, 2014. *See* BX 67.

204. Under similar circumstances, the Court found a violation of Rule 1.16(d) when the respondent resisted payment of an ACAB award to a client of unearned fees. *See In re Martin*, 67 A.3d 1032, 1046-47 (D.C. 2013). In *Martin*, the Court held that an attorney is required to satisfy an ACAB award, and that the respondent violated Rule 1.16(d) when he "repeatedly resist[ed] the mandatory arbitration process [by] 'taking fruitless appeals' with claims that were not substantial following the ACAB decision." *Id*. at 1047. Although the Court noted that Martin was entitled to

contest the ACAB arbitration, he violated the Rule when he challenged the award on baseless procedural grounds. *Id*. Similarly in this case, Respondent has resisted payment of Ms. Cooper's ACAB award for over two years on procedural and jurisdictional grounds that were ultimately rejected by the court. As in *Martin*, Respondent's failure to satisfy the ACAB award violated Rule 1.16(d).[25]

v. Prior Discipline

205. In 2006, Respondent was issued an informal admonition for conduct that took place in 2003 involving his failure to properly distribute the proceeds of a settlement, in violation of Rules 1.1(a) (competent representation), 1.1(b) (skill and care), 1.5(e) (failure to advise client in writing of division of fees and responsibilities of co-counsel), and 1.15(a) and (b) (failure to safe-keep and properly disburse client funds). Respondent has no other disciplinary infractions.

vi. Acknowledgement of the Wrongful Conduct

206. Respondent vigorously defended the allegations against him in this case. Indeed, he continues to assert that he "does not believe that he failed to keep any of the complainants apprised of any material aspect of their case in violation of Rule 1.4(a)." R. Sanctions Br. at 7. At the same time, Respondent contends that, with respect to subsequent cases, he has made a "concerted effort to assure that all phone calls and e-mails are responded to in some manner within 24 hours and that communications with difficult clients are done in writing." *Id*. at 10. Additionally, he represents that he has "taken steps to assure that all potential clients are informed, in writing, when and under what circumstances representation shall begin." *Id*. While

[25] Although Disciplinary Counsel asserts that Respondent was not entitled to retain the "engagement fee" he charged Ms. Cooper under the Court's opinion in *Mance*, 980 A.2d 1196 (D.C. 2009), Disciplinary Counsel notes that the *Mance* ruling was prospective, and that Disciplinary Counsel declined to charge Respondent with misappropriation in the Cooper matter "based upon the relatively new ruling in *Mance*." D.C. Sanctions Br. at 5.

Respondent's efforts to avoid future violations seem to suggests some acknowledgment of the wrongful conduct, the Hearing Committee finds that there is insufficient evidence in the record to make a determination concerning Respondent's degree of remorse for his misconduct in this case and we do not take it into account.[26]

vii. Other Circumstances in Aggravation and Mitigation

207. Disciplinary Counsel alleges that Respondent retaliated against Ms. Cooper by failing to pay an arbitration award, forcing her to apply to the Client Security Fund (CSF) for reimbursement. Disciplinary Counsel argues that Respondent violated Rule 8.4(d) when he filed a meritless defamation suit against Ms. Cooper, seeking $1 million in compensatory damages and $1 million in punitive damages. BX 66. Respondent voluntarily dismissed the complaint after discovering that any statements made to the CSF were confidential, thus precluding any recoverable damages.

208. We consider Respondent's frivolous suit against Ms. Cooper to be an aggravating factor. As Disciplinary Counsel notes, statements Ms. Cooper made to the Clients' Security Fund were confidential, and thus could not have defamed Respondent. Further, Respondent filed the complaint one month after Ms. Cooper testified against him in this disciplinary proceeding, and after Ms. Cooper obtained the ACAB award. The Court has viewed such retaliatory actions against a client as "particularly disturbing." *See In re Baber*, 106 A.3d 1072, 1077 (D.C. 2015) (respondent's frivolous lawsuit against former client, with whom he had a dispute, considered an aggravating factor; noting that attorney's misconduct was "particularly disturbing" where "it came

[26] As discussed *supra* at 4, in accordance with Board Rule 11.11, this Hearing Committee deferred the presentation of matters in aggravation and mitigation until after the parties submitted post-hearing briefs and the Hearing Committee determined that Disciplinary Counsel had proved a violation of Rule 1.4(a). Following that determination, the Hearing Committee ordered that the parties submit evidence of aggravating or mitigating factors in documentary form.

at the expense of his client's interests," and involved "knowingly false accusations" against the client).

v. Fitness Requirement

209. Disciplinary Counsel argues that Respondent should be required to prove his fitness to practice before he is reinstated to the Bar because Respondent failed to recognize his misconduct, has actively resisted remedying past wrongs, and retaliated against Ms. Cooper. D.C. Sanctions Br. at 9. The Court established the standard for imposing a fitness requirement in *In re Cater*, 887 A.2d 1, 24 (D.C. 2005). "[T]o justify requiring a suspended attorney to prove fitness as a condition of reinstatement, 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." Proof of a "serious doubt" involves "more than 'no confidence that a Respondent will not engage in similar conduct in the future." *In re Guberman*, 978 A.2d 200, 213 (D.C. 2009). It connotes "real skepticism, not just a lack of certainty." *Id.* (quoting *Cater*, 887 A.2d at 24).

210. In articulating this standard, the Court observed that the reason for conditioning reinstatement on proof of fitness was "conceptually different" from the basis for imposing a suspension. As the Court explained:

> The fixed period of suspension is intended to serve as the commensurate response to the attorney's past ethical misconduct. In contrast, 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. . . . [P]roof of a violation of the Rules that merits even a substantial period of suspension is not necessarily sufficient to justify a fitness requirement . . . .

Cater, 887 A.2d at 22.

211. In addition, the Court found that the five factors for reinstatement set forth in *In re Roundtree*, 503 A.2d 1215, 1217 (D.C. 1985), should be used in applying the *Cater* fitness standard. They include:

(a) the nature and circumstances of the misconduct for which the attorney was disciplined;

(b) whether the attorney recognizes the seriousness of the misconduct;

(c) the attorney's conduct since discipline was imposed, including the steps taken to remedy past wrongs and prevent future ones;

(d) the attorney's present character; and

(e) the attorney's present qualifications and competence to practice law.

Cater, 887 A.2d at 21, 25.

212. Disciplinary Counsel has failed to produce clear and convincing evidence of a serious doubt of Respondent's continuing fitness to practice based on his violations of Rule 1.4(a), for which an Informal Admonition is the ordinary sanction. And, as explained above, we cannot rely on the circumstances supporting Respondent's alleged violations of Rule 1.4(a) to support a fitness condition. Disciplinary Counsel knew of those circumstances at the time the Informal Admonition issued, but decided not to bring formal charges. Disciplinary Counsel failed to establish a serious doubt regarding Respondent's fitness to practice.

213. As discussed above, the sanctions in cases involving comparable misconduct range from informal admonition to public censure. *See supra* at 56. Here, considering Respondent's prior informal admonition and the frivolous lawsuit that he filed against his former client, the Hearing Committee recommends that Respondent receive a public censure. *See In re Geno*, 997 A.2d at 693-4.

vi. Restitution

213. Disciplinary Counsel contends that Respondent should pay $4,500 to Mamie Strange and $5,500 to Ms. Cooper, with interest, in restitution, as a condition of reinstatement.[27] D.C. Sanctions Br. at 9. The sole basis for this argument is that Respondent "unjustly kept" his clients' money. However, Disciplinary Counsel cites no authority for the proposition that restitution may be ordered in a disciplinary case where the sole violation is a failure to communicate under Rule 1.4(a). To the extent Disciplinary Counsel argues that Respondent's other, uncharged rule violations warrant restitution, Board Rule 6.4 precludes us from considering such violations in this case. Moreover, as Respondent points out, Mrs. Strange never asked that any money be refunded to her, and Ms. Cooper has obtained a judgment awarding her the amount sought by Disciplinary Counsel as restitution in this case. R. Sanctions Br. at 9; BX 66. Accordingly, even if the Board recommends that Respondent be suspended, we do not recommend that Respondent be ordered to pay restitution as a condition of reinstatement.

[27] In the Introduction to Disciplinary Counsel's sanction brief, Disciplinary Counsel asks the Hearing Committee to recommend a $5,500 payment to Ms. Cooper; however, on page 9, Disciplinary Counsel requests a $5,000 restitution payment. The fee paid by Ms. Cooper to Respondent was $5,500. *See* BX 35, BX 41.

VI. CONCLUSION

214. For all the above reasons, we find that Respondent violated Rule 1.4(a) during his representation of Mr. Strange and Ms. Cooper and recommend that Respondent receive a public censure.

AD HOC HEARING COMMITTEE

/ETK/
Erik T. Koons, Esq., Chair

/BLS/
Billie LaVerne Smith

/AF/
Allen Feldman, Esq.

Dated: March 20, 2017